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MAHARASHTRA NATIONAL LAW UNIVERSITY NAGPUR

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FOREWORD

Maharashtra National Law University, Nagpur was established by the government of Maharashtra (Maharashtra Act No. VI of 2014). The University imparts professional legal education, and also caters to the needs of the socially deprived, the marginalized and the downtrodden for their overall development. Under the dynamic leadership of Hon'ble Shri Justice S.A. Bobde, Chief Justice of India and the Chancellor, the University is committed to further innovative pedagogy, disseminate skill-oriented legal education and undertake quality research on issues of law and social sciences.

We are committed to develop this University as a model educational institution, with a special focus on value-based education. The University is associated with the pan-India admission test known as the Common Law Admission Test ('CLAT'), conducted by the Consortium of National Law Universities of India. Quality teaching with qualified, committed and competent faculty members, linkage with employment opportunities and a conducive teaching and learning atmosphere, an emphasis on self-learning, self-discipline, ability to think critically and independently are the qualities we wish to abide by in our University.

To realise the holistic mission of the visionaries of the University, and keeping in view the spirit of the Constitution of India, the University has established a University Social Responsibility Cell ('USRC'). The mandate of the USRC is to strive for excellence through different Centres dedicated to Advanced Research and Advocacy. The USRC aims to undertake social outreach activities based on focused research and societal needs. The University, as part of its social responsibility, has adopted a comprehensive institutional plan to provide a platform for the exchange of ideas and practices, and to offer solutions while organising legal awareness camps, providing mentoring facilities for various competitive examinations without any financial liability on the aspirants. The USRC has evolved into a capacity-building programme for judicial, quasi-judicial, other administrative services and NGOs, in quest of expert legal advice and review.

MNLU, Nagpur has also established an Equal Opportunity Cell, which helps the students by offering extra-credit courses. Furthermore, the Cell provides all possible information about scholarships, offered by different state and central governments and private individuals, and also helps them in applying for such scholarships. The Cell is headed by faculty member(s), and it has a number of students on its board.

Our strength remains in our staunch efforts to create a holistic environment for learning, personality development, extra-curricular brilliance, empathetic social outreach, and the much-deserved recreation for the students. With changing lifestyles, upbringing norms at home, the modern outlook of schooling, etc., the academic or non-academic needs of the students have to be taken care of accordingly.

Since internships are important for securing placements, our Internship and Placement Cells guide the students in a relation-building process with employers, where students can work as interns and even gain employment. Moreover, we are making consistent efforts to nurture professionalism and a sense of discipline, which the students need to exhibit in the courtroom or at the workplace.

Since time immemorial, the Indian cultural ethos has been upholding a fine distinction between *Aam* (general) and *Khas* (particular) practices of any kind of learning, whether general or professional. Keeping in view these practices, in 1988, the establishment of a national law school imparting quality legal education was pondered upon by the Bar Council of India, the judiciary, the Karnataka State Bar Council and the Government of Karnataka. This law school envisaged rigorously training a limited number of students who opted for the legal profession as a career. While introducing this experiment in the form of the National Law School of India University, Bangalore, the statutory bodies of the university and the government of Karnataka introduced a national reservation policy for the Scheduled Castes and the Scheduled Tribes. Further, the law school was given full autonomy in terms of designing the academic curriculum, including innovative pedagogy, befitting the foreign legal educational standards through the existing norms set up by the Legal Education Committee of the Bar Council of India.

Gradually, many National Law Universities were established by state governments, where local reservations in admission, employment and the fee structure have been introduced. These universities are struggling for quality legal education in more ways than one. Most of the National Law Universities are struggling due to low financial viability, as their revenue generation is not much as compared to IITs, AIIMS, IIMs, etc. Hence, the National Law Universities' survival depends on the revenue generated through the collection of fees from the students.

Learning is dynamic, and changes with time, place and circumstantial requirements. Traditional teaching and learning have been a successful experiment in general, but with advent of contemporary requirements, tailor-

made professional courses have gained more popularity as they are proving to be more viable. Higher educational institutions are required to review their existing academic curricula as often as possible, keeping in view the demand and supply norms of professional requirements.

Hence, there is a requirement for a perfect blend of subjects which provides a wider learning base to students, and ultimately improves their chances of employability. There must be an emphasis on maintaining a balance between regular teaching and profession-oriented teaching. Some attention is definitely needed on subjects which do not have a direct impact on professional careers. For instance, English as a subject aids in the personality development of a student, and therefore, introducing some modules on law and literature has become necessary. Law students must also be taught social sensitivity and professional ethics in all disciplines, and an understanding of humanities and literature must be an integral part of the legal curriculum.

Imparting quality legal education that is interdisciplinary in nature, to cater to the demands of globalizing markets can be a strategy for improving the academic curriculum. It can further be updated by taking inputs from experts and industry professionals, to have a blend of both theory and practice. The institutional strategy should also be based on developing links with renowned employers and companies who can provide for in-service training opportunities to graduates. A focus on grooming students and scholars as future employees is also an area that needs attention to enhance placements. Every university should have an internship and placement cell or a committee, consisting of faculty and students, to provide a wide range of options to the students and scholars to have internships in their areas of interest. The university should disclose its internship and placement policy to its students at the time of their admissions.

Academicians across disciplines believe that for a successful career, students have to master the necessary skills, and the legal profession is no exception. It will be appropriate to consider the criticism that National Law Universities do not contribute much to the bar and the bench, and are rather gravitated towards corporates and law firms. National Law University students opting for the practice of law in lower courts in regional languages of respective states is extremely necessary. Issues such as socio-legal, socio-economic, political or legal, are dealt with at this stage, but are not emphasised in the syllabi and classroom teaching. To revitalise legal education in India, it is necessary that the academicians engage in this intellectual exercise. To make legal education oriented towards achieving

the ideal of access to justice, we must introduce regional languages in National Law Universities and expose students to the lower courts.

Article 348 of the Constitution of India provides for English as the language of the Supreme Court of India, High Courts of states, Acts, and Bills. However, recently the Ministry of Law and Justice, Government of India and the Supreme Court of India have started translating the latter's judgments into nine vernacular languages. Use of artificial intelligence for such translations is also under consideration. These moves indicate the importance of regional languages in India in the legal context. For the maxim *ignorantia juris non excusat* to take effect, it is the responsibility of the State and the judiciary to ensure the accessibility of laws and judgments to people. The judiciary and the Ministry of Law and Justice seem to have taken cognizance of this issue and the recent decisions are progressive steps in this direction. While speaking at the Constitution Day Celebration held on November 26, 2019, Hon'ble Shri Justice S.A. Bobde, Chief Justice of India opined that:

An artificial intelligence powered law focused translation engine will aid timely and quality translation, and will help in improving the efficiency of the judicial delivery system. While translating judgements is useful, it pales in comparison to their value to countless litigants and lawyers, whose access to timely justice will no longer be limited by the constraints of language. We will continue to use human translations to validate and correct output of the artificial intelligence-based translation tools. This will be our first endeavour that we launch today.

There are multiple vernacular languages in India with several regional varieties. Therefore, as we become an advanced society, making the judgments available in regional languages is a matter that directly relates to access to justice. Majority of the litigation happens in the lower courts where regional languages are used. The socio-economic status of the clients involved in such litigation is comparatively humble, and the possibility of them or even their lawyers knowing English is poor. In such circumstances, lawyers who have a command over the English language and concerned regional languages at the same time could contribute much more in promoting access to justice in the country. Therefore, introducing regional languages in National Law Universities could be one major way in which legal education in India can be made more effective. However, there has not been much deliberation on this issue. In fact, National Law Universities do provide different options of foreign languages and students take them

positively, however, it would not be wrong to claim that the regional languages are not thought about much seriously.

There is a dearth of qualified, committed and hardworking teachers, and skilled non-teaching staff, and this often becomes a challenge in running the University. Though there is a certain degree of liberty to develop the academic curriculum for the University, the execution of the same is difficult. A teacher needs to remember and understand that his lecture is to be delivered in the classroom to the students who are diverse in more ways than one. The diversity among them ranges from the diversity of language, schooling, ethnicity, geography, gender, race, sex, religion, learning, range of understanding, etc. It is important to note that not all students in a class are consistent in their pace of learning.

Further, teaching law subjects with an interdisciplinary approach has become a herculean task for the law teachers and the institutions. All the institutions try meticulously to appoint the best teachers, who are qualified. It is difficult to certify that the teacher who is found to be eligible and intelligent would also perform well in class. It is the teacher who is supposed to update herself constantly with new developments in the domain area, and deliver to the best of her ability in the classroom. Additionally, bringing experts from the bar and the bench on diverse issues to the classroom may benefit the students. This can help in bridging the gap between theory and practice, by engaging the students in practical socio-legal problems. Further, the institutions of higher education must organise conferences, seminars, conclaves, etc., on issues of contemporary relevance.

Teaching and learning with quality research inputs is a solution for improvement in dissemination of legal education and justice delivery. As an upcoming law school, MNLU Nagpur has set a vision to create quality human resources, which will cater to the needs of the diverse demands of legal education and profession. The University is also working tirelessly on launching career-oriented courses where budding lawyers, judicial officers, quasi-judicial officers and, young executive officers will be trained with use of ICT. We are also conscious about the need for socio-economic and legal diversity in society. We are aware about the disconnect between bench, bar, academia, and industry and will take serious efforts to bridge this gap. With relevant teaching, quality research and social outreach programmes, we hope that we can make a mark in the field of legal education and profession.

With this vision, and a great sense of privilege and pleasure, I bring to you the second issue of the Contemporary Law and Policy Review (‘CLPR’), a student-edited, blind peer-reviewed Journal of the University.

EDITORIAL NOTE

This issue of the second volume of NLUN CLPR contains articles and notes on various contemporary issues, ranging across national and international scenarios. It is an eclectic mixture of opinions, offering the readers an insight into both social and legal issues. This issue contains articles concerning international law, environmental law, international relations, criminal law, constitutional law, corporate law and legal theory. We hope that these pieces benefit the readers by providing a fresh perspective on issues and a starting point for further research.

In *Competing and Conflicting Conceptions of Affirmative Action in the Context of Persons with Disability*: *Part I*, Shirish L. Deshpande and Varsha V. Deshpande discuss the necessity of equal application of affirmative action policies to persons with disability. In doing so, they analyse the concept of affirmative action from a jurisprudential perspective and critique the Persons with Disabilities Act, 1995, for failing to adequately address problems faced by persons with disability. Lastly, they conclude by arguing for political representation of persons with disability as an aspect of political justice.

In *Endosulfan Poisoning*: *A Socio-Legal Analysis of the Biggest Pesticide Tragedy in India*, Trishla Dubey and Amit Kumar Padhy highlights the harmful effects of endosulfan use and analyses both the domestic and international legal framework regulating it. The author further examines the track-record of the State and the judiciary in dealing with infringement of fundamental rights which the use of endosulfan occasions. Lastly, the author concludes by suggesting a complete ban on endosulfan, better implementation of the existing policies and the development of alternate pesticides for use in the country.

In *Presumption of Guilt under POCSO Act vis-à-vis Deception Detection Tests*, Shivangi Bajpai and Shreyash Choudhary argue for the right of the accused to seek administration of deception detection tests for offences under the Protection of Children from Sexual Offences Act, 2012 (POCSO). In doing so, the authors examine the concept of burden of proof and reverse onus clauses and also highlight the justifications and criticism of the latter. Lastly, the authors analyse reverse onus clauses from the lens of POCSO, and posit several arguments in support of voluntary administration of the deception detection tests by the accused during investigation.

In *Germany's Role in World Politics*: *The Need for Increasing Adaptability of the European Old Guard*, Suchismita Panda and Utkarsh Srivastava explore the future of Germany as the central player in EU politics. They analyse the important events that have affected Germany on the social, political and economic fronts. Lastly, the authors argue for an increased role of Germany as a major regional player in EU, especially in the face of an uncertain future for the bloc.

In *The Fallacy of The Surrogacy (Regulation) Bill, 2019*: *An Analysis through the Lens of Transformative Constitutionalism*, Anju Joseph analyses The Surrogacy (Regulation) Bill, 2019 through the perspective of LGBTQ rights. In doing so, the author draws upon the decision of the Supreme Court in *Navtej Singh Johar v. Union of India* and examines the concept of transformative constitutionalism as a means to ameliorate the conditions of the LGBTQ community. The author critiques the Bill for failing to provide the right to avail surrogacy services to members of the LGBTQ community and analyses several fallacies in the arguments against homosexuality. Lastly, the author highlights the divide between the judiciary and the State in dealing with matters concerning the LGBTQ community, and suggests changes to the Bill to enable the LGBTQ community to avail the benefits of surrogacy.

In *Meeting the Ends of Justice through Economic Reservation*: *A Case of Affirmative Action in India*, Jhankruti Badani analyses The Constitution (One Hundred and Third Amendment) Act, 2019, which provides for reservation to Economically Weaker Sections of the society. The author engages in an historical analysis of affirmative action policies in India and argues that the introduction of economic reservations goes against the traditional understanding of reservation and marks a departure from the vision of the Constitution makers.

In *Cross-Border Mergers and Acquisitions*: *Exploring the Issues and Challenges*, Vidhi Singh and Shalini highlight the various issues that companies encounter at different stages in cross-border mergers and acquisitions. The authors analyse India's position on cross-border mergers and acquisitions and the current legal framework regulating the same. Lastly, the authors highlight the global trends in cross-border mergers and acquisitions and argue for more flexibility in legal regimes to facilitate cross-border mergers and acquisitions.

In *The Right to Livelihood of Urban Street Vendors*: *Tracing the Journey to the Street Vendors Act, 2014 and Beyond*, Bhaskar Anand analyses the Street Vendors Act, 2014 and its role in improving the conditions of street vendors. The author highlights the shortcomings of the Act and explores the judiciary's role in furthering the implementation of the Act.

In *Protection of Intellectual Property and Data in Outer Space*: *A Critical Analysis*, Ishika Pashine and Pravesh Bansod analyse the efficacy of the current legal regime in protecting intellectual property rights in outer space. The authors highlight existing space data policies and analyse the issues with the Outer Space Treaty. The authors conclude by suggesting the development of a multilateral treaty dedicated to protection of intellectual property in outer space.

The Student Editorial Board hopes that the assortment of articles in this issue, encompassing various contemporary issues are beneficial and insightful for its readers. We look forward to comments and criticism on the articles published in this issue, hoping that the suggestions would help us further encourage scholarly dialogue in our forthcoming issues.

(Student Editorial Board)

COMPETING AND CONFLICTING CONCEPTIONS OF AFFIRMATIVE ACTION IN THE CONTEXT OF PERSONS WITH DISABILITY: PART I

Shirish L. Deshpande[*] and *Varsha V. Deshpande*[♠]

Abstract

The question whether affirmative action is a matter of right or a privilege has been answered within the analytical framework constructed on the basis of a dominant narrative of formal equality in a liberal State. It perceives affirmative action as special privileges granted by the State in its discretion, with a view to eliminate de facto inequalities. This paper argues that this dominant narrative needs to be deconstructed to reflect the realities of the lives of persons with disability in all walks of life. The dominant narrative adopts the ableist epistemology and the value order sanctified by it to address the questions of rights of persons with disability, thereby misdirecting it in posing the correct question. This paper introduces the debate about conceptualization of affirmative action in the context of backward classes. It then deals with this debate in the context of persons with disability. It is argued that most of the provisions of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 are designed to create rights enabling conditions which are mis-described as affirmative action. This paper then makes out the case for deconstruction of the ableist dominant narrative so as to expose non-recognition of persons with disability as a form of human diversity. The paper concludes by making out a case for representation of persons with disability in the political institutions as an aspect of political justice.

Key Words: Affirmative Action, Persons with Disability, Political Justice, Ableism, Equality

Affirmative Action: An Interaction between Rights and Privileges

At the outset, it may be observed that affirmative action programmes are a part of the component of justice in general, and distributive justice in particular. However, affirmative action programmes have been perceived to be strategies for removing past discriminations and therefore, identification and extent of past discrimination is an essential ingredient of such programmes. Black's Law Dictionary defines affirmative action as a set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future

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discrimination.[1] Further, the findings of discrimination pre-suppose an exercise of discretion by the State. This combination of positive obligations to intervene, to eliminate or reduce past discrimination implies an exercise of power by the State to decide when, and to what extent, the intervention is necessary, coupled with the determination of the nature of intervention.

A prevalent debate in liberal democracies has been about the conceptualisation of affirmative action programmes. The question is whether affirmative action programmes are matters of right or privilege. There are two components of the answer to the question of conceptualisation of affirmative action. One, the ‗discrimination component' and two, the ‗discretionary component'. From the standpoint of the victims of discrimination, affirmative action programmes are designed to enforce the right to equality of the class. The argument is that the right to equality means the right to equal concern and respect, which in turn implies a right to substantive equality and not to formal equality. From the standpoint of the State, although the right to equality imposes a positive obligation to remove *de facto* discriminations, this obligation will be discharged by the State subject to its economic capacity and stage of development, and therefore it is not a matter of right. *De facto* inequality justifies the exercise of power by the State to eliminate it, but it does not generate any enforceable right on the part of the victim.

To illustrate this point in the context of the Constitution of India, attention may be drawn to the provisions of Articles 14 to 18[2] which guarantee the right to equality in general under Articles 14 and 15, and in the sphere of public employment in particular in Article 16. Article 15(3) empowers the State to make special provisions for women and children, and Article 15(4) provides that ―(n)othing in this article shall prevent the State from making any special provisions for the advancement of socially and educationally backward classes or for the Scheduled Castes and Scheduled Tribes." Likewise, Article 16(4) says, ―(n)othing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State." The Court has perceived these provisions as exceptions to the general principle of equality, thereby implying that (a) it was a matter of discretion of the State, and (b) the manner and form of affirmative action is also a matter of discretion of the State.[3] However, in its later jurisprudence, the Court perceived these provisions not as an exception to right to equality, but an additional mode of enforcing the right to equality. Nevertheless, its character as a discretionary entitlement is still retained. The

1 Black's Law Dictionary, 68 (Bryan A Garner, 9th ed., 2009).

2 The Part III of the Constitution of India embodies commitment to Fundamental Rights; Art. 14—Equality before law; Art. 15— (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth); Art. 16—(Equality of opportunity in matters of public employment); Art. 17—(Abolition of Untouchability); Art. 18—(Abolition of Titles).

3 M. R. Balaji v. The State of Mysore, (1963) Supp. 1 SCR 439; T. Devadasan v. Union of India, (1964) 4 SCR 680; contra State of Kerala v. N. M. Thomas, AIR 1976 SC 490; Indra Sawhney v. Union of India, AIR 1993 SC 477.

State has to demonstrate to the satisfaction of the court that the condition precedent for invocation of the power under Articles 15(4) and 16(4), in fact exists.[4]

Affirmative Action: An Interaction between Rights and Privileges in Relation to Persons with Disability

The Census of India data on disability provides the following statistics:[5]

Disabled Population by Sex and Residence, India, 2011			
Residence	**Persons**	**Males**	**Females**
Total	26,810,557	14,986,202	11,824,355
Rural	18,631,921	10,408,168	8,223,753
Urban	8,178,636	4,578,034	3,600,602
Percentage of Disabled to total population India, 2011			
Residence	**Persons**	**Males**	**Females**
Total	2.21	2.41	2.01
Rural	2.24	2.43	2.03
Urban	2.17	2.34	1.98
Disabled Population by Type of Disability India: 2011			
Type of Disability	**Persons**	**Males**	**Females**
Total	26,810,557	14,986,202	11,824,355
In Seeing	5,032,463	2,638,516	2,393,947
In Hearing	5,071,007	2,677,544	2,393,463
In Speech	1,998,535	1,122,896	875,639
In Movement	5,436,604	3,370,374	2,066,230
Mental Retardation	1,505,624	870,708	634,916
Mental Illness	722,826	415,732	307,094
Any Other	4,927,011	2,727,828	2,199,183
Multiple Disability	2,116,487	1,162,604	953,883

The most glaring example of the dependence of rights on privileges is furnished by the law relating to persons with disability. At the social and cultural plane, persons with disability were perceived as mere objects of charity or beneficence which would entitle a donor a place in heaven. Paradoxically, disability was perceived as recompense or penalty for the sins of past birth. This attitude led to social ostracisation and isolation transforming a disabled person into an object of pity or scorn. In the first stage of evolution, the State engaged with disability through soft law, policies and schemes introduced through

4 M. Nagraj v. Union of India, AIR 2007 SC 71; Ashoka Kumar Thakur v. Union of India, (2007) 4 SCC 361.

5 *Disabled Population by Sex and Residence*, *India, 2011*, Census of India, available at http://censusindia.gov.in/, last seen on 23/12/2019.

government resolutions or executive orders which were not binding on the State. There was no recognition by the political institutions of persons with disability. However, the ongoing struggle culminated in the Parliament enacting the Persons with Disability (Equal Opportunity, Protection of Rights, and Full Participation) Act, 1995 (‗the Act') with a view to implement the Proclamation on Full Participation and Equality of People with Disability in Asia-Pacific region, adopted at Beijing in 1992.

The Act establishes a system of rights in the field of education, employment, social security and accessibility. The Act also establishes the Office of the Chief Commissioner of Disability at the Central and State levels. He has been authorised to protect and monitor the rights given by the Act and supervise the expenditure of money allocated for the benefit of persons with disability. However, in the light of India becoming a signatory to the UN Convention on Rights of Persons with Disability, 1992 (‗UNCRPD'), there is a proposal to revise the Act so as to give effect to UNCRPD.

Affirmative Action and Non-Discrimination

Chapters VII and VIII of the Act deals with affirmative action and non-discrimination, respectively. Section 42 of the Act obligates the appropriate government by notification to make schemes to provide aids and appliances to persons with disability, and Section 43 obligates the appropriate government by notification, to frame schemes in favour of persons with disability for the preferential allotment of land at concessional rates for (a) housing, (b) business, (c) setting up of special recreational centres, (d) establishment of special schools, (e) establishment of research centres. Chapter VIII entitled as ‗Non-discrimination' provides that establishments in transport sector shall be within the limits of the economic capacity and development of persons with disability. It also provides for special measures to adapt railways, buses, vessels and air-crafts in such a way as to permit an easy access to such persons and also adapt toilets in the above transport system so as to facilitate the convenience of the wheel chair users. Similar obligations are imposed on appropriate governments and local authorities within the limits of their economic capacity and development, for the installation of auditory signals on public roads for the benefit of persons with visual disability. Likewise, measures have to be taken by the authorities to ensure accessibility for the wheel chair users on public roads and pavements.

The perusal of these provisions brings out the fact that the creation of barrier-free environment for the recognition and realisation of basic human rights by the persons with disability, such as their freedom of movement, are left to the discretion of the appropriate government and local authorities, thereby transforming basic human rights and fundamental freedoms into discretionary entitlements, resulting in denial of equality before law as well as equal protection of laws. These provisions perpetrate violation of equality before the law in that, the persons with disability are denied status as an equal citizen or even the dignity of personhood. The State officially proclaims that it

can make the roads or transport system accessible to persons with disability, if and when the State has necessary capacity and resources. Further, these provisions deny equal protection of law, despite persons with disability being as much citizens of the country, as are the other citizens. Therefore, these provisions treat similarly situated citizens dissimilarly. The State cannot take the refuge of the absence of any explicit prohibition of discrimination on the ground of disability in view of the decision of the Supreme Court in the *National Federation of the Blind v. Union Public Service Commission*,[6] as well as in view of Article 9 of UNCRPD, to which India is a signatory.

The substance of the provisions of Chapters VII and VIII are covered by Article 9[7] of UNCRPD dealing with accessibility. There are three objectives of this Article. One, to enable persons with disability to live independently, two, to participate fully in all aspects of life and three, to enjoy this right on an equal basis with others. Accessibility is a very important human right for persons with disability because recognition and realisation of this right enables a person with disability to exercise other human rights and fundamental freedoms, such as right to education, right to employment, and right to information and communication. The alteration of physical environment in the existing infrastructure may be very costly, but the State parties are obligated to make new barrier-free buildings in consonance with the provisions of UNCRPD. In

6 (1993) 2 SCC 411.

7 Convention on the Rights of Persons with Disabilities deals with Accessibility art. 9, May 3, 2008, 2515 U.N.T.S. 3 (UNCRPD):

Accessibility:

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:
   (a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
   (b) Information, communications and other services, including electronic services and emergency services.
2. States Parties shall also take appropriate measures to:
   (a) Develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
   (b) Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
   (c) Provide training for stakeholders on accessibility issues facing persons with disabilities;
   (d) Provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
   (e) Provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
   (f) Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
   (g) Promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
   (h) Promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

the context of cost-intensive measures, it may be observed that the public sector buildings or the buildings owned and controlled by the government, stand on a different footing as compared to the buildings owned and controlled by the private sector. Clause 2 of Article 9 expressly provides that the State parties shall also take appropriate measures to (a) develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public, (b) ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disability.

The Act does not develop any minimum standards and guidelines, both in the sphere of aids and appliances for persons with disability, and for making the physical environment barrier-free. The basic principle of international human rights jurisprudence is that the States have to make a *bona fide* effort to generate resources to implement the obligations of human rights conventions, including the option of international co-operation in generating the resources necessary for the implementation of positive obligations, so that the State cannot take a specious plea that it does not have the necessary resources to give effect to international conventions. The accessibility directives of Article 9 relating to information, communication and other services, including electronic services can be made available, for example, information on the arrival and departure of trains and aircrafts or making information in public domain available in accessible format, etc. The statutory provisions contained in Chapter VII and VIII appear to confer unjustified latitude in discharging the obligations imposed by Article 9. It ropes in some accessibility services which can be provided by incurring relatively low or no cost at all. This has the consequence of transforming a right-conferring provision into a privilege made available by the State at the time, occasion, and intensity of its choice. Therefore, a human right to accessibility has been reduced to an affirmative action scheme to be implemented by the State. Violation of the human right to accessibility does not occur by any action *per se*, but by the denial of its existence.

Chapter V, Section 26 of the Act obligates the State to provide access to free education in an appropriate environment, till the person attains the age of eighteen years. The Act also enjoins the State to endeavour to promote the integration of students with disability in regular schools. The Act also recognizes the necessity of special schools, both in government and private sectors, for those who need special education in such a manner that children with disability living in any part of the country have access to such schools. However, in this context, Section 27 of the Act obligates the State to endeavour to equip special schools for children with disability with vocational training facilities. The Act also provides for non-formal and informal education for achieving literacy. Section 29 of the Act ensures accessibility rights in the area of education, but the realisation of these rights is dependent upon the formulation of schemes by the appropriate governments, including making learning aids available to children with disability. The Act also encourages research, both in public and private sectors, for developing assistive devices,

teaching aids, and special teaching materials necessary to give a child with disability equal opportunity in education. Section 30 of the Act also provides for the grant of scholarships to students with disability.

A bare perusal of the provisions of Chapter V clearly brings out the precarious status of right to education. The Act does not lay down any time limit within which to implement the provisions of the Chapter nor does it lay down any guidelines for a minimum guarantee of the right to education to children with disability. The children with disability were included in the category of disadvantaged children as defined under the Right to Education Act, 2009 who are entitled to reservation of seats in an educational institution. The inclusion of children with disability was not a spontaneous choice but was earned after a great struggle. As a practical matter, most of the normal schools providing education to children are physically inaccessible either because their buildings are not disabled-friendly or because there is no special transport facility or for some students with disability, the books and the examinations are not in accessible formats.

Chapter VI of the Act deals with employment, which interestingly does not provide for disability as a prohibited ground of discrimination. However, Section 32 of the Act contains provisions for identification of posts and its periodic revision for the purposes of employing persons with disability. Not less than three percent vacancies in any establishment have to be reserved for the specified disabilities under Section 33. The Section also empowers the government, having regard to the nature of work carried on in any establishment and subject to such conditions as may be specified, to exempt any establishment from the provisions of Section 33. Section 34 of the Act provides for the establishment of special employment exchange for persons with disability and obligates the employers to furnish information about the occurrence of vacancy in their establishment. Section 36 of the Act makes provision of carrying forward vacancies, if it is not possible to interchange vacancies reserved for one category of disability to another specified category of disability.

Vertical and Horizontal Reservation

The Supreme Court in *Indra Sawhney v. Union of India*[8] drew a distinction between vertical and horizontal reservation. Vertical reservation is social reservation founded on the concept of social backwardness designed to eliminate past discrimination and to ensure adequacy of representation in the services of the Union and the states. It is provided by the Constitution itself in clause 4 of Articles 15 and 16, whereas horizontal reservation is called special reservation and it is designed to help any disadvantaged section of society in order to ensure equal treatment to them. For example, special reservations have been made for women, freedom fighters, ex-servicemen and persons with disability. The Supreme Court, however, made it very clear that the fifty percent ceiling of reservation of seats and vacancies in public educational institutions

8 AIR 1993 SC 477.

and public offices ought not to be transgressed. The horizontal reservation cuts across vertical reservation, and is called inter-locking reservation. A person may be selected on the basis of a special reservation category, however, his or her placement would be done within vertical reservation depending upon whether the special reservation category candidate belongs to SC, ST, OBC or an open vertical reservation category. This principle was laid down by the Supreme Court of India in *Rajesh Kumar Daria v. Rajasthan Public Service Commission*[9] where the Court observed:

> Where a vertical reservation is made in favour of a backward class under Art. 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. (Vide Indira Sawhney (supra); R. K. Sabharwal v. State of Punjab (1995 (2) SCC 745)[10]; Union of India v. Virpal Singh Chauvan (1995 (6) SCC 684) and Ritesh R. Sah v. Dr. Y. L. Yamul (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women.' If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.[11]

This principle was also reiterated in *Public Service Commission, Uttaranchal v. Mamta Bisht*.[12] Thus, the two types of reservations differ in one crucial aspect. In the case of vertical reservation, if a candidate is selected in the

9 AIR 2007 SC 3127.

10 Union of India v. National Federation of the Blind, (2013) 10 SCC 772 [The Supreme Court held that R.K. Sabharwal does not deal with horizontal reservation therefore law laid down therein is not applicable to persons with disabilities].

11 Ibid, ¶ 7.

12 (2010) 7 SCR 289.

open merit category, he will not be counted against the vertical reservation quota, whereas a special reservation category candidate selected on the basis of open merit competition will be counted against the quota of horizontal reservation. To illustrate the point, if a visually challenged person is selected on the basis of open merit competition, he will be counted against the horizontal quota, i.e., one percent quota prescribed for persons with visual disability.

