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Message from the Patron

Maharashtra National Law University, Nagpur is sincerely dedicated to the vision and mission of imparting state-of-the-art legal education, on par with global standards of excellence in education. In a short span of time since its inception, the University has accomplished remarkable feats in academic as well as extra-curricular activities. The publication of the First Issue of Fourth Volume of Contemporary Law Review (CLR), biannual, peer-reviewed flagship journal of the University, in the midst of the battle with COVID-19 pandemic is testimony to the unflinching dedication of the University to pursue the path of academic excellence, in spite of the numerous challenges presented to its functioning by the pandemic. The publication of the present issue of CLR is a matter of immense pride and joy for me, and affirms that the academic rigour of the University has stood the test of a global crisis. The accomplishments of the University are a reflection and result of the erudite guidance of our beloved Chancellor, Hon'ble Shri Justice S.A. Bobde, Chief Justice of India; the boundless enthusiasm of our students; the tireless efforts of our teaching and non-teaching faculty; and, the diligent and able support of the University administration. I am indebted to the Hon'ble Chancellor for his continuous support and guidance in all endeavours of the University, and for fuelling our motivation to become one of the premier institutions of legal education not only in India, but at the global level.

The Contemporary Law Review (CLR) was instituted with the objective of promoting critical legal thinking and writing, and kindling the minds of law students and legal professionals to think originally and opine prudentially. I must congratulate the editorial board of the journal for selecting contributions from diverse areas of law for publication and discussing various issues of contemporary significance. The journal aims to provide a platform for inquisitive legal minds, searching for opportunities to enhance their horizons by learning and unlearning emerging theories and interpretations of law, as well as the interaction of law with extra-legal disciplines of study. I hope that the journal evokes interest among a wide-range of readership, including law students, research

scholars, academicians, legal professionals and every person with an interest in discovering new and intriguing aspects of law. Reviews and feedback by the readership is highly cherished by the editorial board of CLR, as they would encourage the board to keep improving with each issue. My sincere gratitude is extended to Hon'ble Members of the editorial advisory board for providing the editorial board with valuable guidance. My heartfelt gratitude extends to each member of the editorial board of faculty colleagues for their diligent efforts towards upholding the quality of research published in the journal, and finally, to the contributors of the journal for their thought-provoking and enriching research contributions. Our contributors come from different parts of the globe, and different regions of the country, and it is to their credit that the journal has become a culmination of intellectually enlightening academic writings.

(Vijender Kumar)

Editorial

In the article titled "*Facets of Legitimacy of Children and their Property Rights under Hindu Law: A Socio-legal Analysis*", Prof. (Dr.) Vijender Kumar and Ms. Vidhi Singh analyse the Hindu Marriage Act 1955 as regards the protection accorded to children born to parents who are not legally married, or whose relationship is not protected by law or custom. The authors emphasise that, the Hindu Marriage Act protects children who are legitimate in fact, and to a certain extent, also children who are legitimate in law. The authors further analyse the Hindu Succession Act 1956 to ascertain the inheritance rights of illegitimate children. Further, the socio-legal facets of legitimacy of children, and the property rights of illegitimate children have been comprehensively analysed in the article.

In the article titled, "*The Supreme Court of India: An Empirical Overview of the Institution*", the authors Ms. Aparna Chandra, Mr. William H.J. Hubbard and Ms. Sital Kalantry present an empirical study which sheds light on the role of the apex court in progressive social change. The study is based on a comprehensive dataset of opinions of the Supreme Court of India in the cases decided during the years 2010-2015, as published in the case reporter Supreme Court Cases (SCC). The dataset analysed by the authors contains 5699 judgments resulting in a broad, quantitative overview of the social identity of the litigants; types of matters; levels of success of different groups of litigants; and, the opinion-writing patterns of the judges of Supreme Court.

In the article titled, "*Rape as War Crime: How Far the International Tribunals have been Successful in Protecting Women*", Ms. Hemangini Sharma traces the evolution of the jurisprudence of 'rape' as a crime in international law. The article highlights the compelling circumstances which led to the development of the international law of 'rape' and emphasises the

role of the international community in protection of women against sexual violence during wartime. The article analyses the various international instruments defining various forms of sexual violence against women, committed during wartime. Further, the study highlighted the contribution made by landmark decisions of various international tribunals in formulation of a definition of the crime of 'rape', that is acceptable to the international community.

In the article titled "*Dynamics of the Right of Publicity in India: An Appraisal under Intellectual Property Regime*", Ms. Vandana Mahalwar expounds on the concept of publicity rights and highlights the lack of dedicated legislative protection for such rights in India. The article traces the origin and evolution of right of publicity by analysing its historical roots in the light of right to privacy. The article analyses the recognition of right of publicity by courts in India and highlights the current judicial approach for the effective protection of celebrity rights. The article further analyses the scope of protection of publicity rights under the copyright and trademarks regimes in India and has suggested *sui generis* legislation for the effective protection of publicity rights in India.

In the article titled "*Assessing the Admissibility of Illegally Obtained Evidence in International Arbitration*", Mr. Shivam Tripathi discusses the admissibility of illegally obtained evidence in International Arbitration. The article is divided it in two parts. The first part focuses on analysis of various cases decided by the International Centre for settlement in Investment Disputes, Court of Arbitration for Sports and other tribunals instituted under the UNCITRAL Arbitration Rules. The second part focuses on the analysis of comparison between the cybersecurity and the issues of admissibility. The author emphasises on the admissibility of illegally obtained evidence in arbitration proceedings, and the impact of development of information technology in facilitating

the illegal obtainment of evidence. After discussing various cases decided by the Court of Arbitration for Sports and other arbitration institutions, the author highlighted the unavailability of general principles for determining the legality and admissibility of illegally obtained evidence in International Arbitration and the role of tribunals in developing certain principles while deciding the cases on any issue.

In the article titled, "*Parameters Governing Percipient Witness Testimony in view of Pramaana Theory of Nyaayashaastra*", Ms. Ila Sudame analyses Section 60 of the Indian Evidence Act 1872 which deals with direct evidence. The author highlights that the said Act does not shed sufficient light on crucial aspects, such as the definition, parameters and validity of perception by witnesses who have directly perceived information through their senses, also known as, 'percipient witnesses'. The author deliberates upon addressing these gaps in the Indian Evidence Act 1872 with the aid of Indian epistemology, particularly the *Pramaana* Theory of *Nyaayashaastra*. The author suggests that the inquiry into direct evidence may be supplemented by the *Pramaana* Theory to bolster the efficiency of the Indian criminal justice system.

In the article titled "*Multi-faceted Portrayal of Company's Director in India: Comparing their Roles*", Ms. Gargi Talatule analyses the role of company director in light of the Companies Act 2013. The author presents a comparative analysis of roles and responsibilities of 'company director' in reference to old and new regime of legal mechanism governing company management in India. Further, the author highlights the issues and challenges along with the insufficiency of the legislative intent to define the responsibilities of the director with clarity.

In the article titled "*Admissibility of Electronic Evidence in the Era of Information Technology: A Conceptual Analysis of Judicial Pronouncements*", Mr. Suneel Kumar and Mr. Susanta Kumar

Shadangi analyses the concept of ‘electronic evidence’ in the light of the Indian Evidence Act 1872. The authors highlighted the relevant statutory provisions along with judicial pronouncements touching upon the various facets of the relevancy and admissibility of electronic evidence in India. The article particularly emphasises on analysing the judicial pronouncements pertaining to electronic certificate as required under Section 65B of Indian Evidence Act 1872. Finally, the author concludes by lauding the efforts of judiciaries while interpreting the said provision in light of the changing dynamics of the digital era.

In the article titled “*Comparative Legal Analysis of Indigenous Customary Institutions among Mizo, Khasi and Paite Tribes of North East India*”, Thangzakhup Tombing discusses the institutional set up for Indigenous Peoples of the North East region of India and their matrimonial laws. While analysing the legislation governing personal laws of North Eastern Tribes, the author highlighted the British Colonial Policies and customary rules of tribes regulating the institution of marriage. The author further discusses the Constitutional scheme for the *Mizo, Khasi* and *Pait* Tribes and analyses the recently enacted ‘Mizo Marriage, Divorce and Inheritance of Property Act 2014’ towards promoting gender equality in the institution of marriage and inheritance of property.

In the article titled “*Right to Privacy on Social Networking Sites: A Critical Analysis*”, Ms. Vibhuti Jaswal discusses the concept and significance of ‘privacy’ and the international perspective of right to privacy in the light of personal data protection along with relevant international judicial decisions. The author discusses Indian perspective of right to privacy and focuses on critical analysis of the preservation of right to privacy on social networking sites. Further, the author highlights the repercussions

of indiscriminate use of social media on the fundamental right of privacy and provides suggestions to remedy the same.

In the article titled "*Reflections of Dharmasastra in Narrative Traditions of India: A Lesson for Modern Constitutional Culture*", Mr. Sopan Shinde analyses the role of *Varkri Kirtan*, which is a narrative tradition from Maharashtra consisting of live performances of oral and aural rendition of poetry of saint poets, in disseminating the legal culture in consonance and compatibility with *Dharmasastra*. The author ponders on the capacity of narrative traditions of India in accelerating a movement for social justice by propagating the values of liberty, equality and fraternity, thereby promoting a constitutional culture in the Indian society.

In the article titled "*Liaison Office in India and its Tax Implications*", Mr. Chamarti Ramesh Kumar has discussed the effect of interface between the Income Tax Act 1961 and the Double Taxation Avoidance Agreements to examine the tax implications of Liaison Office in India. Further, he analysed the judicial response towards understanding the preparatory and auxiliary activities carried out by the Liaison Office in India and highlighted the measures for elimination of aggressive tax planning mechanism adopted by the multi-national companies for profit shifting.

(Editorial Committee)

FACETS OF LEGITIMACY OF CHILDREN AND THEIR PROPERTY RIGHTS UNDER HINDU LAW: A SOCIO-LEGAL ANALYSIS

Vijender Kumar[♣] *and Vidhi Singh*[♦]

Abstract

Children are the human assets of a nation state and their existence depends on their parents. If the parents are married as per law, personal or state made, as applicable to them, then there is no legal issue for such children. But, if their parents are not legally married or their relationship is not protected by law or custom, then such children are left to the mercy of social mores, and legal system of the state. The Hindu Marriage Act 1955 protects the interests of children who are legitimate in fact, and also to a certain extent who are legitimate in law, wherever there has been either a marriage, an attempt or presumption of marriage. The Hindu Succession Act 1956 governs the inheritance rights, considers only legitimate children for inheritance and relates illegitimate children only to the mother. However, the children who are not socially recognised and legally protected are left outside the gamut of getting property rights of their father albeit maternity is certain. Hence, this paper is an attempt to analyse socio-legal facets of legitimacy of children and their property rights under Hindu law.

Keywords: Children, Parents, Family, Status, Legitimacy, Marriage, Relationship, Property.

Introduction

In the contemporary Hindu society, cordial family life has become a challenge. With extinguishing ancient family structure among Hindus, individuals have been testing sense of freedom or independence in their matrimonial homes; but children are the most affected creatures by this pursuit of carefree life. In earlier days, marriage was the binding force between two families as their male or female members used to have arranged marriages. But, with liberalisation, privatisation and globalisation, marriage has become individual affair where family has been put on the least priority. In the pretext of job, business, trade, professional requirements, young married or ought to be married couples are forced to live far from their native places in diverse cultural, ethical and professional conditions. Hence, Hindu marriage institution *per se* is facing twofold socio-legal challenges, *viz*., first, individual freedom; and second, public attitude towards marriage. Nowadays, the young people have become career oriented where family bonding lacks in letter and spirit. Individualism is on its peak; due to which many times children suffer from lack

♣ Professor of Law and Vice-Chancellor, Maharashtra National Law University, Nagpur, e-mail: vijenderkumar@yahoo.com.

♦ Student, Symbiosis Law School, Hyderabad, e-mail: singhvidhivk@gmail.com.

of family and social learnings at home. They hardly get exposure towards other relations in family life or society, as their parents have cut themselves off from their respective joint family members due to demands of modern life.

Property, ancestral or coparcenary, is most affected phenomena nowadays in a joint Hindu family. Many members have moved from their place of birth to other places and have settled there with their immediate family. Consequently, only few members, specially the elder ones, are left at the original place of joint Hindu family. They are not in the position to manage the ancestral properties which number of generations accumulated while investing their sentiments and earnings. As part of Indian cultural ethos, ancestors always tried their best to protect properties for future generations; hence, either they covert the nature of such property or sell it off. By doing so, the young generation is distanced from their roots in wake of accomplishing success in their life and they do not consider maintaining relations with elders as important as elders used to take care of them. But, in later point of time, if anything goes wrong in their personal or professional life, they do not know where to fall back for social and financial support. Such kind of family life is neither good for the spouses or cohabitees nor conducive for the upbringing of children. Therefore, a healthy family life with preservation of family relations and property is the only mantra for one's successful life.

The birth of a child under Hindu law is celebrated with due importance attached from the moment they are conceived by their mothers. Once a woman is known to be in the family way (pregnant), she is cared for by the family members, natal as well as marital. While doing so, a married female Hindu performs one of the matrimonial duties. Under Hindu law, progeny within the legal wedlock is one of the core objectives of the marriage which she fulfils by giving birth to a child. Once a child is born in the family, it becomes the asset of the family and the child is confirmed with membership of his/her father's family. Further, the child becomes *Sapindagotraja* (part and parcel of his/her ancestral linage including the father) of his/her father's family. Consequently, the child is confirmed with the surname/*Gotra* of his/her family and thereafter he/she is known by this surname. The child so born to the family and his/her parents are subject to the same personal law, as the parents are subject to their personal law. Furthermore, in personal law of Hindus-uncodified or codified, status of children is given due importance in ancient as well as in contemporary Hindu society which brings them certain property rights in the family. In case of difference of status among children within the family, it leads to unequal distribution of property among them, principally. For example, illegitimate children are family members of their putative father but are not coparceners whereas children born to their parents' legal wedlock are the members as well as the coparceners of their father's family. Under the Constitution of India children have equal rights irrespective of whether they are legitimate or illegitimate by status. But, in personal law situation is different, as it deals with matters such as marriage, adoption, maintenance, custody, divorce, coparcenary, partition and succession, among the persons based on their status, he or she carries within the family and confirms upon him/her property rights

accordingly. As a matter of international policy, India on November 11, 1997 has signed a Convention on '*the Rights of the Child*' and committed to uphold all rights of the children within the territory of India. Being party to this international instrument, India as nation state has its own domestic/municipal laws to govern personal and public life of its citizens. By and large, children are governed by the personal law of their respective parents. For the purpose of this paper, the authors consider it relevant to deal with only Hindu personal law, to be precise, the Hindu Marriage Act 1955 and the Hindu Succession Act 1956. Hence, the authors have analysed position, status and rights including property rights of children in accordance with the Hindu personal law in this paper.

Present form of the Hindu Marriage Act 1955 creates three categories among children, *viz*., (i) children born of their parents' wedlock; (ii) children born of void or voidable marriages including presumption of marriage; and (iii) children born of live-in relationship and/or other relationships which are not covered under the Act. Children mentioned in category (i) are the children who are legitimate, *in fact*, as they are born to legal wedlock of their parents. They get social recognition and legal protection and all their rights such as coparcenary and heirship in the family of their parents are secured. Whereas children mentioned in category (ii) are the children who are born to void or voidable marriages or presumption of marriage. They are legitimate by virtue of law as referred in sub-sections (1) and (2) of Section 16 of the Hindu Marriage Act 1955 and though they get social recognition and legal protection, it is a limited legitimacy which is only to the extent to their parents against whom the property rights can be invoked. While referring to children of category (iii), these are the children who are born of live-in relationships or other such relationships which are not covered in sub-sections (1) and (2) of Section 16 of the Act. These children neither have social recognition nor legal protection under any law and remain illegitimate. Further, these children get nothing from the male persons who had access to the women, who happened to be the mothers of such children. However, these children are entitled to inherit their mother's property as a matter of legal right.

Hence, there are some research questions which would be answered in this paper based on the customary practices, statutory laws and judicial pronouncements on legitimacy of children and their property rights. They are: (i) whether children born of null and void marriages or marriages which are annulled by a decree of nullity, who are legitimate *in law*, are the Class-I heirs of their putative father, if so, whether they share half-blood relationship with the children of their putative father through his legally wedded wife? (ii) In cases wherever the courts have granted succession certificate to the children born of null and void marriages or marriages which are annulled by a decree of nullity, the execution of such decrees or final orders would be governed by the provisions of the Hindu Succession Act 1956 or they would be governed as special cases/laws. (iii) Whether children born from live-in relationships, by circumstances, hold the status being legitimate *in fact* or *in law*, and if so, whether they will be considered as Class-I heirs of the live-in partner of their mother? (iv) In cases wherever the courts have granted succession certificate to

the children born of live-in relationship, by circumstances, the execution of such decrees or final orders would be governed by the provisions of the Hindu Succession Act 1956 or they would be governed as special cases/laws. (v) Whether preference among the full blood and half-blood relations makes any adverse impact on the inheritance rights of these children? (vi) Whenever intestate succession is opened among the heirs born from properly solemnized marriages, null and void marriages or marriages which are annulled by a decree of nullity, would in any way have an application of Section 19 of the Hindu Succession Act 1956? (vii) Whenever intestate succession is opened among the heirs born from properly solemnized marriage and live-in relationship, by circumstances, would in any way have an application of Section 19 of the Hindu Succession Act 1956? Finally, the paper focuses on to critically analyse the status and property rights of children from different categories. It provides insightful facets of legitimacy among these children and also analyses judicial pronouncements on claim of property rights by these children. While concluding on variety of issues, through this paper, the authors appeal to the Hon'ble Chief Justice of India to constitute a larger bench at the Supreme Court to decide the 'scope and extent' of the word 'property' as referred in sub-section (3) of Section 16 of the Hindu Marriage Act 1955, and property rights of children born from null and void or voidable marriages or live-in relationships.

Historical Perspective on Legitimacy of Children

Each member of a joint Hindu family holds status which provides certain rights in its fold, be it matrimonial, care and protection, maintenance, or property. Legitimacy is such a status confirmed on a child born out of the wedlock of a male member of that joint family. Under Hindu law legitimacy of a child is understood as '*Aurasa*' wherein Hindu jurisprudence conceived the concept of *Aurasa* which is different from the concept of legitimacy as understood under English law. A joint Hindu family either governed by Mitakshara school or Dayabhaga school confirms its membership through marriage, birth and adoption. It presumes that its member by birth, who is born to a validly solemnized marriage, and that the child is not only born but also conceived after the marriage to be socially recognised and legally protected. It means that the procreation of a child in addition to birth is given due importance in Hindu law as compared to the birth of a child alone in English law. Therefore, Hindu law considered both conception/procreation and birth of a child during the continuance of lawful wedlock. In ancient Hindu law, there were 12 or 13 kinds of sons mentioned but one of them is '*Aurasa'* son. Manu says that "*him whom a man begets on his own wedded wife, let him know to be a legitimate son of the body (Aurasa), the first in rank*"[1]. Apastamba, Vashistha, Baudhayana and *Vishnu* are also of the same opinion.[2] Further, *Vijnaneswara*, the author of *Mitakshara*, seems to be in agreement with *Manu* in upholding

1 Manu, IX, 166, SBE, Vol. 25, p. 361.

2 Apastamba, II, 18.1; Vashistha, XVII, 13; Baudh, II, 2.3.14; Vishnu, XV, 2.

that conception/procreation as well as birth; and both must have taken place after marriage in order to confer the status of legitimacy on a son.[1]

Keeping in view the abovementioned description of 'legitimate child', there seems to be difference among Roman law, English law and Hindu law which indicates that (i) in Roman law subsequent marriage renders the child legitimate. It covers both conception/procreation and birth; (ii) in English law before 1926, birth should be during the wedlock, however, conception may not be (see Section 112 of the Indian Evidence Act 1872); (iii) in Hindu law, both conception/procreation and birth must be during the subsistence of wedlock. Thus, Hindu law speaks of marriage as condition precedent, but Roman law speaks of marriage as condition subsequent. However, English law takes the middle course; condition precedent for birth and condition subsequent for conception. However, this concept of legitimation, from the Roman law passed into the Canon law in or about the twelfth century[2] and gradually became the law of almost all Western Europe. In Western Europe, the principle found general acceptance and is embodied in the Civil Codes of France, Belgium, Italy, Spain, Portugal, Holland, Germany, Austria, Norway, Denmark, Sweden[3] and Switzerland[4]. Sir Dennis Fitzpatrick says that "*from Europe the system was extended to countries where the Latin influence obtained a predominance*"[5]. Thus, this concept took root in the French Island of the West Indies, in Mexico, Brazil, Argentina, Chile, Peru, Venezuela, Guatemala, Columbia and Ecuador.[6]

Further, in Hindu law, the illegitimate child, putative father and natural mother have not been considered as strangers to each other and an illegitimate child has never been considered as '*filius nullius*'[7]. In some cases, he was considered to be a member of the family. The illegitimate son under *Shastric* law is put in two categories: (i) the child born to a regenerate class by a permanent and exclusively kept concubine; and (ii) the child born to a Sudra by a permanent and exclusively kept concubine. In case[8] of (i), the child being the member of his father's family though not as a coparcener, has full rights of maintenance throughout life. In case[9] of (ii), the child enjoying a much higher

1 Yajn. II, 28; Mitakshara, I, XI, 2.

2 Decretal-Greg 4, xvii.6 etc. *Tanta est enim vis sacramenti (matrimonii) ut qui antea sunt geniti post contractum matrimonium legitimi habeantur*.

3 See the references in Sir Dennis Fitz Patrick's article "*Legitimation by Subsequent Marriage*", Journal of Comparative Legislation, J.C. Leg N.S. VI 1905, p. 22.

4 Article 258 of the Swiss Civil Code 1907.

5 *Supra* n. 3.

6 *Supra* n. 3, pp. 34-35. *vide* Hari Dev Kohli, LAW AND ILLEGITIMATE CHILD, 1st ed. 2003, pp. 99-100.

7 Latin term which means 'a son of nobody', however, an illegitimate child who had few legal rights under the Common Law. Further, laws have broadened the legal rights of illegitimate children who, in the language of some statutes, are referred to as non-marital children.

8 Mitakshara, I, 12.3.

9 Manu, IX, 179, SBE Vol. 25, p. 364. The text of Manu read as "*a son who is (begotten) by a Sudra on a female slave, or on the female slave of his slave, mat, if*

place having a status of a son and a member of his father's family. Since there was no concept of *filius nullius*, there was no such necessity imposed to have a subsequent marriage to legitimatize the illegitimate son. Hence, he is recognised as a son. But, in modern Hindu law, two legal instances have given rise to an inference of legitimation by subsequent marriage though indirectly. First, Section 112 of the Indian Evidence Act 1872 provides presumption of legitimacy. It says, "*that any person was born during the continuance of a valid marriage between his mother and any man*…". This provision provides of birth and not conception during lawful wedlock which overrules the Hindu law and this view has been in number of cases[1] upholding with a rider and burden of proof is put on the father to show 'Non Access'. Second, instance can be gathered from Section 12(1)(d) of the Hindu Marriage Act 1955 wherein Section 12 of the Act provides voidable marriage. The Section provides grounds on which such marriage can be declared as annulled. The sub-section (1)(d) of Section 12 stipulates, "*that the respondent was at the time of marriage pregnant by some person other than the petitioner"*. The expression 'other person that the petitioner' is legally significant. So if the petitioner had pre-marital intercourse with a woman and then later on marries the same woman, such a marriage is valid and not voidable and the child so born shall be legitimate child under the doctrine of '*legitimatio per subsequence matrimonium*'. Though this doctrine has not been taken directly as such situation is exceptional but the law has covered even this exceptional situation and that such a marriage cannot be declared as null and void. So such a marriage is lawful and the child so born is legitimate.[2]

While researching on *Aurasa* son, who is 'legitimate in fact' and first in rank, under ancient Indian literature and the importance attached with such son in Hindu law, the authors of this paper find that *Aurasa* son in ancient Indian legal literature occupies a very high status. It is through the *Aurasa* son that the seers desired immortality. Hence, the *Aurasa* son was desired. It is from the Rigvedic[3] period that the prayer for *Aurasa* son is being made. The *Sutrakaras* and the *Dharmasastrakaras* have defined the *Aurasa* son in an unambiguous way. *Apastamba* defines "*an aurasa son as a son begotten by a man who approaches, in the proper season, a woman of equal caste, who has not belonged to another man, and who has been married legally, (sastravihita) have a right to (follow) the occupations (of their castes) and to inherit the estate*."[4] *Baudhayana*, like *Apastamba* defines the *aurasa* son in the same way. He states that "*one must know a son begotten by (the husband) himself on a wedded wife*

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permitted (by his father), take a share (of the inheritance); thus the law is settled". *vide* also Yajnavalkya, II, 133-134; Mitakshara, I, 12; Dayabhaga, IX, 28; Mayukha, IV, 29-30.

1 *Karapaya Servai v. Mayandi* AIR 1934 PC 49; *Bhagwathi v. Aiyappan* AIR 1953 TC 470; *Palani v. Sethu* AIR 1924 Mad 677; *Kahan Singh v. Natha Singh* AIR 1925 Lah 414.

2 Hari Dev Kohli, LAW AND ILLEGITIMATE CHILD, 1st ed. 2003, p. 113.

3 Rig. 7.4.7.8.

4 G.N. Jha, HINDU LAW IN ITS SOURCES, 1st ed., 1930, Vol. II, pp. 175-176.

of equal caste (to be) a legitimate son of the body (Aurasa). They quote also (the following verse); from the several limbs (of my body) art thou produced, from my heart art thou born; thou art 'self' called a son; mayest thou live a hundred autumns"[1]. *Apastamba* and *Baudhayana* both insist that the *Aurasa* son is only one who is born of a wife of the same *varna*. This view has not been followed by the later *Dharmasutrakaras* and *Dharmasastrakaras*. However, *Vasishtha* defines the *Aurasa* son as one who is assigned the first place among the twelve kinds of sons, who is begotten by the husband himself on his lawfully wedded wife. *Vasishtha* does not insist that the married wife should be of the same *varna* as that of husband.[2] *Vishnu Dharmasutra* defines the *Aurasa* son as the son of the body, *viz.*, "*he who is begotten (by the husband) himself on his own lawfully wedded wife*".[3] Unlike *Baudhayana* and *Apastamba, Vishnu Dharmasutra* does not speak of the same *varna* of the wife as that of the husband. *Manu* defines an *Aurasa* son as one, whom a man begets on his own wedded wife, let him know to be a legitimate son of the body (*Aurasa*), the first in rank.[4] He speaks only of the wedded wife and does not require that the wife should be of the same *varna. Kautilaya* says that an *Aurasa* son is one who has been procreated by a man himself on his wedded wife according to the rules of *Shastra*.[5] The *Aurasa* son is 'in fact a son' born in a lawful wedlock. Gradually, the *varna* of the wife became irrelevant, at least in the case of an *anuloma* marriage.[6]

However, the definition of the *Aurasa* son was subjected to the judicial scrutiny in *Pedda Amani v. Zemindar of Marungpuri*[7] where the Privy Council following the English law did not approve of the Indian definition of *Aurasa* son. The court made modifications in this definition and held that procreation after marriage was not distinctly necessary for legitimacy as a son even according to the ancient texts, that to hold so would be an inconvenient doctrine and that the Hindu law is the same, in that respect as the English law. This decision of the Privy Council being the law of the land is based on the English conception of legitimacy and on the Section 112 of the Indian Evidence Act 1872. This decision has been criticized by Gooroodass Banerjee in his 'Tagore Law Lectures'[8] by concluding that 'the Hindu law of legitimacy is stricter than even the English law'.

Hence, under Hindu law both conception/procreation and birth must be within ones' wedlock to legitimize children born to such marriage. Sub-section (1) of Section 16 of the Hindu Marriage Act 1955 refers as, "…*whether such child is born before or after the commencement of the Marriage Laws*

1 Baudhayana, 11, 2, 3, 14, SBE Vol. 14, p. 226.
2 Vasishtha, XVII, 13, SBE Vol. 14, p. 85.
3 Vishnu, XV, 2, SBE Vol. 7, p. 61.
4 Manu, X, 166, SBE Vol. 25, p. 361.
5 Svayamajatah Kritkriyamaurasash, Arth. III, 7.
6 P.V. Kane, HISTORY OF DHARMASASTRA, 2nd ed. 1973, Vol. III, p. 656.
7 1 I.A. 282, 293.
8 Gooroodass Banerjee, THE HINDU LAW OF MARRIAGE AND STRIDHANA (TLL), 1878.

(Amendment) Act 1976", which indicates that 'birth' of a child includes both conception/procreation and birth in itself; but it must be within the marriage which may be declared by a court on a petition filed by either of the parties to such marriage as null and void. Though the expression 'conceived' explicitly is not to be found in sub-section (1) of Section 16 of the Act as it applies to children born before or after the amended Act of 1976.[1] Further, Sub-section (2) of Section 16 of the Act states that even if a voidable marriage is annulled by a decree of nullity under Section 12 of the Act, the children begotten or conceived before the decree is made, shall be deemed to be legitimate notwithstanding the decree of nullity. It is to be noted that this provision applies not only to children begotten but also conceived before the decree though born after the decree. Furthermore, under Hindu law of partition conception of a child is considered at par with birth of a child. For example, in case of reopening of partition, there are exceptions in Hindu law and one among them is the child in the womb of the mother, on which Manu says that "*once is the partition (of the inheritance) made,…*"[2]. Partition can also be reopened in case of after-born child. While referring judicial pronouncements on the issue it can safely be said that "*a son who was in his mother's womb at the time of partition but was born subsequently to it, is however entitled to reopen the partition and to receive a share equal to that of his brothers. For a son in the womb is in point of law in existence*"[3]. Again in *Yekeyamian v. Agniswarian*,[4] the court held that "*if the pregnancy is known at the time, the distribution should be deferred till its result is ascertained, or the distribution may take place and a share equal to that of a son may be provisionally reserved so as to be allotted to the after-born son, if any. If the pregnancy is not known, and a son is afterwards born, a redistribution must take place of the estate as it then stands*"[5]. Similarly, in case of intestate succession among Hindus, the child in womb of his/her mother at the time of the death of his/her father, who died intestate,[6] is considered as legitimate claimant on the intestacy of his/her father and gets the same share as he/she would have been given had he/she been born before the death of the intestate.[7] Section 20 of the Hindu Succession Act 1956 makes it clear that under Hindu law for the purpose of intestate succession it considers both,

1 *Surjit Singh v. Mohinder Pal Singh* AIR 1988 P&H 156: *Sengu Bai v. Sitaram* (1988) 1 HLR 687 (Bom).

2 Manu, IX, 47, SBE Vol. 25, p. 335.

3 *Jagat Krishna v. Ajit Kumar* AIR 1964 Ori 75.

4 (1870) 4 Mad HC 307.

5 Vijender Kumar (rev.), John D. Mayne, HINDU LAW & USAGE, 18th ed. 2020, p. 1129.

6 Section 3(1)(g) of the Hindu Succession Act 1956 defines the term 'intestate' as "*a person is deemed to die intestate in respect of property capable of which he or she not made a testamentary disposition capable of taking effect*".

7 Section 20 of the Hindu Succession Act 1956 reads as "*a child who was in the womb at the time of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate*".

conception and birth, of a child though this provision makes it mandatory that such a child must be born alive subsequent to the death of the intestate.

Property under Hindu Law

The Mitakshara school classifies property mainly under two heads: first, *Apratibandha Daya* or unobstructed heritage; and secondly, *Sapratibandha Daya* or obstructed heritage. All properties inherited by a male Hindu from a direct male ancestor, not exceeding three degrees higher to him are called *Apratibandha Daya*. In this property his son, son's son, son's son's son acquires an interest by birth. Therefore, it is called as unobstructed heritage. On the other hand, when a person inherits property from any other relation, such as maternal or paternal uncle or brother, nephew, etc., then it is known as *Sapratibandha Daya* and his son, son's son and son's son's son, or for that matter, any other person does not acquire an interest by birth. The Mitakshara property is further divided into two heads, *viz*., joint family property and self-acquired property. First, in joint family property, the property flows from different sources from which all members of the joint family draw out to fulfill their multifarious needs. One of its sources is ancestral property, *i.e.*, any property inherited from an ancestor or ancestress. It includes a share allotted on the partition, and the property begotten on severance of status. In the former, the share, which a coparcener obtains on the partition of ancestral property, is known as ancestral property with respect to his male issue. The coparcener takes an interest in it by birth, whether he is in existence at the time of the partition or is born subsequently;[1] as regards to the latter, whenever a coparcener expresses his intention to partition, a severance of status takes place. Once severance of status takes place among the interested parties to partition then partition takes place by metes and bounds, meaning thereby actual partition. In *Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe,*[2] Justice A.N. Sen had observed that "*the character of any joint family property does not change with severance of status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned among the co-shares*."[3] Secondly, self-acquired property, according to Yajnavalkya, whatever is acquired by the coparcener himself, without detriment to his father's estate such as a present from a friend or a gift at marriage, does not appertain to the coparceners. According to Mitakshara, property acquired by means of learning would be self-acquired property provided that learning was obtained without detriment to the ancestral property. Under old Hindu law there has been a distinction between ordinary education and specialized education/training. On this issue, there has been number of Privy Council judgements.[4] But, by enacting the Hindu Gains of Learning Act 1930 this distinction was taken care of. This Act makes it clear that gains of learning are

1 *Adurmoni v. Chaudhary* (1878) 3 Cal 18.
2 AIR 1986 SC 79.
3 *Ibid*., p. 90.
4 *Mehta Ram v. Rewa Chand* 45 Cal. 666 (PC): *Gokul Chand v. Hukam Chand* 2 Lah 40 (PC).

only self-acquired property, whether the education imparted happens to be ordinary education or specified education. Gains of learning are thus always self-acquired property under this Act.

Primarily, the Hindu Marriage Act 1955 was enacted to provide codify and uniform law of marriage among Hindus which can be seen in the long title of the Act which reads as "*an Act to amend and codify the law relating to marriage among Hindus.*" After an amendment in 1976 into the principal Act of 1955, apart from other objects of the Act, children born from null and void marriages or marriages annulled by a decree of nullity were confirmed with legitimacy, who would otherwise have suffered of illegitimacy. While doing so, the amended Act has also confirmed certain property rights to these children under sub-section (3) of Section 16 of the Act, though the property *per se* is the subject matter of either Hindu law of coparcenary, partition, or succession and these issues are governed by separate wing of Hindu law but not by the Hindu Marriage Act. The word 'property' is used by the lawmakers in Section 16(3) of the Hindu Marriage Act 1955, but the Section 16 does not specify the kind of property that is subject to sub-section 16(3); It is uncertain that whether such property qualifies as ancestral property, or coparcenary property or self-acquired property of the parents. It is clear from the plain reading of sub-section 16(3) that a child who is considered legitimate under sub-sections (1) and (2) of Section 16 of the Act cannot claim any share in the property of any other person than the parents. Sub-section (3) of Section 16 of the Hindu Marriage Act 1955 reads as "*nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents*". Therefore, in Hindu law there are many ways to acquire property rights, such as an *Aurasa* (legitimate) child under Mitakshara law gets an interest in the coparcenary property by birth; under the Hindu Succession Act 1956 legitimate children upto three degrees are the Class-I heirs to their deceased father, grandfather and great grandfather. Also, irrespective of being legitimate or illegitimate status, under Hindu law, children are legal heirs to their mothers.

Further, plain reading of sub-section 3(1)(j) of the Hindu Succession Act 1956 makes it clear that the word 'related' is specifically restricted to legitimate kinship and other relations are not covered. Sub-section (1)(j) of Section 3 of the Act reads as "'*related' means related by legitimate kinship. Provided the illegitimate children shall be deemed to be related to their mothers and to one another, and their legitimate, descendants shall be deemed to be related to them and to one another, and any word expressing relationship or denoting a relative shall be construed accordingly*". In *Daddo v. Raghunath*,[1] the court held that the illegitimate sons or daughters are therefore not to be reckoned as sons and

1 AIR 1979 Bom 176.

daughters under the Act and they are excluded from the line of succession by virtue of this definition except to the extent allowed in the proviso. Further, the court held that "*it is indeed unfortunate that an otherwise dynamic legislation should have extinguished the intestate succession rights of illegitimate sons of Sudras herebefore enjoyed by them unperturbed over the centuries. One hopes for the time when the resultant injustice stands remedied. Till then however the law as in force has to prevail and must be given effect to.*"[1] Under old Hindu law, it was well settled that an illegitimate son of Sudra by a continuously kept concubine was entitled to succeed to the estate both separate and ancestral property of his putative father to a limited extent. If the succession opened after the Act came into force it would be governed by the provisions of this Act only and an illegitimate son of Sudra is not entitled to succeed to the estate of his putative father by way of intestate succession which opens after the Act came into force.[2] Further, in *Chodon Puthiyoth Shyamalavalli Amma v. Kavalam Jisha*,[3] the court held that "*under Section 3(1)(j) of the Act word 'related' means 'related by legitimate kinship'. In fact, to safeguard the rights of the illegitimate children, a proviso thereafter was added to the effect that illegitimate children shall be deemed to be related to their mother and to one another and their legitimate descendants shall be deemed to be related to them and to one another. The deeming provision is not extended to the father of the illegitimate children. Hence, only a legitimate kinship is a relative, who is entitled to inherit to the property of a male Hindu, as provided under the Hindu Succession Act.*"[4]

After reading statutory provisions and judicial pronouncements, it can be simply understood that to acquire property, ancestral or coparcenary or self-acquired, one must have legitimate status within the matrimonial alliance of his/her parents. Present codified laws governing property among Hindus do not distinguish between illegitimate children either from Sudras, permanent kept concubine of a Sudra, or any other segment of Hindu society, but look at whether such children are from lawful wedlock of their parents or not; and accordingly confirms upon them a status which brings along with it certain property rights. However, the Hindu Succession Act 1956 makes a distinction between legitimate and illegitimate children and confirms upon them status and property rights in their family accordingly. Therefore, principle clause of sub-section 3(1)(j) of the Act recognises legitimate kinship as '*related'* not only of their mother but also to their father and his family members. Consequently, legitimate kinships are entitled to get coparcenary status and they are Class-I heirs too to their father and his family members besides legal heir to their mother; whereas, illegitimate kinships are governed by the '*proviso*' attached with the principle clause of sub-section 3(1)(j) of the Act which provides them a limited property rights.

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1 AIR 1979 Bom 176, p. 181.

2 Vijender Kumar (rev.), John D. Mayne, HINDU LAW & USAGE, 18th ed. 2020, p. 1400.

3 AIR 2007 Ker 246.

4 *Ibid*., p. 249.

Presumption of Relationship (Marriage or in Nature of Marriage)

When a clear proof of a marriage which is supposed to be solemnised by observing religious and customary rites by the parties, who otherwise fulfil all conditions laid in Section 5 of the Hindu Marriage Act 1955, cannot be proved before the court then the courts are at liberty under the Indian Evidence Act 1872 to presume certain facts based on certain inferences and administer justice in the matter. While understanding facets of presumption under the Indian Evidence Act, Phipson describes that "*presumptions may be either of law or fact, and when of law may be either conclusive (proesumptiones juris et de jure), or rebuttable (proesumptiones juris), but when of fact (proesumptiones hominis) are always rebuttable*"[1]. He further says that "*presumptions of fact are inferences which the mind naturally and logically draws from given facts, irrespective of their legal effect. Not only are they always rebuttable, but either the trier of fact may refuse to make the usual or natural inference notwithstanding that there is no rebutting evidence*"[2]. The Supreme Court in *Vattacherukuru Village Panchayat v. Nori Venkatarama Deckshuthulu*,[3] held that a presumption can be raised to fill the gaps in evidence, but it cannot be used to contradict evidence. Further, in *State of UP v. Gangula Satya Murthy*[4] case, the Supreme Court held that the power conferred by Section 114 of the Indian Evidence Act 1872 is in respect of inferences which may be drawn by the court. The section does not authorise the courts to legislate as to the manner in which human beings should conduct themselves. Furthermore, in *State of Karnataka v. David Rozario*,[5] the Supreme Court held that a presumption of facts is an assumption resulting from one's experience of the course of natural events of human conduct and human character. Such experience can be used in the ordinary course of life as well as in the business of the courts. Hence, it is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position.[6]

Section 112 of the Indian Evidence Act 1872 provides that legitimacy of a child is proved only if he/she was born during the continuance of a valid marriage between his mother and father. The children born from a live-in relationship were 'illegitimate' in the eye of existing law. However, the Supreme Court in *Tulsa v. Durghatiya*[7] held that children born out of such a

1 Michael V. Argyle et al. (eds.), Sidney L. Phipson, EVIDENCE, 10th ed. p. 2012; Shakil Ahmad Khan (rev.), Ratanlal & Dhirajlal, THE LAW OF EVIDENCE, 26th ed. 2017, pp. 595-596.
2 *Ibid.*, p. 596.
3 (1991) Supp. 2 SCC 228.
4 AIR 1997 SC 1588: *State v. Bhera* 1997 Cr LJ 1237 (Raj).
5 2002 Cr LJ 4127 (SC).
6 Shakil Ahmad Khan (rev.), Ratanlal & Dhirajlal, THE LAW OF EVIDENCE, 26th ed. 2017, pp. 596-597.
7 2008 SC 1193.

relationship will no more be considered illegitimate. Again in *Vidyadhari v. Sukhrana Bai*,[1] the Supreme Court held that even if a person had contracted second marriage during the subsistence of his first marriage, children born out of such second marriage would still be legitimate though the second marriage would be void. Thus, in a case where a couple has lived together for a long time, there shall be presumption of marriage and a child born from such a relationship shall enjoy all the rights of a legitimate child. In *Ram Lubhaya v. Lachhmi*,[2] the court held that long association of the parties as the husband and wife accepted by public at large leads to presumption of valid marriage. This presumption was fortified by the fact that the woman was shown as widow in the death certificate of the man as well as in the mutation certificate. She was held to be entitled to inherit the property as a legal heir. While dealing with live-in relationship, the Supreme Court in *Madan Mohan Singh v. Rajni Kant*,[3] held that where a live-in relationship continues for a long time, it can no longer be treated as 'walk-in and walk-out relationship'. In fact, the Supreme Court in *Tulsa v. Durghatiya*,[4] held that prolonged relationship of this kind gives rise to presumption of marriage. Whereas in *Swaminathan v. Palaniammal*,[5] the court held that where by reason of the provisions in the Hindu Marriage Act 1955 the second marriage, during the subsistence of the first, is void *ab initio*, there would be no presumption of validity even if the couple is living together as the husband and wife and the society recognised them as such. Such marriage does not create any right of succession. Therefore, a long living fact of two heterosexuals creates a valid presumption, though it is a matter of fact but gets due application in law while considering such relationship towards live-in relationship as presumption of marriage. This assumption in turn provides legal recognition to such relationships and makes them legal in the eyes of law. But, children born from such presumed relationships among heterosexuals are not provided any legal support as Section 16 of the Hindu Marriage Act 1955 does not consider them within its scope.

Birth as Conclusive Proof and Legitimate Children

Birth of a child is primarily the choice of married couples on their mutual agreement. Reason being that child is a combination of female egg (gamete) and male egg (sperm) which creates another human being. In birth of a child, one thing is certain, *i.e.*, 'maternity', a woman/mother who gives birth to the child. Hence, mother and child relationship is a certain phenomenon meaning thereby it is a matter of fact. If such birth of a child is from the woman who is within her legal wedlock then neither the birth of such a child nor her status of being mother is questioned, socially or legally. If by any chance, the woman who mothered the child is not within her legal wedlock or presumed to be in marriage relationship other than the birth of such a child then her status of being

1 AIR 2008 SC 1420.
2 AIR 2010 P&H 137.
3 AIR 2010 SC 2933, p. 2938.
4 AIR 2008 SC 1193.
5 AIR 2007 MP 242.

mother is questioned. But, the male/man who has fathered the child, with his male egg to the woman who has given birth to the child, is a matter of presumption to be decided on certain conclusive facts and to be provided with legal protection. It means that 'paternity' is an issue in law, which needs to be decided based on conclusive facts and law applicable to such issue. Therefore, the question of legitimacy between the mother and the child is never an issue in law; as it is a fact that a particular woman has given birth to a child, which cannot be denied in either way. Whether this woman is in a marriage relationship or not is a matter of law or custom. Whether relationship between this woman and the man, who has fathered the child, is legitimate or not is a matter of law and custom. But, when a child is born to such a woman and a man, it is the law which needs to protect not only the interest of these two heterosexuals; but also the child born to them. On a larger note, it is the marriage institution which takes care of the interest of mother, father, and the children and provides them social recognition and legal protection. However, it is the society which decides as to what kind of relationship among the heterosexuals needs to be recognised and accordingly the law protects such relationships. Therefore, law recognises mother-child relationship as legitimate; but puts on legal scrutiny the father-child relationship to examine whether the birth is within the wedlock, or recognises such relationship and accordingly confirms status on them which attracts certain rights including property rights on the children, who are born to such relationship. In such a situation, religious and customary rites, personal law and public law, such as Indian Evidence Act do apply to the father-child and/or mother-child relationships. Whereas judicial scrutiny of the customary practices and legal provisions applicable to the parties becomes crucial in confirming upon them legitimacy of their relationship and to fill the gap.

Birth of a child is a matter of fact, if it is from a validly solemnized marriage whereas confirming legitimacy is a matter of law and policy of the state. Marriage becomes the focal point from where birth gets into existence; and if it is within legal fold, law confirms on it legitimacy as status. Substantive as well as procedural laws consider validity of such marriage as conclusive proof to legitimize birth of a child and confirming certain rights upon that child. Therefore, birth of a child during marriage is considered a conclusive proof of legitimacy under Section 112 of the Indian Evidence Act 1872.[1] In *Bhima v. Dhulapp*[2] the court held that Section 112 of the Indian Evidence Act is based on the principle that when a particular relationship, such as marriage, is shown to exist, then its continuance must *prima facie* be presumed. The intention of law makers while designing Section 112 of the Act seems to be of two-fold, *i.e.*, (i)

1 Section 112 of the Indian Evidence Act 1872, which reads as "*the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten*".

2 (1904) 7 Bom LR 95.

there must be a marriage; once the validity of marriage is proved; and (ii) presumption of legitimacy- legal fiction; there is strong presumption about the legitimacy of children born from that wedlock. However, such presumption can only be rebutted by strong, clear, satisfying and conclusive evidence. First, there must be a marriage, is the concern of personal law. Each personal law has certain requirements including religious and customary rites and ceremonies to be followed. Based on the fulfilment of these requirements and observance of such religious and customary rites and ceremonies, a marriage attains the status of being legal wedlock. Secondly, marriage whether Hindu, Muslim or civil is considered to be a union of two heterosexuals who have reproductive instincts. So there is a strong presumption that if these two heterosexuals consummate their relationship, there is likely to be birth of a child. If such birth is outcome of a legal wedlock, then legitimacy of such child is not questioned, whereas if such birth is out of non-legal wedlock or such a relationship which neither has social recognition nor legal protection, the birth of such a child is open for legal scrutiny and then legal fiction comes into play. Section 16 of the Hindu Marriage Act 1955 provides scope and application of such legal fiction while considering birth of children in certain cases and confirming upon them status and certain property rights. The Supreme Court in *P.E.K. Kalliani Amma v. K. Devi*[1] held that "*Section 16 contains a legal fiction. It is by a rule of fictio juris that the legislature has provided that children, though illegitimate, shall, nevertheless, be treated as legitimate notwithstanding that the marriage was void or voidable*"[2]. Further, the Supreme Court in *Chilukuri Venkateswarlu v. Chilukuri Venkatanarayana*[3] held that "*the presumption under this Section is a conclusive presumption of law which can be displaced only by proof of non-access between the parties to the marriage at a time when according to the ordinary course of nature the husband could have been the father of the child. Access and non-access connote the existence and non-existence of opportunities for marital intercourse. Non-access can be proved by evidence direct or circumstantial though the proof of non-access must be clear and satisfactory as the presumption of legitimacy is highly favoured by law*"[4].

While summarizing on the issue of birth as conclusive proof towards legitimacy of child, it is pertinent to mention that marriage, being a social institution, is governed by personal law of the parties and remains in personal domain of the parties with due legal protection. Whereas any child born from a non-marriage relationship, or presumed to be marriage, or relationship in the nature of marriage, is the subject matter of state's made law, whose status is decided in accordance with law and based on the status so confirmed in law, such child gets property rights against the parent/s. But, while deciding status of any child under Hindu personal law applicable to such child through proper application of law is the area where personal and public laws applied together

1 (1996) 4 SCC 76: AIR 1996 SC 1963.
2 II (1996) DMC 82 (SC).
3 AIR 1954 SC 176.
4 AIR 1954 SC 176, p. 178.

which largely depends on presumption of public morality and public policy in existence at that point of time. The Supreme Court in *Sham v. Sanjeev*[1] held that in a civilised society it is imperative to presume the legitimacy of a child born during continuation of a valid marriage and whose parents had 'access' to each other. It is undesirable to enquire into the paternity of a child whose parents 'have access' to each other. In *S.P.S. Balasubramanyam v. Suruttayan*,[2] the Supreme Court held that "*if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Indian Evidence Act that they live as husband and wife and the children born to them will not be illegitimate*"[3].

Status of Children under the Hindu Marriage Act and their Rights

Under Hindu law the issue of legitimacy of children is considered to be having both procreation/conception and birth from a legal wedlock as the key factors. However, under English law birth alone of a child from the wedlock is sufficient to consider the child as legitimate. In contemporary Hindu society, there is no discrimination made among male and female children with regard to legitimacy, they have been treated at par, and except inheritance laws, other laws are also gender neutral. In 1955, Indian law makers had imported English concept of legitimacy while drafting Hindu Marriage Act. The law relating to marriage among Hindus was amended and codified in 1955 in the form of the Hindu Marriage Act. The Act introduced a uniform and codified law among Hindus to govern their marriage in a monogamous manner. Among many other new developments, divorce among Hindus was also introduced and it was accepted by the Hindu society. On and after May 18, 1955, the day on which the Hindu Marriage Act 1955 (Act 25 of 1955) came into force, so long as a marriage qualifies all conditions mentioned in Section 5 of the Act and solemnised with due ceremonies as provided in Section 7 of the Act, any child born to such a wedlock is considered as legitimate child and such child shall have all rights in the family of his/her father. Section 11 of the Hindu Marriage Act 1955 provides that any marriage solemnized after the commencement of the Hindu Marriage Act 1955 which contravenes any provision laid in clauses (i), (iv) and (v) of Section 5 of the Act shall be null and void. A court of competent jurisdiction may, on a petition presented by either party thereto against the other party, declare the marriage as null and void by a decree of nullity if it contravenes any of the conditions specified in these clauses. Further, Section 12 of the Act provides grounds for nullity of marriage, wherein any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any ground provided thereunder. Sections 11 and 12 of the Hindu Marriage Act exhibit that there are two categories of legitimate children: (i) child born out of legal wedlock- this child is legitimate as a matter of fact, because his parents' marriage is socially recognised and legally protected; (ii) child born from the marriage which was

1 (2009) 12 SCC 454.
2 AIR 1992 SC 756.
3 *Ibid*., p. 757.

either found to be null and void and was annulled by a decree of the court of competent jurisdiction on the grounds mentioned in Section 12 of the Hindu Marriage Act; hence, the child who in normal course of things would have been illegitimate but due to amended Act of 1976 the child shall be considered as legitimate, *i.e.*, 'legitimate in the eyes of law'. However, this legitimacy is limited to the extent of: first, removing social stigma from the child who is not at fault but born to the parents as of their choice; secondly, keeping in view financial hardships of the child in future, he has been provided certain property rights under Section 16(3) of the Hindu Marriage Act. Therefore, confirming legitimacy upon the children born from the marriages which are either found to be null and void or annulled by a decree of the court are legitimate 'in law' but not legitimate 'in fact'. Hence, they cannot be considered as members of their putative father's joint family or members of his coparcenary. Eventually, sub-section (1) of Section 16 of the Act provides legitimacy to children born out of void marriages, sub-section (2) of Section 16 provides legitimacy to children born out of voidable marriages and sub-section (3) of Section confirms certain property rights to children from marriages which are declared null and void under Section 11 of the Act or annulled by a decree of nullity under Section 12 of the Act. However, such property right can be claimed only from the parents of such children.

Marriage among Hindus was considered a holy union. It was not a contract but a *Samskara* or sacrament. However, with the advent of times, keeping in view the developments in Hindu society, correspondingly the law making process and change in behavioural pattern among Hindus, marriage among Hindus became a social contract while upholding customary and religious sanctity. But, in this transition, marriage as social institution has undergone sea changes, confirming status on children born from defectively or incompletely solemnized marriages among the parents. For this purpose, Section 16 of the Act has been consistently attacked on various occasions through numerous judicial scrutinies while interpreting it in beneficial manner in favour of children born to marriages which were null and void or annulled by a decree of nullity. One such case was of *P.E.K. Kalliani Amma v. K. Devi*,[1] where the court analyzed original Section 16 with amended Section 16 of Act and held that "*Section 16 was earlier linked with Sections 11 and 12. On account of the language employed in unamended Section 16 and its linkage with Section 11 and 12, the provisions had the effect of dividing and classifying the illegitimate children into two groups without there being any nexus between the statutory provisions and the object sought to be achieved thereby. It is to be seen whether this mischief has been removed. Section 16(1) of the Act begins with a non obstante clause*"[2]. Similarly, in number of cases[3] the court held that "*non*

1 AIR 1996 SC 1963: (1996) 4 SCC 76, pp. 101-102.

2 *Ibid.*, p. 101.