The inequality is quite apparent and striking. A person belonging to a backward class, selected on open merit, makes way for his brother belonging to a backward class; whereas the person with disability, who is equally entitled to compete on the basis of merit, even if selected on merit, is not in a position to create room for his brother with disability under the one percent quota prescribed in Section 33 of the Act. There appears to be no principled basis on which such a distinction can be drawn in Constitutional law. The vice of this distinction is double counting. Being entitled to compete in an open merit competition is a right available to both—a person without disability, and a person with disability. Further, the person without disability is enabled by this principle to discharge his fraternal obligations to his brother. However, the same is denied in respect of his brother with disability.

Affirmative Action: An Interaction between Rights and Privileges: Deconstructing Ableism

Deconstruction and Justice

Ableism sets up a binary dynamic that is not simply comparative but rather co-relationally constitutive. Campbell argues that formulation of ableism not only problematises the signifier disability but points to the fact that the essential core of ableism is the formation of a naturalised understanding of being fully human and this is articulated on a basis of an enforced presumption that erases difference.[13]

It may be observed that this perspective, which dominates the entire world and sets the standards or benchmarks with reference to which the world is to be seen and adjudged, is the ableist perspective. This perspective is a paradigm instance of what is called ‗normal'. Anything that falls short of or beyond the conception of normal is, by definition, either abnormal, sub-normal, unusual, special or disabled. The most important or far-reaching consequence of perceiving the world in this way is to treat everything conforming to the criteria set by the ableist perspective as ‗natural'. This perspective is sanctified by the medical model of disability. This model locates the problem within the human body. If the body does not conform to the medically prescribed standards for a normal human being, it is necessarily a disabled body. From this perspective, all policies and programmes are aimed at either correcting the medical condition or minimizing the consequences of disability.

13 Fiona Kumari Campbell, *Contours of Ableism-The Production of Disability and Abledness*, 16-17 (2009).

In other words, the phenomenon of disability is a natural product of the understanding founded on ableism. Such a production of disability is surrounded with a hallow of infallibility and appears to be absolute and unquestionable. The disability scholars seek to de-construct the medical model of disability by arguing that disability is not a natural category but a socially constructed one.[14] They argue in favour of the social model of disability, wherein the disability is to be located in the external social environment. Therefore, one is disabled because one is unable to use one's wheel-chair to access a public utility building, or cannot read books because the books are not available in accessible formats such as audio or Braille. Disability scholars and activists have also argued that the costs of including people with disabilities in all aspects of social, political, and economic life have been greatly exaggerated, and are rarely a significant factor in rectifying injustice. Where those costs are substantial, they usually reflect past injustice: the expense of installing ramps in a new building is trivial; the failure to have done so is an injustice, to which the greater costs of retrofitting are attributable.

Moreover, the treatment of stigmatized groups as social and political inferiors, even if officially repudiated, is embodied in the structure and practices of the society. As feminists have long pointed out, job requirements and workplaces have been designed for men which often place women at a significant disadvantage. Physical structures and social practices have also been designed solely for able-bodied' people, and disability scholars have pointed out the disadvantages created by such a structural bias—a claim that underwrites the demand for reasonable accommodation that is now a standard feature of disability discrimination law.[15]

This re-conceptualization of disability has a distinct advantage in that it seeks to broaden the range of differences which can be accommodated without any assumption of any sense of deficiency, shame or gratuitous obligation. It aims at human variation or difference without any baggage of prejudices associated with differences. From this vantage point, making provisions for left-handed individuals and for wheel-chair users is an aspect of human variation to be addressed by the social environment.

The social model of disability has recently been incorporated by UNCRPD. Article 1 of the Convention says that:

> The Convention is to promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. Persons with disabilities include those who have long term physical,

14 For the relationship between deconstruction and justice, *see* Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 Cardozo Law Review 919, 919 (1990); Also *see*, William Paul Simmons, *Human Rights Law and Marginalized Other* (2011).

15 *See generally*, Wasserman et al., *Disability and Justice*, The Stanford Encyclopedia of Philosophy, available at http://plato.stanford.edu/archives/sum2015/entries/disability-justice/, last seen on 24/01/2019.

> mental, intellectual or sensory impairment which in its interactions with various barriers may hinder a full and effective participation in the society.

Thus, it is clear that the Convention focuses on the impairment which, in interaction with various barriers, will hinder their full and effective participation in the society. Adoption of this model in the Convention has far reaching implications in the way the conception of justice for equality has to be perceived, articulated and addressed by the disability scholars and by the decision makers.

The Convention adopts two approaches to deal with the human rights of persons with disabilities. On one hand, it requires that all persons with disabilities are entitled to exercise all human rights and fundamental freedoms on an equal basis with others and, on the other hand, it focuses on the disability rights such as right of accessibility, right to be recognized as an equal person before law and right to independent living. However, the Convention defines discrimination on the basis of disability by using a comparator of an able-bodied human being. Discrimination means:

> Any distinction, exclusion or restriction on the basis of disability which has the purpose or the effect of impairing or nullifying recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination including denial of reasonable accommodation.

The Convention also defines reasonable accommodation as a means, necessary and appropriate, modifications and adjustments not imposing a disproportionate or undue burden wherever needed.

UNCRPD and the Constitution of India

The Constitution of India did not recognize the existence of persons with disability in its provisions. The very limited coverage which the Constitution of India gives to the subject of disability is evidenced by a perusal of Articles 39-A[16], 41[17] and Entry 9, List II. Barring the exception of Article 39-A which provides for equal justice and free legal aid, the Constitution of India creates an image of a disabled person as non-entities worthy of protection through welfare measures, and not the subjects of rights. Even the equal justice and free legal aid provisions are contained in the chapter on Directive Principles of State Policy

16 Art. 39A (Equal justice and free legal aid)—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

17 Art. 41 (Right to work, to education and to public assistance in certain cases)—The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

which have been explicitly declared as unenforceable in a Court of law. Part III of the Constitution dealing with fundamental rights does not mention disability as a prohibited ground of discrimination unlike race, caste, sex, etc. This is because at the time of the framing of the Constitution, disability was not recognized as part of the mainstream politics of the State as caste, race, sex or religion were. This political indifference consequently led to constitutional non-cognizance of disability.

Interpretive praxis of the Supreme Court transformed disability as a non-entity, into disability with an equal right to personhood. This landmark decision in *National Federation of Blind v. Union Public Service Commission*[18] involved a challenge to a Union Public Service Commission rule prohibiting the use of a scribe for writing a competitive exam. The validity of this rule was questioned by a voluntary organization representing persons with visual disability as violative of the right to equal opportunity in matters of employment. The Supreme Court struck down the rule interpreting Article 16 to prohibit discrimination on the ground of disability, and directed the Commission to implement the provisions of Article 16 for persons with disability. This was a great victory of the disability movement in general, and for a struggle for equal recognition as persons before law and of the persons with visual disability in particular.

It may be observed that the international conventions are not automatically enforceable within the domestic legal system, unless the convention is incorporated by the Parliament in the exercise of the powers conferred by the Article 253 of the Constitution of India. Article 51(c) obligates the Indian states to foster respect for international treaties or agreements. The primacy of the municipal law has been recognized by the Supreme Court in a number of decisions.[19] On this analysis, the judgment whether to incorporate the international convention within the domestic legal system, and the nature and extent to which it should be implemented, is the constitutional judgment of the Parliament of India. However, this parliamentary initiative was ceased by the Supreme Court in *Vishaka v. State of Rajasthan*,[20] where the Court held that if the international convention is not inconsistent with the Constitution of India, the Court is entitled to rely on it for the purpose of interpreting and applying the fundamental rights in India.

In view of this fact, the Constitution of India will have to be amended to incorporate the various general and disability-specific human rights and fundamental freedoms within Part III. We may broadly indicate the human rights which are to be incorporated within the Constitution: (a) providing for disability as a separate prohibited ground of discrimination in Article 15 and 16, (b) to incorporate three disability-specific rights namely the right to

18 (1993) 2 SCC 411.

19 Kesavananda Bharti v. State of Kerala, AIR 1973 SC 1461; Jolly George Varghese v. The Bank of Cochin, AIR 1980 SC 470.

20 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.

accessibility, universal design and the recognition of the right to language of persons with disability, (c) the recognition of the right to equal legal capacity for all persons with disability.

Article 3 of the UNCRPD outlines the principles guiding the drafting of the Convention. It lists eight basic principles which underpin the possession and exercise of all human rights and fundamental freedoms on the basis of equality with others. They are:

a. Non-discrimination;

b. Full and effective participation and inclusion in society;

c. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

d. Equality of opportunity;

e. Accessibility;

f. Equality between men and women;

g. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The most fundamental principle amongst all is the respect for differences and acceptance of persons with disability as a part of human diversity and humanity. It has far-reaching implications in deconstructing the ableist perspective which is at the heart of the entire legal system. All laws and institutions, doctrines, principles and standards are designed to reflect the life experiences of the able-bodied human beings. On an epistemological level, the ableist perspective does not accommodate the life experiences of persons with disabilities. Even the grammar of the language reflects the state of being of a normal person. Therefore, for a blind man to say that he has ‗seen' movie becomes a joke. Neither can a person with speech impairment speak, nor can a person with a wheel chair walk. Hence, seeing, speaking and walking for a person with disability is beyond the reach of the language, which is designed to embody and represent the mode of living of a normal person. Therefore, it is not surprising that the Constitution of India makes a very negligible and charitable reference to persons with disability. No one can deny that persons with disability being born in India are citizens; however, the diversity of citizens with disability does not find any legal recognition in the Constitution.

The Act attempts to address the concerns of citizens with disability by recognizing their right to participate in a statutory body, which is entrusted with the responsibility of redressing core issues in disability policy in India, and the revision of schemes and plans, taking into account their implications for persons with disability. Besides the fact that this statutory body is not constituted by number of states in India, the dominant majority is that of normal persons with

the attendant standards reflecting the ableistic vision. In other words, the citizens with disability are alienated from the process of policy formation, and even implementation at the national and regional levels. Their position is unlike any other citizen without disability, who is entitled to review and criticise the decisions taken. It is an indirect mode of participation in supervising and monitoring decisions taken for them without them. Therefore, the existing law merely gives an impression of transparency and accountability which is supposedly achieved for citizens with disability.

Ableism and Justice for Disability

As the famous philosopher Jack Derrida draws attention to the critical function of justice by drawing a sharp distinction between justice and law. Law, for Derrida, has two distinguishing features: *First*, it is enforceable: not that it is necessarily enforced, but that force could be used legitimately on behalf of law; and *secondly*, it is a human creation so is deconstructable, it can be critiqued and improved. On the other hand, justice, ~~"if~~ there is such a thing," like one of Plato's forms, is transcendent and thus not deconstructable. It is beyond the reach of human activity and knowledge. It may be observed here that what may be the most appropriate metric of justice for persons with disability, whether to promote equality of resources or welfare, opportunities or capabilities, these considerations fall outside the purpose of this paper. The idea is to draw attention to the principal basis for the authentic voice for persons with disability. Therefore, the denial of equal political representation is perceived as political injustice perpetrated by the organisation of the polity according to the ableist perspective. It denies the people with disability the right to articulate, raise and redress the problems through the representation of people with disability in the political and the governmental apparatus.

What implications does ableism have in the field of disability justice? First of all, from an ableist point of view, an argument about justice assumes a double guise. On one hand, it concerns the first order questions of substance viz., how much economic inequality does the justice principle permit? How much redistribution is required, and according to which principles of justice? What constitutes equal respect and what kind of differences merit public recognition? Beyond such first order questions, the argument about justice also concerns second order meta-level questions as to what is the proper frame within which the first order questions of justice are to be considered? Who are the relevant subjects? Who are entitled to just distribution and reciprocal recognition in the given case? The result of raising these meta-level questions is to challenge the very foundation of the theory of justice, founded on the model of ableism. It is not the substance of justice, but the frame within which such questions are to be addressed and resolved.

The traditional framework is preoccupied by the ableist epistemology and axiology, and is concerned with the first-order questions of recognition and redistribution. Such a theory fails to develop the conceptual resources for reflecting on meta-issues of the frame. In order to deal satisfactorily with the

problem of framing, the theory of justice must incorporate the life experiences and the state of being disabled. The general meaning of justice is parity of participation. According to this radical democratic interpretation of equal moral worth, justice requires social arrangements that permit all citizens to participate as peers in social life. Overcoming injustice means dismantling institutionalized obstacles that prevent some people from participating equally in social interactions. The citizens with disability do not have parity in participation in matters concerning them. It may be noted that the recognition of persons with disability as a form of human diversity, and acceptance of their different demands, calls for revision of the political decision-making rules so as to accord parity of participation to the citizens with disability.[21] It is an ongoing struggle for the right to have rights.

Conclusion

The slogan ―nothing about us without us" has remained a slogan, and must, in fact, be realised. Therefore, on this level, injustice is political as the citizens with disability are denied the authorship of formulating and revising the policies and programs of redistribution of goods and services. They are denied the equal role in designing the ground rules of political institutions and processes. Political recognition on this meta-level would enable them to establish criteria of social belonging, and thus also determine who counts as a member of the society. The political dimensions of justice specify the reach of economic and cultural dimensions of political and social life. They tell us who is included and excluded from the circle of those who are entitled to just distribution and reciprocal recognition. They also tell us how the claims of redistribution of the resources are to be mooted and adjudicated. Therefore, it concerns representation of citizens with disability in political institutions, making it clear that the theory of justice, informed and guided by the ableist epistemology and axiology undermines the spirit of the UNCRPD. It is submitted that the constitutional foundations will have to be revised to reflect the revision of human rights law and justice undergirding the UNCRPD.

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Editors' Note—*This paper is the first part of a two-part series. Part II of the paper, which analyses the Rights of Persons with Disability Act, 2016 will be published in the forthcoming issues of the journal.*

21 Nancy Fraser, *Reframing Justice in a Globalizing World*, quoted in Lloyd's, *Introduction to Jurisprudence*, (Michael Freeman, 9th ed., 2014).

ENDOSULFAN POISONING: A SOCIO-LEGAL ANALYSIS OF THE BIGGEST PESTICIDE TRAGEDY IN INDIA

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Abstract

Endosulfan is a toxic pesticide widely used in India. There have been significant efforts worldwide to ban the use of this pesticide which is taking a toll on human and animal lives all around the world. This paper will discuss the harmful effects of Endosulfan spraying on agricultural fields, farmers' lives, biodiversity, and the environment at large, with special reference to the states of Kerala and Karnataka. This paper also outlines the existing legal framework, both at the national and international level. The paper will also analyse whether the Apex Court and the government have been successful in upholding and respecting the fundamental rights to health and environment on their road to economic development.

Key Words: Endosulfan, Pesticide, Fundamental Rights, Livelihood, Economic Development

Introduction

India is an agrarian economy with the world's second-largest human population. Our lands are fragmented and small, and in order to support the ever-increasing population, India needs to be self-sufficient in food production. This makes the use of pesticides, insecticides, and other chemical fertilizers inevitable.

The Green Revolution that took place in 1960s has already proven that India's position as to food accessibility, sufficiency, and even its capability to export surplus to other nations, is a result of the latest technology developed in the form of chemical fertilizers. However, everything has two sides and the use of chemical fertilizers, in the long run, has proved to be extremely harmful, not only for agricultural crops but also for living beings exposed to its use via water, food, and air. After almost sixty years, there are calls to revise the existing policies which enable an indiscriminate use of chemicals on crops and adversely affect terrestrial and other inter-connected ecosystems.

Rachel Carson in her globally celebrated work *The Silent Spring*, published in 1962, was the first to draw international attention to the harmful uses of pesticide. While calling pesticides as ‗elixir of death', her exact views on pesticides were:

> For the first time in the history of the world, every human being is now subjected to contact with dangerous chemicals, from the moment of conception until death. In the less than two decades of their use, the

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> synthetic pesticides have been so thoroughly distributed throughout the animate and inanimate world that they occur virtually everywhere. They have been recovered from most of the major river systems and even from streams of groundwater flowing unseen through the earth. Residues of these chemicals linger in soil to which they may have been applied a dozen years before. They have entered and lodged in the bodies of fish, birds, reptiles, and domestic and wild animals so universally that scientists carrying on animal experiments find it almost impossible to locate subjects free from such contamination.[1]

Based on her observations, the then U.S. President John F. Kennedy constituted a committee to study the problems associated with pesticides, and the committee's findings proved Carson's apprehensions right. Even though Carson has not expressly dealt with Endosulfan in her book, her insights are very helpful in understanding the adverse impacts of such chemicals on environment, wildlife and humans at large.

In this paper, the author's main focus is to analyse the use of Endosulfan which has been shown to have disastrous effects on people's health and ecosystems. The Endosulfan crisis has taken a shape of a tragedy and is being referred to as a 'Secret Bhopal',[2] as it has severely damaged the lives of people exposed to it. Despite the pesticide's disastrous effects and the order of the Supreme Court, it has not yet been officially banned nation-wide. It is to be noted that India is not only a leading consumer of this pesticide, but also a manufacturer and exporter. In fact, a government company, Hindustan Insecticides Ltd., is one of the biggest producers.[3]

Endosulfan: A Spray of Death

Endosulfan is a chlorinated hydrocarbon insecticide of the cyclodiene sub-group which acts as a contact poison in a wide variety of insects and mites.[4] Endosulfan was introduced in the 1950s by Farbwerke Hoechst A.G., Germany and FMC Corporation, which has now discontinued its production, but companies across the world are still producing and distributing it.[5] It is sold under the trade name of Cyclodan, Thiodan, Thionex, Endofan, Thyonex, etc., as an insect killer (earthworms, beetles, caterpillars, etc.), and also as a wood preservative.[6] Endosulfan is the only generic pesticide in use which does not

1 Rachel Carson, *Silent Spring*, 17 (1962).

2 *Childhoods lost: disabilities and seizures blight India's Endosulfan victims*, The Guardian (15/02/2017), available at https://www.theguardian.com/globaldevelopment/2017/feb/15/childhoods-lost-disabilities-seizures-blight-india-kerala-Endosulfan-victims, last seen on 28/03/2019.

3 Ben Block, *Pesticide Endosulfan Ruled "Highly Toxic"*, Worldwatch Institute, available at http://www.worldwatch.org/node/6299, last seen on 30/07/2019.

4 *Endosulfan*, Extoxnet, available at http://pmep.cce.cornell.edu/profiles/extoxnet/dienochlor-glyphosate/Endosulfan-ext.html, last seen on 28/07/2019.

5 *Endosulfan. A closer look at the arguments against a worldwide phase out*, National Institute for Public Health and the Environment, Ministry of Health, Welfare and Sport, Netherlands, available at https://www.rivm.nl/bibliotheek/rapporten/601356002.pdf, last seen on 31/07/2019.

6 *Learning with the Times: Endosulfan has chronic adverse effects on humans*, The Times of India (09/05/2011), available at http://timesofindia.indiatimes.com/articleshow/8201080.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, last seen on 31/07/2019.

harm pollinators such as honey bees, and beneficial insects. Since India is the second largest producer of fruits and vegetables in the world, and one of the largest producers and exporters of honey, there is a greater need for a pesticide which is mild on bees.[7] Moreover, since Endosulfan is not protected by a patent, it is easily available in the market at a very cheap price suited to the needs of a developing country like India.[8]

Despite all these advantages that Endosulfan seemingly has, it is still considered a harmful substance in many developed and developing countries. Through extensive research conducted world-wide, it has been proved that exposure to Endosulfan can directly affect a person's central nervous system, resulting in their inability to understand, followed by other symptoms of poisoning like diarrhoea, vomiting, agitation, convulsions and loss of consciousness.[9] It can also affect a person's capacity to reproduce, affect cells, cause tissue defects and defects in the gastrointestinal tract, cancer and congenital malformations in girls and may also prove to be fatal.[10]

Effects of Endosulfan use

Right to Life or Livelihood: The Farmers' Dilemma

Use of Endosulfan by farmers exposes them to a variety of health risks and at the same time its ban affects their right to livelihood. The right to life and livelihood are protected under Article 21 of the Constitution of India.[11] Since Indian agriculture is chemical-based, and the land holdings are usually small and marginal, a majority of the farmer population cannot afford expensive pesticides that are considered to be necessary for preventing crop failure forcing them to rely on a cheap alternative like Endosulfan. In order to protect the farmers' lives, Endosulfan should be banned, but the bigger question here is whether India can afford such a ban. Banning it at a time when farmer suicides and their engagement in debt-traps is increasing every day will further aggravate their sufferings. A more appropriate solution is spreading awareness and encouraging the use of bio-pesticides as a substitute of harmful pesticides and fertilizers.

Disturbing the Ecological Stability

Endosulfan not only takes a toll on human life but equally affects animal and plant life. Its contribution to bio-accumulation and bio-magnification kills birds

7 Ramesh K. Goyal et al., *Report of the Committee to evaluate the safety aspects of Endosulfan,* Department of Health & Family Welfare, Government of Gujarat, available at http://www.indiaenvironmentportal.org.in/files/Endosulfan-gujarat_0.pdf, last seen on 01/04/2019.

8 Gauri Kapoor, *Environmental Exposures and Childhood Cancer*, 49 Indian Paediatrics 101, 102 (2016); Also *see*, N. Satish Kumar et al., *Estimation of Endosulfan Insecticide Residues in Paddy of Krishna District*, 1 International Journal of Research in Pharmacy and Chemistry 55 (2011).

9 *Endosulfan Industry's Dirty War - A Chronology of events*, Centre for Science and Environment, available at https://www.cseindia.org/Endosulfan-industrys-dirty-war-a-chronology-of-events--1927, last seen on 31/07/2019.

10 Ibid.

11 Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180.

like vultures,[12] and marine organisms like fishes,[13] thereby disturbing the entire ecological balance. Transfusion of Endosulfan in water, land, and soil leads to environmental pollution.[14] Due to the risks associated with its use, almost eighty countries have banned Endosulfan.

Food Safety and Security

India is a developing country and struggles to meet the basic needs of its population. Historically, yearly floods, droughts and other natural calamities, coupled with poor infrastructure have led to a lot of food wastage in India. It was only in the 1960s, after the Green Revolution (which promoted the use of chemical fertilizers), that India was able to attain food sufficiency. While use of fertilizers and pesticides assures food sufficiency, affordability, and accessibility, turning a blind eye to the qualitative aspect of food safety is resulting in gross injustice to the society and the environment.

The Anupam Varma Committee, constituted by the Centre in 2013, reviewed sixty-six pesticides which are used in India, but are banned or restricted in many parts of the world due to their hazardous properties. Based on the Committee's report, in 2016, the Union Ministry of Agriculture and Farmers' Welfare proposed a ban on eighteen of sixty-six pesticides, with effect from 2018 in a few cases, and from 2021 in others.[15] Furthermore, a lot of pesticides in India fail to meet the Maximum Residue Limit ('MRL') set by Food Safety and Standards Authority of India ('FSSAI') which is a violation of Article 47 of the Constitution of India, Food Safety and Standards Act, 2006 and the National Food Security Act, 2013.[16]

Legal Framework on Hazardous Chemicals

International Legal Framework

There are various international conventions regulating use of chemicals. The Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998[17] mandates the prior informed consent of parties before any chemical can be exported to their territory. The Stockholm Convention on Persistent Organic Pollutants,

12 Vibhu Prakash et al., *Recent changes in populations of critically endangered Gyps vultures in India*, 29 Birdlife Conservation International 55, 65 (2019).

13 S. Osafo-Acquaah and E. Frimpong, *Residues of Lindane and Endosulfan in Water and Fish Samples from Rivers, Farms in Besease, Agogo and Akomadan in the Ashanti Region of Ghana*, available at https://inis.iaea.org/collection/NCLCollectionStore/_Public/28/036/28036672.pdf?r=1&r=1, last seen on 29/03/2019.

14 *Campaign to ban Endosulfan*, Pesticide Action Network Asia & Pacific, available at http://archive.panap.net/en/p/page/pesticides-campaigns-Endosulfan/40, last seen on 29/03/2019.

15 Karnika Bahuguna and Amit Khurana, *Government agencies, companies must be accountable for peddling harmful chemicals*, Down to Earth (05/04/2017), available at https://www.downtoearth.org.in/news/agriculture/government-agencies-companies-must-be-accountable-for-peddling-harmful-chemicals-56951, last seen on 31/07/2019.

16 Ibid.

17 The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, February 24, 2004, 2244 U.N.T.S. 337 (1998).

2001[18] („Stockholm Convention") lists chemicals that are extremely hazardous and should be completely banned from being dealt with between State Parties, and the Basel Convention, 1989[19] deals with transboundary movement of hazardous chemicals and pesticides around the world. Since the use of Endosulfan affects the environment which is pervasive and unrestricted by the territory of any State, the representatives of different States which are parties to the Stockholm Convention started to work toward finding a solution to this newly evolved environment hazard.

In 2009, after intense debate and research, the Stockholm Convention's Persistent Organic Pollutants Review Committee („POPRC") agreed that Endosulfan is a persistent organic pollutant and that global action is warranted, setting the stage for a global ban.[20] Nations like New Zealand, U.S. and Australia have already started this process. The POPRC nominated Endosulfan to be added to the Stockholm Convention at the Conference of Parties („COP") in April 2011, the effect of which would be a global ban. Developing nations like India and China opposed this ban citing various reasons like the cost-effectiveness of the pesticide, their heavy dependence on it and the ban being a result of the conspiracy of the developed countries.[21] Finally, one twenty seven countries decided to put a complete ban on the circulation, manufacture, use, and distribution of Endosulfan and listed it in Annex A to the Stockholm Convention, with specific exemptions which resulted in its complete ban.[22]

India and other developing nations raised some concerns on the ban of this pesticide. One primary concern was the non-availability of an alternative to this pesticide, which is equally affordable and effective in killing unwanted pests that damage the agricultural crops. The use of Endosulfan had significantly boosted the agricultural production worldwide. This led India to even set up a manufacturing unit of Endosulfan in the country and it became one of the leading exporters of this pesticide around the world. Presently, India does not have any alternative solution and the use continues unabated. If the developed nations take the lead in technology sharing and easing their IP protection norms, there is a possibility that even the developing and underdeveloped nations would contribute to the global phase-out of this pesticide.

Access to financial aid remains an issue for third world countries since the development of an alternative solution and the treatment of existing stocks require heavy investment. Mobilization of funds at the international level for

18 The Stockholm Convention on Persistent Organic Pollutants, May 17, 2004, 1522 U.N.T.S. 293 (2001) („Stockholm Convention").

19 The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, March 22, 1989, 1673 U.N.T.S. 57 (1989) („Basel Convention").

20 *Report of the Persistent Organic Pollutants Review Committee on the work of its fifth meeting*, Stockholm Convention on Persistent Organic Pollutants, Geneva, 12–16 October 2009, UNEP/POPS/POPRC.5/10/Add.2.

21 Jayashree Nandi, *India bats for Endosulfan as world calls for a blanket ban*, The Times of India (5/11/2010), available at http://timesofindia.indiatimes.com/articleshow/6874128.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, last seen on 31/07/2019.

22 *Pesticide Endosulfan to be Banned Worldwide*, News Wire, available at http://www.ens-newswire.com/ens/may2011/2011-05-05-01.html, last seen on 23/03/2019.

aiding environmental measures in the poor countries is a rare occurrence, despite the existence of institutions like the Global Environmental Facility (‗GEF'). This hurdle must be overcome so as to ensure inclusivity and to facilitate contribution by even third-world countries to the global phase-out.

Regulatory Framework on Pesticides in India

The need for pesticide regulation was studied in India in 1964-67 by the M.S. Thakker Committee which recommended the enactment of the Insecticides Act, 1968.[23] The Insecticides Act, 1968 and Insecticides Rules, 1971 deal with the import, export, sale, transport, distribution of insecticides to prevent risk to humans and animals.[24] This legislation directly regulates the use of pesticides and other chemical fertilizers circulated within and outside India. Under the Act, two authorities at the Central level have been constituted: Central Insecticides Board[25] and the Registration Committee,[26] both of which are empowered to control and regulate pesticides in India.

Other existing legislations also contain safeguards against fatal pesticides. For instance, Endosulfan comes within the definition of ‗hazardous substance' under the Environment Protection Act, 1986. Hazardous substance is any substance or preparation which, by reason of its chemical or physio-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plant, micro-organism, property or the environment.[27] Since Endosulfan is covered by this definition, rules like Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 (‗MSIDC') and Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 are applicable, which impose duties on the occupier of the industry manufacturing, using or handling these substances. State Pollution Control Boards also have a responsibility to prepare an annual inventory of the waste generated, recycled, recovered, re-exported, processed and to submit it to the Central Pollution Control Board by September 30 every year.

The government has also proposed the enactment of the Draft Pesticide Management Bill in 2017 which seeks to deal with the issue of pesticides in a more robust manner by protecting farmers' interest and promoting the safe use of pesticides. The law proposes to impose stringent punishment (five years' imprisonment and fifty lakh rupees from two years' imprisonment and two thousand rupees)[28] and fines for misbranded products. The law empowers state governments to deal with the issue of pesticide use, and also proposes special

23 *About CIBRC*, Directorate of Plant Protection, Quarantine & Storage, Ministry of Agriculture & Farmers Welfare Department of Agriculture, Cooperation & Farmers Welfare, available at http://ppqs.gov.in/divisions/cib-rc/about-cibrc, last seen on 31/07/2019.
24 S. 3, Insecticides Act, 1968.
25 Ibid, S.4.
26 Ibid, S.5.
27 S. 2(e), Environment Protection Act, 1986.
28 SS. 35-43, Draft Pesticide Management Bill, 2017.

courts for speedy disposal of cases.[29] The Pesticide Management Bill, if passed, will replace the old Insecticide Act, 1968.

Specific Case Studies on Endosulfan in India

Kerala Endosulfan Tragedy

Kerala is engaged in producing a wide variety of crops like cashew, cotton, tea, paddy, fruits, and others which require extensive Endosulfan spraying for the crop's protection from pests, resulting in better yields and profits to the farmers. The indiscriminate use of this pesticide resulted in numerous abnormalities which were noticed in the nearby ecosystems. This caused a huge public outcry and the government banned the use of Endosulfan in the affected region (Kasaragod village in particular). The State Pollution Control Board ordered a ban on the aerial spraying in Kasaragod in 2004. However, when tests in 2008-10 revealed the presence of the pesticide in water samples, aerial spraying was banned across the state.[30]

Karnataka: *Another Case Study*

The use of Endosulfan in Karnataka began in 1980s to eliminate the tea-mosquito bug in cashew plantations of the Karnataka Cashew Development Corporation. In over ninety villages in Talukas of Puttur, Belthangady, Sullia, and Bantwal in Dakshina Kannada District, indiscriminate use of Endosulfan on thousands of hectares of land supporting cashew plantations resulted in widespread loss of biodiversity, soil fertility, and abnormalities in humans.[31]

After Endosulfan spraying started in Kokkada, Belthangady saw a sharp increase in medical complications in farmers. In the following years, instances of cancer, skin problems, infertility, etc., increased and hundreds of mentally and physically deformed children were born. This region in south Karnataka has suffered maximum damage from Endosulfan poisoning.[32] The year 2000 saw a decline in the use of Endosulfan but by this time it had already wreaked ruin in the surrounding areas.

Studies Conducted on Endosulfan in India (2001-2016)

National Institute of Occupational Health Study (2001)

National Institute of Occupational Health is an affiliate of the Indian Council of Medical Research and a part of the Union Ministry of Health and Family

29 Ibid, S. 44.

30 *Kerala bans Endosulfan after 500 deaths over 20 years*, 8 Indian Journal on Medical Sciences 6, 6 (2011).

31 Mundoor Manjunath Dayakar et al., *Assessment of oral health status among Endosulfan victims in Endosulfan relief and remediation cell - A cross-sectional survey*, 9 Journal of Indian Society of Periodontology 709, 711 (2015).

32 Ibid.

Welfare, Government of India.[33] Its study in 2001 on Endosulfan titled, ‗Final Report of the Investigations of Unusual Illnesses Allegedly Produced by Endosulfan Exposure in Padre Village of Kasaragod district (N. Kerala)' registered the presence of both *alpha* and *beta* Endosulfan in soil, water and human blood samples collected from the region.[34] In its considered view, Endosulfan was the causative factor for health problems in the village.[35]

O. P. Dubey Committee (*2003*)

The eight-member Dubey Committee was formed in 2003 by the Union Ministry of Agriculture to study the link between the health problems found in Padre village in Kasaragod district and the use of Endosulfan in nearby cashew plantations of the Plantation Corporation of Kerala.[36] This Committee gave a clean chit to the use of Endosulfan, ignoring the dissenting views from other committee members and the widespread agitations of the local people.[37]

Y.K. Gupta Committee (*2006*)

The Committee was constituted by the Ministry of Health and Family Welfare for a focussed inquiry on aerial spraying of any pesticide. The Committee suggested that an ultra-low volume (‗ULV') formulation be used, and that the permission of the Central Insecticides Board should be made mandatory for undertaking aerial spraying of any pesticide for agricultural use. Neither any action was taken on the recommendations of this Committee, nor was any data revealed regarding ULV level in future reports.[38]

Ramesh Goyal Committee (*2011*)

A study conducted by KSCSTE confirmed that Endosulfan was persistent in the soil and the sediment samples even after ten years since aerial spraying was stopped on the cashew plantations in Kasaragod. The study was conducted in

33 Kushal Pal Singh Yadav, *Endosulfan declared not guilty*, Down To Earth (04/07/2015), available at https://www.downtoearth.org.in/news/Endosulfan-declared-not-guilty-12799, last seen on 30/03/2019.

34 *Ban of Endosulfan*, Press Information Bureau, Ministry of Health and Family Welfare, Government of India, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=107462, last seen on 01/04/2019.

35 *Disclosed: Lies about Endosulfan*, Centre for Science and Environment, available at https://www.cseindia.org/disclosed-lies-about-Endosulfan-2468, last seen on 01/04/2019; *The Perils of Endosulfan*, The Economic Times (26/04/2011), available at https://economictimes.indiatimes.com/opinion/et-commentary/the-perils-of-Endosulfan/articleshow/8086876.cms?from=mdr, last seen on 01/04/2019.

36 *Dubey panel's clean chit to Endosulfan challenged*, The Business Line (07/04/2004), available at https://www.thehindubusinessline.com/2004/04/07/stories/2004040700601700.htm, last seen on 01/04/2019.

37 *What Dubey Did*, Down To Earth (30/08/2005), available at http://www.indiaenvironmentportal.org.in/content/11247/what-dubey-did/, last seen on 02/04/2019.

38 R Ramchandran, *Lethal Mix*, 26 Frontline (03/06/2011), available at https://frontline.thehindu.com/static/html/fl2811/stories/20110603281111400.htm, last seen on 31/07/2019.

the eight affected panchayats in Kasaragod district in Kerala.[39] This study revealed the irreparable loss Endosulfan has caused to the environment.

The findings of the above reports and studies show a sharp contrast in their conclusions. This strikes a serious blow to the credibility of governmental agencies and the authorities constituted by them from time to time.

Kerala State Council for Science Technology and Environment (*KSCSTE*)

A study conducted by KSCSTE confirmed that the presence of Endosulfan was persistent in the soil and sediment samples even after ten years since aerial spraying stopped on the cashew plantations in Kasaragod. The study was conducted in the affected panchayats in Kasaragod district in Kerala.[40] This study reveals the gravity of the matter and the irreparable loss it has caused to the environment.

Calicut University Teacher Education Centre and Wildlife Protection Society of India (*WPSI*)*, 2015*

Both of these organisations which conducted a detailed study of five hundred and fifty families in the affected area are non-profit. Researchers found that members of one-hundred and seventy-four families had serious health problems. Many children were found suffering from birth deformities, cancer, cerebral palsy, mental disorders, skin diseases, vision loss, and many women were found infertile.[41]

Salim Ali Foundation (*2016*)

It is a non-for-profit organization that works for sustainable development and conservation of biodiversity. A research team led by Dr. V.S. Vijayanand submitted its report indicating that the pesticide affected plants and animals of the area, besides causing endless human suffering. A significant decline (40-70%) has been noticed by the foundation in plants and animal diversity (Nilgiri langur, tiger, jackal, wild boar, jungle cat, mouse deer, etc.,) which is a cause of great concern.[42]

Government-Industry Syndicate vis-à-vis the Triad of Articles 21, 39(*e*) *and 47 of the Constitution of India*

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39 *Studies Indict Endosulfan*, Centre for Science and Environment, available at https://www.cseindia.org/studies-indict-Endosulfan--2823,last seen on 01/04/2019.

40 Ibid.

41 Savvy Soumya Mishra, *State of Endosulfan*, Down To Earth (17/08/2015), available at https://www.downtoearth.org.in/coverage/agriculture/state-of-Endosulfan-2400, last seen on 01/04/2019.

42 Vincy J Dasan, *Environmental Racism vs. Environmental Justice: An Exploration through Sarah Joseph's "Gift In Green"*, 3 International Journal of English Language, Literature, and translation studies 304, 307 (2016); *see*, Roy Mathew, *Endosulfan destroyed biodiversity of Kasaragod villages*, The Hindu (27/09/2016), available at https://www.thehindu.com/news/national/kerala/Endosulfan-destroyed-biodiversity-of-Kasaragod-villages/article10693037.ece, last seen on 04/04/2019.

The findings of the above reports and studies show a sharp contrast in their conclusions which puts a question mark on the credibility of government authorities constituted from time to time. Because of the government-corporate nexus, the authorities are risking the lives of millions. This also raises serious concerns on how lobbying in India is done in order to benefit a small group of people (industrialists, politicians, etc.,), while the lives of millions are put on stake. By doing so, the government is breaching one of the most basic fundamental rights available to the people of India, i.e., the right to live with dignity, as enshrined in the Constitution.[43] The Constitution also imposes a duty on the State to maintain the health and strength of workers, men and women, and children.[44] The health of the workers is seriously deteriorating on exposure to this pesticide, even children are suffering from the exposure, and in some cases abnormalities have arisen in children right from the time of birth as a direct result of this exposure. It is also the duty of the State to improve public health and raise the standard of living of people[45] which, as experience shows, has not been fulfilled.

Even though committees are not directly responsible to the people, but the result of their studies affects policy making in our country and hence, the people at large. Utmost care should be taken by the government while implementing the recommendations.

Role of the Supreme Court

In May 2011, the Democratic Youth Federation of India (‗DYFI')[46] filed a PIL requesting a complete ban on the use of the pesticide.[47] DYFI is a not-for-profit youth organisation which works on issues affecting the youth.[48] As a result, the Hon'ble Supreme Court passed an ad-interim order on May 13, 2011, banning the production, sale, and use of Endosulfan all over India till further orders. A Joint Committee headed by the Director General of Indian Council of Medical Research (‗ICMR') and the Agriculture Commission was appointed by Supreme Court to examine the health impacts of Endosulfan on humans and the environment, and to also suggest alternatives to Endosulfan. Accordingly, the Central government issued instructions on May 14, 2011 to all state governments and union territories administrations to implement the interim order of the Court. Thereafter, the Hon'ble Supreme Court vide its order dated September 30, 2011 allowed export of 1090.596 MT of Endosulfan technical

43 Art. 21, Constitution of India.
44 Art. 39(e), Constitution of India.
45 Art. 47, Constitution of India.
46 Democratic Youth Federation of India v. Union of India, (2011) 15 SCC 528.
47 *The Story of Endosulfan in India*, Green Clean Guide (2011), available at http://greencleanguide.com/the-story-of-Endosulfan-in-india/,last seen on 01/04/2019.
48 *Democratic Youth Federation of India (DYFI)*, available at http://www.dyfi.in/, last seen on 01/04/2019.

from the existing quantity. On December 30, 2011, the Hon'ble Court allowed the export of 2698.056 KL of Endosulfan formulation from the existing stock.[49]

The Secretariat of Central Insecticides Board and Registration Committee, in compliance of Supreme Court's directions recalled all certificates of registration for Endosulfan. Thereafter, via order dated April 23, 2012, the Hon'ble Court directed the Union of India to file a detailed report on the disposal/phase out of Endosulfan. Accordingly, a report was submitted by Ministry of Agriculture on July 12, 2012 on the manner of disposal of Endosulfan and the present stock available with manufacturers, states, and formulators.[50]

The Supreme Court not only actively suppressed the use of Endosulfan but also directed Kerala government to pay five hundred crores to the victims of the Endosulfan pesticide tragedy in 2018.[51] Despite all the steps taken by the Apex Court for the Endosulfan victims, the pesticide is still used owing both to the farmers' need and manufacturer's greed.

Analyzing the Present-day Situation

The Stockholm Convention, ratified by India in 2006, has declared Endosulfan a persistent organic pollutant and more than eighty nations have already banned its use.[52] The Supreme Court, in 2011, banned its use and manufacture in Kerala and gave several directives to the Centre and states. Additionally, it has regularly monitored the work done by state governments to minimize the harmful effects of this pesticide. The Insecticides Act, 1968 still recommends restricted use of Endosulfan while not putting a complete ban on it. In spite of both the Centre's and Court's directions, Endosulfan use still persists. There are multiple reasons because of which the battle against Endosulfan is not over yet.

First, there has been a long delay in imposing a nation-wide ban and throughout this duration, the Centre, at the national as well as international level, has maintained its support for continuance of use of Endosulfan.

Secondly, farmers in India are poor and the lack of government support for buying expensive pesticides has forced farmers to resort to a cheap alternative.

Thirdly, developing nations have continued to accuse the developed nations of trying to force them to buy a more expensive alternative to Endosulfan.

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49 *Supreme Court allows export of Endosulfan*, Centre for Science and Environment, available at https://www.cseindia.org/supreme-court-allows-export-of-Endosulfan--3227, last seen on 09/01/2019.

50 Supra 7.

51 Savvy Soumya Misra and Sopan Joshi, *Tracking decades-long Endosulfan tragedy in Kerala*, Down to Earth (16/08/2018), available at https://www.downtoearth.org.in/coverage/health/tracking-decades-long-Endosulfan-tragedy-in-kerala-56788, last seen on 20/03/2019.

52 MA Watts, *Countries that have Banned, are Phasing Out, Don't Use or are Still Using Endosulfan*, Pesticide Action Network Asia and the Pacific, available at https://cdn.cseindia.org/attachments/0.45254900_1498917931_Endosulfan_bans16April2011.pdf, last seen on 20/03/2019.

Fourthly, there is lack of honest identification of the beneficiaries by the government and its agencies. In 2017, the state government had conducted a medical camp to find out the number of people affected by the spraying of Endosulfan. The agitators say that out of the 6,800 who applied, 4,838 people were given slips to come to the camp and of these, only 3,888 were examined. The list produced by specialists, of people who could possibly be affected by Endosulfan, contained 1,905 names. Later, this list was reduced to two hundred and eighty-seven names and mostly the names of children were excluded from the list. This met with serious criticism from the mothers, forcing the Revenue Minister to examine the matter. Mothers raised their voices and the Revenue Minister said it will be re-examined.[53] This incident shows the careless approach of the government in addressing problems arising from Endosulfan use.

Fifthly, children and pregnant ladies are the most vulnerable sections exposed to Endosulfan.[54] While the pregnant women exposed to this toxic substance give birth to children born with autism, thyroid dysfunction, and other neurological diseases,[55] pesticide spraying can continue to affect children born years after it. "The half-life of Endosulfan is six to nine years. It means that if there are 2 gm/litre of the substance in the water now, it will become 1 gm/litre after nine years, and half gm/litre after nine more years and so on."[56] Therefore, this is a persistent problem and requires attention of the government for many decades. A one-time compensation as ordered by the Supreme Court or some financial aid are not enough to address a problem which continues to have a long-term impact.[57]

Conclusion and Suggestions

Every developed nation, regardless of a socialist or a capitalist economy, values their citizens the most. Sadly, this is not the case with India which is still in an endless race of modernizing itself through its outdated industries, without realizing that it lacks the updated technology, high-tech machinery, safety, and a hygienic environment for the people working inside or living near factories. In the long run, if proper steps are not taken, it will lose not only its human resources but also its rich biodiversity and other biotic and abiotic resources.

Focusing on the situation of Endosulfan, following suggestions might prove to be helpful:

1. Complete ban on Endosulfan

53 *Every Budget, Kerala allots funds for Endosulfan victims: But we get nothing, say victims*, The News Minute (01/02/2019), available at https://www.thenewsminute.com/article/every-budget-kerala-allots-funds-Endosulfan-victims-we-get-nothing-say-victims-96064, last seen on 31/07/2019.

54 Ms. Sindhu Sivan, *Impact of pesticides on humans causing disability in India*, 5 International Journal of Advanced Research, 33, 35 (2016).

55 *Toxic Substances Portal*, Agencies for Toxic Substances & Disease Registry, available at https://www.atsdr.cdc.gov/phs/phs.asp?id=607&tid=113, last seen on 01/04/2019.

56 Supra 53.

57 Ibid.

There is a need to eliminate the use of Endosulfan completely from the India but along with this, we also need to create awareness among the locals, industrialists, and the farmers to refrain from using this pesticide illegally. Only then we can truly resolve this issue in real time.

2. Disposal of existing stocks of Endosulfan

Operation Blossoms Spring has been launched by the Kerala Government in 2014 to dispose off the existing stocks of Endosulfan.[58] This has been done following the orders of the Supreme Court. The process of disposal required transfer of the pesticide first to the corroded barrels and then into heavy-duty polythene drums. The polythene drums have been chosen to prevent leaking and spilling drums in the region. Thereafter, the drums will be handed over to qualified international agencies for detoxification and disposal. The selected agency will take the drums out of the locality to safer areas outside the State for disposal.[59]

3. Proper identification of the beneficiaries of the compensation

The governments are not only required to identify the true beneficiaries but have to also ensure that no one is left unattended. For this, a proper Endosulfan Victim Rehabilitation Monitoring Authority should be set up to ensure transparency and accountability in the process.

4. Continued medical assistance to the victims

A one-time compensation by the government is not enough in such cases. Instead, the governments should issue medical credit cards which will cover their medical treatment.

5. Regular monitoring of the area

There should be regular monitoring of the affected regions not only by the government officials but also by the community and Non-Governmental Organizations working nearby. Any unusual case should be immediately reported to the government.

6. Establishment of Pesticide Regulatory Authority

Such authorities should be constituted at the state level. By far only Jammu and Kashmir seems to have taken such an initiative.[60]

7. Strengthening Research and Development in our Country

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58 Savvy Soumya Mishra, *Disposal of Endosulfan begins*, Down To Earth (04/07/2015), available at https://www.downtoearth.org.in/news/disposal-of-Endosulfan-begins-38546, last seen on 31/07/2019.

59 K.A. Shaji, *Steps to dispose of Endosulfan stock*, The Hindu (23/05/2016), available at https://www.thehindu.com/news/national/kerala/steps-to-dispose-of-Endosulfan-stock/article6473247.ece, last seen on 02/04/2019.

60 *J&K to set up pesticides regularity authority*, The Hindu (09/05/15), available at https://www.thehindu.com/news/national/other-states/jk-to-set-up-pesticides-regularity-authority/article7186474.ece, last seen on 09/07/2019.

Under the banner of Make in India Campaign, the government should encourage the development of indigenous pesticides that can prove to be a better substitute for Endosulfan. This will not only be cheap, but it will also reduce our dependence on foreign technologies.

8. R&D on other pesticides so that such cases do not happen in future

Proper research and testing of the pesticide should be done before introducing it in the market so that any harmful impact can be mitigated. Criminal liability should be imposed on manufacturers who knowingly manufacture and sell harmful pesticides in the market.

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PRESUMPTION OF GUILT UNDER POCSO ACT VIS-À-VIS DECEPTION DETECTION TESTS

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Abstract

Burden of proof has established itself over the course of time as a fundamental principle in the administration of criminal justice. It places an obligation on one party to convince the tribunal of the truth of some proposition of fact, which is in issue. Reverse onus clauses are a crucial form of burden of proof which reverse the presumption of innocence and, arguably, place the accused at a decided disadvantage. In the present paper, the authors argue that the basic objective behind these clauses, although noble, must be in line with the standard of presumption of innocence. The authors have discussed and critically analysed the applicability and constitutionality of the presumption behind Section 29 and Section 30 of Protection of Children from Sexual Offences Act, 2012. In an endeavour to uphold the welfare of those protected by the statutes with underlying reverse onus clauses, an oversight ends up extinguishing the rights of the accused. Due to the presence of reverse onus clauses, the accused often seeks to resort to Deception Detection Tests to rebut the prevailing presumption of guilt. However, the judicial position on the production of the Deception Detection Tests as evidence renders the accused powerless. In this article, the authors argue that even if Deception Detection Tests remain inadmissible at the stage of trial, they must be allowed at the stage of investigation, on the request of the accused.

Key Words: Burden of Proof, Presumption of Innocence, Reverse Onus, Presumption of Guilt, Deception Detection Tests, POCSO

Introduction

In the purview of criminal law, the term ‗burden of proof' is of much significance, making it crucial to appreciate the implications associated with this concept. Burden of proof has established itself over the course of time as an underlying principle in the administration of criminal justice. It has been defined as follows: ―On every issue, there is an obligation on one party to convince the tribunal of the truth of some proposition of fact, which is in issue and which is vital to his case."[1]

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1 S.L. Phipson and D.W. Elliot, *Manual of the Law of Evidence*, 70 (2001).

Burden of proof has two related but distinct components: *first*, the ‗burden of production' which is the obligation of the parties to a trial to produce the relevant evidence and *second*, the ‗burden of persuasion' which is the process of convincing the judge to a certain standard which is commonly referred to as standard of proof. The guilt of an accused must be proved beyond reasonable doubt.[2] The primary duty of the Court is to ensure that the required standard of proof has been met. In doing so, the Court must take into consideration the quality and quantity of the evidence produced on record in order to arrive at a conclusion.

Burden of proof can also be explained through the Hegelian logic of thesis and antithesis. In a criminal trial, originally, the accused is given the benefit of doubt and is presumed to be innocent, until proven guilty. This is the narrative (thesis) of a legal dispute where the burden of proof lies on the prosecution and is popularly termed as presumption of innocence. The accused is deemed innocent until proven guilty and only bears the duty to counter the prosecution's allegations. However, in some cases, statutes can reverse the presumption of innocence which shifts the burden of proof on the accused. This is an exception to the general rule and becomes the antithesis to ‗benefit of doubt'.

To harmonize the conflict between the thesis and the antithesis, Hegel suggests a unified idea called synthesis.[3] Synthesis of presumption of innocence and presumption of guilt provides for an approach where the accused is provided the opportunity to adduce evidence and, in the process, shift the burden of proof on the other party. It is of great significance to understand that if the consolidating idea (here, the process of production of evidence discovered during administration of Deception Detection Tests or ‗DDT') is diluted, it might lead to a situation of obstruction of justice. Before analyzing the dynamics that can lead to difficulty in production of evidence in favour of innocence of the accused in Protection of Children from Sexual Offences Act, 2012 (‗POCSO') matters, a discussion on the attributes of burden of proof would prove worthwhile. The attributes, of course, being referred to are the two ends of the balance, i.e., the presumption of innocence and the presumption of guilt.

Reverse Onus: Justifications and Criticisms

The importance of presumption of innocence is most aptly expressed in the words of Bradner:

> The presumption of innocence is not a mere phrase without meaning; it is in the nature of evidence for the defendant; it is as irresistible as the heavens till overcome; it hovers over the prisoner as a guardian angel throughout the trial; it goes with every part and parcel of the evidence.[4]

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2 *Burden of Proof*, Cornell, available at https://www.law.cornell.edu/wex/burden_of_proof, last seen on 12/03/2018.

3 David Gray Carlson, *Hegel's Theory of Quality*, 22 Cardozo Law Review 425, 447 (2001).

4 Bradner, *Rules of Evidence as Prescribed by the Common Law: For the Trial of Actions and Proceedings*, 460 (7th ed., 2015).

However, at the same time what cannot be ignored is the importance of reverse burden clauses which are present in multiple statutes in India. One by one, the authors shall attempt to unfold the motivation behind inclusion of reverse burden clauses.

Criticism of justifications of Reverse Onus Clauses

One of the major reasons behind reversing the burden of proof is that placing it on the prosecution has led to a low conviction rate in offences that warrant conviction. This stems from a near impossibility or difficulty that the prosecution is faced with in producing the evidence for proving the guilt of the accused in such offences. These offences (like sexual offences against children and socio-economic offences) are coloured with such social discomposure that they automatically create a generic prejudice,[5] and this generic prejudice has been used time and again to justify reverse onus clauses. This generic prejudice comes into play when partiality is evoked by (a) the knowledge of the nature of the crime or, (b) the type of parties that are involved, which necessitates a prejudice against the accused. Moreover, creation of reverse onus clauses has also been endorsed by the 47th Law Commission Report on Socio Economic Offences,[6] thus validating the presumption of guilt.

This has also substantiated by the fact that the presumption of innocence is not recognized as a fundamental right in the Constitution of India. The Supreme Court of India has, time and again, in a series of judgments held that presumption of innocence is a human right as envisaged under Article 14(2) of the International Covenant on Civil and Political Rights, 1966, but it is not a fundamental right within the ambit of Constitution of India. In *Vinod Solanki v. Union of India*,[7] the Apex Court has reiterated the principle laid down in *Noor Aga*[8] in the following words:

> It is now a well settled principle that presumption of innocence as contained in Article 14(2) of the International Covenant on Civil and Political Rights is a human right, although per se it may not be treated to be a fundamental right within the meaning of Article 21 of the Constitution of India. This however does not invalidate the presumption in its entirety. It will be appropriate to say that presumption of innocence being a human right cannot be thrown aside, but it has to be applied subject to exceptions.

However, in the opinion of the author, none of the above justifications is convincing enough to reverse the onus. To presume that the accused is guilty even before the Court has weighed the evidence adduced by either side is a violation of the tenets of criminal jurisprudence, and is in conflict with the ‗beyond reasonable doubt' standard of proof. Additionally, it has been generally

5 Neil Vidmar, *Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials*, 21 (6th ed., 1997).
6 47th Law Commission of India report, *The Trial and Punishment of Social and Economic Offences, 1972*, available at http://lawcommissionofindia.nic.in/1-50/Report47.pdf, last seen on 12/03/2018.
7 Vinod Solanki v Union of India, (2008) 16 SCC 537.
8 Noor Aga v. State of Punjab, (2008) 16 SCC 417.

argued that the reverse onus clauses are exceptional in nature and prevail only in regulatory offences or statutory offences.

Even in cases of a socio-economic nature like the offences prescribed under the Customs Act, 1962 or Foreign Exchange Management Act, 1999 etc., where the accused is not inherently presumed to be a threat to the society, it is not the generic prejudice that drives reverse onus clauses, instead it is the regulatory nature of these offences that becomes effective. To substantiate the reasonability of reverse onus clauses, it has been repeatedly argued that in the cases of regulatory or statutory offences, which are not common law offences, the accused is not susceptible to the stigma that is usually accompanied with those offences. A plain oversight persists in this argument because even though there might not be a stigma attached to these offences, the accused is still prone to the penalties that put him in a position of peril at the time of conviction.[9]

With respect to the argument related to administrative convenience, it has been argued that the reverse onus clauses are incorporated in statutes after giving due consideration to the logistics and dynamics of evidence collection and the difficulty that is associated with proving the guilt of the accused. According to David Hamer:

> In determining whether a reverse burden is compatible with the presumption of innocence, regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But Courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice - where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment.[10]

To suggest that reversing the onus is defensible because it makes it easier for the prosecuting agency to put forth its case is a dangerous locus to be at. For instance, proving the state of *mens rea* has always been a difficult task for the prosecution, while it is comparatively easy for the accused to prove the absence of the same, since he is the one who has committed/witnessed the series of acts that led to the commission of the offence, and is in the best knowledge of the existence of the culpable mental state.[11] If this logic were to be followed, the State would be at an inherent advantage as it could impose liability without the requirement of a culpable mental state for all offences, by a simple incorporation of a reverse onus clause.

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9 N. Prakash, *Presumption of Innocence*, 12 Central India Law Quarterly 190, 198 (1999).

10 David Hamer, *The Presumption of Innocence and Reverse Burdens: A Balancing Duty*, 66 The Cambridge Law Journal 141, 142 (2007).

11 Regina v. Edwards, 1 S.C.R. 128 (1996, Supreme Court of United States).

Even if we do adopt such an approach on the basis of the generic bias to protect children from the evil of sexual offences within the ambit of POCSO, there would still exist an operational fallacy which brings those accused under POCSO at a standstill during the trial process. This operational fallacy can be attributed to: a) the problem in theory, and b) the practical problem in adducing evidence, highlighted in the next section.

POCSO and the Problem with Reverse Onus Clauses

POCSO is a recent addition to the statutes containing exceptional reverse onus clauses. Section 29 and Section 30 of POCSO presume guilt and culpable mental state of the accused in cases where the accused is alleged to have committed an offence falling within the scope of Sections 3, 5, 7 and 9 of the Act. The Apex Court and the High Courts of India have attempted to justify the inclusion of such reverse onus clauses in this Act on the grounds of the generic bias discussed above, mostly by virtue of the reference to the nature of subjects protected under POCSO, that is, children. The constitutional validity of these clauses has been defended by giving a reference to Article 15(3) of the Constitution of India which allows the creation of special laws for children. This justification derives its validity from Article 14 of the Constitution which allows for a rational classification in order to uphold the principle of equal protection of laws.

Equal protection of laws is a positive concept. It implies that the law should be equally administered among equals and that the like should be treated alike,[12] without the distinction of race, religion, wealth, social status or political influence.[13] POCSO mentions that it has been enacted with an objective to protect children from the offences of sexual assault, sexual harassment and pornography.[14] In light of the same, it has been argued by legal scholars that the inclusion of the clause is justified. However, the law with respect to the constitutionality of the reverse onus clauses in POCSO is unsettled and a series of conflicting judgments have been delivered by the High Courts with respect to these clauses.

The Problem in Theory: Constitutionality of Section 29 and Section 30 of POCSO

Section 29 and Section 30 of POCSO cast the onus of proof on the accused to prove his innocence. In a situation where the State holds the accused guilty and penalizes the accused for failure to discharge the burden cast on him, the accused's right to personal liberty is being overshadowed by the procedure established by law. At this stage, it becomes important to mention that after *Maneka Gandhi v. Union of India*,[15] it is settled that, "If the procedure

12 Western U.P. Electric Power and Supply Company Limited v. State of Uttar Pradesh, AIR 1970 SC 21.

13 Jagannath Prasad v. State of Uttar Pradesh, AIR 1961 SC 1245; Also *see*, M.P. Jain, *Indian Constitutional Law*, 931 (6th ed., 2011); Durga Das Basu, *Shorter Constitution of India*, 396 (13th ed., 2001).

14 Preamble, Protection of Children from Sexual Offences Act, 2012.

15 Maneka Gandhi v. Union of India, AIR 1978 SC 597.

prescribed does not satisfy the test of Article 14, e.g. if it is arbitrary, oppressive or fanciful, it would be no procedure at all within the meaning of Article 21."[16] Additionally, Article 14 also entails the concept of reasonableness and thus, if the procedure established by law is unreasonable, it cannot be called a procedure established by law at all. Therefore, the fundamental rights under Part III of the Constitution cannot be taken away unless the tests under Article 14 and Article 21 of the Constitution are satisfied. This is also the essence of the concept of due process[17] in American jurisprudence.

In order to place the limitation of a reverse burden on the presumption of innocence according to the statutory exception imposed by POCSO and as per judicial precedents, a set of ‗foundational facts' has to be originally established. In the absence of a proof of such foundational facts, which have a rational connection with presumed facts, the limitation of the reverse burden on the *actus reus* (Section 29) and *mens rea* (Section 30) will not stand. The foregoing principle has been clearly laid down by the Supreme Court in *Noor Aga v. State of Punjab*,[18] and more specifically by the Calcutta High Court in *Sahid Hossain Biswas v. State of West Bengal*[19] which deliberates on the reverse onus clauses and the threshold required to trigger the limitation under Section 29 and Section 30 of POCSO. What needs to be emphasized at this point is the fact that the pre-requisites for invoking Section 29 and Section 30 of the POCSO, i.e., the ‗foundational facts', remain undefined and unexplained by these judicial findings. Therefore, Section 29 and Section 30 are extremely arbitrary in their application. This would consequently make Section 29 and Section 30 unconstitutional.

In the above discussion, the constitutionality of the presumption under Section 29 and Section 30 is not being challenged *per se*. Rather, the challenge lies because the procedure for implementation of this presumption is ambiguous, and is hence arbitrary. There are, of course, findings by the Supreme Court pertaining to the constitutionality of presumption of guilt as a legal principle but a discussion focused on constitutionality of the presumption of guilt imposed particularly under POCSO is long due.