3 *Union of India v. G.M. Kokil* AIR 1984 SC 1022: *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* (1986) 4 SCC 447: *R.S. Raghunath v. State of Karnataka* (1992) 1 SCC 335; *P.E.K. Kalliani Amma v. K. Devi* (1996) 4 SCC 76, p. 102.

obstante clause is sometimes appended to a section in the beginning, with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision or Act mentioned in that clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provision indicated in the non obstante clause will not be an impediment for the operation of the enactment."[1] Further, the phrase "*notwithstanding that a marriage is null and void under Section 11*" employed in Section 16(1) indicates undoubtedly the following: (a) Section 16(1) stands delinked from Section 11; (b) Provisions of Section 16(1) which intend to confirm legitimacy on children born of void marriages will operate with full vigour in spite of Section 11 which nullifies only those marriages which are held after the enforcement of the Act and in the performance of which Section 5 is contravened; (c) Benefit of legitimacy has been conferred upon the children born either before or after the date on which Section 16(1) was amended; (d) Mischief or the vice which was the basis of unconstitutionality of unamended Section 16 has been effectively removed by amendment; (e) Section 16(1) now stands on its own strength and operates independently of other sections with the result that it is constitutionally valid as it does not discriminate between illegitimate children similarly circumstanced and classifies them as one group for conferment of legitimacy. Hence, Section 16, in its present form, is, therefore, not ultra vires to the provisions of the Constitution of India.[2]

In *Ampthill Peerage*[3] Lord Simon of Glaisdale observed, "*legitimacy is a matter of status. It is the condition of belonging to a class in society the members of which are regarded as having been begotten in lawful matrimony by the men who the law regards as their fathers. Motherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition. Fatherhood, by contrast, is a presumption. A woman can have sexual intercourse with a number of men any of whom may be the father of her child; though it is true that modern serology can sometimes enable the presumption to be rebutted as regards some of these men. The status of legitimacy gives the child certain rights both against the man whom the law regards as his father and generally in society.*"[4] Further, in an Australian case[5], Barwick, C.J. held that "*I cannot attribute any other meaning in the language of a lawyer to the word 'legitimate' than a meaning which expresses the concept of entitlement or recognition by law.*"[6] Further, the Supreme Court of India in *P.E.K. Kalliani Amma v. K. Devi*[7] held that "*illegitimate children are children as are not born*

1 *P.E.K. Kalliani Amma v. K. Devi* (1996) 4 SCC 76, p. 102.
2 *Ibid.*
3 [1977] AC 547: [1976] 2 All ER 411; *P.E.K. Kalliani Amma v. K. Devi* (1996) 4 SCC 76: AIR 1996 SC 1963.
4 *Supra* n. 1, pp. 96-97.
5 *Salemi v. Minister for Immigration and Ethnic Affairs* [1977] 14 Aus LR 7; *P.E.K. Kalliani Amma v. K. Devi* (1996) 4 SCC 76: AIR 1996 SC 1963.
6 *Supra* n. 1, p. 97.
7 *Supra* n. 1.

either in lawful wedlock, or within a competent time after its determination. It is on account of marriage, valid or void, that children are classified as legitimate or illegitimate. That is to say, the social status of children is determined by the act of their parents. If they have entered into a marriage, the children are legitimate; but if the parents commit a folly, as a result of which a child is conceived, such child who comes into existence as an innocent human baby is labelled as illegitimate. Realizing this situation, Parliament enacted Section 16 of the Hindu Marriage Act. The object of Section 16 was to protect legitimacy of children born of void or voidable marriages."[1] Thus, the Hindu Marriage Act 1955 is a beneficent legislation and has to be interpreted in such a manner that it advances the very object of the legislation. In fact, the Act intends to bring about social reforms. Conferment of social status of legitimacy on a group of innocent children, who are otherwise treated as bastards, is the prime object of Section 16.[2] Hence, it is evident that Section 16 of the Act intends to bring about social reforms, conferment of social status of legitimacy on a group of children, who are otherwise treated as illegitimate, as its prime object.[3]

Under original Hindu Marriage Act 1955, no heed was paid towards confirming upon children born out of null and void marriage or the marriage which was annulled by a decree of nullity, as a status of legitimate child; hence, they remained illegitimate and suffered from social stigma which denied them of property rights. For reflective understanding of the readers, Section 16 of the original Act is reproduced here which reads as: "*Section 16. Legitimacy of children of void and voidable marriages- Where a decree of nullity is granted in respect of any marriage under Section 11 or Section 12 any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity*: *Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents*".

Such state of affairs continued until 1976 when Section 16 of the Act[4] was amendment confirming upon children born out of null and void marriage or

1 *P.E.K. Kalliani Amma v. K. Devi* (1996) 4 SCC 76, p. 97.

2 *Ibid.*, p. 100.

3 *Bharatha Matha v. R. Vijaya Renganathan* AIR 2010 SC 2685, p. 2689.

4 Substituted by Act 68 of 1976, Marriage Laws (Amendment) Act 1976, Section 11, w.e.f. 27.5.1976. For ready reference amended Section 16 is reproduced here which reads as: Section 16. Legitimacy of children of void and voidable marriages-(1) *Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such a child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976) and whether or not a*

annulled by a decree of nullity, legitimacy as status removing social stigma from such children who were not the party of such birth on their own but for the parents, they were paying the price of illegitimacy. Section 16 of the Act has not only confirmed status being legitimate on such children but also provided them with property rights from the immediate parents. Finally, the Hindu Marriage Act underwent important changes by virtue of the Marriage Laws (Amendment) Act 1976, which came into force with effect from May 27, 1976. Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect, *per se*, or on being so declared or annulled, as the case may be, of bastardizing the children born of the parties to such marriage.

The legitimate status of the children which depended very much upon the marriage between their parents being valid or void, thus turned on the act of the parents over which the innocent child had no hold or control. But, for no fault of it, the innocent baby had to suffer a permanent setback in life and in the eyes of society by being treated as illegitimate. A laudable and noble act of legislature is seen in enabling Section 16 which puts an end to a great social evil. At the same time, Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children is concerned, to the properties of the parents only.[1]

It seems relevant to bring an analogy adopted by the Karnataka High Court in *Sarojamma v. Neelamma*,[2] where the court held that when the object of sub-sections (1) and (2) of Section 16 of the Hindu Marriage Act 1955 is to confer a status of legitimacy to a child who is born out of wedlock which is found to be null and void or which can be annulled by a decree of nullity under Section 12 of the Act, it would not be right to limit the properties of the parents referred to under sub-sections (1) and (2) of Section 16 of the Act only to the self-acquired properties of the parents and exclude either the joint family or the ancestral

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decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.
(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.
(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

1 *Jinia Keotin v. Kumar Sitaram Manjhi* 2003 (1) SCC 730, p. 733.

2 AIR 2005 NOC 422: 2004 (2) KCCR 1161.

properties of the parents. It should not make any difference whether it is a joint family property or a self-acquired property of the parent. Once such a child is given the status of legitimacy, as for all purposes, the child should be treated at par with the other children born to the parents whose marriage is valid in law. The child born out of such marriage, which is given the status of legitimacy under Section 16 of the Act, in no way can be held responsible for the contravention of law. They should be given a right in the properties of their parents and cannot be deprived of the right to take his/her share either in the joint family property or ancestral properties of the parents. The object of Section 16 of the Act is intended to protect the interest of such children both in regard to their status and the right to succeed to the estate of their parents. Such a beneficial provision, which intended to protect such children, should be given a liberal and wider meaning, which would serve the object of the legislation. Further, it is also necessary to point out that such a child of a void or voidable marriage, should be treated as related to its parents within the meaning of Section 3(1)(j) of the Hindu Succession Act 1956 by virtue of Section 16 of the Hindu Marriage Act 1955. The proviso given to Section 3(1)(j) of the Act of 1956 must be confirmed to those children who are not clothed with legitimacy under Section 16. Therefore, by virtue of Section 16(1) of the Act of 1955 as amended in 1976, the illegitimate son can be equated with his natural sons and treated as coparceners for the properties held by the father whether the properties are originally joint family property or not. However, the only limitation is that during the lifetime of the father, the illegitimate son of a void marriage is not entitled to seek for partition and he can seek for partition only after the death of his father.[1]

The Supreme Court in *Jinia Keotin v. Kumar Sitaram Manjhi*[2] held that Section 16 of the Act though enacted to legitimize children who would otherwise suffer by becoming illegitimate, expressly provides in sub-section (3) thereof for a provision with a non-obstante clause stipulating specifically that nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12 of the Act. Further, it was held that there is no room for according upon such children who, but for Section 16 of the Act, would have been branded as illegitimate, any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount not only to violate the provision specifically engrafted in sub-section (3) of Section 16 of the Act but also attempt to relegislating on the subject.[3]

Legal Disability of Status among Children Born out of Other Relationships

Children born out of null and void marriages or marriages which are annulled by a decree of nullity are governed under Sections 11 and 12 of the

1 AIR 2005 NOC 422, pp. 422-423.
2 2003 (1) SCC 730.
3 *Ibid.*, p. 733.

Hindu Marriage Act 1955 respectively and they have been provided with status being legitimate under sub-section (1) and sub-section (2) of Section 16 of the Hindu Marriage Act 1955. However, children born from other relationships or marriages which are not covered under Sections 11 and 12 of the Act still remained as illegitimate children. In *Reshamlal Baswan v. Balwant Singh Jwalasingh Punjabi*[1] the court held that Section 16 does not entitle the benefit to children born out of an illicit relationship as there was no marriage between their parents. The benefit under Section 16, even after the 1976 amendments, is available only where there is a marriage but is hit by Section 11 of the Act. In *Ramayammal v. Muthammal*[2] case, the court held that where a third party is successful in challenging the marriage as void as per Section 11 of the Hindu Marriage Act in other proceedings, it would not be deemed that the child of such marriage is legitimate. In *Meenal Sahu v. Krishna Kumar Sahu*[3] the court held that on a plea of the husband that, the wife had concealed of her earlier marriage and that marriage was declared null and void. But, she remarried during pendency of a case as the decree of nullity of marriage in favour of the wife by itself does not give any entitlement for remarriage unless conditions under Section 15 of the Act are satisfied. Therefore, marriage performed between the parties was manifestly illegal and was not a marriage at all in the eyes of law.[4] Further, a marriage which is void as being in contravention of the provisions of Section 15 of the Act either before or after its amendment, is not covered by sub-section (1) of Section 16 of the Act and the children would remain illegitimate whether or not the marriage is declared null and void by a decree of nullity.[5] Furthermore, in *Anurag Mittal v. Shaily Mishra Mittal*,[6] *the Supreme Court has rendered an extensive judgment clarifying the law pertaining to remarriage of divorced persons. The judgment throws light on the circumstances in which second marriage would be valid. The court in this case deals with Section 15 of the Hindu Marriage Act 1955 which puts a condition on a divorcee in contracting a second marriage.* The cause of action in the case arose when the appellant married the respondent even before the appeal was withdrawn from the High Court in the case. The court held that restriction placed on a second marriage in Section 15 of the Act till the dismissal of an appeal would not apply to a case where parties have settled and decided not to pursue the appeal.[7]

Another example could be live-in relationships among heterosexuals in India. As on today, live-in relationship is not recognised under the Hindu Marriage Act 1955; consequently, children born from such relationships are not covered under Section 16 of the Hindu Marriage Act 1955. Hence, children born from such relationships remain illegitimate. The amended Section 16 of

1 1994 (2) HLR 188 (MP).
2 AIR 1974 Mad 321.
3 AIR 2017 Chh 206.
4 *Meenal Sahu v. Krishna Kumar Sahu* AIR 2017 Chh 206, p. 208.
5 *Kanwaljit v. N.K. Singh* AIR 1961 P&H 331.
6 AIR 2018 SC 3983: (2018) 9 SCC 691.
7 *Ibid.,* p. 3991.

the Act provides no relief to such children. In some cases[1], the Supreme Court has recognised long lasting relationship among adult heterosexuals by giving them the benefit of presumption under Indian Evidence Act 1872. On close scrutiny of these cases, one can make out that the Apex Court has given benefit to those couples or cohabitees whose marriages were either found to be null or void or annulled by a decree of nullity under Section 11 and 12 of the Hindu Marriage Act 1955 respectively. Meaning thereby is that in these marriages, there had been an attempt to marry by a minimum one of the parties. Such attempt of the party or parties facilitated the court to presume certain fact of relationship and cohabitation, as husband and wife, among them besides social recognition. Hence, such marriages have been considered by the Apex Court as one class of marriage and provided with legal protection to the parties involved and the same protection has been extended to the children born from such marriages. But explicitly, there is no provision in the Hindu Marriage Act 1955 to protect live-in relationship among heterosexuals. Thinking about live-in relationship among homosexuals is far from the legislative imagination, as marriage among homosexuals in the country is not yet permitted by the existing laws. At the same time, we cannot ignore the possibility of having child by these homosexuals by using surrogacy, or adoption or any other medico-legal instrument. Therefore, the existing laws must have suitable provisions to recognise and protect live-in relationships in the country. Similarly, children born from such relationships and their property rights against the cohabitees have no answer in the Hindu Marriage Act 1955. Hence, there is also a need to have suitable law to recognise and protect the interest and rights of such children.

Children from Void and Voidable Marriages and their Property Rights

In normal course of things birth of a child in the family is expected from the legal wedlock of the parents. Section 5 of the Hindu Marriage Act 1955 provides conditions for a Hindu marriage and Section 7 of the Act provides ceremonies for a Hindu marriage. A marriage where these sections have been followed and the marriage is solemnized properly. Such a marriage is recognised by the Hindu society and is protected by the Hindu Marriage Act 1955. A child who is born from the marriage which is socially recognised and legally protected is a legitimate *in fact*, he is a coparcener in his father's coparcenary; he is a Class-I heir to his father, and legal heir to his mother. But, when a child is born from a null and void marriage or marriage which is annulled by a decree of nullity, such a child is having a different kind of status under Hindu law. Such a child is not legitimate *in fact* but legitimate *in law*. Legitimacy as status is confirmed on such children under either sub-sections (1) or (2) of Section 16 of the Hindu Marriage Act 1955. In such circumstances,

1 *Lata Singh v. State of UP* AIR 2006 SC 2522: *Madan Mohan Singh v. Rajni Kant* AIR 2006 SC 2522: *S.P.S. Balasubramanyam v. Suruttayan @ Andali Padayachi* AIR 1992 SC 756: *Tulsa v. Durghatiya* AIR 2008 SC 1193: *Vidyadhari v. Sukhrana Bai* AIR 2008 SC 1420: *Revanasiddappa v. Mallikarjun* AIR 2011 SC (Supp) 155.

children born to null and void marriages or marriages annulled by a decree of nullity are neither coparcener nor Class-I heirs to their putative father but they are legal heir to their respective mother. Therefore, under this section of the paper, the authors would try to explore the status of children born from void and voidable marriages and their property rights under present Hindu law supporting his arguments with the relevant case law.

While pondering on whether illegitimate child can acquire/claim as of a matter of right, a share in the joint family property, the Andhra Pradesh High Court dealt with this question in *G. Nirmalamma v. G. Seethapathi*[1] wherein the court held that under Section 16(3) of the Act of 1955 an illegitimate child would be entitled to succeed/claim a share in the joint Hindu family property as well. This view of the Court was contrary to the law laid down by the Supreme Court in *Jinia Keotin v. Kumar Sitaram Manjhi*[2]. Further, in *Neelamma v. Sarojamma*,[3] the Supreme Court while reiterating its earlier decision held that an illegitimate child cannot succeed/claim a share in the joint Hindu family property. Such illegitimate child would only be entitled to a share in the self-acquired property of the parents.

Further, the property rights of illegitimate children to their father's property were recognized in the cases of Sudras to some extent by the court in *Kamulammal v. T.B.K. Visvanathaswami Naicker*[4], the Privy Council held that "*when a Sudra had died leaving behind an illegitimate son, a daughter, his wife and certain collateral agnates, both the illegitimate son and his wife would be entitled to an equal share in his property. The illegitimate son would be entitled to one-half of what he would be entitled had he been a legitimate issue. An illegitimate child of a Sudra born from a slave or a permanently kept concubine is entitled to share in his father's property, along with the legitimate children*"[5]. Further, in *P.M.A.M. Vellaiyappa Chetty v. Natarajan*[6], it was held, "*the illegitimate son of a Sudra from a permanent concubine has the status of a son and a member of the family and share of inheritance given to him is not merely in lieu of maintenance, but as a recognition of his status as a son; that where the father had left no separate property and no legitimate son, but was joint with his collaterals, the illegitimate son was not entitled to demand a partition of the joint family property, but was entitled to maintenance out of that property*"[7]. Sir Dinshaw F. Mulla, speaking for the bench, observed, "*though such illegitimate son was a member of the family, yet he had limited rights compared to a son born in a wedlock, and he had no right by birth. During the lifetime of the father, he could take only such share as his father may give him,*

1 AIR 2001 AP 104.
2 2003 (1) SCC 730. See also *Minor Gopi v. Rathinam* I (2002) DMC 90 (Mad); *Pediredla Appayamma v. Kostu Apparao* 2003 (1) HLR 47 (AP); *Rajeshwari v. Silvia* 2003 (2) HLR 59 (Kant).
3 (2006) 9 SCC 612.
4 AIR 1923 PC 8.
5 *Ibid*.
6 AIR 1931 PC 294.
7 *P.M.A.M. Vellaiyappa Chetty v. Natarajan* AIR 1931 PC 294, p. 298.

but after his death he could claim his father's self-acquired property along with the legitimate sons"[1]. Whereas in *Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh*[2], the facts were that "*the Raja was a Sudra and died leaving behind legitimate son and daughter, an illegitimate son and three widows. The legitimate son had died and the issue was whether the illegitimate son could succeed to the property of the Raja. The Privy Council held that the illegitimate son was entitled to succeed to the Raja by virtue of survivorship*"[3]. Further, in *Gur Narain Das v. Gur Tahal Das*,[4] a bench comprising Justice K.B.S. Sir Fazal Ali and Justice Vivian Bose agreed with the principle laid down in *P.M.A.M. Vellaiyappa Chetty v. Natarajan*[5] and supplemented the same by stating certain well-settled principles to the effect that "*firstly, that the illegitimate son does not acquire by birth any interest in his father's estate and he cannot therefore demand partition against his father during the latter's lifetime; secondly, that on his father's death, the illegitimate son succeeds as a coparcener to the separate estate of the father along with the legitimate son(s) with a right of survivorship and is entitled to enforce partition against the legitimate son(s); and thirdly, that on a partition between a legitimate and an illegitimate son, the illegitimate son takes only one-half of what he would have taken if he was a legitimate son*."[6] However, the bench was referring to those cases where the illegitimate son was of a Sudra from a continuous concubine. Furthermore, in *Singhai Ajit Kumar v. Ujayar Singh*[7], the main question was whether an illegitimate son of a Sudra vis-a-vis his self-acquired property, after having succeeded to half-share of his putative father's estate, would be entitled to succeed to the other half share got by the widow. The bench referred to Ch. 1, S. 12 of the Yajnavalkya (Mitakshara) and the cases of *Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh*[8] and *P.M.A.M. Vellaiyappa Chetty v. Natarajan*[9] and concluded that "*once it is established that for the purpose of succession an illegitimate son of a Sudra has the status of a son and that he is entitled to succeed to his putative father's entire self-acquired property in the absence of a son, widow, daughter or daughter's son and to share along with them, we cannot see any escape from the consequential and logical position that he shall be entitled to succeed to the other half share when succession opens after the widow's death*."[10]

While relying on presumption of long lasting relationship among the parents, the court in *Radhakrishnan v. Balakrishna*[11] held that "*since even illegitimate*

1 *P.M.A.M. Vellaiyappa Chetty v. Natarajan* AIR 1931 PC 294, p. 298.
2 1889-90 IA 128.
3 *Ibid*.
4 AIR 1952 SC 225.
5 *Supra* n. 4, p. 227.
6 *Supra* n. 2.
7 AIR 1961 SC 1334.
8 *Supra* n. 3.
9 *Supra* n. 1.
10 *Singhai Ajit Kumar v. Ujayar Singh* AIR 1961 SC 1334, p. 1337.
11 2002 (1) HLR 482 (Mad).

children can inherit from the properties of their parents irrespective of the fact whether there had been a valid marriage in between his father and mother, it is sufficient if it comes to be proved that the claimant is born to his parents from out of their living together for a reasonable time"[1]. Further, in *Revanasiddappa v. Mallikarjun*,[2] the Supreme Court opined that "*with the amendment of Section 16(3), the common law view that the offsprings of marriage which is void and voidable are illegitimate 'ipso-jure' has to change completely. We must recognize the status of such children which has been legislatively declared legitimate and simultaneously law recognises the rights of such children in the property of their parents. This is a law to advance the socially beneficial purpose of removing the stigma of illegitimacy on such children who are as innocent as any other children*."[3] The Court further opined that "*in our view, in the case of joint family property such children will be entitled only to a share in their parents' property but they cannot claim it on their own right. Logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self-acquired and absolute property. In view of the amendment, we see no reason why such children will have no share in such property since such children are equated under the amended law with legitimate offspring of valid marriage. The only limitation even after the amendment seems to be that during the life time of their parents such children cannot ask for partition but they can exercise this right only after the death of their parents*."[4]

The Supreme Court in *Bhogadi Kannababu v. Vuggina Pydamma*[5] case held that it is a settled matter relating to the right of children born out of null and void marriage to inherit their father's property along with other heirs and is also entitled to obtain succession certificate.[6] However, in case of a woman married to a person who already has a living spouse is not entitled to maintenance and any share at all in benefits of deceased husband, but children born to her have right to get maintenance and other benefits.[7] Further, in the case of two wives claiming to be married to the deceased and children were born to both women from the deceased, though wife claiming to be first wife could not produce documentary evidence from public record to prove her marriage, yet second wife produced marriage certificate issued by the Marriage Registrar. Therefore, second wife being legally wedded wife of deceased would be entitled to succeed to his estate along with her children; however, first wife would not be entitled to

1 *Radhakrishnan v. Balakrishna* 2002 (1) HLR 482 (Mad).
2 AIR 2011 SC (Supp) 155.
3 *Revanasiddappa v. Mallikarjun* AIR 2011 SC (Supp) 155, para 33.
4 *Ibid*., para 35.
5 AIR 2006 SC 2403. See also *Gulabia v. Sitabiya* AIR 2006 (NOC) 1379 (All); *Sivaraman v. Rajeshwari* II (2005) DMC 581 (Mad); *Mahaveer v. Sukumar Tulajagonda* AIR 2013 (NOC) 331 (Kant); *Pediredla Appayamma v. Kostu Apparao* 2003 (1) HLR 47 (AP).
6 *Sarita Bai v. Chandra Bai* AIR 2011 MP 222. See also *Chandramathi K. v. B.N. Usha Devi* AIR 2013 Kant 1.
7 *Savitaben Somabhai Bhatiya v. State of Gujarat* AIR 2005 SC 1809.

succeed to estate of the deceased as her marriage was not proved; however, her children would be entitled to succeed to estate of the deceased upon presumption of legitimacy; and second wife would also be entitled to pension of deceased as per Maharashtra Civil Service Pension Rules 1982.[1]

Further, illegitimate son can be equated with his natural sons and treated as coparceners for the properties held by the father whether the property be originally joint family property or not. The only limitation attached is that during the lifetime of the father, the illegitimate son of a void marriage is not entitled to seek a partition. He can seek a partition only after the death of the father.[2] Whereas on partition of the ancestral property, it is regarded as the self-acquired and absolute property of the deceased father. If he leaves no male issue, the daughters from the first and second marriage shall share the property in equal shares.[3] Furthermore, when at the time of death of the father of a child of a void marriage, who was the sole surviving coparcener, who could deal with the property as his own in any manner he preferred subject to the right of the female members of the joint family. The coparcenary property in possession of such a sole surviving coparcener should be held to be his separate or exclusive property for the purpose of section 16(3).[4] Similarly, where coparcenary property devolved upon father as sole surviving coparcener and he had no legitimate son, in such a case property inherited by him is considered as his self-acquired property. An illegitimate son would be entitled for share in property of his father even though he had no right in coparcenary property.[5] Whereas a suit for partition and separate possession of joint Hindu family property, during lifetime of the father, by children born out of void marriage is not maintainable, as such right can be availed only by coparceners.[6] However, in *Balakrishnan v. Selvi,*[7] the court held that right of an illegitimate child extends to the self-acquired property of the parents only. Such child cannot seek right over properties as coparcener to the parents. Hence, in this case, no cause of action arose to illegitimate daughter claiming partition over property of her father during his lifetime. Further, in *Amrit Lal v. Savitri,*[8] the court held that "*a child begotten in a marriage which is otherwise null and void, even for the reason that either parent had a spouse living at the time of the second marriage, would have no right to coparcenary or other property of either parent, except that property which is their own parents. Thus, even ancestral property falling specifically to the share of a person, would devolve upon the son (and after 2005 also to the daughter) of that person, even if his children are born in a marriage otherwise void. Further, the suit property was not proved to be*

1 *Nanda Santosh Shirke v. Jayashree Santosh Shirke* AIR 2011 (NOC) 286 (Bom).
2 *Rasala Surya Prakasarao v. Rasala Venkateswararao* 1993 (1) HLR 233 (AP).
3 *Kusum Shivajirao Babar v. Hirabai Balwant Shingate* 2001 (1) HLR 59 (Bom).
4 *Chikkamma v. Suresh* (*N*) 2000 (2) HLR 464 (Kant).
5 *Vempati Anasuyamma v. Gouru Venkateswarloo* AIR 2008 AP 207: *Kenchegowda v. K.B. Krishnappa* AIR 2009 (NOC) 277 (Kant).
6 *N. Sadasiva v. Purushothama* AIR 2011 (NOC) 40 (Kant).
7 AIR 2018 Mad 103.
8 AIR 2017 P&H 130.

coparcenary property but was proved to be ancestral property, the children would be entitled to the property held by their father as his own share of ancestral property."[1] Furthermore, while considering a child born from second marriage as a member of the putative father's family, for benefiting him of compassionate appointment in government job, the Supreme Court in *Union of India v. V.R. Tripathi*[2] held that "*in sub-section (1) of Section 16 of the Hindu Marriage Act 1955, the legislature has stipulated that a child from a marriage which is null and void under Section 11 of the Act is legitimate, regardless of whether the birth has taken place before or after the commencement of Amending Act 68 of 1976. Legitimacy of a child born from a marriage which is null and void, is a matter of public policy so as to protect a child born from such a marriage from suffering the consequences of illegitimacy*"[3]. The Court further held that "*once Section 16 of the Hindu Marriage Act 1955 regards a child born from a marriage entered into while the earlier marriage is subsisting to be legitimate, it would not be open to the State, consistent with Article 14 to exclude such a child from seeking the benefit of compassionate appointment. Such a condition of exclusion is arbitrary and ultra vires.*"[4]

From the above-mentioned judicial pronouncements, and statutory analysis of relevant provisions on the issues, it can easily be concluded that Section 16(3) of the Hindu Marriage Act 1955 and Section 3(1)(j) of the Hindu Succession Act 1956 have been interpreted and applied in favour of children born from the marriages which were to be either null and void or annulled by a decree of nullity. But, one thing was made crystal clear that there has been an attempt to marry by a minimum one of the parties to such marriages or one of the parties fulfilled all conditions of marriage or religious and customary rites were followed by one of the parties. Further, the courts in India while dealing with these cases have not only uphold reasons and objects of amended Section 16 of the Hindu Marriage Act 1955 or real intention of law makers; but also have gone much ahead in propounding new jurisprudence through presumption of marriage and confirming legal status on children born to such relationships. These judicial efforts need appreciation from all of us, though much is yet to be achieved.

Children from Live-in Relationships and their Rights

The situation is different in case of children born from live-in relationships as they are not covered under Section 16 of the Hindu Marriage Act 1955. The fiction of legitimacy created by Section 16 of the Act of 1955 is limited to the extent of children born from null and void marriages or marriages which are annulled by a decree of nullity. The children born from such marriages are having right in property of their respective parents. The reason why children born from live-in relationships are not considered could be the absence of 'marriage' among the live-in partners, which cannot be proved to be solemnized

1 *Amrit Lal v. Savitri* AIR 2017 P&H 130, p. 138.
2 AIR 2019 SC 666.
3 *Ibid*., p. 671.
4 *Ibid*., p. 672.

as required by Sections 5 and 7 of the Hindu Marriage Act 1955. In live-in relationships which are 'by choice', there is no attempt to marry by the parties. On the other hand, in live-in relationships which are 'by circumstance', there has always been an attempt to marry by one of the parties, though the other party, who was having a living spouse and did not disclose this material fact to the live-in partner. Therefore, neither sub-section (1) nor sub-section (2) of Section 16 of the Hindu Marriage Act 1955 recognise such relationship of live-in partners; and at the same time these sub-sections do not confirm legitimacy as status on the children born from such relationships. Consequently, sub-section (3) of Section 16 does not provide any property rights or financial support to such children. The Supreme Court in *Revanasiddappa v. Mallikarjun*,[1] case held that "*however, one thing must be made clear that benefit given under the amended Section 16 is available only in cases where there is a marriage but such marriage is void or voidable in view of the provisions of the Act*"[2]. Further, the Supreme Court, while considering live-in relationship sympathetically, in *Indra Sarma v. V.K.V. Sarma*[3] held, that "*the (woman) appellant's status was that of a mistress, who is in distress, a survivor of a live-in relationship which is of serious concern, especially when such persons are poor and illiterate, in the event of which vulnerability is more pronounced, which is a societal reality. Children born out of such relationship also suffer most which calls for bringing in remedial measures by the Parliament, through proper legislation*"[4]. Furthermore, in *Nandakumar v. State of Kerala,*[5] the Supreme Court held that when a male of 20-year and a woman of 19-year married; such a marriage is not a void marriage under the Hindu Marriage Act. The said marriage may attract Section 12 of the Act, at the most, may be voidable at the instance of the party who is below the marriageable age. This Court relied on the fact that both the parties to the marriage are major. Even if they were not competent to enter into the wedlock, they have right to live together even outside wedlock. It would not be out of place to mention that 'live-in relationship' is now recognised by the legislature itself which has found its place under the provisions of the Protection of Women from Domestic Violence Act 2005. Therefore, position of children born from live-in relationships is somehow different in the eyes of law; and judicial system of the country also looks at these relationships differently.

Some judicial pronouncements are unveiled in the forth-coming lines. In *S.P.S. Balasubramanyam v. Suruttayan @ Andali Padayachi*,[6] the Supreme Court held that if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Indian Evidence Act that they live as husband and wife and the children born to

1 AIR 2011 SC (Supp) 155.
2 *Ibid.*, para 34.
3 AIR 2014 SC 309.
4 *Ibid.*, para 66.
5 AIR 2018 SC 2254.
6 AIR 1992 SC 756.

them will not be illegitimate. Further, in *P.E.K. Kalliani Amma v. K. Devi*,[1] the Supreme Court held in view of the legal fiction contained in Section 16 that the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents. Furthermore, in *Rameshwari Devi v. State of Bihar*,[2] where after the death of a government employee, children born illegitimately to the woman, who had been living with the said employee, claimed the share in pension/gratuity and other death-cum-retirement benefits along with children born out of a legal wedlock. The Supreme Court held that under Section 16 of the Act, children of void marriages are legitimate. As the employee, a Hindu, died intestate, the children of the deceased employee born out of void marriage were entitled to share in the family pension, death-cum-retirement benefits and gratuity. Whereas in *Jinia Keotin v. Kumar Sitaram Manjhi*,[3] the Supreme Court held that while engrafting a rule of fiction in Section 16 of the Act, the illegitimate children have become entitled to get share only in self-acquired properties of their parents. The same view has been approved and followed by the Supreme Court in *Neelamma v. Sarojamma*[4]. While taking live-in relationships seriously and equating them with presumption of marriage, the Supreme Court in *Lata Singh v. State of UP*[5] held, that live-in relationship is permissible only in unmarried major persons, heterosexual. The live-in relationship if continued for such a long time, cannot be termed in as '*walk in and walk out*' relationship and there is a presumption of marriage between them.[6] Hence, the Supreme Court in *Bharatha Matha v. R. Vijaya Renganathan*,[7] held, "*a child born of void or voidable marriage is not entitled to claim inheritance in ancestral coparcenary property but is entitled only to claim share in self-acquired properties, if any… further, question of inheritance of coparcenary property by the illegitimate children, who were born out of the live-in relationship, could not arise*"[8]. In *Chodon Puthiyoth Shyamalavalli Amma v. Kavalam Jisha*,[9] the court held that where the marriage was not solemnized between the parties and a child was born out of it. The child born was not legitimate. Therefore, Section 16 does not apply to the child born out of this relationship; and hence, the child is not entitled to share in property of the putative father.[10] Further, in *Vidyadhari v. Sukhrana Bai*,[11] the Supreme Court granted the inheritance to the four children born from a woman with

1 AIR 1996 SC 1963.
2 AIR 2000 SC 735.
3 (2003) 1 SCC 730.
4 (2006) 9 SCC 612.
5 AIR 2006 SC 2522.
6 *Madan Mohan Singh v. Rajni Kant* AIR 2010 SC 2933.
7 AIR 2010 SC 2685.
8 *Ibid.*, p. 2690.
9 AIR 2007 Ker 246. See also *Premi v. Ram Lok* AIR 2008 (NOC) 1861 (HP).
10 *Ibid.*
11 AIR 2008 SC 1420. See also *Revanasiddappa v. Mallikarjun* AIR 2011 SC (Supp) 155.

whom the man shared a live-in relationship during his lifetime, calling them *'his legal heirs'*. In *Madan Mohan Singh v. Rajni Kant*[1] the Supreme Court held that live-in-relationship is permissible only among unmarried major persons of heterogeneous sex and reiterated that if a man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption in favour of marriage and against concubinage under Section 114 of the Indian Evidence Act 1872, that they live as husband and wife and the children born to them will not be illegitimate; however, such presumption can be rebutted by leading unimpeachable evidence.

Present form of the Hindu Marriage Act 1955 does not provide scope for live-in relationships among the heterosexuals or homosexuals, though it protects void and voidable marriages among Hindus and also protects interest of children born from such marriages. However, in number of cases,[2] the Apex court has provided legal status to the parties to live-in relationships and also provided protection to the children born out of such relationships. Looking at growing number of live-in relationships among Hindus in the country indicates that such kind of relationships find their acceptability among young working peoples and members of upper-class of society. But, there is no legal provisions to protect such relationships except the Protection of Women from Domestic Violence Act 2005 which provides certain rights. However, a well-designed legislation to this effect or suitable amendments into the Hindu Marriage Act is the need of the hour.

Disposal of Property by the Parents

After understanding statutory provisions on providing legitimacy to children born to null and void marriages or marriages annulled by a decree of nullity under sub-sections (1) and (2) of Section 16 of the Hindu Marriage Act 1955 and confirming upon them property rights under sub-section (3) of Section 16 of the Act; and after reviewing judicial pronouncements on these sub-sections of Section 16 of the Act, the authors remind that the children who have been declared legitimate by amended Section 16 of the Act of 1955 (as amended in 1976) are entitled to get, to claim, to inherit property from their putative father and mother only. This looks to be a glossy picture in theory, but in practice, it does not appear to be the same, as there are numerous ways in which the parents may exclude their children from inheriting their properties. For instance, every Hindu male, who is governed by Mitakshara law, in the normal course of things, is entitled to hold: (a) ancestral property/coparcenary property, and (b) self-acquired property, with absolute ownership rights on them. In fact, under the Hindu law, a son (daughter of a coparcener who is governed by Mitakshara law after September 9, 2005 also), born to legal wedlock of his/her parents gets an interest by birth in his/her father's coparcenary property, also by virtue of

1 AIR 2010 SC 2933.

2 *S.P.S. Balasubramanyam v. Suruttayan* AIR 1992 SC 756*; P.E.K. Kalliani Amma v. K. Devi* AIR 1996 SC 1963*; Madan Mohan Singh v. Rajni Kant* AIR 2010 SC 2933; *Revanasiddappa v. Mallikarjun* AIR 2011 SC (Supp) 155; *Indra Sarma v. V.K.V. Sarma* AIR 2014 SC 309.

his/her birth becomes Class-I heir to his/her father, grandfather and great grandfather and confirms his/her share in the ancestral property of them, and also is entitled to hold the self-acquired property. Further, this son/daughter is also a legal heir to his/her mother. But, under Section 16 of the Hindu Marriage Act 1955, there is a category of legitimate children who are otherwise not legitimate, meaning thereby is that, there are two categories of legitimate children: (a) children who are *legitimate in fact*; and (b) children who are *legitimate in law*. Additionally, there is another category of children who are neither legitimate *in fact* nor *in law*, *i.e.*, children born from live-in relationships or born to other relationships which are not covered under Section 16 of the Hindu Marriage Act 1955.

So, present Hindu law has no other option but to treat these children (legitimate *in fact*, *in law*, neither *in fact* nor *in law*) differently with regards to their property rights. For example, a child born to the legal wedlock of his/her parents is a coparcener by birth in his father's coparcenary, Class-I heir to his/her father, grandfather and great grandfather whereas a child born to the marriage which was either found to be null and void or annulled by a decree of nullity is neither a coparcener by birth in his/her father's coparcenary nor a Class-I heir to the father or grandfather or great grandfather, though he/she is a legal heir to his/her mother. The point which appears to be more crucial here is that under Hindu law, past or present, a child who is born to a marriage which is found to be null and void or annulled by a decree of nullity, there is no father-child legal relationship which creates a joint property among them. Similarly, under Hindu law, though there is mother-child legal relationship, there is no joint property concept among them. Therefore, in both the situations, these children cannot claim any share from their parents' self-acquired property during their lifetime. The situation becomes more vulnerable in cases of the children born from live-in relationships or any other relationships which are not covered under section 16 of the Hindu Marriage Act 1955. Whereas, children born to the legal wedlock of their parents, being coparcener can ask for partition, even against the will or wish of their father, from the coparcenary property to which their father is a member, but this kind of status and right is not available to the children who are legitimate by virtue of Section 16 of the Hindu Marriage Act 1955 nor such a status and right is available to the children who are not covered by Section 16 of the Act.

Now, let's take a case of a putative father, who is a coparcener in his father's coparcenary governed by Mitakshara law, has ancestral property in hands and also has a lot of self-acquired properties to his credit. Normally, his children from legal wedlock are the coparceners and Class-I heirs. They will get a share in coparcenary and ancestral properties and along with their mother, they will also inherit their father's self-acquired properties. But, in case of legitimate children, by virtue of Section 16 of the Act, they are entitled to a share in his self-acquired property and his share from the coparcenary property if partition had taken place during his lifetime, which needs to be claimed through the intervention of the court; however, they are required to share such properties along with the children, who are legitimate *in fact*, born to their putative father.

Further, if the putative father does not behave as a prudent person, he can easily exclude these children by making a *Will* under Section 30 of the Hindu Succession Act 1956 of his self-acquired property, an interest in the coparcenary property and his share from the ancestral property, in favour of any one of his choice during his lifetime. As Section 30 of the Hindu Succession Act 1956 does not put a cap on limit as upto what extent a Hindu male or female can make a *Will* of his or her property, meaning thereby a Hindu can make a *Will* of his/her entire property even to the extent of excluding his Class-I heirs or legal heirs who otherwise can claim share into those properties on intestacy on their parents.

Same is the case of a female Hindu, under Hindu law, though there are well established principles of law that maternity is certain which creates mother-child relationship but there is no list of Class-I relatives with regards to a female Hindu under the Hindu Succession Act 1956. The Act provides relations who are legal heirs to a female Hindu. Hence, children born to marriages which are null and void or annulled by a decree of nullity or live-in relationships are attached with their mother and they are the legal heirs to their mothers; but if these Hindu females do not act as prudent persons then they can also exclude these children from inheriting their properties through the instrument of *Will*, as empowered by Section 30 of the Act. Therefore, in such circumstances, we need to think holistically about the children born to marriages which are null and void or annulled by a decree of nullity or live-in relationships or other relationships which are not covered under Section 16 of the Act; and to provide them due social recognition and legal protection through suitable law.

Though the judiciary is quite sensitive and dynamic on these issues resolving them timely and holistically, in many cases, either due to non-arability of law on the issue or different interpretation and application of existing law, the Apex Court invoked Article 142 of the Constitution of India. As law making process in the country is found to be very slow, especially in regards to personal laws; hence, many children are suffering from legal disability for no fault on their part, but the legal system does help them. The best example for this could be the Hindu Marriage (Amendment) Bill 2010, (it seeks to amend the Hindu Marriage Act 1955 and the Special Marriages Act 1954 which provides for irretrievable breakdown of marriage as an independent ground for divorce as well as grants women the right to a share in the property of their husbands), is still pending with the Parliament and has not seen the light of the day.

Inheritance Rights of the Children

A unique issue relating to inheritance rights of the children born to validly solemnized marriages, null and void marriages, marriages annulled by a decree of nullity and live-in relationships has raised a conflict in law, among certain provisions of the Hindu Marriage Act 1955 and the Hindu Succession Act 1956 on the one hand, and the judicial pronouncements on the other. The children born to the parents whose marriage was solemnized properly are legitimate *in fact*, coparcener and Class-I heirs to their father under Mitakshara law, and legal heirs to their mother. Further, the children born to the parents whose marriage

was null and void or annulled by a decree of nullity are legitimate *in law*; neither they are coparcener in their father's coparcenary nor Class-I heirs to their putative father, however, they are legal heirs to their mother. But, the situation is different in case of children born to live-in relationship. For example, sub-section (1) of Section 16 of the Hindu Marriage Act 1955 provides legitimacy to the children born, before or after the commencement of the Hindu Marriage (Amendment) Act 1976, to a marriage which is null and void under Section 11 of the Act. Similarly, sub-section (2) of Section 16 of the Hindu Marriage Act 1955 provides legitimacy to the children begotten or conceived before the decree of nullity is made under Section 12 of the Act. Further, sub-section (3) of Section 16 of the Act confirms upon any child of a marriage which is null and void or which is annulled by a decree of nullity, any rights in or to the property of the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not having the legitimate child of his parents. Furthermore, the courts in some cases have considered the children born to the parties, who are found to be living as the husband and wife for a considerable period of time and the society treated them as the husband and wife, as legitimate and provided them with inheritance rights. Hence, the Hindu Marriage Act 1955, being a social welfare legislation, confirms legitimate status on certain children under Section 16 of the Act and also provides property rights to such children. But, the said Act does not deal with inheritance law among Hindus. The law relating to inheritance among Hindus is provided by the Hindu Succession Act 1956.

The Hindu Succession Act 1956 provides intestate and testamentary succession which is based on the gender, relation and status. For the purpose of a male Hindu, there is a schedule attached with Section 8 of the Act which indicates the relations fall under which category or class of the heirs, such as heirs in Class-I and Class-II. Further, Section 18 of the Act provides preferential right of succession among 'full blood' heirs related to an intestate over the 'half-blood' heirs,[1] which reads as "*heirs related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of the relationship is the same in every other respect*".[2] Therefore, Section 18 of the Act makes it clear that if the intestate leaves behind his heirs related by full blood and half-blood, then the heir related by full blood will inherit in preference to the heir related by half-blood, subject however to the condition that the nature of the relationship should be the same in every other respect. The nature of relationship is defined in Section 3(1)(j) of the Hindu Succession Act 1956.[3]

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1 Section 3(1)(e)(i) of the Hindu Succession Act 1956 defines the terms 'full blood' and 'half-blood' which reads as "*two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife, and by half-blood when they are descended from a common ancestor but by different wives*".

2 Section 18 of the Hindu Succession Act 1956.

3 Section 3(1)(j) of the Hindu Succession Act 1956 which reads as "'*related*' *means related by legitimate kinship: Provided the illegitimate children shall be deemed to*

Therefore, after reading of Sections 3 and 18 of the Hindu Succession Act 1956 it can be presumed that relationship between the intestate[1] and the heir[2] must stand in legitimate status, irrespective of the fact that whether the legitimacy is *in fact* or *in law*. Even the woman through whom the child is to be reckoned to the intestate must hold the status being a legally wedded wife/widow. The nature of the heirs' relationship to the intestate should be with reference to the classification made in Section 8 read with Section 10 to 13 of the Act for a male Hindu and Sections 15 and 16 of the Act for a female Hindu respectively. Further, in case of heirs referred in Class-I of the schedule attached with Section 8 of the Act, the question of their relationship with the intestate (male Hindu) by half-blood does not arise, because except the mother of the intestate, all other heirs are descendants of the intestate. On the other hand, if the intestate is a female Hindu, the child born to her husband by another woman cannot be considered to be related to her by half-blood as there is no blood relationship at all in such a case.

With such an understanding of law relating to intestate succession among Hindus, if there are children born from legal wedlock, on one hand and children born from the marriages which are found to be null and void or marriages which are annulled by a decree of nullity, on the other. The children in both the situations are related to their father, a male Hindu (a unit of relationship); but also related through two females (two separate units of relationship). The existing Hindu law considers these children related to their father by legitimate kinship. If the status of these children is the same for the purpose of intestate succession among Hindus, then they are to be considered as "*if the nature of the relationship is the same in every other respect*". In such a situation, the preferential claim on intestacy of their father among the full blood and half-blood relations plays a vital role. Further, providing preference to the full blood relations under Section 18 of the Act is based on the principle of propinquity which says that "*closer a person to the intestate, more the chances of inheriting the property, remoter the person lesser the chances of inheriting the property of the intestate*". Furthermore, under the Hindu Succession Act whenever intestate succession for a male Hindu is opened and the property is divided among the Class-I heirs, it is opened in a particular manner, which denotes the mode and nature of the property in the hands of the legitimate claimants. The Section 19 of the Act provides such law which reads as "*if two or more heirs succeed together to the property of an instate, they shall take the property: (a) save as otherwise expressly provided in this Act, per capita and not per stripes; and (b)*

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be related to their mothers and to one another, and their legitimate, descendants shall be deemed to be related to them and to one another, and any word expressing relationship or denoting a relative shall be construed accordingly".

1 Section 3(1)(g) of the Hindu Succession Act 1956 defines the term 'intestate' which reads as "*a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect*".

2 Section 3(1)(h) of the Hindu Succession Act 1956 defines the term 'heir' which reads as "*heir means any person, male or female, who is entitled to succeed to the property of an intestate under this Act*".

as tenants-in-common and not as joint tenants."[1] Therefore, it becomes necessary to understand that receiving heirs who holds the property on intestacy of their father, whether they would hold it as tenants-in-common and not as joint tenants. So in such a situation, where legitimate claimants of intestate succession include children born to legal wedlock and other relationships, how would they inherit property on their father's intestacy and would they hold that property as tenants-in-common? If they are not the member of their father's family; whether the law would permit fragmentation of joint family property into small pieces and let it go out of the joint family fold. However, the preference given to the full blood relations over the half-blood relations and mode of succession of two or more heirs do not serve the purpose in today's times.

While relying on the beneficial interpretation and application of Section 16 of the Hindu Marriage Act 1955, and having in view best interest of the children, the court in *Sarita Bai v. Chandra Bai*,[2] case held that "*the children born out of null and void marriage would inherit their father's property along with other heirs and is also entitled to obtain succession certificate.*"[3] Further, in *Amrit Lal v. Savitri*,[4] the court held that "*the children would be entitled to the property held by their father as his own share of ancestral property.*"[5] Again in *Bharatha Matha v. R. Vijaya Renganathan*,[6] held that "*a child born of void or voidable marriage is entitled only to claim share in self-acquired properties*"[7]. These are some of the cases, where courts have found the children, born from null and void marriages or marriages annulled by a decree of nullity, entitled to the share on intestacy of their putative father along with succession certificate. On the other hand, the court in *Vidyadhari v. Sukhrana Bai*,[8] has granted inheritance rights to the four children born from a woman with whom the man (live-in partner) shared a live-in relationship during his lifetime and certified them as *'his legal heirs'*.[9] Further, in *Madan Mohan Singh v. Rajni Kant*[10] case, the Supreme Court while retreating its own judgment of *S.P.S. Balasubramanyam's* case (*supra*) held that "*the children born from live-in relationship will not be illegitimate*".[11]

Above-mentioned cases are the examples, where the courts not only protected the status of the children born from null and void marriages or marriages which are annulled by a decree of nullity or live-in relationship, by circumstances, but also provided them property rights from the putative father

1 Section 19 of the Hindu Succession Act 1956.
2 AIR 2011 MP 222.
3 *Ibid.,* p. 224.
4 AIR 2017 P&H 130.
5 *Ibid*., p. 138.
6 AIR 2010 SC 2685.
7 *Ibid.*, p. 2690.
8 AIR 2008 SC 1420.
9 *Vidyadhari v. Sukhrana Bai* AIR 2008 SC 1420, p. 1424.
10 AIR 2010 SC 2933.
11 *Madan Mohan Singh v. Rajni Kant* AIR 2010 SC 2933, p. 2938.

or the live-in partner. The courts have been treating such cases sympathetically and tried their best to protect best interest of the children. No one can raise any doubt that justice has been done while protecting property rights of these children, but when we look at the application of inheritance law, one must understand that the courts are propounding new jurisprudence of inheritance among the children born from different kind of relationships of their parents. The new jurisprudence of inheritance may have long lasting impact on existing inheritance laws. For example, whenever intestate succession among Hindus is opened, it is opened among the surviving relations of the propositus such as his widow, sons, daughters, mother, son of pre-deceased son, daughter of pre-deceased son, widow of pre-deceased son, etc., meaning thereby that the property of the propositus devolves among his surviving relations who are having legitimate relationship with him, either by birth or by adoption or by marriage. At the same time, the property which is subject to the intestacy is not the property to be divided only among the relations of one degree/generation, it may be divided among the relations of more than one degree/generation of its ascending or descending order. The law of intestate succession in case of a male Hindu is laid down in the Hindu Succession Act 1956. This Act considers only legitimate relations among the propositus and the surviving heirs. The issue for our consideration comes when a child who is not legitimate under the provisions of the Hindu Succession Act 1956 but such child is considered legitimate under the Hindu Marriage Act 1955. This child is provided with limited property rights under Section 16 of the Hindu Marriage Act and granted succession certificate by the court. So in such cases, whether the provisions of the Hindu Succession Act 1956 for the execution of such decree of succession certificate would apply or such cases would be governed by other law, as special cases?

Further, the child who is not legitimate *in fact*, but is legitimate *in law*, is not a coparcener in his/her putative father's family, but is a member of his/her putative father's family; is not a Class-I heir to his/her putative father but is a legal heir to his/her putative father; is not a full blood relative to his/her putative father along with the children born from his legal wedlock but is a half-blood relative to them. If the provisions of the Hindu Succession Act 1956 apply for the execution of such succession certificate, the children born from validly solemnized marriages and the children born from null and void marriages or marriages which are annulled by a decree of nullity or live-in relationship, by circumstances, would inherit the property from their father and/or putative father as tenant-in common and not joint tenant, meaning thereby such order of the court *i.e.*, succession certificate, would club these full bold and half blood relatives together. Such kind of situation may disturb social fabric of the joint family system.

In such circumstances, it becomes imperative for any student, research scholar and teachers of family law to understand that under which inheritance law or in what manner these inheritance rights are to be executed while diverse kind of relationships, status and rights are exhibited, recognised and protected by law. Further, family relations among young people are diverse in their nature and instability of marital relations is at its peak. Changing living pattern of

young couples impacts on their marriage responsibilities or obligations and priorities are ever changing. At the same time, Hindu joint family property is losing its significance and getting fragmented in bits and pieces. Intrinsic value attached with ancestral property, specially the dwelling house, is getting converted day by day into sky-high residential flats, gated community housing, micro, small and medium enterprises (MSMEs), commercial complexes etc. and agricultural land getting converted into commercial crops such horticulture, floriculture, polyculture etc. On the other hand, in the contemporary Hindu society, there are new emerging forms of relationships such as live-in relationship, relationship in the nature of marriage etc. In today's society people do not believe in marriage but they do not mind to get in live-in relationship. If a child is born out of such relationships, such a child is not legitimate under the present Hindu law, and he/she is also not covered within the ambit of Section 16 of the Hindu Marriage Act 1955. The problem for consideration in such complex legitimacy issues needs to be answered by keeping in mind the contours of the Hindu law of inheritance and their impact on next generation as well.

Conclusion

As the paper addresses research questions with the best possible material available on the complex facets of legitimacy attached with children and their property rights under Hindu law, the authors arrive at and fully exhibits the lacunae in the present Hindu law of marriage and inheritance. The children who are born from null and void marriages or marriages annulled by a decree of nullity or born from live-in relationship by circumstance are at the receiving end of such lacunae in law. Hence, the authors have tried to persuade the lawmakers that there is a need to redefine the word 'property' as given in Section 16(3) of the Hindu Marriage Act 1955 and to expand the term 'related' as given in Section 3(1)(j) of the Hindu Succession Act 1956 besides other relevant provisions of these Acts. Against this rather disheartening picture, the authors find solace in the Supreme Court of India's cognizance on February 27, 2020[1] of a long pending matter before the Apex Court of the country. It has initiated the matter to be placed before the Hon'ble Chief Justice of India to constitute a larger bench, as was also opined by another bench of the Supreme Court in 2011 in *Revanasiddappa's* case (supra). Since March 31, 2011, there has not been any attention paid to the matter where property rights of children, born from null and void marriages or marriages annulled by a decree of nullity, were involved and the matter was to be decided by the Apex Court of the country. But, in the present scenario of administration of justice system at the Apex Court, the authors are confident that a due attention will be paid towards protecting property rights of these children through the constitution of a larger bench.

1 *Parvathamma v. Gangadharaih* Civil Appeal No(s). 3576/2010, February 27, 2020, https://main.sci.gov.in/supremecourt/2008/37129/37129_2008_12_108_20919_Order_27-Feb-2020.pdf, (visited on April 18, 2020).

To recap the matter once again for the consideration of a larger bench of the Supreme Court would be: first, "*the legislature has used the word "property" in Section 16(3) and is silent on whether such property is meant to be ancestral or self-acquired. Section 16 contains an express mandate that such children are only entitled to the property of their parents, and not of any other relation*"[1]. Therefore, a clarification on the word 'property' is required with its nature and scope of division and devolution among the children born from (i) legal wedlock, (ii) null and void marriages or marriages annulled by a decree of nullity, and (iii) live-in relationships, by circumstances, meaning thereby live-in relationship among the heterosexuals. Secondly, "*on a careful reading of Section 16(3) of the Act we are of the view that the amended Section postulates that such children would not be entitled to any rights in the property of any person who is not his parent if he was not entitled to them, by virtue of his illegitimacy, before the passing of the amendment. However, the said prohibition does not apply to the property of his parents. Clauses (1) and (2) of Section 16 expressly declare that such children shall be legitimate. If they have been declared legitimate, then they cannot be discriminated against and they will be at par with other legitimate children, and be entitled to all the rights in the property of their parents, both self-acquired and ancestral. The prohibition contained in Section 16(3) will apply to such children with respect to property of any person other than their parents*"[2]. Hence, discrimination among the children born from various categories of relationship of their parents needs to be done away with and equal property rights may be provided to these children. Thirdly, to consider live-in relationships among heterosexuals as living in the nature of marriage or presume to be marriage and provide them legal protection under Section 16 of the Hindu Marriage Act 1955. And lastly, to provide social and legal status and equal property rights to the children born to live-in relationships and other relationships which are not covered, at present, by Section 16 of the Hindu Marriage Act 1955. The Supreme Court of India may issue appropriate directions to the Law Commission of India and National Commission for Women, New Delhi "*to deliberate on the issues referred above and to make appropriate recommendations to the Government of India to enact suitable law*".

It seems to be pertinent to mention here what the bench of the Supreme Court in *Revanasiddappa's* case (supra) opined, "*with changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today. The concept of legitimacy stems from social consensus, in the shaping of which various social groups play a vital role. Very often a dominant group loses its primacy over other groups in view of ever changing socio-economic scenario and the consequential vicissitudes in human relationship. Law takes its own time to articulate such social changes through a process of amendment. That is why in a changing society law cannot afford to remain static. If one looks at the history of development of Hindu Law, it will be*

1 *Revanasiddappa v. Mallikarjun* AIR 2011 SC (Supp) 155, para 25.
2 *Ibid.*, para 26.

clear that it was never static and has changed from time to time to meet the challenges of the changing social pattern in different time"[1]. Therefore, the law on the above mentioned issues must change keeping in view changing social pattern of society. As Martin Luther King Jr rightly said, "*injustice anywhere is a threat to justice everywhere*". Hence, to do justice to the children who are the future of nation state, the lawmakers and the Apex Court are under social, moral and constitutional obligations.