The Generic Bias and the Difficulty in Production of Evidence

The common problem associated with the abovementioned position in law is that the accused experiences difficulty with respect to the production of evidence. As per the law of evidence, the Apex Court has reiterated that "there is no prohibition in law to convict the accused on the basis of sole testimony of the prosecutrix and the law does not require that her statement be corroborated by the statements of other witnesses."[20] A reliance on such a law where the victim's testimony is the sole evidence for proving guilt can lead to consequences. This unpopular opinion might lead to a different debate

16 District Registrar and Collector, Hyderabad v. Canara Bank, AIR 2005 SC 186.
17 Hagar v. Reclamation Dist., 111 U.S. 701 (1884, Supreme Court of United States).
18 Noor Aga v. State of Punjab, (2008) 16 CC 417.
19 Sahid Hossain Biswas v. State of West Bengal, (2017) 180 AIC 294.
20 Md. Iqbal v. State of Jharkhand, (2013) 14 SCC 481.

advocating support for the testimonies of child victims without corroboration. Although there exists a view where ―the child complainant of sexual abuse is widely regarded as the paradigmatic vulnerable witness who is most likely to encounter difficulties in giving evidence",[21] it is highly criticized and the contrary is often justified by referring to the special status that the State has endowed on certain classes of the society, like children.

Analysing DDTs as a Solution post *Selvi*

Over the years, a special focus has been given on investigative techniques involving neuroscience. However, these methods have received extreme opposition from the media and advocates of the fundamental rights in India. Before proceeding to the prevailing law on the methods employed for ensuring true testimonies or confessions from the accused, it is important to understand that these tests are, of course, not hundred percent reliable. This is evinced by the fact that the evidence produced by way of medical application such as DNA mapping is only considered to be secondary evidence according to the Indian Evidence Act, 1872 (‗IEA'). Therefore, Section 45 of IEA only allows the Court to resort to expert opinion in certain cases where special skills and knowledge are required. The resistance to DDTs is attributed majorly to the alleged violation of the principle against self-incrimination and to protect the aspects of a fair trial. In this light, in 2010, a three-judge bench of the Supreme Court in the case of *Smt. Selvi v. State of Karnataka*[22] held that the compulsory administration of such techniques to aid the investigative process is an unjustified intrusion into the mental privacy of an individual. It was further held that if the test is voluntarily administered with the permission of court, and relevant information is revealed, such information can be admitted as evidence under Section 27 of IEA. However, the results of the tests are not admissible *per se*, but the information obtained through these tests is admissible under Section 27 if it leads to discovery of some material fact. A single-judge bench in *Navaneetha Krishnan v. The State by Inspector of Police*[23] has reiterated the same position.

Although *Selvi* primarily cleared the air with respect to the admissibility of DDTs as evidence when administered by the State through its investigative machinery, with the consent of the accused, it did not attempt to clarify as to whether the accused has a right to voluntarily seek DDTs in order to adduce evidence of his innocence. This has led to a situation where when the accused seeks administration of DDTs to prove his/her innocence, it is subject to the permission of the judiciary, which is often denied, thus making it difficult for the accused to prove his innocence in a case where there is a statutory reversal of the burden of proof.

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21 Fiona E. Raitt, *Judging Children's Credibility–Cracks in the Culture of Disbelief, or Business as Usual*, 13 New Criminal Law Review: An International and Interdisciplinary Journal 735, 758 (2010).

22 Selvi v. State of Karnataka, (2010) 7 SCC 263.

23 Navaneetha Krishnan v. The State by Inspector of Police, 2018 SCC OnLine SC 378.

Further, in *Justice K.S. Puttaswamy (Retd.) v. Union of India*,[24] the Supreme Court has laid down a consent-based law on privacy. This is to say that the aspect of privacy involves the idea of autonomy to make decisions about matters that are vital to one's life. Therefore, a decision that is made by an accused in custody to seek administration of DDTs, if completely autonomous satisfies the test laid down in *Puttaswamy*. In light of the evolving dynamics of privacy and consent, it becomes necessary that before rejecting the pleas of accused to undergo DDT, the Court must weigh the two foundational elements of consent and privacy together, and attempt to maintain a balance between the right to a fair legal trial and right against self-incrimination, i.e., the right to preserve one's privacy.

DDTs and POCSO

There have been many cases where the accused has sought reliance on DDTs to prove his innocence in POCSO cases. In *Annu Yadav v. State of Uttarakhand*,[25] the accused sought the narco-analysis test to prove his innocence after being accused under POCSO. The Uttarakhand High Court rejected the plea for such a test and referred to *Lawrence M. Dugan v. Commonwealth of Kentucky*[26] and reiterated: "the evidence produced before the Court in the shape or under the process of narco-analysis technique is not fool-proof evidence, particularly where the evidence will not be given before the Court from the side of the prosecution but on the insistence of the defence."[27] In *Sunilkumar Virjibhai Damor v. State of Gujarat*,[28] when the accused sought DDTs to prove his innocence, Gujarat High Court allowed the plea observing that:

> To level false allegations of sexual assault against any person is something very serious. Ultimately, if such allegations are found to be false, then there is no way in which the person against whom such false allegations are leveled can be compensated. In any society, once such allegations are leveled, the entire image of that person as well as the family members of that person would get tarnished.

In *Sidhu Yadav v. State of NCT of Delhi*,[29] when the accused demanded a narco-analysis test to prove his innocence after being charged under Section 5 of POCSO (Section 5 of POCSO automatically entails the presumption under Sections 29 and 30 of POCSO), the Court held that the same could not be allowed because the evidence recorded in the course of a narco-analysis test or a polygraph test is inadmissible. The Court further went on to discuss the admissibility of such a test and was unconvinced about the credibility of such evidence in the process of conviction. However, at this stage, it should be

24 Justice K.S. Puttaswamy (Retd.) v. Union of India, 2015 SCC OnLine SC 1640.
25 Annu Yadav v. State of Uttarakhand, 2016 (3) N.C.C. 47.
26 Lawrence M. Dugan v. Commonwealth of Kentucky, 333 SW 2d. 755 (1960, Court of Appeals of Kentucky).
27 Ibid.
28 Sunilkumar Virjibhai Damor v. State of Gujarat, 2018 SCC OnLine Guj 2153.
29 SidhuYadav v. State of NCT of Delhi, 2017 SCC OnLine SC 1645.

mentioned that in *Sidhu Yadav*, the Court particularly dealt with a situation where the accused sought a narco-analysis test for further investigation under Section 173(8) of Code of Criminal Procedure, 1973 (‗CrPC'). However, the implications of procedural impropriety with respect to the production of evidence at different stages of trial are beyond the scope of this paper.

Evidentiary Value of DDTs

As discussed above, in cases where no prejudice can be shown by the prosecution on the plea of the accused seeking DDTs, the Courts should allow such tests in the spirit of fair trial, and to uphold the rights of an accused.[30] Production of evidence is the primary step and once such evidence has been produced, the Courts have the platform to weigh the credibility of such evidence before giving the final verdict.

According to the foregoing discussion, it can be seen that the Supreme Court has maintained that DDTs can only be allowed at the stage of investigation with the permission of the Court. Therefore, the authors suggest that administration of DDTs be allowed in all cases at the stage of investigation, where reverse onus clauses determine the burden of proof, due to the reason that production of evidence forms a part of the rights of the accused and is exclusive of the premise which tests the authority of evidence. If at any point, the judiciary and the State allow administration of DDTs at the instance of the accused, such a procedure would demand special monitoring and the presence of a magistrate, and persons with a background in advocacy of human rights to ensure fairness and for reduction in chances of coercion.

Conclusion

Three arguments have been put forth to permit the voluntary administration of DDTs at the stage of investigation in POCSO cases: 1) that these tests do not lead to the invasion of privacy of the accused 2) that the inadmissibility of such evidence is not a valid ground to refuse administration of such tests during investigation and 3) that such tests are being recommended to balance the rights of the victims with the rights of the accused to a fair trial.

1) DDTs do not lead to the invasion of privacy of the accused

In *Selvi*, the Supreme Court has clearly laid down that DDTs, when administered with the consent of the accused, do not lead to violation of fundamental rights of the accused. In the same spirit, it is redundant to discuss the possibilities of violation of Part III by the use of DDTs. Therefore, one of the major arguments by the advocates of the rights under Part III should be considered validly ruled out. In order to uphold the rights of the accused during the trial, it becomes important to incorporate the provisions related to DDTs as valid and legal investigative techniques at least at the instance of the accused.

30 Dr. Purshottam Swaroop Chand Soni v. State of Gujarat, 2007 (3) GLR 2088.

2) The inadmissibility of DDTs should not be a ground for refusal of administration of such tests at the stage of investigation.

One of the major grounds for disallowing the administration of such tests by the Courts during investigation is the inadmissibility of scientific tests during trial. Allowing the accused to present evidence by way of revelations, produced during administration of these tests, is not a final word for conviction or acquittal. These revelations have to stand the test of the trial procedure and judgment of the Court to lead to any final consequence. In view of this discussion, it is not an overstatement to suggest that inadmissibility of DDTs should not be a ground for refusal of administration of these tests during investigation.

3) DDTs have been recommended as a tool of investigation in an attempt to balance the rights of the victims with the rights of the accused at the stage of investigation.

Administration of DDTs, when the accused voluntarily seeks to undergo them to prove his innocence in cases of reverse onus under POCSO, should be allowed to balance the presumption of guilt against the burden to prove his innocence beyond reasonable doubt. In order to balance the rights of the victim with that of the accused, it is suggested that the courts provide the accused with all opportunities available to his assistance.

The need of the hour is to harmonize the rights of the accused and rights of the victim along with a need to expand the scope of the rights available to the accused. This should be done by allowing the administration of DDTs in all cases under POCSO.

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GERMANY'S INCREASED ROLE IN WORLD POLITICS: THE NEED FOR INCREASING ADAPTABILITY OF THE EUROPEAN OLD GUARD

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Abstract

This paper will thematically predispose itself with Germany's rise as the factotum of the EU, a role that was thrust upon it since its comparative but coterminous rise along with France. As the present drivers of EU, having distinct visions of it, it becomes imperative to critically engage in an analysis of the incremental odds that Germany has surmounted. On a regional and global scale, it has had the unenviable position of defending its policy apropos the migration crisis, with both domestic and global condemnation. The paper begins with a general introduction giving an overview of the German State and its functioning. This is followed by analysing the predicaments that Germany has dealt with over the years, particularly with a focus on the Eurozone Crisis, the migration and refugee crisis, Brexit, domestic political difficulties in Germany, and its relations with France. The authors have utilised the EU28 Survey in order to underline the potential of a joint Franco-German exercise in taking forward the EU. This partnership has already made strides in areas like security, defence, political partnership, migration, asylum and politico-economic institutionalisation. Finally, in the conclusion, the authors argue that an evolving matrix of threats and circumstances will require, in particular, that Germany steps up to its role as the regional big brother while being cognisant of the various geo-economic and political threats that will no doubt serve to rock the European Union's boat in the near future.

Key Words: Eurozone Crisis, Refugee Crisis, Migration, Brexit, EU Reforms

Introduction

The paper has tailored itself apropos the politics of Angela Merkel, considered perhaps sanguinely as the bellwether of European Union (‗EU') States and political heads. This is not an unintentional exercise, in fact, it serves to underline the tremendous influence she has exercised both domestically and on the larger geopolitical scene during her industrious leadership.

Germany is the most populous member country of the EU. It is a federal, parliamentary, and representative democratic republic and its political system

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operates according to the 1949 fundamental law, *Grundgesetz*.[1] Its monetary policy is governed by the European Central Bank, which is situated in Frankfurt, the economic centre of continental Europe.

The current Chancellor, Angela Merkel, is the head of the government and exercises executive power through the Cabinet, similar to the role of a Prime Minister in parliamentary democracies. Since 1949, the party system has been dominated by the Christian Democratic Union and the Social Democratic Party of Germany. Germany has played an influential role inside the EU since the latter's inception. It has maintained a robust alliance with France and all neighbouring nations since its reunification in 1990. In 1999, Chancellor Gerhard Schröder's government formulated a new German overseas policy apropos taking part in the NATO decisions surrounding the Kosovo conflict,[2] and by way of sending German troops into combat zones for the first time since 1945.

The German socialist economy is characterised by its large pool of professional labour force, a big capital stock, a high degree of innovation, and low levels of corruption. It is the third largest exporting country in the world and has the largest national economy in Europe.[3] The unemployment rate, according to the Eurostat, stands at just 4.7 percent as of January 2015.[4] Germany is a part of the EU single market, which consists of more than five hundred and eight million consumers. Germany officially started using the euro in 2002 and is a constitutive member of the Eurozone, which represents around three hundred and forty million citizens.

Predicaments facing Germany

The Eurozone Crisis

The euro was introduced in 2002 as the single currency of the EU, consolidating the largest trade bloc in the world and creating one of the world's strongest currencies.[5] But the accumulation of massive, unsustainable deficits and public debt in several peripheral economies soon threatened the Eurozone's viability, triggering a sovereign debt crisis. The crisis highlighted the economic interdependence of the EU, while also underlining the lack of political integration necessary to provide a coordinated fiscal and monetary response.

A Greek default would have precipitated its exit from the euro and potentially caused a crises chain across Europe. Thus, in May 2010, the troika

1 *Fläche und bevölkerung*, Gemeinsames Statistik portal, available at https://www.statistikportal.de/de/bevoelkerung/flaeche-und-bevoelkerung, last seen on 16/11/18.

2 Wolfgang-Uwe Friedrich, et. al, *The Legacy of Kosovo: German Politics and Policies in the Balkans*, 22 American Institute for Contemporary German Studies 1,18 (2000).

3 *World Trade Statistical Review 2018*, WTO, available at https://www.wto.org/english/res_e/statis_e/wts2018_e/wts2018_e.pdf, last seen 27/02/2019.

4 *Euro area unemployment rate at 11.0%*, Eurostate Newsrelease Euroindicators (30/09/2015), available at https://ec.europa.eu/eurostat/documents/2995521/7012746/3-30092015-AP-EN.pdf/9adc381a-dbab-4e56-acde-eeeab6420971, last seen on 27/02/2019.

5 Christopher Alessi and James McBride, *The Eurozone in Crisis*, CFR Blog, available at https://www.cfr.org/backgrounder/eurozone-crisis, last seen on 27/02/2019.

of the European Commission, the European Central Bank, and the International Monetary Fund created the European Financial Stability Facility („EFSF") to provide Greece with a one sixty three billion dollar bailout loan, in exchange for spending cuts.[6] Unlike Greece, Ireland's troubles were caused by a banking crisis resulting from the 2008 subprime crisis. Portugal's economic deficit meant that with withdrawing investors, the country could no longer finance itself. At the end of 2011, the centre of the crisis shifted to Europe's larger countries, particularly Italy. Prime Minister Berlusconi was forced to step down in favour of an economist Mario Monti's government. Spain, like Ireland, faced a housing bust that left its banking sector vulnerable. In France, the election of Socialist President Francois Hollande brought a government less willing to undertake structural reforms.[7] To understand why the German economy thrived while other European economies struggled during the 2008-09 Eurozone crisis, one must hark back to the successful belt-tightening policy during early 2000s. The Hartz reforms may be seen as the reason for the reduced labour costs and encouragement towards more people to work. German austerity and structural labour-market changes encouraged competitiveness, shored up growth, and increased employment[8] to rescue the flailing economies. These went against the newly elected French President Francois Hollande's proposal to create Eurobonds. Merkel's plan made the following proposals:[9]

- Launching quick-start programs to help business start-ups.
- Relaxing protections against wrongful dismissal.
- Introducing „mini-jobs" with lower taxes.
- Combining apprenticeships with vocational education targeted toward youth unemployment.
- Creating special funds and tax benefits to privatize state-owned businesses.
- Establishing special economic zones like those in China.
- Investing in renewable energy.

The seven-point plan had succeeded an intergovernmental treaty approved on December 8, 2011, which saw the creation of a fiscal unity parallel to the monetary union that already existed.[10] The treaty did three things: *first*, it enforced the budget restrictions of the Maastricht Treaty. *Secondly*, it reassured lenders that the EU would stand behind its members' sovereign debt. *Thirdly*, it

6 *See generally*, *The Internal Impact and External Influence of the Greek Financial Crisis* (John Marangos, 2017).

7 Jacob Funk Kirkegaard, *The Socialist Dilemma of François Hollande: To Be Schröder or Zapatero?*, PIIE Blog, available at https://www.piie.com/blogs/realtime-economic-issues-watch/socialist-dilemma-francois-hollande-be-schroder-or-zapatero, last seen on 27/02/2019.

8 Fiona Ehlers, *Merkel Prepares to Strike Back against Hollande*, Spiegel Online, available at http://www.spiegel.de/international/europe/merkel-preparing-to-strike-back-against-hollande-with-six-point-plan-a-835295.html, last seen on 25/03/2019.

9 Ibid.

10 *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, European Union Document D/12/2 (01/02/2012), http://europa.eu/rapid/press-release_DOC-12-2_en.html, last seen on 25/03/2019.

allowed the EU to act as a more integrated unit. Specifically, the treaty created five changes:

- Eurozone member countries would legally give some budgetary power to centralized EU control.
- Members that exceeded the three percent deficit to Gross Domestic Product ratio would face financial sanctions. Any plans to issue sovereign debt must be reported in advance.
- The European Financial Stability Facility was replaced by the European Stability Mechanism („ESM"), which became effective in July 2012.
- Voting rules in the ESM would allow emergency decisions to be passed with an eighty-five percent qualified majority. This allows the EU to act more quickly.
- Eurozone countries would lend another two hundred billion Euros to the IMF from their central banks.

Merkel's thinking has been analysed as nuanced. It is rooted in the orthodox school of economic ordoliberalism.[11] The sovereign debt crisis had brought forth the realization that globalization and deep economic integration have made Europe and Germany prosperous: but also vulnerable like never before. Germany's insisted on structural changes based on two factors: the domestic setup of corruption and policy challenges is a source of risk, and the realisation that one vulnerable EU member State endangers all others. Two competing German metaphors can be used to alternatively substantiate the strategy of Angela Merkel on the euro crisis.[12] The pejorative version is that she is using „salami tactics" to make the deal more digestible for the German public. The more positive metaphor is that Germany's government is „driving by sight" (*auf Sichtfahren*).

Migration and Refugee Crisis

The U.N. defines an international migrant as „any person who changes his or her country of usual residence".[13] Migrants can move for a variety of reasons, and „migrant" is an umbrella term, encompassing both asylum-seekers and economic migrants. Refugees, by contrast, are guaranteed a particular kind of protection under international law. A refugee is recognized as a person fleeing conflict or persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion. Under the United Nations Refugee Convention, 1951, a country is legally obliged to shelter a refugee and is not

11 Also known as the „New classical economics" and historically close to the famous Austrian school of economics. It is based on a small set of strict rules by the government (the „ordo", or order) within which markets operate freely. Proponents today include Jens Weidmann, head of Germany's central bank, and Hans-Werner Sinn, President of Munich's Ifo Institute. They represent the hawks in the euro debate.

12 Constanze Stelzenmüller, *Germany and the euro crisis: Not just for austerity's sake*, Brookings, available at https://www.brookings.edu/blog/order-from-chaos/ 2015/07/10/germany-and-the-euro-crisis-not-just-for-austeritys-sake?, last seen on 25/03/2019.

13 *Handbook on Measuring International Migration through Population Census*, United Nations Department for Economic and Social Affairs Statistical Division 2017, available at https://migrationdataportal.org/themes/international-migrant-stocks, last seen on 23/03/2019.

allowed to expel or return a refugee to somewhere where their life or freedom would be threatened (Non-Refoulment).

A multifocal crisis had emerged in South Sudan, the Democratic Republic of Congo, Ukraine, Iraq, and the Central African Republic driving the 2015 crisis, but more than half of all refugees worldwide in 2014 came from Syria, Afghanistan, and Somalia.[14] Since Syria's civil war began in 2011, more than four million Syrians have sought shelter in neighbouring countries, and another 7.6 million have been forced from their homes but remain displaced within Syria. The developing countries currently hosting the vast majority of refugees from Syria are reaching breaking point. Lebanon, Jordan and Turkey, sheltering 3.6 million Syrian refugees between them, are overwhelmed, and international humanitarian funding is stretching itself at the seams.[15]

Angela Merkel's pledge has further bolstered the number of Syrians in Germany by allowing them to apply for asylum in Germany, effectively suspending the Dublin Regulation.[16] The rule had placed a disproportionate burden on the southern countries of Italy, Greece, and Malta, who witness the maximum arrivals from the Mediterranean, and are treated as transit countries by these people.[17] Numbers are sharply down from their 2015-16 peak because of a 2016 EU deal with Turkey,[18] new border fences in the Balkans,[19] and a 2017 bilateral arrangement between Italy and Libya, but tens of thousands of people are still trying to reach Europe. Critics have regarded the predisposition of refugees to choose one country over another in terms of refuge destination, as a sort of ‚asylum shopping'.[20]

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14 *World at War*, UNHCR Global Trends, Forced Displacement in 2014, available at https://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html, last seen on 25/03/3019.

15 Kemal Kirişci, *Why 100,000s of Syrian refugees are fleeing to Europe*, Brookings Institution, available at https://www.brookings.edu/blog/order-from-chaos/2015/09/03/why-100000s-of-syrian-refugees-are-fleeing-to-europe/ , last seen on 27/03/2019.

16 The Dublin regulation determines the EU member state responsible to examine an asylum application to prevent asylum applicants in the EU from ‚asylum shopping' or ‚asylum orbiting.' By default (when no family reasons or humanitarian grounds are present), the first member State that an asylum seeker have entered and in which they have been fingerprinted is responsible. If the asylum seeker then moves to another member State, they can be transferred back to the member State they first entered; *see*, Annapaola Ammirati, *What is the Dublin Regulation*, Open Migration, available at https://openmigration.org/en/analyses/what-is-the-dublin-regulation/, last seen on 28/03/2019.

17 Naina Bajekal, *The 5 Big Questions About Europe's Migrant Crisis*, TIME (09/092015), available at http://time.com/4026380/europe-migrant-crisis-questions-refugees/ , last seen on 28/03/2019.

18 Since the beginning of the Syria crisis in 2011, the Commission has provided a total assistance of €455 million in Turkey, including humanitarian aid and longer-term assistance. In November 2015, the EU set up the Refugee Facility for Turkey. Over €240 million worth of projects have already been released to date; *see*, *EU-Turkey statement*, Council of the European Union, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/, last seen on 29/03/2019.

19 Barbara Surk, *E.U. Hoped Balkan Border Deal would be Model for Peace. Then it Collapsed*, The New York Times (09/12/2017), available at https://www.nytimes.com/2017/12/29/world/europe/slovenia-croatia-border-eu.html, last seen on 29/03/2019.

20 Jacopo Barigazzi, *EU aims to stop 'asylum shopping'*, Politico (04/062016), available at https://www.politico.eu/article/eu-aims-to-stop-asylum-shopping-refugee-crisis/, last seen on 29/03/2019.

The German federal government responded to the events of summer 2015 with the Asylum Package I,[21] which called for greater participation of the federal government in the cost of financing of refugee accommodation and also contained several measures aimed at accelerating the asylum procedure. However, with the growing number of refugees, these measures were inadequate. At the beginning of November 2015, the coalition leaders agreed upon the Asylum Package II,[22] which provided for the creation of more „special reception centres" for asylum seekers from safe countries of origin, who are subject to re-entry restrictions, lodge subsequent applications or are unwilling to cooperate.

The arrival of asylum seekers has tested the member States' ability to respond to crises with a united front. A pattern of States becoming orthodox in their asylum policy can be discerned, such as in the case of Sweden, which initially led the statistics for accepting the maximum number of refugees, but subsequently introduced restrictions in its asylum policy and sealed its frontiers. Merkel's pronouncement has remained the cornerstone of Germany's refugee policy, despite mounting resistance within the country, even from her party, and from many other European governments.[23] Her famous dictum of *Wirschaffen das!* (We can do it!), has become the catchphrase of the open and humanitarian Germanstance on the European refugee crisis. Merkel's open-door policy can be attributed to several factors:[24]

- *Willkommenskultur*: A survey commissioned by the Bertelsmann Stiftung[25] found that Germans are increasingly more comfortable with the notion that Germany is becoming a country of immigrants, particularly in former West Germany. Although, some right-wing movements have gained traction, the numbers show that a vast majority of Germans believe that their country should be open to refugees.
- Merkel's Personal Project: Before the summer of 2015, Merkel's style of politics was characterized by pragmatism and incremental steps, rather than following a sweeping political vision. Now, in a departure from her usual style, Merkel has made Germany's open asylum policy her personal political project, despite strong resistance from many quarters.
- Demographic Boon: It has been argued that since Germany's population is shrinking and aging, the rationale for allowing refugees in, is to augment the labour force. However, the real reason behind

21 Jenny Gesley, *Germany: Parliament Adopts Legislative Package on Asylum and Refugees*, Global Legal Monitor, http://www.loc.gov/law/foreign-news/article/germany-parliament-adopts-legislative-package-on-asylum-and-refugees/, last seen on 29/03/2019.

22 Ibid.

23 Janosch Delcker, *The phrase that haunts Angela Merkel*, Politico (19/08/2016), available at https://www.politico.eu/article/the-phrase-that-haunts-angela-merkel/, last seen on 30/03/2019.

24 Matthias Mayer, *Germany's Response to the Refugee Situation: Remarkable Leadership or Fait Accompli?*, Bertelsmann Foundation, available at https://www.bfna.org/research/germanys-response-to-the-refugee-situation-remarkable-leadership-or-fait-accompli/, last seen on 29/03/2019.

25 Saim Saeed, *Migrants (still) welcome in Germany: survey*, Politico (04/07/2017), available at thttps://www.politico.eu/article/migrants-still-welcome-in-germany-survey/, last seen on 30/03/2019.

> Germany's policy was a humanitarian calculation rather than an economic one.

Polling results showed that the responses to the challenges of refugee reception vary and, on the whole, can be viewed as ambivalent.[26] On the one hand, German society has demonstrated a great degree of solidarity with refugees and has shown spontaneous support for them. On the other hand, right-radicals such as the *Nationaldemokratische Partei Deutschlands* ('NPD') initiated numerous protests against the reception of asylum seekers. There has been a significant rise in the anti-immigration Patriotic Europeans Against the Islamisation of the Occident ('Pegida') movement, which has staged regular demonstrations, as well as the rise of the populist right-wing party Alternative for Germany ('AfD'). Over the last few months of 2018, there have been calls for the introduction of a ceiling for asylum seekers. If the ceiling were reached, all further asylum seekers would be turned back at the border. However, this idea raises legal objections, as in the case of non-refoulment.

The borderless Europe of the Schengen Agreement is bound to unravel. There is no longer a migrant crisis *per se*, but there is definitely a political crisis over the issue of migration.[27] As long as the States do not present a consensual front, the issue of rights violations during times of humanitarian crisis will continue. The creation of a fortified Europe claimed its many victims. The primary of these has been the States' goodwill and consensus for action over mitigating the breached red lines of migration and displacement. So far, the implementation of a pan-European solution proposed by the German federal government and aimed at a fairer distribution of asylum seekers between all the member States of the EU has proved impossible.

***Britain's Exit from the European Union* (*Brexit*)**

As the UK is one of the largest net financial contributors to the EU, Brexit will also impact the EU's finances when the next multi-annual budget (2021-2027) comes up for discussion. The Finance Ministry in Berlin has estimated that Germany's potential additional annual contribution could be €6-7 billion through further contributions and phasing out the rebate system.[28]

In this regard, Germany's relations with France should not be overlooked. Angela Merkel and Emmanuel Macron have remained aligned in publicly

26 Marcus Engler, *Germany in the refugee crisis–background, reactions and challenges*, Vocal Europe (11/05/2016), available at https://www.vocaleurope.eu/germany-in-the-refugee-crisis-background-reactions-and-challenges/, last seen on 30/03/2019.

27 James McAuley and Rick Noack, *What you need to know about Germany's Immigration crisis*, The Washington Post (03/07/2018), available at https://www.washingtonpost.com/news/worldviews/wp/2018/07/03/what-you-need-to-know-about-germanys-immigration-crisis/?utm_term=.d5a90c9ea7b8, last seen on 30/03/2019.

28 Mehreen Khan and Guy Chazan, *Germany's annual EU budget bill set to double to €33bn*, Financial Times (27/10/2019), https://www.ft.com/content/9c82433c-f846-11e9-a354-36acbbb0d9b6, last seen on 29/03/2019.

backing the EU's red lines on Brexit.[29] However, their backing has not meant seeing eye to eye on several key issues. Looking towards the post-Brexit EU27, a reinvigorated France is pushing for reforms. For example, regarding the Eurozone, it is trying to take the EU in a political direction that Germany would not necessarily support.[30] While France does provide the much-needed counter-balance to an overweening German influence on EU politics, Berlin may hesitate if this means protectionism or the spending of more German money. Further, despite growing enthusiasm for a French counter-balance to German power, one must realise the comparatively weaker capabilities of France vis-à-vis Germany.

Theresa May had requested two extensions from the original March 29 deadline to leave, after the Tories failed to back her proposed deals for a „soft" Brexit.[31] After her eventual resignation, Boris Johnson replaced her as the prime minister, and managed a third extension, pushing the deadline to January 31, 2020. With Prime Minister Johnson wanting a hard exit, he has persuaded the Parliament to pass a legislation to go ahead with the same.[32] What changed between May's and Johnson's tenure? While May faced the formidable opposition of the Northern Irish Democratic Unionist Party and Conservative breakaways, it is not the same for Johnson. Still, there is much work to be done.

Negotiating the terms of Britain's departure from the EU has been hard, but negotiating the terms of the future relationship may be even harder. Johnson has the unenviable onus of coming up with a deal that not only works for the EU but also passes muster within his own party divisions, those for maintaining closer ties with the bloc, and those advocating for a cleaner break. After the UK formally leaves the EU on January 31, 2020, there is still a lot to talk about and months of negotiation will follow. While the UK has agreed to the terms of its EU departure, both sides still need to decide what their future relationship will look like. This will be worked out during the transition period (which some prefer to call the implementation period), which begins immediately after Brexit day and is due to end on December 31, 2020. During this eleven-month period, the UK will continue to follow EU rules, and its trading relationship will remain the same. The transition period is meant to give both sides some breathing space while a new free trade agreement is negotiated. This is needed because the UK will leave the single market and customs union at the end of the transition. A free trade agreement allows goods to move around the EU without checks or

29 Johnny Pring**,** *Looking across the North Sea: a German view of Brexit*, friends of Europe, available at https://www.friendsofeurope.org/insights/looking-across-the-north-sea-a-german-view-of-brexit/, last seen on 30/03/2019.

30 Peter Foster, *Fiasco: the inside story of the Brexit talks*, Prospect (02/09/2019), available at https://www.prospectmagazine.co.uk/magazine/peter-foster-brexit-longread, last seen on 29/03/2019.

31 Matthew Weaver, *Back May's deal or risk soft Brexit, Hammond tells Tories*, The Guardian (07/03/2019), available at https://www.theguardian.com/politics/2019/mar/07/philip-hammond-warns-hard-brexiters-to-vote-for-theresa-may-deal-or-risk-softer-brexit, last seen on 30/03/2019.

32 Kate Proctor, *Brexit: Boris Johnson will amend bill to outlaw extension*, The Guardian (17/12/2019), available at https://www.theguardian.com/politics/2019/dec/16/boris-johnson-will-amend-brexit-bill-to-outlaw-extension, last seen on 30/03/2019.

extra charges. If a new one cannot be agreed in time, then the UK faces the prospect of having to trade with no deal in place. That would mean tariffs on UK goods travelling to the EU and other trade barriers.[33] Aside from trade, many other aspects of the future UK-EU relationship will also need to be decided like law enforcement, aviation standards, supply of gas & electricity etc.

Domestic Political Quagmire

As the 2008-09 subprime disaster hit Europe and in the subsequent Eurozone crisis, Merkel became the image of monetary austerity, prescribing sweeping price cuts and tight fiscal supervision as the panacea for southern Europe‘s issues.[34] However, as Germany became the largest paymaster for the Eurozone bailouts, so was Merkel increasingly perceived as the driving force behind the Union‘s efforts to restore confidence in the euro,[35] although her fiscal belt-tightening did not find as many usual enthusiasts.

Merkel confronted her biggest challenge as Chancellor when migrants and refugees began heading in huge numbers for what was Europe‘s most successful financial system and model country, which several of her domestic and fellow EU leaders have simplistically derided as ‗asylum shopping‘. But with the burgeoning wave of immigration, she took the lead in opening Germany‘s borders, temporarily stalling the Dublin regulation. Naturally, not everybody was happy with the open-door policy and the far-right, populist party, AfD, aligned itself vehemently against it.[36]

Franco-German Relations

Franco-German relations were first institutionalised in 1963 by the Elysée Treaty, supported by the spirit of reconciliation between the two countries. For Charles de Gaulle and Konrad Adenauer, it constituted a milestone commitment, which was supported by common values and shared responsibility.[37] It has particular relevance in our times for the development of bilateral cooperation and highly successful partnership over the decades, despite occasional political divergences, and regardless of institutional similarities/dissimilarities and the style of functioning. It was and is referred to as the ‗Franco-German tandem‘, the ‗Franco-German engine‘ or the ‗flywheel for Europe‘.[38]

The EU28 Survey

33 *Brexit: All you need to know about the UK leaving the EU*, BBC News (27/01/2020), available at https://www.bbc.com/news/uk-politics-32810887, last seen on 27/01/2020.

34 Jeffrey Gedmin, *Right-wing populism in Germany: Muslims and minorities after the 2015 refugee crisis*, Brookings, https://www.brookings.edu/research/right-wing-populism-in-germany-muslims-and-minorities-after-the-2015-refugee-crisis/, last seen on 29/07/2019.

35 *Angela Merkel: Germany's shrewd political survivor*, BBC News (03/06/2019), available at https://www.bbc.com/news/world-europe-23709337, last seen on 29/07/2019.

36 Supra 34.

37 Tobias Sudholter *The Franco-German relationship - the engine of European integration*, Master Thesis, University of Twente/ University of Munster, 1, 6 (2014).

38 Ibid.

The EU28 Survey[39] is a bi-annual expert poll conducted by European Council of Foreign Relations (‗ECFR') in the twenty-eight member States of the EU. On the fiscal policy and Eurozone governance, an area of considerable importance for France and Germany, respondents perceived a great deal of potential for joint Franco-German action in the next two years.[40] At the same time, many respondents saw this area as one most likely to create controversy between their governments, and as one in which the current level of agreement between Paris and Berlin was either medium or low (in almost equal measures).[41] These findings speak to the difficulty the Franco-German engine will have in securing a deal on Eurozone reform. But they also show that each side is highly aware of the other's position, thereby illustrating the maturity that is required in their bilateral relationship.

In three other core policy areas: refugee protection, the migration crisis, asylum policy, European defence structures and integration, and EU institutional reform, the picture is unclear. Respondents' views of these issues diverged to a greater degree than that on fiscal policy and Eurozone governance.[42] Particularly, a large section of the German public sees Macron's idea of transforming the Eurozone into a transfer union as a ploy for Germany to bankroll other States. Macron has consequently defended his views, suggesting that the idea of debt mutualisation is the farthest from his vision of a Franco-Germanic thrust within the EU engine.[43] While London has pushed for an *ad hoc* agreement, Brussels wants the UK to accept one of the existing models, which include membership in the single market, membership in the customs union or a traditional free trade agreement.[44]

Most respondents believed that there was a medium level of consensus between France and Germany on migration, refugee, and asylum policy. In comparison to the French, more Germans perceived that there was a strong consensus in this area.[45] These findings perhaps illustrate that because the refugee crisis affected the Germans more than the French, the former is likely to place greater emphasis on a joint approach in this area. A similar pattern emerges on the European defence front. Although these findings might once again reflect Germany's desire to boost European defence in light of the

39 Josef Janning, *Migration dominates EU priorities through 2023*, European Council on foreign relations (09/072018), available at https://www.ecfr.eu/article/commentary_migration_dominates_eu_priorities_through_2023, last seen on 29/03/2019.

40 Almut Möller, *Consensus and the Franco-German engine: New perceptions of European cooperation*, European Council on Foreign Relations, available at https://www.ecfr.eu/article/commentary_consensus_and_the_franco_german_engine_new_perceptions_of_europe, last seen on 29/03/2019.

41 Ibid.

42 Ibid.

43 Steven Erlanger, *Merkel and Macron Publicly Clash over NATO*, The New York Times (23/11/2019), available at https://www.nytimes.com/2019/11/23/world/europe/nato-france-germany.html, last seen on 29/03/2019.

44 Adriano Bosoni, *For Germany and the EU, a Summer Respite Nears its End*, Stratfor (23/08/2018), available at https://worldview.stratfor.com/article/germany-and-eu-summer-respite-nears-its-end, last seen on 29/03/2019.

45 Supra 40.

securitisation in and around Europe, the French are perhaps fundamentally more sceptical about Germany's commitment to such efforts. While ECFR's data suggests that France and Germany share a strong sense of strategic responsibility for keeping the Union afloat, and agree on wanting to lead it jointly, a generalised purpose is inadequate to see the EU through the coming years. It is time for Paris and Berlin to take a leap of faith.[46] In these times, characterised by a difficult and conflict-ridden multipolar world order, enhanced and reinforced cooperation between France and Germany presents a fascinating model for jointly addressing and tackling Europe's growing political, economic and social challenges.

Conclusion

As Germany will be at the centre of the debates concerning trade and economic reforms in the near future, and Berlin's decisions will be felt across Europe. In the negotiations concerning EU reform, Germany will find that governments in Northern Europe are better organised and willing to present a common front against many of France's plans. The Netherlands, Sweden, Denmark, Finland, etc., are likely to resist any attempts to transfer additional powers to supranational institutions in Brussels. This sort of intergovernmentalism will also likely be continued in the area of common foreign and security policy.

With regard to Brexit, the UK is scheduled to leave the EU on January 31, 2020, but many crucial decisions about its departure are yet to be taken. According to the chief EU negotiator, Michel Barnier, the withdrawal agreement establishing the legal terms of Britain's exit is eighty percent complete. The problem is that the remaining twenty percent will be extremely hard to resolve, because the question of the future of the Irish border remains open. In addition to the withdrawal treaty, the EU and the UK are also supposed to sign a joint political declaration describing their future economic, political and security ties.

The most recent sources of political risk for the EU include a negative effect on bilateral trade because of higher U.S. tariffs (as of December 2019, the U.S. was considering tariffs of up to hundred percent on European products, which the Trump administration had previously absolved from such duties), the lack of agreement on EU reform and a disorderly Brexit. Germany and the most prominent EU States and institutions will be negotiating on multiple fronts to minimize any damage caused by these events, but the task ahead of them will not be easy. Regardless of how these various disputes pan out, one thing has become increasingly clear. In the future, as Merkel finds herself increasingly sidelined within her party and Annegret Kramp-Karrenbauer emerges as a successor, many of the issues outlined in this paper will continue to remain relevant. Today, Angela Merkel pulls greater strings in Europe than any other leader, and occasionally more than the rest of them taken together. One may see

46 Ibid.

this as a function not just of the monetary disaster but additionally of other leaders‘ inability to offer a credible alternative of how Europe should function. Whilst other States whinge about Germany hijacking the European agenda, the question bears relevance as to who is in a position to be a credible rival.

Post the realisation of whatever changes in geopolitics that will follow Brexit, the Franco-German power, while requiring resilience, will have to face the assertions of the Visegrád Group. In the changing configurations of statism, the power groups will assume an asymmetric proportion. On the trade front, we may assume French *dirigiste* policies will hold it in better stead than German economic ambitions. Yet, on the security and defence fronts, while Germany has continued to assume a leadership role, it will have to significantly step up its efforts. None of the impacts of changing geopolitics, in particular Brexit, will be in the short term. Indeed, the answers to these questions will determine the future of the EU project as a whole. At the start of the UK‘s two-year withdrawal from the EU in March 2017, many looked to Germany as the EU‘s key power, hoping that it would make concessions to smooth out the path to a deal between London and Brussels. Once the new government was in place in Berlin after the federal election in September 2017, it was assumed that economic self-interest would kick in.

As Donald Trump‘s threatened trade wars still hang over the EU like a Damocles‘ sword, losing barrier-free access to a key market is not a prospect they would look forward to. Finally, Germany has long had a lackadaisical attitude towards stepping up and donning the mantle of authority, which has, at various points of time, led allies to remark that a post-war Germany is the best of all historical outcomes. Yet, it belies the image that its allies had hoped it would assume after the Reunification. Clearly, the profit arising from Germany‘s status as a major continental geo-economic power is yet to be realised. Part of this problem is not just the permeation of an orthodox thought process in German politics, economics and the conduction of international relations within the global order, but also the strategic selfishness of the Deutsch Republic, which has found great similarities in statecraft with the ideals of the French Republic. This paper, ergo, asserts that the ‗broadening versus deepening‘ argument of Europe, which has long been accepted in strategic thinking on geopolitics, will now give way to the realisation that within the present set of changed circumstances (as with the unremitting threats like the withdrawal of the U.S. from Afghanistan and Syria, a potential powder keg that is the Middle East, and the uncertainty facing the Iranian nuclear and missiles issue), Germany will have to step up, both as a State operating within the EU, and as an institutional factotum within it, driving and leading it to the necessary changes that face the present world order.

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THE FALLACY OF THE SURROGACY (REGULATION) BILL, 2019: AN ANALYSIS THROUGH THE LENS OF TRANSFORMATIVE CONSTITUTIONALISM

Anju Joseph[*]

Abstract

In Navtej Singh Johar v. Union of India, the Supreme Court, by partially striking down Section 377 of the Indian Penal Code as unconstitutional, has freed the LGBTQ community from the fetters of a century old draconian law. The law not only chained their sexual autonomy, but also prevented them from expressing their individual identity. Through this decision, the Indian judiciary has paved a way for transformative constitutionalism. However, the Indian Parliament has taken a regressive step by introducing the Surrogacy (Regulation) Bill, 2019, a law which aims to protect the interests of the society, but which in reality overlooks the interests of the LGBTQ community. This paper seeks to analyse the impact of the Bill on the LGBTQ community and study its effect in light of Navtej Singh Johar, which has opened the window for reforms for the LGBTQ community. The paper also attempts to make a comparative analysis of the Bill and the Supreme Court's decision. In doing so, it also attempts to highlight the fallacy of our legal system in trying to bring about selective transformative constitutionalism.

Keywords: Section 377, Decriminalisation, Constitutionalism, Surrogacy Bill, LGBTQ.

Introduction

On September 6, 2018, the Supreme Court of India in *Navtej Singh Johar v. Union of India*[1] held that Section 377 of the Indian Penal Code ('IPC'), to the extent that it prohibits consensual homosexual relations between adults, is unconstitutional. Following this, on December 19, 2018, the Surrogacy (Regulation) Bill, 2019[2] which aims to impose a complete ban on commercial surrogacy, was passed in the Lok Sabha. Indeed, India has received nationwide, and even worldwide recognition for its tremendous efforts towards such reformation.[3] The move of the Parliament in considering the Bill, and that of the

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1 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

2 The Surrogacy (Regulation) Bill, 2019 (passed by the Lok Sabha, 5/08/2018).

3 Michael Safi, *Campaigners celebrate as India decriminalises homosexuality*, The Guardian (6/09/2018), available at https://www.theguardian.com/world/2018/sep/06/indian-supreme-court-decriminalises-homosexuality, last seen on 24/10/2019; Also *see*, *India court legalises gay sex in landmark ruling*, BBC News (6/09/2018), https://www.bbc.com/news/world-asia-india-45429664, last seen on 24/10/2019; Zainab Patel, *The long road to LGBT equality in India*, UNDP India, available at https://www.in.undp.org/content/india/en/home/blog/lgbtequalityindia.html, last seen on 24/10/2019.

Supreme Court in recognising the sexual autonomy of LGBTQ community, is indicative of the fact that the Indian legal system is attempting to weed out discrimination and arbitrariness from the society.

Despite these glorious achievements, the question which still remains is whether such reformation is actually going to ameliorate the conditions of the LGBTQ community by prohibiting discrimination, or is it only an illusion of equality and justice.

While the judiciary is active in protecting and upholding the rights of the LGBTQ community through its judgment in *Navtej Singh Johar*, the Parliament through the Surrogacy Bill is ignoring the right of the LGBTQ couples to parent a child. By enacting a law which prevents a section of the society from availing its benefits is in direct contradiction with judicial decisions which recognise the right to privacy, freedom and the right to sexual autonomy as well as the identity of the LGBTQ community.[4] In order to understand the full impact of the Supreme Court's decision to decriminalise Section 377 and the likely impact of the Surrogacy Bill on the LGBTQ community in the light of this decision, it is important to analyse the context in which the judgment was delivered and in which the Bill is intended to be enacted.

Homosexuality and the Rights of the LGBT Community: A Social Taboo in India

Prior to *Navtej Singh Johar*, the situation of the LGBTQ community was dire. Gay people were regarded as, and are still considered by many, as outcasts and as a mistake of nature. Homosexual relationships were criminalised and were nothing but a 'social taboo' and were equated to some kind of mental abnormality.[5]

From historical accounts, it appears that homosexual behaviour patterns were tolerated, and even celebrated in India.[6] As a matter of fact, it has been often argued that homosexual relationships were neither considered a social taboo nor a sin, and were not criminalised by the Indian society prior to colonial rule. The Hindu religion, which is a widely practised religion in India, portrays various instances of homosexuality, in addition to recognising *hijra* as a third gender. Characters from various Hindu scriptures, such as *Shikhandi* from Mahabharata, who was born as a female but identified herself as a male and got married to another female. Likewise, *Bahucha Mata*, who is the goddess of fertility, is worshipped by *hijras* as their patroness. Hindu deities such as *Ardhanarisvara*, which is the hermaphrodite form of Lord *Shiva*, *Aravan*, a hero whom Lord *Krishna* married after he became a woman and Lord *Ayyappa*, a god born from the union of Lord *Shiva* and Lord *Vishnu* in his female incarnation as *Mohini*, are all usually identified with and worshipped by

4 National Legal Services Authority v. Union of India and others, (2014) 5 SCC 438; Also *see*, Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

5 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

6 Gurvinder Kalra et al., *Sexual variation in India: A view from the west*, 52 Indian Journal of Psychiatry 264, 264 (2010).

transgenders and homosexuals. Also, a number of 14th century texts in Sanskrit and Bengali (including *Krittivasa Ramayana*) narrate how King *Bhagiratha* was born of the union between two women blessed by Lord *Shiva*.[7]

Several Hindu scriptures openly describe homosexuality. Three important ancient Hindu scriptures, the *Narada Smriti*, the *Sushruta Samhita*, and the *Kama Sutra*, stand out in this regard, out of which the former two are concerned with *dharma* and medicine respectively. The *Narada Smṛiti* enumerates fourteen types of *panda*, who are impotent men declared to be ‗incurable' and are forbidden from marrying a partner of the opposite sex.[8] Among these, there are men who engage in oral sexual conduct with other men (*mukhebhaga*),[9] men who are sexually enjoyed by other men (*sevyaka*)[10] and onlookers who watch other men engaging in sexual acts (*irshyaka*).[11] In its discussion of oral sexual conduct between men, the *Kama Sutra* uses the term *tritiya-prakriti* (third sex or nature) to define men with homosexual desires and describes their practices. It divides such men into two types: those with a feminine appearance and demeanour, and those having a manly appearance with beards, moustaches, and muscular builds.[12] In addition to this, Hindu scriptures also describe transgenders, bisexuals, and intersex persons and even talk about their protection from abuse by the general public. This includes the *Narada Smriti* which states that people of the third sex should never be fined and the *Arthashastra* which makes the act of vilifying or publicly mocking any person of the third gender as offences punishable with small fines.[13]

The analysis makes it clear that ancient texts do not victimise homosexuals, instead it is the societal prejudice which motivates abhorrence towards this community. The origins of this prejudice can be traced back to the colonial era. It was the British-enacted IPC which contained Section 377 and was one of the many arbitrary laws imposing Victorian morality on their colonies.

The root cause for the oppression and suppression of the same-sex relationships individuals belonging to the LGBTQ community in India was a set of unexplained and pre-conceived notions regarding gay, transgender, bisexual and intersex persons. The main arguments which are raised by the proponents who argue in favour of criminalising homosexual relationships are that they are against the order of nature, and such relationships would eventually destroy the institution of the family, for legalizing same-sex marriages weakens the linkage connecting marriage with spousal and parental responsibility, and guarantees

7 Ibid, at 6.
8 Amara Das Wilhelm, *Tritiya-Prakriti: People of the Third Sex: Understanding Homosexuality*, 47 (2008).
9 Ibid, at 49.
10 Ibid, at 51.
11 Ibid.
12 Homosexuality, *Hinduism & the Third Gender (A Summary)*, GALVA-108, available at https://www.galva108.org/single-post/2014/05/15/Homosexuality-Hinduism-the-Third-Gender-A-Summary, last seen on 21/03/2019; *see*, *Narada-smriti* 12.15 and *Kama Sutra* 2.9.2.
13 Supra 8, at 80.

that children will be deprived of an extremely valuable and protective relationship with their father or their mother.[14]

Nevertheless, despite the society's gradual acceptance of homosexuality, according to the report titled, ‗Politics and Society Between Elections 2019' published by the Azim Premji Foundation and Lokniti, CSDS, more than half of the Indian society is still conservative even about the idea of accepting same-sex relationships.[15] Therefore, the decision in *Navtej Singh Johar* is a break from these archaic beliefs and traditions.

Navtej Singh Johar: A New Beginning

In 2016, Navtej Singh Johar, a dancer belonging to the LGBTQ community filed a writ petition in the Supreme Court challenging the constitutional validity of Section 377 of the IPC on the basis of Articles 14, 15,19 and 21 of the Constitution of India. The matter was initially placed before a three-Judge bench which considered the conflicting decisions of *Suresh Kumar Koushal v. Naz Foundation*[16] and *K.S. Puttaswamy v. Union of India*[17] (*K.S. Puttaswamy*) and decided to refer the matter to a Constitution Bench. The Bench unanimously declared Section 377 unconstitutional, to the extent it criminalised consensual sexual acts between adults and also overruled the decision in *Suresh Kumar Koushal*.

Reasons for Decriminalisation

A *prima facie* reading of the provision does not reveal any constitutional infirmity, it is only in its effect on homosexual relations that its arbitrariness becomes evident. The ingredients necessary to constitute an offence under Section 377 were: a) voluntary carnal intercourse; b) against the order of nature; c) occurring with any man, woman or animal. The provision also contains an explanatory clause that states that mere penetration is sufficient to constitute the offence even if sexual intercourse is not fully carried out. The punishment for committing an unnatural offence is also quite severe, since the act is made punishable with life imprisonment.

Section 377 has been partially decriminalised for its many limitations. The main limitation of the provision is its failure to give a definition as to what constitutes ‗against the order of nature'. The expression against the order of nature has neither been defined in Section 377 IPC nor in any other provision of the IPC.

14 Lynn D. Wardle, *The Attack on Marriage as the Union of A Man and A Woman*, 83 North Dakota Law Review 1365, 1370 (2007); *see*, Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 William & Mary Bill of Rights Journal 203, 231-55 (2006) (explaining the importance of dual-gender marriage in parenting and harm resulting when it is absent).

15 Nikhil Rampal, *Section 377 anniversary: Half of country still doesn't approve of same-sex relationships*, India Today (06/09/2019), available at https://www.indiatoday.in/diu/story/section-377-anniversary-same-sex-relationships-1596408-2019-09-06, last seen on 26/10/2019.

16 (2014) 1 SCC 1.

17 (2017) 10 SCC 1.

While the language of the provision expressly stated that same sex relationships were against the order of the nature, it indirectly made voluntary carnal intercourse between adults against the order of nature an offence.

Another flaw that the Court found with the provision was that there was no intelligible differentia between natural and unnatural consensual sex and it was manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBTQ community by subjecting them to discrimination and unequal treatment. This made it violative of Article 14 of the Constitution. In addition to this, the provision was a blatant violation of one's right to life and privacy guaranteed under Article 21 of the Constitution in all aspects. In this respect, the Court held that:

> Dignity is an inseparable facet of every individual that invites reciprocal respect from others to every aspect of an individual which he/she perceives as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice. The Constitution has ladened the judiciary with the very important duty to protect and ensure the right of every individual including the right to express and choose without any impediments so as to enable an individual to fully realize his/her fundamental right to live with dignity.[18]

Hence, one of the major drawbacks of the provision was its failure to distinguish between non-consensual and consensual sexual acts of competent adults in private space.[19] Though, *prima facie* it may seem as if Section 377 was enacted for protecting women, men, and animals against unwilling carnal intercourse against the order of nature, but the actual reason for its enactment was that the society in the 1860s considered homosexuality a sin committed against god. This statement finds its validation from the fact that it took one fifty-eight years for India to take an alternative and reformative step. India, whose history and scriptures show that the nation embraced homosexuals and transgenders, had turned into a country which, despite having adopted an all-inclusive Constitution, was holding onto a draconian Victorian law.

When the Court examined Section 377 in the context of Article 19(1)(a), it was held that consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm public decency or morality. The Court, upon looking at the constitutional validity of its decision in the *Suresh Koushal case,* held that accepting the view in *Suresh Koushal*, would be tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and denial of progressive realization of rights.[20]

Thus, in light of the above considerations, it was clear that there was no reasonable ground for penalising voluntary homosexual relationships when there is no case of cruelty or infringement of others' rights in the society. In a

18 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 139 (Misra J. and Khanwilkar J.).
19 Ibid, ¶ 254.
20 Ibid, ¶ 203.

culturally diverse country like India, such ambiguous laws can create more chaos than solve problems. This provision, when made, was purely intended to criminalise homosexual relations and acts like sodomy which were opposed to the social and religious beliefs of the British. In order to make it seem that the provision is not arbitrary, we could say that bestiality was added to the provision.

Transformative Constitutionalism: A Step in the Right Direction

The term ‗Transformative Constitutionalism' with regard to all Constitutions, and particularly so with regard to the Constitution of India, refers to the ability of the Constitution to adapt and transform with the changing needs of the times. The concept of transformative constitutionalism has ―at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution."[21] Karl Klare defines it as: ―a long-term project of constitutional enactment, interpretation, and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[22]

Even though *Navtej Singh Johar* is not the first case dealing with amelioration of the conditions of the LGBTQ community, it is certainly a momentous decision reflecting the transformative potential of the Constitution. This was a case where once again the Supreme Court had to make a constructive interpretation of the notions of right to equality, right to freedom of expression and the right to life and liberty, all of which are guaranteed by our Constitution by way of Articles 14, 15, 19 and 21. Instead of promoting constitutional morality, the provision reinforced the societal notions of morality.

There were many cases that came up before the judiciary prior to *Navtej Singh Johar* for decriminalising Section 377, and also with regard to the various grievances faced by the LGBTQ community and in all of these cases, concepts of gender identity, individual dignity, sexual autonomy, discrimination based on sex were deliberated in detail.

One such landmark case was *National Legal Services Authority v. Union of India,*[23] which was relied upon by the Supreme Court to dwell upon the concepts of gender identity and sexual orientation. It was observed that gender identity is a fundamental aspect of life[24] and an individual's way of self-identification.[25] Discriminating a person on the ground of one's gender identity is equivalent to discrimination on the ground of sex.[26] It was further opined that where the Constitution, through the fundamental rights, has recognised the gender identity and sexual autonomy of such groups, there is no reason for law

21 Ibid, ¶ 5.
22 Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 South African Journal of Human Rights 146, 188 (1998).
23 National Legal Services Authority v. Union of India, (2014) 5 SCC 438.
24 Ibid, ¶ 21.
25 Ibid.
26 Ibid, ¶ 67.

to deny members of such community the basic human rights, which are inclusive of the right to living with dignity and liberty, the right to privacy, the right to freedom of expression, the right to education and empowerment, the right against violence, and the right against exploitation and discrimination.[27] Despite this, sexual relations between transgenders constituted an offence under Section 377 prior to its decriminalisation.

K.S. Puttaswamy was another case where one's sexual orientation was identified as an essential attribute of privacy, and it was held that such a right should not be based on majoritarian acceptance. It was contented by the petitioners in the *Navtej Singh Johar* that in light of the right to privacy being recognised as a part one's fundamental rights, it should be made applicable to every citizen in India, including those who form a part of the LGBTQ community.

The Court also relied upon the cases of *Shakti Vahini v. Union of India*[28] and *Shafin Jahan v. Asokan K.M*,[29] wherein it was held that an individual's freedom to exercise the choice of selecting a partner is protected under Articles 19 and 21 of the Constitution of India. The Court relied on *Fazal Rab Choudhary v. State of Bihar,*[30] where it was held that the offence under Section 377 of the IPC implies sexual intransigence and it was argued that there should not be identical transplantation of western ideology in our country.

However, the two main contradictory precedents that the Supreme Court looked into for deciding the *Navtej Singh Johar* apart from the decision in *NALSA* are the decisions in *Naz Foundation* and *Suresh Koushal*. In the former case, the Delhi High Court struck down Section 377 of the IPC on the ground that carnal intercourse between homosexuals or heterosexuals, with consent cannot be an offence. This decision was overturned in the latter case which took a narrow perspective of individual rights and disregarded the interests of the minority in favour of the majoritarian interest. This decision was overruled in *Navtej Singh Johar,* where the Court held that:

> In Suresh Koushal, this Court overturned the decision of the Delhi High Court in *Naz Foundation* thereby upholding the constitutionality of Section 377 IPC and stating a ground that the LGBT community comprised only a minuscule fraction of the total population and that the mere fact that the said Section was being misused is not a reflection of the *vires* of the Section. Such a view is constitutionally impermissible.[31]

Civil Rights of the LGBTQ and Impact of The Surrogacy (Regulation) Bill, 2019 on the LGBTQ Community

The LGBTQ community is a minority when compared to the rest of the Indian population, both in terms of demography and their sexual preference.

27 Ibid, ¶ 120.
28 Shakti Vahini v. Union of India and others, (2018) 7 SCC 192.
29 Shafin Jahan v. Asokan K.M, AIR 2018 SC 1933.
30 Fazal Rab Choudhary v. State of Bihar, (1982) 3 SCC 9.
31 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 82.

However, no accurate figures exist for the size of the lesbian, gay, bisexual, transgender and queer (LGBTQ) population. Prejudice and fear prevent disclosure of identity in many instances, making it difficult to estimate the LGBTQ population.[32] It was only by the 21st century that the LGBTQ community's demand for civil rights started to gain momentum. The LGBTQ community received recognition in the U.S. with their Supreme Court removing the ban on same-sex marriage[33] and upholding same-sex couples' fundamental right to marry on the grounds of both equal protection and substantive due process.[34] While the Supreme Court has decriminalised Section 377, the LGBTQ community still has a long way to go in realisation of their civil rights. This is because the Court has not legalised same sex marriages as such but has simply recognised the decisional autonomy of the members and put an end to harassment by law.

Justice Chandrachud has observed that it is ―much more than merely decriminalising certain conduct which has been proscribed by a colonial law. The case is about an aspiration to realise constitutional rights."[35] The constitutional guarantee of equality also mandates the State to safeguard and protect certain civil rights such as the right to marriage, adoption, inheritance and to have a family. However, owing to the vast religious and cultural diversity, each religion has its own personal laws regulating such matters in India. The lack of a Uniform Civil Code also makes it more challenging for the State to frame a uniform law for LGBTQ individuals belonging to different religions.[36]

LGBTQ Rights in the Surrogacy (Regulation) Bill, 2019

The Surrogacy (Regulation) Bill, 2019 aims to promote altruistic surrogacy and to put an end to commercial surrogacy in India, which involves the surrogate mother taking payments in cash or otherwise from the intending parents, which exceeds the basic medical expenses and insurance coverage that are likely to be incurred. It aims to regulate the practice of surrogacy in India. However, the Bill does not permit unmarried persons or a single parent to avail surrogacy services. It also indirectly prevents homosexual couples and others from the LGBTQ community from having a child through surrogacy.

The Surrogacy (Regulation) Bill, 2019, is only one among the many laws in India which do not provide civil rights for the LGBTQ. Even if the Surrogacy Bill had allowed homosexuals to avail surrogacy services, the other existing

32 Warren Kealy-Bateman, *The possible role of the psychiatrist: The lesbian, gay, bisexual, and transgender population in India*, 60 Indian Journal of Psychiatry 489, 489-93 (2018).

33 Obergefell v. Hodges, 135 S. Ct. 2584 (2015, Supreme Court of the United States).

34 Ibid, at 2604 [―T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty"].

35 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 4,5 (Chandrachud J.)