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1 *Revanasiddappa v. Mallikarjun* AIR 2011 SC (Supp) 155, para 27.

THE SUPREME COURT OF INDIA: AN EMPIRICAL OVERVIEW OF THE INSTITUTION*

Aparna Chandra[♣], *William H.J. Hubbard*[♦] *and Sital Kalantry*[♠]

Abstract

The Indian Supreme Court has been called "the most powerful court in the world" for its wide jurisdiction, its expansive understanding of its own powers, and the billion plus people under its authority. Yet scholars and policy makers have a very uneven picture of the court's functioning: deep knowledge about the more visible, "high profile" cases but very little about more mundane, but far more numerous and potentially equally important, decisions. This paper aims to address this imbalance with a rigorous, empirical account of the Court's decisions from 2010 to 2015. The researchers relied on the most extensive original dataset of Indian Supreme Court opinions, created to provide a broad, quantitative overview of the social identity of the litigants that approach the court, the types of matters they bring to the court, the levels of success that different groups of litigants have before the court and the opinion-writing patterns of the various judges of the Supreme Court. This analysis provides foundational facts for the study of the court and its role in progressive social change.

Keywords: Supreme Court, Jurisdiction, Litigant, Appellant, Opinion, Reversal Rate.

Introduction

The Indian Supreme Court has been called "*the most powerful court in the world*" for its wide jurisdiction, its expansive understanding of its own powers, and the billion plus people under its authority.[1] Yet, for an institution that

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♣ Assistant Professor of Law and Research Director, Centre for Constitutional Law, Policy and Governance, National Law University, Delhi, e-mail: aparna.chandra@nludelhi.ac.in.

♦ Assistant Professor of Law, University of Chicago Law School, Chicago, e-mail: whubbard@uchicago.edu.

♠ Clinical Professor of Law, Cornell University-Law School, Cornell, Ithaca, NY, e-mail: sk49@cornell.edu.

1 George Gadbois, "*Supreme Court Decision Making*", 10 BANARAS LAW JOURNAL 1 (1974); V.R. Krishna Iyer, OUR COURTS ON TRIAL, 1st ed. 1987, p. 18. This assessment has been widely echoed in subsequent academic works on the Indian Supreme Court. *vide* Shylashri Shankar, "India's Judiciary: Imperium in Imperio?", Paul R. Brass (ed.), ROUTLEDGE HANDBOOK OF SOUTH ASIAN POLITICS: INDIA, PAKISTAN, BANGLADESH, SRI LANKA, AND NEPAL,

exercises immense public power and enjoys a high degree of legitimacy, no broad account exists of who approaches the Court, for what purposes, and with what levels of success.[1] Both due to its fragmented bench structure (where cases are usually decided by only two or three out of thirty-one judges) as well as the large volume of cases, scholars and policy makers have a very uneven picture of the court's functioning: deep knowledge about the more visible, "high-profile" cases, and near-absolute silence about more mundane, below the radar, but often equally important, decisions.[2]

This imbalance is particularly relevant to the central question addressed in this book: To what extent does (or can) the Supreme Court of India promote progressive social change? Observers of the Court see the Court as self-consciously seeking to give justice to the common person not only through high- profile cases asserting or expanding rights for the disadvantaged, but also by exercising its discretionary jurisdiction to admit and decide each year thousands of low-profile cases, usually involving individuals asserting mundane legal claims.[3] Thus, much of the current practice of the Court cannot be understood simply by studying its landmark judgments. The Court devotes the lion's share of its energy to smaller cases, and these smaller cases are part of its strategy of providing access to justice for the disadvantaged.

But is the Court succeeding in this aspect of its mission? The Indian judiciary as a whole, and the Supreme Court in particular, has come under increased attack for being unable to fulfill its mandate of providing access to justice for common persons. Concerns about large backlogs, long delays, and barriers to access have eroded the legitimacy of the judicial system and have led to calls for systemic reforms. However, there is little consensus on the nature of the judicial dysfunction, its causes, and paths to reform. While some believe that the Supreme Court has witnessed a "*docket explosion*" which has limited the Court's ability to provide timely and just resolution of disputes,[4] others argue that the core concern with the Court's functioning is "*docket exclusion*",

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1st ed. 2010, p. 165; Alexander Fischer, "Higher Lawmaking as a Political Resource", Miodrag Jovanović and Kristin Henrard (eds.), SOVEREIGNTY AND DIVERSITY, 1st ed. 2008, p. 186.

1 An initial effort to flesh out this picture was made in Nick Robinson, "*A Quantitative Analysis of the Indian Supreme Court's Workload*", JOURNAL OF EMPIRICAL LEGAL STUDIES, Vol. 10, 2013, p. 570. Using 'the hodgepodge of data that is either publicly available or that can be acquired from the Supreme Court'.

2 Nick Robinson, "*Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*", AMERICAN JOURNAL OF COMPARATIVE LAW, Vol. 61, 2013, p. 101.

3 Aparna Chandra et al., "*The Supreme Court of India: A People's Court?*", INDIAN LAW REVIEW, Vol. 1, 2017, p. 145.

4 Rajeev Dhavan, LITIGATION EXPLOSION IN INDIA, 1st ed. 1986.

whereby the Court is increasingly accessible only for the rich and powerful.[1] Both narratives-that of explosion and exclusion-agree, however, that the Court is increasingly limited in its ability to achieve the lofty ideals of providing succor and justice to "*the butcher, the baker and the candle-stick maker…the bonded labour and pavement dweller.*"[2]

To address these concerns, various proposals for reforming the direction and functioning of the Supreme Court have been advocated. These include proposals to abolish two-judge benches;[3] to set up special benches like the recently established social justice bench;[4] to set up regional benches;[5] to bifurcate the Court's constitutional court function from its appellate court function;[6] and so on. However, in the absence of rigorous empirical study of the Court, many of the current reform proposals are based on impressionistic and anecdotal evidence of the Court's functioning.

Little empirical data exists on the functioning of the Supreme Court. In the early years of the Court George Gadbois undertook such an exercise.[7] More recently, Nicholas Robinson has provided empirical insights into the functioning of the Court.[8] The Vidhi Centre for Legal Policy has also begun

1 G. Mohan Gopal, "*Justice and the Two Ideas of India*", FRONTLINE, Friday, May 27, 2016, http://www.frontline.in/cover-story/justice-and-the-two-ideas-of-india/article8581178.ece, (visited on August 29, 2018).

2 *Moti Ram v. State of Madhya Pradesh* (1978) 4 SCC 47.

3 Fali Nariman, "*Abolish Two Judge Benches*", INDIAN EXPRESS, Thursday, April 10, 2014.

4 Masoodi et al., "*Supreme Court Sets Up Social Justice Bench*", LIVE MINT, Thursday, December 4, 2014, (describing notice issued by the Supreme Court on establishing the social justice bench); Utkarsh Anand, "*Allocate More Time to Social Justice Bench, Say Experts*", INDIAN EXPRESS, Saturday, December 13, 2014.

5 Report No. 229 of the Law Commission of India on "*Need for Division of the Supreme Court into a Constitution Bench at Delhi and Cassation Benches in Four Regions at Delhi, Chennai/Hyderabad, Kolkata and Mumbai*", August 2009, https://indiankanoon.org/doc/24442307/, (visited on August 29, 2018).

6 *Ibid*.

7 George H. Gadbois, Jr., "*The Supreme Court of India: A Preliminary Report of an Empirical Study*", JOURNAL OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES, Vol. 4, 1970, p. 34. Nonetheless, several authors have used empirical data generated largely by the Court itself to identify trends and the workings of the Court. Rajiv Dhavan used data extensively to observe the litigation explosion in Indian courts. *vide* Rajeev Dhavan, LITIGATION EXPLOSION IN INDIA, 1st ed. 1986, pp. 60-61. In 1965, these cases were 60% of admitted cases and in 1982, they were 42% of admitted cases.

8 Nick Robinson, "*A Court Adrift*", FRONTLINE, Friday, May 3, 2013, http://www.frontline.in/cover-story/a-court-adrift/article4613892.ece, (visited on August 30, 2018).

empirical studies of the Court.[1] However, much remains to be done in mapping the functioning of the Court.

In this paper, the researchers provide a descriptive account of the functioning of the Court through an empirical analysis of all cases decided by the Supreme Court between 2010–2015. The objective of this paper is to understand the social identity of the litigants that approach the court, the types of matter they bring to the court, the levels of success that different groups of litigants have before the Court, and the decision patterns of the various judges of the Supreme Court. Our approach is quantitative and comprehensive, based on a dataset of information drawn from all judgments rendered by the Supreme Court during the years from 2010 through 2015. Our dataset contains information on judgments in over 6000 cases, decided in over 5000 published opinions issued during this time period. Each of the Court's opinions was hand-coded for information on a wide range of variables, allowing us to compile the largest and most detailed dataset on the Court's judgments ever collected.

This data provides information about all of the cases decided by Supreme Court judgments during this period (as reported in the Supreme Court Cases reporter), including facts about the parties before the Court, where the cases arose, what claims are at issue, what kind of legal representation the parties have, how the Court hears the cases and how long the Court takes to decide, who wins, and which justices write the opinions of the Court. In this study, we summarize this treasure trove of information with the goal of establishing a set of basic facts about the Court. These facts, we hope, will prompt new research questions and inform existing descriptive and normative debates about the role of the Court in promoting progressive social change. At the very least, this study provides a foundation of empirically grounded background facts to inform and contextualises it.

In the sections that follow, the researchers provide a brief background on the Supreme Court of India and a description of the creation of the dataset before presenting the findings. While the aspiration of this paper is descriptive, not normative, the researchers offer in a short, concluding section some initial thoughts about potential implications of the findings they report.

Background of the Supreme Court of India

The Indian Supreme Court is the apex court for the largest common law judicial system in the world. Set up in 1950 under the Constitution of India, the Court began its existence with 8 judges. Over the years, the Court has changed

1 Alok Prasanna Kumar et al., Consultation Paper on "*The Supreme Court of India's Burgeoning Backlog Problem and Regional Disparities in Access to the Supreme Court*", October 2015, VIDHI CENTRE FOR LEGAL POLICY, https://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/560cf7d4e4b092010fff89b1/1443690452706/29092015_Consultation+Paper+on+the+Supreme+Court%27s+Burgeoning+Backlog+Problem.pdf, (visited on August 30, 2018).

dramatically in size and structure. At present it has 31 seats.[1] It entertains over 60,000 appeals and petitions[2] and issues approximately 1,000 judgments per year.[3] Court rules do not require judges to sit *en banc*. Judges ordinarily sit in benches of 2 or 3, and sometimes—increasingly rarely—in larger benches.[4] Decisions of all benches of the Court are binding on all lower courts within the territory of India.[5]

Judges of the Court are technically appointed by the President in consultation with Chief Justice of India.[6] In practice, as a result of judicial interpretations, appointments to the Court are made by a '*collegium*' of the senior-most judges of the Court, who choose the Court's new members.[7] Appointees tend to be senior judges, often chief justices, from the High Courts.[8] Judges of the Supreme Court must retire at 65 years of age.[9] Consequently, most judges serve on the Supreme Court for short durations, and generally for not more than five years.[10] In its 68 years of existence, more than 230 judges have served on the Court.[11] The Chief Justice of India is the senior most judge of the Supreme Court as measured by the date s/he was appointed to the Court.[12]

The Supreme Court has broad jurisdiction. It performs a dual function: as a court of original jurisdiction on certain matters such as those relating to the

1 Article 124(1) of the Constitution of India 1950.

2 THE SUPREME COURT OF INDIA: ANNUAL REPORT 2014, p. 79 https://main.sci.gov.in/pdf/AnnualReports/annualreport2014-15.pdf., (visited on August 30, 2018).

3 JUDIS, the official e-reporter of the Supreme Court of India records 900 judgments for 2014.

4 Nick Robinson et al., "*Interpreting the Constitution: Supreme Court Constitution Benches Since Independence*", ECONOMIC AND POLITICAL WEEKLY, Vol. 46, No. 9, 2011, pp. 27-28. (Finding that the number of cases heard and disposed of by five judge benches has decreased from 15.5% in the 1950s to 0.12% in the 2000s.) A single judge sits for "chamber matters", a set of designated procedural matters, such as bail applications pending appeal.

5 Article 141 of the Constitution of India 1950.

6 Article 124(2) of the Constitution of India 1950.

7 (1998) 7 SCC 739; *Supreme Court Advocates on Record Ass'n v. Union of India* (1993) 4 SCC 441; *S.P. Gupta v. Union of India* AIR 1982 SC 149.

8 The High Courts are the next-highest courts to the Supreme Court in the hierarchy of Indian court system.

9 *Supra* n. 6.

10 T.R. Andhyarujina, "*The Age of Judicial Reform*", THE HINDU, Saturday, September 1, 2012, http://www.thehindu.com/opinion/lead/the-age-of-judicial-reform/article3845041.ece, (visited on August 30, 2018).

11 Data gathered from adding up the lists of sitting and retired justices. SUPREME COURT OF INDIA, https://www.sci.gov.in, (visited on August 30, 2018).

12 Abhinav Chandrachud, "*Supreme Court's Seniority Norm: Historical Origins*", ECONOMIC AND POLITICAL WEEKLY, Vol. 47, No. 8, 2012, p. 26.

enforcement of fundamental rights;[1] and as a final court of appeals against decisions and orders passed by subordinate courts and tribunals.

Article 32 of the Constitution guarantees the right to move the Supreme Court for enforcement of fundamental rights. A distinctive component of this jurisdiction is public interest litigation ("PIL"), a judicially created innovation of the 1970s. Through PILs the Court reformulated standing rules to allow any member of the public to seek relief from the Court on behalf of a person or people whose fundamental rights had been violated but who could not, "*by reason of poverty, helplessness or disability or socially or economically disadvantaged position*", come before the Court for relief themselves.[2]

The Court also has discretionary appellate jurisdiction over any order passed by any court or tribunal across the country.[3] A party seeking such discretionary review files a Special Leave Petition (SLP). In recent years, on average about 68,000 cases are filed annually before the Supreme Court,[4] most of which are SLPs.

Apart from SLPs, the Court can also hear cases certified for appeal by high courts.[5] Further, many statutes provide for a statutory right to appeal to the

1 This is not the limit of the Court's jurisdiction. The Supreme Court has original jurisdiction with respect to inter-state disputes and over certain election matters. The President may also refer any matter to the Court for its advisory (non-binding) opinion. Article 143 of the Constitution of India 1950.

2 *S.P. Gupta v. Union of India* AIR 1982 SC 149. The Court's own data reveals, however, that even among cases admitted for merits hearing, PILs constitute only 1% of the Court's cases. *vide* Nick Robinson, "*A Quantitative Analysis of the Indian Supreme Court's Workload*", JOURNAL OF EMPIRICAL LEGAL STUDIES, Vol. 10, No. 3, 2013, pp. 570, 590, 598.

3 Article 136 of the Constitution of India 1950 provide that "*Special leave to appeal by the Supreme Court. (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.*"

4 Average of cases filed in 2010-14. THE SUPREME COURT OF INDIA: ANNUAL REPORT 2014, pp. 76-79, https://main.sci.gov.in/pdf/AnnualReports/annualreport2014-15.pdf., (visited on August 30, 2018).

5 Article 132, Article 133 and Article 134 of the Constitution of India 1950. Although the Court's jurisdiction can be invoked through procuring a certificate of appeal from the high court, this practice is rarely used. One possible reason for the low use of the 'Certificate of Appeal' jurisdiction is that while ordinarily a petitioner has 90 days to file a SLP, the limitation for filing a SLP after the high court has refused a certificate of appeal is 60 days. Some experts suggested during interviews and interactions with us that lawyers do not invoke the certificate of appeal process so as to give themselves more time to file in the Supreme Court.

Court.[1] Appeals as of right are defined by statute for certain claims heard by lower courts and well as for review of decisions by specialized tribunals-adjudicatory bodies separate from the Indian court system that resolve statutory claims in specialized fields, such as electricity regulation, customs and excise, or statutory consumer protection.

Cases filed before the Court are processed in two stages: an initial admissions stage to decide which cases to admit for hearing; and a regular (merits) hearing. Judges sit in benches of two every Monday and Friday to decide which cases to hear.[2] The admissions hearing is an *ex parte* proceeding, and the Court denies most SLPs at the admissions stage. However, if the Court is inclined to admit a case, it ordinarily does so only after issuing notice to the other side to appear. A party can also preemptively file a 'caveat' in the Court, requesting that no petition be admitted in which it is a respondent without the presence of such party. In such cases, a matter is listed for admission only after notice is served to the other party. Very rarely does the Court admit a matter *ex parte*. Of the matters in which notice is issued, the Court may dispose of the matter at the admissions stage itself (called 'final disposal' matters). In such cases, after a brief hearing, if the Court admits the matter, it allows or denies the SLP as part of the same order. Where the Court finds the need for a more extensive hearing, the case is listed for a 'regular' merits hearing.

Data Processing

Our study is based on a comprehensive dataset of all opinions of the Court from 2010 to 2015, as published in the case reporter *Supreme Court Cases* (SCC). The dataset contains 5699 judgments from 2010 to 2015 (dealing with 6857 cases).[3] Our methodology for creating this dataset involved five roughly sequential elements: (1) selection of source material for Court opinions; (2) initial development of a template for hand-coding, and pilot testing, review, and revision of the template; (3) comprehensive hand-coding of all cases within the sample frame; (4) processing and quality control; and (5) creation of the final database for analysis.

First, we selected SCC as the source material for our dataset because it is the most cited reporter by and before the Supreme Court.[4] Since SCC is a private reporter, it is under no obligation to publish every decision given by the Supreme Court. However, it is easily accessible, has extensive headnotes, and

1 THE SUPREME COURT OF INDIA: ANNUAL REPORT 2014, pp. 59-63, https://main.sci.gov.in/pdf/AnnualReports/annualreport2014-15.pdf., (visited on August 30, 2018).

2 Bibhuti Bhushan Bose (ed.), SUPREME COURT OF INDIA PRACTICE AND PROCEDURE: A HANDBOOK OF INFORMATION, 3rd ed. 2010, p. 35.

3 Cases that raise similar issues or revolve around the same facts are tagged and heard together by the Court. Hence, one judgment may dispose of more than one case.

4 Rakesh Kumar Srivastava, "*A Guide to India's Legal Research and Legal System*", GLOBALEX, https://www.nyulawglobal.org/globalex/India_Legal_Research.html, (visited on August 30, 2018). (Chief Librarian of the Supreme Court, stating that this reporter is used around 60% of the time before the Supreme Court itself).

unlike other reporters, records many details, including the names and designations of lawyers involved.

We began our research by running a pilot of the project at Cornell Law School. At this stage, students at Cornell Law School coded cases based on an initial template. After review of the pilot effort, the template was overhauled. To ensure internal consistency within the final dataset, we discarded the results of the pilot coding phase.

We then assembled a team of nearly two-dozen students from National Law University ("NLU"), Delhi, who then took up the task of coding cases. The team read judicial opinions from the SCC Reporter and completed Excel templates. The NLU, Delhi team hand-coded all cases reported in SCC in its volumes for the years 2010 to 2015. Cases reported in these volumes that were decided prior to 2010 were excluded from consideration. Each case was coded for 66 variables (although we do not discuss all coded variables below).

The team of coders at NLU, Delhi then worked with a team of researchers at the University of Chicago Coase-Sandor Institute for Law and Economics to identify coding errors and variables that required recoding. This iterative process involved statistical analysis of the coded data to identify inconsistencies in coding patterns across variables. This primarily consisted of items being entered inconsistently by coders, due to spelling errors or the use of abbreviations by some coders but not others.[1] These inconsistencies were documented by the research team and corrected through an automated recoding process to make codes consistent across cases.[2]

Finally, the cleaned and processed data was converted to the Stata database format for statistical analysis. The dataset includes all Court judgments from 2010 through 2015 that have been published in the SCC, with the exception of orders from one-judge benches.[3]

A Quantitative Overview of the Court, 2010-2015

In this part, we present a series of descriptive analyses roughly corresponding to the sequence of events in the life of a case decided by the Court. In the sections below, we address, in sequence, the following topics: The characteristics of the cases, including their subject matter, procedural history and the time elapsed in the judicial process; characteristics of the litigants bringing the cases, or being brought to court; characteristics of their attorneys; characteristics of judges deciding these cases; and finally trends and patterns of

1 For most variables, such discrepancies were avoided through use of pre-filled drop-down menus that allowed coders to choose among multiple options. Some variables needed to have an option for coders to enter unique text, however.

2 Computer code documenting these corrections is available upon request.

3 Research has excluded one-judge benches because they generally deal with procedural matters, such as certain types of minor interim applications, which do not generate merits judgments (although they occasionally generate orders that appear in SCC).

the decisions themselves. In our Conclusion, we provide tentative discussion of potential implications of some of our empirical findings.

A. Case Characteristics

1. Subject Matter Categories

We begin by looking at the subject matter of the cases that the Court is deciding. Table 1 shows the distribution of subject matters, using the categories employed by the Court itself.[1] Criminal cases are the single largest category, while civil cases are spread over 40 separate categories, none of which consume the lion's share of the Court's attention. The largest category among civil cases is "Service Matters," which covers employment related disputes in government service.

Note that Constitutional Matters comprise 5.3% of the entire output of the judiciary, and PIL matters comprise an additional 3.1%. Thus, less than 10% of the Court's attention (as measured by number of cases) focuses on case categories most associated with the protection of human rights and the interests of the disadvantaged. Of course, while the volume of these cases is relatively low, this says nothing about the time, effort and energy of the Court that these matters take. Also, criminal matters, which disproportionately affect the most vulnerable populations, make up a large share of the Court's output.

TABLE 1. SUBJECT MATTER CATEGORIES

Subject Matter Category	Share
Criminal Matters	29.1%
Service Matters	11.2%
Ordinary Civil Matters	10.4%
Land Acquisition & Requisition Matter	6.2%
Constitutional Matters	5.3%
Indirect Taxes Matters	3.8%
Letter Petition & PIL Matters	3.1%
Direct Taxes Matters	2.7%
Compensation Matters	2.6%
Family Law Matters	1.9%
Matters Relating to Judiciary	1.9%
Mercantile Laws, Commercial Transactions, etc.	1.9%

1 Bibhuti Bhushan Bose (ed.), SUPREME COURT OF INDIA PRACTICE AND PROCEDURE: A HANDBOOK OF INFORMATION, 3rd ed. 2010. However, the judgments themselves do not indicate under which subject matter category the Court registry has placed individual cases. We have therefore used the Court's categories but categorized the cases ourselves.

Labour Matters	1.8%
Arbitration Matters	1.8%
Land Laws and Agricultural Tenancies	1.5%
Environmental Matters	1.3%
Contempt of Court Matters	1.3%
Academic Matters	1.2%
Appeal Against Orders of Statutory Body	1.2%
Rent Act Matters	1.1%
Election Matters	1.1%
Matters Relating to Leases, Govt. Contracts, etc.	1.1%
Matters Relating to Consumer Protection	1.0%
Mines, Minerals and Mining Leases	1.0%
Company Law, MRTP & Allied Matters	0.8%
Admission/Transfer to Engineering and Medical Colleges	0.8%
Matters Pertaining to Armed Forces	0.6%
Admission to Educ. Inst. Other Than Med. & Eng'g	0.4%
Establishment and Recognition of Educ. Inst.	0.4%
Personal Law Matters	0.3%
Simple Money & Mortgage Matters, etc.	0.3%
Habeas Corpus Matters	0.2%
Statutory Appointments	0.2%
State Excise—Trading in Liquor	0.2%
Religious & Charitable Endowments	0.2%
Human Rights Matters	0.1%
Admiralty and Maritime Laws	0.1%
Reference Under Right to Information	0.1%
Other (3 categories)	0.0%
Total	100.0%

2. Procedural History

Our data enables us to trace the procedural history of cases. Most cases decided by the Court come to it as appeals from lower courts and tribunals. Only about 12 percent of judgments are for proceedings within the Court's original (rather than appellate) jurisdiction. See Table 2.

TABLE 2. CASE ORIGINS: NATURE OF PROCEEDING

Variable	All	Civil	Criminal
Appeal/SLP	88.1%	86.2%	92.7%
Writ Petition	8.2%	9.7%	4.9%
Other Original Jurisdiction	3.2%	3.4%	2.0%
Review or Curative	0.6%	0.7%	0.4%
N	6850	4659	2174

Of those cases that came to the Court through appeal or special leave petition (SLP), the vast majority (about 85 percent) came from courts rather than tribunals. Interestingly, 6.2% of the appeals involved an interlocutory appeal, that is, an appeal from an order other than the final decision of a court below. See Table 3.

TABLE 3: CASE ORIGINS: SOURCE OF CASE

Variable	Count	Percent of Total	N
Referred from Smaller Bench	131	1.9%	6806
Originated in Court Rather than Tribunal	5806	85.4%	6799
Interlocutory Appeal	428	6.2%	6854
Continuing Mandamus	383	5.7%	6724

Examining the cases coming up to the Supreme Court on appeal from high courts, we find that high courts are unevenly represented in our dataset, with over 600 cases from the High Court of Punjab and Haryana and no cases from the High Court of Manipur or the High Court of Tripura (which may not be surprising, since these courts were created only in 2013). See Table 4. These patterns largely track what we might expect, based on factors such as the per capita GDP of the states within the jurisdiction of each high court (See Figure1), the size of the various courts' jurisdictions and their geographical proximity to the Supreme Court.[1]

1 Robinson, "*A Quantitative Analysis of the Indian Supreme Court's Workload*", JOURNAL OF EMPIRICAL LEGAL STUDIES, Vol. 10, 2013, p. 570.

TABLE 4. CASE ORIGINS: HIGH COURT APPEALED FROM

Rank	High Court	Number	Reversal Rate (%)
1	High Court of Punjab & Haryana	646	62
2	High Court of Bombay	607	56
3	High Court of Delhi	530	55
4	High Court of Allahabad	502	54
5	High Court of Madras	368	60
6	High Court of Karnataka	367	61
7	High Court of Andhra Pradesh	301	59
8	High Court of Madhya Pradesh	289	64
9	High Court of Rajasthan	262	62
10	High Court of Calcutta	261	60
11	High Court of Kerala	233	49
12	High Court of Gujarat	198	61
13	High Court of Patna	171	64
14	High Court of Uttarakhand	121	63
15	High Court of Orissa	94	73
16	High Court of Gauhati	91	54
17	High Court of Jharkhand	88	65
18	High Court of Himachal Pradesh	73	56
19	High Court of Chhattisgarh	56	65
20	High Court of Jammu & Kashmir	39	44
21	High Court of Sikkim	8	75
22	High Court of Meghalaya	1	62
23	High Court of Manipur	0	0
24	High Court of Tripura	0	0
	Total	5306	59

3. Case Duration

Next, we examine how long the cases in our data took to reach judgment. Litigation in India is notoriously slow. Our data allow us to quantify how long cases remain pending in the Supreme Court before the Court hands down judgment. See Table 5. On average, cases take about 10 years from filing in the

court of first instance to judgment in the Supreme Court. About one-third of that time was spent in the Supreme Court itself.

The data also permit, to a limited extent, a comparison of case duration in the Supreme Court, the High Courts, and courts of first instance. For 170 cases, we have detailed information on filing and judgment dates for all three levels of the court system, which allows us to compare, for the very same cases, how much time they spent in each level of the court system. Table 6 indicates that on average, cases that travel all the way to the Supreme Court are likely to take longer in the Supreme Court than in the lower courts, including the court of first instance where the case was tried. Although a significant amount of energy is devoted to resolving delays in the trial courts, our data indicates that the problem is present throughout the system, and in fact may be more acute in the higher levels of the judiciary.

TABLE 5. DATE AND DURATION

Variable	Mean	Median	Max	Min	N
Year Filed in Court of First Instance	2002	2004	2015	1905	3937
Year Decided in Court of First Instance	2003	2005	2014	1964	1381
Year of Decision Appealed From	2008	2008	2015	1976	5500
Year Filed in Supreme Court	2009	2010	2015	1968	6853
Year Decided by Supreme Court	2012	2012	2015	2010	6856
Duration in Court of First Instance (Days)	1466	858	9372	1	180
Duration in Court Below (Days)	1784	987	16574	5	1278
Duration in Supreme Court (Days)	1569	1296	12404	0	5461

TABLE 6. CASES WITH COMPLETE DURATION DATA

Variable	Mean	Median	Max	Min
Duration in Court of First Instance (Days)	1424	847	9372	0
Duration in Court Below (Days)	2082	880	11966	18
Duration in Supreme Court (Days)	1456	1207	4372	30

Table 7 indicates that at the Supreme Court itself, civil and criminal cases take on average approximately the same amount of time to be decided. Writ petitions to the Court take longer—as is to be expected given that they court has to hear the case afresh and cannot rely on case records from the courts below. Interestingly, cases originating in tribunals take longer for disposal in the Supreme Court as compared to cases originating in courts. One of the goals behind setting up tribunals is to speed up the disposal of cases. If such cases are likely to face long pendency in the Supreme Court, this purpose gets defeated.

TABLE 7. DURATION (DAYS) IN THE SUPREME COURT, BY CASE TYPE

Variable	Mean	Median	Max	Min	N
Civil	1582	1212	12404	0	3440
Criminal	1533	1411.5	8993	0	1812
Constitutional Challenge	1610	1140.5	12404	0	194
Writ Petition	1937	1492.5	12404	81	34
Case Originated in Court	1541	1277.5	12404	0	4542
Case Originated in Tribunal	1721	1441	11078	0	909

Breaking down case durations by subject matters reveals wide variation in the speed with which different types of cases are resolved by the Court. Table 8 shows that some (albeit small) categories of cases take upwards of 7 or 8 years on average, while others take much less. (Eight years is 2922 days, and four years is 1461 days, so the category of Admiralty and Maritime cases exceeds 8 years in duration on average, and *twenty* additional categories exceed 4 years duration in Supreme Court alone.) Only one category, habeas corpus, averages resolution in less than one year.

TABLE 8. AVERAGE DURATION (DAYS) IN THE SUPREME COURT, BY SUBJECT

Rank	Subject Matter Category	Duration
1	Admiralty and Maritime Laws	3050
2	Religious & Charitable Endowments	2776
3	Indirect Taxes Matters	2261
4	State Excise—Trading in Liquor	2133
5	Direct Taxes Matters	2116
6	Land Acquisition & Requisition Matter	2021
7	Land Laws and Agricultural Tenancies	1990
8	Human Rights Matters	1801
9	Family Law Matters	1796
10	Matters Relating to Commissions of Enquiry	1763
11	Matters Pertaining to Armed Forces	1691
12	Labour Matters	1663
13	Environmental Matters	1651
14	Simple Money & Mortgage Matters, etc.	1643
15	Contempt of Court Matters	1610
16	Constitutional Matters	1593
17	Mercantile Laws, Commercial Transactions, etc.	1546
18	Criminal Matters	1544
19	Matters Relating to Consumer Protection	1526
20	Ordinary Civil Matters	1499
21	Service Matters	1469
22	Appeal Against Orders of Statutory Body	1460
23	Arbitration Matters	1450
24	Compensation Matters	1438
25	Rent Act Matters	1378
26	Company Law, MRTP & Allied Matters	1356
27	Personal Law Matters	1343
28	Mines, Minerals and Mining Leases	1284
29	Letter Petition and PIL Matters	1280
30	Academic Matters	1193
31	Matters Relating to Judiciary	1188
32	Matters Relating to Leases, Govt. Contracts, etc.	1077

33	Establishment and Recognition of Educ. Inst.	888
34	Statutory Appointments	863
35	Election Matters	735
36	Admission to Edu. Inst. other than Med. and Engg.	631
37	Eviction Under the Public Premises	592
38	Reference Under Right to Information	538
39	Admission/Transfer to Engg. and Med. Colleges	390
40	Habeas Corpus Matters	190

B. Litigant Characteristics

Next, we consider the configuration of the parties in the cases in our data. We use the terms plaintiffs and defendants to refer to the original status of parties in the court of first instance. Plaintiffs and defendants are about evenly represented among appellants.[1] A large fraction of cases involves multiple plaintiffs or multiple defendants (or both). To the extent that the lead plaintiff or defendant is a natural person, parties are overwhelmingly male. (Only 16.8% of the plaintiffs are female and 9.1% of the defendants are women. Males are a higher share of defendants than plaintiffs because in our data criminal defendants are about 95 percent male.) See Table 9. Perhaps the most notable statistics in Table 9, though, are the shares of all parties (including natural persons, governments, and institutional entities such as corporations) who are Indian. Unlike the United States Supreme Court, which like the United States court system as a whole, entertains a substantial number of claims by or against foreign parties, the Supreme Court of India appears to be a forum almost exclusively engaged with disputes between Indian nationals.

TABLE 9. PLAINTIFFS AND DEFENDANTS: SUMMARY STATISTICS

Variable	Mean	N
Appellant is Plaintiff	46.3%	5894
More than One Plaintiff	38.2%	5892
More than One Defendant	55.9%	5890
Plaintiff is Male (among Individual Plaintiffs)	83.2%	2756
Defendant is Male (among Individual Defendants)	90.9%	2475
Plaintiff is Indian	99.7%	5888
Defendant is Indian	99.8%	5887

1 For simplicity, the term ‘appellant’ is used to refer to the party who sought review in the Supreme Court, regardless of whether by special leave petition or appeal.

Focusing specifically on civil cases, the majority of plaintiffs are individuals (*i.e.*, natural persons), and government is the defendant more often than not. Not surprisingly, then, the most common configuration of parties in our dataset is an individual plaintiff versus a government defendant. See Table 10.

(We do not separately present results for criminal cases, where the configuration is usually the government against an individual defendant.)

TABLE 10. PAIRINGS OF PARTIES IN CIVIL CASES, SHARES BY STATUS

Plaintiff \ Defendant	Individual	Government	Institution
Individual	17.0% (N=662)	32.9% (N=1284)	11.6% (N=453)
Government	4.4% (N=172)	0.9% (N=34)	3.4% (N=131)
Institution	2.7% (N=104)	20.1% (N=783)	7.1% (N=277)

Looking instead at the appellant/appellee relationship rather than the plaintiff/defendant relationship, we find that individuals make up the largest group of appellants in both the civil and criminal context. In criminal appeals this implies that the vast majority of the Court's criminal judgments involve individuals appealing against conviction and/or sentence, rather than the state appealing an acquittal. This data is consistent with the premise that Court tends to take up the cause of the individual against corporations or the government.

TABLE 11. APPELLANTS IN CIVIL AND CRIMINAL CASES

Share of Appellants	Civil Cases	Criminal Cases	Total
Individual	46.1%	84.9%	58.4%
Government	23.9%	10.9%	19.8%
Institution	30.0%	4.2%	21.8%

As Table 11 indicates, before the Supreme Court the Government is the appellant in roughly 20% of the cases. Of these, service matters, tax matters and

criminal matters form the largest share of the cases that the government brings to Court. See Table 12. Interestingly, in tax matters, the government wins in only half the cases that the Court admits. This might indicate both over-appealing by the Government, and relaxed admission scrutiny for such cases by the Court. Paired with the finding in Table 11 above, that tax matters take amongst the longest to dispose of, these statistics point to the need for the Court and the Government to review their approach to tax litigation.

TABLE 12. GOVERNMENT APPELLANTS, TOP SUBJECT MATTER AND REVERSAL RATES

Rank	Subject Matter Category	Share	Reversal Rate
1	Service Matters	19.2%	67.3%
2	Criminal Matters	17.3%	56.8%
3	Indirect Taxes Matters	10.8%	50.3%
4	Ordinary Civil Matters	8.9%	66.4%
5	Direct Taxes Matters	6.9%	48.4%
6	Land Acquisition and Requisition Matters	6.4%	74.1%
7	Constitutional Matters[1]	5.5%	100%
8	Academic Matters	2.3%	13.8%
9	Arbitration Matters	2.1%	65.5%
10	Appeal Against Orders of Statutory Body	2.1%	72.4%

C. Attorneys

There are two tiers in the Supreme Court bar in India: advocates and senior advocates. "Senior advocate" is a status conferred upon an attorney the Court itself. Senior advocates are an exclusive group. As of April 2015, there were 349 senior advocates designated by the Supreme Court of India,[2] but these

1 Note that the reversal rate for constitutional matters is 100% due to there being only one observation with non-missing information on reversal.

2 List of Senior Advocates Designated by Supreme Court, (visited on April 23, 2015), SUPREME COURT OF INDIA, http://www.sci.nic.in/outtoday/List%20of%20Sr.%20Advocates%20Designated%2

lawyers obtain a great share of the advocacy work at the Court. As Table 13 indicates, advocates and senior advocates are about evenly represented in our dataset, (with only a tiny number of unrepresented parties). In criminal cases, most attorneys (for both sides) are advocates, while in civil cases, a majority are senior advocates.

TABLE 13. COUNSEL, BY PARTY AND CASE TYPE

	Appellant			Respondent		
Counsel	Total	Criminal	Civil	Total	Criminal	Civil
Advocates	51.1%	64.0%	45.1%	46.9%	58.5%	41.4%
Senior Advocates	47.5%	35.2%	53.3%	52.9%	41.2%	58.3%
Other[1]	1.4%	0.8%	1.6%	0.3%	0.4%	0.3%
N	6041	1960	4058	5978	1956	3999

Notably, there are more cases pairing senior advocates against each other than other pairings of attorneys. See Table 14.

TABLE 14. PAIRINGS OF COUNSEL FOR APPELLANT AND RESPONDENT, CIVIL CASES

Appellant \ Respondent	Advocate	Senior Advocate
Advocate	1098 (28.5%)	659 (17.1%)
Senior Advocate	513 (13.3%)	1582 (41.1%)

Further, in a small fraction of cases (3.9 percent) the Court appoints *amicus curie* - typically a senior or otherwise well-respected lawyer, to act as a friend of the court, and assist the Court in the matter. The Amicus does not represent

0by%20Supreme%20Court%20as%20on%2023%2004%202015.pdf, (visited on August 30, 2016).

1 'Other' refers to 'party in person' (i.e., *pro se* party) or legal aid representation.

either party. S/he is supposed to assist the court in an impartial manner. Amicus curie are generally appointed in PILs or in criminal appeals where the defendant is represented where the Court feels the need for additional assistance over and above what the defense lawyer can provide.

D. Decision Characteristics

1. Bench Size

We now turn from the characteristics of the cases to how the Court decides them. First, we examine bench size. Nearly 90 percent of cases in our dataset were decided by a two-judge bench, and nearly all the rest were decided by three-judge benches. Only 91 cases out of 6856 cases in our data were decided by a five-judge bench and in this six-year period, there was no benches larger than five judges. See Table 15.

TABLE 15. SUMMARY STATISTICS, BY BENCH SIZE

Bench Size	2	3	5	All
Total Cases	5971	794	91	6856
Share of Total	87.1%	11.6%	1.3%	100.0%
Number with PIL	187	71	4	262
Share with PIL	3.1%	9.0%	4.4%	3.8%
Share of PIL	71.4%	27.1%	1.5%	100%
Number with Const. Challenge	349	65	32	446
Share with Const. Challenge	5.8%	8.2%	36.4%	6.5%
Share of Const. Challenge	78.3%	14.6%	7.2%	100%

As one would expect, to the extent we see five-judge benches in the data, they are disproportionately devoted to cases within the original jurisdiction of the Court. While over 90 percent of decisions from two-judge benches arose out of appeals and SLPs, only about half from five-judge benches did. See Table 16.

TABLE 16. SUMMARY STATISTICS, CASE CATEGORIES, BY BENCH SIZE

Case Category	2	3	5
Appeal/SLP	91.4%	66.4%	56.7%
Writ Petition	5.7%	24.2%	28.9%
Other Original Jurisdiction	2.3%	8.8%	12.2%
Review or Curative	0.6%	0.5%	2.2%
Total	100%	100%	100%

More surprising is the distribution of cases involving challenges to the constitutionality of laws or government action. Given that substantial questions of law as to the interpretation of the constitution are required by law to be decided by constitution benches of five or more judges,[1] one would expect cases involving challenges to the constitutionality of legislation or government action to be concentrated in five-judge benches. However, as Table 15 shows, more than 78% of all such questions are decided by 2 judge benches. Less than 8% of constitutional challenges are decided by benches of 5 or more. There were even fewer cases disposed by 5 judge or more benches (0.12%) from 2005 to 2009 than in our data set.[2] In contrast, in the period from 1950–1954, 15.5% of disposed cases were by 5 or more judge benches.[3] A sharp decline in bench size occurred from the early 1960s to the late 1960s.[4]

A similar pattern appears for PILs. Given their broad reach, intended social impact, and fundamental rights implications, one might expect the Court to decide such cases in larger benches. Yet over 71% of all PILs are heard by two-judge benches.

2. Outcomes

We turn now to outcomes: how does the Court resolve the cases in our data? Table 17 provides some data on outcomes. We find an overall reversal rate of nearly 60 percent. The reversal rate in criminal cases (about 55 percent) is lower than in civil cases (about 61 percent). In other work, we interpret this difference

1 Article 145 of the Constitution of India 1950.

2 Nick Robinson et al., "*Interpreting the Constitution: Supreme Court Constitution Benches Since Independence*", ECONOMIC AND POLITICAL WEEKLY, Vol. 46, No. 9, 2011, pp. 27-28.

3 *Ibid*.

4 *Ibid*.

as reflecting a willingness of the Justices of the Court to admit criminal appeals with weaker grounds for appeal (and therefore with a lower probability of an eventual reversal).[1] This is consistent with Justices being more concerned about correcting errors in criminal proceedings; they may admit borderline criminal appeals but dismiss borderline civil appeals.

TABLE 17. SUMMARY STATISTICS, INDICATOR VARIABLES

Variable	Mean	N
Reversed	59.4%	6278
Reversed, Civil Cases	61.4%	4195
Reversed, Criminal Cases	55.3%	2066
Referred to Larger Bench	1.7%	6386
Plaintiff Wins	50.0%	5632
Parties to Bear Own Costs	90.3%	2468

Interestingly, despite reversing lower court decisions in only 60% of the cases admitted for a merits hearing, the Court, by and large, does not impose costs on parties. In 90.3% of the cases it directs parties to bear their own costs. Following on from the discussion about bench sizes, Table 18 presents the success rates of PILs and constitutional challenges in the Supreme Court, by bench size.[2] Although larger benches are more willing to declare something unconstitutional or grant relief in a PIL, benches of all sizes show willingness to reach these conclusions.

TABLE 18. SUMMARY STATISTICS, BY BENCH SIZE

Bench Size	2	3	5	All
Share of PILs Successful	50.0%	69.2%	100%	53.8%
Share of Const. Challenges Successful	51.5%	55.6%	60.0%	52.7%
Share Overruling Precedent	0.9%	5.2%	19.8%	1.7%

Table 19 provides further information on constitutional challenges. The majority of constitutional challenges are against executive action rather than legislation or constitutional amendments. The success rate of challenges to executive action is higher than challenges to legislation as well. Table 20

1 Aparna Chandra et al., "*The Supreme Court of India: A People's Court?*", INDIAN LAW REVIEW, Vol. 1, No. 2, 2017, p. 145.

2 Authors code a PIL successful if the plaintiff is the prevailing party in the Supreme Court. Authors code a constitutional challenge as successful if the challenged government law or action is struck down or altered by the judgment.

provides details of the success rates of the various types of constitutional challenges, by bench size.

Another action that should be reserved for judgments by larger benches is the overruling of precedent. This is because decisions of coordinate and larger benches are binding on subsequent benches. If the judges on a subsequent bench disagree with the ruling of a previous coordinate bench, or find contradictory precedents from larger benches, they are required to refer the matter to the Chief Justice of India for reference to a larger bench.[1] In our data, we coded a judgment as overruling precedent if the SCC headnote so indicated.[2] Indeed, we find that larger benches and especially five-judge benches are much more likely to overrule precedent in the course their decisions. See Table 18 above. Notably, though, half (56 of 115) of all overrulings are announced by two-judge benches, in disregard of rules of precedent.

TABLE 19. SUMMARY STATISTICS, NATURE OF CONSTITUTIONAL CHALLENGE

Reason	Number	Number Successful
Constitutional Amendment / Legislation: Basic Structure	21	6
Legislation: Fundamental Rights	77	16
Legislation: Other	52	31
Executive Action: Basic Structure	12	4
Executive Action: Fundamental Rights	224	125
Executive Action: Other	55	34
Total	441	216

1 *Central Board of Dawoodi Bohra v. State of Maharashtra* (2005) 2 SCC 673.

2 The Chief Editor of the SCC informed us that the SCC headnote editors also flag cases that impliedly overrule precedents. Such implied overrulings are therefore also part of this data.

TABLE 20. NUMBER (SUCCESSFUL) OF CONSTITUTIONAL CHALLENGES, BY BENCH SIZE AND NATURE OF CHALLENGE

Bench Size	2	3	5
Const. Amend./Legislation: Basic Structure	4	7	10
	(3)	(1)	(2)
Legislation: Fundamental Rights	57	18	2
	(10)	(4)	(0)
Legislation: Other	48	2	2
	(29)	(0)	(2)
Executive Action: Basic Structure	10	0	2
	(2)		(2)
Executive Action: Fundamental Rights	183	32	9
	(98)	(21)	(6)
Executive Action: Other	42	6	7
	(26)	(4)	(4)
Total	344	65	32
	(168)	(30)	(16)

We also find variation in the reversal rates of different high courts and other courts and tribunals from which the cases originated. Table 21 ranks the high courts, tribunals, and special courts by their reversal rates. Most rates are in a band roughly around the overall reversal rate of about 59 percent. Although there are some outliers far from the average, we advise caution in interpreting the outlier values, as many of them involve courts with relatively small numbers of cases (there are only 8 cases from the High Court of Sikkim, for example), and thus the difference may be due to variation arising from small sample sizes.

TABLE 21. REVERSAL RATE: ADJUDICATORY BODY APPEALED FROM

High Court	Reversal Rate	Number[1]
High Court of Sikkim	75.0%	8
High Court of Orissa	73.3%	94
High Court of Jharkhand	65.1%	88
High Court of Chhattisgarh	64.8%	56
High Court of Madhya Pradesh	64.1%	289
High Court of Patna	64.0%	171
High Court of Uttarakhand	62.7%	121
High Court of Punjab & Haryana	62.3%	646
High Court of Rajasthan	62.1%	262
Special Court	61.5%	13
High Court of Gujarat	61.3%	198
High Court of Karnataka	60.9%	367
High Court of Madras	59.9%	368
High Court of Calcutta	59.7%	261
High Court of Andhra Pradesh	59.2%	301
High Court of Himachal Pradesh	56.2%	73
High Court of Bombay	55.7%	607
High Court of Delhi	54.7%	530
High Court of Allahabad	54.4%	502
High Court of Gauhati	53.9%	91
Tribunal	50.3%	254
High Court of Kerala	49.1%	233
High Court of Jammu & Kashmir	43.6%	39
High Court of Meghalaya	0.0%	1
Total	58.5%	5573

The data also shows that individual, government and institutional appellants are likely to win at roughly the same rates. See Table 22.

1 Number of cases include cases for which information on reversal is missing.

TABLE 22. APPELLANT WIN RATES, BY PARTY STATUS

Appellant Status	Win Rate	Number
Individual	58.0%	3728
Government	61.2%	1277
Institution	61.4%	1261
Total	59.3%	6266

Finally, we studied whether concurring judgments by lower courts (i.e., the courts of first and second instance reached the same outcome) would have an impact on the reversal rate before the Supreme Court. We find, as expected, that the Supreme Court is more likely to reverse a decision when lower courts disagree on the outcome, than when the lower courts agree.

TABLE 23: REVERSAL RATE, BY LOWER COURT AGREEMENT

Outcomes in lower courts/tribunals	Agreement	Disagreement	N
Criminal Appeals from High Courts	49.8%	58.0%	1384
Civil Appeals from High Courts	60.3%	63.7%	1142
Civil Appeals from Appellate Tribunals	59.6%	73.8%	600

E. Opinion Characteristics

The researchers conclude that the survey of data in hand on the court with a look at the judgments and opinions are the work product of the justices of the Court. The first thing to note is that the Supreme Court of India is prolific! It produces nearly a thousand opinions per year. As these opinions average almost 9 pages in length, the Court generates over 8000 pages of new law for the bench and bar to digest each year.[1] See Table 24.

1 Judgments in prior sections are organised wherein, each case decided by the court is treated as separate, even if two cases were decided in a single opinion. In this section, instead of judgments, opinions are treated as the unit of analysis. Thus, if a judge writes a single opinion deciding two consolidated cases, that is treated as a single observation.

TABLE 24. TOTAL JUDGMENT LENGTH

Variable	Mean	Median	Max	Min	N
No. of Pages in Opinion	8.7	6	268	1	5547
No. of Pages in Opinion, Const. Challenge Cases	17.9	11	268	1	269

Nearly all of this output takes the form of unanimous judgments. Most opinions take the familiar form of an opinion authored by a single justice (what we are calling "signed opinions"), although a large share of opinions are per curiam (*i.e.*, not attributed to a specific justice). Separate opinions, whether concurring or dissenting, are extremely rare. See Table 25. Even five-judge benches, which presumably hear the most difficult and contentious cases, produce a separate opinion (dissenting or concurring) barely 10 percent of the time.

TABLE 25. AUTHORSHIP SUMMARY STATISTICS, BY BENCH SIZE

Bench Size	2	3	5	All
Share with Signed Opinion	74.4%	61.9%	80.7%	73.2%
Share with Concurrence	0.8%	2.7%	5.3%	1.0%
Share with Dissent	0.3%	1.4%	5.3%	0.5%

Among signed opinions, opinion-writing duties do not fall evenly among justices. Table 26 lists the judges in our data, with the total number of opinions of the court (as opposed to concurring opinions or dissenting opinions) each justice has authored and the total number of cases in which each justice has participated.[1] The number of opinions authored by justice varies widely (from none to 236). This is largely due to variation in the number of cases decided by the justices, of course, but there is also substantial variation in how often a justice writes after hearing a case. In Table 26, we use bold typeface to mark the three highest rates (Banumathi, Kabir, and Sirpurkar, JJ.) and three lowest rates

1 The 'other' justices not separately listed are Justices Arijit Pasayat, B.N. Kirpal, Y.K. Sabharwal, G.B. Pattanaik, and V. Ramaswami, each of whom served during only a tiny segment of sample period and thus are not well represented in the data.

(Joseph, Agrawal, and Misra, JJ.) of opinion writing as a percent of all cases in which the justice participates. Justice Banumathi writes the opinion of the court nearly two-thirds (64.4 percent) of the time she participates in the case; Justice Joseph did so less than one-in-twenty times (4.4 percent).[1]

TABLE 26. OPINION AUTHORSHIP: OPINIONS OF THE COURT

Justice	Opinions of the court	Total Cases	Rate
B.S. Chauhan	236	495	47.7%
P. Sathasivam	227	511	44.4%
G.S. Singhvi	184	494	37.2%
K.S.P. Radhakrishnan	178	450	39.6%
T.S. Thakur	176	403	43.7%
Dipak Misra	167	438	38.1%
Altamas Kabir	160	252	63.5%
R.M. Lodha	151	348	43.4%
R.V. Raveendran	139	295	47.1%
A.K. Patnaik	133	397	33.5%
Swatanter Kumar	112	300	37.3%
S.J. Mukhopadhaya	111	307	36.2%
Ranjan Gogoi	100	253	39.5%
A.K. Ganguly	96	246	39.0%
Aftab Alam	95	299	31.8%
A.K. Sikri	95	239	39.7%
V. Gopala Gowda	95	231	41.1%
Mukundakam Sharma	89	201	44.3%
C.K. Prasad	86	337	25.5%
Anil R. Dave	85	364	23.4%
S.S. Nijjar	83	288	28.8%

1 For purposes of identifying outliers in opinion-writing rates, we focus only on judges who have participated in at least 25 judgments. Justices who have heard only a handful of cases, of course, may have very high or very low rates simply due to small sample size, so to speak.

Ranjana Prakash Desai	78	204	38.2%
D.K. Jain	75	170	44.1%
M.Y. Eqbal	75	160	46.9%
H.L. Dattu	72	373	19.3%
F.M.I. Kalifulla	68	212	32.1%
H.L. Gokhale	61	244	25.0%
J.S. Khehar	61	176	34.7%
V.S. Sirpurkar	56	98	57.1%
Dalveer Bhandari	53	193	27.5%
Madan B. Lokur	49	187	26.2%
R. Banumathi	47	73	64.4%
Kurian Joseph	45	124	36.3%
Jasti Chelameswar	44	219	20.1%
Vikramajit Sen	43	139	30.9%
S.H. Kapadia	37	110	33.6%
J.M. Panchal	37	110	33.6%
Markandey Katju	36	152	23.7%
Chockalingam Nagappan	36	134	26.9%
P.C. Ghose	36	110	32.7%
H.S. Bedi	35	174	20.1%
Gyan Sudha Misra	34	267	12.7%
B. Sudershan Reddy	31	107	29.0%
Adarsh Kumar Goel	31	64	48.4%
Prafulla C. Pant	28	59	47.5%
Shiva Kirti Singh	27	91	29.7%
N.V. Ramana	26	92	28.3%
Rohinton Fali Nariman	24	69	34.8%
Deepak Verma	23	164	14.0%
U.U. Lalit	20	51	39.2%
Abhay Manohar Sapre	20	50	40.0%
S.A. Bobde	17	122	13.9%

Tarun Chatterjee	11	21	52.4%
K.G. Balakrishnan	10	74	13.5%
Arun Mishra	9	37	24.3%
Amitava Roy	9	22	40.9%
Cyriac Joseph	5	113	4.4%
R.K. Agrawal	2	38	5.3%
5 others	3	7	42.9%
Total	4172	12073	34.6%

As noted above, concurrences and dissents are exceedingly rare in our data. The few separate opinions we do find are largely the product of a minority of justices. As Table 27 indicates, only 10 justices have authored more than one concurring opinion in our data; 37 have authored zero. But even among those justices most likely to write a concurring opinion (Lokur, Chelameswar, and Thakur, JJ.), they do so rarely.

TABLE 27. OPINION AUTHORSHIP: CONCURRING OPINIONS

Justice	Concurring Opinions	Total Cases	Rate
Madan B. Lokur	8	187	4.3%
T.S. Thakur	6	403	1.5%
Jasti Chelameswar	5	219	2.3%
K.S.P. Radhakrishnan	4	450	0.9%
Dipak Misra	4	438	0.9%
C.K. Prasad	4	337	1.2%
Altamas Kabir	3	252	1.2%
A.K. Ganguly	3	246	1.2%
Gyan Sudha Misra	3	267	1.1%
A.K. Sikri	2	239	0.8%
G.S. Singhvi	1	494	0.2%
R.M. Lodha	1	348	0.3%
Swatanter Kumar	1	300	0.3%
Aftab Alam	1	299	0.3%

Mukundakam Sharma	1	201	0.5%
Ranjana Prakash Desai	1	204	0.5%
F.M.I. Kalifulla	1	212	0.5%
H.L. Gokhale	1	244	0.4%
J.S. Khehar	1	176	0.6%
R. Banumathi	1	73	1.4%
Kurian Joseph	1	124	0.8%
Vikramajit Sen	1	139	0.7%
S.H. Kapadia	1	225	0.4%
B. Sudershan Reddy	1	107	0.9%
Rohinton Fali Nariman	1	69	1.4%
Cyriac Joseph	1	113	0.9%
37 others	0	5707	0%
Total	58	12073	0.4%

So too with dissenting opinions. Table 28 reveals that only 5 justices have authored more than one dissenting opinion in our data; 46 have authored zero. Interestingly, the three justices who write dissents at the highest rate (Banumathi, Misra, and Chelameswar, JJ.) are familiar from the tables above, as well. When considering the prospects for the Supreme Court of India to serve as a catalyst for social change, it may be worth contemplating whether the extremely low rates of concurring and dissenting opinions indicate a norm of agreement, or perhaps even conformity, within the Court. If so, a norm of agreement might empower the Court to speak in a united way when making bold pronouncement, or it may prevent the Court from taking bold steps in the first place.

TABLE 28. OPINION AUTHORSHIP: DISSENTING OPINIONS

Justice	**Dissenting opinions**	**Total Cases**	**Rate**
Gyan Sudha Misra	6	267	2.2%
Jasti Chelameswar	4	219	1.8%
V. Gopala Gowda	3	231	1.3%
H.L. Gokhale	2	244	0.8%

R. Banumathi	2	73	2.7%
P. Sathasivam	1	511	0.2%
K.S.P. Radhakrishnan	1	450	0.2%
Altamas Kabir	1	252	0.4%
A.K. Patnaik	1	397	0.3%
Ranjan Gogoi	1	253	0.4%
Aftab Alam	1	299	0.3%
Anil R. Dave	1	364	0.3%
S.S. Nijjar	1	288	0.3%
F.M.I. Kalifulla	1	212	0.5%
V.S. Sirpurkar	1	98	1.0%
Dalveer Bhandari	1	193	0.5%
H.S. Bedi	1	174	0.6%
46 others	0	7548	0%
Total	29	12073	0.2%

Conclusion

In this study, the authors present a wide range of findings from our analysis of the largest, most detailed dataset of Supreme Court of India judgments ever constructed. These findings should help establish basic facts about the Court that can inform and perhaps provoke future research.

Evaluating the potential of the Supreme Court of India to instantiate social change requires identifying the current capabilities and limitations of its current practices. In this respect, our study has identified many facts about the Court that may be relevant. Here, we will simply note a few of them and offer some speculations about their relevance for the larger project of understanding how the Court functions and which directions for potential reform are the most promising.

First, the large number of cases decided by the Court, large number of criminal cases, and large number of cases involving individual appellants, are consistent with the Court's oft-stated self-conception as a 'people's court' determined to provide broad access to litigants. Yet handling the crush of thousands of routine cases surely detracts from the time and energy that the Court can devote to high-profile cases or the elaboration of broad rules to govern Indian society. There are clearly trade-offs here. One way that the Court has created a greater capacity to hear large numbers of cases has been its

increasing reliance on two-judge benches, to the point in our study period, nearly 90% of cases are being decided by only two judges. Yet decisions overruling existing precedent are required to be heard by benches of three or more judges and important constitutional challenges by benches of five or more (although, as we observed, this rule appears to be honored in the breach). The Court's ability to speak with a unified voice (or at least to speak in groups larger than two) on questions of jurisprudential or constitutional import suffers as the resources of the Court are spread thinner and thinner to hear more and more cases. Thus, a crucial question is whether the Court would benefit from striking a different balance. In other work,[1] we explore this question further.

Second and closely related, we see that public interest litigations constitute less than 4% (262 of 6856) of the cases in our data, and most PILs are handled by two-judge benches. Yet PILs are the consummate legal actions for promoting progressive social change. Do the small numbers relative to the whole belie a disproportionate impact (and disproportionate effort and attention from the Court)? Or does this call for a reassessment of the Court's commitment to PILs? Our data alone cannot answer these questions.

Third, while our focus and the focus of this volume is on the role of the Court, our data raises questions about the role of attorneys in setting India's agenda for social change. Accounts of the influence of so-called "grand advocates" abound.[2] Is there a way to see whether they affect the outcomes of cases? Preliminary work by Vidhi suggests that the most certainly do.[3] If elite advocates have substantial influence over which cases the Court exercises its

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1 Aparna Chandra, et al., "*The Supreme Court of India: A People's Court?*", INDIAN LAW REVIEW, Vol. 1, 2017, p. 145.

2 Robinson and Galanter describe an even smaller group of lawyers in the top echelon of the Indian legal profession whom they dub 'Grand Advocates.' Marc Galanter and Nick Robinson, India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization 2 & 11 (HLS Program on the Legal Professional Research Paper No. 2013-5, 2013). These elite lawyers charge eye-popping fees ($10,000 for a few minutes of argument) and represent only the "*uber-rich, major multinational corporations, and the country's political class*." Robinson and Galanter further argue that 'the presence of so many benches, and the resulting pervasive (though mild) indeterminacy of precedent, increases the chances that representation by a grand advocate may make a difference in outcome. At least it is perceived to possibly make a difference by significant numbers of clients with deep pockets engaged in controversies where the stakes make irrelevant the size of legal fees'.

3 Amok Prasanna Kumar, "*The True Worth of a Senior Advocate: Senior Counsels Seem to Wield Disproportionate Influence on How the Supreme Court of India Exercises its Jurisdiction*", LIVE MINT (September 16, 2015). Vidhi randomly selected 378 SLPs out of the 34,500 civil SLPs filed in 2014 where there was a lawyer appearing only for the petitioner. They found that a senior advocate appeared in 38% of the cases and notice was issued in 60% of those cases. When a non-senior advocate appeared, the success rate was 33%. On the other hand, the average odds of success for civil SLPs are under 44%.

discretion to hear, this raises the question of the agenda-setting power of advocates vis-à-vis the Court itself.

Fourth, the data on case duration suggests that delays in adjudication are substantial in the Supreme Court and are distributed throughout the appellate hierarchy as well. Many questions remain: How long are the delays faced by the cases that aren't in our data, which are pending but not yet decided? At what levels of the court system can delays be most easily remedied? How are delays affecting the delivery of justice? Most importantly for the agenda of this book, how does pervasive delay affect the ability of the Indian Courts to deliver aid to the disadvantaged or instantiate legal and social change? Delay, by its very nature, preserves the status quo.

Surely, there are countless more questions that we have not even identified. Our hope is that the data we have presented here will provide a starting point for research that identifies, and ultimately answers, these questions.

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RAPE AS WAR CRIME: HOW FAR THE INTERNATIONAL TRIBUNALS HAVE BEEN SUCCESSFUL IN PROTECTING WOMEN

Hemangini Sharma[♣]

Abstract

War brings along with it untold misery and sufferings to all who have to bear its brunt. This is true specifically for women, who face a higher risk than men due to their vulnerability. During World War I the Japanese kept 'comfort women'. World War II saw similar instances of women being forcefully used for sexual gratification. Incidents of mass rape are not unknown in the war that disintegrated former Yugoslavia. Rape was systematically used as a means in the Rwandan genocide, which continued for hundred days. At the time of the Nuremberg Trials, international criminal law did not exist. Principle VI of the judgment of Nuremberg Trial propounded three categories of act as crimes under international law viz. 'Crimes against peace', 'War Crimes' and 'Crimes against Humanity', but none included rape as a war crime. The Statute of the ICTY followed by ICTR and later on the Rome Statute recognized rape as a War Crime and also an act of Genocide. This article examines how far the International Tribunals of former Yugoslavia, Rwanda and the International Criminal Court have been successful in penalizing war criminals for rape in pursuance to the said provisions. This is a crucial aspect in the development of International Criminal Law as it set precedent for all war / war like situations in future.

Keywords: Rape, War Crimes, Crime against Humanity, Tribunal and Genocide.

Introduction

> *When he was done [raping me], he inserted his hand inside me and began pinching me with his fingers, as if he wanted to pull everything out. I screamed and he grabbed my right breast and twisted it so hard that I screamed again; long afterwards my entire breast was blackened. He thrust the knife to my throat and said that, if I screamed one more time, he would slaughter me.*[1]

The above text explains the plight of women facing war. In addition to bearing the atrocities of war and threat to life and property, women have to be in the constant fear of sexual assault and invasion. Loss to property and physical hardships may be compensated in one way or the other. But loss to dignity,

♣ Assistant Professor of Law, School of Law, Amity University, Gwalior, e-mail: hemanginisharma10@gmail.com.

1 Rana Lehr-Lehnardt, "*One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*", BYU JOURNAL OF PUBLIC LAW, Vol. 16, No. 2, 2002, p. 317.

sexual violence and mutilation etc. are acts which leave the victim in a loss of hope, depression and dismay. War time rape is a phenomenon that has been occurring since the first time humans started waging war against each other. The basic psychological drive behind such heinous acts is to have complete control over the victim. In the ancient times, rape was offered as reward to the victors. This trend has followed into the contemporary warfare as well. It is frequently used as a means of psychological warfare to humiliate the enemy and undermine their morale. The perpetrators now use it in a systematic manner as a means of destroying a particular group or nation because in most communities, victims of rape are disowned and made outcasts. Such acts destroy the cultural unity of the group. After a violent rape, the victims are often left sexually mutilated, unable to indulge in sexual intercourse later on, and unable to conceive. Forced pregnancy is another means used by the perpetrators to destroy the unity of a group. In most communities, the child's lineage is determined by the father. The child of a rape victim does not belong to the group. Hence, rape leads to instability in the whole community.

The horrors of the World Wars, the reports of mass rapes in the Yugoslavian wars of secession, and the genocidal massacres in Rwanda, led various social scientists, scholars and human rights organisations to strive towards finding ways to deal with such situations. At this juncture, the efforts of the International Community to define and punish this offence are worth mentioning. From the drafting of the Liber Code[1] in 1863, which was the first attempt made to codify the laws of war, the International community has come a long way in developing the jurisprudence on rape in war times and has made significant contributions in the field.

Rape: International Law Perspective

The role that women play in an armed conflict can be divided into two categories:

1. As members of the civilian population; and
2. As members taking part in hostilities or the armed conflict.

International humanitarian law and international criminal law has strived to protect women playing different roles and at different stages of an armed conflict. But it has to be borne in mind that sexual violence is not limited to rape, it includes forced prostitution, sexual slavery, forced impregnation, forced maternity, forced termination of pregnancy, enforced sterilization, indecent assault, trafficking, inappropriate medical examinations, and strip searches.

The offence of rape from international law perspective has a different dimension altogether. Essentially the definition remains the same, but internationally, rape is discussed either in the context of war crime, genocide or crimes against humanity. Before the World War I, the Lieber Instructions of

1 Instructions for the Government of Armies of the United States in the Field (Lieber Code). April 24, 1863, http://www.icrc.org/ihl.nsf/73cb71d18dc43727412567-39003e6372/a25aa5871a04919bc12563cd002d65c5?, (visited on May 1, 2020).

1863,[1] which was one of the first attempts to codify the laws of land warfare, classified rape as a crime of *troop discipline.* Article 44[2] and Article 47[3] of these Instructions provided for the offence of rape and its punishment, respectively. The Hague Convention of 1907, which was drafted thereafter, sought to protect women by requiring the protection of their *honour*.[4] The modern criminal law jurisprudence on rape is a recent development and the term 'rape' was included in the definition of 'Crimes against Humanity' as adopted by the Control Council Law.[5]

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1 Instructions for the Government of Armies of the United States in the Field (Lieber Code). April 24, 1863, http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/a25aa5871a04919bc12563cd002d65c5?, (visited on May 1, 2020).. The 'Lieber Instructions' represent the first attempt to codify the laws of war. They were prepared during the American Civil War by Francis Lieber, then a professor of Columbia College in New York, revised by a board of officers and promulgated by President Lincoln. Although they were binding only on the forces of the United States, they correspond to a great extend to the laws and customs of war existing at that time. The 'Lieber Instructions' strongly influenced the further codification of the laws of war and the adoption of similar regulations by other states. They formed the origin of the project of an international convention on the laws of war presented to the Brussels Conference in 1874 and stimulated the adoption of the Hague Conventions on land warfare of 1899 and 1907.

2 Article 44 of the Lieber Code 1863, which reads as "*All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior*".

3 Article 47 of the Lieber Code 1863, reads as, "*Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred*".

4 Article 46 of the Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907 states that: "*Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected...*", https://ihl-databases.icrc.org/ihl/WebART/195-200056, (visited on April 15, 2020).

5 Control Council for Germany, Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, December 20, 1945, Official Gazette Control Council for Germany No. 3, 1946, pp. 50, 53. This law set forth a uniform legal basis in Germany for the prosecution of war criminals and similar offenders, other than those dealt with under the International Military Tribunal, http://hrlibrary.umn.edu/instree/ccno10.htm, (visited on April 10, 2020).

Charter of the International Military Tribunal (Nuremberg)

The development of international law on 'rape' after World War II can be traced to the Nuremberg Charter which included crimes against humanity and explicitly elaborated the prohibited acts that constitute such a crime. But the crime of rape specifically did not find any mention.[1] Article 6(c) of the Charter established crimes against humanity as the following:

> *Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the Jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated*.[2]

However, the Nuremberg Judgment did not make any reference to rape, and rape was not prosecuted. The Allies did establish a Commission to investigate allegations of mass rape of French and Belgian women, but it was not a serious initiative.

The next important document was the Charter of the International Military Tribunal for the Far East to ensure the just and prompt trial and punishment of the major war criminals in the Far East.[3] During the World War II, the practice of *comfort women*[4] was prevalent, where the Japanese Government placed two hundred thousand women and girls in military brothels to serve its troops. Although the Statute did not explicitly criminalise rape, the Tribunal prosecuted

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1 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis 1945 (Also known as the London Agreement), https://www.jus.uio.no/english/services/library/treaties/04/4-06/london-agreement.xml, (visited on April 20, 2020).

2 Article 6 of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis 1945.

3 Charter of the International Military Tribunal for the Far East 1946, January 19, 1946, https://www.un.org/en/genocideprevention/documents/atrocitycrimes/Doc.3_1946%20Tokyo%20Charter.pdf, (visited April 20, 2020).

4 Jone Johnson Lewis, "*History of the Comfort Women of World War II*", THOUGHTCO., January 11, 2020, https://www.thoughtco.com/world-war-ii-comfort-women-3530682, (visited on April 20, 2020). During World War II, the Japanese established military brothels in countries they occupied. Women, many from occupied countries including Korea, China, and the Philippines, were forced to provide sexual services to personnel in the Japanese Imperial Army- though the claims of how many were sexual slaves and how many were simply recruited as prostitutes is disputed. Estimates of the number of "comfort women" range from 80,000. Many of the surviving comfort women charge that they were forced to serve and were treated badly in the centres, often sustaining permanent health damage.

rape crimes.[1] But even in this case, the Tribunal decided to ignore the enforced prostitution of those women who were forced to provide sexual services to the troops.

The first modern day international instrument to protect women against rape was the 1949 Convention Relative to the Treatment of Prisoners of War (or the Fourth Geneva Convention).[2] Major development in defining rape as an international crime came through the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY)[3] and the International Criminal Tribunal for Rwanda (ICTR)[4]. Both of these Tribunals have significantly advanced the jurisprudence of the crime of rape by enabling it to be prosecuted as genocide, a war crime, and a crime against humanity. The Tribunals have had to develop their own definitions of rape, since at the time of their formation there was no internationally agreed definition. Based on the decisions of these Tribunals, there emerged a definition of rape both in terms of the *actus reus* and *mens rea.*

Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court (ICC) could not escape to mention in this regard. The ICC Statute expands gender crimes by making rape an individual crime, including other forms of sexual violence, and explicitly defines rape as a war crime and a crime against humanity. The ICC Statute was able to take advantage of the work of the two tribunals in establishing a definition of rape in international law. The definition of rape in the ICC Statute includes two key elements:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim, or the perpetrator, with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

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1 Gabrielle Kirk McDonald, "*The International Criminal Tribunals Crime and Punishment in the International Arena*", ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW, Vol. 7, 2001, p. 667.

2 Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1950.

3 The International Criminal Tribunal for the former Yugoslavia (ICTY) is a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990's.

4 Recognising that serious violations of humanitarian law were committed in Rwanda and acting under Chapter VII of the Charter of the United Nations, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) by Resolution 955 of November 8, 1994. The purpose of this measure was to contribute to the process of national reconciliation in Rwanda and the maintenance of peace in the region. The International Criminal Tribunal for Rwanda was established for the prosecution of persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994.

2. The invasion was committed by force, or by the threat of force or coercion, such as that was caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent.

One of the most significant aspects of the above elements is the presence of the *coercive environment* and the inability of a person to give consent. This moves away from an assumption of implied consent, and recognises that under certain coercive circumstances, the assumption works the other way namely, the assumption is that the sex was unwanted.[1] For the purposes of the Statute, 'crimes against humanity' means any of the following acts, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[2]

For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above. The Statute further significantly expands the number of specific sexual crimes. Thus, in

1 Chapter VII of the Charter of the United Nations, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) by Resolution 955 of November 8, 1994.

2 Article 7 of the Rome Statute of the International Criminal Court 1998, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf, (visited on April 25, 2020).

addition to including "*measures intended to prevent births within a group*" as a form of genocide in line with the 1948 Genocide Convention, Article 7 of the Statute designates "*rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity*" as crimes against humanity.[1] The war crimes over which the ICC has jurisdiction include "*rape, sexual slavery, enforced prostitution, forced pregnancy enforced sterilization or any other form of sexual violence*" when committed in international or non-international armed conflicts.[2]

The Geneva Conventions

The Geneva Conventions, which set the standards in international law for humanitarian treatment of the victims of war, expressly referred to sexual violence, but in an inadequate manner. Even the Additional Protocols did not offer much explanation. The First Geneva Convention related to wounded soldiers in the battle field, the Second Convention related to wounded and shipwrecked at sea, the Third to prisoners of war and the Fourth Convention related to civilians under enemy control.[3] Article 27 of the Fourth Geneva Convention provides that: "*Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.*"[4] This provision emphasises the special obligation on the parties to a conflict to protect women against sexual violence. But, it creates a notion that the list of sexual offences provided are stigmatised because they are a direct assault to her honour rather than her physical and psychological well-being. The Additional Protocol I to this Convention expressly lays down a prohibition on such acts of sexual violence. Article 75 of this Protocol provides

1 Article 7(2)(f) of the Rome Statute of International Criminal Court 1998 defines forced pregnancy as: "*unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law*".

2 Articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute of International Criminal Court 1998.

3 The Geneva Conventions and their Commentaries, https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions, (visited on April 25, 2020).

4 Article 27 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva 1949 reads as "*Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion. However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war*".

for certain fundamental guarantees, which are to be ensured both by civilian as well as military agents.

Article 75(2) (b) provides:

> *The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.*

Protocol-I deals with the issue of protection of women more specifically. It states:

> *Protection of women:*
>
> 1. *Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.*
> 2. *Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.*
> 3. *To the maximum extent feasible, the Parties to the conflict shall endeavor to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.*[1]

The reference of sexual violence can also be found in Article 77 of the protocol, but that is in reference to children who are the victims of an armed conflict. Additional Protocol II applies in case of non-international armed conflicts. It states:

> "*Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault…*"[2]

This provision is repetitive of the above Article in Protocol I. Apart from this, prohibition of sexual violence can be found explicitly mentioned in various humanitarian law provisions which prohibit violence to life, including cruel and

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1 Article 76 of the Protocol Additional to the Geneva Conventions 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977.

2 Article 4(2)(e) of the Protocol Additional to the Geneva Conventions 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II) 1977.

inhumane treatment, torture and outrages upon personal dignity which are equally applicable to international and non-international armed conflicts.[1]

Statutes of International Criminal Tribunals for Yugoslavia and Rwanda

In the recent years, regulation of sexual violence by international humanitarian law has taken centre stage and significant developments have taken place. Acts of sexual violence fall within the scope of *wilfully causing great suffering or serious injury to body or health* but they were not expressly included in the list of grave Breaches of the Geneva Conventions and Additional Protocol I.[2] But these acts are incorporated as self-standing crimes in the Statutes of the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda and of the International Criminal Court. The statutes of the mentioned international Tribunals consider rape to be a crime against humanity. Article 5(g) of the ICTY states as follows:

> *The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:*
>
> *(a) murder;*
> *(b) extermination;*
> *(c) enslavement;*
> *(d) deportation;*
> *(e) imprisonment;*
> *(f) torture;*
> *(g) rape;*
> *(h) persecutions on political, racial and religious grounds;*
> *(i) other inhumane acts.*[3]

Article 3(g) of the ICTR Statute states as follows:

> *The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:*
>
> *(a) murder;*
> *(b) extermination;*
> *(c) enslavement;*

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1 Common Article 3 Geneva Conventions; Article 75(2) of the Additional Protocol I; and Article 4(2)(a) of the Additional Protocol II.

2 Article 50 of the Geneva Convention I, Article 51 of the Geneva Convention II, Article 130 of the Geneva Convention III, 147 of the Geneva Convention IV and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977.

3 *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia,* https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, (visited on May 9, 2020).

(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.[1]

The ICTR statute in its Article 4(e) includes "*outrages against personal dignity and in particular, rape, enforced prostitution and any form of indecent assault*"[2] as violations of common Article 3 and of Additional Protocol II over which the Tribunal has jurisdiction. In developing this jurisprudence, the ICTY in its judgment in *Delalic and Others*[3] and *Furundzija*[4] has recognized that rape or other acts of sexual violence may be subsumed under torture or outrages upon personal dignity, in particular humiliating and degrading treatment, committed in armed conflicts- international or non-international - which are violations of the laws and customs of war (i.e., Article 3 common to the Geneva Conventions) over which the Tribunal also has jurisdiction.

The ICTR and ICTY in various instances have held that rape and other forms of sexual violence can constitute grave breaches of the Geneva Conventions of 1949, laws or customs of war and genocide, as well as crimes against humanity.[5] It reflects efforts of the tribunals to develop the jurisprudence of sexual violence, more particularly rape. It is of utmost importance to protect women during war because apart from suffering from the usual consequences of war, they also live under the threat of being attacked sexually. The tribunals had come a long way to offer maximum protection to women during such times of strife.

The *Akayesu* [6] case is the most celebrated one, it being the first of its kind to frame out the definition of rape and bring it under the ambit of crimes against humanity. It is celebrated broadly for two reasons:

Firstly, it was the first judgment of either of the tribunals to define rape, finding it to be *a* "*physical invasion of a sexual nature, committed on a person under circumstances which are coercive*".[7] This judgment found that such acts are "*not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact*".[8]

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1 *Statute of the International Tribunal for Rwanda,* https://legal.un.org/avl/pdf/ha/ictr_EF.pdf, (visited on May 9, 2020).
2 Article 4(e) of the International Criminal Tribunal for former Yugoslavia 1994.
3 *Prosecutor v. Zenzil Delalic*, Case No. IT-96-21, Trial Chamber, November 16, 1998, para 476, 479 and 496.
4 *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Chamber, December 10, 1998, para 210.
5 *Prosecutor v. Akayesu*, Case No. 96-4-T, Trial Chamber, September 02, 1998.
6 *Ibid*.
7 *Ibid*., para 688.
8 *Ibid*.

Secondly, the Trial Chamber found that rape and sexual violence can constitute the factual elements of the crime of genocide "*in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such*".[1] Thus, although rape is not specifically listed as a crime of genocide in the statute, it has been held to cause serious *bodily and mental harm* to members of the group and can therefore be prosecuted under the applicable provisions.[2]

The next case which addressed rape as a crime against humanity is the *Celebici*[3] case. This was another important development that took place in this direction. The Trial Chamber again placed heavy reliance on the *Akayesu* judgement and upheld it. It appreciated the broad view taken by the Trial Chamber in the mentioned case and stressed that rape is an offence where physical invasion takes place under coercive circumstances.[4] This case abandoned the narrow scope of rape as a crime committed against women and held that it is an offence that can be committed both against men and women alike.

The Trial Chamber further contributed to the development of this jurisprudence in the case of *Furundzija*[5] by including sexual penetration of the mouth of the victim by the penis of the perpetrator. This act amounted to sexual assault prior to this case. The Trail Chamber while defining rape included these acts in the *actus reus* of the crime so that the perpetrators do escape on a lower penalty.[6] This is one of the most significant developments that have taken. The Chamber finally concluded that that rape and serious sexual assault should be prosecuted as a grave breach, genocide, and of course, as a crime against humanity as provided in Article 5 of the statute.[7] It also recognises that coercion-which the Trial Chambers in *Akayesu* and *Celebici* found is inherent in armed conflict-exists whether directed toward the victim or toward third parties.

The judgement delivered in *Kunarac*[8] was widely appreciated as it was one of the first decisions to frame rape as a crime against humanity. The important aspect of the decision was the trial chamber's reformulation of the elements of rape set out in *Furundzija*[9]. Rather than following the model of rape based on penetration and coercion, the judges of the ICTY trial chamber in *Kunarac* broadened the definition of force and non-consent and explicitly recognised the victim's right to sexual autonomy. The *Kunarac* decision makes explicit what

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1 *Prosecutor v. Akayesu*, Case No. 96-4-T, Trial Chamber, September 02, 1998, para 731.
2 *Ibid*.
3 *Prosecutor v. Zenzil Delalic*, Case No. IT-96-21, Trial Chamber, November 16, 1998.
4 *Ibid*., para 478.
5 *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Chamber, December 10, 1998, para 210.
6 *Ibid*., para 174.
7 *Ibid*., para 172.
8 *Prosecutor v. Kunarac*, Case no IT-96-23-T & IT-96-23/1-T (Trial Chamber Feb. 22, 2001)
9 *Supra* n. 5.

the ICC Statute suggests - that sexual autonomy is intrinsically connected to human dignity and bodily integrity. The ICTY thus has reinstated the basic principles of setting out a framework that makes clear that the victim's ability to consent, in addition to the effective exercise of that consent in view of the external circumstances of war will distinguish legal from illegal sexual acts. The ICTY has given sexual autonomy a discrete character warranting protection under international law. This interest is not based on a showing of force, because it is emitted from the perspective of the individual victim, the woman who can and should choose when and how to engage in sexual and reproductive acts.

Each of these judgments discussed above has significantly dealt with the crimes of rape and sexual violence, demonstrating at long last, they should be prosecuted as vigorously and at par with other crimes committed during conflicts. Although rape is enumerated only as a crime against humanity in the Statute of the ICTY and the Statute of the ICTR, these judgments recognize that rape and sexual violence can also constitute a grave breach of the Geneva Conventions, a violation of the laws or customs of war, or an act of genocide.

Apart from the above mentioned statutes that seek to protect women against rape in war times, there exists other human rights instruments as well that deal with violence against women in general. These instruments include the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict and the 1993 UN Declaration on the Elimination of Violence against Women. In these instruments, references to sexual offences and violence are limited. The Inter-American Convention provides that:

> *Violence against women shall be understood to include physical, sexual and psychological violence:*
>
> *(a) that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;*
>
> *(b) that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and*
>
> *(c) That is perpetrated or condoned by the state or its agents regardless of where it occurs.*[1]

The Convention provides a very wide scope for sexual violence including violence by family, community and State agencies. Further, sexual offences and

1 Article 2 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994.

sexual violence are specifically addressed in the Convention on the Rights of the Child, which requires States parties to protect children from all forms of sexual exploitation and sexual abuse.[1] Finally, the Genocide Convention includes "*imposing measures intended to prevent births within a group*" among the list of acts which, if accompanied by the necessary intent to destroy that group in whole or in part, may amount to genocide.[2]

Conclusion

The ICC Statute is the first ever international instrument to provide a legal framework in which women's autonomy and consent can be expressed, assessed, and promoted. By all means, this is a considerable achievement apart from the ICTR and ICTY. The Rome Statute or the Statue of the International Criminal Court also deals with gender based crimes and seeks to enumerate rape as one of the acts that constitute a crime against humanity.[3] The ICC provisions broaden the foundation upon which sexual crimes can be prosecuted under international law in several important ways. Rape is not defined in the ICC Statute, but its inclusion as an act of crime against humanity emphasizes the gender component of sexual violence. They underscore that violence against women is not a necessary aspect of war, and they mark how women's rights are human rights. They also demonstrate that the principles of human dignity and autonomy are central to the international legal order and to democracy, and that they function in times of peace as in war, regardless of gender, regardless of circumstances.

There are other issues that need to be considered. The ICC is not a court of first instance. It can only take jurisdiction over cases where States are either unable or unwilling to prosecute, and as such, it will ironically be most effective if it never takes a case as a result of having spurred national courts to try the cases first.[4] In order to render the ICC provisions on sexual crimes effective, they must be properly implemented at the domestic level to ensure that the mechanisms for prosecution are in place. Also, the ICC provisions must seep down so that communities are able to combat the causes and not only the effects of violence against women. The ICC has jurisdiction over the most serious international crimes, not over the most pervasive sexual atrocities. Domestic violence, random acts of aggression, marital assaults, and the range of other sexual assaults not committed in the context of war crimes, genocide, or crimes against humanity and thus they cannot be addressed by the ICC. Violence against women in war is a reflection of attitudes and approaches to women which are rooted in our everyday life and in our most basic human interactions.

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1 Article 34 of the Convention on the Rights of the Child 1989.

2 Article II (d) of the Convention on the Prevention and Punishment of the Crime of Genocide 1948.

3 Article 7 of the Rome Statute of the International Criminal Court 1998.

4 Gerhard Hafner, "*A Response to the American View as Presented by Ruth Wedgewood*", EUROPEAN JOURNAL OF INTERNATIONAL LAW, Vol. 10, 1999, p. 108.

Thus it can be rightly concluded that the ICC, the ICTY and the ICTR have been successful in protecting women against sexual violence during war, both internal and external, more particularly rape. The decisions discussed above are much celebrated in the international community as the judges have gone beyond the traditional understanding of the concept of rape and included other elements which were usually considered to be mere acts of sexual assault. The most significant phenomenon amongst all other is the evolution of a proper definition of rape, with well-defined elements. This was necessary to avoid miscarriage of justice as without a proper definition, any interpretation can be accorded to the crime and subsequently it can be brought down to a lower level with much lesser punishments. Thus the women now have a definite body of law and a very strong jurisprudence to rely on in times of war that can offer some respite to their bruised souls.

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DYNAMICS OF THE RIGHT OF PUBLICITY IN INDIA: AN APPRAISAL UNDER INTELLECTUAL PROPERTY REGIME

Vandana Mahalwar[♣]

Abstract

The 'right of publicity' gives the entertainers and other celebrities an assignable and descendible right to exploit the commercial value of their name, image or likeness. The concept of publicity rights does not exist per se in the Indian law. In the absence of any clear law on right of publicity, the courts are steadily recognising and enforcing the right, considering it as a proprietary right. This paper discusses the standard justifications that are made in support of right of publicity. Then, it goes on to trace the origin and development of the right of publicity, finding its historical roots in the right to privacy. The paper further analyses the common law based approach adopted by Indian courts and then, attempts to reflect how the current judicial approach is unconvincing to protect the celebrity rights. Further, the paper discusses the limited protection afforded by intellectual property regime through copyright and trademark statutory provisions. Examining the interplay between copyright and publicity rights and rationalising copyright overreach as not a good idea to enforce personality interests, the paper finally concludes with a suggestion to have a separate legislation for governing the publicity rights.

Keywords: Intellectual Property Rights, Publicity, Right of Publicity, Commercial Exploitation, Identity.

Introduction

Since the advent of the industrial revolution and augmented proliferation in the consumption of goods and services, merchandisers have sought new ways to attract the attention of consumers.[1] A celebrity's name, image, voice or likeness can become powerful instruments to the manufacturers of goods and suppliers of services to promote their outputs. In turn, celebrities seek to prevent the unauthorised use of their attributes by manufacturers and suppliers of goods.[2] Celebrities do allow their identities to be used for merchandising purposes in return for a specific license fee. This practice does not harm the interests of celebrities but when merchandisers make unauthorised commercial use of the personality, then the issue of right of publicity comes into picture. The 'Right of publicity' is established as an exclusive right of individuals to exploit their

♣ Fulbright Visiting Scholar, Duke Law School, Duke University, Durham, USA and Assistant Professor, Faculty of Law, University of Delhi, Delhi, e-mail: vandana.mahalwar@gmail.com.

1 H. Beverley-Smith et al., PRIVACY, PROPERTY AND PERSONALITY, 1st ed. 2005, p. 1.

2 G. Black, PUBLICITY RIGHTS AND IMAGE, 1st ed. 2011, p. 1.

names, images, voices, likenesses, signatures or other related indicia, in a commercial manner. Developed as a byproduct of the right to privacy, the right of publicity has emerged as an umbrella term to include a wide range of circumstances, ranging from the publication of an image without permission, to that of taking photographs without consent of the subject,[1] to the misappropriation of a singer's voice.[2] Historically, the right of publicity was first recognised as an independent branch of the right to privacy in 1953, in the case *Haelan Laboratories, Inc. v. Topps Chewing Gum,* wherein the Second Circuit held that "*in addition to and independent of the right of privacy, a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture*".[3]

This right of publicity has become subject to the use of different nomenclature and legal treatments in different jurisdictions of the world. For example, the right is deemed as 'Right of Publicity' in the United States, while Continental Europe uses the term 'Personality Rights'.[4] This paper discusses the jurisprudence evolved by Indian courts on the right of publicity. The courts in India found themselves in a short-lived quandary when first asked whether a celebrity should have any right to limit the appropriation of his/her persona attributes.

Arguments Advanced in Support of Right of Publicity

This part discusses the chief justifications that the courts and commentators have advanced in support of the right of publicity. The main rationale in support of the right of publicity can be classified into three categories. Following are the justifications which briefly touch upon the arguments in support of publicity rights:

Moral Argument

First of all, is the 'Moral' justification, which is premised on the theory of 'prevention of unjust enrichment'.[5] Generally, advertisers prefer to exploit the

1 *Aubry v. Les Editions Vice Versa* (1998) 1 SCR 591.

2 *Midler v. Ford Motor Co*. 849 F.2d 460 (9th Cir. 1988).

3 202 F.2d 866, 868 (2d Cir. 1953); Darren F. Farrington, "*Should the First Amendment Protect Against Right of Publicity Infringement Actions Where the Media is Merchandiser? Say It Ain't So, Joe*", FORDHAM INTELLECTUAL PROPERTY, MEDIA & ENTERTAINMENT LAW JOURNAL, Vol. 7, 1997, p. 779.

4 Ian Blackshaw, "*Understanding Sports Image Rights*", WIPO, https://www.wipo.int/ip-outreach/en/ipday/2019/understanding_sports_image_rights.html, (visited on April 6, 2020).

5 Michael Madow, "*Private Ownership of Public Image: Popular Culture and Publicity Rights*", CALIFORNIA LAW REVIEW, Vol. 81, 1993, pp. 125, 178. The moral argument is based on the injustice of permitting others to "*reap where they have not sown*".

identity of those persons who are famous, but 'fame is no sure test of merit'.[1] In similar fashion, Nimmer derived the justification of right of publicity from the axiom that "*every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations*".[2] Nimmer deftly deploys the Locke's labour theory which advances the proposition that "*the economic value of identity should be allocated to the celebrity because the value is primarily the result of the celebrity's labor*".[3] The right is justified as a matter of moral right on the ground that one who has created the property shall prevail in case of conflicting claims.

Economic Argument

The economic justification for publicity rights is based on the argument that the people will continue to write books only when they are assured that they will get to reap what they have sown. It is maintained that right of publicity aims to incentivise the creativity and it encourages the persons to expend their time, efforts and resources in creation of work. Underscoring the importance of economic rationale, Chief Justice Rose Bird expressed in *Lugosi v. Universal Pictures*: "*Providing legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition…*"[4].

Misappropriation of personality attributes poses a substantial threat to the economic value of celebrities. However, this argument takes us further to the question: whether the incentivisation results in increase of efforts and creativity in entertainment creations, in light of the fact that the monetary rewards for achieving fame are much more than the needed control incentive.[5] The position is not clear whether protection through incentives leads to overinvestment in entertainment industry and it produces more people with fame.[6]

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1 H.L. Mencken, A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES, 1st ed. 1942, p. 384.

2 Melville B. Nimmer, "*The Right of Publicity*", LAW AND CONTEMPORARY PROBLEMS, Vol. 19, 1954, pp. 203-216 defines the right of publicity as "*the right of each person to control and profit from the publicity values which he has created or purchased*". He says that a person who has expended "*time, effort, skill, and even money' in his or her creation, is presumptively entitled to enjoy himself or herself*".

3 Mark P. McKenna, "*The Right of Publicity and Autonomous Self-Definition*", UNIVERSITY OF PITTSBURGH LAW REVIEW, Vol. 67, 2005, pp. 225-230.

4 603 P.2d 425 (Cal. 1979).

5 Dustin Marlan, "*Unmasking the Right of Publicity*", Hastings Law Journal, Vol. 71, 2020, pp. 419-453; Mark P. McKenna, "*The Right of Publicity and Autonomous Self-Definition*", UNIVERSITY OF PITTSBURGH LAW REVIEW, Vol. 67, 2005, p. 225. Quoting Lander and Posner "*the motive in providing stronger publicity rights is not to encourage greater investment in becoming a celebrity (the incremental encouragement would doubtless be minimal), but to prevent the premature exhaustion of the commercial value of the celebrity's name or likeness*".

6 Stacey L. Dogan and Mark A. Lemley, "*What The Right of Publicity Can Learn from Trademark Law*", STANDFORD LAW REVIEW, Vol. 58, 2006, pp. 1161-

Consumer Protection Argument

The publicity rights are also rationalised to protect the consumers from any deception or confusion regarding the product endorsement.[1] Unauthorised appropriation of identity substantially involves the risk of detriment to the actual or potential consumers, based on the false suggestion of endorsement of goods or services.[2] The merchandisers can make unauthorised use of celebrity's identity and lead the consumers to believe into buying them, which dashes the expectations of the consumers. Nevertheless, there is no evidence that consumers suffer from any damage because of confusion as to the source of celebrity's identity.

Right to Privacy: A Progenitor to the Right of Publicity

To properly understand the notion of a publicity right, it becomes imperative to trace its genesis in the right to privacy, which has previously been used as an instrument to protect the personality interests. As defined by J. Thomas McCarthy in Right to Publicity, it was a right to control the dissemination of information about oneself. All persons have a right to be left alone and to lead a life free from invasion or any unwarranted interference. The right to privacy secured a person's right 'to be let alone' and protected non-economic dignitary interests rooted in human personality.[3] Later, however, it was recognised that right to privacy was inadequate to protect all the relevant personality interests because of its inability to safeguard the financial interests of celebrities.[4] William Posner's four-prong classification of the right to privacy then reinforced the origin of right of publicity. His four part classification of the privacy tort covered: invasion of privacy by intrusion into private affairs; invasion of privacy by public disclosure of private facts; invasion of privacy by false light and; invasion of privacy by appropriating some aspect of an individual's identity for commercial gain.[5]

India, being a signatory to International Covenant on Civil and Political Rights 1966 and Universal Declaration of Human Rights 1948, protects 'dignity' as a constitutional value. Article 17 of the International Covenant on

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1188; Diane Leenheer Zimmerman, "*Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!*", DEPAUL-LCA JOURNAL OF ART & ENTERTAINMENT LAW AND POLICY, Vol. 10, 2000, pp. 283-306. There is no data which shows that celebrities will not invest in their talent if they are not provided right of publicity.

1 Alain J. Lapter, "*How the Other Half Lives (Revisited): Twenty Years since Midler v. Ford-A Global Perspective on the Right of Publicity*", Texas Intellectual Property Law Journal, Vol. 15, 2007, pp. 239-254. Promoting the notion that an enforceable right of publicity will protect consumers from deceptive trade practices.

2 Michael Madow, "*Private Ownership of Public Image: Popular Culture and Publicity Rights*", CALIFORNIA LAW REVIEW, Vol. 81, 1993, pp. 125-155.

3 S. Warren and L. Brandeis, "*The Right to Privacy*", HARVARD LAW REVIEW, Vol. 4, 1890, pp. 193-205.

4 F.W. Harper and F. James, THE LAW OF TORTS, 1st ed. 1956, pp. 689-690.

5 William Prosser, "*Privacy*", CALIFORNIA LAW REVIEW, Vol. 48, 1960, p. 383.

Civil and Political Rights, 1966 provides that "*no one shall be subject to arbitrary or unlawful interference with his privacy, family, human or correspondence, nor to unlawful attacks on his honour and reputation*". Article 12 of Universal Declaration of Human Rights 1948 stands almost similar to Article 17 of International Covenant on Civil and Political Rights in its language.

In India, right to privacy stems from the common law right of a person to prevent intrusion into one's private life. Privacy doctrine in India emerges from two sources in the Constitution of India, namely, the Preamble and Article 21 of Part III of the Constitution of India. The objectives set by the Preamble are "*to secure to all of its citizens the Fraternity assuring the dignity of the individual*". To balance the privacy-dignity claims, the court in *Kharak Singh v. State of UP*,[1] derived the right of privacy from the Preamble's goal of dignity of the individual.

Article 21 of the Constitution of India provides that "*No person shall be deprived of his life or personal liberty except according to procedure established by law*". In *Kharak Singh*, the court derived the right to privacy from 'Right to Life and Personal Liberty' given under Article 21 of the Constitution by giving a wide and liberal construction to the word "*Personal Liberty*". Reliance was placed on *Wolf v. Colorado*, wherein court held that "*the security of one's privacy against arbitrary intrusion by the police… is basic to a free society*". In *Gobind v. State of Madhya Pradesh*,[2] Supreme Court of India evolved a vast jurisprudence on Privacy doctrine, but right to privacy was yet to be explicitly declared as a fundamental right. The court, in this case stated that "*right to life did not entail mere animal existence but instead a right to live with human dignity*".[3] In *ICC Development (International) Ltd. v. Arvee Enterprises*, the High Court of Delhi, while making a special reference to celebrity rights, acknowledged that the right of publicity has originated in and developed from the right to privacy.[4]

Supreme Court of India, in its historic judgment, *Justice K.S. Puttaswamy v. Union of India*, held that, "*the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution*"[5]. The apex court also expressed that 'informational privacy', or the privacy relating to 'personal data' and facts, is also an indispensable aspect of the right to privacy. Chandrachud J., while analysing the concept of dignity, contended that, "*Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which*

1 AIR 1963 SC 1295.
2 AIR 1975 SC 1378.
3 *Ibid*.
4 *ICC Development (International) Ltd. v. Arvee Enterprises* 2003 (26) PTC 245 (Del).
5 (2017) 10 SCC 1.

straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination".[1]

Evolution of Right of Publicity in India

Before the right to publicity was recognised, right to privacy was used as an instrument to protect the interests in personality. Right to Privacy secured a person's right 'to be let alone' and protected non-economic dignitary interests in personality.[2] Later it came to appear that Right to privacy is inadequate to protect the personality interests as it failed to safeguard the financial interests of celebrities.[3] The right of publicity protects a specific intangible good, namely, persona. The right aims to protect all symbols or indicia which identify a person.[4] As interpreted by Frazer, the "*indicia of identity*" comprises the name, likeness and voice of a natural person.[5] While personality rights, on a regular basis, protect unauthorised use of the plaintiffs name or image,[6] it also extends to protect the performances of celebrities.[7] Different terminology is used for such symbols like 'persona', 'personality', 'identity' or 'character'.

The jurisprudence on right of publicity is relatively in its embryonic period in India. Though it does not have any specific legislation governing the publicity rights of celebrities, yet in a few judgments, the Indian judiciary has recognised the right of publicity as part of common law. Right to publicity as a kind of the right of privacy was first recognised by the Supreme Court of India in *R. Raja Gopal v. State of Tamil Nadu*,[8] where the apex court expressed that "*the first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising-or non-advertising-purposes or for any other matter*".

The Delhi High Court took notice of the right of publicity in *D.M Entertainment v. Baby Gift House*[9]**.** In this case, Daler Mehndi, a popular music composer, lyricist and singer in India was involved in the production of various music albums such as *Bolo ta ra ra ra, Dardi rab rab*, and others, which were sold extensively all over the world.[10] In 1996, Daler Mehndi incorporated D.M. Entertainment in which 'D.M.' stood for the initials of his name. After incorporation of the company, Daler Mehndi assigned all his publicity rights including commercial endorsements rights and other related rights, to the

1 (2017) 10 SCC 1, para 169.
2 S. Warren and L. Brandeis, "*The Right to Privacy*", HARVARD LAW REVIEW, Vol. 4, 1890, pp. 193-205.
3 F.W. Harper and F. James, THE LAW OF TORTS, 1st ed. 1956, pp. 689-690.
4 Julius C.S. Pinckaers, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA, 1st ed. 1996, p. 265.
5 Tim Frazer, "*Appropriation of Personality: A New Tort?*", LAW QUARTERLY REVIEW, Vol. 99, 1983, p. 281.
6 *Factors Etc. v. Pro Arts, Inc*. 579 F.2d 215 (2d Cir. 1978).
7 *Waits v. Frito-Lay, Inc.* 978 F.2d 1093 (9th Cir. 1992).
8 1994 SCC 632.
9 *D.M. Entertainment v. Baby Gift House* MANU/DE/2043/2010.
10 *Ibid.*

company.[1] Baby Gift House (BGH), is a company that manufactures toys and gifts in Delhi.[2] It sold some dolls that were allegedly imitations of, and modelled on, the likeness of Daler Mehndi.[3] In addition to that , the dolls could dance and sing lines from some of the Daler Mehndi's song.[4] D.M. Entertainment initiated action against the defendants in Delhi High Court, alleging that the importation and sale of the dolls or images was a clear violation of his right to control the commercial value of his identity.[5] The plaintiff company also asserted that the defendants were liable for false endorsement and passing off, and hence sought a permanent injunction against the defendants.

The Delhi High Court held that, defendants were liable for infringing plaintiff's right of publicity, false endorsement and for passing off. The Delhi High Court noticed that Mehndi's identity was incorporated into the toys with an aim of commercial advantage.[6] The High Court mentioned that defendants were manufacturing the toy dolls and hence exploited Mehndi's publicity value.[7]

Moreover, the Court noted that in a jurisprudential sense, the right of publicity can be placed within the individual's right to allow or prohibit the profitable appropriation of his persona.[8] The Delhi High Court contended that a person asserting false endorsement should establish that his persona's exploitation is likely to mislead public that he actually promoted that commodity.[9] In Delhi High Court's opinion, the appropriation of Mr. Mehndi's personality attributes for profit making was not justifiable as it led the public to believe that either he has some connection with the defendant's product or he has licensed his images for the advertising purpose.[10] Hence, the Court decided that the defendants were liable for false endorsement.

In *ICC Development (International) v. Arvee Enterprises*,[11] ICC Development (International) Limited (ICC) , coordinator of the ICC World Cup organised in South Africa, Zimbabwe, and Kenya in 2003,[12] made a distinctive insignia and talisman for that event and applied for its registration as trademark in many countries.[13] In India , ICC applied for registration of 'ICC Cricket World Cup South Africa 2003,' and its insignia. Philips India Limited and the certified dealers advertised their own goods by tendering the tickets for the

1 *D.M. Entertainment v. Baby Gift House* MANU/DE/2043/2010.
2 *Ibid.*
3 *Ibid*., para 9.
4 *Ibid.*
5 *Ibid*., para 1.
6 *Ibid*.
7 *Ibid*., para 14.
8 *Ibid*.
9 *Ibid*., para 15.
10 *Ibid*.
11 *ICC Development (International) v. Arvee Enterprises* 2003 (26) PTC 245 (Del).
12 *Ibid*., para 2.
13 *Ibid*.

World Cup.[1] It made the catchphrases "*Philips: Diwali Manao World Cup Jao*" and "*Buy a Philips Audio System to win a ticket for the World Cup*".[2]

ICC initiated action against the defendant for the infringement of its right of publicity, and requested for interim injunction. Subsequent to hearing, the court declared that nonliving bodies are not capable to be protected under the publicity rights. The court mentioned that such a judgment would not be in favour of the fundamental notion of 'persona', that alludes to a living creature. According to the court, the publicity rights emanated from the right to privacy and can only attach to indicia of an individual's personality, like his name, personality features, signature, voice, etc.[3] While an individual acquires the right of publicity because of his association with an event, sport, or movie, the right of publicity cannot attach to the event that made the person popular, nor in the corporation that organised the event.[4]

Another important case on the right of publicity is *Titan Industries Limited v. Ramkumar Jewellers*,[5] wherein the plaintiff was selling a range of diamond jewelry under the brand name 'Tanishq' and the defendant misappropriated an advertisement hoarding of the plaintiff, featuring popular actors Amitabh Bachchan and Jaya Bachchan. The defendant was selling identical goods to those of plaintiff's goods. The court while granting permanent injunction in favour of plaintiff, expressed that:

> *When the identity of a famous personality is used in advertising without their permission, the complaint is not that no one should not commercialize their identity but that the right to control when, where and how their identity is used should vest with the famous personality. The right to control commercial use of human identity is the right to publicity.*

To summarise, it can be said that right of publicity is a recent development in India. The courts have been majorly relying upon the common law to protect the publicity interests. Although the courts are giving reliefs in the publicity cases but the ambiguities regarding the scope and limitations of these rights still exist.

Protection under Intellectual Property Regime

There is a thin line between exploitation of the right of publicity in a name or image and infringement of a copyrighted name, image or photograph. Although misappropriation of a person's name, image or likeness runs parallel to infringement of copyright in a name or image, they both do not fully overlap

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1 *ICC Development (International) v. Arvee Enterprises* 2003 (26) PTC 245 (Del), para 1.

2 *Ibid*.

3 Souvanik Mullick and Swati Narnaulia, "*Protecting Celebrity Rights Through Intellectual Property Conceptions*", NUJS LAW REVIEW, Vol. 01, No.4, 2008, p. 615.

4 *Ibid*.

5 2012 (50) PTC 486 (Del).

each other as the purposes of the two regimes are different in nature. There may not be any commercial interest involved in infringing the copyright in a name or image, but that remains a key criterion for exploitation of right of publicity. Moreover, the advantages accruing to a copyist from the unauthorised exploitation of an individual's persona are usually not as far reaching as those attainable from earned professional or academic credit.

The Copyright Act 1957 does not define the term 'celebrity'. But, in context of character merchandising, we can make reference to the meaning of 'performer' given in Section 2(qq) of the Copyright Act 1957. It can't be asserted that a performer is always a celebrity and likewise a celebrity may not be a performer in any way. A performer may include an actor, musician, sportsperson, dancer, singer, acrobat, juggler, conjurer, one delivering lecture, or any other person making any other kind of performance. Section 2(q) of the Copyright Act defines 'performance' as performance in relation to performer's right, means any visual or acoustic presentation made live by one or more performers. Section 38 of the Act provides special rights to the performers who appear or make any performance in relation to that performance and the right in such performance shall subsist for 50 years. Moreover, Sections 38 and 38A of the Act recognises the performer's right and prevents the unauthorised use of one's performance.

The Indian Copyright Act 1957 protects the painting, drawing, and photograph under the category of artistic works. Section 14 of the Act provides the exclusive right to owner of copyright to make any adaptation of the work,[1] to include the work in any cinematograph work[2] and to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work.[3] Thus, a celebrity having an ownership in his/her image has the right to prevent unauthorized commercial reproduction when a substantial portion of the plaintiff's work has been used.

Celebrities can also seek protection under the trademark law, but this protection is very limited in its scope. Under the trademark law, the name of any well-known personality may be registered as a word mark and the images may be protected by registering them as trademark devices and accordingly the protection can be given to the commercial value of such personalities. As per section 2(zb) of the Trademarks Act 1999, mark must be capable of being represented graphically and of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours. In addition, Section 14 of the Trademarks Act 1999 prohibits registration of a trademark which suggests a false connections with any person.[4]

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1 Section 14(c)(v) of the Copyright Act 1957.

2 Section 14(c)(iv) of the Copyright Act 1957

3 Section 14(c)(i) of the Copyright Act 1957.

4 Section 14 of the Trade Mark Act 1999 states that: "*Use of names and representations of living persons or persons recently dead-'Where an application is*

The Trademark Act 1999 well recognises the tort of passing off to protect the unregistered trademarks. When a person uses an unregistered trade mark without permission of the owner to sell any goods or services, the trademark owner may seek protection through action for passing off. Passing off is a common law remedy and is well accepted in India also since there is no statutory law available for unregistered trademarks.[1] To take a successful action for passing off, the owner of a trademark needs to establish the following requisites: (a) mark's goodwill; (b) misrepresentation; and (c) resultant injury to the plaintiff's business or goodwill.[2]

Hence, the person seeking protection has to establish goodwill in his or her image, in order to be successful in an action of passing off. Relying on the first element, it can be asserted that action of passing off can be availed by only those who have a 'position in the society', as it is unlikely for any common individual to prove the goodwill in his name or image.

Other Statutory Roads to Right of Publicity

After analysing different intellectual property laws, it can be stated that there is no specific provision in India's current intellectual property regime to protect the right of publicity. There are, however, some provisions not related to intellectual property which might provide some degree of protection relevant to right of publicity.

A. The Emblems and Names (Prevention of Improper Use) Act 1950

The Emblems and Names (Prevention of Improper Use) Act 1950 prohibits the improper use of some dignitaries' names, for the purpose of any trade, business, calling or profession, without previous permission of the Central Government or any authorised officer of the Government.[3] It prohibits the

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made for the registration of a trade mark which falsely suggests a connection with any living person, or a person whose death took place within twenty years prior to the date of application for registration of the trade mark, the Registrar may, before he proceeds with the application, require the applicant to furnish him with the consent in writing of such living person or, as the case may be, of the legal representative of the deceased person to the connection appearing on the trade mark, and may refuse to proceed with the application unless the applicant furnishes the registrar with such consent".

1 Swati Deva, "*What's in a Name? Disputes Relating to Domain Names in India*", INTERNATIONAL REVIEW OF LAW COMPUTERS AND TECHNOLOGY, Vol. 19, No. 2, 2005, pp. 165-181.

2 Nishant Kewalramani and Sandeep Hegde M, "*Character Merchandising*", JOURNAL OF INTELLECTUAL PROPERTY RIGHT, Vol. 17, 2012, pp. 454-459.