36 In India, the right to marriage is recognised and regulated by The Hindu Marriage Act, 1955, The Indian Christian Marriage Act, 1872 and The Special Marriage Act, 1954. Adoption is regulated by The Hindu Adoptions and Maintenance Act, 1956, the Guardians and Wards Act, 1890 and The Juvenile Justice (Care and Protection of Children) Act, 2015.

personal laws in India with regard to marriage, adoption, procreation and succession would still be prejudicial to the LGBTQ community. The mandatory requirement of a legal marriage under the Bill prevents homosexuals from adopting or conceiving children by way of surrogacy.

This is because the Parliament has not legalised same sex marriages, plausibly because personal laws consider marriage as a union between man and woman, and reproduction is also viewed as a natural phenomenon that should only take place between a man and a woman. It is believed that every child needs a father and mother figure in their life, and two males or two females are considered incompetent in raising a child. However, this does not take into account the problems which may arise even in the case of heterosexual parents who may be abusive or may neglect their child.

The argument that homosexual parents are not competent parents is illogical, and is based on religious superstitions and biased ideologies. Heterosexuality does not guarantee a secure upbringing. The only reasonable argument that can be raised against the right of homosexuals to parenting is that children from such a parenting may be subject to ridicule and harassment from the society. Even then, the problem lies in the faulty mentality of the society and not with homosexuality. Religious and cultural beliefs are so deep-rooted in the hearts and minds of Indians that they are unwilling to look beyond their prejudices and idiosyncrasies to see what matters the most. However, as Justice Indu Malhotra said –The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life should be protected from public censure."[37]

On comparing the judgment in *Navtej Singh Johar* with the Surrogacy (Regulation) Bill of 2019, a clash of minds is clearly visible. While the judiciary has upheld homosexuality and is paving way for a progressive society, the Legislature on the other hand, is trying to pass a Bill which, if made a law, is likely to indirectly discriminate same sex couples who intend to avail the services of surrogacy. The Legislature has not done anything to place the LGBTQ community in the same standing as that of the rest of the society.

Thus, the Bill clearly is indicative of a regressive mind set and portrays a biased attitude towards the LGBTQ community. The Bill is highly prejudicial to the LGBTQ community in not providing them the right to avail surrogacy services. An amendment must be made to the Surrogacy (Regulation) Bill, 2019, to entitle the LGBTQ to avail the services of a surrogate mother. It is high time that the legislature steps up and takes some action by making progressive laws which grants equal civil rights to those who belong to the LGBTQ community.

Conclusion

In the aftermath of *Navtej Singh Johar*, the Bill whose benefits have not been made available to the LGBTQ community, is contradictory to the

37 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 640 (Malhotra J.).

judiciary's decision to protect and promote the rights of the LGBTQ community. The Surrogacy Bill which permits only _ethical altruistic surrogacy' to married heterosexual couples acts as a complete bar for the LGBTQ community to parent a child born through surrogacy. Prescribing marriage as a precondition for availing surrogacy services leaves no room for the LGBTQ couples to have children through surrogacy in India, whether they are married or unmarried.

While the Bill seeks to do away with commercial surrogacy, it has potential to add to the many laws which neglect the interests of the LGBTQ community. It is crucial that the legislature amends the Bill to provide for the rights of the LGBTQ community so that it embodies the true spirit of the Constitution of India.

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MEETING THE ENDS OF JUSTICE THROUGH ECONOMIC RESERVATION: A CASE OF AFFIRMATIVE ACTION IN INDIA

Jhankruti Badani[*]

Abstract

Affirmative Action policies in India are broadly regarded as a mechanism to remedy the historical wrongs against certain groups of people. Furthering the constitutional safeguards of equality and justice as envisioned under the Preamble, the Constitution (One Hundred and Third Amendment) Act, 2019 has introduced a new category of vertical reservation based on economic criteria. The Act has introduced a novel criterion of reservation by awarding an additional ten percent reservation to Economically Weaker Sections. This has added fuel to the ongoing debate on the seven-decade old reservation policy, and has received mixed reactions from the masses. The paper critically analyses the existing framework and the correlation of economic reservation in India with the ideals of justice as envisioned under the Constitution of India through the means of affirmative action.

Key Words: EWS, Economic Reservation, Affirmative Action, Justice, Discrimination, Public Policy

Introduction

> The worst form of inequality is to try to make unequal things equal.
>
> -Aristotle

Affirmative action, the most contentious public policy in contemporary India, is analogous to the concepts of compensatory or protective discrimination which endorses the principles of equality and justice as underlined in the Constitution of India. Affirmative action is an umbrella term[1] for various measures taken by the government such as reservation.

In India, affirmative action was introduced through the policy of reservation with an aim to cure the injustice deeply rooted in the society. Justice, the first virtue of social institutions,[2] along with equality was embedded as an indispensable principle in the Constitution.[3] Therefore, the *raison d'etre* of

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1 Affirmative Action, as a phrase, which was used for the first time in the U.S. in 1961 in President John F. Kennedy's Executive Order 10925, was established to promote and ensure non-discrimination in government employment. The early sightings of the similar concept dates back to 1935 in Wagner's Act as codified under the regime of Franklin Roosevelt, however, the concept has also been used synonymously with various other theories as prevalent around the world like reservation in India, Nepal and Pakistan, Employment Equity in Canada and South Africa, Sons of the soil in Malaysia, Positive Action in UK, and so on.

2 John Rawls, *A Theory of Justice*, 3 (1st ed., 1971).

3 The prime rationale of the Constitution of India envisioned by the Constituent Assembly is reflected in the Preamble to the Constitution, which highlights justice as the first goal of the democratic setup.

affirmative action is to ensure justice and equal treatment. There are two considerations which guide the policy of reservation in India: *first*, to compensate and rectify the historical discrimination and injustice inflicted upon various classes, and *secondly*, to level the playing field for everyone irrespective of any natural differences. The foundation for affirmative action in India was laid down in various constitutional provisions[4] to cure the historical wrongs inflicted upon minorities, tribals, persons belonging to the lower castes, etc. and to empower the comparatively weaker sections of society like women, children and educationally backward classes, etc.

However, 2019 witnessed a major breakthrough in the implementation of affirmative action policies in India. Adding to the existing categories of reservation, the Parliament brought a significant shift by introducing reservations for a new class of citizens,[5] the Economically Weaker Section (‗EWS').[6] This was a result of demands by various communities for special recognition. The reservation also aimed to partially address the grievances of those unreserved or so called *suvarna* groups.[7] However, what caught the attention of the whole polity is that with this addition to reservation policy, the reservations in India at central level has approximately reached sixty percent,[8] reducing the scope for other groups. The basic principle of justice provides a way of assigning rights and duties in the basic institutions of society, and at the same time defines the appropriate distribution of the benefits and burdens of social cooperation.[9] Indian policy of affirmative action is a tool to ensure:

> ...corrective and remedial justice to compensate the victims of prior

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A promise to secure to all its citizens social, economic and political justice, cannot be read in isolation from the feature of Equality of status and opportunity, which intends to remove discrimination and injustice in the society.

4 Various provisions of the Constitution of India: Articles 15, 16, 17, 29, 30, 46, 330, 338, 340, etc., have extensively incorporated measures for development and upliftment of the depressed or marginalized classes like scheduled castes, tribes, other backward classes, women, etc.

5 The Constitution (One Hundred and Third Amendment) Act, 2019 which came into effect from 14/01/2019, made major amendments to articles 15 and 16 of the Constitution of India and introduced ten percent reservation for the economically weaker sections.

6 The Ministry of Social Justice and Empowerment Office Memorandum No. 20013/01/2018-BC-II dated January 17, 2019, stipulates that those persons shall fall under the category of EWS who are not covered under the existing reservations for the Scheduled Castes (‗SC'), Scheduled Tribes (‗ST') and Socially and Educationally Backward Classes and whose family income is below rupees eight lakhs including income from sources like salary, agriculture, business, profession, etc; *see generally*, *Office Memorandum*, Ministry of Social Justice and Empowerment, F. No.200'13/0 1120 18-BC-II, available at http://www.iitk.ac.in/doaa/data/GOI-OM-on-EWS.pdf, last seen on 27/01/2020.

7 The Jats in Haryana, the Patels and Gujjars in Gujarat, Marathas in Maharashtra, Brahmins, and similar communities and peasant castes have demanded reservation strongly for decades as they lack access to various educational and economic opportunities. Thus, the 103rd Amendment Act was a step by the Government to address the grievances and demands of all such groups and communities.

8 Reservation is provided to SCs, STs and Other Backward Classes (‗OBC') at the rate of fifteen percent, 7.5 percent and twenty-seven percent respectively in case of direct recruitment on all-India basis by open competition. In case of direct recruitment on all-India basis otherwise than by open competition, the percentage fixed is 16.66 percent for SCs, 7.5 percent for STs and 25.84 percent for OBCs. The persons belonging to Economically Weaker Sections (‗EWS') who are not covered under the scheme of reservation for SCs, STs and OBCs shall get ten percent reservation in direct recruitment in civil posts and services in the Government of India.

9 *See generally*, John Rawls, *A Theory of Justice* (1st ed.,1971).

> injustice, isn't merely focussed on reparation for past inequities ... is a forward looking balancing act of reformative social engineering; an architecture of a better future of harmonious relationship amongst all classes of citizens; an equitable redistribution of community resources with a view to the greatest happiness of the greatest number of people.[10]

Introduction of reservation for EWS has given rise to opinions like giving preference to utilitarian notion of greatest happiness to as many citizens as possible will dilute the envisioned rationale behind affirmative action in India.

Dynamics of Discrimination and Justice in India

Indian society, since time immemorial, has been classified into diverse social groups on the basis of place of birth, caste, religion, etc. Affirmative action policies in India were pioneered to remedy the wrongs and differential treatment meted out to them.[11]

Predominantly, caste was the basis of discrimination in India, which itself has a profound history of evolution. Caste (*varna*), means race or lineage and was principally bifurcated into four main groups[12] namely, the *Brahmins*, the *Kshatriyas*, the *Vaisyas* and the *Sudras*.[13] The untouchables in India were recognized by various names like Dalits, Harijans, etc., who were treated as the bottom most class in the social hierarchy. Historically, these groups were assigned the most degrading occupations like manual scavenging, skinning carcasses, collecting garbage, leatherworking, cleaning latrines, etc.

This division of groups can be traced back to *Manusmriti*,[14] which relegated groups of people to certain occupations on the basis of the castes they were born into. It was hierarchal in nature and resulted in a generational identification as status groups.[15]

Similarly, religious identity was also a source of discrimination in historical India, especially for those religious groups who were in minorities. Due to different ethnic and cultural upbringing, various religious minorities were subjected to differential social treatment and were deprived basic opportunities. This discrimination led to lack of equal opportunities in education, political representation and employment.

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10 Indra Sawhney v. Union of India, AIR 1993 SC 447, 460 (Thommen J.)

11 *See generally*, Ratna G. Revankar, *The Indian Constitution-A Case Study of Backward Classes* (1971).

12 The *varna* system in ancient India also popularly known as *Chaturvarna* system, holds a reference in Shlok 1-91 of the *Manusmriti*.

13 S.V. Ketkar, *History of Caste in India* (1st ed., 1909); Susan Bayly, *Caste, Society and Politics in India from the Eighteenth Century to the Modern Age* (2nd ed., 2008).

14 *Manusmriti* or the Laws of Manu, is one of the earliest works of *Dharmashastras* and dictates the initial Hindu scheme of governance. It discusses the origin of the four castes, the law which governs them, their duties, rights, etc., and finally the two prime conclusions of human life: obtaining fruits of this life's actions in the next birth, or liberating oneself from the cycle of birth and death. *Manusmriti* asserts that for the sake of the prosperity of the world, god had made the four *varnas* namely the *Brahmin*, the *Kshatriya*, the *Vaisya*, and the *Sudra* from his mouth, arms, thighs and feet respectively (*Sholka* 1-31).

15 *See generally*, Andre Beteille, *Tribe, Caste and Religion in India*, 59-65 (Romesh Thapar, 1977).

Another neglected section of the society were the tribals, who were not even considered a part of the societal structure. Due to their seclusion from the society, they were deprived of equal opportunities in education, employment and political representation. Thus, caste, race, and religion were considered the root-cause of social injustice in India. This discrimination stemmed from the bigotry ingrained in the Indian psyche.

Therefore, a need arose to reasonably classify these groups on the basis of their socio-economic positions.[16] This required the government to formulate special plans for the communities that have been traditionally deprived of opportunities.[17]

The Constitution of India addressed these grievances by (a) identifying the marginalised and depressed groups, (b) grouping them into separate categories, and (c) guaranteeing preferential or protective measures to safeguard their rights and interests. The Constitution makers identified the categories which needed preferential treatment like the Scheduled Castes (‗SCs'), Scheduled Tribes (‗STs'), Other Backward Classes (‗OBCs'), women and children.

The SCs and the STs are guaranteed reservations under Articles 15, 16, 330 and 332 of the Constitution of India. Article 15 empowers the State to make special provisions for women and children,[18] for SCs, STs,[19] and also for Socially and Educationally backward classes,[20] including in admissions to educational institutions.[21] Similarly, Article 16, which ensures equality of opportunities in matter of public employment, empowers the State to provide reservations to any backward class of citizens who lack adequate representation in the services under the State.[22] Articles 330 and 332 which provide for reservations for SCs and STs in the House of People and Legislative Assemblies, further the principle of political justice enshrined in the Preamble.

16 The differences between the various castes and religious communities resulted not only from age-old shackles of *varna* system and societal psychology, but also from British policies like divide and rule. The discrimination gained momentum and was given due attention in various measures like Morley-Minto reforms, Government of India Act, 1935, Montagu-Chelmsford Reforms, etc., where the depressed classes and mainly the minorities, were given reservation of seats at the federal level. Till the time India gained independence, various demands were being made by religious minorities and certain communities, which ultimately called attention of the Constituent Assembly while drafting of the Constitution was highly debated.

17 G.G. Wankhede, *Affirmative Actions and the Scheduled Castes: Access to Higher Education in India, Higher Education in a Global Society: Achieving Diversity, Equity and Excellence*, 329-342 (2015).

18 Art. 15 (3), Constitution of India.

19 The first all-India effort to recommend reservations on caste basis (other than for SCs and STs) was attempted by the Kaka Kalelkar Commission in 1953. This Commission was appointed by the Government of India to satisfy the requirements of Articles 15(4) and 340(1) of the Constitution, which led individual state governments to appoint their own Backward Classes Commissions under the Commission of Enquiry Act, 1952 and draw out lists of backward castes for reservation in educational institutions and public appointments.

20 Art. 342-A, Constitution of India.

21 The Constitution (First Amendment) Act, 1951 added clause 4 to Article 15 and The Constitution (Ninety Third Amendment) Act, 2005 added clause 5 to the same.

22 The Constitution (Seventy-Seventh Amendment) Act, 1995 inserted the clause 4-A and The Constitution (Eighty-First Amendment) Act, 2000 inserted clause 4-B to the Article 16 of the Constitution.

Economic Reservation and the Indian Approach

Traditionally, the affirmative action policies have aimed at remedying discrimination based on caste, religion and gender. But reservation for the EWS category marks a departure from the conventional understanding of affirmative action, as introduced by the Constituent Assembly.

Reservation policies in India have been subject to much criticism from different quarters of the society. Upper castes resisted the idea of reservation as it had resulted in loss of opportunities for them. Therefore, they demanded that reservation must be based on economic criteria as well. Another argument against reservation policies was that they ―foster caste feudalism, polarise people on caste lines and endanger social unity; perpetuate dependence of the reserved communities on the state; subject the upper caste persons to destructive discrimination; and that the system cannot survive if merit, efficiency and achievement are disregarded."[23] The argument that reservations are disproportionate[24] and do not reflect the actual societal position, is premised on the fact that even among the SCs and STs, certain classes of people are socially and economically well-off and do not need reservations. However, the reserved categories counter this argument citing the fact that their present position is a result of historical discrimination which has not been completely eliminated yet.

The opposition to reservation policies which arose because they were supposed to be a short-spanned ameliorative step have continued to exist for more than seventy years.[25] Another reason for this opposition is that it always incites more communities to demand reservation, leading to a disproportionate increase in the scope of reservation.[26] The liberal implementation of reservation policies has transformed it from an exception to a rule with ever-increasing communities vying for reservation.

This rampage for reservations led the government to hurriedly pass the law to pioneer reservations for EWS. It also amended two fundamental rights of the Constitution, i.e., Articles 15 and 16. Adding clause 6 to Article 15, and clause 5 to Article 16, the State has now reserved ten percent seats for EWS. This amendment added a new category to the existing vertical reservation which is a deviation from original intent of the Constitution-makers and the judiciary, which has consistently held that reservations cannot cross fifty percent of total reservations[27] which now is inclusive of SCs, STs, OBCs, and now EWS. Horizontally, the reservations are already provided to various other groups like

23 K.C. Suri, *Caste Reservations in India: Policy and Politics*, 55 The Indian Journal of Political Science 37, 37-54 (1994).

24 Ibid, at 44.

25 Originally, reservations were introduced as a ten-year measure, subject to enhancement as and when it was required. Due to the ‗living' nature of the Constitution, this provision has been every ten years. With the introduction of The Constitution (One Hundred and Twenty-Sixth Amendment) Bill, 2019, reservation has been extended by another decade; *see* Art. 334, Constitution of India.

26 Dharma Kumar, *The Affirmative Action Debate in India*, 32 Asian Survey, 290, 290-302 (1992); *see* Thomas Sowell, *Preferential Policies: An International Perspective* (1990).

27 This limit was added by the Supreme Court in M.R. Balaji v. State of Mysore, AIR 1963 SC 649, and was reiterated Indra Sawhney v. Union of India, AIR 1993 SC 447.

women,[28] disabled,[29] ex-servicemen, etc. However, any amendment to these clauses which tends to change the existing framework, has been put to the test of judicial interpretation.[30]

In *State of Kerala v. N. M. Thomas*,[31] V.R. Krishna Iyer J. opined that the ―danger of reservation"[32] has multiple consequences. He stated that these dangers are three-fold, wherein ―its benefits, by and large, are snatched away by the top creamy layer of the ‗backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake."[33] He further added that the claim for reservation:

> is over-played extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the ‗weaker section' label as a means to score over their near equals formally categorised as the upper brackets.[34]

Lastly, he opined that:

> ...a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross fertilisation of castes...this solution is calculatedly hidden from view by the higher ‗backward' groups with a vested interest in the plums of backwardism… a constant process of objective re-evaluation of progress registered by the ‗under-dog' categories is essential lest a once deserving ‗reservation' should be degraded into ‗reverse discrimination'...[35]

The debate of economic backwardness as a ground for reservation has already been addressed in the case of *Indra Sawhney v. Union of India*,[36] where it was concluded by a nine-judge bench that: ―Reservation of seats or posts solely on the basis of economic backwardness, i.e. without regard to evidence of

28 Women hold around thirty percent reservation in India and this is proposed to be extended to thirty-three percent by The Women Reservation Bill, 2008; see, *Women's Reservation Bill [The Constitution (108th Amendment) Bill, 2008]*, PRS, available at http://prsindia.org/billtrack/womens-reservation-bill-the-constitution-108th-amendment-bill-2008-45, last seen on 29/12/2019.

29 A three percent reservation on total number of vacancies in the cadre strength for the persons with disabilities, (as a horizontal form of reservation), was mandated by the Supreme Court of India in Union of India v. National Federation of the Blind, (2013) 10 SCC 772.

30 Various petitions have, time and again, challenging the validity of the reservation provisions in the Supreme Court of India. Beginning from State of Madras v. Smt. Champakam Dorairajan, AIR 1951 SC 226, the Court has interpreted reservation provisions and its scope in several cases; *see generally*, M. R. Balaji v. State of Mysore, AIR 1963 SC 649; General Manager, S. Rly. v. Rangachari, AIR 1962 SC 36; M. Nagraj v. Union of India, AIR 2007 SC 71.

31 State of Kerala v. N.M. Thomas, AIR 1976 SC 490.

32 Ibid, at 531.

33 Ibid.

34 Ibid.

35 Ibid.

36 Indra Sawhney v. Union of India, AIR 1993 SC 447.

historical discrimination, as aforesaid, finds no justification in the Constitution."[37]

> …Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are intertwined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Art. 16(4)… [38]

The Apex Court reiterated that economic condition of a community cannot be a criterion to determine backwardness, because the Indian notion of backwardness rests on historical discrimination. However, the present observations were made in the context of the economic criterion being the sole basis for determining backwardness vis-à-vis reservation.

The government appointed an Expert Committee under the Chairmanship of Maj. Gen. (Retd.) S.R. Sinho, with an objective of suggesting the criteria for identification of economically backward classes (‗EBC') and the extent of reservation in education and public employment.[39] In its 2010 report, relying on the National Sample Survey Organisation (‗NSSO') estimates, the Commission reported that the percentage of people below the poverty line is high in the general category. Accordingly, it recommended reservation for EBC as that for others. However, it noted that unless an amendment to the Constitution was made or the Supreme Court raised the ceiling beyond fifty percent, it would be difficult to identify EBCs.

The argument of raising the ceiling beyond fifty percent finds support in the dictum of the Supreme Court in *Indra Sahwney* where the majority held that: "…while 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people."[40] However, this claim is not backed by sufficient data to justify exceeding the fifty percent limit.

Therefore, few questions which demand attention are: Whether the additional ten percent EWS to the existing reservations is a step in the right direction to fulfil the purpose of economic justice? Can economic justice be fulfilled in isolation from social or political justice? Whether the present measure is a departure from the vision of the Constitution makers or is its application in the true sense? Whether the Indian democratic system is strong enough to withstand this major change, especially when the reservation system

37 Ibid, ¶ 88-A.

38 Ibid, ¶ 122.

39 *See generally*, *Annual Report 2013-14*, Ministry of Social Justice and Empowerment, available at http://socialjustice.nic.in/writereaddata/UploadFile/2013-14eng.pdf, last seen on 29/12/2019.

40 Indra Sawhney v. Union of India, AIR 1993 SC 447, ¶ 810 [After a long period of debate on the limit for reservation in the cases of M. R. Balaji v. State of Mysore, AIR 1963 SC 649, and State of Kerala v. N.M. Thomas, AIR 1976 SC 490, the Supreme Court's ruling in Indra Sawhney v. Union of India, AIR 1993 SC 447 has struck a compromise by introducing an exception to the fifty percent ceiling rule.

in India has already extended towards permanency? These questions have to be considered in the light of socio-economic conditions prevalent at the time of drafting of the Constitution, and the developments that have taken place in the past seven decades and to understand how far reservation policies have been successful in achieving the goals of the Constitution.

Conclusion

Economic reservations reflect a paradigm shift in the concept of affirmative action policies in India. However, there is a doubt as to the necessity of its introduction in the existing vertical reservation system. Where at one end, there is a demand for a uniform system, such a complex matrix of variables would tend to further complicate the mechanism of reservation and dilute the true spirit and intention with which it was introduced in India. Therefore, the ever-complicating reservation structure in India and the increasing demands for reverse discrimination, clearly reflect a major fault area in achieving the goals of the Preamble, and the major gap in its realization, being left without a concrete backing of statistics and research. The introduction for EWS reservation has given a new angle to the existing debate on reservation policies. Thus, there emerges a dire need to revisit the entire framework of affirmative action in India.

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CROSS-BORDER MERGERS AND ACQUISITIONS: EXPLORING THE ISSUES AND CHALLENGES

Vidhi Singh[*] and *Shalini*[♠]

Abstract

Corporate restructuring is a complex process, adopted by corporate entities worldwide, to elevate their market position. In this era of globalization, cross-border M&A has become a popular form of restructuring. Cross-border M&A involves the integration of two different entities, headquartered in two different States. In the present paper, the authors endeavour to examine the intricacies involved in the process of cross-border M&A. For this purpose, the authors have divided the process of M&A into three stages i.e., the pre-M&A phase, the integration phase and the post-M&A phase. Each broad segment covers the challenges encountered by the transacting parties. The authors have further suggested measures to mitigate the issues associated with the different stages of the deal. The paper discusses the Indian scenario by drawing parallels with certain international corporate restructuring deals. Lastly, the authors highlight contemporary developments in cross-border M&A.

Key Words: Globalisation, Cross-Border M&A, Corporate Restructuring, Foreign Investment, Operational Synergy

Introduction

Economic growth is essential for national prosperity and development. The advent of globalization, privatization and liberalization spurred cross-border financial and economic activities. Corporate restructuring is not immune to cross-border influences. Cross-border mergers and acquisitions ('M&A') take place when the acquirer and target companies are headquartered in different countries. Banking, insurances, telecommunications, chemicals and pharmaceuticals companies generally observe continent wide M&A.[1] The primary reason for an M&A is to achieve synergy by integrating two or more business units in a combination with an increased competitive advantage.[2] For instance, the Carrefour merged with Promodies in order to compete with Walmart as the company expanded on a large-scale.[3]

Cross-border M&A is filled with intricacies when compared to domestic M&A. However, cross-border M&A is an inevitable phenomenon in the present

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1 *World Investment Report 1998: Trends and Determinants*, U.N. Sales E.98.II.D.5, 21 (1998).

2 *Advances in Mergers and Acquisitions*, 8 (Sydney Finkelstein and Cary L. Cooper, 1st ed., 2010).

3 Vijay Govindarajan and Anil K. Gupta, *Taking Wal-Mart Global: Lessons from Retailing's Giant*, Strategy Business, available at https://www.strategy-business.com/article/13866?gko=203b4, last seen on 03/01/2020.

era, since corporate entities aspire for expansion of their businesses at the global level despite difficulties at every stage of the process. The difference in the geographical locations poses challenges at different stages of M&A. At the preliminary stage, regulatory issues, management conflicts, cultural differences, financial constraints and valuation difficulties are some enumerated and recognized obstacles that companies have to confront in cross-border M&A transactions. There are several other difficulties that arise in the integration and post-integration stages. Integration of a new business, assessing the market opportunities, effects of regulatory changes, retention of talent and bridging the gap through communication are other challenges faced in the later part of the deal. Re-engineering a corporate structure is not an easy task, but it proffers mutual benefit, due to which the entities enter into the complex cross-border M&A transactions.

In case of cross-border M&A, challenges are likely to emerge due to variation in the structure, management and other soft and hard elements of the corporations. Although, viewing the economic viability and significance of cross-border transactions, measures should be taken to avoid maximum risks involved in the global deals.

India's Ventures into Cross-Border M&A

The 1990s was a golden era for the Asia-Pacific region which witnessed a spike in cross-border M&A. India remained unsure to open its economy to foreign direct investment, which drove investors to other countries like Africa and Latin America, turning them into favourite destinations for investors around the world. In 1999, the Foreign Exchange Regulation Act (‗FERA') was replaced by the Foreign Exchange Management Act (‗FEMA'), which governed foreign exchange, facilitating the Indian corporations in attracting international opportunities. The new legislation relaxed the overseas investment limits which, in turn, raised the investment. In order to remove the stringent provisions of the Monopolies and Restrictive Trade Practices Act, 1969, which restricted expansion of the corporation and other restructure procedures, the legislators replaced the Act with a more comprehensive statute titled Competition Act, 2002.

India has been a favoured destination for foreign investment, and Indian companies have often been acquired by the foreign stakeholders.[4] There has been a slight shift in this trend, and now the Indian companies have become the bidders, after the amendment in Insolvency and Bankruptcy Code in April 2017.[5] The recent growth in cross-border M&A has proved to be a boon for small businesses as they now receive opportunities to expand themselves as

4 Utsav Masharu and Muhammad Ali Nasir, *Policy of Foreign Direct Investment Liberalisation in India: Implications for Retail Sector*, 65 International Review of Economics 465, 465 (2018).

5 Mohit Bhalla, *Bankruptcy Code: What's changed, what it means*, The Economic Times (12/02/2019), available at https://economictimes.indiatimes.com/news/et-explains/bankruptcy-code whats-changedwhatimeans/articleshow/67951799.cms?utm_source=contentofinterest&utm_medium =text&utm_campaign=cppst, last seen on 28/11/2019.

international corporate players, which, in turn, boosts the Indian economy. The 2005 World Investment Report by the United Nations Conference on Trade and Development recognized India as a leading nation in information technology (‗IT') and an attractive hub for research and development.[6] Numerous transactions have been entered into between Indian and global entities. For instance, a Saudi Arabian telecommunication corporation, Zain, was acquired by Bharti Airtel, and Jaguar and Land Rover were acquired by Tata.

The main reasons for Indian entities to indulge in foreign acquisition are to attract opportunities in foreign markets, expansion of assets, growth of services or products, and intense domestic competition. M&A transactions result in operational and financial synergies. While the former enables the reduction in average cost of production, the latter reduces the cost of capital.[7] Other motives for which the companies attract towards integration are managerial motives, diversification, to boost market power, to expand the size of the business, cross-selling, economies of scale, and to reduce tax liability.

Broadly, cross-border M&A is categorized into inward and outward, wherein the former deals with selling of a domestic firm, which results in inward capital flow, whereas, the latter signifies acquisition of a foreign entity which entails outward capital flow.[8] Unlike joint ventures, M&A is long-term integration where the capital of the companies is pooled. The ultimate objective of expanding their businesses is achieved through investment in tangible and intangible assets.

Challenges at Different Stages of M&A

The figure shown below illustrates that each decision made at any stage in the deal affects every procedure in the transaction. The process is in a cyclic form, and each segment contributes to a successful M&A. In the pre-deal phase, differences have to be negotiated. Each compartment, in the figure shown, requires the parties involved to mitigate the challenges encountered at each stage of the deal.

6 *World Investment Report 2005*: *Transnational Corporations and the Internationalization of R&D*, U.N. Sales E.05.II.D.10 (1998).

7 *Financial Synergy*, Corporate Finance Institute, available at https://corporatefinanceinstitute.com/resources/knowledge/deals/financial-synergy/, last seen on 28/11/2019.

8 *Cross-border mergers and acquisitions*, 102, 102 in *Measuring Globalisation: OECD Economic Globalisation Indicators* (2010).