3 Section 3 of the Emblems and Names (Prevention of Improper Use) Act 1950 states that: "*Notwithstanding anything contained in any law for the time being in force, no person shall, except in such cases and under such conditions as may be prescribed by the Central Government, use, or continue to use, for the purpose of any trade, business, calling or profession, or in the title of any patent, or in any trade mark or design, any name or emblem specified in the Schedule or any colourable imitation thereof without the previous permission of the Central Government or of such*

competent authority from registering any trademark or design which bears any prohibited emblem or name.[1]

B. Advertising Legislation

The Advertising Standards Council of India hereafter referred as ASCI is a voluntary self-regulating body, has adopted a code to control the contents of advertisements. ASCI aims to encourage honest practices and fair competition in the market. The code, being self-regulatory in nature, is not binding in effect. Paragraph 1.3 of chapter 1 of the code provides:[2]

> *Advertisements shall not, without permission from the person, firm or institution under reference, contain any reference to such person, firm or institution which confers an unjustified advantage on the product advertised or tends to bring the person, firm or institution into ridicule or disrepute. If and when required to do so by The Advertising Standards Council of India, the advertiser and the advertising agency shall produce explicit permission from the person, firm or institution to which reference is made in the advertisement.*

C. The Personal Data Protection Bill 2018

Apart from evolving the privacy doctrine, India has also taken steps to create a legal framework for personal data protection. With the objective of protecting the autonomy of individuals in relation to their personal data, the Government of India has also prepared a Bill, namely, The Personal Data Protection Bill 2018. The Bill seeks to diminish intrusion into the privacy of individuals through the collection and usage of their 'personal data'. Celebrities, among others, will be in best position to benefit from the protection conferred by this pending piece of legislation. The Bill offers protection against unauthorised use and disclosure of 'personal data' in specified circumstances, which in turn confers an incidental right of publicity in the form of right of action for violating of the Personal Data Protection Act. Although the personal data protection law is not specifically designed with an objective to protect personality rights, it nonetheless affords some degree of protection against commercial exploitation of one's personal data. The definition of 'personal data' includes all that which is commercially exploitable of a celebrity. Section 3(29) defines 'personal data' as "*data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, or any combination of such features, or any combination of such features with any other information*".

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officer of Government as may be authorised in this behalf by the Central Government".

1 Section 4 of the Emblems and Names (Prevention of Improper Use) Act 1950.

2 "*ASCI Codes*", THE ADVERTISING STANDARDS COUNCIL OF INDIA, https://ascionline.org/index.php/ascicodes.html, (visited on May 25, 2020).

The Act will be applicable to any Indian company, any Indian citizen or the State for the purpose of processing any personal data. More specifically, the Bill confers on natural persons the right to protect his or her personal data, subject to the limitations mentioned in the Bill, and this protection would be independent of any common law or fundamental right to privacy. Chapter III of the Bill unequivocally sets out the legitimate grounds for processing personal data. These grounds suggest that data can be processed only with the consent of the 'data principal',[1] for any necessary function of the Parliament,[2] or for the mandated compliance of any order of the court.[3] Rules of the Bill also hold the corporate body (that is using the data) liable for compensating the individual, in case of any negligence in maintaining security standards while dealing with the data. The Bill also entitles the data principal to a right to seek compensation for the damage suffered because of unauthorised and unlawful processing.[4] Rules provide a huge amount of penalties in case of contravention of the provisions of Bill, namely, up to fifteen crore rupees (USD 2.7 million) or 4% of its total worldwide turnover from the preceding financial year, whichever is higher.[5] Overall, the provisions of the Indian Personal Data Protection Bill appear similar to the European Union's General Data Protection Regulation, except for a few miniscule terminological differences.

The Bill is likely to become more effective in the absence of proper recognition of right of publicity as such, and it will enable a celebrity to assert a privacy claim when his or her identity has been misappropriated. As a practical matter, a celebrity will initiate an action for the right of publicity only where that right is expressly recognised, while a broader privacy claim will be invoked by a celebrity whose identity has been appropriated.

United States' Approach to Right of Publicity: India's Takeway

When compared with other jurisdictions, India seems to lag far behind in recognising and protecting the right of publicity. The United States, hereinafter US, remains at the forefront in the development and strengthening of legal doctrines to ensure the protection of rights related to personality traits. In the US, to be sure, there is no uniform federal law for the right of publicity mainly because these rights are already regulated by all the states independently. Altogether, 28 states in the US protect the right through common law (including Alabama, Arizona, California, Florida, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin), while 22 states have enacted statutes of right of publicity in order to protect the legitimate interests of celebrities in their personality traits. [6] Some states in the

1 Section 12 of the Personal Data Protection Bill 2018.
2 Section 13 of the Personal Data Protection Bill 2018.
3 Section 14 of the Personal Data Protection Bill 2018.
4 Section 75 of the Personal Data Protection Bill 2018.
5 Section 69 of the Personal Data Protection Bill 2018.
6 "*Statutes and Interactive Map*", RIGHT OF PUBLICITY, http://rightofpublicity.com/statutes, (visited on June 03, 2020).

US recognise the right of publicity even for non-celebrities, while in some states, the right is protected even *post mortem* (e.g., Washington, California and Indiana). On the other hand, courts in India have invoked the torts of passing off and false endorsement in most of the cases dealing with the right of publicity. Examples include Commercial exploitation of Amitabh Bachchan's baritone voice in a tobacco company's advertisement, as well as unauthorised use of actor Rajnikanth's persona. Bollywood actor Amitabh Bachchan filed a suit when a *Gutka* company imitated his voice in an advertisement to endorse a product, without seeking the actor's permission. The same actor also expressed his disapproval of the appropriation of his voice. Likewise, Indian actor Sunny Deol's voice was imitated by Big 92.7 FM, and he served a legal notice to radio station claiming Rs.200/- Cr. as damages.[1] In the absence of any recognised right of publicity, nothing expressly entitles the Indian celebrities to preempt others from using their images, voices or the likenesses.

A careful comparison of laws in India and the US shows that Indian celebrities could safeguard their rights better under a US-like model publicity law, given that US celebrities have successfully prevented the unauthorised commercial use of their voices or likenesses.[2] It may be said that if actors, such as Amitabh Bachchan and Sunny Deol, had taken action against misappropriation of their voices under the US publicity law regime, they would have been successful in the same way as Bette Midler was successful in preventing sound-alikes of her voice in *Midler v. Ford Motor Co*.[3] In India, instead many such cases remain unsuccessful and untested because of the lack of any clear statutory mechanism to combat unauthorised commercial exploitation of a celebrity's right of publicity.

Conclusion

Although the statutory provisions and case law analysed above show an awareness of the word 'property in persona' in India, there is still no specific law governing the right of publicity. Appeals to such a right in persona have often been complicated by applications of privacy law doctrines as well as application of trademark law, copyright law and the tort of passing off, even though none of these is well suited to enforce a right of publicity as such. The prevailing intellectual property regime have rendered only partial and narrower solutions to personality related disputes. In order to deal with the right of publicity, pertinent laws would need to cover both commercial and dignitary aspects, while privacy law concerns only the latter issue. Furthermore, none of the existing intellectual property laws respond to all the personality traits that celebrities need to protect. Some aspects of personality, such as voice, likeness

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1 Amit Gupta, "*Why Celebrities seek Copyrights*", FINANCIAL EXPRESS, December 27, 2010, https://www.financialexpress.com/archive/when-celebrities-seek-copyrights/729569/, (visited on June 3, 2020).

2 Michael J. Hoisington, "*Celebrities Sue Over Unauthorized Use of Identity*", HIGGS FLETCHER & MACK, August 2020, https://higgslaw.com/celebrities-sue-over-unauthorized-use-of-identity/, (visited on June 3, 2020).

3 849 F.2d 460 (9th Cir. 1988).

etc. fail the 'graphical representation' requirement of trademark law, hence they remain outside the ambit of trademark law. Copyright law likewise fails to squarely cover all the attributes of a celebrity because of its foundational principles requiring like fixation of works of authorship and its originality requirements. Hence, while intellectual property laws might be capable of protecting the personality interests to a limited extent, they primarily aim to incentivise and protect the creativity and originality of works of authorship as such, which are not *sine qua non* in right of publicity. Moreover, when such a right is asserted, if right of publicity is to be protected by copyright law, plaintiff in most of the relevant cases will succeed under the rubric of transformative use through a recontextualisation of works in a significant way. These inadequacies of the current legal framework are perpetuating the commodification of personality; hence it becomes imperative for India to enact separate legislation to mitigate the problems of violation of right of publicity.

The proposed legislation needs to have clear provisions regarding who is entitled to be protected by the law; whether celebrities alone or other persons are also included; what attributes of personality are to be protected, which formalities are needed to qualify for protection; whether the term of protection must be specified, as well as certain limitations on the right of publicity needed to obtain a fair balance with the right to free speech and expression of public. Only such *sui genesis* legislation can solve all the problems, rather than an amended Intellectual Property regime to accommodate such personality interests of celebrities.

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ASSESSING THE ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN INTERNATIONAL ARBITRATION

Shivam Tripathi[♣]

Abstract

The arbitral tribunals are regularly faced with the question of admissibility of illegally obtained evidences. There is no clear view governing the admissibility of such evidences, as none of the convention, model laws or protocols deal with the issue. The evidentiary rules only provide the discretionary powers to tribunals to decide the matter, relating to admissibility, credibility and reliance on any of the evidences presented before it. The allocation of discretionary power results in drastically different views taken by various arbitral tribunals. The paper analyses the cases decided by various arbitral tribunals across the globe to highlight that with the increase of the violations of cyber security, the instances of presentation of illegally obtained evidences have increased substantially. The paper further discusses the issues of admissibility of illegally obtained evidence by analysing various cases decided by the International Centre for settlement in Investment dispute, Court of Arbitration for Sports or other tribunals instituted under the UNCITRAL rules and draws a comparison between the cybersecurity and the issues of admissibility. Finally, the paper analyses the principles followed by the tribunals in relation to the admissibility of illegally obtained evidences.

Keywords: Illegally Obtained Evidence, Admissibility, UNCITRAL, Cybersecurity, Tribunal.

Introduction

Arbitration is one of the alternative dispute resolution mechanisms for the settlement of disputes. The arbitral tribunals are the settlement authorities in arbitration proceedings wherein, it is concerned with the disputes which are majorly involves the question of fact and not of law. Therefore, fact-finding is one of the most crucial function of the arbitral tribunal hence, evidence plays a significant role in decision making process. As the international arbitration involves parties from different legal systems, divergence in evidentiary issues is very common. Most of the institutional arbitration guidelines are silent on the topic of evidentiary matters, leaving the discretion to the parties and the arbitration tribunal.

However, the UNCITRAL Arbitration Rules provide that when one of the party submits a piece of evidence to be relied on, the tribunal is under a duty to

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

"*determine the admissibility, relevance, materiality, and weight of the evidence offered*".[1] Similarly, the London Court of International Arbitration (LCIA) Arbitration Rules provides that it is upon the discretion of the tribunal "*to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion*".[2] In the International Arbitration Rules of American Arbitration Association (AAA), it is provided that "*tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party*".[3] Apart from these various national arbitration law, also recognises the discretion of the arbitration tribunal.

Therefore, there is an element of discretion on the part of the arbitration tribunal, to accept or reject to evidence so presented. The tribunal decides the weight accorded to the evidence and the admissibility of any evidence.[4] Although arbitrators in international arbitration do not follow the rigorous principles established by the common law countries or civil law countries with regards to the issue of admissibility of evidence, but admissibility is not considered without its general exceptions such as confidentiality, privilege, illegally obtained evidence, etc. The author in this article focuses on the issues of admissibility and reliability accorded to illegally obtained evidence in International arbitration.[5] The term illegally obtained evidence can be a mix of various types of documentary evidences. Generally illegally obtained evidence are gathered from an array of documents acquired through hacking, or documents protected by the principle of attorney client privilege and sometimes it can also take form of an audio or video recording by an undercover.

Evidentiary Rules in International Arbitration

Considering party autonomy as the most essential feature of any arbitration, the rules regarding the evidentiary matters are also decided by an agreement between the parties, and if the parties fail to arrive at an agreement, then the tribunal has the power to decide the same. However, certain general principles is always applicable, many refer such principles as the international principles in regards to admissibility and relevancy of evidences. The first such principle is the liberty accorded to the parties with regards to submission of evidence. The parties in an arbitration proceeding are free to submit any evidence which they

1 Article 27(4) of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2010.

2 Article 22(1)(iv) of the London Court of International Arbitration (LCIA) Arbitration Rules 2014.

3 Article 20(6) of the American Arbitration Association (AAA), International Dispute Resolution Procedures 2014.

4 Gary Born, INTERNATIONA COMMERCIAL ARBITRATION, 2nd ed. 2014, p. 2309.

5 Robert Pietrowski, "*Evidence in International Arbitration*", ARBITRATION INTERNATIONAL LAW REVIEW, Vol. 22, No. 03. 2006, pp. 373-374.

think is relevant to decide the factual matrix, and then it is left upon the tribunal to decide whether the evidence should be admitted or not. Under this discretionary power the tribunals can even admit and evaluate, evidence obtained illegally or unlawfully.[1]

Various model law and institutional arbitration guidelines provide for such wide range of discretionary power. For example, the UNCITRAL Arbitration Rules provide that "*the tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered*",[2] similarly the UNCITRAL Model Law provides that "*the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence*".[3]

The International Centre for Settlement of Investment Disputes (ICSID) Rules 2006 of procedure for arbitration proceedings[4] states that: "*the Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value*".[5] In London Court of International Arbitration (LCIA) Arbitration Rules states that "*The Arbitral Tribunal shall have the power, upon the application of any party or [...] upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide: [...] (vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal*".[6]

Apart from this there is a series of soft law applicable to the subject matter.[7] The first one being the International Bar Association (IBA) rules on the taking of evidences state that "*the Arbitral Tribunal shall determine the admissibility,*

1 Peter Ashford, "*The Admissibility of Illegally Obtained Evidence*", ARBITRATION: THE INTERNATIONAL JOURNAL OF ARBITRATION, MEDIATION AND DISPUTE MANAGEMENT, Vol. 85, No. 4, 2019, pp. 377-387.

2 Article 27(4) of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2010.

3 Article 19(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985.

4 Rule 34 of the International Centre for Settlement of Investment Disputes (ICSID) Convention Arbitration Rules 2006.

5 *Ibid*.

6 Article 22(1)(iv) of the London Court of International Arbitration (LCIA) Rules 2014.

7 The rules made under soft law are important as they are applicable even when the parties have expressly agreed to apply the same in their proceedings.

relevance, materiality and weight of the evidence".[1] Also the Prague rule provides that "*the arbitral tribunal may at the case management conference or at any later stage of the arbitration, if it deems it appropriate, indicate to the parties…its preliminary views on… the weight and relevance of evidence submitted by the parties*".[2] Apart from all these, there is a general duty upon the tribunal to act in good faith.

However, the tribunals have very rarely considered an evidence submitted by the parties as inadmissible. The tribunals rather consider the credibility, value and degree of reliance on the evidence instead of declaring the entire evidence as inadmissible.[3]

Admissibility of Illegally Obtained Evidence in International Arbitration

The arbitral tribunal does not have to adhere to any rules or laws, unless the contrary is agreed by the parties' involved.[4] However, concept of admissibility under the international arbitration law is inspired by the common law principle that every relevant material of admissible and every irrelevant material is inadmissible. Further, the matter is relevancy is left to the discretion of the judge (in case of courts and arbitrators in case of arbitration). There is a lot of confusion between the concept of exclusion of evidence on grounds of inadmissibility and exclusion of evidence on purely procedural grounds in any adjudicatory proceeding. The former deals with the idea where the evidence due to its irrelevancy and latter deals with the concept of procedural equality. Any evidence is declared inadmissible by any adjudicatory authority on purely procedural grounds when the parties fail to submit the evidence in time and manner prescribed by law, or tribunal as the case may be. However, currently we are only concerned with the procedural aspect of admissibility of evidences.

As stated earlier that the arbitration tribunal can make its own laws with the consent of the parties, in regards to admissibility, relevance, materiality and

1 Article 9(1) of the International Bar Association (IBA) Rules on the Taking of Evidences in International Arbitration 2010.

2 Rule 2.4(e)(iv) of the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) 2018.

3 One the reason for such approach is that the award so made by the tribunal is the decision of the first and last instance for the parties involved, and if principles similar to adjudicatory mechanisms are applied the whole motive of initiation of arbitration proceedings will be frustrated.

4 For example, Article 19(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 states that: "*Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence*".

weight of any evidence, and while doing so the tribunal takes inspiration from the IBA rules on Taking Evidence in International Arbitration.[1]

Nonetheless all the rules and guidelines on the subject matter do not deal with the issue of admissibility of illegally obtained evidences directly.[2] However with these issues cropping up the tribunals have set up a procedure to decide whether the evidence should be admitted or not.

The tribunals follow a two-step procedure: the first step being, whether the party in the arbitration proceeding was involved in illegally procuring the evidence? The tribunal under this issue will rely on the age old principle that, "the plaintiff should come with clean hands" theory.[3] The tribunal will admit the evidence if the evidence is procured by a third party which does not have any interest in the award of the tribunal. However, if the party is involved the tribunal will not favour the admission of such evidence, however to deny the admission it must be proved that the illegal act so conducted by the party was of a very serious nature. The second step is that the tribunal must grant the concerned party a right to be heard.

Instances of Inadmissibility of Illegally Obtained Evidence

The leading case of *Methanex v. United States*,[4] the question before the tribunal was admission of evidence submitted by claimant in the issue. The claimant before the initiation of the arbitration proceeding, hired a personal investigator and procured very personal data from one of the witnesses of the respondents in the arbitration.[5] The evidences were obtained by the investigator through a series of trespass committed by him, over the property of the witness. The tribunal in this case, held that all the evidences so produced by the claimant are inadmissible[6] on the grounds that admitting such evidences would lead to

1 Article 9(2) of the International Bar Association (IBA) Rules on the Taking of Evidences in International Arbitration 2010.

2 Edna Sussman, "*The Arbitrator Survey: Practices, Preferences and Changes on the Horizon*", AMERICAN REVIEW OF INTERNATIONAL ARBITRATION, Vol. 26, 2015, pp. 517-521. Survey results demonstrated that only 11 percent of arbitrators excluded evidence that would not be admissible under national evidentiary standards more than 75 percent of the time.

3 Jessica O. Ireton, "*The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence*", INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES FOREIGN INVESTMENT LAW JOURNAL, Vol. 30, 2015, p. 231.

4 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005, https://www.italaw.com/cases/683, (visited on September 12, 2020).

5 *Ibid*.

6 Article 15(1) of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2010 states that: "*the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that*

the effect of unfair advantage to the claimant, which would in turn violate the principle of good faith under the international arbitration regime. The award however did not state that the acts of the claimant were unlawful, but the tribunal did mention the irrelevancy of the evidences.

In *EDF (Services) v. Romania (Procedural Order No.3)*,[1] the tribunal followed the principle laid down in *Methanex v. United States*.[2] The question under this case was admission of voice recording of one of the witnesses of the respondent by the counsel of the claimant. The recordings were in violation of the law of privacy applicable under the Romanian law, i.e., the recordings were done without the consent of the witness. The tribunal gave a number of reasons for not allowing the admission of the evidence. For example, similar to the award in *Methanex v. United States*,[3] the tribunal stated that such admission would violate the general principle of good faith under the international arbitration regime.[4] Furthermore, the tribunal stated that the recordings were heavily manipulated[5] and the claimant did not show up the evidence till the very end of the proceedings even though the claimant had access to the recordings from the very begging and such actions of the claimant showed the ill intentions of the claimants, which were in contradiction to the procedural fairness under the arbitration law.[6]

In *Libananco v. Turkey*,[7] the dispute arose between the Libananco and the Turkish authorities over the violation of the concession agreement between the two. During the proceedings it was discovered that the Turkish authorities misusing their sovereign powers had acquired over 2000 documents protected under the attorney client privilege, i.e., communication between the company and its legal advisor. The Turkish authorities contended that the documents were not acquired with any ill intention, but the same were acquired under the general surveillance policy. The tribunal rejected the contention and held that principle of confidentiality and privacy are of utmost importance in any

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the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case".

1 *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13*)*, Procedural Order No. 3, https://www.italaw.com/cases/375, (visited on September 12, 2020).

2 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005, https://www.italaw.com/cases/683, (visited on September 12, 2020).

3 *Ibid.*

4 Article 9(2)(g) of the International Bar Association (IBA) Rules on the Taking of Evidences in International Arbitration 2010 states that "*considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling*".

5 *Ibid*.

6 The tribunal also noted that the principle of local laws is not available under the international arbitration regime, and therefore rejected the contention of violation of the Romanian Laws.

7 *Libananco Holdings Co Limited v. Republic of Turkey* (ICSID Case No ARB/06/8) https://www.italaw.com/cases/626, (visited on September 12, 2020).

arbitration proceeding, and therefore all the documents so acquired by the authorities are inadmissible. However the tribunal did not decide the final dispute on the grounds that it lacked jurisdiction to do the same.

Further in *ConcoPhilips v. Venezuela*,[1] Venezuela filed an application for review of the arbitral award on the grounds, that certain new documents in the form of cables were discovered on Wikileaks, if the new evidence would have been considered the successful contention of US, in the earlier award would have failed. The respondents made the application for reconsideration twice, but failed on the grounds that the tribunal did not have the power to review its earlier order without considering the documents released on Wikileaks. However while both the applications were rejected by majority of the arbitrator, there was a strong dissenting opinion by the arbitrator appointed by Venezual. Prof. George Abi-Saab[2] states that the tribunal had the power to reconsider its earlier order in order to maintain its judicial character. Further he added that in the present case a strong case is being made out, and if the evidences so produced as considered, then there are strong chances that the entire case would be reversed. Venezuela, did not stop after the rejection of the second application and filled for a third application for review of the award. In the third application the tribunal did not answer the question of admissibility of illegally obtained evidence or their credibility, but ultimately considered the evidences.

Instances of Admissibility of Illegally Obtained Evidences

In Yukos Case,[3] the tribunal did not deal with the issue of admissibility, as neither of the parties raised any contentions for the same. The issue in the case was the withdrawal of audit report by the auditor, and the reasons for such action stated by him. The auditor stated that he had to withdraw the report as the Russian Federation was imparting a lot of pressure on him[4], the evidence for the same was submitted by the claimant through a number of cables leaked from the US diplomatic office. However, the respondent denied all the allegations and they did not raise any contravention with regards to the admissibility of the evidences. Scholars argue that the reference to the leaked documents was unnecessary for the decision of the tribunal and therefore the tribunal ought not to have admitted the evidences.

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1 Decision on Respondent's Request for Reconsideration, dated March 10, 2014; Decision on the Respondent's Request for Reconsideration, dated February 9, 2016; and Interim Decision, dated January 17, 2017.

2 The arbitrator appointed by Venezuela, for the first application of reconsideration/review of the arbitral award.

3 *Yukos Universal Ltd. v. Russian Federation*, UNCITRAL, PCA Case No. AA227/04-2005, https://www.italaw.com/cases/1175, (visited on September 12, 2020).

4 *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (PCA Case No. AA 226), Final Award, https://www.italaw.com/cases/544, (visited on September 12, 2020).

In *Caratube v. Kazakhastan*,[1] the tribunal in this case had to deal with the question of admissibility of documents leaked following the hacking of a number of email accounts. The question under this case was of complex nature. The claimant sought admission of several documents including certain documents which were protected under the principle of legal privilege. The respondent contended that the admission cannot be allowed as legal privilege of some documents and for the rest of the documents they claimed that there are great chances that the documents are forged and such admission will lead to imbalance among the parties to the arbitration as the respondents did not have access to the emails of the claimants. The tribunal did not allow the admission of evidence covered under the principle of legal privilege, but other documents were allowed to be admitted on the grounds that if the said documents are not allowed the award of the tribunal will be artificial and will not be effective in resolving the dispute. The court rejected the contention of the respondents that such an action would promote hacking, and said that the more important responsibility of the tribunal was to grant an award considering all the facts and issues in the case, and controlling cybercrime was not the first responsibility of the tribunal.

Admissibility of Illegally Obtained Evidence and the Court of Arbitration for Sports

The Court of Arbitration for Sports (CAS) has enacted a code governing the procedural aspect of the sports disputes submitted to the institution. Rule 44 specifically talks about the admissibility of evidences. Like any other tribunal the CAS panel also has the power to determine the value and materiality of the evidences so submitted by the parties. It is pertinent to mention here that most of the documents relating to commercial arbitration are not available to general public. However, since awards by the Court of Arbitration for Sports can be accessed, therefore these have been employed to further analyse the position of illegally obtained evidence in International Arbitration. This section thereby examines a series of awards passed by the CAS in order to understand the extent of admissibility of these illegally obtained evidences.

In *Valverde v. CONI*,[2] the International Court of Arbitration for Sports had to consider the admission of anti-doping test conducted by Spanish authorities. The result of the blood test was positive: however, the Spanish authorities decided not to initiate any proceeding against the sportsperson. However the results of the test were leaked and the Italian authorities on the grounds of the

1 *Caratube International Oil Company LLP v. The Republic of Kazakhst*an, ICSID Case No. ARB/08/12, https://www.italaw.com/cases/211, (visited on September 12, 2020).

2 *Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano* (CAS 2009/A/1879), Award, https://www.wada-ama.org/sites/default/files/resources/files/cas_2009_a_1879_valverde_v_coni_en_0.pdf, (visited on September 12, 2020).

test issued a ban to the sportsman. The world anti-doping agency challenged the decision of the Italian authorities as well as the Spanish authorities. The main point of contention by the claimant in the present arbitration was that the Spanish authorities had banned the use of the blood test conducted on the sportsperson, therefore the ban of issued by the Italian authorities violated the Spanish orders. However, the CAS rejected the contentions and held that the reports of blood test conducted by the Spanish authorities was admissible on the grounds that the contention for inadmissibility of the evidence is a mere procedural defect and "*balancing of various juridical interests*".

In *Ahongalu Fusimalohi v. FIFA*,[1] the panel was faced with a question of admissibility related to a video recording by an undercover of a newspaper. The undercover had a candid conversation with the one of the member of the FIFA executive committee. During the conversation the member talked about the corruption within the committee and his involvement in the same. The same was published by the newspaper. The FIFA Ethics Committee, on the grounds of the newspaper publication, initiated a disciplinary proceeding against the member, and eventually terminated his services. The member appealed to the FIFA Appeal Committee, but the decision of the appeal was not in his favour, although they reduced his sanctions.

The dispute then came to the panel, and the member contented that the recording was inadmissible as an evidence on the grounds that it violates his privacy. The panel considering the two applicable laws, i.e., the FIFA Statute[2] and the Swiss procedural law,[3] held that the recording was admissible as an evidence although it did not deal with the question of legality of such an evidence.[4] The panel also took note of the principle - the plaintiff should approach the court with clean hands - and in the present case, the member was guilty of corruption.[5]

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1 *Ahongalu Fusimalohi v. Fédération Internationale de Football Association* (CAS 2011/A/2425), Award, http://www.centrostudisport.it/PDF/TAS_CAS_ULTIMO/97.pdf, (visited on September 12, 2020).

2 FIFA Statutes 2019.

3 Swiss Criminal Procedure Code 2007 provides that "*the private interest can override the public interest. However in the present case this should not be the case on the following reasons: (a) the general public interest will override the private interest as the member was guilty of corruption, (b) the FIFA ethic committee had analysed the recording and held him guilty*".

4 The panel relied on the Valverde II decision heavily and held that the panel had the power to admit the illegally obtained evidences.

5 The decision of the panel in this case becomes all the more important because, the member did not file any criminal or civil proceeding against the newspaper, which gives rise to serious speculation in regards to the unlawfulness of the evidences.

In *Amos Adamu v. FIFA*,[1] had similar facts to that of *Ahongalu Fusimalohi v. FIFA*.[2] However, the panel in the present case made a more elaborate award. The member in the present case contented that the recording was indeed in violation of the Swiss right to personality. The panel rejected the contention on the same grounds as mentioned in Fusimalohi case, and stated that the evidence is admissible in the present circumstances as the conversation was not made under coercion, deceit or any act in-violation of the public policy.[3]

In *FC Metalist v. Football Federation of Ukraine*,[4] the question before the panel was admission of certain audio recordings. As the entire award is not available, the method used by the panel for deciding the admissibility of the evidences can only be derived from the Swiss Tribunal judgement. The judgement apprised the methodology used by the panel and said that the panel was correct in admitting only those recordings which were being referred by both the parties during their course of arguments. The panel said that other recordings were inadmissible as, one of the parties was involved in illegally procuring the recordings.

In *Sivasspor v. UEFA*,[5] the panel took into account the awards made under the Valverde II[6] and Metalist case.[7] The question with regard to admission of wiretaps recorded by the Turkish authorities during investigation proceedings,

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1 *Amos Adamu v. FIFA* (CAS 2011/A/2426), https://arbitrationlaw.com/sites/default/files/free_pdfs/cas_2011.a.2426_aa_v_fifa.pdf, (visited on September 12, 2020).

2 The arbitrator appointed by Venezuela, for the first application of reconsideration/review of the arbitral award.

3 Georg von Segesser, "*Admitting illegally obtained evidence in CAS proceedings: Swiss Federal Supreme Court Shows Match-Fixing the Red Card*", KLUWER ARBITRATION BLOG, http://arbitrationblog.kluwerarbitration.com/2014/10/17/admitting-illegally-obtained-evidence-in-cas-proceedings-swiss-federal-supreme-court-shows-match-fixing-the-red-card/?doing_wp_cron=1595677692.1250140666961669921875, (visited on July 25, 2020).

4 The award by the CAS is available in the public domain however as the FC Metalist appealed the award in the Swiss Federal Tribunal; *X v. Football Federation of Ukraine*, Judgment of the Swiss Federal Tribunal 4A_362/2013, http://www.swissarbitrationdecisions.com/sites/default/files/27%20mars%202014%204A%20448%202013.pdf, (visited on July 25, 2020).

5 *Sivasspor Kulübü v. UEFA* (CAS 2014/A/3625), Award, https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/CASdecisions/02/44/19/34/2441934_DOWNLOAD.pdf, (visited on July 25, 2020).

6 *Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano* (CAS 2009/A/1879), Award, https://www.wada-ama.org/sites/default/files/resources/files/cas_2009_a_1879_valverde_v_coni_en_0.pdf, (visited on September 12, 2020).

7 *FC Metalist v. Football Federation of Ukraine*, https://www.uefa.com/MultimediaFiles/Download/uefaorg/CASdecisions/02/47/24/25/2472425_DOWNLOAD.pdf, (visited on September 12, 2020).

conducted to find out the match fixing football clubs, was not raised by either of the parties in the arbitration proceedings. However, the panel went ahead and held that the same were admissible on the grounds that the mere fact that some of the evidence so produced in front of the panel are not admissible under the local or municipal law does not lead to the conclusion that the same are inadmissible under the arbitration panel.

Cyber Security *vis-à-vis* Admissibility of Illegally Obtained Evidence

With the growth and development of technology there have been a number of positive changes in every aspect of human life, but it has also brought the anti-social aspect of hacking and cyber intrusion. They are the problems faced by every government, corporate houses and even individuals. "*Security breaches are becoming so prevalent that there is a new mantra in cybersecurity today: 'It's when not if', a law firm or other entity will suffer a breach*".[1]

One of the major aspects of cyber security and arbitration is, when evidences are acquired through one of such methods, there are no guidelines or rules governing the admission of the same. As noted earlier the tribunals have a wide range of power to admit or exclude any evidence. But with the current pace of the technological boom such data leaks and privacy contravention are going to increase.[2] The tribunals in order to tackle such situations have inclined towards a more strict approach to cases concerning cyber intrusion. The tribunals have sought to find other remedies rather than merely excluding the evidences so produced.[3] One such remedy could be proceedings of 'misconduct' under the IBA guidelines.[4]

The issue of breach of cyber security may also lead to instances where the text messages, emails or even the entire data on one's computer is hacked. The parties may content that they do not have accesses to their data as it was 'stolen'.[5] The tribunal will be faced with the issue of verifying such contention, for doing the same the tribunal would need some forensic techniques to find the

1 Edna Sussman, "*Cyber Intrusion as the Guerrilla Tactic: An Appraisal of Historical Challenges in an Age of Technology and Big Data*", EVOLUTION AND ADAPTATION: THE FUTURE OF INTERNATIONAL ARBITRATION, ICCA CONGRESS SERIES, Series No. 20, 2019, pp. 849-868.

2 Paul W. Grimm, et al., "*Authenticating Digital Evidence*", BAYLOR LAW REVIEW, Vol. 69, 2017, pp. 1-9.

3 *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, https://www.italaw.com/cases/626, (visited on September 12, 2020).

4 Guidelines 26 and 27 of the International Bar Association (IBA) Guidelines on Party Representation in International Arbitration 2013.

5 Elliott Geisinger and Pierre Ducret, "The Uncomfortable Truth: Once Discovered What to Do With It", Markus Wirth et al. (eds.), THE SEARCH FOR 'TRUTH' IN ARBITRATION: IS FINDING THE TRUTH WHAT DISPUTE RESOLUTION IS ABOUT?, 1st ed. 2011, pp. 113-114.

same. Although till date there have been no instances where the tribunal had to decide on to the authenticity of the evidence, but with the increase in case of breach of cyber security, the tribunals are likely to face such questions soon.[1]

Another aspect of breach of cyber security in respect of arbitration, is whether their lies a duty of the arbitrator to report such a breach? The question arises due to the fact that breach of cyber security is considered a crime in many nations. The question has a number of off shoots: for example, if there exists such duty to whom such breach should be reported? And whether such action would lead to breach of confidentiality essential to any international arbitration proceedings.[2]

During a recent arbitral proceedings between China and Philippines, there were serious allegations made on China stating that there was a series of malware launched by China aiming the legal representative of Philippines, at the Permanent Court of Arbitration.[3] Taking into account the sensitive geo-political matter, International Council for Commercial Arbitration along with some other organisation formulated a working group with an aim to formulate a defined structure of rule and guidelines governing the area of illegally obtained e-evidence. When such matter is contented, there are serious questions raised in regards to the principles of fair trail and confidentiality, which are considered of utmost importance in International Commercial Arbitration Proceeding. With the matter at hand the stakes were even higher as the information sought for, was publicly unavailable information, and if such information would have been leaked in the public domain the state in question would have faced severe economic and political consequences.[4]

The International Council for Commercial Arbitration, during the 2018 conference circulated a draft protocol, with an intention to promote awareness among the participants of the international arbitration with regards to cyber security. The protocol provides guidelines for cybersecurity measures to be taken for individual matter under international arbitration, these guidelines aim

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1 J.H. Boykin and M. Havalic, "*Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration*", TRANSNATIONAL DISPUTE MANAGEMENT JOURNAL, Vol. 5, 2015, https://www.transnational-dispute-management.com/article.asp?key=2255, (visited on September 30, 2020).

2 *Ibid*.

3 Sreenivasa Rao Pemmaraju, "*The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and admissibility*", CHINESE JOURNAL OF INTERNATIONAL LAW, Vol. 15, No. 2, 2016, pp. 265-307.

4 Olivier P. Andre et al., "*CyberInsecurity: A New Protocol to Counter Cyberattack in International Arbitration*", INTERNATIONAL INSTITUTE OF CONFLICT PREVENTION AND RESOLUTION, July 2018 https://www.cpradr.org/news-publications/articles/2018-07-05-cyberinsecurity-a-new-protocol-to-counter-cyberattacks-in-international-arbitration/_res/id=Attachments/index=0/Legal%20BlackBook%20CyberInsecurity.pdf, (visited on January 28 2020).

to ensure security while exchanging information during the arbitral proceedings.[1] Further the protocol intends to provide solution to enhance the security of information and methods to control cyber data security breaches. The protocol notifies that if the issue of breach of cyber security are not resolved, the legitimacy and credibility of any arbitral proceeding would be in question. However, the draft protocol does not provide a straight fit jacket to reduce the instances of cyber security during the arbitration proceeding, such an action was intentional as the working group took into account the element of choice of law by the parties, also the working group worked on the lines of the UNCITRAL Model Law. The protocol is in its consultative period and will come into effect soon.

Conclusion

After analysing a number of cases relating to admissibility of illegally *obtained* evidence, a number of principles can be carved out which the tribunals and panels have invariably followed. First such principle is, the principle of fair trial. Second principle is the international tribunals and panels do not rely on the municipal laws to decide the question of admissibility. Third principle is none of the international conventions or treaties or soft laws lay down detailed provisions with regards to the admissibility of illegally obtained evidence or for that matter questions relating to admissibility of evidence in general. The last one being, the tribunals and panels exercise a wide range of discretionary powers in regards to the admissibility of evidence. They have the power to decide the value, credibility and, materiality of the evidence so produced.

As suggested by Cherie Blair and Ema Vidak in their research, a more detailed test should be followed by the tribunals while deciding the question of admissibility.[2] The writers have suggested a three prong test under which the tribunal should first look into the issue that whether or not the party to the arbitration was involved in illegally procuring the evidence, second whether public policy would favour the admission of the evidence, and lastly whether the interest of justice would favour the admission of the evidence.[3]

Another problem with illegally obtained evidence is their authenticity and the violation of cyber security. With regard to the authenticity of the evidence,

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1 "*Cybersecurity Protocol for International Arbitration Consultation Draft*", INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (ICCA), NEW YORK CITY BAR ASSOCIATION AND INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (CPR), http://www.arbitrationicca.org/media/10/43322709923070/draft_cybersecurity_protocol_fi nal_10_april.pdf, p. 5, (visited on January 28 2020).

2 Cherie Blair and Ema Vidak Gojkovic, "*Wikileaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence*", INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES REVIEW, Vol. 33, No. 1, 2018, pp. 235-256.

3 *Ibid*.

the tribunals are very stringent with their approach wherein, when an illegally obtained evidence is produced and the credibility of the same cannot be proved, then the tribunal has the power to reduce the reliance of the award on such evidence, *i.e.*, the award will be solely based on the illegally obtained evidence. The illegally obtained evidence as seen in most of the cases above are obtained by hacking or data breaches. The tribunals while analysing the issue of cybersecurity and admissibility have indeed constructed a complex structure. However, the tribunals while analysing the question of admissibility should keep in mind the side effects of such analyses. As a number of researches have shown that the mere presentation of illegally obtained evidences in front of any adjudicatory body, negatively effects the decision making. The results as based on the theory that while analysing the question of admissibility the tribunals verifies the entire piece of evidence, and after such analyses even if the evidence is held to be inadmissible, there is a latent effect of the knowledge. Therefore, to avoid such instances the tribunals should adopt a more elaborate method of analysing any illegally obtained evidences.

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PARAMETERS GOVERNING PERCIPIENT WITNESS TESTIMONY IN VIEW OF *PRAMAANA* THEORY OF *NYAAYASHAASTRA*[*]

Ila Sudame[♣]

Abstract

Section 60 of the Indian Evidence Act 1872 deals with direct evidence. Direct evidence includes testimonies of percipient witnesses who testify to something that they have perceived through their own senses. These testimonies are considered as best evidence and are heavily relied upon for administration of justice. However, for such an important piece of evidence, the Evidence Act is silent upon the definition, parameters and validity aspects of perception which happen to be crucial to avoid cases of witness misidentification. An allied branch of study can be found in the Indian epistemology flowing from Nyaayashaastra wherein definition of perception as a means of knowledge and the validity thereof has been laid down and time-tested for over centuries. This paper aims to explore these parameters of Pramaana and the possibility of supplementing the inquiry into direct evidence by taking recourse to this body of knowledge for preventing miscarriage of justice.

Key Words: Evidence, Testimony, Perception, Percipient Witness, Witness Misidentification, Epistemology, *Nyaayashaastra, Pramaana*, Justice.

Introduction

The Indian Evidence Act 1872, majorly qualifies as a procedural or adjective piece of legislation which keeps the substantive laws in motion. The object of any legal proceeding is the determination of rights and liabilities which depend upon facts. The fundamental idea of law of evidence is to consolidate or lay down principles governing facts in a matter and proof thereof. Pursuantly, it provides for definitions for the terms engaged in running its scheme, like facts, kinds of facts, evidence, manner of rendering evidence or proofs, the admissibility and burdens thereof, etc. What may be admissible as a piece of evidence is decided by inquiring into the source of that knowledge, reliability thereof, and subsequently communication and interpretation of the same. The Act of 1872, however, at multiple junctures, is found to be silent on identifying and laying down the necessary parameters for validly sourcing knowledge to

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♣ Centre Co-ordinator, Centre for Shaastric Studies and Research in Law (CSSRL), Maharashtra National Law University, Nagpur, e-mail: deshpande.ila@gmail.com.

constitute evidence for the proof of facts. The epistemological pursuits of our indigenous knowledge system flowing from *Nyaayashaastra*, have simplistic methods and refined approaches for all such studies. *Nyaayashaastra* has identified and enunciated some primary subjects known as *padaartha*s. The ascertainment of truth about anything is done by application of the correct understanding of these *padaartha*s. These *padaartha*s are sixteen in number. The first primary subject or *padaartha* as enunciated in *Nyaayasutra*[1] hereinafter referred as N.S, *pramaana* (the means of valid knowledge-often referred to as proofs) is concerned with the modes of acquisition of valid knowledge, various sources thereof and the factors instrumental in the process of ascertaining the truth of this knowledge. This philosophy resonates with the rationale of Laws of Evidence in their modern form. This correlative study of the *pramaana* theory of *Nyaayashaastra* and the Act of 1872 regarding source of the information/knowledge that may qualify as 'evidence' provides a perfect interface to identify the vulnerabilities of the positive law and further supplement its provisions with the anchors of definitions/explanations etc., with the help of allied studies.

Under the scheme of Indian Evidence Act 1872, facts may be judicially noticed, proved by oral evidence or proved by documentary evidence. Of these, judicially noticeable facts need not be proved.[2] All other facts except for the contents of documents or electronic records may be proved by oral evidence.[3] The implicit rule of 'best evidence' ideated in Act applies to both oral and documentary evidence.[4] In all cases where oral evidence is required to be adduced, direct testimony is considered to be the 'best evidence'.[5] This direct testimony is rooted in the process of witness identification or a witnesses' perceptual knowledge of any event. Thus, perceptions have the potential to prove a charge beyond reasonable doubt or even be conclusive evidence of a fact. The entire process of witness identification has an immense bearing on administration of justice. This makes it imperative to study the roots of these perceptions in one's cognitive process in order to place reliability on them. However, for such an important piece of evidence, the Act of 1872 is silent upon the definition, parameters and validity aspects of perception which happen to be crucial to avoid cases of witness misidentification. The theories of Indian epistemology from *Nyaayashaastra*, specifically relating to perceptions as a means of valid knowledge (*pratyaksha pramaana)* can lead us to analyse the testimonies of percipient witnesses under a brighter light, and can certainly be an indispensable aid to the process of administering justice. The multi-disciplinary approach of studying a subject known as *akhanda-vidya* has been

1 *Nyaayasutra* of Gautama, is the first systematic work on *Nyaayashaastra*.
2 Section 56 of the Indian Evidence Act 1872.
3 Section 59 of the Indian Evidence Act 1872.
4 *Kalyan Kumar Gogoi v. Ashutosh Agnihotri* (2011) 2 SCC 532.
5 Section 60 of the Indian Evidence Act 1872.

the traditional method of study for Indian scholars. The main objective of this paper is to create an interface of study between the complementary disciplines of epistemology, testimonies of percipient witnesses and cognitive forensics to some extent, and explore the possibility of extending the time-tested indigenous parameters of *pramaana-shaastra* to anchor the concept of perception under Section 60 of the Act of 1872 for preventing miscarriage of justice. In order to achieve the object of this study, a conceptual analysis of the limited terms involved herein from disciplines apart from law is carried out in brevity as a matter of necessity. Further, this paper gives the researcher an opportunity to venture into a relatively neglected or unemployed field of legal epistemology in the Indian context.

Pramaana **Epistemology: Classification of Valid Knowledge**

> "*To be master of any branch of knowledge, you must master those which lie next to it…*"[1]
>
> - Oliver Wendell Holmes

Knowledge is an episode that finds its source in our beliefs. Our beliefs acquire the status of knowledge when they are proved to be true.[2] After all, it is only upon the court's belief that a fact exists that it can said to be 'proved'.[3] This is where the question of evaluation of evidence arises which takes us to the concern of validly sourcing the knowledge. Therefore, an allied study of epistemology or *pramaana-shaastra*, where the means of valid knowledge- often referred to as 'proof' is theorised, becomes imperative here. '*Pramaana*' as a term, is of dual character: evidential and causal.[4] A *pramaana* provides evidence or justification for regarding a cognitive episode as a piece of knowledge.[5] As a causal character, it is the means or instrument (*karana*) leading to a knowledge-episode.[6] Valid knowledge known as *pramaa* is the end of *pramaana*.[7] *Pramaana,* as discussed above, is the first of the sixteen primary topics/ *padaartha*s as identified by the *Nyaayasutras.*

In courts, affidavits are filed wherein the deponent voluntarily swears or affirms some statement of facts, and the same can be used as evidence upon court's orders.[8] The Supreme Court had clarified the position regarding the nature and source of knowledge in an affidavit by relying on Order 19, Rule 3

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1 Sheldon Novick, THE PROFESSION OF THE LAW: COLLECTED WORKS OF JUSTICE HOLMES, Vol. 3, 1995, pp. 471-473.
2 Bimal Krishna Matilal, PERCEPTION: AN ESSAY ON CLASSICAL INDIAN THEORIES OF KNOWLEDGE, 1st ed. 1991, 1st Ind. rep. 2016, p. 21.
3 Section 3 of the Indian Evidence Act 1872.
4 *Supra* n. 2, p. 35.
5 *Ibid.*
6 *Ibid.*
7 *Supra* n. 2, p. 22.
8 *Supra* n. 3.

of the Civil Procedure Code 1908 which requires the deponent to disclose the nature and source of his knowledge with sufficient particularity.[1] Thus, the *pramaana*s of the statements made in the affidavit are highly crucial for such formal assertions.

According to *Nyaayashaastra,* the sources or instruments of valid knowledge or *pramaana* are four-fold, *viz.*, perception (*pratyaksham*); inference (*anumaanam*); comparison (*upamaanam*); and verbal testimony (*shabdaha*).[2] As we peruse the provisions of the Indian Evidence Act 1872, we find that though not in the similar fashion of classification, it does identify these sources of perception, inference, comparison and expert testimony wherefrom the knowledge regarding any act/event/happening may be acquired and subsequently adduced as 'evidence' as defined in the interpretation clause of the Act. The classification of evidence with their parallel epistemic foundations in *pramaana* theory of *Nyaayashaastra* can be stated briefly as under:

(i) *Perception (Pratyaksham)-Direct Evidence*

Perception or *pratyaksham* is defined in the *Tarka-Samgraha* (a work on *Nyaayasutra*) as the knowledge that is produced by the contact of a sense-organ with its object.[3] This is pure sensory perception where the knowledge is sourced from the episode of one's direct sensory contact with an object/event/happening. Section 60 of the Act of 1872 identifies such direct sensory perceptions. It requires the oral evidence in all cases to be direct. In other words, it mandates that if the oral evidence refers to a fact perceivable by any sense then the testimony must be by that person who says he perceived it by that sense.

(ii) *Inference (Anumaanam)-Circumstantial Evidence*

Inferential knowledge is defined in *Nyaayasutra* as the knowledge that is preceded by perception.[4] The *Tarka-Samgraha* defines it as knowledge born of subsumptive reflection.[5] In simpler words, it means the structured process of arriving from a premise to a conclusion by employing the reason. Where direct evidence is unavailable or insufficient, putting together the circumstantial evidence in any crime and coming to conclusion by applying reason is a form of inferential knowledge or *anumaanam*.

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1 *Sukhwinder Pal Bipan Kumar v. State of Punjab* (1982) 1 SCC 31.

2 [*Pratyaksha-anumaana-upmaana-shabdaahaa "pramaanaani"*] N.S.-1.1.3.

3 [*Indriya-artha-sannikarshah-janyam-jnyaanampratyaksham*] translated by A.B. Gajendragadkar and R.D. Karmarkar, TARKA SAMGRAHA OF ANAMBHATTA, 1st ed. 2004, p. 9.

4 [*Atha Tatpoorvakam*] N.S.-1.1.5.

5 [*Paraamarshah-janyam-jnyaanam-anumitih*], translated by A.B. Gajendragadkar and R.D. Karmarkar, TARKA SAMGRAHA OF ANAMBHATTA, 1st ed. 2004, p. 11.

(iii) *Comparison (Upamaanam)-Analogy*

Upamaanam means knowledge acquired by instituting a comparison or analogy. As defined in the *Nyaayasutra*, it means the knowledge of a thing through its similarity to another thing previously wellknown.[1] Section 73 of the Act of 1872 allows the proof of a signature/seal/writing purported to be of a given person to be ascertained by instituting a comparison with the one that is already admitted/ proved for the satisfaction of the Courts. This source of knowledge can be classified as *upamaanam*.

(iv) *Verbal Testimony/Word (Shabdah)-Expert Testimony*

Verbal Testimony is the word or assertion of a reliable person who speaks of things as they are.[2] Section 45 of the Act of 1872 speaks of the opinion of experts being relevant facts. According to the provision, when a doctor (who is not a party to the litigation) is called upon to testify as an expert witness in cases of medical negligence, his/her opinion is admissible as a relevant fact. This testimony of the doctor, owing to the belief of expertise in him/her, qualifies as *shabdah*. The principles governing *shabdah* can be read not just with the provisions relating to expert testimonies, but can also be applied to the testimonies of percipient witnesses under Section 60 of the Act of 1872.

There are other sources of knowledge that have been discussed in the Act of 1872 like hearsay, presumptions etc. *Nyaaya* philosophy, however doesn't identify them as separate sources of knowledge and instead considers them to be included in either of the four sources discussed above. This interface is briefly discussed hereunder:

(a) Rumour (Aitihya)-Hearsay

The discussion regarding the means of valid knowledge goes further in the *Nyaayasutra* where 'rumour' or *aitihya* as a whole other means of right knowledge is pondered upon amongst others. It defines rumour/*aitihya* as an assertion which has come from one to another without any indication of the source from which it first originated.[3] The Indian Evidence Act 1872 identifies such assertions as hearsay, and regards them as no evidence and declares them inadmissible in view of Section 60 which requires all evidences to be direct. In *Nyaayasutra,* the contention of *aitihya* being a distinct means of valid knowledge comes to be dismissed as rumour happens to be included in verbal testimony. Furthermore, while discussing verbal testimony, it rejects the testimony of any person who doesn't speak of things as they are, *i.e.,* the testimony of an *ayathaartha-vakta.*

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1 [*Prasiddha-saadharmyaat-saadhya-saadhanamupamaanam*] N.S.-1.1.6.

2 [*Aaptopadeshah-shabdah*] N.S.- 1.1.7; [*Aaptavaakyam-shabdah*], translated by A.B. Gajendragadkar and R.D. Karmarkar, TARKA SAMGRAHA OF ANAMBHATTA, 1st ed. 2004, p. 18.

3 N.S.- 2.2.1.

(b) Presumption (Arthaapattih)

Presumptions have had a significant role to play in jurisprudence. Presumptions come into operation in the absence of actual certainty of the truth or falsehood of a fact or proposition.[1] It is an inference (affirmative / disaffirmative) logically drawn by a process of probable reasoning from something which is taken for granted.[2] Presumption may be of a fact or of law. There are mixed presumptions of law and fact too. *Nyaaya* has defined presumption as the deduction of one thing from the declaration of another.[3] The definitions of 'presumption' given by both - the positive law and *Nyaayashaastra*, suggest that presumptions are inferences. *Nyaayashaastra* doesn't acknowledge presumptions as separate source of knowledge but includes them in the category of inference or *anumaanam*.

This interface of the various identified sources of valid knowledge in the positive law and *Nyaaya* epistemology is only illustrative of the scope of these two disciplines being practically read together. The categorisation of various sources of knowledge is an indispensable study, as every source of knowledge - be it percipient witness' testimony, circumstantial evidence, expert evidence etc., has a completely different bearing on administration of justice.

Nyaaya's Parameters of Perceptions (_Pratyaksham_)

It is said that "*there are things known and there are things unknown and in between are the doors of perception*". As discussed earlier, *pratyaksham* is the knowledge born out of contact of a sense organ with an object. It is the plain perception born out of interaction between sense organs and the object. *Pratyaksha pramaana* is considered as the most supreme means of valid knowledge as opposed to drawing inferences, analogies or an expert's testimony. In fact, the *Chaarvaaka* system of Indian philosophy identifies perception as the only dependable source of valid knowledge. The *Dvaita* epistemology defines perception as the contact of a faultless sense organ with a faultless object. That is to say perception is a *pramaa* or valid knowledge at all times. The *Naiyyayikas* do not ascribe faultlessness either to the sense organ or the object. But they go ahead to establish which of the perceptions can qualify as *pramaa*. Interestingly they deal with the concept of perception as it is. A person's perception may not be a true cognition but that is one's own perception. Whether it coincides with reality or *yathaartha* is a subsequent and different question. But at the stage of defining the perception, *Nyaaya* epistemology doesn't qualify it with the requirement of being a faultless perception.

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1 Sudipto Sarkar and V.R. Manohar, SARKAR ON EVIDENCE, 15th ed. 1999, 1st Ind. rep. 2004, p. 77.

2 *Ibid*.

3 Nandalal Sinha and M.M. Satisa Chandra Vidyabhushana, THE NYAYA SUTRAS OF GOTAMA, 1st Ind. rep. 2016, p. 55.

Classification of Perceptions

Perception is classified as internal (*maanasa*) and external (*baahya*). Internal perception arises out of mind's contact with psychical processes. External perception is the due to sensory contact with the objects. *Nyaaya* also classifies perceptions as: ordinary (*laukika*) and extraordinary (*alaukika*) perceptions.[1]

(i) *Ordinary Perceptions (Laukika)*

These are the perceptions that occur when the object is present to the sense-organ.[2] When an object is available to either of the sense organs and is perceived by the relevant sense organ then an ordinary perception takes place. For example, the colour as cognised by the eyes is visual perception. Sound as heard by the ears is aural perception. Smells as known through the nose is nasal perception. Taste as known to the tongue is gustatory perception and touch as felt by the skin is tactual perception. This ordinary perception is classified into three modes based upon how the properties or characteristics of the object are perceived. Thus, ordinary perception may be indeterminate perception, i.e., *nirvikalpakam* / *nishprakaarakam*, determinate perception i.e., *savikalpakam / saprakaarakam,* re-cognition i.e., *pratyabhijna*.

(a) Indeterminate Perception (Nirvikalpakam/Nishprakaarakam)

Indeterminate or *nirvikalpakam* perception is that in which the object is apprehended as something with a very general characteristic. It is when at the first sight one identifies the primary properties of an object but not the specification. To clarify with an example, the indeterminate perception is when one cognises the 'orangeness' (characteristics like round shape, color, smell etc.) in an orange. It just the primary cognition of an object without attributing any specific characteristics to it. Just like, the cognition of a thing at a distance where one can only immediately tell that 'it is something that has a linear elongated shape and has a reflective capacity'.

(b) Determinate Perception (Savikalpakam/Saprakaarakam)

Determinate perception on the other hand is said to occur when the object is cognised and known to possess some character. It occurs when one specifically cognises an object as 'orange'.[3] It is a perception which can attribute characters to an object. That is to say, in the above example if the 'linear elongated shaped thing with a reflective capacity' is actually cognised as 'this is a knife', then it is a determinate perception.

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1 Satischandra Chatterjee and Dhirendramohan Datta, AN INTRODUCTION TO INDIAN PHILOSOPHY, 1st ed. 1939, 1st MLBD ed. 2016, p. 172.

2 *Ibid.*

3 *Ibid*., p. 176.

(c) Remembrance (Smritih) and Re-Cognition (Pratyabhijna)

Herein, an object is already cognised at an earlier point in time and is re-cognised later when one perceives it again and knows that it is the same object.[1] In *pratyabhijna* or re-cognition, an object that was cognised before is cognised again. That is to say, in the same example above, 'this is the same knife that he cuts fruits with.' Re-cognition is rooted in remembrance (*smritih*) which is again, a form of cognition. It arises out of mental impressions alone.[2] Further, remembrance is of two kinds: (i) correct remembrance, which is produced from right apprehension that coincides with reality; (ii) incorrect remembrance, which is produced from wrong apprehension that does not coincide with reality.[3] This mode of cognition can be said to be a subset of sensory perception.

(ii) *Extraordinary Perceptions (Alaukika)*

Ordinary perception is that obtained through senses. Extraordinary perception occurs when the object is not ordinarily present to the sense-organ but is conveyed to the sense through an unusual medium.[4] There are three types of extraordinary perception accepted in the *Nyaayashaastra*: *saamaanya-lakshana, jnaana-lakshana* and *yogaja.*

(a) Saamaanya-Lakshana

It is the kind of extraordinary perception wherein there occurs a cognition of a universal or *saamaanya* like, the perception of 'manhood'.[5] This implies the perception of a class of men that are not physically present to a sense-organ. So, while stating that 'all men are mortal', one hasn't physically perceived 'all men' but a quality of 'manhood' which is universal or *saamaanya* to the class of men is perceived.

(b) Jnaana-Lakshana

Perceptive faculties of various sense-organs are closely linked with each other. *Jnaana-lakshana* occurs when a process of cognition takes place owing to close connection between various perceptive faculties. So, the various perceived characteristics in one object become an integral part of a single perception. In a testimony where one states 'I saw a piece of fragrant sandalwood', it actually

1 Satischandra Chatterjee and Dhirendramohan Datta, AN INTRODUCTION TO INDIAN PHILOSOPHY, 1st ed. 1939, 1st MLBD ed. 2016, p. 177.

2 [*Samskaara-maatra-janyam-jnaanam-smritih*], translated by A.B. Gajendragadkar and R.D. Karmarkar, TARKA SAMGRAHA OF ANAMBHATTA, 1st ed. 2004, p. 8.

3 [*Smritih-api-dvividha- yathaarthah ayathaarthah cha. Pramaa-janyaa yathaarthah, apramaa-janyaa ayathaarthah*], translated by A.B. Gajendragadkar and R.D. Karmarkar, TARKA SAMGRAHA OF ANAMBHATTA, 1st ed. 2004, p. 20.

4 *Supra* n. 1.

5 *Ibid.,* p. 174.

implies the perception of fragrance by eyes. Here, the past olfactory experience of fragrance is closely linked with the visual experience of sandalwood.[1]

This is the part of *Nyaaya* theory of perceptions which explains perceptual illusions and hallucinations.[2] This kind of extraordinary experience wherein the correct subject of the stated sense-organ is not actually present to it and causes illusions.[3] The classic examples of such a perception are the illusion of snake in a rope; the illusion of a man in a lamp post far away.

(c) Yogaja

The third kind of extraordinary perception is the *yogaja* or the intuitive perceptions caused by the yoga practice. This is the perception of all objects-past, present, future, hidden and infinitesimal, by the *yukta* or the one who possesses supernatural powers owing to spiritual perfection by devout meditation or *yogabhyaasa*.[4]

Defects in Perceptions

Faulty perceptions may arise out of some defects or *dosha* in the process of perception. These defects may fall in three categories: environmental, pathological and cognitive.

(i) *Environmental Defects*

The environmental defects of perception include defective environment, that is to say, haziness; bad lighting; object being too near or too far that makes it difficult to perceive the object.

(ii) *Pathological Defects*

The pathological defects are the defects in instruments of perception due to myopic vision, tactual numbness, hearing incapacity etc.[5]

(iii) *Cognitive Defects*

The cognitive defects arise due to the mental state of the perceiver for example, inattentiveness; disturbed state due to anger/pain/other overpowering positive or negative emotional states. These may also arise due to illusions caused by *jnaana-lakshana* or not being able to distinguish between a perception and an inference. It may also arise when the internal psychological factors or set of mind affects the perception.

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1 Satischandra Chatterjee and Dhirendramohan Datta, AN INTRODUCTION TO INDIAN PHILOSOPHY, 1st ed. 1939, 1st MLBD ed. 2016, p. 174.

2 Bimal Krishna Matilal, PERCEPTION: AN ESSAY ON CLASSICAL INDIAN THEORIES OF KNOWLEDGE, 1st ed. 1991, 1st Ind. rep. 2016, p. 286.

3 *Ibid.*

4 *Supra* n.1, p. 175.

5 Jonardon Ganeri, ARTHA: MEANING, 3rd imp. 2017, p. 108.

Role of Cognitive Psychology in Distinguishing Sources of Knowledge Episodes

At this juncture, where the various sources of valid knowledge or evidence are culled out, the identification of knowledge episodes in order to categorise this knowledge can be discussed. Cognition literally means the mental action or process of acquiring knowledge and understanding through thought, experience and the senses. It is the cause and basis of every knowing. In other words, any piece of knowledge or 'knowing' - valid or invalid, can be said to be the effect or end result of process of cognition. Cognition is referred to as *jnyaanam* and defined in *Nyaayashaastra* as the quality which is the cause of all kinds of communications. It is the cause of the immediate knowledge which manifests itself in the form 'I know'.[1] When a person testifies to something, it is his/her knowledge of the event. In order to decide the validity of this knowledge which is to qualify as admissible evidence, it is imperative to understand how it was actually cognised. That is to know its origin. Cognition can be said to be instrumental in realisation of a 'fact' as defined in the Act of 1872. A 'fact' may be anything, state of things, or relation of things, capable of being perceived by the senses. A 'fact' also includes any mental condition of which any person is conscious. When an object is known/cognised as it is, it is a valid apprehension of that object. That is to say the testimony of a person coincides with the reality. The one who testifies is speaking of things as they are. This valid cognition is known as *pramaa*. The instruments of valid apprehension /*pramaa* are the means of valid knowledge: perception (*pratyaksham*), inference (*anumitih*), comparison (*upamitih*) or verbal testimony (*shaabdah*). So, the testifier may employ either of these faculties to testify. The evidence may be a person's direct perception of an event; it may be his inference or analogy or an expert opinion about the happening. All of these are classified as valid sources of knowledge.

The detrimental part in the entire process is the classification of this knowledge. It is required to be categorically classified whether a person who is testifying has the knowledge *via* sensory perception or is drawing inferences and analogies or it's his/her expert opinion on the event. This is because each of these forms of evidences has a different bearing upon the matters. Where an expert opinion is regarded as a relevant fact, the sensory perception is a direct evidence of an event. A person's inferences/analogies may account for circumstantial evidences. Not only this, the entire procedure of testing these evidences and the standards of proving whether the testimony coincides with reality or *yathaarthah* is unique. The knowledge *via* sensory perception has to stand the test of faultless senses and other environmental, pathological and cognitive specifications. The circumstantial evidences or the inferential knowledge should stand the test of logical syllogism or *pancha-avayava* where

1 [*Sarva-vyavahaara-hetuh-gunahbuddhih-jnyaanam*], translated by A.B. Gajendragadkar and R.D. Karmarkar, TARKA SAMGRAHA OF ANAMBHATTA, 1st ed. 2004, p. 8.

the premise is established as a conclusion *via* a structured process of reasoning. The expertise in an opinion or any verbal testimony has to stand the test of reliability or *aapti* and correct mode of communication. So, the test for proving every fact is unique for all varieties of evidence. It depends upon the source of cognition.

Cognitive psychology is a subject, that is concerned with the mental processes of perception, memory, thinking, processing of knowledge etc., is another allied field along with epistemology that has immense potential to standardise the mechanism of laws of evidence and thereby improvise justice administration. An error in classifying the knowledge episode into the categories of perception, inference, analogy or opinion can seamlessly perpetuate to change the parameters of weighing that evidence in the given facts and circumstances of a case and easily result in miscarriage of justice.

Nyaaya's Parameters for Capacity to Give Rational Answers

The second significant aspect of adducing testimonial evidence after acquisition and classification of knowledge is the communication thereof. The validly perceived and received knowledge needs to be communicated in a rational and syntactical manner so as to make it a reasonable exercise.

The Indian Evidence Act 1872 has provided for the communicative competence of witnesses by stating who can testify. According to it, the persons capacitated to give rational answers to the questions put to them can testify.[1] The provision, however, doesn't specify factors governing the 'capacity to give rational answers'. *Nyaaya* epistemology while dealing with *shabdah* or verbal testimony culls out the various distinctions of a sentence that are contributive to the validity of testimony. These tenets of logical structure of a sentence are laid down in context of verbal testimonies. Not every combination of words can make an intelligible sentence. The sentence can cause its meaning and knowledge therein possible to be communicated in the intended and intelligible manner only when it fulfils four conditions *viz.*, verbal expectancy (*aakanksha*), compatibility (*yogyataa*), proximity (*sannidhih*) and intended meaning (*taatparyah/vaakyaarthah*).[2]

(i) *Verbal Expectancy (Aakaanksha)*

A word only when brought in relation to other words in the right order can convey a complete meaning. There is a mutual need amongst words to make a meaningful sentence. Therefore, simply uttering the words 'he did' doesn't convey complete meaning. It needs to be uttered with such other accompanying words that will convey the meaning completely. Also, these words in the other

1 Section 118 of the Indian Evidence Act 1872.

2 [*Aakaanksha yogyataa sannidhih cha vaakyaartha jnaane hetuh*], translated by A.B. Gajendragadkar and R.D. Karmarkar, TARKA SAMGRAHA OF ANAMBHATTA, 1st ed. 2004, p. 18.

order of 'did he' will change the meaning of the sentence. This is verbal expectancy or *aakaanksha*. A sentence devoid of verbal expectancy is declared as *apramaanam*.[1]

(ii) *Compatibility (Yogyataa)*

This means absence of mutual contradictions in the sentence. Where there is mutual contradiction, the sentence cannot convey a clear meaning. This incapacitates it from being a valid testimony, for example, 'there was a fair dusky man.' Here, the words 'fair' and 'dusky' create contradiction making the sentence incapable of conveying a meaning.

(iii) *Proximity (Sannidhih/Aasattih)*

In order to make a sentence intelligible, the words constituting it should be uttered in proximity with each other. There cannot be intervals of space and time during these utterances. That is to say, uttering one word of the sentence and then completing it with another word the next day. A witness's/ expert's testimony needs to be continuous till it is completed.

(iv) *Intended Meaning (Taatparyah/Vaakyaartah)*

One word may have several meanings. In the example given above, 'fair' may mean light color and it may also mean just and reasonable. Therefore, in order to gather the correct meaning, the intention or *taatparya* of the speaker must be considered.

Communication of the perceived or received knowledge is equally crucial to the entire process of adducing testimonial evidence. This logical arrangement of the sentence mandated in *Nyaaya* epistemology is a time-tested method of rendering and receiving productive testimonial evidence. The semantic power of words coupled with epistemic foundations make testimonies infallible and play a crucial role in preventing miscarriage of justice.

Percipient Witness Testimony Under Section 60 of the Indian Evidence Act 1872: A Critical Analysis

> "*The stimulation of his sensory receptors is all the evidence anybody has had to go on, ultimately, in arriving at his picture of the world*".
>
> - W.V.O. Quine 'Epistemology Naturalized'

Having visited *Nyaaya*'s epistemological foundation for the concept of perception, Section 60 of the Act of 1872 can now be examined. Following is a brief analysis of this provision of law of evidence in the light of its language, intent, purpose, scope and limitations.

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1 [*Tathaa cha aakaanksha rahitam vaakyam apramaanam*], translated by A.B. Gajendragadkar and R.D. Karmarkar, TARKA SAMGRAHA OF ANAMBHATTA, 1st ed. 2004, p. 18.

Principle

Section 60 of the Act of 1872 requires oral evidence in all cases to be direct. This provision dealing with 'direct evidence' in cases of oral evidence, is a manifestation of the 'best evidence rule'. The best evidence rule is designed to prevent the introduction of such evidence, which, from the nature of the case, supposes that better evidence is in possession of the party.[1] Lord Esher had expressed, "*different kinds of evidence may be used to prove the same fact*".[2] It is not an impossibility to prove a fact stated through oral evidence from indirect evidence. However, Section 60 disqualifies 'hearsay' evidence in all cases of oral evidence where direct evidence is available.

Direct Evidence

By 'direct evidence' it is meant that whenever an evidence is required to be adduced regarding a fact that can be sensorily perceived or an opinion that one holds, then it must be the evidence of a witness who has directly perceived that fact or the person who holds such opinion himself, respectively. Indirect evidence is the evidence that is inferential and employs the process of reasoning to establish its proposition. This may be circumstantial or presumptive evidence. The law of evidence treats the accounts of perception or 'direct evidence' of any event/happening wherein, it gives more weightage to 'direct evidence' as opposed to inferences from circumstantial evidences and presumptions, expert testimony or analogies. The reason being that in matters of direct testimonial evidence, there is only source-dependence. That is to say, only the reliability of the source needs to be examined here. The inference and analogy based evidences on the other hand are premise-dependent, in addition to being source dependent. In other words, the proof of these facts in turn depend on the proof of various other facts forming a part of its premise.

Percipient Witnesses

Section 118 of the Act of 1872 states who can testify wherein, it provides that all persons who can understand the questions put to them and are capacitated to give rational answers to them can testify. These persons are called witnesses or *saakshinah*. Their competence to testify as specified in Section 118 and by *Nyaaya* epistemology - on the touchstone of reliability and ability to speak of things as they are, is known as '*aapti*'.[3] The term 'witness' itself does not find a place in the interpretation clause of the Act of 1872 but has been dealt with definitively to the extent of stating the qualification of a

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1 Sudipto Sarkar and V.R. Manohar, SARKAR ON EVIDENCE, 15th ed. 1999, 1st Ind. rep. 2004, p. 1269.

2 *Lucas v. Williams* [1892] 2 QB 166.

3 [*Aaptopadeshah-shabdah*] N.S.- 1.1.7; [*Aaptavaakyam-shabdah*], translated by A.B. Gajendragadkar and R.D. Karmarkar, TARKA SAMGRAHA OF ANAMBHATTA, 1st ed. 2004, p. 18.

competent witness in this provision. *Paanini*,[1] has defined witness or *saakshin* as the 'one who has directly seen'.[2] This definition relates to the popularly used term 'eye-witness' or 'ocular witness'. Other scholars have provided for a wider definition for the term witness which states that a proper witness is one who has himself either seen or heard or experienced the matter in dispute.[3] This definition relates to the term 'percipient witness'. Similarly, the Black's Law Dictionary has defined 'witness' as someone who sees, knows or vouches for something.[4] Section 60 has spoken of witnesses who may give evidence as to a perceivable fact or an opinion. Thus, this provision has contemplated two kinds of witnesses: percipient and opinion witness. Of the testimonies contemplated under this provision, the testimonies of those who have themselves seen, heard or perceived a fact, relate to the evidence of perceivable facts. These perceivable facts may be perceived through either of the senses. The term 'eye-witness' is more popularly employed for such cases. This may be owing to the high frequency of cases of ocular witnesses as opposed to witnesses perceiving through other senses. But for the study of all perceptions and perceivable facts under Section 60, the term 'percipient witness' may be used as an umbrella term for all kinds of perceptions by witnesses. The Black's Law Dictionary has defined percipient witness as the witness who has perceived the things about which he or she testifies.[5]

Perceptions Contemplated Under Section 60 of the Indian Evidence Act 1872

Section 60 of the Act of 1872, in so far as it relates to perceivable facts, reads as:

> *Oral evidence must, in all cases whatever, be direct; that is to say-If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner.*

It can be inferred that, perceivable facts have been categorised by the language of this provision into two kinds *viz.*, (i) facts perceived by pure sensory perceptions; (ii) facts perceived by any other senses or in any other manner.

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1 Indian grammarian and Sanskrit Scholar: 4th Century BCE to 6th-5th Century BCE.
2 P.V. Kane, HISTORY OF DHARMASHASTRA, Vol. III, 3rd ed. 1993, p. 330.
3 *Ibid.*
4 Bryan A. Garner, BLACK'S LAW DICTIONARY, 10th ed. 2014, p. 1838.
5 *Ibid*., p. 1839.

(i) *Pure Sensory Perceptions*

The first clause of this section lays down the general rule of oral evidence to be direct. The second and third clauses are illustrative of what can be called as pure sensorial perceptions, where the second clause speaks of ocular evidence and the third clause speaks about aural evidence. It is abundantly clear from the language of Section 60 that where it is dealing facts that can be seen or heard, it is referring to pure sensory perception and qualifying these as 'direct evidence'. These are the perceptions classified by *Nyaaya* epistemology as: (i) Ordinary (*laukika*) perceptions; (ii) External (*baahya*) perceptions.

(ii) *Perceived by 'Any Other Sense' or in 'Any Other Manner'*

In continuance, the provision identifies perceptions through any other sense or in any other manner. Following the principle of *ejusdem generis*, the phrase 'any other sense' can be said to include the knowledge episodes sourced through other sense organs like olfactory and tactual sense which may include 'facts which could be smelled' and 'facts which could be touched', respectively. The interpretation of the phrase 'in any other manner' has been done to include knowledge episodes occurring due to memory/remembrance or re-cognition. If the identified sense organs for external perceptions are five *viz.*, sight, smell, auditory, tactual and taste, then knowledge episodes sourced through memory can certainly not be included in the category of 'pure sensory perceptions'. The provision has thus created another category of perceptions which relate to 'perceptions through any other sense or in any other manner'. This category of witness may include: Internal perceptions or *maanas*; Memory-based re-cognition (*pratyabhijna*) of the object/happening; Extra-ordinary perceptions (*alaukika*) or extra-sensory perception.

Discrepancies in Percipient Witness Testimonies and their Effects

The process of a witness perceiving a fact directly through pure sensory perception, like in the case of eye-witness, or perceived in any other manner, and proving it by offering direct oral evidence, cannot be said to be free from the influences of the following factors:

(a) The witnesses processing their perceptions by employing their inferential or analogical faculties to the perceived knowledge;

(b) The witnesses being prone to having illusion of the object/event owing to multiple perceptions arising at once as in the case of *jnaana-lakshana*;

(c) The witness instituting analogy with an already cognised object/happening which was itself based upon an incorrect cognition as in the case of *ayathaarthah smritih*;

(d) The witness's incapability to recapitulate an object/happening from his/her memory;

(e) The witness lacking '*aapti*' or 'not being able to give rational answers'; and

(f) Placing heavy reliance on indeterminate perceptions (*nirvikalpak jnaanam*) as opposed to the more specific circumstantial evidence only because that indeterminate perception is a piece of direct evidence by an 'eye-witness'.

When these factors operate, they cause discrepancies in perception. This amounts to processing of the knowledge perceived through bare and basic physical senses. What needs to be examined here is, whether pure sensory perceptions as contemplated in this part of the provision provide scope for such knowledge episodes sourced from factors that actually cause discrepancies in perception. Facts arising from pure sensory perceptions are those that a witness sees, hears or perceives through such other sense organ.

What happens to that perceived knowledge after the witness psychically processes it/ confuses it with other sensory perceptions/ creates an incorrect memory-based picture, can no more be called as pure sensory perception. Because, this processing of the perceived knowledge has resulted in the witness himself diluting his/her perceptions by drawing inferences or instituting analogies which are completely different means of valid knowledge that do not qualify as perceived facts under this provision. Internal perceptions have effect on external perceptions. Inter-mingling of two sensorial perceptions like smell and sight or of sight and hearing may create an illusion of existence of a fact.

The process of re-cognition may institute an analogy with a previously known thing. This previous knowledge in turn is prone to being distorted owing to the lapse in time. Re-cognition is when something already known is cognised again. This depends on the remembrance power/memory or *smritih* of a person. The Supreme Court has observed that the power of perception and memorising differs from man to man and also depends upon situation. It also depends upon the capacity to recapitulate what has been seen earlier.[1] Discrepancies in testimony after a lapse of considerable time are humanly unavoidable. Therefore, "*minor contradictions are bound to appear in statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person*". The Apex Court further observed that although minor testimonial discrepancies caused by memory lapse have been considered as acceptable by the Court, it is also remarked that it is "*wholly unsafe*" to rely upon a version unless it is corroborated by another evidence that may probabilise the testimony.[2]

It has been observed by the Apex Court that "*theoretically in some cases the emotional balance of the victim or eyewitness may be so disturbed by his*

1 *Daya Singh v. State of Haryana* (2001) 3 SCC 468.
2 *Sampath Kumar v. Inspector of Police* (2012) 4 SCC 124.

extraordinary experience that his powers of perception may become distorted and his identification may become untrustworthy…".[1] The High Court of Madhya Pradesh has gone further to identify that "*Normal, mental phenomena includes some kinds of vrittis, viz., pramaan (right knowledge), viparyaya (erroneous knowledge), vikalp (fancy), smriti (memories)… Practice of Yoga in a proper way understands the extra sensory perception. Psychology studies by Corringtom and Tyrrel have proved beyond reasonable doubt that super normal phenomena has acceptance and there is an extra physical element in man*".[2]

However, epistemologically speaking, diluted sensory perceptions do not amount to being 'facts which could be seen' or 'facts which could be heard' in the literal interpretation of this provision. Legal epistemics would not warrant regarding these pieces of evidence as direct evidence. If these are systematically categorised as inferential knowledge/comparisons/presumptions etc., then it entails disqualifying these pieces of evidence as 'direct' or 'best' evidence under Section 60.

Scientifically Enhanced Investigation Techniques in the Light of *Nyaaya* Epistemics

The study of *Nyaaya* epistemology can be extended to the *pariksha* or examination of some scientifically lead investigation techniques. There are three such tests *viz*., narco-analysis, polygraph examination and the brain electrical activation profile test, that were until year 2010, administered involuntarily. These tests are an aid to investigation and improve the process of fact finding. They are also a good alternative to the 'third-degree methods'. The question of a person's right against self-incrimination in context of these tests came up before the Supreme Court.[3] The Apex Court in its judgment has held that such tests can be administered only by consent of the individual. At the outset, the Supreme Court referring to "*Self-Incrimination and the Epistemology of Testimony*" by Michael Pardo, classified the results of these inquiries as "*personal testimonies*".

Epistemologically speaking, how far reliability can be placed upon these testimonies, specifically, testimonies in case of narco-analysis that a person gives under the influence of a drug like sodium pentothal is question yet to be completely settled as these inquiries have not been banned but only made consensual. The ability to give rational answers is a precondition to testifying before courts. In these testimonies, there is complete lack of the logically structured sentences. The words uttered may not even be in proximity with each other and lack *sannidhih* itself and thus question of complying with the other aspects of a logical sentence barely arises. Also, whether this knowledge

1 *Daya Singh v. State of Haryana* (2001) 3 SCC 468.

2 *Maharashi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P.* AIR 2002 MP 196.

3 *Selvi v. State of Karnataka* (2010) 7 SCC 263.

qualifies as *savikalpak jnaanam* or determinate perception, is doubtful. Indeterminate perceptions often cause invalid inquiries leading to *apramaa.*

Towards Scepticism or Infinite Regression?

The study of standards of proof may be charged with the defect of infinite regression or *anaavastha*. In fact, this charge has been faced by Indian scholars in the course of debates. Nagarjuna came up with two theories to counter this charge:

(i) A proof is self-evident that is used to prove something else but it does not require a further proof.[1]

(ii) A piece of knowledge derives its authority and validity from something other than itself.[2]

In either of the theories mentioned above, this epistemological inquiry cannot be said to be flawed with the fallacy of infinite regression, so far as it is adhering to the principles of logic that guide one towards valid conclusions with a firm grounding and does not lead one to *anaavastha.* Scepticism can be an incident of one's duty of development of a scientific temper and a spirit of inquiry under Article 51A(h) of the Constitution of India. That by itself may not be enough to constitute a charge of infinite regression. But, scepticism transitioning into an infinite regress or *anaavastha* may make the inquiry unfeasible.

If the pursuit of truth is the philosophy of law of evidence, then it is deeply connected with pursuit of knowledge. The reason behind this statement being a conditional one fashioned as an 'if-then' hypothesis is the conceptual analysis of what is defined as a 'fact' and 'proved' in the positive law and what can epistemologically be regarded as the 'truth'. It is widely believed and followed that what may be held as truth according to one person, may not be the truth according to another. Although related to the research in this paper, this subject qualifies as a whole other subject to be dwelled upon separately. However vague, the term 'truth' may appear to be, arriving precisely at it can be channelised by knowing the qualifications of what can be called as correct knowledge in the *Nyaayashaastra.*

Scope of Supplementing Inquiry of Perceptual Knowledge under Section 60 of the Indian Evidence Act 1872 with *Nyaaya's* Epistemic Foundations

The history of codification of the evidence law in India reveals the industry and care with which the great mass of principles and rules of English law have

1 Bimal Krishna Matilal, PERCEPTION: AN ESSAY ON CLASSICAL INDIAN THEORIES OF KNOWLEDGE, 1st ed. 1991, 1st Ind. rep. 2016, p. 51.

2 *Ibid*., p. 55.

been drafted by Sir James Stephen and eventually codified.[1] At the same time, its makers have been verbose regarding the incompleteness of this code. In the words of Justice Holmes, "*However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in the continuous growth*".[2] What is being studied as a 'scope' in this section of the paper has in fact, been identified as a necessity by those who put this masterpiece of legislation together. Jurists have emphasised in very specific words: "*The law of evidence is an abstract and difficult subject and like all other things of its kind, it is still in a process of growth. To say that everything that is good and useful is contained in the Act and nothing more will be necessary to add to its usefulness, or to make it perfect, would be dogmatic. It would be illusory to think that in forming our ideas on the subject, or in actual work, we are not to travel beyond the limits assigned by the Act, and consult English text books on the subject. We must have recourse to every possible means that throw any light on the subject, without stopping to enquire from which quarter it comes*".[3]

Another eminent jurist Mr. Norton remarked- "*It appears to me idle to expect to be able to confine the judge or the advocate to the four corners of the Code. It will be necessary for the judge and the practitioner to refer to the well-known text books, whenever points not specifically provided for in the Code, present themselves. Probably some hundreds of judicial decisions will be necessary to explain the Code, and many amendments, and still more, large additions, will have to be made after it…*"[4]

These remarks by the framers of this law make their expectation of resorting to extraneous sources for safe guidelines abundantly clear. Now, regarding the possibility of invoking principles and guidelines from the indigenous literature of India flowing from the *shaastras*, it is pertinent to note that law of evidence is *lex fori*.[5] By the term '*lex fori*', it is meant, law of the forum or the law of the jurisdiction where the case is pending.[6] Therefore, the matters of law of evidence relating to admission/rejection of evidence, competence of a witness, which evidence to prove which fact, etc., are to be governed by the law of the country in which the question arises and proceedings take place.[7] It has been observed that earlier, "*the mofussil courts believed that it was their duty to administer the English law of evidence and a tendency towards a capricious administration of that law prevailed. This was thought undesirable for two*

1 Sudipto Sarkar and V.R. Manohar, SARKAR ON EVIDENCE, 15th ed. 1999, 1st Ind. rep. 2004, p. 4.
2 *Ibid*., p. 6.
3 *Ibid*.
4 *Ibid*, p. 9.
5 *Ibid*., p. 26.
6 Bryan A. Garner, BLACK'S LAW DICTIONARY, 10th ed. 2014, p. 1049.
7 *Supra* n. 1, p. 26.

reasons: first because the English law of evidence is based as it is on the social and legal institutions of England and was not applicable here in its entirety, owing to the peculiar circumstances of this country. Secondly, because, a competent knowledge of the English law could then be hardly expected from the judges, and so a strict application of that law would result in miscarriage of justice". [1]

Thus, the eminent English jurists had made it amply clear that there is a lot of scope for supplementing the law of evidence with relevant parameters wherever it is found lacking them; and that, these parameters are to be supplemented by the principles, methods and guidelines that are peculiar to the circumstances and socio-legal setup of this country. Bentham had remarked that "*comprehensiveness of evidence is an epistemological desideratum*".[2] The Law of Evidence in its enacted form can be read with a range of *pramaana* theories that actually anchor its objects, concepts, reasons and purpose and go ahead to complement it with their epistemic and scientific approach. The definitions or *lakshana*s of the *pramaana*s alone as given in the *Nyaayasutra* have the potential to augment the interpretation clause and other central provisions of laws of evidence. Their enunciation/*uddesha* and examination/*pariksha* further bear the time-tested logic and have the capacity to unfalteringly supplement the loop-holes wherever they may arise. By the supplementation of epistemological knowledge base to the positive law, there is an evident colossal scope of improving our definitions and creating more systems to simplify the execution of legal processes. The meaning assigned to 'direct evidence' under Section 60 of the Act of 1872 exudes ample clarity in the context of inclusions and exclusions therein. Enhancing it with the tenets that *Nyaaya* epistemology has to offer, accords profundity to the system.

Constraints on Legal System for Improvising Administration of Justice

Our legal systems of administration of justice have been relentlessly functioning for arriving at the truth. However, it is also subject to range of constraints to practically modify and improvise its methods and thereby innovate evidence laws. Some of these constraints are discussed hereunder:

Advocacy-Research Leading to Pseudo-Inquiries

Every advocate in the court is engaging in what is known as *jalpah,* i.e., a logically arranged and systematically researched argument which is advanced in order to win one's case. This is in contradiction to *vaadah* which focuses on establishing the truth rather than winning the matter. This is based upon 'advocacy-research' which ultimately lead to pseudo-inquiries. Prof. Susan

1 Sudipto Sarkar and V.R. Manohar, SARKAR ON EVIDENCE, 15th ed. 1999, 1st Ind. rep. 2004, p. 2.

2 Susan Haack, EVIDENCE MATTERS: SCIENCE, PROOF AND TRUTH IN THE LAW, 1st ed. 2014, p. 22.

Haack[1] in her work, 'Epistemology and the Law of Evidence: Problems and Projects' has distinguished the concepts of 'genuine inquiry' from 'pseudo inquiry' and thereby dealt with the nature of 'advocacy research'.[2] In her work titled, 'What's Wrong with Litigation-Driven Science?' she has dwelled upon 'litigation-driven research' and defined it as the work that is undertaken for the purpose of finding evidence favouring one side in litigation and otherwise playing down the evidence favouring the other side.[3] This litigation driven research or advocacy research is one of the major reasons behind there being lesser emphasis on epistemic parameters of evidence laws.

Negligence of Epistemological Virtues

Normally, lawyers are constrained with a lot of 'non-epistemological desiderata' to be able to conduct allied inquiries. This results in the negligence of a whole other dedicated body of knowledge which happens to be central to the process of arriving at the truth. What is required is inculcation of epistemological virtues like intellectual honesty, patience and thoroughness and doing away with epistemological vices like self-deception, hastiness and carelessness.[4]

Limitations of Research Projects

The research projects relating to criminal justice administration like the Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003; 198th Report of the Law Commission of India on Witness Identity Protection and Witness Protection Programmes, Witness Protection Scheme, 2018 etc., have been some of the most extensive and fruitful works in reforming the system. However, the aspects of witness identification specifically relating to percipient witnesses are in need more figures and statistics in India as compared to the American, Canadian and British inquiries.

It is due to such constraints that despite having a whole body of time-tested knowledge dedicated to this vital aspect, the Indian legal system lacks in the practical implementation of this associative knowledge base while the westerners have gone ahead to create and dwell upon an entirely committed field of 'legal epistemology'.

Conclusion

The Indian intellectual heritage contained in the *shaastras*, have a plethora of time tested theories that bear relevance and practical utility to inquiries conducted in various professional disciplines. It is very interesting to study their interface with the modern positive laws and reach the depths that these

1 Professor of Law and Professor of Philosophy at the University of Miami.
2 Susan Haack, EVIDENCE MATTERS: SCIENCE, PROOF AND TRUTH IN THE LAW, 1st ed. 2014, p. 6.
3 *Ibid*., p. 199.
4 *Ibid*., p. 22.

philosophies have to offer to the existing body of knowledge. The analysis of the relevant provisions of Evidence Act and the *pratyaksha pramaana* theory reveals that the *shaastras* certainly have the required dimensions to offer to the positive law which will help in settling a lot of practical questions that arise and are eventually settled by judicial pronouncements, but on a case-to-case basis. It's high time that we borrow these principles on a regular basis and merge these two disciplines of study and thereby innovate and enrich our legislations. The day when the principles of Indian legal epistemology embedded in the *shaastras* are celebrated by practising them in the actual Courts shouldn't be so far.

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MULTI-FACETED PORTRAYAL OF COMPANY'S DIRECTOR IN INDIA: COMPARING THEIR ROLES

Gargi Talatule[♣]

Abstract

The Companies Act 2013 was introduced with primary objectives of consolidating scattered compliance requirements like those of TRIMS, Depository System, SEBI, ease of doing business, and matching international standards of corporate governance. The introduction of new legal mechanism realized the role of company for the development of contemporary society and brought various effective changes in the administration and management of the company form of business. The new regime focuses on monitoring and streamlining the important components of management of company wherein it introduced an exponential increase in Director's role, due to increased expectations and modification in their character sketch. In the present situation, when government is committed to encouraging entrepreneurship, stakeholders are more vigilant, niche areas of industry are evolving, local business are transcending to global in a flash and governance regime is strengthening. This paper attempts to highlight the provisions that outline identity of directors. Secondly, it explores how far are the provisions of Company law aligned to contemporary nature of Director's role. Finally, this paper contends that law needs to cover the multitudes of a director's role with precision in order to unleash it to the fullest capacity.

Keywords: Director, Role of Directors, Company, Committees of the Board, Management.

Introduction

The corporate law in India has been fundamentally transformed since early 1990s due to the adoption of liberalisation, privatisation and globalisation policy.[1] The Companies Act 2013 is the existing governing legislation that lays enhanced focus on corporate governance and increases role of director manifolds. Traditionally, perceived as the drivers of the corporate entity, directors have been subject to constant evolution for effective adaptation of the changing corporate environment. The evolving landscape compels the moulding

♣ Ph.D. Scholar, Maharashtra National Law University, Nagpur, email: gmoharil23@gmail.com.

1 Afra Afsharipour, "*Directors as Trustees of the Nation: India's Corporate Governance and Corporate Social Responsibility Reform Efforts*", SEATTLE UNIVERSITY LAW REVIEW, Vol. 34, 2011, p. 996.

of director's role to match the aspirations of the organisation as well as the society. The tools of modelling their role are primarily the relevant legislations of the State and the internal policies of the companies.

The Companies Act 2013 is a commendable initiative which has been flexible to accommodate specifics that are more typical to one form of company over other. To that extent, it has been active in shaping and re-shaping director's role. However, the corporate harmony continues to remain imbalanced due to mushroom growth of incidences of director's non-conforming conduct, in spite of the revised framework of Companies Act 2013, Rules and Secretarial Standards. This may be instigated by malice, lack of clarity on model conduct or uncertain applicability of the provisions.

Thus, the objective of this research paper is to revisit the existing company law in India in the light of multi-modality attached to directorship. The paper analyses and compares the various facets of directorship with a view to appraise provisions of Company law through varied layers of administration, execution and finance attributed to a director. The researcher argues that the role of directors must be carefully carved to ensure that its purpose and objectives are met appropriately wherein, in the first section, the researcher briefly highlights the interaction of directors with their stakeholders. Further, the researcher has discussed different kinds of companies to give a bird's eye view of the changing role of directors to match the company's objectives. The following two sections throw light on the office of director and kinds of directorships. The last sections deal with how a director's role is impacted by committees and participation in the Board. The researcher has discussed the role of directors and impact of the basic corporate phenomena on it through doctrinal method.

Analysis of Director's Role: Stakeholder's Perspective

Corporate entity, being the source of director's office, is its foremost stakeholder. The relationship between the board of directors and firm performance is more 'varied and complex',[1] yet research in the past indicates a strong correlation between performance of the company and its Board. The trusteeship theory expounds how the shareholders and creditors trust the company with their money, expecting the directors to help them derive better value as an instrument for mobilising capital to investments. The next stakeholder group is the financers of the company and any business structure is a component of national economy. Thus, it seeks conducive environment which

1 Nicholson, G.J. and Kiel, G.C., "*Can directors impact performance? A case-based test of three theories of corporate governance. Corporate Governance: An International Review*", CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW, Vol. 15, 2017, pp. 585-608; Beverley Jackling and Shireenjit Johl, "*Board Structure and Firm Performance: Evidence from India's Top Companies, Corporate Governance: An International Review*", CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW, Vol. 17, No. 4, 2009, p. 494.

is found in the stakeholders by the name of state and its authorities. The Ministry of Corporate Affairs, Securities and Exchange Board of India, National Company Law Tribunal, Insolvency and Bankruptcy Board of India are chief bodies governing companies. They affect the director's role in order to regulate conflicting interests of all the market participants towards an inclusive and sustainable growth. A company draws all its resources from society in the form of manpower, money and material. Hence, being at the peak of corporate structure, the largest stakeholder for director is society at large. It is, therefore, crucial that a clear sphere is demarcated within which directors can exercise business creativity in tandem with society.

The magnanimity of director's role in a corporation is on account of two factors wherein, operationally, they permeate in every aspect of corporate activity and conceptually, they are the largest element of corporate life having exchanges with every other stakeholder. The irony of the concept of director is that, it is one of the oldest component of corporate law, yet it has the responsibility of keeping itself and the business relevant. This factor of relevance triggers the process of evolution.

Reflections of Heterogeneous Corporate Structures on Director

The conditions of the environment have substantial impact on the organisation, therefore it is reasonable to expect that organisations would attempt to take actions to ensure continued success and viability, or to make their environments more munificent.[1] This is aptly understood through the evolution of company law from being a private law to public law. The evolution witnessed not only the changing dynamics of the trade, but also the carriers of trade, i.e., the vehicles of business. A company, whose primary characteristics were limited liability and separate legal entity, developed into mature forms classified further by the ownership structure, object and nature of activity undertaken by the company.

The private companies and public companies are well established categories, but the new Act expands the ownership of a private company to an investor base upto 200 members.[2] Thus, by basing upon practical needs, the law interferes to dilute the popular notion that private companies are usually closely held. However, the overall health of family businesses has been a key driver of India's economic growth, as it has always been a crucial factor that influenced the overall entrepreneurial landscape in India.[3] Acknowledging the need of

1 Jeffrey Pfeffer, "*Size and Composition of Corporate Boards of Directors: The Organization and its Environment*", ADMINISTRATIVE SCIENCE QUARTERLY, Vol. 17, No. 2, 1972, p. 218.

2 Section 2(68)(ii) of the Companies Act 2013.

3 Sanjay Nayar, "*Revitalising India's Entrepreneurial Landscape*", http://www.forbesindia.com/article/indias-family-businesses/revitalising-indias-entrepreneurial-landscape/46389/1, (visited on April 04, 2019).

encouraging small business set up with low risk appetite on recognising the need of single unified ownership and management, the new Act introduced, the concept of One Person Company[1] which is an outcome of the report of J.J. Irani Committee's wherein it recommended that, "*Yet it would not be reasonable to expect that every entrepreneur who is capable of developing his ideas and participating in the market place should do it through an association of persons. We feel that it is possible for individuals to operate in the economic domain and contribute effectively*".[2] This reflects observation of the economy's interaction with an individual, as a market maker. Similarly, after recognising the contribution of small companies to the economy, with an intent to appropriately absorb them under the company law regime in a manner conducive for them to flourish.[3]

The company structures have evolved out of the communication between industry and stakeholders. Similar to the management principles that identify the Responsible Accountable Supportive Consulted Informed hereinafter referred as RASCI Matrix, the company structures are also affected by the predominant role of stakeholder. Depending on whether the promoters or owners take responsibility of discharging their liability in case of winding up to the extent of unpaid value of the share or a certain guaranteed amount that they think shall be in a position to pay classifies a company as either limited by shares or by guarantee, respectively.[4] Though a juristic person, company has equal growth potential and with the maturity of company, its transaction becomes more strategic and complex. Further, as the growth curve reaches its optimum, sustainability becomes an overpowering objective for the company. The avenues for sustainability are identified in other entities for financial or operational support, or sometimes by acquiring another company that would stimulate revenue generation. Such corporate restructuring or alliances attaches additional identities to the company, i.e., holding, subsidiary and the newly introduced associate companies.[5] In the Indian context, there are five different structures of companies having highly dispersed shareholding and professional management; concentrated ownership and management control rests with majority shareholders, mainly in family managed companies; public sector with government ownership and professional management; multinational corporations, and family ownership with professional management.[6]

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1 Section 2(62) of the Companies Act 2013.

2 J.J. Irani, "*Report of the Expert Committee on Company Law*", MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, 2005, p. 15.

3 C.R. Datta, COMPANY LAW, 7th ed. Vol. 1 2017, p. 390.

4 Section 2(21) and 2(22) of the Companies Act 2013.

5 Section 2(46), 2(87) and 2(6) of the Companies Act 2013.

6 Amitha Sehgal and J. Mulraj, "*Corporate Governance In India: Moving Gradually From A Regulatory Model To A Market-Driven Model: A Survey*", INTERNATIONAL JOURNAL OF DISCLOSURE AND GOVERNANCE, Vol. 5, 2008, p. 208.

Companies have come to become preferred business vehicles for propelling economic growth covering majority sectors of economic activity, such as Banking Company[1] as a major element of financial transaction; Foreign Company[2] for its nexus with jurisdiction beyond the Indian sovereign; Government Company[3] as a social enterprise; Listed Company[4] as a fund of national savings; and Companies with Charitable Objects[5] as noble associations not running behind the top line. However, the removal of provisions relating to producer companies in the new act is a major departure from Indianising the company law. These separate provisions defend the need for customised approach towards role of directors depending on the company as each type of company creates unique and innovative grounds for laying the founding blocks for structuring a director's role.

Director's Appointment: Understanding the Nature and Consent Approach

Etymologically, the term 'director' was adopted in English from the Latin term 'dirigere' which means to guide. This has pretty much been the common understanding, truly so. Director, in relation to an association of persons or a body of individuals, means any member controlling the affairs thereof.[6] Director is an appointed or elected member of the board of directors of a company who, with other directors, has the responsibility for determining and implementing the company's policy.[7] Director means one who supervises, regulates, or controls; while Board of Directors means a group of people comprising the governing body of a Corporation.[8] The Black's Law Dictionary[9] relates director with activities like direction, regulation, guidance, orders, management, superintendence and administration. It also adds another qualification 'elected according to law' and 'authorised'. The general understanding stems from the fact that director is an omnipresent element flowing through every aspect of the organisation.

The Companies Act 2013 identifies a director to be "*an individual who is appointed as a part of Board of Directors of the Company*";[10] while Board of Directors is defined as collective body of directors.[11] As the two concepts draw references from the existence of the other a question as to what happens first-

1 Section 2(9) of the Companies Act 2013.
2 Section 2(42) of the Companies Act 2013.
3 Section 2(45) of the Companies Act 2013.
4 Section 2(52) of the Companies Act 2013.
5 Section 2(8) of the Companies Act 2013.
6 Section 105A Explanation (a) of the Insurance Act 2009.
7 Business Dictionary, http://www.businessdictionary.com/definition/company-director.html, (visited on March 21, 2019).
8 Jeffrey Lehman and Shirelle Phelps (eds.), WEST'S ENCYCLOPEDIA OF AMERICAN LAW, 2nd ed., Vol. 13, 2005, pp. 30-69.
9 Bryan A Garner (ed.), BLACK' LAW DICTIONARY, 9th ed. 2009, p. 527.
10 Section 2(34) of the Companies Act 2013.
11 Section 2(10) of the Companies Act 2013.

whether an individual becomes a director or does board come into existence comes to the fore. This definition seems to be a drafting liberty arising out of the popular notion around director, the company and their relation with one another. The subsequent question comes on the law addressing persons *acting/ holding out* as directors. Thus, approach towards directors must cover the two dimensions of *de jure vis a vis de facto*. It is difficult to understand why the new act (which apparently sought to bring clarity) made this stark departure from its predecessor which prescribed an inclusive definition.[1] Previously, the Director could be identified by his position, now his office becomes a point of reference. It is also noteworthy that the Chapter on 'Appointment and Qualification of Directors' under the Companies Act 2013 opens with Board composition and structure.[2]

The Act of 2013 mandates that consent of director should be taken to act as such. Thus, an individual enters the office with his/her consent. Conceptually, 'consent' is reflective of the free will initiated by voluntary action and when a director consents to become a director, the act mandates for a declaration that he is not disqualified under the Act.[3] This becomes a cause of concern because at the time of becoming a director, the law expects a clean image behind the corporate veil, but does not solicit preparedness for discharging the role effectively. As a result, the expectations of the Act are set as sanctions with limited positive prescriptions. The office that a director holds is the physical touchstone, but the real framework of the role can be sketched through objectives of appointment of a director. This falls back on the well-established theory that director is heart and soul of the company. The soul ought to know what it should and wants to seek within the boundaries of its Memorandum and Articles of Association.

Directorships: Overview of the Varied Classification

The Companies Act 2013 prescribes that every company should have directors.[4] The stress that directors should be individuals is the causal base for the argument that company is an artificial entity which cannot work devoid of the thought, purpose and objectivity that a human mind can bring. The directors, so summoned, transform a company into an 'artificial living entity'. The company in its lifetime, witnesses the multiple layers to the office of a director.

Promoter Director: Conceivers of the Business Idea

In the incorporation phase Promoter and Directors overlap in most cases. This phase is mostly driven by either the technical expertise that an individual want to bring to the market, or by amateur entrepreneurial skills. However, this

1 Section 13(2) of the Companies Act 1956 states that: "*Director includes any person occupying the position of director, by whatever name called*".
2 Chapter XI of the Companies Act 2013.
3 Section 152(5) of the Companies Act 2013.
4 Section 149 of the Companies Act 2013.

is a critical stage where to fulfil the minimum number of directors required under law,[1] often a relative or friend is on board (particularly in Startups). Role of such individual appointed as director cannot be fairly appreciated as the same law applies to them, irrespective of their reality. The intent of law is to bring democracy to company management is bona fide, implementation is a cause of concern. Such friend or relative is often the source of capital and hence, demands the position of director as a possessive instinct for having control over his investment. This is a situation of conflict between the expectation of law and reality of the industry. However, the other characteristics like at least one of the directors should be resident and none of the directors should hold directorships more than the statutory limits, make for definite dots to join for creating portrait of directors.

Accountability Approach Towards Role of Director

The Companies Act 2013 provides an additional tag of 'Key Managerial Personnel'[2] to Managing Directors and Whole-Time Directors. The literal meaning of Key Managerial Person can be understood as one who has to manage or to perform critical managerial functions. Neither the returns for Key Managerial Personnel nor the consent declaration at the time of appointment as Director stresses on requirement of management skills. This is a major gap in setting performance objectives with the individual who is to become a Key Managerial Personnel. The concept of officer who is in default continues to cover directors like the previous legislation, with modification that, where there are neither any key managerial personnel, nor any director(s) as specified by the Board in this behalf (who has given consent in writing to the Board as such), all the directors become officers in default. This is a welcome move to hold companies where the directors are designated as directors in law but not spirit. This supports the argument on the importance of appropriately identifying the directors in a particular category so as to aptly define their role.

Employment Nexus with Director: Brief Overview

Whole-time director is a whole time employee of the Company.[3] This supports the argument that director (not all) is an employee of the company. This instigates process of creative job description for company as the role of such director is impacted not only by the statute, but with company's policies as well, in particular - Human Resources. If the law is focused on the element of 'employment', there is a grey area on how the law expects a company to handle such director-employee.

1 Section 149(1)(a) of the Companies Act 2013.
2 Section 2(51) of the Companies Act 2013.
3 C.R. Datta, COMPANY LAW, 7th ed. Vol. 1 2017, p. 398.

Participation Approach for Classification of Directors

The terms executive director is not defined in the Companies Act 2013 while non-executive directors could be understood as those who are not whole time. However, the applicable explanation is given as:

> *Explanation-The expression 'Senior Management' means, personnel of the company who are members of its core management team excluding Board of Directors comprising all members of management one level below the executive directors, including the functional heads.*[1]

Whole time directors could be identified as a major component of Executive Directors by attaching literal meaning to the term 'executive'. In case of larger companies, the executive directors are appointed, evaluated and even removed by Independent Directors. However, it is uncertain how the Act relates this categorisation to companies where Independent Directors are not mandated by law leaving the character sketch slightly vague and at the same time requiring identification of director in either of the category in Form DIR-12 for-Appointment/ Change in Directors/ Key Managerial Personnel.

Corporate Management Dimensions to Director's Role

The term Managing Director is perhaps a superlative reflection of one of the fundamental propositions of corporate law, due to the separation of ownership and management. This position fits under the 'Principal-agent Theory' of corporation that sees a Corporation as a production set where professional managers make production choices, such as investment or effort allocations, that the firm's owners do not observe.[2] Managing Director is entrusted with substantial powers for managing the affairs of company.[3] The inclusive definition of Managing Director as prescribed in the Act supports that structure of Managing Director's role is derived not only from the office but also from its function. In a departure from the definition in the Act of 1956, where entrusting substantial managerial powers was a privilege bestowed on Managing Director, the Act of 2013 makes the definition simple. While it is clear that his role does not cover routine administrative acts by way of explanation, the Act leaves the interpretation of 'substantial powers' open. This leaves role of managing director incomplete in terms of the legal presupposition. The check on arbitrary actions by way of shareholder, creditor or regulatory intervention may not be a fool proof solution in smaller companies. Thus, blanket prescription of rights, duties, power and responsibilities in the law seem deficient.

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1 Section 178(8) of the Companies Act 2013.

2 D.S. Chopra and Nishant Arora, COMPANY LAW PIERCING THE CORPORATE VEIL, 1st ed. 2013, p. 22.

3 Section 2(54) of the Companies Act 2013.

Independent Directors: Natural Justice vis-a-vis Individual Interest

The increased hope and responsibility on Independent Directors in pursuit of top notch corporate governance.[1] In *Dovey v. Corey*,[2] the court stated: "*The business of life could not go on if people could not trust those who are put in a position of trust for the express purpose of attending to details of management*." In view of corporate scandals, being one of the ultimate triggers for a new corporate law regime in India, the Companies Act 2013 introduced the concept of Independent Directors. A strong focus of the legislation to keep the stakeholders trusted in companies is evident from how the Act contains elaborate provisions for Independent Directors (much more than any other category of directors). A clear compartment is identified for this role with primary characteristics of behavioural competence in the form of integrity, expertise and experience. To reasonably justify the office, role of Independent Director is to bring an unbiased value addition without an iota of pre-conceived notions. It is expected that individuals with credibility hold this office and the Code for Independent Directors is required to provide professional guidance to them.[3] Details like how the Independent Directors should focus on strategy, risk management, code of conduct, etc. help identify the role of Independent Director with enhanced clarity. However, sometimes this enhanced clarity becomes a major burden because it is marked with vigorous words under not just Companies Act but other regulations also, i.e., Security Exchange Board of India. Consequently, it has been observed that Independent Directors silently glide away as soon as they whiff slightest of liability coming towards them; statistics presented by an online news agency that "*According to data collated by Prime Database, a primary market research tracking firm, out of 743 independent directors who quit the boards of Nifty-listed firms in 2018, 561 stepped down without adequate reasons before end of their term. While 297 quit without assigning a reason, 264 cited personal reasons and preoccupation.*"[4]

The million dollar question (quite literally) on independence of the Independent Director in India has been debated.[5] Mr. Narayan Murthy fairly states that, Independent directors should be transparent towards the shareholders and government to ensure good governance and compliance to laws.[6] The role

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1 Umakanth Varottil, "*Evolution and Effectiveness of Independent Directors in Indian Corporate Governance*", HASTINGS BUSINESS LAW JOURNAL Vol. 6, No. 2, 2010, p. 281.

2 [1901] A.C. 477.

3 Schedule IV of the Companies Act 2013.

4 Jayshree P. Upadhyay, "*Why Independent Directors are Rushing for the Exit Door*", https://www.livemint.com/Companies/bntAau6XcAhPfTZ5yCVx7O/Why-independent-directors-arerushingfortheexit-door.html, (visited on March 24, 2019).

5 Madhuryya Arindam, "*The Independent Director: Has it Been Indianised Enough?*", NUJS LAW REVIEW, Vol. 6, No. 2, 2013, p. 231.

6 Avishek Rakshit, "*Narayana Murthy's Take on Good Governance and What it Takes to be a CEO*", BUSINESS STANDARD, https://www.business-

of Independent Director though craft fully etched will be of minimal substance unless played in true spirit with appropriate balance of auditing, advisory and monitoring functions which will differentiate them from being seen as external consultants. Thus, law needs to be sensitive towards varying degrees and relevance of independence for varying corporate models.

Democratic Structure and Representation Approach

The Whole Time Directors bring sweat to the Board; the Independent Directors bring expertise and objectivity; the Small Shareholder's Director[1] and Nominee Director[2] represent a particular section of investors, creditors, i.e., an identified stake holder group. In the era of inclusive and balanced stakeholder approach, these directors are appointed for the cause of particular section little more than the other stakeholders generally.

Director appointed by small shareholders is evidence of the law taking heed of diffused ownership. This office is initiated primarily by shareholders, however not preventing the company to create it *suo moto*.[3] Such directors could also be identified as Independent Directors subject to qualifications mentioned by the Act. This opens space for ambiguity for two reasons- firstly, it is not reasonable to assume absence of prejudice during a director's tenure as a representation of small shareholders and secondly, the rules specify for a cooling off period of three years before the director can take any other office, which apparently implies that the law is also subsequently assuming traces of dis-balanced inclination. The role which should have been sorted to attend the small shareholders transgresses its conventional perception.

In case of identified stakeholders are lenders, bankers, associate companies, in order to protect their interest, they deploy nominee directors. Such nominee directors are appointed on the basis of nature of interaction of company with their nominating body. The objective is clear but the role again is blurred as the law is silent as to how the other provisions shall apply, especially those relating to independence, interest and fiduciary duties. The principle of representation is a double edged sword and may introduce element of bureaucracy in the board functioning. Thus, law must circumscribe the role of such directors with acute precision.

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standard.com/article/companies/narayana-murthy-s-take-on-good-governance-and-what-it-takes-to-be-a-ceo-119040700014_1.html, (visited on April 07, 2019).