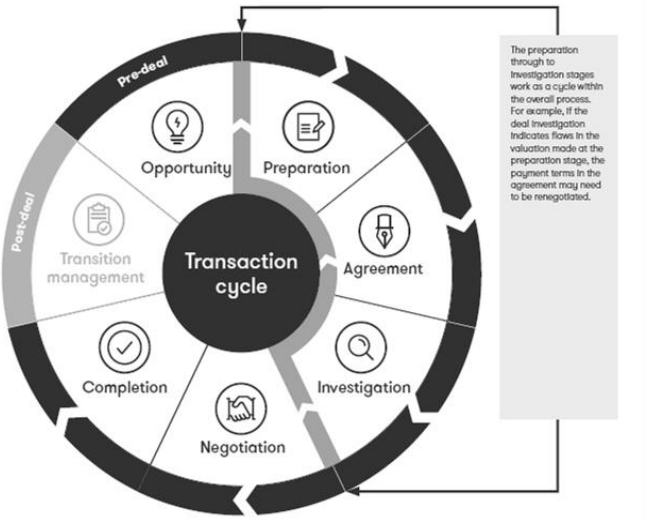

Figure 1[9]

It is pertinent to mention that there can be no water-tight division of factors which pose challenges at different stages, and therefore, these challenges have to be dealt with holistically. In the following segments of this paper, the author attempts to broadly divide M&A into three phases: (1) pre-M&A phase, (2) integration phase and (3) post-M&A phase.

Pre-M&A Phase

The pre-merger stage is a crucial stage which can save the parties from the unavailability of finance and shield the entity from any unprofitable agreement. Before the M&A transaction, the companies face several challenges such as resistance from the employees, negotiation by the executive, approval by shareholders and regulators, analysis of the target firm, development of process plan for re-integration including business administration and tax laws.

Due Diligence

The process of due diligence should involve a scrutiny of the target company‘s business along with other legal, political and social issues which could affect the deal. Due diligence creates the possibility to assess the potential risks with the deal and to arrive at possible solutions. The process involves analysing the accounting, operational, commercial and regulatory implications. Not following the process of due diligence can lead to enduring repercussions.

9 *Reducing Risk in Cross-Border Transactions*, Grant Thornton, available at https://www.grantthornton.global/en/insights/articles/reducing-risk-in-cross-border-transactions/, last seen on 02/07/18.

Identification and Valuation

Identification and valuation are important for a prospective M&A deal. At the stage of identification, the bidder company has to identify a target entity which could prove to be beneficial to the business of the acquirer, if merged. This job is done by acquisition specialists who assist the acquiring company in the identification process. Prior to globalization, companies had limited choices, but now with technological development, the domestic companies have the option to go for cross-border mergers.

Identification is followed by the stage of valuation. Valuation methods are industry-specific and are used by the parties to evaluate the target company. They assess the economic viability which can facilitate the acquirer in developing their future plans. In the valuation process, one has to foresee the profitability, market power, cash flows, assets, etc., of the targeted entity. The price is fixed through this valuation on the finalization of the deal. In the Tsingtao Brewery in China, ~~"t~~he cost per tonne of brewing capacity of the business is an industry-specific valuation method frequently employed".[10] Due to the lack of information on cross-border M&A, the target company's business is not evaluated pre-merger, as the information is sometimes very sensitive, making the evaluation difficult.

Stage of Settlement

The stage of settlement comes after the stages of valuation and identification. This stage involves the consent of the management and regulatory authorities, compensation assessment, etc. An acquisition can be friendly or hostile: while the former is with the consent of the target company, the latter involves certain resistance by the target company.[11] There may be several dissenting members in the target company who might object to the takeover. An open offer can be another tool used by the acquirer to gain control over the company, even if the shareholders do not approve of the deal.

Regulatory Challenges

The government policies of a nation largely affect and influence investment, privatization, liberalization and, in turn, are decisive for cross-border M&A. Therefore, regulatory challenges must be dealt with promptly at the very outset. It is imperative that the specialists hired have thorough knowledge of the domestic regulations and have a good professional network. To protect public interest, countries stringently regulate cross-border M&A transactions. For instance, U.S. imposes a dual safeguard, i.e., the approval of the deal by the Federal Trade Commission and the Department of Justice. The competition and corporate laws are distinct in different States, making the restructuring process complex.

10 David K. Eiteman et al., *Mutinational Business Finance*, 619 (10th ed., 2007).

11 Isabel Feito-Ruiz and Susana Menéndez-Requejo, *Cross-Border Mergers & Acquistion in Different Legal Environment*, 31 International Review of Law and Economics 169, 171 (2011).

In inbound mergers, the resultant domestic entity has to adhere to all the requirements regarding loans and other provisions of foreign jurisdiction. However, in outbound mergers, the company has to comply with the regulations of the Reserve Bank of India (‗RBI') if the merger takes place with an Indian company.[12] The present legislation sets a minimum amount for investment which has resulted in reduction of outbound M&A.[13] An analysis of the acquisition of MTN Ltd., a South African corporation, by Bharti enterprises exposes the deficiencies in Indian legislations.[14]

Avoidance of Tax Default

It is significant to have a clear outlay of the tax structure when it comes to integration and restructuring the assets and stocks of a company. Further, the accounting considerations have to be taken into account by the bidder company in order to boost its growth. The parties engaged in the same need to be fully aware about the financial and accounting policies in the transaction to avoid confusion. Tax compliance is necessary both at the pre and the post stages of M&A.

Technology Barriers

Technological reforms drive entities to go for M&A, as the combination of resources and capital reduces the cost of innovation, and increases innovatory capability. Due to technological improvements, the interaction gap between the two entities gets reduced, which further simplifies the M&A. This was most aptly demonstrated in CleanTech Biofuels, Inc.'s acquisition of the sophisticated technology of Biomass North America Licensing, Inc. through a strategic merger to convert municipal solid waste into cellulosic biomass and generate electricity.[15] Technological reforms revamp the competitive environment. In recent years, the increasing dependence on technology has brought with it not only benefits, but cyber threats as well. These cyber threats hinder national and international transactions, and can be insurmountable barriers in M&A deals. The parties involved must opt for safeguards to shield the deal from any cyber threats. Generally, the parties underestimate the probable impacts of technology, which affect the deal at a later stage. The authors suggest that a pre-M&A IT plan would significantly benefit the deal. The IT needs long term investment for substantial returns due to inherent

12 Atul Pandey et al., *India*: *FEMA Cross Border Merger Regulations Issued by RBI*, Mondaq, available at http://www.mondaq.com/india/x/689316/Corporate+Commercial+Law/FEMA+Cross+Border+Merger+Regulations+Issued+By+RBI, last seen on 02/03/2020.

13 Rishabh Shroff and Manu Varghese, *A New Dawn for India's Cross Border Merger Regime, India Corporate Law*, Cyril Amarchand Mangaldas Blog, available at https://corporate.cyrilamarchandblogs.com/2017/05/new-dawn-indias-cross-border-merger-regime/, last seen on 11/07/ 2018.

14 *Bharti Airtel-MTN $ 24 billion deal called off*, The Economic Times (01/10/2009), available at https://economictimes.indiatimes.com/industry/telecom/bharti-airtel-mtn-24-billion-deal-called-off/articleshow/5074181.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, last seen on 02/03/2020.

15 Mandavi Singh, *Intellectual Property*: *The Dominant Force in Future Commercial Transactions Comprising Mergers and Acquisition*, Indian Journal of Intellectual Property Law 180, 182 (2009).

intricacies, which further exacerbate when corporations enter into M&A transactions. In the words of Shant Peter Yeremian, ~~–~~the best mitigation post-deal IT integration failure is early assessment, planning and engagement well before the deal is closed."[16]

Financial Constraints

Prior to entering into M&A transactions, the companies must assess their financial capabilities. The bidder, at the outset, has to analyse its financial capabilities to fulfil the requirements of the deal, also analysis of target company's finance is to be done to forecast the post-merger position.

Integration Phase of M&A

Once the agreement stage is arrived, several problems begin to emerge. At this stage, the management of the companies involved have to undergo a tedious process in order to combine two distinct corporate entities.

Inevitable Human Factors

In the pre-merger phase, the bidder company generally overlooks social and human factors, however, at the integration phase, this proves to be a significant problem. Human resource is crucial for running the resultant business successfully. An M&A entails changes in the psychological and the organizational environment for the employees of both the units, as it instils a sense of uncertainty about the future and a feeling of confusion in the new organisation.

The employees face challenges in adoption of new organisational methods, adaptation to the new culture in the management process, etc. In *Hindustan Lever Employees Union v. Hindustan Lever Ltd*.,[17] the Supreme Court upheld the interest of the employees in the M&A transaction.

After an acquisition operation, the employees either support the organization, working more or continue working like before the change, they try to change certain aspects by expressing their opposition, or they reduce the effort at work.[18] The employees are generally apprehensive of losing their jobs and working under a different leadership of the new management. The social capital theory[19] determines the rate and the extent to which the employees make social contacts in or outside the organization. These factors are of more importance at the post-acquisition stage in contrast to other external factors.

16 *Managing IT challenges pre- and post-M&A*, Financier Worldwide, available at https://www.financierworldwide.com/managing-it-challenges-pre-and-post-ma/#.W0XfitJLjIV, last seen on 01/07/2018.

17 Hindustan Lever Employees Union v. Hindustan Lever Ltd., AIR 1995 SC 470.

18 Mariana Vancea, *Challenges and Stakes of the Post-Acquisition Integration Process*, 13 Annales Universitatis Apulensis Series Oeconomica, 167, 177 (2011).

19 Jean- Luc Arregl et al., *The Development of Organizational Social Capital: Attributes of Family Firms*, 44 Journal of Management Studies 73, 73 (2007).

Culture differences

Culture as a factor more or less marks a difference in the integration process. A few scholars consider culture vital to post-integration stability, while others consider it relatively unimportant. Language can also prove to be a barrier when the two companies are situated in different parts of the world. It hinders communication, making it difficult to build emotional and psychological connections between the parties to the deal. This aspect looks at how social interactions such as public relations can facilitate mutually beneficial cooperation and coordination, and how social capital can enhance network and industrial growth.[20] In resolving the cultural repugnancy between the bidder and target company, the opinions of both should be taken into consideration, and a mixed-culture attitude should be adopted. A dual approach needs to be applied in mitigating cultural conflict, i.e., an integration of ‗formal' culture and ‗operational' culture.

Management Integration

In the process of restructuring, a number of jobs and posts overlap. The integration of the entities into a single unit leads to the restructuring of the employees' posts. Sometimes, there is a reshuffling of the departments of the employees, which demands a very flexible attitude on the part of the management and staff.

Other Challenges

The political structure of the nation determines the feasibility and flexibility of foreign investment, especially for industries related to defence and security. Prior approval from the trade unions or labour unions is sometimes a pre-requisite in certain countries.[21] Therefore, an investor, before venturing into a foreign environment for investment, needs to avoid every probability of political risk.

The acquirer company often seeks to take over the intellectual property assets of the target company. Acquiring intellectual property rights is one of the lucrative motives for indulging in the restructuring process. In cross-border M&A, when an intellectual property asset is transferred, the laws of the bidder company differ from the target company's laws and hence, if any issues arise, the dispute becomes subject to multiple jurisdictions.

20 Rudolf R Sinkovics et al., *Marketing Integration in Cross-Border Mergers and Acquisitions: Conceptual Framework and Research Propositions*, 8 European Journal of International Management 644, 649 (2013).

21 Paul Albert and Sohini Mandal, *India: Employee Rights in Mergers and Acquisitions*, Mondaq, available at https://www.mondaq.com/india/Employment-and-HR/727352/Employee-Rights-In-Mergers-And-Acquisitions, last seen on 04/01/2020.

The payment to the shareholders of the target company is to be done by the acquiring company. It is either done through exchange of shares or in cash.[22] At this stage, negotiation helps in curbing any future hurdles, and is a strong method to peacefully settle the terms between the parties. Any ambiguity at the primary stages of the deal needs to be clarified in the agreement, or the acquirer ought to specify the occurrences, future happenings, and consequences to the management of the target company.

Post-M&A Phase

In post-acquisition integration, both the acquirer and the target companies' employees struggle to achieve compatibility. Reasons such as better management, synergies arising from the new combination, or the infusion of capital, previously out of the reach of the acquisition target, must be effectively implemented after the transaction. As a function of the total number of studies examined, fourteen of seventeen (i.e., 82.4 percent) cited business combination failures related to post-M&A integration. Reasons for subsequent failures in M&A are human risks, retention of talent, job risks, employees diminishing commitment and fall in productivity.[23]

Employees Dilemmas

It is often found that the employees of the target company are forced to adjust and survive in the corporate environment of the bidder company. The cultural differences weaken the performance of the entities after M&A operations. Cultural conflicts entail a clash of values, morals, ideologies, visions, missions, etc. of the distinct bodies. Lack of trust-building by the new management weakens the morale of the employees of the target companies. This generally happens due to poor communication in the process of M&A. Other issues which arise at the managerial level is a clash of leadership, and losing key personnel. The management must be fully aware of the demands of the staff, and help in their transition. The acquisition of Ash Stevens Inc. by Piramal Enterprises sets an example for future deals in terms of employee care and training post-merger.[24] Piramal Enterprises provided the key personnel of the company specific guidance and opened up opportunities in order to retain their talent. An introduction to the working style of the future management prior to the M&A process strengthens the target company's workforce.

Centralization versus Decentralization

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22 Alfred Rappaport and Mark L. Sirower, *Stock or Cash?: The Trade-Offs for Buyers and Sellers in Mergers and Acquisitions*, Harvard Business Review, available at https://hbr.org/1999/11/stock-or-cash-the-trade-offs-for-buyers-and-sellers-in-mergers-and-acquisitions, last seen on 02/01/2020.

23 Rica Bhattcharyya and Sachin Dave, *From HR issues to cultural integration, the reasons behind M&A failures*, The Economic Times (26/07/2016), available at https://economictimes.indiatimes.com/news/company/corporate-trends/from-hr-issues-to-cultural-integration-the-reasons-behind-ma-failures/articleshow/53387584.cms?from=mdr, last seen on 02/01/2020.

24 Nandini Piramal, *Manage employees during a merger*, Livemint (09/07/2018), available at https://www.livemint.com/Leisure/9nfANbboS5er4aXCMjHaMO/Manage-employees-during-a-merger.html, last seen on 10/07/2018.

In cross-border M&A, the integration of two companies with different aspirations often results in an ambiguous vision for the future. In order to align their goals, it is important to formulate a common strategy with shared values. Post-merger, companies with branches at different geographical locations often face co-ordination challenges. It is advisable to adhere to a decentralized mechanism for the smooth functioning of the management.

Size Concerns

Owing to the variation in the size of the acquiring and target companies, apprehension can arise in the minds of the shareholders and the employees of the target company. Differences can hamper the growth and defeat the purpose of the merger.[25] For instance, the merger of Daimler and Chrysler dissolved to form a third largest automobile corporation with increased market capitalization and revenue.[26]

Indian Legal Framework Regulating Cross-Border M&A

In India, M&A picked up pace only with the advent of liberalization in 1991. The remarkable amendments to the Companies Act in 2013 fueled the growth rate of cross-border transactions by easing and liberalizing the norms regulating such transactions. In recent times, the Indian legislature has amended the law to keep up with the contemporary demands. In India, cross-border M&A is majorly regulated under (i) the Companies Act, 2013; (ii) SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011; (iii) Competition Act, 2002; (iv) Insolvency and Bankruptcy Code, 2016; (v) Income Tax Act, 1961; (vi) The Department of Industrial Policy and Promotion (DIPP); (vii) Transfer of Property Act, 1882; (viii) Indian Stamp Act, 1899; (ix) FEMA, and other allied laws as may applicable, based on the M&A structure.[27] For governing inbound and outbound mergers, there are rules which provide an elaborate mechanism under the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (‗FDI Regulations') and the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 (‗ODI Regulations').[28] In the Companies Act, 1956, there was no provision regulating outbound mergers, however, there was a procedure to carry out inbound mergers. This omission was taken care of by Section 234 of Companies Act, 2013 which now provides for an M&A between domestic and foreign companies. Rule 25-A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 supplements the procedure provided in Section 234.

25 Elvis Picardo, *How M&A can Affect a Company*, Investopedia, available at https://www.investopedia.com/articles/investing/102914/how-mergers-and-acquisitions-can-affect-company.asp, last seen on 04/01/2020.

26 *Daimler-Benz and Chrysler sign merger agreement*, Dieselnet, available at https://dieselnet.com/news/1998/05daimler.php, last seen on 01/01/2020.

27 Shruthi Shenoy and Ifla A, *India: Cross Border Mergers – Key Regulatory Aspects to Consider*, Mondaq, available at https://www.mondaq.com/india/CorporateCommercial-Law/695282/Cross-Border-Mergers-Key-Regulatory-Aspects-To-Consider, last seen on 05/01/2020.

28 Ibid.

Foreign Exchange Management (Cross Border Merger) Regulations, 2018 is one such move by the RBI to address issues which may arise in cross-border M&A. FEMA Regulations create a legal fiction by stating that transactions that comply with all the procedural requirements, shall be deemed to be approved by the RBI. In furtherance of this, the key company personnel are required to give an undertaking, stating compliance with the FEMA Regulations. Chapter XV of the Companies Act regulates compromises, arrangements and amalgamations. Section 234 enumerates provisions only on merger and amalgamation. This Section poses a dilemma regarding the scope of other arrangements like de-merger. *Prima facie*, it appears that other cross-border arrangements are not facilitated by the said provision, however, the FEMA Rules provides insights on such other arrangements.

Indian laws are weak as compared to the laws of countries with emerging markets like China and Brazil. It can be argued that India has become a less favoured location for investment due to its inability to enforce property rights, etc. Additionally, there is a lack of coordination among various regulatory authorities.

Contemporary Setting of Global M&A

As per the figure given below, it can be observed that while 2007 experienced a good growth of cross-border transactions, there was a sharp decline in the volume of M&A in 2008. This sudden fall was the direct effect of the 2008 global economic crisis. Till 2009, the depletion continued and reached one twenty three billion dollars.[29] At the same time, the cost of debt financing for cross-border M&A rose, as bank lending conditions deteriorated rapidly, following tightening credit conditions and rising interest rate premiums for the corporate sector.[30] Even in 2012, there was a decline in the volume of global M&A.

29 *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development*, U.N. Sales E.09.II.D.15 (2009).

30 Ibid.

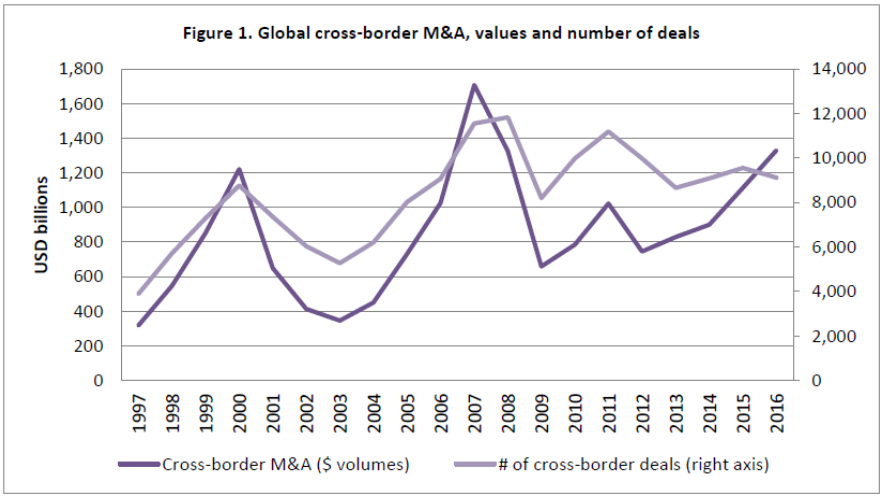

Figure 2[31]

Globally, there were 2,834 cross-border deals in the first half of 2018, as compared to 3,346 in the same period in 2017.[32] Nations are becoming protectionist in their approach in order to gain self-sufficiency rather initiating global trade. Expressing her concerns, the managing director of Dominion Bond Rating Service Morningstar, Elisabeth Rudman, recently opined that –we've seen big cross-border mergers and acquisitions in the banking sector in the past and a lot of them did not turn out very well at all … (It's) difficult to see that as a solution to everything".[33] This protectionist attitude was demonstrated by the trade war between the US and China, which led to the renunciation of two deals amounting to one hundred seventeen billion dollars between Qualcomm, Inc. and Broadcom, Inc.[34] and between Alibaba and MoneyGram.[35]

Countries like India which have a lot of apprehensions about venturing into global transactions, often have to additionally meddle through political or legal restrictions. The merger between the U.A.E. Aviation Company Jet-Etihad and Jet Airways deal is a good instance to evaluate the factors challenging cross-

31 Michael Gestrin, *Cross-Border M&A on the Rise*, *OECD: Global Forum on International Investment*, OECD, available at https://www.oecd.org/investment/globalforum/2017-GFII-Background-Note-MA-trends.pdf, last seen on 06/07/2018.

32 Silvia Amaro, *Cross-border megadeals fall for the first time since 2013 amid trade and political concerns*, CNBC, available at https://www.cnbc.com/2018/07/02/trade-and-politics-hit-cross-border-megadeals.html, last seen on 04/07/2018.

33 Silvia Amaro, *SocGen chairman calls on regulators to help strengthen Europe's banks*, CNBC, available at https://www.cnbc.com/2018/07/09/socgen-chairman-calls-on-regulators-to-help-strengthen-europes-banks.html, last seen on 11/07/2018.

34 Elizabeth Balboa, *Trade Wars Aside, First Half of 2018 sees Highest Value of Cross-Border M&A in a Decade*, Benzinga, available at https://www.benzinga.com/general/education/18/07/11982084/trade-wars-aside-first-half-of-2018-sees-highest-value-of-cross-bor, last seen on 7/07/2018.

35 Joe Mont, *The compliance challenges of cross-border deals*, Compliance Week, available at https://www.complianceweek.com/news/news-article/the-compliance-challenges-of-cross-border-deals#.W0YX9NJLjIU, last seen on 11/07/2018.

border deals, as there were obstructions and support for the deal.[36] Sometimes, the companies have to pass through the net of security issues. For instance, the SNOPC, a Chinese oil company, was thwarted by the US Senate. For the purpose of performing due diligence, information is readily available in domestic mergers, however, information gathering in a foreign market is more difficult, more time consuming, and more complex.[37]

Conclusion

With the advent of globalization, corporations are transcending national boundaries by entering into global ventures. M&A, foreign investment, venture capital are important for the economy. The challenges encountered at different stages of M&A can often deter the companies from going ahead with the deal. States often make stringent provisions which can hinder global trade; therefore, the transaction laws must be made flexible to encourage corporations to enter into M&A. The resolution of issues arising at different levels of M&A demands stage-wise strategic planning by the target company and the acquirer company before entering into the cross-border M&A deal. The procedural challenges involved in different phases of M&A can be mitigated with the combined efforts of the acquirer, the target company and the States.

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36 Anirban Chowdhury, *A Jet-Etihad deal won't comfort many investors*, The Economic Times (21/01/2019), available at https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/a-jet-etihad-deal-wont-comfort-many-investors/articleshow/67615614.cms?from=mdr, last seen on 03/01/2020.

37 *Cross-border PMI: Understanding and Overcoming the Challenges*, The Boston Consulting Group, available at https://www.bcg.com/documents/file48163.pdf, last seen on 03/07/2018.

PROTECTION OF RIGHT TO LIVELIHOOD FOR URBAN STREET VENDORS: A JOURNEY FROM OLGA TELLIS TO STREET VENDORS ACT, 2014 AND BEYOND

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Abstract

Street vending is one of the most resorted-to occupations in the informal sector. However, street vendors have often been subjected to ill-treatment and harassment. Even post-independence, they had no legal recourse for protection against social and financial abuse. Due to improper implementation of the Street Vendors Act, 2014, the judiciary had to step in to ensure the protection of the street vendors' rights. In this article, the author traces the landmark judgements rendered by the judiciary for the same, and tries to critically appraise the Street Vendors Act, 2014 which, if implemented properly, can uplift the status of vendors, providing them with much needed social security. In furtherance of the same, the author highlights the challenges of The Street Vendors Act vide judicial pronouncements. Thus, there is a need to bring stability in the uncertain future of these vendors and provide them a socially dignified existence. Thereafter, the author concludes by suggesting methods for bridging the problem of non-compliance.

Key Words: Street Vendors, Town Vending Committee, Social Security, Livelihood, Unorganised Sector

Introduction

The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 (‗the Street Vendors Act') defines a street vendor as:

> a person engaged in vending of articles, goods, wares, food items or merchandise of everyday use or offering services to the general public, in a street, lane, side walk, footpath, pavement public park or any other public place or private area, from a temporary built up structure or by moving from place to place and includes hawkers, peddler, squatter.[1]

Street vending being a small-scale business, is an industry in itself.[2] Street vending as an occupation has its genesis in the population rise that resulted in unemployment in formal sector. Apart from people who have no other source of employment, many migrants and internally displaced people have also entered

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1 S. 2(1)(l), The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 (‗Street Vendors Act').

2 Maharashtra Ekta Hawkers Union v. Municipal Corporation, Greater Mumbai, 2013 SCC OnLine SC 815.

this occupation.[3] Despite no governmental support, street vendors have contributed significantly to the country's progress.

In 2004, for the very first time, the State recognized the vendors' role in the local economy pursuant to certain Supreme Court verdicts. The National Policy on Urban Street Vendors, 2004 and 2009, and the Model Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2009 were some of the initiatives that were taken by the Government. In 2011, the National Advisory Council (_NAC') recommended the enactment of a central law.[4] Pursuant to this recommendation, on March 4, 2014 after receiving the assent of the President, the Bill became a law and came into force on May 1, 2014. In this paper, the author argues that the implementation of the Act has been lax and arbitrary. The research includes the study of the livelihood of the street vendors and problems prevailing in the Indian society. It also discusses the landmark Supreme Court judgments since the *Olga Tellis v. Bombay Municipal Corporation*[5] and the issues in the implementation of the Act.

Right to Livelihood of Street Vendors

The term _livelihood' is subjective and differs circumstantially, and hence is difficult to define. The definition of livelihood as adopted by the Food and Agricultural Organisation says that livelihood comprises of the capabilities, assets (including both material and social resources) and facilities required for a living.[6]

A livelihood is sustainable when it can maintain or enhance the different elements which determine living of an individual or group of people. Food security, gender security, good health condition, increase in income, better living condition and reduced vulnerability are some of the requisites for a sustainable livelihood. The sustainable livelihood approach places the poor at the centre stage. Some universally accepted constituents of livelihood are: natural capital (land, water, biological resources), financial capital (stocks of money or assets in liquid form), social capital (rights or claims derived from group membership), physical capital (infrastructure, resources created through economic production), and human capital (quantity and quality of labour available).[7]

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3 *Street Vendors and the Law*, WIEGO, available a http://www.wiego.org/informal_economy_law/street-vendors-and-law, last seen on 1/04/2019.

4 *Recommendations on a Central Law for Protection of Livelihood Rights and Social Security of Street Vendors*, National Advisory Council, available at http://www.prsindia.org/uploads/media/Land%20Acquisition/NAC%20press%20release_Land%20Acq%20and%20others.pdf, last seen on 14/11/2019.

5 Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545.

6 *Guidance note on recovery livelihood*, UNISDR, available https://www.unisdr.org/files/16771_16771guidancenoteonrecoveryliveliho.pdf, last seen on 04/07/2019.

7 *Livelihood Indicators and Measures*, Cornell Blog, available at http://blogs.cornell.edu/lmrc/2007/09/20/414-candidate-livelihood-indicators/, last seen on 03/04/2019.

Despite the existence of these crystallized basic parameters of right to livelihood, they are rarely taken into consideration for lower groups/class of people in India, especially the independent labourers. In absence of proper accommodation, street vendors live on footpaths, sharing the space with rabid dogs and cats.[8] Harassment of vendors has been reported in China, Angola, Egypt and Zimbabwe, and human rights abuses have been investigated in Bangladesh, China, Rwanda, Egypt, Angola and Mexico.[9] With this data, it is evident that street vendors have been subjected to harassment not only in India but globally.

Only a few developed countries have taken the welfare of street vendors seriously and provided a legislative framework to ensure their well-being and livelihood. India's move to legalise the practice of street vending was the beginning of a new era in the country for street vendors. Professor Martha Chen has written that ~~"th~~he informal economy needs to be seen not as a marginal or peripheral sector but as a basic component . . . of the total economy."[10] This is particularly relevant for India, where street vendors are important contributors to the economy.

In India, street vending makes up eleven percent of the total (non-agricultural) urban employment, and fourteen percent of the total (non-agricultural) urban informal employment.[11] A centrally located administrative district in large cities like Ahmedabad[12] and one or more non-central areas or districts in the urban periphery, tend to have more natural markets with denser populations of both consumers and street vendors, and therefore often have a distinct policy dynamics relating to more intense contestation of public space.[13]

Livelihood as interpreted by the Judiciary

One of the monumental pronouncements of the Supreme Court has been *Olga Tellis*, where the petitioners, who were evicted slum and pavement dwellers, sought the Court's intervention against their eviction. The case revolved around the concept of livelihood, an aspect covered in the Constitution of India under Article 21. The Supreme Court observed that "life' means something more than mere animal existence, and ~~"a~~n equal facet of that right is the right to livelihood because no person can live without the means of living, i.e., the means of livelihood." Very importantly, the Court has observed that ~~"s~~uch deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live." Hence, if the right to

8 Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545, ¶ 21.

9 Sally Roever and Caroline Skinner, *Street Vendors and Cities*, 28 Environment & Urbanization 359, 362-363, 2016.

10 Martha Chen, *Rethinking the Formal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment*, DESA Working Paper Series, available at https://www.un.org/esa/desa/papers/2007/wp46_2007.pdf, last seen on 08/08/2019.

11 Sally Roever, *Informal Economy Monitoring Study Sector Report: Street Vendors*, WIEGO, available at http://www.wiego.org/sites/wiego.org/files/publications/files/IEMS-Sector-Full-Report-Street-Vendors.pdf, last seen on 9/03/2019.

12 Ibid, at 9.

13 Ibid.

livelihood is not treated as a part and parcel of the fundamental right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.[14]

In *Sodan Singh v. New Delhi Municipal Corporation,*[15] the Court held that the hawkers' right to carry on trade and commerce is subject to reasonable restrictions under Article 19(6) and does not have any nexus with Article 21, and that facts in *Olga Tellis* were clearly distinguishable from usual trade and business. This was echoed in *Saudan Singh v. New Delhi Municipal Corporation*,[16] where the contention that street hawking was protected by Article 21 was rejected by the Apex Court. In the author's opinion, the Court was erroneous in holding that there was no nexus between the right to livelihood and the right to life.