1 Section 151 of the Companies Act 2013.

2 Section 161(3) of the Companies Act 2013.

3 Rule 7 of the Companies (Appointment and Qualifications of Directors) Rules 2014.

Analysis of Individual *vis-a-vis* Collective Functioning of Directors

During 21st Century, due to the global business environment there is pressure on boardroom regulation and practices on number of fronts.[1] This is probably the reason behind emergence of formal board committees through the Act of 2013. The board committees are intended to prescribe structure and focus approach of decision making. This helps in reaching to a balanced resolution where larger Board can take an informed decision on the basis of inputs from its own members who possess the specific acumen. The board committees are a phenomena of larger entities but their job cannot be disregarded as limited to larger corporations only. What is expected of them is ideally the expectation for each director and also collectively as board. Smaller companies can take cues as, essentially, no promoter starts a company with the aim of keeping it small.

The new law also prescribes for composition and role of other Committees like Nomination and Remuneration Committee,[2] Stakeholders Relationship Committee[3] and Corporate Social Responsibility Committee.[4] These committees are channelised expectations of a director's role. As the organisation grows, attention to detail becomes a challenge and therefore, distributing the responsibilities aligned to skill sets eases doing business.

The Act of 2013 prescribes that the board needs to lay terms of reference for the Audit Committee, which is comprised of members who are financially literate.[5] This is the basic instinct that a director needs to develop as the captain of ship sailing for profit making. Nowhere does the 'consent' cover this aspect. Technical expertise and financial sense are the laying blocks for effectively discharging director's role. As non-executive directors are not involved in regular activities, their participation in nomination and remuneration committee is of paramount importance to support principles of natural justice. In case of Company being listed on stock exchange or has a wide base of investors/ lenders, Stakeholders Relationship Committee solely attends to their grievances. Similarly, the role of director receives an added dimension of philanthropy through participation in Corporate Social Responsibility Committee.

Franklin Gevurtz's description of the rationale behind existence of boards across four parameters:[6] (i) Need for Central Management; (ii) Group Decision Making; (iii) Representation of Corporate Constituents and Mediating Claims to

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1 Bryan Horrigan, "*Directors' Duties and Liabilities - Where are We Now and Where are We Going in the UK, Broader Commonwealth, and Internationally?*", INTERNATIONAL JOURNAL OF BUSINESS AND SOCIAL SCIENCE, Vol. 3 No. 2, 2012, p. 21.

2 Section 178(1) of the Companies Act 2013.

3 Section 178(5) of the Companies Act 2013.

4 Section 135 of the Companies Act 2013.

5 Section 177 of the Companies Act 2013.

6 Franklin A. Gevurtz, "*The Historical and Political Origins of the Corporate Board of Director*", HOFSTRA LAW REVIEW, Vol. 33, No. 1, 2004, pp. 95-102.

Distribution; (iv) Monitoring of Management. It covers the gamut of what boards actually do.

However, what boards actually do, it varies for each organisation. Historically, India has been a family oriented society with concepts of joint and undivided families. Indian company law regime could not align itself to the value of Indian society. The new act too misses to capture this. The heightened barriers pertaining to related party transactions are in acute conflict to Indian ethos where businesses are born within families. Traditionally, quite a few communities in India have been typecast for their family owned businesses. The biggest of Indian Corporates, like, Tatas, Ambanis and Birlas too have begun their journeys as family owned business. The internal feuds between them, in spite of a diversified board, stands out to show how the family often ties to overpower legal independence offered by statutes.

The actions of boards is also aligned to the industry and type of company they are working with. For example, results from study by Miriam Schwartz-Ziv and Michael S. Weisbach suggest that Boards play supervisory role and can be characterised as active monitors in case of Government Companies.[1]

As a start-up, the Board is more focussed on entering the market with core technical skills. The Board is less focussed on managerial skills or advisory. This is mainly because the number of employees is less and the company setup is small. Further, the compliance regime has been relaxed for such small companies and where the board's size is also small, as a result, the board do not have to invest in costs of compliance. A major aspect, where the board is accountable, is the Venture Capitalists or Angel Investors who put their bets on these Start-Ups. While the board performs collectively, there may be cases where some director(s) exist for name sake and they usually submit to the active director. Upon completion of gestation period, Board of Directors tends to focus on yields on investment. At this stage managerial functions assume importance, as the resource base widens- both Human and Financial. Often, the boards are seen relying on consultants and peers for necessary guidance.

However, what boards do matters the most as the Company reaches a sizeable position. It is during this growth towards maturity that most of the important decisions are taken, records whereof may or may not be perfect. The minutes of the board and general meetings are an accurate source to understand what the board does. Maintenance of minutes is a crucial requirement. It is a required skill for directors and Company Secretary, if any. The minutes can be called for by the shareholders and is a strong weapon that can be used to look into the actions of board.

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1 Miriam Schwartz-Ziv and Michael S. Weisbach, "*What Boards Really Do? Evidence from Minutes of Board Meetings*", JOURNAL OF FINANCIAL ECONOMICS, Vol. 108, 2013, pp. 349-366.

Once the organisation becomes large enough, board distributes some of its functions to Key Managerial Personnel or one level below them. In the new regime the activities of board relates more to strategic decisions of the company. The Board is expected to become large and diverse at this level. The directors assume greater responsibilities. Their roles are expected to fall into a particular category and their functions are set accordingly.

Board's Reports[1] as mandated in the Companies Act 2013 is also an important source of information for understanding the activities that takes place in the board room during the year. Except for One Person Companies, it applies to all the other companies with some variation in expected content. Right from the number of meetings held to individual attendance, the participation of directors can be understood. In its report, the Board presents events of corresponding year and future prospects. It owns the responsibility through Director's Responsibility Statement. The Act of 2013 requires them to disclose the actions taken by different committees, if any. Thus, what directors do, in fact, can be understood by referring to various records, registers and returns prescribed under the Act of 2013. However, the purpose and thought behind their actions is a subjective discussion. Thus, even if the act of the board is within the ambit of law, the intent of board is circumscribed by way of duties under Section 166 of the Act of 2013, and other provisions regarding the disclosure and ethical orientations. This intention needs to be considered in true spirit to bring meaningfulness to the role of directors with respect to the industry, size, structure and stage of business in order to uphold the significance of its position.

Conclusion

The approach of the new company law was to present an appropriate framework of governance that could be complied by all companies without sacrificing the basic requirement of exercise discretion and business judgement in the interest of company and its stakeholders.[2] The Companies Act 2013 is a welcoming step to the extent it attempts to relate with emerging business scenario. Extensive changes can be observed with respect to the provisions governing powers, functions, and responsibilities of directors. However, consistency is compromised in the treatment of the different roles of directors. The Act of 2013 marks out the specific details for the role of independent director or managing director and leaves few spaces vacant like treatment for director's holding out. The roles designed for various directors are understood within the definitions but what happens beyond in terms of the specific code of conduct for each category is left undefined. While the disclosure norms continue to be a major part of director's duties, codification of common law

1 Section 134(3) of the Companies Act 2013.

2 J.J. Irani, "*Report of the Expert Committee on Company Law*", MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, 2005, p. 30.

duties seems a starting point to develop behavioural competency. This results in insufficient understanding of the expected role of directors and gives a scope for discretion that may often defeat the purposes of company and result into underutilisation of full potential of director.

The foreground of initiatives, i.e., 'Skill Development', 'Make in India' and 'Start up India', additional board scrutiny and a wider compliance regime; it is imperative than ever before that, directors, who lead the corporate India, have clear vision, mission and skills to channelise the growth of company. To equip the directors with required competence in contemporary era, it is important to integrate directorship theories and examine boards with more of a behavioural lens for responding to the queries of activists and external stakeholders, who do not understand the governance failures of seemingly well-structured and composed boards.[1]

It is recommended that the law appreciates directors against appropriate background of nature and size of business and incorporate capacity building measures, appraisal mechanisms that shall report into the ministry, behavioural and technical competencies aligned to the category. It is important that the tone is set right in the initial stage of the company's life so that the directors internalise their roles, that there is little scope for ignorance of what is required out of them and that the pin pointed message is conveyed through the law. The National Guidelines on Responsible Business Conduct suggests ushering of a new philosophy of responsible and sustainable business.[2] The researcher has concluded above observations based on the doctrinal study, therefore, a further study is recommended with comprehensive empirical evidences to suggest effective reforms in the Companies Act 2013 in order to widely cover the roles and responsibilities of directors.

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1 Jill Brown, "*Corporate Boards and Performance*", OXFORD RESEARCH ENCYCLOPEDIA OF BUSINESS AND MANAGEMENT, 2018, pp. 1-36.

2 "*National Guidelines on Responsible Business Conduct*", MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, 2018. https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf, (visited on April 08, 2019).

ADMISSIBILITY OF ELECTRONIC EVIDENCE IN THE ERA OF INFORMATION TECHNOLOGY: A CONCEPTUAL ANALYSIS OF JUDICIAL PRONOUNCEMENTS

Suneel Kumar[♣] *and Susanta Kumar Shadangi*[♦]

Abstract

We are at with a juncture of a technological revolution which has engrossed not only India but the entire world. Information Technology (IT) has plausibly eased out almost every humanised action. This increasing dependency on electronic means of communications, e-commerce and storage of information in digital form has unquestionably necessitated transforming the law concerning information technology and rules of admissibility of electronic evidence both in civil and criminal cases in India. The proliferation of computers and the influence of information technology on society as whole, coupled with the ability to store and accumulate information in digital form have all necessitated amendments in Indian law to incorporate the provisions on the appreciation of digital evidence. Electronic evidence is not only limited to that found on computers but may also extend to embrace evidence on digital devices, i.e., telecommunication or electronic multimedia devices. This broadening horizon of digital evidence has given impetus to the novel concept of 'digital forensics'. This article is an exiguous endeavor to conceptualise the admissibility of electronic evidence in Indian legal regime, juxtaposing them with the judicial discourse, as put forth by the judiciary at the pinnacle in regard to plethora of issues which revolve around the electronic evidence.

Keywords: Digital Evidence, Electronic Evidence, Information Technology, Scientific Evidence.

Introduction

The advancement of technology and evolution of communication systems have substantially transformed the process of exchanging information in all the spheres of life. As the result of this, there has been a dramatic spurt in involvement of digital media in unlawful activities. This has paved the way for the investigation of these criminal activities in digital world on modern scientific lines so that the production of electronic evidence may be on the basis of conclusive forensic/scientific evidence. However, the rapid growth in the number of cases involving electronic evidence has all-too-often found law

♣ Assistant Professor, ICFAI Law School, The ICFAI University, Dehradun, email: sk17yadav@gmail.com.

♦ Associate Professor, ICFAI Law School, The ICFAI University, Dehradun, email: susanta.shadangi@iudehradun.edu.in.

enforcement and the judiciary not advanced enough to deal with the new issues evolving out of such evidence. The gathering, conservation, communication and presentation of the digital evidence must fulfill legal requirements for the admissibility of the evidence.[1] The law of evidence in India,[2] is said to be one of the brilliant pieces of legislation drafted during the colonial era, and which is still being followed. The brilliance could be elucidated by the fact that there have not been a lot of amendments proposed to this act since the time it was framed. One of the major amendments that were brought into the Act was the inclusion of the provision dealing with the admissibility of electronic evidence with the advent of era of information and technology.

Electronic Evidence: Conceptual Connotation

The kinds of evidence considered in this paper for analysis have been variously described as 'electronic evidence', 'digital evidence' or 'computer evidence'. Digital Evidence is "*information of probative value that is stored or transmitted in binary form*".[3]

Section 3 of the Indian Evidence Act 1872 fundamentally describes two types of evidence: (i) Oral evidence, i.e., evidence of witness; (ii) Documentary evidence, i.e., the documents produced for the inspection of the court, which includes electronic records. The Information Technology Act 2000 provides the wider connotation to the term 'electronic record' which is defined as

> "*electronic record means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;*" [4]

Section 3 of the Act of 1872 was amended by virtue of Section 92 of the Information Technology Act 2000 and the phrase "*All documents produced for the inspection of the Court*" was substituted by "*All documents including electronic records produced for the inspection of the Court*".

Being a party to the 'United Nations Commission on International Trade Law' (UNCITRAL), India was obligated to frame a law which could govern the actions undertaken in the arena of information technology. This gave way for the framing of the Information Technology Act 2000. The advent of the Act of 2000 legitimately governed the transactions through the internet and other acts undertaken through the electronic medium. This set forth the path for the use of the electronic records as evidence to prove the *factum probanda*. In order to

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1 Olivier Leroux, "*Legal Admissibility of Electronic Evidence*", INTERNATIONAL REVIEW OF LAW, COMPUTERS & TECHNOLOGY, Vol. 18, No. 2, 2004, pp.193-202.

2 The Indian Evidence Act 1872.

3 Eoghan Casey, DIGITAL EVIDENCE AND COMPUTER CRIME: FORENSIC SCIENCE, COMPUTERS, AND THE INTERNET, 3rd ed. 2011, pp. 7-8.

accommodate them, necessary amendment to the Indian Evidence Act was an inevitable demand. The amendment manifested the provision regarding the inclusion and admissibility of electronic evidence.

Section 64 of the Indian Evidence Act 1872,[1] provides the general and protruding provision for proving the contents of document to the 'primary evidence'[2] only, except under any one of the circumstances of Section 65[3], wherein the 'secondary evidence'[4] is permitted to prove the contents of any

1 "*Proof of documents by primary evidence- Documents must be proved by primary evidence except in the cases hereinafter mentioned.*"

2 Section 62 of the Indian Evidence Act 1872 defines 'primary evidence' as: "*Primary evidence means the document itself produced for the inspection of the Court. Explanation 1. Where a document is executed in several parts, each part is primary evidence of the document; Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. Explanation 2. Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.*"

3 Section 65 of the Indian Evidence Act 1872 provides as: *Cases in which secondary evidence relating to documents may be given- Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:*
(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
(d) when the original is of such a nature as not to be easily movable;
(e) when the original is a public document within the meaning of section 74;
(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;
(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.
In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

4 Section 63 of the Indian Evidence Act 1872 defines 'secondary evidence' as: "*Secondary evidence means and includes-*
(1) Certified copies given under the provisions hereinafter contained;

document in the court. The adduced evidence which does not fit the ambit of primary evidence, it may be admissible, if comes within the definition of secondary evidence and satisfying the conditions of Section 65. In the case of secondary evidences, the burden of proof lies on the party putting forth the secondary evidence. After section 65, the following provisions were inserted, namely, Section 65A[1] and Section 65B[2], by the enactment of the Information

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(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
(3) Copies made from or compared with the original;
(4) Counterparts of documents as against the parties who did not execute them;
(5) Oral accounts of the contents of a document given by some person who has himself seen it."

1 Section 65A of the Indian Evidence Act 1872 provides as: "*Special provisions as to evidence relating to electronic record-The contents of electronic records may be proved in accordance with the provisions of section 65B.*"

2 Section 65B of the Indian Evidence Act 1872 provides as: "*Admissibility of electronic records-*
(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.
(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:
(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—
(a) by a combination of computers operating over that period; or
(b) by different computers operating in succession over that period; or
(c) by different combinations of computers operating in succession over that period; or
(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of

Technology Act 2000 to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, which involve the use of alternatives to paper-based methods of communication and storage of information, and consequently the Indian Evidence Act 1872 was amended. Section 65A deals with the admissibility of those electronic evidences which fulfill the criteria as mentioned under Section 65B. The paper primarily focuses the development of the Information Technology and its importance on the admissibility of electronic evidence. The authors have majorly dealt with the analysis of the trend in which the courts have developed the jurisprudence, with respect to the rules regarding the admissibility electronic evidence. The important judicial pronouncements have been taken into account to understand the judicial perception in the light of changing dynamics of law, society and technology.

Legal Recognition of Electronic Records

The Information Technology Act 2000 opens the door for the electronic governance by providing legal recognition of electronic records and their

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computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.
(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,-
(a) identifying the electronic record containing the statement and describing the manner in which it was produced;
(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.
(5) For the purposes of this section,-
(a) infomation shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Explanation- For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

admissibility in legal proceedings as an evidence. Section 4 of the Act of 2000 provides as:

> *Where any law provides that information or any other matter shall be in writing or typewritten or in printed form, then not withstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is- (a) rendered or made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference.*

The electronic record is attributed, if it is created, transacted, transmitted and produced in a secure manner so that the originality of the document and the contents therein may be ensured and accepted by the courts without hesitancy. The judges are expert of law: however, other than the area of law, they are laymen. Hence, the Information Technology Act 2000 and the Indian Evidence Act 1872, jointly provide the principles and procedure for the security, relevancy and admissibility of the electronic record to guide the judges to decide the relevancy and admissibility of electronic records.

Admissibility of Electronic Evidence

Oral admission as to the contents of document is generally not admissible. However, it can be considered, if the party intents to give the oral account of the contents of document, has to establish their relevancy within the exceptions to the general rule as given under Section 22[1] of the Act of 1872. The scope of the general rule and exceptions under Section 22 required to be extended to accommodate the electronic documents and to determine the relevance of oral testimony as to the contents of electronic records. Therefore, after Section 22, Section 22A[2] was inserted, by the enactment of the Information Technology Act 2000 to determine the relevancy of oral admissions as to the contents of electronic document. Where the genuineness of the electronic record is in question, the oral admissions regarding the contents of such records are relevant, but not otherwise. Oral evidence is restricted to prove the fact recorded in any document or electronic record. Section 136 of the Act of 1872[3]

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1 Section 22 of the Indian Evidence Act 1872 provides as: "*When oral admissions as to contents of documents are relevant- Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.*"

2 Section 22A of the Indian Evidence Act 1872 provides as: "*When oral admissions as to contents of electronic records are relevant- Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.*"

3 Section 136 of the Indian Evidence Act 1872 provides as: "*Judge to decide as to admissibility of evidence- When either party proposes to give evidence of any fact,*

empowers the judge to decide as to admissibility of evidence. The scope of newly added provisions regarding the 'electronic evidence' have been determined by the courts time to time, to expand the horizons of evidence law to give a safe, secure and reliable procedure to prove and admissibility of electronic evidences.

Electronic Evidence: A Judicial Approval

One can trace the advent of the admissibility of electronic evidence and the surrounding debate from the case of *Som Prakash v. State of Delhi*,[1] where the Supreme Court of India observed the need of statutory change to include the electronic evidence. The court insinuated that denying such discoveries to be admitted in the court of law is crude and that a statutory change could help criminal trials. The Court opines:

> *It is but meet that science-oriented detection of crime is made a massive programme of police work, for in our technological age nothing more primitive can be conceived of than denying the discoveries of the sciences as aids to crime suppression and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only thereby discouraging the liberal use of scientific research to prove guilt.*[2]

Later on, in the case of *SIL Import v. Exim Aides Exporters*,[3] the apex court again promoted and encouraged the use of technology, by saying that when parliament is considering the advancement in technology while framing the laws then the courts in the country should not condone the usage of the same and the information obtained from it should be included. Further the court held:

> *Facsimile (or fax) is a way of sending handwritten or printed or typed material as well as pictures by wire or radio. In the West such mode of transmission came to wide use even way back in the late 1930s. By 1954 the International News Service began to use facsimile quite extensively. Technological advancement*

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the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise. If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking. If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."

1 *Som Prakash v. State of Delhi* AIR 1974 SC 989.

2 *Ibid*.

3 (1999) 4 SCC 567.

> *like facsimile, internet, e-mail etc. were in swift progress even before the Bill for the Amendment Act was discussed by Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue.*[1]

These cases established a threshold of admissibility of electronic evidences to the courtroom. This was further substantiated in *Grid Corporation of Orissa v. AES Corporation*,[2] the issue involved two arbitrators who had to sit together in order to appoint a third arbitrator. The court said that it is not necessary to meet the people in person, when it could be done through electronic means. The apex court further affirmed:

> *When an effective consultation can be achieved by resort to electronic media and remote conferencing it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties. The appointment need not necessarily be by a writing signed by the two arbitrators; it satisfies the requirement of law if the appointment (i) has been actually made, (ii) is preceded by such consultation as to amount to appointment by the two, and (iii) is communicated. It is not essential to the validity of the appointment that the parties should be consulted, or involved in the process of appointment or given a previous notice of the proposed appointment.*[3]

The very first instance of the case which required the admissibility of electronic evidence emerged in the case of *State v. Mohd. Afzal*.[4] This case is also referred to as the parliament attack case and was further decided by the Supreme Court. The Delhi High Court, in this case, pronounced that, the data and information which are produced by a computer can be treated as electronic evidence and should be admitted. The only pre-requisite for the admissibility is that the evidence of this sort should adhere to the checklist provided in the provisions mentioned under Section 65B of the Act.

In 2005, the Supreme Court had to decide upon the requirement of the certificate as mentioned under Section 65B of the Act, for adducing the evidence. This was in the case of *State v. Navjot Sandhu*,[5] where the court said that the phone records can be admitted. In this case, the court did not consider the need for a certificate. It just said that the call records can be admitted as

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1 *SIL Import v. Exim Aides Exporters* (1999) 4 SCC 567.
2 2002 AIR (SC) 3435.
3 *Ibid*.
4 (2003) DLT 385.
5 AIR 2005 SC 3820.

secondary evidence, under Sections 63 and 65 of the Act. The provision for the requirement of a certificate is mentioned under Section 65B. Further, the court said that if the certificate is not being provided, then also the evidence could be put forth in the court if it is a legitimate one and fulfils the requirements given under the Section 63 and Section 65. The relevant excerpt from this leading case is as follows:

> *According to Section 63, secondary evidence means and includes, among other things, 'copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies'. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.*[1]

In *Rakesh Kumar v. State*,[2] the Delhi High Court affirmed with the abovementioned decision of the apex court regarding the adducing of the call records as secondary evidence.

In *State of Maharashtra v. Dr. Praful B. Desai*,[3] the court while turning the decision of the High Court, allowed the witness to give the statement through video conferencing, and also spawned the advantages of the mode as follows:

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1 *State v. Navjot Sandhu* AIR 2005 SC 3820.
2 (2009) 163 DLT 658.
3 (2003) 4 SCC 601.

> *Recording of evidence by video-conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the accused. The accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact, the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded courtroom. They can observe his or her demeanor. In fact, the facility to playback would enable better observation of demeanor. They can hear and rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of playback would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court. All these objects would be fully met when evidence is recorded by video-conferencing. Thus no prejudice, of whatsoever nature, is caused to the accused. Of course, as set out hereinafter, evidence by video-conferencing has to be on some conditions.*[1]

The case of *Avnish Bajaj v. State*,[2] was the case where the court had to look upon the question that what differences exist between ISP and CP. It did highlight that the police need to be abreast with the changing times and that they need to get edified about the same. At the end, the court propounded that as the ISP was the accused in this case, therefore, the burden lies upon the ISP to provide the proof of its allegations and innocence.

In *Abdul Rahman Kunji v. The State of West Bengal*,[3] the Calcutta High Court was deciding upon the admissibility of an email as electronic evidence. The court said that the witness' statement could be admitted to ascertain the genuineness of the copy of the email as evidence.

Therefore, we see that the court did not necessitate the requirement of the certificate until this stage and the admissibility of the electronic evidence was not contingent upon the certificate proving the authenticity of the evidence.

Ankur Chawla v. CBI,[4] was the case where the High Court of Delhi decided upon the admissibility of audio and video clips in the form of a compact disc for this particular case and stated that it is inadmissible. The trial court admitted the electronic evidence in this case in an erroneous manner. In another case

1 *State of Maharashtra v. Praful B. Desai* (2003) 4 SCC 601.
2 2008 (105) DRJ 721.
3 (2015) 1 Cal LT 318.
4 2014 SCC OnLine Del 6461.

of *Jagdeo Singh v. State*,[1] the court rejected the electronic evidence which was a compact disc, having the data of an intercepted phone call records, because they were not produced along with the certificate which is required by virtue of section 65B. In *Sanjaysingh Ramrao v. D.G. Phalke*,[2] the court upheld the decision of the apex court in the case of *Anvar P.V. v. P.K. Basheer*,[3] and said that since the recorder was not verified, therefore, the transcription and the translation of the recorded voice cannot be admitted as evidence. It pressed upon the question of the authenticity of the source.

In *Anvar P.V.*[4] the court acknowledged the addition of the special provision to the Act of 1872 by way of an amendment, after the framing of the Information Technology Act 2000. This case is known for changing the plots in the courtroom, and is a landmark case, as in this judgment by a three-judge-bench, the court discussed about the reliability of secondary data and decided that the secondary data (all the electronic evidences) cannot be treated as admissible evidence unless they are accompanied by the certificate of which Section 65B talks about. The certificate ascertains the authenticity of the evidence here. Thus, the case is known for its attempt in setting up the threshold for the admissibility of electronic evidence under Section 65B of the Act.

The court also made a distinction in this case, by putting forth its reasoning for the treatment of CD as primary evidence and the recordings as secondary evidence. The court while making a distinction said that since the recordings are made using other electronic devices, therefore they have to be categorised under the head of secondary evidence, whereas, the compact discs are solely used in their very form and hence could be considered as a primary evidence. Later, the Rajasthan High Court adhering to the aforementioned distinction ruled that the recording done on a camera having an HDD can be considered as primary evidence and thus the applicability of Section 65B will not be followed in this situation.[5] Therefore, it is imperative to make a distinction between the primary evidence and the secondary evidence in every case as this delineates the requirement of certificate and the provision under which the evidence can be admitted.

The court in the aforementioned case did bring the clarity regarding the electronic evidence and the need of certificate while adducing it, but it did not make it clear as to when are the certificates required precisely. Considering the procedural aspect of the Act, it is the basic rule that the courts cannot deny justice for any flaw in the adherence to the procedures. The whole idea of

1 2015 SCC OnLine Del 7229.
2 (2015) 3 SCC 123.
3 AIR 2015 SC 180.
4 *Anvar P.V. v. P.K. Basheer* AIR 2015 SC 180.
5 *Preeti Jain v. Kunal Jain* AIR 2016 Raj 153.

rocedural law is to ease out the process of attainment of justice. In the case of *Thana Singh v. Central Bureau of Narcotics*,[1] a digital charge sheet was held to be a document and it can be accepted as an electronic record. Hon'ble Supreme court directed to supply of charge sheet in electronic form additionally.[2] The courts, in the cases, such as *Paras Jain v. State of Rajasthan*,[3] and *Kundan Singh v. State*,[4] have also pronounced the same. In both the cases, the Rajasthan High Court, and the Delhi High Court, respectively, said that, the certificate required for the admissibility of the secondary evidence in the form of electronic evidence could be provided at the later stage of trial initiation, post the charge sheet is filed, and this will not dilute its gravity and value.

> *When legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in the Court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced along with the charge-sheet but it was not in a proper form but during the course of hearing of these petitioners, it has been produced on the prescribed form.*[5]
>
> *The computer output, when provisions of section 65-B are satisfied is treated as evidence of the contents of the original or facts therein of which direct evidence is admissible. The secondary evidence in the form of a paper print out or media output produced by copying, recording or storing files is treated as a document and are admissible and bear the same status as 'direct evidence' on the question of admissibility. The provision, therefore, negates and does not require production of the original computer/equipment/media, on which the data was stored and from which computer output be it in the form of printed paper or optical or magnetic media data has been obtained. The expression 'direct evidence' as strictly understood in the Evidence Act 1872 has been explained below.*

1 (2013) 2 SCC 603.
2 (2013)2 SCC 590.
3 (2016) 2 RLW 945 (Raj).
4 2015 SCC OnLine Del 13647.
5 *Paras Jain v. State of Rajasthan* 2015 SCC OnLine Del 13647.

> *Paragraph 21 quoted above records and notices that in State (NCT of Delhi)v. Navjot Sandhu alias Afzal Guru, (2005) 11 SCC 600, a responsible officer had certified the document at the time of production itself and the signatures in the certificate were also identified and, therefore, there was compliance of Section 65B of the Evidence Act. In these circumstances, we do not accept the legal ratio in Ankur Chawla v. Central Bureau of Investigation, (Crl. M.C. No. 2455/12 & Crl. M.A. Nos. 8308 and 8318/2014 and Crl. Rev. P. 385/2012 decided on 20th November, 2014 by the Delhi High Court) wherein it has been held that the certificate under Section 65B must be issued when the computer output was formally filed in the court and certificate under Section 65B cannot be produced when the evidence in form of electronic record is tendered in the court as evidence to be marked as an exhibit. The said certificate can be produced when the electronic record is to be admitted and taken on record, i.e., when the prosecution, defence or a party to the civil litigation wants the electronic record to be marked as an exhibit and read in evidence. As far back as 1931, the Lahore High Court in Baldeo Sahai v. Ram Chander AIR 1931 Lahore 546 had stated that there are two stages relating to documents. One is the stage when all the documents on which the parties rely are filed by them in Court. The next stage is when the documents proved and formally tendered in evidence. It is at this later stage that the Court has to decide whether they should be admitted or rejected. If they are admitted and proved then the seal of the Court is put on them giving certain details laid down by law, otherwise the documents are resumed to the party who produced them with an endorsement thereon to that effect.*[1]

Essentially, the judgment in the *Anvar P.V.*,[2] actually shed light upon the correct procedure of law and the manner in which the electronic evidence can be adduced. The importance of the certificate was made paramount, and courts around the country, heavily relied upon the rationale of this case. For instance, *Bala Shaheb Gurling Todkari v. State of Maharashtra*,[3] *Ankur Chawla*,[4] and *D.G.Phalke*,[5] are few of the cases which relied their decisions upon the aforementioned Supreme Court judgment.

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1 *Sanjaysingh Ramrao v. D.G. Phalke* (2015) 3 SCC 123.
2 *Anvar P.V. v. P.K. Basheer* AIR 2015 SC 180.
3 *Bala Saheb Gurling Todkari v. State of Maharashtra* 2015 SCC OnLine Bom 3360.
4 *Ankur Chawla v. CBI* 2014 SCC OnLine Del 6461.
5 *Sanjaysingh Ramrao v. D.G. Phalke* (2015) 3 SCC 123.

There has also been a plethora of cases where the Supreme Court itself along with the High Courts resorted to an alternate view regarding the admissibility of secondary evidence in form of electronic evidence. For instance, in the case of *Thomas Bruno v. State of UP*,[1] the apex court cited the judgment given in the *Navjot Sandhu*[2] case, regarding the admissibility of electronic evidence. Though the court did not go against the ruling and the basic principle and rationale which the *Anvar P.V.* [3] case spawned.

The most recent view of the apex court on the debate surrounding the admissibility of the electronic evidence has relied upon the *Anvar*[4] judgment where the two-judge-bench of A.K. Goel J. and U.U. Lalit J., decided and said that, if a party is not in possession of the device responsible for the procurement of the information, then it is obvious that he will not be able to produce the required certificate, and hence, this cannot come in way of dissemination and impartation of justice. The decision was given considering the fact that the requirement of the certificate is only a procedural need and this cannot and should not be acting as a threat to justice delivery.

> *The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/ witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act 1872 which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B(4) is not always mandatory.*[5]

This judgment seems *per incuriam* though, considering two factors essentially. One, the judgment being in contravention to the rationale which was provided in the relying case which necessitated the need of the certificate, and

1 (2015) 7 SCC 178.
2 AIR 2005 SC 3820.
3 *Anvar P.V. v. P.K. Basheer* AIR 2015 SC 180.
4 *Ibid.*
5 *Shafhi Mohammad v. State of Himachal Pradesh* (2018) 2 SCC 801.

second, the bench strength is less than what it needs to be to overturn the decision.

Thus, the legal scenario post the *Anvar P.V.* case[1] seems quite incoherent to some extent but also welcoming as it widens the door for the admissibility of electronic evidence and brings down the threshold of the authenticity of the same, though with a caveat of skepticism attached to it regarding the proper implementation of this procedure, which cannot be done away with.

Conclusion

In 21st Century, the expanding horizons of science and technology have thrown new challenges to the legal fraternity. Storage, processing and transmission of data on magnetic and silicon medium become cost effective and also easy to handle whereas, the conventional means of record and data processing become outdated. Therefore, law had to respond and gallop with the technical advancement. This seems quite obvious seeing the trend in which the court has expanded the ambit of the rule for the admissibility of the electronic evidence, that the court's only motive is to impart justice in the best way possible so that none of the person could be denied of its right to justice.

As seen from the development of the jurisprudence in the Indian scenario, there are a plethora of issues which revolve around the electronic evidence, such as the probability of it getting manipulated or the question of its genuineness. In such cases, the court had initially let the allowed the admission of the electronic evidence without much hassle and procedural safeguards. But subsequent to the increasing usage of technology, and framing of the Information Technology Act 2000 there was an amendment brought into the Act. The court interpreted this amendment in a strict sense in order to not let the justice delivered to the wrong person.

Over the years, the court has raised the bar for admissibility of electronic evidence in a gradual manner. The requirement of the certificate was made mandatory, and the adherence to the requirements enlisted under the provision of Section 65B was necessitated for an electronic evidence to be made admissible. This has been a step much appreciated as this prevents the abuse of the concept of the electronic evidence. The reason for this is also to safeguard the interest of any single innocent person, as it would be extremely unjust if any innocent person is denied justice due to the admissibility of flawed evidence.

The judgments by Supreme Court have made the rule a stricter one over the years and have well delineated the jurisprudence in this arena for the welfare of all. It cannot be alleged that the apex court did not consider the daily scenario which a common mass might face in such regards. Therefore, the trend over the years, according to the pronouncements and interpretation of the provisions

1 *Anvar P.V. v. P.K. Basheer* AIR 2015 SC 180.

related to the admissibility of the electronic evidence has been pretty relaxed yet a strict one. The Courts have always been inclined towards incorporating the needs of changing time and technology along with the need of the people, for justice dissemination.

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COMPARATIVE LEGAL ANALYSIS OF INDIGENOUS CUSTOMARY INSTITUTIONS AMONG *MIZO, KHASI* AND *PAITE* TRIBES OF NORTH EAST INDIA

Thangzakhup Tombing[♣]

Abstract

The Mizo, Khasi and Paite indigenous tribal communities of North-East India who are more or less mongoloid tibeto-burman populations have their own peculiar language, rich traditional culture, customary procedures and laws since time immemorial. Recently, they have transitioned from kinship and homogeneity of occupation and culture to heterogonous complex society. Many of their customary institutions are on the verge of being replaced by formalisation and institutionalisation processes which are alien to the indigenous community and the indigenous way of life. The Mizo community had enacted the 'Mizo Marriage, Divorce and Inheritance of Property Act 2014' to bring gender equality to marriage, during marriage and on dissolution of marriage among the Mizos. On closer look however, patriarchy is still deeply ingrained. Among the Khasis the sanctity of their age old matrilineal system is undergoing unprecedented churning owing to the influence of heterogeneous patriarchal society surrounding them. While customary institutions and collective consciousness of the Paite community is mired by corruption, confusion and self-doubt because of the blatant let down by the State's total lack of empathy towards the cultural and self-determination rights of the indigenous people.

Keywords: Legal Pluralism, Customary Laws, Indigenous People.

Introduction

In 21st Century, the North-Eastern Indian indigenous institutions are growing through a process of unprecedented churning. The interactions, opportunities and global exposure to liberalise the ideas and notions of individualism, self-determination and indigenous identity had brought about new consciousness on the basis of unique language, culture and age old customs and traditions. This emerging ideology has laid the foundation for analysis and criticism of age old belief system, the structure of the social institutions from the perspective of the values of the 'Universal Declaration of Human Rights 1948', i.e., equality of gender, rights of the individuals against the community etc. This argument has assumed a space of difference for realization of the aspirations- cultural,

♣ Assistant Professor of Law, National Law University and Judicial Academy, Assam, e-mail: t.tombing@nluassam.ac.in.

political and economic ramifications.[1] In pursuance to this new narrative the indigenous communities of the '*Mizos*', '*Khasis*' and '*Paites*' tribes had also undergone major adoption, adjustments and amendments to their age old customary systems and ways of life. Some of these new changes had helped the communities to establish socio-economic and political identity and institutions, which are in tune with the value system of the contemporary world. Whereas, some of the changes were so radical that they seem misfit and undesirable for the better well-being of the communities and their traditional institutions in the long run.

The *Mizo*, *Khasis* and *Paite* communities belonged to small marginalised indigenous communities who, even after cumulatively counted, would not even form a fraction of the entire population of India. However, the constitutional protections extended to the North-East Region by the Constitution of India through the special provisions, i.e., Articles 244, 244A, 275, 371C and 371G. These provisions enable to attain the phenomenal progress- socially, economically and politically. These developments have both positive as well as negative implications to some extent, on their old age customary laws and institutions which were hitherto harmonious. The paper aims to analyse the role of British colonizers and subsequently the Republic of India in shaping the social, economic and political life of the indigenous communities of *Mizos*, *Khasis* and *Paites* tribes. Further, the researcher analyses the impact of political and religious ideology in shaping the status of indigenous institutions and personal laws of the *Mizo*, *Khasis* and *Paite* tribes in 21st Century.

British Colonial Policies

The *Mizos*, *Khasis* and *Paite* tribes of the North-East States, i.e., Mizoram, Meghalaya and Manipur are intertwined due to shared geographical location and administrative legacy of the British Colonial, *viz.* the Regulation of 1796, the General Regulation of 1822, the Bengal Eastern Frontier Regulation of 1873. Prior to the Bengal Act,[2] they had enjoyed autonomy in the harmonious maintenance of their societies through the office of their Chiefs and his subordinate institutions by reliance and adherence to their customary laws and procedures. The British Raj's policy mission towards tribesman policy had been of conciliation rather than repression or devastation.[3] This was to ensure trust and confidence rather than being despised by them,[4] thus there was no trace of

1 Prasentjit Biswas and Chandan Suklabaidya, ETHNIC LIFE-WORLDS IN NORTH-EAST INDIA: AN ANALYSIS, 1st ed. 2008, pp. 24-25.

2 H.L. Gupta, "*Presidential Address in North East India History Association*", J.B. Bhattacharjee (ed.) PROCEEDINGS OF NORTH EAST INDIA HISTORY ASSOCIATION, 6th Session, Agartala, 1985, pp. 8-9. The highly coveted and very lucrative tea cultivation was major attraction for the British colonial expansion in 1824 to the North-East Region and also the need for the exclusion of Burmese from Assam and Manipur, two failing yet strategically very important monarchies.

3 B.K. Roy Burman (rev.), Alexander Mackenzie, THE NORTH EAST FRONTIER OF INDIA, 1st ed. 2016, p. 6.

4 *Ibid*., p. 53.

policy of extermination and repression.[1] The Inner Line Regulation of 1873 was passed for common refrain from interference in the affairs of tribal communities who came under the particular jurisdiction of the regulation.[2] The British interest in the lucrative tea gardens and their volatile engagements-fiscal as well as military, had made it expedient that special powers and special rules be laid down in the North east frontier region. Accordingly, Mckenzie held that,

> "*...regulations give power to the Lieutenant- Governor to prescribe a line, to be called "the inner line" in each or any of the districts affected, beyond which no British subject of certain classes or foreign residents can pass without a license. And the rules are laid down regarding trade, the possession of land beyond the line, and other matters...*"[3]

Thus, Section 2 of the Bengal Eastern Frontier Regulation of 1873 introduced the concept of inner line which mandated the prohibition of all British subjects beyond the inner line without proper formalities. It also prescribed legislative as well executive power from time to time to alter and notify to prohibit any subject living outside the area from moving or living therein.[4] The Government of India Act 1935 maintained the same rules regarding excluded and partially excluded areas but, no statute applied to such an area unless the Governor so directed.[5] In the exercise of his function in these areas the Governor was to act in his discretion without ministerial advice.[6]

Post the Second World War the non- interference policy of the British Raj was espoused, thus in 1946 the Cabinet Mission suggested formation of an Advisory Committee on the Rights of Citizens, Minorities and Tribal and excluded Areas.[7] The Bordoloi Committee which was constituted recommended placing tribal hill areas under Sixth Schedule and separate treatment on grounds of the distinct- social, religious beliefs; and distinct structure of the tribal

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1 B.K. Roy Burman (rev.), Alexander Mackenzie, THE NORTH EAST FRONTIER OF INDIA, 1st ed. 2016, p. 53.

2 Thangzakhup Tombing and Nikhil Bhardwaj, "*Religious Values and the Notion of Property: A Comparative Analysis of Property Rights Among Hindu and the Indigenous Communities of North East India*", Shilpa Khatri Babbar and Ramesh Kumar Sharma (eds.), TRANFORMING IDEAS INTO VIABLE SOLUTIONS, 1st ed. 2019, p. 246.

3 *Ibid*., pp. 255- 256.

4 H. Kham Khan Suan, "*Asymmetry in Local Democracy: An Overview of North-East India's Experience*", INDIAN JOURNAL OF FEDERAL STUDIES, Vol. 2, 2003, pp. 105-106. The British introduced the inner line permit to the north eastern states of Arunachal Pradesh, Tripura, Mizoram and Manipur as an extension of the Bengal Eastern Frontiers Regulation 1873.

5 Kusum and P.M. Bakshi, CUSTOMARY LAW AND JUSTICE IN THE TRIBAL AREAS OF MEGHALAYA, 1st ed. 1982, p. 7.

6 *Ibid*.

7 S. Shokhothang Haokip, "*Local Self Governance in India: A Study of Autonomous District Council in Manipur and Mizoram*", VOICE OF REASERCH, Vol. 2, No. 3, 2013, pp. 37-38.

organisations; and the fear of exploitation by the plains.[1] Thus, the North-East Frontier (Assam) Tribal and Excluded Areas Committee and the Excluded and Partially Excluded Areas justified the exclusion of the tribal inhabited areas on the following grounds:[2]

(i) the distinct social, religious beliefs and tribal organisation of the different tribal people;

(ii) the fear of exploitation by the plains on account of their superior organization and experience of business; and

(iii) necessity to make suitable financial provision conferred upon the local councils themselves for the development of tribal areas.

Constitutional Scheme and the *Mizos, Khasis* and *Paite* Tribes

The Nehru-Verrier Elwin philosophy propagated for the recognition of the distinct social identity and rights of tribes in North-East in their distinct cultural, political and economic life.[3] Nehru advocated for the preservation and protection of tribal ethos by refraining from imposing mainstream lifestyle on tribes of the North-East in the name of assimilation and integration.[4] Elwin endorsed this concern at two folds: (i) assimilation of tribal culture within the civic life; (ii) not making second-rate copies of the mainstream.[5]

Article 366(25) of the Constitution of India defines 'Scheduled Tribe' as: "*Scheduled Tribes means such tribes or tribal communities or parts or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution.*"[6] The Constitution of India recognises the necessity of separate political and administrative structures for the tribal people.[7] The Sixth Schedule envisages to provide the tribal people with a simple and inexpensive administrative set up of their own which would safeguard their tribal customs and ways of life and secure to them management of their affairs characteristically in accordance tribal customary laws and procedures.[8]

1 S. Shokhothang Haokip, "*Local Self Governance in India: A Study of Autonomous District Council in Manipur and Mizoram*", VOICE OF REASERCH, Vol. 2, No. 3, 2013, pp. 37-38.

2 *Ibid*.

3 Thangzakhup Tombing and Kamongla Longkumer, "*Tribal Customary Laws of Marriage of the Naga and Mizo Tribes of North East India and Private International Law: A Comparative Study*", Anindhya Tiwari et al., LEGAL AUDIT: A COMPILATION OF RECENT SOCIO-LEGAL ISSUES IN INDIA AND ABROAD, 1st ed. 2018, pp. 105-110.

4 Madhav Khosla (ed.), LETTERS FOR A NATION: FROM JAWAHARLAL NEHRU TO HIS CHIEF MINISTERS 1947-1963, 1st ed. 2014, p. 150.

5 Verrier Elwin, A PHILOSOPHY FOR NEFA, 2nd ed. 1959.

6 *Ibid*.

7 Articles 244(2) and 244A of the Constitution of India 1950.

8 Animesh Ray, MIZORAM DYNAMICS OF CHANGE, 1st ed. 1982, p. 93.

Article 371G of the Constitution of India provides special provisions and framework for administration and preservation of the tribal social life, culture, customs and administration of civil and criminal justice as per tribal and customary laws of the *Mizo* tribes in Mizoram. It implies that in order to preserve the social life of the *Mizo* even laws enacted by Parliament of India cannot be enforceable in the state of Mizoram in respect of the religious or social practices of the *Mizos* and also in the *Mizo* customary law and procedure.[1]

The *Khasi* community of Meghalaya are concentrated in the United Khasi-Jaintia Hill District Council since the creation of the Meghalaya in 1972.[2] Except for Shillong all the districts in Meghalaya are under the provision of the Sixth Schedule. Though majority of the tribal communities in the region are patriarchal society, the *Khasi* and *Garo* communities follow matrilineal system.

The *Paite* community are predominantly inhabited in the southern of Manipur and some scattered few are in the State of Mizoram. The administration of the hill areas was under the Manipur (Village Authorities in Hill Areas) Act 1956.[3] With the creation of Manipur state in 1972, *vide* Article 371C of the Constitution of India,[4] the *Paite* tribe and other tribes of the state have been enjoying the status of special constitutional safeguards.[5] It mandated the creation of Tribal Autonomous District Councils to preserve, protect and administer civil and criminal justice as per customary procedures of the tribal communities of Manipur.

Indigenous Tribes of North East India

The Indigenous and Tribal Peoples Convention (No. 169) of 1989 adopted by the General Conference of International Labour Organisation (ILO) (also known as ILO Convention 169), wherein 'indigenous peoples' defined as:

> *peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions*.[6]

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1 Article 371G(a)(i) and (ii) of the Constitution of India 1950.

2 N.K. Dev, TRADITION AND MODERNITY IN KHASI SOCIETY, 1st ed. 2004, p. 254.

3 R. Sanga, "*The Manipur (Village Authority In Hill Areas) Act, 1956*", December 13, 2012, https://zogam.com/articles/articles-i/politics/1378-the-manipur-village-authority-in-hill-areas-act-1956.html., (visited on March 27, 2020).

4 Inserted by the Constitution (Twenty Seventh Amendment) Act 1971, whereby the President has been empowered to constitute a Committee of Legislative Assembly for the Hill Areas of the State of Manipur.

5 *Viz*. exemption from the Manipur Land Revenue and Land Reforms Act 1960.

6 Article 1(1)(a) of the Indigenous and Tribal Peoples convention (No. 169) of 1989.

It thereby implies the ILO Convention applies to tribal people in independent countries who have their own unique social, cultural, economic and political institution distinct from the national framework and institutions, and whose status is regulated wholly or partially by their own customary laws and procedures. The Convention does not clearly define who indigenous or a tribal peoples but indicate that they must have their own social, economic, cultural and political institutions and traditional customs and laws. The UN Declaration on the Rights of Indigenous Peoples emphasises the right of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in accordance with their aspirations and needs.

The term 'tribal' in isolation merely holds colloquial connotation but a notified 'Scheduled Tribes' connotes a notion of specific constitutional privileges and benefits conferred by this status and for the protection of specific sections of the population considered historically disadvantaged and 'backward'. The term 'Scheduled Tribe' is purely administrative term, a more political rather than anthropological, which is an area specific and designed to reflect the level of socio-economic development, rather than being ethnic marker.[1] On juristic analysis of the status indigenous tribes and their traditional institution the following features of theoretical importance can be imported:

1. Tribal law is the law of a group, while the law elsewhere has an in individual oriented basis. Among tribal people group life and communal living, and a sense of belonging to a social unit are much more predominant than in a non-tribal institution.
2. Tribal law is deeply rooted in history and pays homage to the past. Tribal law do evolve with time but the change is gradual and imperceptible.
3. Tribal law is special law applicable to a place where closely knit communities live together.[2]

The term '*Mizo*'[3] is a later stage development during the Mizo National Front, hereinafter MNF, insurgency movement to include kindred tribes or clans who share affinity of language, culture, traditions and ethnic origin. It has a political undertone- a symbol of unity and solidarity.[4] They belong to Tibeto-Barman language speaking Mongoloid stock. During the British Raj the people inhabiting the present state of Mizoram were referred to as 'Lushai'.[5] Thus *Mizo*

1 Shashi Sharma et al., PROTECTION OF HUMAN RIGHTS IN INDIA, 1st ed. 2010, p. 256.

2 B. Malinowski, FORCES OF LAW AND ORDER IN A PRIMITIVE COMMUNITY, 1st ed. 1925, p. xiii.

3 The word 'Mizo' is a compound of two words – 'Mi' and 'Zo' which literally mean people dwelling in the high hills.

4 B.B. Goswami, MIZO UNREST, 1st ed. 1979, p. 18.

5 J. Zahluna, "*Role of the Opposition in the Legislature: A study of the Third Mizoram Sate Legislative Assembly*", DEPARTMENT OF POLITICAL SCIENCE, MIZORAM UNIVERSITY, AIZAWL, 2011, http://14.139.116.8:8080/jspui /handle/123456789/245, (visited on August 26, 2020).

is a closely knit homogenous tribe who have common dialect, custom, tradition and culture.[1]

Traditional Administrative System of *Mizos*

Traditional Mizo village and its administration is centred on the village Chief. The need for maintaining tranquillity and harmony among different feuding clans gradually led to the evolution of the institution of Chieftainship in the 14th Century.[2] The institution was concretised with the passage of time, it became hereditary and succession to chief ship would passed on to the youngest surviving son. The Chief wields full authority in the village. He appoints council of elders called '*upa'* who would guide him on the basis of established "customs" when matters come to his court for adjudication. As he appoints he also has the discretion to dismiss the elders. Normally no case is tried without consulting the elders.[3] The Chief had the power to condone or pardon any accused. In cases of serious crimes the chief may disband the accused from village or keep him as slave to himself and his family.[4]

In 1945-46, when the independence of India became imminent, the then Superintendent of Lushai Hills, A.R.H. MacDonald initiated a political reform by instituting a forum which enabled the participation of Chief and commoners in election and representation in election in the 20 circles of the then Lushai Hills. The elected members were to form 'advisory council' on whose advice the chief could exercise his power. MacDonald even dismissed four chiefs and replaced them with four ex-servicemen in the meeting January 18, 1946 to drive home the point that no chief is indispensable. This left indelible imprint in the mind of the *Mizo* Communities.[5] The administration of *Mizo* society through the institution of Chieftainship lasted for 250 years till it was abolished in 1955. The Mizo District Council took root with abolishing of the Chieftainship. In post independent India the collective will of the people to identify themselves as '*Mizo*' was realised when the erstwhile 'Lushai Hills District' was changed to 'Mizo District' with effect from April 29, 1954 by the Act of Parliament[6]. After

1 J. Zahluna, "*Role of the Opposition in the Legislature: A study of the Third Mizoram Sate Legislative Assembly*", DEPARTMENT OF POLITICAL SCIENCE, MIZORAM UNIVERSITY, AIZAWL, 2011, http://14.139.116.8:8080/jspui /handle/123456789/245, (visited on August 26, 2020).

2 Lal Biak Thanga, THE MIZOS: A STUDY IN RACIAL PERSONALITY, 1st ed. 1978, p. 171.

3 *Ibid.,* p. 18.

4 Lalchungnunga, MIZORAM: POLITICS OF REGIONALISM AND NATIONAL INTEGRATION, 1st ed. 1994, p. 30.

5 R.Thanhlira, EVOLUTION OF LEGISLATIVE ASSEMBLY IN MIZORAM: INTER-RELATION BETWEEN THE LEGISLATIVE, EXECUTIVE AND JUDICIARY, 1st ed. 1997, p. 15.

6 Lushai Hills District (Change of Name) Act 1954; Lalchungnunga, MIZORAM: POLITICS OF REGIONALISM AND NATIONAL INTEGRATION, 1st ed. 1994, p. 171.

being administered under the Mizo District Council for 20 years, it was elevated to the Status of UT of Mizoram on January 21, 1972.[1]

The erstwhile MNF movement in its initial inception was an endeavour to carve out ethnic and cultural identity of *Mizo*[2] with a mission to preserve, protect and secure a better future for the *Mizo* people.[3] Earlier it was known as the *Mizo* National Famine Front in 1960: however, due to the indifference attitude towards the hardship, sufferings and deaths faced by the *Mizo* people due to *Mautam*[4]it was rechristened into the MNF. The Mizo District Council were wary that *mautam* would strike again in 1958-59, however their apprehensions were convenient ignored by the Government of Assam as mere tribal superstition.[5] The utter let down and dismissal by the Assam Government and the Union of India about their apprehensions of the bamboo flowering in 1959 and subsequent famine which led to the loss of around 100 *Mizo* lives. The loss of lives triggered uprising for complete separation against the Government of India.[6] After 26 years of protracted insurgency movement, the MNF and the Government of signed peace accord that led to the creation of Mizoram State in 1986.

Analysis of *Mizo* Personal Laws and Customary Institution

The *Mizo* of Mizo-ram[7] follow patriarchal system and their law of inheritance is based on descent through the father's clan. The male head of the family is the authority on all matters like property, social and economic aspects of life.[8] The role of man and woman in family and society is defined and elaborated based of the *Mizo* patriarchal notion of morality, chastity and social ordering and moorings crystallised over a period of time.[9] Hitherto till the

1 The North-Eastern Areas (Reorganisation) Act 1971.

2 V. Hluna and Rini Tochawng, THE MIZO UPRISING: ASSAM ASSEMBLY DEBATES ON THE MIZO MOVEMENT, 1st ed. 1966, pp. 100-132.

3 Thangzakhup Tombing, "*Insurgency Movements in North East India and its Impact on the Hill Women Folks of the States of Nagaland, Mizoram and Manipur: Voice of the Unheard Victims*", NLUA LAW REVIEW, Vol. 3, No. 1, 2019.

4 '*Mautam*' means bamboo death, a cyclical ecological phenomenon of bamboo blooming which occur every 48- 50 years leading to huge surge in the population of rat. The rats would raid stored grains, thereby eventually leading to famine. The phenomenon had also occurred in 1862 and 1911.

5 Anand Ranganathan, "*A Brief History of Mizoram: From the Aizawl Bombing to the Mizo Accord*", NEWS LAUNDRY, August 6, 2015, http://www.newslaundry.com/2015/08/06/a-brief-history-of-mizoram-from-the-aizawl-bombing-to-the-mizo-accord, (visited on March 18, 2020).

6 *Ibid*.

7 'Ram' means, land, thus Mizoram means the land of *Mizos*.

8 J. Zahluna, "*Role of the Opposition in the Legislature: A study of the Third Mizoram Sate Legislative Assembly*", DEPARTMENT OF POLITICAL SCIENCE, MIZORAM UNIVERSITY, AIZAWL, 2011, p. 16, http://14.139.116.8:8080/jspui/handle/123456789/245, (visited on August 26, 2020).