In light of *Sodan Singh* and the era of liberalization, privatization and globalization, the Supreme Court in *Maharashtra Ekta Hawkers Union v. Municipal Corporation, Greater Mumbai*[17] iterated that the practice of evicting street vendors without due process would be unconstitutional.

In *Gainda Ram v. M.C.D,*[18] the Apex Court directed and mandated the government to recognize and provide vendors a legitimate status in the society while discussing the National Policy on Urban Street Vendors, 2009. The Court observed that if the said Bill is enacted, it will have to *prima facie* recognize the rights of hawkers and vendors under Article 21 of the Constitution of India.

Street Vendors Act, 2014: A Critical Appraisal

The post-liberalization era saw a manifold increase in workers shifting to the informal sector, majority of which resorted to street-vending. In response to this, the Act aims to balance three key objectives:

(a) securing the right to livelihood of urban street vendors;

(b) ensuring congestion free public spaces and streets; and

(c) convenience of vending services for customers.[19]

In furtherance of these objectives, the Act provides an inclusive framework for registration of street vendors, providing reasonable grounds for relocation, eviction and confiscation of goods, regulatory functions of the local authority and Town Vending Committee, and a grievance redressal mechanism.[20]

The idea to legalise street vending came a few months before the 2010 Commonwealth Games, when a large number of vendors were evicted due to

14 Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545.
15 (1989) 4 SCC 155.
16 Saudan Singh v. N.D.M.C., AIR 1992 SC 1153.
17 Maharashtra Ekta Hawkers Union v. Municipal Corporation, Greater Mumbai, (2009) 17 SCC 231.
18 (2010) 10 SCC 715.
19 Ibid.
20 Ibid.

security concerns.[21] This stirred discussions on the issue, leading to the Supreme Court's direction to legalise their status in *Gainda Ram*. Due to limited employment opportunities in rural areas, the rural population migrated to urban areas. This, in turn, led to a shortage of employment within cities due to an increase in the supply of workforce. Since street vending does not require much skill or capital, many turned to street vending.[22]

Despite this, the law overlooks the existing street-vendors in the rural areas. In a number of villages, the upper caste groups dominate the economically and socially backward groups. In case of any dispute, the rural street vendors can only approach the *pradhan* or the market head, who informally negotiates the disputes on behalf of the vendors with the local authorities. Since no formal protection has been given, the street vendors in rural areas continue to face exploitation. This subjects the rural street vendors to unequal treatment as compared to the urban street vendors.

Even though India has enacted a law for street vending, there are some major impediments which have arisen due to some lacunae present in the Act. In the author's opinion, the first major loophole is that the Act does not include the Railways under its ambit,[23] which deprives the vendors, at stations and in trains, of their right to equality as enshrined under the Constitution of India.

Another point of criticism is that the street vendors are given no social security under the Street Vendors Act. Notwithstanding the fact there is no protection in the Act, the Parliament has enacted the Unorganized Workers' Social Security Act, 2008 which ensures social security of people engaged in the unorganised sector. It includes health and maternity benefits, provident funds, housing, educational schemes for children, skill upgradation, etc. Various social welfare schemes like the *Aam Aadmi Bima Yojna*, *Rashtriya Swasthya Bima Yojna* and National Family Benefit Scheme have been provided under this Act for the benefit of the unorganized workers.[24]

The Street Vendors Act provides for penal provisions which often result in harassment of the street vendors as there is no proper recourse available to them. The local authorities rarely take the initiative for the betterment of street vendors and also abuse their powers by penalizing these vendors. Property rights of street vendors have been disregarded (both for saleable items and their means to carry out the trade).[25] *Prima facie*, no protection has been provided to them, except for the provision of tendering notice to the vendor before the

21 Shivkrit Rai and Deepanshu Mohan, *Gaps in Implementation of Street Vendors Act are Making Delhi's Merchants Invisible*, The Wire (01/11/2017), available at https://thewire.in/economy/street-vendors-act-implementation-gaps, last seen on 23/10/2019.

22 Pariroo Rattan, *Street Vendors Act 2014: A Forgotten Promise*, Working Paper 341, Centre for Civil Society, available at https://ccs.in/internship_papers/2015/341_street-vendors-act-2014-forgotten-promise_pariroo-rattan.pdf, last seen on 23/10/2019. .

23 S.1, Street Vendors Act.

24 Schedule 1, SS. 2(1) and 3, The Unorganized Worker's Social Security Act, 2008.

25 Amit Chandra and Rajul Jain, *Property Rights of Street Vendors*, Centre for Civil Society, available at https://ccsindia.org/property-rights-street-vendors-1,last seen on 23/10/2019.

imposition of fine and confiscation as a last resort.[26] This considerably weakens the aim of the Act.

Examples can be taken from some other countries which have introduced beneficial legislations for street vendors. In an inclusive move towards street vending post 2016 election, the Los Angeles City Council decriminalized and removed the city's law banning street vending to help protect undocumented immigrants vulnerable under the Trump administration. In a significant move in November 2018, the council unanimously voted to legalize street vending after ten years of campaigning.

Only two notable cases of inclusive practices reported in the media from Africa. In a rare case of cooperative street vendor management, the Monrovia City Corporation signed a memorandum of understanding with the Federation of Petty Traders and the Informal Workers' Union of Liberia (FEPTIWUL) in September, 2018 as part of an effort to ensure a smooth working relationship between petty traders and the municipal government of Monrovia. In Kenya, the Draft Protection to Livelihood and Regulation of Street Vending Bill promises to license street vendors, providing livelihood rights and social security and shielding them from police harassment.[27]

Judicial Reforms post Street Vendors Act

After legalisation of street vending in India, a new set of challenges for the State have surfaced with respect to the implementation of the Street Vendors Act. The Act seeks to empower street vendors by requiring the respective State Governments to constitute Town Vending Committees ('TVC') as per the Street Vendors Act. The TVCs have to identify the areas under their jurisdiction as vending and non-vending zones for regulation of vending activities.[28] Further, the TVCs have to conduct surveys of all existing street vendors and issue certificates.[29] However, these Committees have either not been constituted or are non-functional in most parts of the country.[30] This is a major roadblock in the collection and surveying of data for the grant of certificates.

In India, street vending adds dynamism to urban cities and in many places is considered a cornerstone of historical and cultural heritage. For example, street vendors who sell tea, called *chai-wallahs*, are an important part of India's cultural heritage.[31] Further, they offer ordinary articles of everyday use for a comparatively lesser prices which adds to their utility to the general public.

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26 Ibid.

27 Caroline Skinner and Pilar Balbuena, *Where are the inclusive cities? Street vendors globally face increasing hostility*, WIEGO Blog, available at https://www.wiego.org/blog/where-are-inclusive-cities-street-vendors-globally-face-increasing-hostility, last seen on 20/12/2019.

28 S. 3(1), Street Vendors Act.

29 Ibid, SS. 3, 4.

30 *Progress Report Implementing The Street Vendors Act 2014*, Centre for Civil Society, available at https://ccs.in/sites/default/files/research/svac-report-2019.pdf, last seen on 05/05/2019.

31 *Street Vendors*, WIEGO, available at http://www.wiego.org/informal-economy/occupational-groups/street-vendors, last seen on 01/04/2019.

However, hawking may be justifiably prohibited near hospitals or high security areas. The Supreme Court in the *Maharashtra Ekta Hawkers Union*[32] has laid down various guidelines which have to be followed. Multiple guidelines in this case were in concurrence with the Apex Court's previous decisions, some of which were reiterated by the Bombay High Court.[33] In this case, it was observed that pavements are public property, intended to serve the general public. They do not exist for private use as it would frustrate the very object for which they have been created. It has been reiterated by the Courts that the right of hawkers to carry out vending activities is subject to proper regulation in public interest, including their health and security considerations.

In *Maharashtra Ekta Hawkers Union*,[34] the Supreme Court had specifically put a restriction on hawking within one hundred meters from any place of worship, holy shrines, educational institutions, hospitals and within one hundred and fifty meters from any municipal market or a railway station. Further, the Court stated that no hawking could be permitted in non-hawking zones, but due consideration had to be given to the rights of the hawkers who were to conduct their vending businesses on streets. Their rights had to be balanced with that of the pedestrians or others who use the roads for the purpose of plying their vehicles. Where TVCs were not established as per the National Policy on Urban Street Vendors, 2009, the Municipal Corporations and Councils were directed to constitute the same, giving due representation to the various stakeholders, including the representatives of the street vendors, so as to regulate the vending activities and identify the vending zones in the area of Greater Mumbai. Furthermore, for constituting a TVC, there has to be a survey for the data collection of street vendors in a given area, out of whom the election is to be held and the voters' list is to be issued. No policies can be made and implemented unless a TVC is constituted with proper representation of street vendors. The legal discourse surrounding street vendors has been about ‗legitimizing and normalizing the street vendors' presence on streets,' who are otherwise thought to be encroachers on the public space. This perception has created a presumption of illegality and has thus left vendors vulnerable to harassment by public officials.[35]

Conclusion

Street vendors are one of the sections of the unorganized sector which the general public frequently encounters, but they are often considered as a ‗nuisance' or a ‗menace'.[36] Prior to the enactment of the Street Vendors Act, the

32 Maharashtra Ekta Hawkers Union v. Municipal Corporation, Greater Mumbai, (2004) 1 SCC 625.

33 Maharashtra Ekta Hawkers Union v. The State of Maharashtra, W.P. 652/2017 [Bombay High Court].

34 Maharashtra Ekta Hawkers Union v. Municipal Corporation, Greater Mumbai, (2004) 1 SCC 625.

35 Ayani Srivastava et.al., *Formalizing The Informal Streets: A Legislative Review of the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2012*, available at http://docs.manupatra.in/newsline/articles/Upload/B2BF305B-4500-4D24-B87F-46F2AD083584.pdf, last seen on 03/04/ 2019.

36 *The Aesthetics of Discrimination: Street Vendors and Public Spaces*, Alternative Law Forum, available at http://altlawforum.org/publications/the-aesthetics-of-discrimination-street-vendors-and-public-spaces/, last seen on 14/03/2019.

basic rights of street vendors were being blatantly violated due to absence of effective legal remedies.

The Supreme Court has recognised the rights of street vendors through its various decisions starting with its decision in *Olga Tellis*. Since then, the Apex Court has safeguarded the livelihood of this vulnerable group. Articles 14, 19(1)(g) and 21 of the Constitution of India have been the foundation of the rights extended to the street vendors by the Supreme Court. Since hawkers and street vendors are easy targets of harassment and are being victimized by the law enforcement agencies (such as police or municipal officers) which frequently carry out anti-encroachment drives and illegal evictions, the vendors can seek justice under the Constitution of India.

The existing gap between the objectives and the implementation of the Street Vendors Act can be bridged by organising targeted campaigns for sensitization of the authorities as well as the general public. Observing November 14 as the ‗International Street Vendors Day' to celebrate the valuable contributions made by street vendors at the local and the global levels[37] and creating Community Development Funds,[38] safeguards the interests of street vendors. Although TVCs have to be mandatorily constituted in all states under the Street Vendors Act to ensure its effective implementation, many states have either failed to do so or have failed to effect their proper functioning, thereby defeating the objective of the Act. Therefore, the formation and the effective functioning of TVCs is indispensable for providing basic security to vendors and safeguarding them from socio-economic threats, failing which the constitutional ideals of social equality and welfare shall remain mere aspirations.

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37 *International Street Vendors Day*, WIEGO, available at http://www.wiego.org/informal-economy/international-street-vendors-day, last seen on 15/03/2019.

38 *Urbanization and Street Vending: Report prepared by Pierre Schlegel and Sylvain Racaud*, IFRA Nairobi (2016), available at http://ifra-nairobi.net/wp-content/uploads/2016/12/Report-Urbanization-and-Street-Vending_edited_online_99dec.pdf, last seen on 10/12/2019.

PROTECTION OF INTELLECTUAL PROPERTY AND DATA IN OUTER SPACE: A CRITICAL ANALYSIS

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Abstract

The proliferating inventions in the outer space have given rise to many practical issues in the field of intellectual property. These inventions are mostly being undertaken by commercial and private agencies rather than the States. The treaties between States are drafted keeping in consideration certain trade related aspects of IPR, along with various national IP laws. This research paper discusses whether the legal regime and current laws that regulate the field of outer space affairs are adequate to protect the rights of the individuals or States. Further, the paper also looks at whether there is a need to widen the scope of the present laws. It also provides justification for harmonizing privacy, data protection and invention in outer space according to the fast-changing circumstances.

Key Words: Intellectual Property, Space Law, Patents, Copyright, Invention, Data protection

Introduction

Intellectual property ('IP') rights are legal rights which aim at providing the inventors the privilege of their work. The benefit of such rights may be given in areas of practical invention, literature, music, etc., which can then be used by them for business practices. Exclusive rights are granted to the owner against any misuse of work without the permission of the owner. However, to maintain a utilitarian equilibrium, these rights are given only for a limited/particular time period.[1]

As of now, India is the fourth largest space power after the U.S., Russia, and China.[2] This calls for the development of the country's outer space administration. The national laws and international agreements in the country are well defined with respect to protection of IP on earth, but there is a lack of clarity in laws governing the IP of outer space activities. Currently, this sector sees significant participation from private entities which have a profit motive in

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1 *What is a Patent?*, World Intellectual Property Organization, available at https://www.wipo.int/patents/en/faq_patents.html, last seen on 27/03/2019.

2 *India Successfully Tests Anti-Satellite Technology*, The Hindu (27/03/19), available at https://www.thehindubusinessline.com/news/science/india-successfully-tests-anti-satellite-technology-says-pm-modi/article26651622.ece, last seen on 27/03/2019.

undertaking developments.[3] Due to the privatization of the activities, there is a need to protect the rights of private individuals as well as the State.

Intellectual Property and Space Inventions

U.S. is the only country which has stringent domestic IP laws applicable to outer space. These specific laws are mentioned under Title 17, Title 35 and Title 51 of the U.S. Code, which was first published in 1926, and contains provisions on jurisdictional and other rights over patents, etc.[4] The National Aeronautics and Space Act of 1958 (‗NASA Act') also contains provisions regarding inventions made in outer space. Section 305 of the NASA Act[5] deals with property rights in inventions and the patent laws applicable where an invention relating to the outer space is made.

The U.S. Patents Act, 35 U.S.C. §§ 1 et seq., section 105 (a), states that if any invention is made in the outer space on any object such as a spacecraft, satellite, etc., belonging to the U.S., it will be considered as made on U.S. territory, unless there is any international agreement with other States. Apart from the U.S., Germany is the only country which has developed its laws to govern IP rights of inventions made in outer space. As of now, no other country has made its national laws compatible with the patent laws in outer space.[6]

The laws of National Aeronautics and Space Administration (‗NASA') also govern its relationship with private individuals involved in any space project. The same is provided under the NASA Guidelines for Promoting Scientific and Research Integrity of June 2018.[7] The involvement includes the sharing of tools, types of machinery and equipment, etc. A prominent example is the 1980 Agreement of NASA and McDonnell Douglas. In this case, the process of electrophoresis was used for the preparation of a drug in the space, wherein NASA agreed not to hamper the rights of McDonnell Douglas and not to carry on a similar joint venture in future. This kind of a mechanism ensures that private individuals see a significant return for the work they have put in inventing something and also encourages further innovation.

Every country must incorporate such laws and principles. Currently, countries like Japan, U.S., Russia, Canada along with the member States of the European Space Agency (‗ESA'), are working towards the establishment of a

3 Barbara Luxenberg, *Protecting Intellectual Property in Space*, 19 International Institute of Space Law, 172, 173 (1985).

4 *Intellectual Property and Space Activities*, World Intellectual Property Organization, available at https://www.wipo.int/export/sites/www/patent-law/en/developments/pdf/ip_space.pdf, last seen on 12/08/2019.

5 National Aeronautics and Space Act (Act of July 29, 1958) S. 305 (United States).

6 Derek M. Abeyta, *Privatized Space Exploration: How will Intellectual Property Rights be enforced When infringement occurs in Outer Space?*, 1 Arizona Law Journal of Emerging Technologies 60, 71 (2017); Harsha Rohatgi, *Patents in the Field of Outer Space*, IIPRD Blog-Intellectual Property Discussions, available at https://iiprd.wordpress.com/2014/10/22/patents-in-the-field-of-outer-space/utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original, last seen on 30/07/2019.

7 *NASA Guidelines for Promoting Scientific and Research Integrity*, NASA, available at https://www.nasa.gov/sites/default/files/atoms/files/nasa_guidelines_for_promoting_scientific_and_research_integrity-july_2018.pdf, last seen on 12/08/2019.

legal regime to determine the rights and obligations of each of the partner States, along with assessing their control and jurisdiction over the International Space Station (‗ISS').[8]

The ISS has also given an appropriate test for evaluating the effect of the legal framework on IP rights in outer space. The presence of astronauts in outer space for a long period gives them a good opportunity to invent things which can be patented. These inventions are being used by the ISS on earth. The problem arises with respect to the applicability of national patent laws to outer space, as they are only applicable to the inventions made within the boundaries of the State. They do not extend extra-territorially to outer space. States do not possess jurisdiction and control over the entity. Thus, it is proposed that the best solution to bridge this legal gap would be to apply national laws to even outer space, as was done by the U.S. in 1990.[9]

From an international standpoint, there is an existing framework contained in the inter-governmental agreement which is an agreement signed between the four partners of the ISS: U.S., ten members of ESA, Canada, and Japan. Article 21 of the agreement addresses the conflicts arising in space regarding IP rights by not only protecting IP rights, but also restricting States from infringing the rights of other States. However, ratification of the inter-governmental agreement by many countries will be required to successfully fulfill the purpose behind it, i.e., the need for harmonization of the laws of different countries.[10]

IP Rights and the Protection of Space Data

In the case of *University of London Press Ltd. v. University Tutorial Press Ltd.*,[11] Peterson J. stated that what merits duplicating is at first sight worth securing.[12] The growth of the internet has brought various changes in various dimensions and the same has wide use in the area of space technology. However, it has also made several forms of IP such as trade secrets, copyrights, software, and business strategies, etc. vulnerable to infringement.

Similarly, in the context of outer space, data is continuously derived from the satellite or any other object. This data is then transmitted to the space station situated on earth. This transmission to earth requires a considerable amount of time. Within this time, data can be hacked or stolen by any other spy satellite or hacker. There have been various cases in which satellites have been hacked. For instance, in 2011, the Chinese hackers were successful in hacking the NASA's satellite data and were able to access the complete system for a considerable

8 *Patents and space-related inventions*, European Space Agency, available at https://www.esa.int/About_Us/Law_at_ESA/Intellectual_Property_Rights/Patents_and_space-related_inventions, last seen on 19/03/2019.

9 Ibid.

10 A. M. Balsano, *Intellectual Property Rights and Space Activities*, European Space Agency, available at http://www.esa.int/esapub/bulletin/bullet79/balsano.htm, last seen on 10/05/2019.

11 University of London Press Ltd. v. University Tutorial Press Ltd, 2 Ch 601 (1916, Chancery Division).

12 Anirban Mazumder, *Database Law Perspectives from India*, 43 (1st ed., 2016).

amount of time, which allowed them to modify and delete the said data.[13] Rivest-Shamir-Adleman (‗RSA') are the inventors of a public key encryption technology, which is developed by RSA Data Security, Inc., which organizes conferences on these issues every year since 1991 in U.S., Europe, Russia, and the U.A.E. There have been frequent discussions on data security issues in these conferences.[14] The discussions revealed a serious threat to the safety of satellites of the countries and suggested that satellites could be hacked in such a way to destroy themselves, such as through destroying camera lenses by pointing them directly towards the sun, etc. Although this can be prevented by encrypting satellite data just as normal data on any other device, the limited storage and the capacity of the satellite make the encryption too difficult and costly. Research has also proved that encryption is not a complete solution to the problem. For instance, researchers at the University of Bochum in Germany have been successful in cracking the A5-GMR-1 and A5-GMR-2 algorithms used in satellite phones, which are commonly used by the military.[15] Data collected from satellites such as images and other information need protection from external bodies and private entities against the infringement of intellectual property. Even though the international directive of the Outer Space Treaty (‗OST') talks about the use of space for the advantage of all mankind without hampering the rights of anyone,[16] it is still incumbent upon the stakeholders to facilitate further research in this area.

Moreover, any value addition to the existing data invites copyright protection,[17] but it cannot be given on mere representation of raw data or factual information. There is always a risk that data may be hacked when it is being transferred from outer space to earth.[18] Since copyright protection cannot be given to unprocessed data, there is no prohibition on using this data illegally. Therefore, the present regime must be modified to provide copyright protection to unprocessed data as well.[19]

Remote Sensing Data Policy

Private entities require authorization from nations to carry out activities in outer space. This applies to sending a remote sensing satellite as well. Once the

13 *Chinese Hackers had full access to NASA Lab that Commands 23 Spacecraft*, Daily Mail (07/03/2012), available at https://www.dailymail.co.uk/sciencetech/article-2110506/Chinese-hackers-control-Nasa-lab-commands-23-spacecraft.html, last seen on 18/08/2019.

14 *About RSAC*, RSA Conference, available at https://www.rsaconference.com/about, last seen on 08/01/2020.

15 Adam Hudaib, *Satellite Network Hacking & Security Analysis*, 10 International Journal of Computer Science and Security 8, 8 (2016).

16 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 4, Oct. 10, 1967, 610 U.N.T.S. 205 (‗Outer Space Treaty').

17 *Ethics and Intellectual Property,* Princeton University Library, available at https://libguides.princeton.edu/c.php?g=102546&p=665867, last seen on 28/03/2019.

18 Ellen Nakashima, *Russian Hacker Group Exploits Satellites to Steal Data, Hide Tracks*, The Washington Post (09/09/2015), available at https://U.S..kaspersky.com/about/press-releases/2015_russian-hacker-group-exploits-satellites-to-steal-data-hide-tracks---the-washington-post, last seen on 13/04/2019.

19 Supra 12.

authorization is granted by a State, the satellite becomes its responsibility. The problem arises when authorization is not granted, as in many countries, authorization can only be granted under national laws. Every object launched in the outer space has to be registered, and it is upon the launching State to do so. A country launching a remote sensing satellite on behalf of another country does not become the State of registry but qualifies as a launching State. The Convention on Registration of Objects Launched into Outer Space, 1976 requires the State of Registry to have control over the satellite, but the launching State can also exercise jurisdiction and control over it through special arrangements. The extent to which this control can be exercised is uncertain, giving rise to the problems relating to extent of dissimilation of data and damage arising from the use of remote sensing. Even though the Liability Convention, 1972 covers compensation for damage, the definition of damage does not specifically include remote sensing activities.[20]

Various States are developing remote sensing laws at the domestic level. The U.S. issued detailed remote sensing regulations, in accordance with the Land Remote Sensing Act, 1992, for the commercial remote sensing system in 2000. France has an existing law addressing remote sensing which includes laws relating to access of data, its distribution and copyright. Canada is also developing a national legal framework. There are many international agreements which have direct or indirect guidelines to protect the IP of spatial data like the OST, Berne Convention, 1971, Principles relating to Remote Sensing of Earth from Outer Space, 1986, Universal Copyright Convention, 1971, but they have failed to resolve problems relating to the IP protection. The Berne Convention covers only two components: *first*, it defines the functions and operations of international copyright protection of the protected work, *secondly*, it explains access to copyrighted material.[21]

The Brussels Convention, 1974 is the only Convention which directly relates to the satellite communications and IP rights protection. It specifically deals with the protection of rights of the original satellite broadcasters and states that each signatory State (in its territory) must take preventive measures to avoid any transmission or distribution of the satellite data for which the signal emitted is not intended. However, this is merely a precautionary step and does not provide copyright protection to the distributor or the owner. The subject matter protected under this Article is the mode of transmission, i.e., the signals and not the transmitted contents. Moreover, re-broadcasting is left beyond its coverage after at least one authorized transmission to the territorial station under Article

20 C. D. Johnson, *Legal & Regulatory Considerations of Small Satellite Projects*, 10, 11 in *Guidebook on Small Satellite Projects* (Wiley Larsen et. al., 2014).

21 J. I. Gabrynowicz, *Report of the National Center for Remote Sensing, Air, and Space Law on the Land Remote Sensing Laws and Policies of National Governments: A Global Survey*, National Centre for Remote Sensing, Air, and Space Law at University of Mississippi School of Law, available at http://joannegabrynowicz.com/wp-content/uploads/2013/11/Gabrynowicz-RS-Law-Global-Survey-II.pdf, last seen on 20/05/2019.

2(3) of the Convention. Hence, once the data is re-broadcasted, further transmission is beyond the scope of this article.[22]

In the case of direct broadcasting, it enables direct transmission to the public without the use of land stations. Therefore, interests of the original author are threatened due to lack of regulation of the broadcasters and uncertainty surrounding the liability to pay royalties.[23] Even the procedure of licensing copyrighted material for use and the subsequent distribution thereof to the copyright owner is complicated.

As long as the U.S. administrator was involved with NASA in satellite remote sensing activities, the U.S. never claimed proprietary rights over the same. However, the introduction of the Land Remote Sensing Policy Act, 1992 (‗LANDSAT')–that facilitates the distribution of data in the private sector— has given proprietary rights to the contractor who markets the unenhanced data.[24]

The French space agency has developed the *Satellite Pour l'observation de la Terre* (‗SPOT') meaning Satellite for observation of Earth system and *Centre National d'études Spatiales* (‗CNES'), i.e., National Centre for Space Studies with a private data distribution system. It has encouraged the French government to develop a policy that joins a proprietary right protection system with appropriate measures of data distribution. CNES contains all the authors' rights and copyright fee for basic data. Furthermore, the derived data is transferred via an organization of agents and distributors. In the case of derived data, the work is performed by the distributor and the copyright is shared by both the original author and the distributor.[25]

On the other hand, Article VIII of the OST states that in case any object is launched by any State in outer space, the State which has launched it or which has the ownership of it will have jurisdiction and control over it. Furthermore, the complete data which the objector satellite finds, belongs to the State that owns the object.[26] This provides discretionary power to the particular State to extend its national laws to space activities and makes it completely dependent on the State to protect the IP of its nationals.

There have been various efforts till date to establish a concrete procedure for granting a copyright to directly broadcasted data and to extend that benefit to the original owners of that data.[27] The same is possible only if all the countries obey or give consent to it, and if there are uniform laws for it.

Open Data

The Global Earth Observation System of Systems (‗GEOSS') is coordinated by the Group on Earth Observation (‗GEO') and is an international voluntary

22 L. B. Malagar and M. Magdoza-Malagar, *International Law of Outer Space & the Protection of Intellectual Property Rights*, 17 Boston University International Law Journal 311, 353 (1999).
23 Ibid.
24 Ibid, at 358-359.
25 Ibid, at 359.
26 Outer Space Treaty, art. 8
27 Ibid, at 354.

effort comprising of ninety-seven governments and eighty-seven organizations to provide, to the public as well as private sectors, access to diverse information. The GEOSS, on one hand, moves towards the trend of sharing full, free, and easy access to the data, and on the other hand, restricts the use and dissemination of certain data. The access to earth observation data is provided for free by the GEOSS, but a fee is charged if the obtainment is for commercial uses.[28] These restrictions mainly pertain to concerns regarding the protection of national security, financial viability, proprietary interest, privacy, confidentiality, indigenous rights, and conservation of sensitive ecological, natural, archaeological, or cultural resources.[29]

The LANDSAT Data Distribution Policy also aims at providing full, free and open data for the purpose of maximum usage by the private and public sectors. The policy basically claims to stimulate data for commercial development of enhanced data.[30]

Problems with the OST

The Harvard-Smithsonian Center for Astrophysics (‗CfA') has warned that there are loopholes in the OST which it seeks to prohibit.[31] Under Article I of the above treaty, ownership of a celestial body (for instance, the moon) is not allowed[32] but a State can exploit resources, have a research facility and also bar any other State from intervening in its activities on the celestial body.[33] According to Martin Elvis, a senior astrophysicist at the CfA, this might lead to *de facto* ownership of the property in outer space. He has further stated the example of some leading countries who are trying to land on the moon in the near future.[34] Hence, this creates an ardent need to modify the present laws to prevent future disasters.

According to the ESA, the satellite SMART-1 had a certain part on the moon which receives sunlight continuously. As the axis of the moon is aligned towards the sun, there is a certain part near the South Pole which receives the maximum sunlight.[35] This part of the moon is an ideal place for capturing solar energy. Hence, private companies are now figuring out ways to transport payloads, and how to efficiently use rockets to get the goods delivered at a lower cost. Therefore, the law needs to be reframed to prevent further conflicts arising due to the use of that area by different countries.

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28 Ray Harris and Ingo Baumann, *Space Data Policies & Satellite Earth Observation*, 32 Space Policy 44, 44 (2015).

29 M. Fukunaga, *Current Status and Recent Developments of the Non-Discriminatory Principle in the 1986 UN Principles on Remote Sensing*, 105, 105 in New Perspectives on Space law (M.J. Sundahl and V. Gopalakrishnan, 2011).

30 Ibid.

31 Alwin Powell, *Eternal Light Up for Grabs*, The Harvard Gazette (10/7/2016), available at https://news.harvard.edu/gazette/story/2016/07/eternal-light-up-for-grabs/, last seen on 24/03/2019.

32 Outer Space Treaty, art. 1

33 Ibid, art. 4

34 Supra 31.

35 Katharine Sanderson, *The Sunniest Spot on the Moon*, Nature-International Weekly Journal of Science (2007).

Conclusion

The current international space law treaties were mostly drafted at the time of the Cold War[36] and were largely focussed on peace-keeping, leaving out commercial activities in outer space. None of the space treaties address the need for IP protection of outer space activities. Notwithstanding this legal gap, the OST does provide that the State that registers the space object shall retain control and jurisdiction over it while being in outer space or on any celestial body. This provides a window for States to extend their national laws, including patent laws to registered space objects. A possible solution to the problem of different laws in States is to develop a treaty dedicated to protection of IP in outer space. We also propose the following suggestions:

- There must be a clear definition of the rights and obligations in a proposed legal framework with respect to the control and ownership of IP rights, both of the State and entities like the ISS.
- The proposed legal framework must also address copyright protection to prevent theft of satellite data through hacking.
- The OST should be modified to address activities of the private sector.

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36 C. D. Johnson, *The Outer Space Treaty*, Oxford Research Encyclopedia of Planetary Science, available at http://oxfordre.com/planetaryscience/view/10.1093/acrefore/9780190647926.001.0001/acrefore-9780190647926-e-43, last seen on 12/08/2019.

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