9 There has been a notion among the *Mizo* that, *Mizo* women were not supposed to have political or religious view as attributed by the Mizo proverb which says, "*women and crabs do not have a religion*".

passing of the *Mizo* Marriage, Divorce and Inheritance of the Property Act, 2014 the *Mizos* were governed by their *Mizo* Customary laws and procedure in matters pertaining to marriage, divorce and on succession and inheritance as prescribed in the *Mizo Hnam Dan.*

Mizo Hnam Dan

The journey of the *Mizo Hnam Dan* had been tumultuous one, right from its conception with the establishment of the District Council in 1954. Since its first compilation in 1957 by the Mizoram District Council it had gone through phases of criticism, apprehensions and wanton debates in the 1970s, 80s till the publication of its first edition, the *Mizo Hnam Dan*, was undertaken by the law and Judicial Department, Government of Mizoram.[1] There were protests from the '*Lai* and *Mara*'[2] community that the compilation was monograph of the erstwhile *Lushai* clan and thus not applicable to them. It also suffered internal protest and criticism from female groups and influential Church leaders.[3] The 'Mizo Heniche Insuih Khawm Pawl', hereinafter MHIP, the largest women body since 1974 opposed the customary laws on the ground that they are fundamentally biased against *Mizo* women since the notion of rights and role of women in family and society was derived solely from the patriarchal value system and understanding.[4]

Legal Analysis of Mizo Hnam Dan

Mizo marriage is a mix of *Mizo* customary and Christian form of marriage.[5] It maybe rigid customary form of marriage which requires a process of courtship, engagement and finally settling for bride price or it may be ordained in the Church by local priest. Marriage may also takes place without social ceremony by way of '*tlandun*'; '*luhkhung*' or '*makpa chungkhung*'. The literal meaning of '*tlandun*' is marriage through process of elopement. Where the girl became pregnant and she quietly starts living-in with the boy responsible, the process is called '*luhkhung*'.[6] The *Mizo* society seems to have trivialised sexual intimacy between unmarried man and woman because in an event of an illicit child is begotten the person who had fathered is never held responsible towards the child welfare of the child but paying the traditional '*sawn man*' a token

1 Mizoram Gazette Notification No. H. 12018/119/03- LJD/62, April 04, 2005.

2 The *Lai* and *Mara* were accorded separated council, in present context the State of Mizoram has three (Sixth Scheduled) autonomous districts Councils- the Lai, Mara and Chakma.

3 The Presbyterian Church, the largest church, is accused of downplaying the right of *Mizo* women in church and social life under the guise of the preservation and protection of *Mizo* customs and tradition as per the provisions of the *Mizo Hnam Dan.*

4 Thangzakhup Tombing, "*Marriage and Divorce Law among Indigenous North East Tribes of India: Comparative Study of Mizoram and Meghalaya*", NLUA LAW REVIEW, Vol. 2, No. 1, 2017, p. 40.

5 *Ibid.*

6 http://www.mizoram.nic.in/about/custom.htm, (visited on July 20, 2020).

amount of Rs.40 only he may claim proprietary right over the child's person or personality.

In '*makpa chungkhung*' wherein, if the bride is the only daughter of her parents and there are no male heirs, the bridegroom goes to live in his wife's house without the need to pay the bride price.[1] This is an exceptional situation in an otherwise patrilineal society. In such marriage there is a counter obligation of the son-in-law to care for his wife's parents when they are at old age.[2] One of the important and essential parts of customary marriage is the practice of the payment of the bride price. It is for the purpose of compensating the economic loss to the girl's parents household on marriage.[3]

Analysis of Matrimonial Causes of Mizo Hnam Dan

The *Mizo* customary law approach in matters of divorce is intrinsically patriarchal against women,[4] as such the MHIP had always campaign for reformation, equalisation of women in matters pertaining to matrimonial causes. Among Mizo, as per customary law a Mizo man can simply divorce his wife by unilateral declaration of, '*Ka ma che*' or 'I divorce thee'.[5] The unilateral pronouncement can effectively dissolve the marriage to the extent that wife loses her property and child custody rights.[6] If lucky she is entitled to the customary '*hmeicche puan'* or the 'women raiment' comprising of a mattress, two pillow and her clothes.[7] The '*hmeicche puan'* is the only dowry a Mizo bride would traditional carry to her new house after marriage. The Shah Bano judgment[8] which ruffled the entire nation in the 1980's was not much of a difference, whereby the husband unilateral divorce of his old wife under Muslim law was questioned on the ground of constitutionality. In the *Shayara Bano*[9] judgment of 2017, the Supreme Court of India had finally declared *talaq-e-biddat* or the triple *talaq* as unconstitutional. In a similar pattern the constitutionality of unilateral divorce by *Mizo* husband needs to be debated and discussed for the protection and dignity of *Mizo* women.

1 http://www.mizoram.nic.in/about/custom.htm, (visited on July 20, 2020).

2 Thangzakhup Tombing, "*Marriage and Divorce Law among Indigenous North East Tribes of India: Comparative Study of Mizoram and Meghalaya*", NLUA LAW REVIEW, Vol. 2, No. 1, 2017, p. 40.

3 Ruth Lalsiemsang Buongpi, "*Gender Relations and the Web of Traditions in Northeast India*", THE NEHU JOURNAL, Vol. 11, No. 2, 2013, p. 78.

4 The provisions of the Indian Divorce Act 1869 are not applicable to the people of Mizoram though majority of the *Mizos* are Christian.

5 *Divorce to make Mizoram women poor* Guwahati, INDIAN EXPRESS, April 02, 2010 http://archive.indianexpress.com/news/divorce-to-make-women-poorer/599041

6 Thangzakhup Tombing, "*Marriage and Divorce Law among Indigenous North East Tribes of India: Comparative Study of Mizoram and Meghalaya*", NLUA LAW REVIEW, Vol. 2, No. 1, 2017, p. 41.

7 *Ibid*.

8 *Mohd. Ahmad Khan v. Shahbano Begum* AIR 1985 SC 945.

9 *Shayara Bano v. Union of India* (2017) 9 SCC 1.

Mizo Marriage, Divorce and Inheritance of Property Act 2014

The Mizo Marriage, Divorce and Inheritance of Property Act 2014 was enacted by the state legislature, after protracted struggle by *Mizo* women society and pressure from other groups.[1] The Act of 2014 marked the transition of *Mizo* community from compilation of customary laws to the enactment of legislation. This enactment is an attempt to create equality of status among *Mizo* male and female in matters pertaining to the institution of marriage among *Mizos*.[2] It extends to the whole of Mizoram state except to the three Sixth Schedule areas of Mizoram.[3] The Act of 2014 envisages making marriage a joint affair of both the Government and the Church.[4]

Grounds for Marriage under the Act of 2014

According to the Act of 2014, the party to marriage must be *Mizo* tribe by birth; by adoption or who is accepted by the *Mizo* Society and Community at large as a '*Mizo*'[5] where both the parties to the marriage are *Mizos*. Where one member of the party to a marriage is a *Mizo*, the Act of 2014 will be applicable only in case of a *Mizo* male.[6] Thereby implying that only *Mizo* males are allowed inter-community marriage. This is in utter violation of the spirit of inter caste community envisaged and promoted by the Supreme Court of India in the case of *Lata Singh v. State of Uttar Pradesh*[7].

Forms of Marriage under the Act

Courtship, proposal, acceptance and finally payment of bride or the marriage price a very important integral of a Mizo marriage.[8] Customary forms of marriage like *tlandun; makpa chung khum, luhkhung* which were part and parcel of the culture of Mizo society had been completely done away. The Act lays down that Mizo marriage shall be purely traditional customary procedure,

1 Mizo Hmeiche Insuihkhawm Pawl (MHIP) and the Mizo Women's Federation had been demanding the need for reformation of the Mizo Customary law to be more equalitarian.

2 Thangzakhup Tombing, "*Marriage and Divorce Law among Indigenous North East Tribes of India: Comparative Study of Mizoram and Meghalaya*", NLUA LAW REVIEW, Vol. 2, No. 1, 2017, p. 42.

3 Section 1(2) of the Mizo Marriage, Divorce and Inheritance Act 2014, provides that, the Sixth Schedule provisions are applicable only three districts of Chakma District, Mara District and Lai District.

4 Press Trust of India, "*New Mizoram Marriage and Inheritance of Property Law Soon"*, BUSINESS STANDARD, Aizawl, Wednesday, December 17, 2014, https://www.business-standard.com/article/pti-stories/new-mizo-marriage-and-inheritance-of-property-law-soon-min-114121700654_1.html, (visited on March 15, 2020).

5 Section 3(m) of the Mizo Marriage, Divorce and Inheritance Act 2014.

6 Section 2 of the Mizo Marriage, Divorce and Inheritance Act 2014.

7 (2006) 5 SCC 475.

8 Section 3(r) and (s) read with Sections 3 and 4 of the Mizo Marriage, Divorce and Inheritance Act 2014.

finally solemnised by a 'Licensed Officer'[1] as per the definition and the process laid down in Section 3(r) of the Act of 2014. The Act of 2014, seems to have introduce too much of rigidity and formality to *Mizo* marriage which otherwise was inclusive and flexible. Such rigid and formal approach towards forms of marriage by declaring voidable other customary forms of marriages could be detrimental to the goals and it aims to achieve.[2] Maybe the strength of the marriage institution among Mizos is its inherent flexibility.

Essential Conditions for Marriage

Section 10 of the Act of 2014 provides that, for a valid marriage three conditions are pertinent: (i) that the parties to the marriage are not of the same sex; (ii) there should not be living spouse at the time of marriage; and (iii) both the parties to the marriage must be major. Violation of any these grounds will render the marriage *void ab initio.* Another essential condition of valid marriage is the concept of non-violation of prohibited degree prescribed by the Act. According to Section 9[3] of the Act of 2014, the 'prohibited relationship' is to be defined in the light and context of religious party's marriage affiliation to the rules and practices of denomination, not otherwise. This a peculiar and radical attempt to read religious notions into *Mizo* marriage laws which could otherwise have been purely secular or a semblance of secular as well as religious. Also, it is a departure from the established concept of prohibitory degree of marriage based on consanguine as well as prohibition due to affinity. Section 12 of the Act of 2014 provides that every marriage solemnised under the Act of 2014 must be registered under Mizoram Compulsory Registration of Marriage Act 2007 in compliance with the Supreme Court's decision in *Seema v. Ashwini Kumar*.[4] The Act of 2014 does not define the status of illegitimate child: however, Section 3(w) of the Act of 2014 provides that 'sawn' means an illegitimate child. '*Sawn man*' is a token amount of a sum of Rs.40/- paid by the male to the woman if he had child out of wed lock.[5] The practice of paying of '*sawn man*' may entail the right of the illegitimate child to inherit property of the deceased father in exceptional circumstances of absence of any other prospective closer blood relative(s). Section 31(10) and (11) provide circumstances in which illegitimate child may inherit property where the

1 Section 3(j) of the Mizo Marriage, Divorce and Inheritance Act 2014 provides that, "*Licensed Officer means any person authorised/ permitted by any religious denomination to solemnise marriage under this Act*".

2 Section 8 of the Mizo Marriage, Divorce and Inheritance Act 2014 provides that, "*A man and a woman living together on inru or tlandun or fan or luhkhung is not a valid marriage unless regularised under this Act*".

3 Section 9 of the Mizo Marriage, Divorce and Inheritance Act 2014 provides the, Degrees of Prohibited Relationship as: "*A man cannot enter into a marriage with any of the persons the rules or practice of the religious denomination of which he is a member prohibits and a woman cannot enter into a marriage with any of the persons the rules or practice of the religious denomination of which she is a member prohibits*".

4 I 2006 DMC 327 SC.

5 Section 3(w) of the Mizo Marriage, Divorce and Inheritance Act 2014.

deceased father had paid the *sawn man.* In the case of *Master Lalrinheta and Another v. Smt. Tlanghmingthangi*,[1] the Court by applying the ratio of *Revansiddapa v. Mallikrjun*[2] held that child born out of *sawn* cannot be disqualified from inheriting the parents property in the event where the parentage of the child could be ascertained.

Analysis of Matrimonial Causes under the Act of 2014

The Act of 2014 does not recognise the concept of restitution of conjugal right. This is a welcome legislation for those who are proponents of unconstitutionality of restitution conjugal rights as was laid down in *T. Saretha v. T. Venkatasubbiah.*[3] *Mizo* marriage may be dissolved by competent Court either on the grounds of dissolution of marriage as per the provisions of Section 13 of the Act of 2014, or they are granted an alternative relief of judicial separation[4]. If the parties to the marriage fail to rescind the decree of judicial separation for a period not exceeding six months, the Court shall pronounce dissolution of marriage within sixty days.[5] With regard to permanent alimony and maintenance on dissolution of marriage, the Act of 2014 maintains a fine balance of the duties and liabilities of both husband and wife in economic as well as social terms towards themselves and children, if any.[6] Section 27 of the Act of 2014 provides that, on dissolution of marriage either by '*mak*' or '*kawngka sula mak*' the wife is entitled to share of the acquired property or the matrimonial property a share not exceeding 50 per cent of the total acquired property. It also implicitly recognises the concept of 'matrimonial property' vide the expression the word 'property acquired' during covertures.[7]

Property Right under the Act of 2014

According to Section 3 of the Act of 2014, a property is either movable or immovable property.[8] It can be personal property[9], acquired property[10] or ancestral property.[11] A *Mizo* person is entitled to inherit the property of his direct male ascendant not removed more than four degrees from him. However, any property inherited from maternal ascendants, how high-so-ever is not

1 RFA No. 31 of 2009, Senior Civil Judge- 1, Aizawl District, (2012), p. 16.
2 SCCR 472 (2011).
3 AIR 1983 AP 356. The Supreme Court however had restored the constitutionality of restitution of conjugal rights in *Saroj Rani v. Sudarshan Kumar Chadhha* AIR 1984 SC 119.
4 Section 14(1) and (2) of the Mizo Marriage, Divorce and Inheritance Act 2014.
5 Section 14(3) of the Mizo Marriage, Divorce and Inheritance Act 2014.
6 Section 16(i) of the Mizo Marriage, Divorce and Inheritance Act 2014.
7 Section 27(1) of the Mizo Marriage, Divorce and Inheritance Act 2014 provides as: "*A woman leaving her husband on mâk' or kawngka sula mâk shall have a share of the acquired property and shall be given a share not exceeding fifty percent of the acquired property*".
8 Section 3(t) of the Mizo Marriage, Divorce and Inheritance Act 2014.
9 Section 3(u) of the Mizo Marriage, Divorce and Inheritance Act 2014.
10 Section 3(a) of the Mizo Marriage, Divorce and Inheritance Act 2014.
11 Section 3(b) of the Mizo Marriage, Divorce and Inheritance Act 2014.

treated as an ancestral property.[1] According Section 3(x) of the Act of 2014, woman's personal property means any property owned by a woman which is registered in her name, purchased, gifted or inherited. It also includes her dowry which she brought to her husband's house during the time of her marriage. Thereby, creating a different class of property exclusively for women. The Act of 2014 envisage the women right to property from the perspective of: (i) *Mizo* women right to property on dissolution of marriage by a decree of divorce and; (ii) *Mizo* women right to inheritance.

Section 27(4) of the Act of 2014 provides that if the reason for the divorce was due to desertion whoever was guilty of desertion was liable to forfeit his/ her share in the 'acquired property'. Which means that if the husband was found guilty of deserting his wife for no reasonable excuse his wife is entitled to all the shares in the acquired or matrimonial property and *vice- versa*.[2] However, Section 25 of the Act of 2014 provides that if a wife leaves her husband by process of '*sumchuah'* that is she leaves her husband by returning her bride price for no reasonable excuse, except on ground that the husband being was an adulterer or cruel or insane or impotent[3], lest for her personal property, she ends up losing all her rights towards the acquired or matrimonial property.[4] Chapter VIII of the Act of 2014 provide the elaborated grounds for widow and women the head of the family on the demise of her husband and also the right to inherit property in a capacity as widow, daughter, unmarried daughter, divorced daughter etc.

Khasi Personal Laws and Customary Institution

The *Khasi* community of Megahlaya bounded in the North by Kamrup, Nagaon and Karbi Anglong districts of Assam, in the east and west by deep forest of the North Cachar and Garo Hills and on the South the Sylhet district of Bangladesh[5]. The Khasi and Jaintia Hills lie between 24° 58' North, and 90° 45' and 92° 51' East.[6] It is presumed that the *Khasi* ancestors might have wandered into this land locked habitat in the wake of the Tibeto- Burman influx into the region.[7] They follow matrilineal system since time immemorial. According to Peter Schmidt they belonged to Austro Asiatic language. The term '*Khasi*' is a general name for the Syntengs, the Wars and the *Bhoi* who are the inhabitants of the Khasi and Jaintia Hills.[8] *Khasi* literally means 'ancient mother' thus it quite

1 Thangzakhup Tombing, "*Marriage and Divorce Law among Indigenous North East Tribes of India: Comparative Study of Mizoram and Meghalaya*", NLUA LAW REVIEW, Vol. 2, No. 1, 2017, pp. 46-47.

2 *Ibid.*

3 Section 25 of the Mizo Marriage, Divorce and Inheritance Act 2014.

4 *Ibid.*

5 N.K. Dev, TRADITION AND MODERNITY IN KHASI SOCIETY, 1st ed. 2004, p. 6.

6 Verrier Elwin, A PHILOSOPHY FOR NEFA, 2nd ed. 1959.

7 R.Thanhlira, EVOLUTION OF LEGISLATIVE ASSEMBLY IN MIZORAM: INTER-RELATION BETWEEN THE LEGISLATIVE, EXECUTIVE AND JUDICIARY, 1st ed. 1997, p. 41

8 A.S. Khongphai (ed.), Keith Cantlie, NOTES ON KHASI LAW, 1st (rep.) 2009, p. 89.

resonates that *Khasis* trace descent from the mother.[1] Traditionally the youngest daughter, had been custodian of family traditions, lineage and property as such as *Khasi* women enjoy a position of unusual dignity and importance.[2] Thus, *Khas*i succession to the tribal office runs through the female line i.e., from the mother to the youngest daughter.[3] She is the steward of the family and the watcher of the material and spiritual welfare of the family.[4]

With the enactment of the North Eastern Reorganisation Act 1971, Meghalaya became a full fledged State in 1972.[5] After the formation of the State of Meghalaya, the judicial administration was bifurcated between the District Council and the Deputy Commissioner on the basis of the Sixth Schedule and rules of administration of justice.[6] The state is divided proportionately into five administrative divisions under the Khasi and Jaintia Hills district; and the Garo Hillls district. Though laws of Meghalaya have jurisdiction in the District Councils, the Council may pass it with the assent of the Governor in matters pertaining to social customs, marriage, divorce, inheritance etc.[7] It is to be noted that traditionally *Khasi* community had Syiemship or chieftainship.[8]

Institution of Marriage Among Khasis

The traditional belief associated with the marriage among *Khasis* is a sacramental relationship. It is a religious duty of every parent to give away daughter in marriage without any commercial transaction.[9] They prefer exogamous marriage. According to their customs if a person marries within the clan the person will lose the right to inherit property. As a punishment he may be ostracised from society and in extreme case forfeit right of burial on death with other family member.[10] Though monogamy is the norm, customs permit man to have informal alliance with another woman.[11] In such case the first wife is treated as the real wife i.e., the *katnga trai,* and the second wife as the stolen wife i.e., *ka tnga trait uh.*[12] There is no custom of polyandry. There is no compulsory registration of marriage solemnised under customary law.

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1 The North Eastern Reorganisation Act 1971.

2 Thangzakhup Tombing, "*Marriage and Divorce Law among Indigenous North East Tribes of India: Comparative Study of Mizoram and Meghalaya*", NLUA LAW REVIEW, Vol. 2, No. 1, 2017, p. 51.

3 Kusum and P.M. Bakshi, CUSTOMARY LAW AND JUSTICE IN THE TRIBAL AREAS OF MEGHALAYA, 1st ed. 1982, p. 5.

4 A.S. Khongphai (ed.), Keith Cantlie, NOTES ON KHASI LAW, 1st (rep.) 2009, p. 89.

5 *Supra* n. 2.

6 N.K. Dev, TRADITION AND MODERNITY IN KHASI SOCIETY, 1st ed. 2004, p. 6.

7 Sixth Schedule (Para 1) of the Constitution of India 1950.

8 *Supra* n. 6, p. 155.

9 *Supra* n. 4, pp. 31-32.

10 *Supra* n. 6, p. 59.

11 *Ibid.,* p. 57

12 Ailynti Nongbri, "*The Image of the Suffering Woman: A Selective Study of the Khasi Novels* [1963-1990]", 2006, Department of Khasi, North-Eastern Hill University, Shilong, http://hdl.handle.net/10603/61522, (visited on July 30, 2020).

There are three forms of solemnisation of marriage among *Khasis* as: (i) by putting on ring; (ii) ceremony without ring; (iii) by partaking of liquor.[1] Among Khasi inter-clan marriage is strictly prohibited but preference is given to cross cousin marriage.[2] Divorce among Khasis is least formal, it is extra- judicially permissible and there is no stigma attached to it.[3] They take resort to customary divorce through the simple ritual of throwing cowries or copper in the air. On completion of this ritual they are mutually separated with no personal obligation.[4]

Khasi Christian Marriage and Divorce Laws

Khasi Christian community is governed by the provisions of the Christian Marriage Act 1872 by virtue of Section 3 of the United Khasi Jaintia Hills District (Christian Marriage) Act 1954.[5] Christian marriage is solemnised in Church by the officiating minister, who is usually the Pastor of the Church.[6] Whereas traditional *Khasi* marriage is performed at the bride's place mediated by mediators or *ksiangs* from each side.[7] Registration of *Khasi* Christian marriage is compulsory.

Among Christian *Khasis* the grounds of divorce for Christian Khasi are governed by the provisions of the Indian Divorce Act, 1869. In the case of *Miliancy Foster Blah v. Ka Margaret Rose Thangkiew*,[8] the Gauhati High Court held that the dissolution of marriage of the parties under the Indian Christian Marriage Act 1872 has to be sought as per the provisions of Section 17 of the Indian Divorce Act 1869. In *Ka Amal Lyngdoh v. U. Jabin Pakem*[9] confirmation of decree nisi of the dissolution of marriage granted by the Judge, District Court, Jaintia Hills Autonomous District Council, Jowai was petitioned at the Gauhati High Court.

Khasi Family

Khasi male play a pivotal dual role of being the provider as well as the protector at two different stages of capacity in a *Khasi* family. He is borne of the mother, brought by his mother and her family, thus prior to marriage he has the

1 P.R.T. Gurdon, THE KHASIS, 1st ed. 1975, (rep. 1987), p. 127.
2 *Ibid.*
3 Kusum and P.M. Bakshi, CUSTOMARY LAW AND JUSTICE IN THE TRIBAL AREAS OF MEGHALAYA, 1st ed. 1982, p. 88.
4 *Ibid*., p. 203.
5 In pursuance to the provisions of Para 11 read with Para 3 (1) of the Sixth Schedule of the Constitution the United Khasi- Jaintia Hills District Council is empowered to make laws, rules and regulations pertaining to marriage, divorce, social customs etc. shall be published in the Official Gazette of the State Government to have the force of law.
6 Leaderwell Pohsnap, TRUMPETS FOR THE KHASI: EVALUATING THE INDEGENITY OF THE CHURCH OF GOD AMONG THE KHASIS, 1st ed. 1988, p. 200.
7 *Ibid.*, p. 201.
8 AIR 1995 Gau 47.
9 AIR 1987 Gau 69.

responsibility of being bread earner and the protector of the person of his mother, his sisters and young brothers.[1] In a traditional *Khasi* family sons are the sons of their mother, while the mother belonged to her mother and so forth. At his wife's house on the birth of children he acquires the status of the executive head of the family who has to earn livelihood to provide for his family. At his mother's house he will be head of the family in the capacity as a maternal uncle, and his role as adviser is crucial in good times and in hardships. Thus, in a *Khasi* family the maternal uncle '*the Kni'* is the executive head[2] while in the capacity of father he is a mere symbolic head.[3]

On marriage he becomes the son of his wife's mother's family, and also the head of the family with his wife and children.[4] His duty towards the new family is to provide and protect the family, property, religion of his wife and children.[5] But this new role as the head of the family of his wife and children does not abdicate his responsibility towards his mother and the *kur*.[6]

Sanctity of Khasi Property and its implications on the Society

The role of maternal uncle and the father as the executive and symbolic head is a creation of law owing to the religious obligations to protect and preserve *ka niam* and responsibility of a son towards his mother and the *kur.* On his death (*Khasi* male) his obsequial rites and ceremonies and the remains of his bones will go back to the family stone, *mawbiah.* Strong religious sentiment towards property among *Khasis* owing religious duty had in some cases even taken communal colour and led to communal unrest.

It is to be noted that strict non-endogamous marriage norms have been exploited by the non-*Khasi* men. Numerous instances of non-*Khasi* male marrying the youngest *Khasi* daughter only for the purpose of acquiring her property or to open business in their wives name to avoid paying taxes[7] had led to suspicion and misgivings upon by the *Khasi* male, which had even led to communal unrest. Somewhere these misgivings and insecurity among *Khasi* male could be attributed to age old notion of strong religious sentiments and duties attached towards their ancestral property. The recent attempt of the KHADC (*Khasi* Social Custom of Lineage) (Second Amendment) Bill 2018 to disqualify *Khasi* women from the status of being tribal if they marry a non-*Khasi* strikes at the root of the concept of *Khasi* property and thereby, end up

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1 The provisions of the Indian Divorce Act 1869 are not applicable to the people of Mizoram though majority of the Mizo's are Christian.

2 A.S. Khongphai (ed.), Keith Cantlie, NOTES ON KHASI LAW, 1st (rep.) 2009, p. 95.

3 *Ibid*.

4 Chie Nakane, GARO AND KHASI: A COMPARATIVE STUDY IN MATRILINEAL SYSTEMS, 1st ed. 1968, pp. 118-119.

5 *Ibid*.

6 *Supra* n. 2, p. 99.

7 Simanterik Dowreh, "*Married in Meghalaya: Feminist Dream for the Iron Fist of Matriarchy?*", FIRST POST, Friday, August 12, 2016, http://www.firstpost.com/specials, (visited on July 30, 2017).

violating the age old as well as fundamental rights of *Khasi* women rights to choice of spouse and also rights to succession and inheritance of property.[1]

Paite Personal Laws and Customary Institution

The State of Manipur is situated in the North-Eastern frontier of India. It lies contiguous to three other North Eastern States of India Nagaland to the north, Cachar District of Assam to the west, on the south by Mizoram with the Chin state of Myanmar, and towards the east by upper Myanmar. Manipur, which was a princely state before Indian independence, was amalgamated with the Union of India on October 15, 1949 as a union territory. Manipur got the status full-fledged statehood with the North-Eastern Reorganisation Act 1971, on January 21, 1972.

Village Administration in Hill Areas of Manipur

In Manipur State Hill Peoples (Administration) Regulation was enacted in 1947, it provided that the criminal and civil justice should be administered by the court of a village authority, the Court of Circle Authority, the Hill Bench at Imphal and the Chief of Manipur State.[2] The Court of a Village Authority was empowered to try any criminal case, involving the offence of theft, mischief, cattle lifting, simple hurt/ assault, use of criminal force or illegal slaughter of cattle. In civil matter the Village Authority could try any suit of values below Rs.501/-. The Circle Court could exercise the power of a Magistrate of the First Class. The Hill Bench at Imphal exercised the powers of the Sessions Court. It was composed of a judge of the Chief Court as Chairman with two hill men as judges. Except the Village Authority all the other Courts had appellate. The Manipur (Village Authorities in Hill Areas) Act 1955 amended and rechristened as the Manipur Hill Areas (Acquistion of Chiefs Rigths) Act 1967. It weakened the rights of the Chiefs hitting directly on the Customary Laws of the tribals of Manipur.[3] *Vide* Article 371C of the Constitution, the Manipur (Hill Areas) District Council Act 1971 was subsequently passed to provide for the establishment of District Council in the Hill Areas in the then Union Territory of Manipur. Following the attainment of statehood in 1972, the Act of 1971 was enforced in 1973. Unlike district councils of other parts of North-East region, the district councils in Manipur are not entrusted with any judicial and legislative powers.

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1 Prasanta Mazumdar, "*Meghalaya Council Faces Flak After Passing Bill Stripping Khasi Women of ST Status if She Marries a Non-Khasi*", THE NEW INDIAN EXPRESS, Guwahati, Friday, July 27, 2018, https://www.newindianexpress.com/nation/2018/jul/27/meghalaya-council-faces-flak-after-passing-bill-stripping-khasi-women-of-st-status-if-she-marries-a-1849494.html, (visited on August 18, 2018).

2 Priyadarshini M. Gangte, CUSTOMARY LAWS OF MEITEI AND MIZO SOCIETIES, 1st ed. 2008, p. 23.

3 *Ibid.*

Paite Customary Laws and Institutions

The *Paites* are concentrated in the southern parts of Manipur. The population of *Paite* in Manipur is around 60,000 (2011 census). *Paite* is their mother tongue and they are believed to be the descendants from the Tibeto-burman ancestry. Their migration from the Tibeto-Burma in the north to their present habitat is recalled in their folklore. The *Paites* are divided into clans, which again are subdivided into lineages. The clans are grouped into two distinct classes, one of the chiefs and the other of the commoners. The main function of a clan is to regulate the property and to provide protection to its members. The *Paites* have a concept called '*indongta*' or the family council, it gurantees kinship obligations and reciprocal co-operation, it is in this institution that the roots of the customary practices of *Paite* tribe are found. The personal laws relating to marriage, divorce, inheritance, adoption etc. are managed by indongta.[1]

The village administration was the responsibility of the Chief and his council of elders. Every member of the council had the privilege or right to select *jhum* sites of their choice before it was opened for commoners. Any matter related to the village community was decided and settled by the chief with the help of his council of elders. Whenever a dispute arose, the plaintiff had to produce a pot of beer, *zubel*, at the chief's house, which is like court fee stamp to file a lawsuit. The village court without this *zubel* could take up no case. The case having been heard, the convicted was fined according to tribal customs. If the fine was accompanied by *salam*, a pig of at least three palms, or *salam* with the *zubel,* the latter was just to be eaten up by the chief and his council at the formers house.[2]

Marriage Among Paite

Adult marriage is the rule among them. The *Paites* have freewill to select a boy or a girl of their choice. Though marriage was not confined to any particular clan or family but in fact there was a certain amount of prejudice against marrying on father's side. Spouses are acquired through negotiation. Matrilateral cross-cousin marriage was the first preference, and it was not only encouraged but even obligatory. This is called *ni-nungzui.*[3]

Marriage laws of the *Paite* is one of the least complicated. The essential conditions for validity are that both the parties must be of marriageable age and that both parents and their household must consent to it. The actual marriage is then performed in the knowledge of the family household council and the public. However, with the coming of Christianity, Church marriage under the supervision of a Pastor has become quite prevalent. However, it must be noted that for a formal marriage among *Paite*, it is essential that bride price and *'thaman'* be paid without fail. The term '*thaman*' refers to a fee paid to the

1 Jeuti Barooah, CUSTOMARY LAWS OF THE PAITES OF MANIPUR: WITH SPECIAL REFERENCE TO LAND HOLDING SYSTEM, 1st ed. 2007, p. 96.

2 *Ibid.*

3 Eddy Asirvatham, CHRISTIANITY IN THE INDIAN CRUCIBLE, 2nd ed. 1957, p. 174.

bride's family by the bridegroom and it signifies the right to bury her in case of death. But if it is a case of elopement bride price is mandatory but not as prompt as it is when it is a formal marriage.

Divorce is permissible and either spouse can initiate the proceedings. In the past, bride price was paid in kind, usually standing mithuns but now it is given in cash, merely as a token ritual. Grounds for divorce among *Paites* are: adultery; unsoundness of body/mind; by mutual consent etc. In the case of *T. Songchinzam & Party v. T. Thongngaihlian & Party*,[1] PTC Court granted divorce to the petitioner on the basis of the statement of the petitioner's wife - confession of having committed adultery with the defendant. In another case of *T. Jamsongin & Party v. C.T. Vungjoyson & Party*,[2] the Court granted divorce on the bizarre ground of a husband's accusation of adultery committed by the wife. In this case what happened was the plaintiff, an army man, who was away from home due to his posting was tipped off by his sister that his wife and another person were found alone in the house and that the other person was found lying on the bed of the petitioner. Without even confirming anything the petitioner hastily asked his wife to leave his house and retreat back to her paternal home. When the matter came to the court, the court held that since there seem to be no intention for reconciliation they must be treated as divorced. Thus divorce was granted.

Inheritance Law Among Paites

There is no common rule of inheritance and succession as it varies from household to household. According to *Paite* customs, the eldest son is the rightful heir over ancestral as well as self-acquired property of the father.[3] The younger son as such has no claim over his father's property during the lifetime of his brother. In case of '*gam*', where the deceased died without any male heir the nearest male relative of the deceased person will come to lay claim on the property of the deceased person, leaving nothing for the widow or daughters. This is quite similar to the concept of 'devolution back', prevalent earlier among Hindus before Women Right to Property Act 1938.

The peculiarity of the customary practice of the *Paite* is that an illegitimate son has the status of a first born if such child was born before the father was formally married. Such a son will thus be treated as the eldest son and he will be entitled to succeed and inherit his father.[4] The position of woman in capacity of wife, daughter, mother, sister etc. is precarious as they are not endowed with any inheritance right. However, by the *Paite* Customary Laws (1st Amendment) 2004, daughters are now allowed to inherit and succeed from their father in special circumstance even if it is a 'gam', the provision is a big boon to widows

1 PTC Court case no.94/PTC-GHQ/Court/2009.
2 PTC Court case no.(14) 95/PTC/GHQ/ Court/2010.
3 Jeuti Barooah, CUSTOMARY LAWS OF THE PAITES OF MANIPUR: WITH SPECIAL REFERENCE TO LAND HOLDING SYSTEM, 1st ed. 2007, p. 67.
4 Section 83 of the Paite Customary Laws (1st Amendment) 2004; Section 88 of the Paite Customary Laws and Practices (2nd Amendment) 2004.

who have no son. In the case of *Kaikhanthang v. Tlangdawl*,[1] the father had disqualified his only son form inheriting his property since he found him to be disrespectful towards him. He had distributed his entire property between his three daughters. When the matter reached the PTC Court, the Court held that the act of the father was in gross violation of the *Paite* Customary Laws. It held that such arbitrary act must be immediately rectified.

Conclusion

The transition of *Mizo* society from a highly patriarchal society to a more egalitarian society by the enactment of the Mizo Marriage, Divorce and Inheritance of Property Act 2014. It has paved the way for the recognition, protection and equalisation of rights *Mizo* women to marriage, during marriage and on dissolution of marriage. It also posits on *Mizo* women absolute right to inherit and succeed property in the capacity of wife, mother, daughter, sister etc. But applicability of the Act is limited only to the *Mizo* tribe of Mizoram but not the other women folk in three Autonmous District Councils of Lai, Mara and Chakma.

The Act of 2014 had reduced the customary '*sawn man*' that is the price for fornication or adultery which led to the birth of an illegitimate child only to a mere 'token' amount of Rs.40/- payable by the accomplice to the woman.[2] This provision hits at the root of the noble attempt of the legislator for equalisation of the statuses of male and woman through the Act, thereby rendering it parochial, ill-conceived and deeply patriarchal. The 'prohibited relationship' for marriage on the basis religious parties' marriage affiliation to the rules and practices of denomination, not otherwise does not augur well as it kind of create religious exclusiveness to the otherwise secular institution of marriage among *Mizos*. Close scrutiny of the narrative of property under the Act seems to have been borrowed from the nuanced understanding of the western and Hindu concept of property as such it is misfit and out of place.

Khasi Hills Autonmous District Council should have been the most progressive. Among Khasis even if marriage is illegal, void or voidable the legitimacy of the child is never questioned as maternity is above social institutions.[3] Because of the matrilineal system, which place Khasi women at a much higher pedestal than their other counterpart in the North East finds itself in precarious situation because of the inherent powers of male to decide and take decisions in the social and political lives of Khasis. The fervour of the Khasi male to preserve purity of the race and of the property seems to have led to unspoken insecurity because inter-marriage of Khasi women with non Khasis. The drastic step taken by the KHADC to stripped Khasi women their status of tribe on marrying non-*Khasi* and subsequent disqualification from inheritance and also of their children is regressive as it strikes at the root of Universal Human Rights.

1 PTC Court case no.20'102/PTC/GHQ/Court/2010.
2 Section 3(w) of the Mizo Marriage, Divorce and Inheritance Act 2014.
3 Section 10 of the Indian Divorce Act 1869.

The transition of the *Paite* tribes in the last six decades and the progress they have made, appears to have become redundant with no scope for further progress. The misgivings, mistrust and cynicism of the *Paite* tribes towards their social and political institutions have become more profound post the mayhem that unfolded after the passing of the three infamous bills on August 31, 2015. The *Paite* community of Manipur had so far maintained *status quo*, however the compilation of their customary laws was amended in 2004 and 2013 to allow testamentary succession to daughters in case of absence of any prospective male heir. It provides that if a father has no son to succeed and inherit him, he may distribute his properties- movable and immovable, among his daughters.[1] This mere piecemeal development among *Paite* tribe does not serve in any way to mitigate the wide gender gap and the stronghold of patriarchy among *Paite* community.

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1 The Paite Customary Laws and Practices (2nd Amendment) 2004.

RIGHT TO PRIVACY ON THE SOCIAL NETWORKING SITES: A CRITICAL ANALYSIS

Vibhuti Jaswal[♣]

Abstract

Article 12 of the Universal Declaration of Human Rights 1948 provides for right to privacy. The right is also recognised by the Article 17 of the International Covenant on Civil and Political Rights (ICCPR) which protects every person's privacy and prohibits arbitrary interference by others. In India, the right to privacy is recognised as a fundamental right under the Article 21 of the Constitution of India as laid down by the Supreme Court in its various judgements. Although this right has been recognised by various International Conventions and protected by the domestic laws, it faces the biggest threat due to increasing cybercrimes on social networking sites. The protection of personal data of the individual is one of the aspects of rights to privacy. Therefore, in this paper, the author analyses the concept of right to privacy with respect to personal data protections on social networking sites. The research methodology used for the present study is purely doctrinal based on secondary sources.

Keywords: Right to Privacy, Human Rights, Personal Data, Social Networking.

Introduction

Alan F. Westin observed that all living beings present on planet earth possess certain innate characteristics reflecting the sense of privacy, and it is the basic instinct among all the earthly species to fight for their private space. The enjoyment of private space creates infinite opportunities to live peaceful life for all without disturbing the balance of nature. Human beings have been searching the true meaning of privacy since the time of antiquity. And this journey still continues. It has been realised by the human civilizations that privacy performs various functions in an individual's private and public life.[1] Private realm of an individual completes her or his inner and outer being. Solace in isolation guides the individual in finding out the truth of life, which cannot be expressed in any physical form.[2] The capability to oust strangers or unwanted persons from one's private space gives sufficient time to an individual to awaken the real self, and to get rid of the social stigma attached with her or his identity.[3] Privacy to the

♣ Ph.D. Scholar, Rajiv Gandhi National University of Law, Punjab, e-mail: jaswalvibhuti8@gmail.com.

1 Alan F. Westin, PRIVACY AND FREEDOM, 1st ed. 1967, pp. 7-10.

2 Julie Inness, PRIVACY, INTIMACY AND ISOLATION, 1st ed. 1992, p. 91.

3 Jeffrey Rosen, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA, 1st ed. 2000, p. 8, wherein it is stated that, "*[P]rivacy protects us from*

personal information protects the individual from the prejudices of the conservative society. It prepares the individual to make social relationships without any hindrance. Privacy also protects the democratic rights of an individual, and enables her or him to participate in the decision-making processes of the government. Political opponents, dissidents, activists, whistle blowers etc. need anonymity and protection from the autocratic regimes. Privacy encourages tolerance among the members of the society. Protection to one's mental thoughts and expressions increases the accessibility of the public sphere. It is very significant in terms of the deliberative democracy, especially when the public sphere demands inclusive society. Considering the significance of privacy, all civilised legal systems have taken pledge to protect the right to privacy of every person.[1] Right to privacy includes the control over one's personal information and the personal autonomy over one's personal decisions. Again, the definition of personal information and autonomous personal decisions is not exhaustive. Both personal information and personal decisions revolve around an individual's body, mind and soul. Personal information includes DNA, biometric information, face, physical appearance, name, location, gender, religion, caste, race, habits, tastes, preferences, sexual orientation, and so on. Privacy also relates to the personal decisions that include choices about marriage, procreation, body amendments, lifestyle, medical treatment, etc.

International Human Rights Law on Right to Privacy and Personal Data Protection

Right to privacy has been recognised under Article 12 of the Universal Declaration of Human Rights. Article 12 provides protection to an individual's right to respect for private and family life. State is prohibited under the

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being misdefined and judged out of context in a world of short attention spans, world in which information can easily be confused with knowledge. True knowledge of another person is the culmination of a slow process of mutual revelation. It requires the gradual setting aside of social masks, the incremental building of trust, which leads to the exchange of personal disclosures. It cannot be rushed; this is why, after intemperate self-revelation in heat of passion, one may feel something close to self-betrayal. True knowledge of another person, in all of his or her complexity, can be achieved only with a handful of friends, lovers, or family members. In order to flourish, the intimate relationships on which true knowledge of another person depends need space as well as time: sanctuaries from the gaze of the crowd in which slow mutual self-disclosure is possible."

1 Daniel J. Solove, UNDERSTANDING PRIVACY, 1st ed. 2009, pp. 39-77, wherein it is provided that Daniel J. Solove's relative theory of privacy said: "*The value of privacy must be determined on the basis of its importance to society, not in terms of individual rights. Moreover, privacy does not have a universal value that is the same across all contexts. The value of privacy in a particular context depends upon the social importance of the activities that it facilitates.*"

provision from intruding into one's private and family life. Despite its non-binding nature, the Universal Declaration of Human Rights has influenced the international human rights law and the European data protection law. Article 17 of the International Covenant on Civil and Political Rights (ICCPR) protects every person's privacy, home, correspondence, honour and reputation from any kind of arbitrary or unlawful interference. Right to Privacy has also been recognised in various other international instruments including United Nations Convention on the Rights of the Child, and the United Nations Convention on Migrant Workers. Article 16 of the United Nations Convention on the Rights of the Child 1989 protects the privacy, honour and reputation of children.

Edward Snowden revealed about the United States' global surveillance program to the whole world. He disclosed that the universal surveillance program that controls all modes of communication can intercept anyone's personal communications. The surveillance techniques have the unprecedented capabilities to do surreptitious monitoring over every individual. The United Nations and the European Union took serious note on the issue, and passed number of resolutions. They criticised the United States' mass surveillance programs. In resolution, they said that the mass surveillance program violates the right to privacy and freedom of expression. Both of these rights are essential for the functioning of every democratic society. The resolutions concluded that mass surveillance programs are not specific; are not necessary; are not proportionate; and so on. Special Rapporteur appointed to inquire the issue said that the mass surveillance affects the private lives of journalists, bloggers, whistle-blowers, political dissidents, religious minorities, ethnic minorities and LGBT communities. It also violates the right to access to the freedom of information. Special Rapporteur recommended the member States to encourage the use of encryption technology as a defence against the widespread surreptitious surveillance. Right to privacy, right to protection of the personal data, and right to use the encryption technology is enforceable against both public and private entities.[1] The report on 'The Right to Privacy in the Digital Age 2014,' recommended the member States to implement the international human rights law and to provide adequate safeguards to the individuals' right to privacy.[2] The United Nations' resolutions of 2016 and 2017 said that the big

1 William New, "*UN Expert Urges Encryption, Anonymity Online to Preserve Freedom of Expression*," INTELLECTUAL PROPERTY WATCH, June 18, 2015, http://www.ip-watch.org/2015/06/18/un-expert-urges-encryption-anonymity-online-to-preserve-freedom-of-expression/, (visited on May 3, 2020).

2 Report of the Office of the United Nations High Commissioner for Human Rights, "*The right to privacy in the digital age*", A/HRC/27/37, Human Rights Council, Twenty-seventh session, Agenda items 2 and 3, June 30, 2014, http://www.ohchr.org/Documents/Issues/DigitalAge/A-HRC-27-37_en.doc, (visited on April 24, 2020).

data collected by the business entities can threaten the individuals' right to privacy in the digital age. The resolutions reminded the private entities about their responsibility to protect the human rights and the data protection rights of the individuals.[1]

Article 8 of the European Convention on Human Rights provides that every person has the right to respect for her or his private and family life. The provision also recognises her or his right to respect for home and correspondence. State cannot interfere into this right unless the interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. European Court of Human Rights has widened the scope of private life guaranteed under Article 8 of the European Convention on Human Rights. By doing so, the Court has recognised the unwritten and implied aspects of private life that deal with a person's physical, social and psychological identity. The concept of private life includes the protection of an individual's both inner and outer circle of life. An individual has right to enjoy one's own private life in complete secrecy or isolation and to exclude the outside world from the personal sphere. Further, private life protected under Article 8 of the European Convention also encompasses the right to private social life, and the individual has personal autonomy to make social relationships. It means that an individual can claim his or her right to private life at public places as well.[2]

The European Court of Human Rights, in *Von Hannover v. Germany (No.2)*[3] and *Alex*, reiterated the five-point criteria in order to balance the right to freedom of expression against the right to respect for private life:[4] (a)

1 Revised draft resolution on the right to privacy in the digital age, UN General Assembly, A/C.3/71/L.39/Rev.1, New York, November 16, 2016.

2 Guide to Article 8 of the European Commission of Human Rights, https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf, (visited on April 24, 2020).

3 *Von Hannover v. Germany (No. 2)*, Applications nos. 40660/08 and 60641/08, European Court of Human Rights, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-109029%22]}, (visited on April 24, 2020).

4 In *Haldimann v. Switzerland*, Application no. 21830/09, decided on February 24, 2015, the European Court of Human Rights balanced the right to freedom of expression against the right to private life using six criteria: (1) whether the matter contributed to a debate of general interest; (2) ascertaining how well-known the person being reported on is and the subject of the report; (3) the person's prior conduct; (4) the method of obtaining the information; (5) the veracity, content, form, and repercussions of the report/documentary; and (6) severity of the penalty imposed.

Contribution to a debate of general interest;[1] (b) How well known is the person concerned and what is the subject of the report?;[2] (c) Prior conduct of the person concerned;[3] (d) Content, form and consequences of the publication; and (d) Circumstances in which the photos were taken.

The European Court of Human Rights construed a right to protection of reputation from the language of Article 8 of the European Convention, and recognised its importance in *Chauvy v. France*.[4] The court said that there must be a fair balance between the freedom of expression and right to reputation.[5] The supervisory court must balance the public interest in right to know the historical facts and the need to protect the right to reputation of an individual. Freedom of expression of an individual protected under Article 10 can be made subject to a law that imposes restrictions on it in the interests of democratic society or for the protection of the reputation of others. But it is mandatory that an interference with the freedom of expression should be necessary and proportionate in nature. Disproportionate interference with the freedom of expression would violate the privacy rights of the journalists, authors, artists or publishers.

In *Roman Zakharov v. Russia*,[6] the European Court of Human Rights reiterated the minimum safeguards, which have been developed by this court in previous case-laws relating to the secret surveillance. The Court has held that

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1 Articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well known that person might be, cannot be deemed to contribute to any debate of general interest to society.

2 In principle, private individuals enjoy more privacy than public figures. Further, the public officials who do not hold official functions can keep their lives more secret than those who hold official functions.

3 The European Court of Human Rights, in *Axel Springer v. Germany*, no. 39954/08, February 7, 2012, para 83, said that "*Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence*".

4 2004-VI Eur. Ct. H.R. 211.

5 *Ibid.*, pp. 229-230. The European Court emphasised that: "*[T]he Court must verify whether the authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in this type of case, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right of the persons . . . to protect their reputation, a right which is protected by Article 8 of the Convention as part of the right to respect for private life.*"

6 European Court of Human Rights, *Roman Zakharov v. Russia*, No. 47143/06, December 4, 2015, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-159324%22]}, (visited on April 24, 2020).

the law governing secret surveillance should be clear on the following points:[1] in what kind of offences, the interception order will be passed; what kind of persons will be subject to the interception of communication; what will be the duration of the interception; what is the procedure to regulate the use and storage of the personal data; what is the procedure in case of sharing the data with other parties; under what circumstances the recordings will be deleted; and so on.

In *Roman's* case, the European Court held that the law governing interception of communications did not provide the adequate safeguards against the abuse of surveillance. The Court held that the domestic law did not have any provision that tells about the deletion of personal data after the purpose has been achieved. The Court also held that the existing judicial authorization is very limited in nature.[2]

Similarly, in *Szabó and Vissy v. Hungary*,[3] the European Court of Human Rights held that the Hungarian Secret Surveillance was neither subject to judicial authorisation nor to judicial review. The Court said that the secret surveillance is allowed only if it is "*necessary in a democratic society*", and this

1 European Court of Human Rights, *Roman Zakharov v. Russia*, No. 47143/06, December 4, 2015, para 231, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-159324%22]}, (visited on April 24, 2020). In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in law in order to avoid abuses of power: the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed.

2 European Court of Human Rights, *Roman Zakharov v. Russia*, No. 47143/06, December 4, 2015, para 261, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-159324%22]}, (visited on April 24, 2020). The Court notes that in Russia judicial scrutiny is limited in scope. Thus, materials containing information about undercover agents or police informers or about the organisation and tactics of operational-search measures may not be submitted to the judge and are therefore excluded from the court's scope of review. The Court considers that the failure to disclose the relevant information to the courts deprives them of the power to assess whether there is a sufficient factual basis to suspect the person in respect of whom operational-search measures are requested of a criminal offence or of activities endangering national, military, economic or ecological security.

3 European Court of Human Rights, *Szabó and Vissy v. Hungary*, No. 37138/14, January 12, 2016, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-160020%22]}]}, (visited on April 24, 2020).

requirement must be interpreted as it requires "*strict necessity*".[1] The Court of Justice of the European Union (CJEU) in *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources*[2] emphasised on the prior judicial or independent review of the public authorities' access to the individuals' personal data for the prevention and investigation of an offence.[3] In this case, Directive 2006/24/EC required telephone communications service providers to retain citizens' telecommunication data, including traffic and location data, for up to two years in order to prevent, detect, investigate and prosecute crime and safeguard the security of the State.[4] The Court of Justice of the European Union (CJEU) considered the directive as an interference with the right to personal data protection and right to respect for private life. It was

1 European Court of Human Rights, *Szabó and Vissy v. Hungary*, No. 37138/14, January 12, 2016, para 73 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-160020%22]}]}, (visited on April 24, 2020) provides that, "*[G]iven the particular character of the interference in question and the potential of cutting-edge surveillance technologies to invade citizens' privacy, the Court considers that the requirement "necessary in a democratic society" must be interpreted in this context as requiring "strict necessity" in two aspects. A measure of secret surveillance can be found as being in compliance with the Convention only if it is strictly necessary, as a general consideration, for the safeguarding the democratic institutions and, moreover, if it is strictly necessary, as a particular consideration, for the obtaining of vital intelligence in an individual operation. In the Court's view, any measure of secret surveillance which does not correspond to these criteria will be prone to abuse by the authorities with formidable technologies at their disposal. The Court notes that both the Court of Justice of the European Union and the United Nations Special Rapporteur require secret surveillance measures to answer to strict necessity.*"

2 Court of Justice of the European Union, Joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung* [GC], April 8, 2014, http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=511178, (visited on June 30, 2020).

3 Court of Justice of the European Union, Joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung* [GC], April 8, 2014, http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=511178, (visited on June 30, 2020), para 62 provides that, "*[A]bove all, the access by the competent national authorities to the data retained must be made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes following a reasoned request of those authorities submitted within the framework of procedures of prevention, detection or criminal prosecutions.*"

4 *Ibid.*, para 17.

observed by the court that the large volume of the retained data can disclose the identity and private details of the persons.[1]

On July 16, 2020, the Court of Justice of European Union (CJEU) in *Data Protection Commissioner v. Facebook Ireland Ltd, Maximillian Schrems*,[2] invalidated EU-US data sharing agreement (known as, Privacy Shield). The Court held that the agreement did not provide the adequate protection to the personal data of the European Union's users in the United States. But the court validated the standard contractual clauses in the context of third countries. Standard contractual clauses are being used for the transfer of personal data to processors established in the third countries. Privacy advocates have criticised this, and have argued that the rise of surveillance powers in such third countries is affecting the personal data of the European Union's data subjects.

General Data Protection Regulation 2016 (GDPR) replaced the Data Protection Directive of 1995 with the aim to protect the personal data of the individuals against the misuse. Public authorities and private entities processing or controlling the individuals' personal information are bound to protect the personal data under the regulation.[3] It regulates collection, use, processing and

1 Court of Justice of the European Union, Joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung* [GC], April 8, 2014, http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=511178, (visited on June 30, 2020), para 26 provides that, "*[I]t should be observed that the data which providers of publicly available electronic communications services or of public communications networks must retain, pursuant to Articles 3 and 5 of Directive 2006/24, include data necessary to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' communication equipment, and to identify the location of mobile communication equipment, data which consist, inter alia, of the name and address of the subscriber or registered user, the calling telephone number, the number called and an IP address for Internet services. Those data make it possible, in particular, to know the identity of the person with whom a subscriber or registered user has communicated and by what means, and to identify the time of the communication as well as the place from which that communication took place. They also make it possible to know the frequency of the communications of the subscriber or registered user with certain persons during a given period.*"

2 Case C-311/18, decided on July 16, 2020.

3 Article 4(1) of the General Data Protection Regulation 2016 provides that, "'*personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.*"

transfer of the personal data. The data controllers are supposed to follow certain principles including *'lawfulness, fairness and transparency', 'purpose limitation', 'data minimisation', 'accuracy', 'storage limitation', 'integrity and confidentiality'*.[1] Data processors and controllers can collect limited amount of personal information upon an individual for the intended purpose. For this, they should also adopt the least intrusive methods of the collection of the personal information. Explicit consent at the time of the collection and use needs to be taken by the data controllers. The use of the collected information is limited to the purpose only. It cannot be used for unintended purposes. The personal information cannot be transferred without the explicit and informed consent of the concerned individual. Once the purpose for which the information was collected is completed, the same should be deleted from the archives. Right to be forgotten or right of erasure has also been recognised by the European Court in *Google Spain v. Gonzalez*.[2] Right to access the information; to correct or update the information are the basic rights of the individuals. To enforce the regulation, punishment has also been prescribed.

Right to Privacy in India

In *A.K. Gopalan v. State of Madras*,[3] the Court literally interpreted Article 21, and held that every law prescribed by the State should be deemed to be reasonable. The court refused to read due process as a part of Article 21 of the Constitution of India. In *M.P. Sharma v. Satish Chandra, District Magistrate, Delhi*,[4] the Supreme Court, Eight Judges Bench, relied upon the *A.K. Gopalan's* construction i.e., each provision contained in the part on fundamental rights as embodying a distinct protection. The Supreme Court said that a power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.

In the case of *Kharak Singh v. State of UP*,[5] (Six Judges Bench) the Supreme Court held that domiciliary visits at night violated one's right to private home. But the Court did not recognise right to privacy as a fundamental right to life and personal liberty. In *Govind v. State of MP*,[6] the Court held that only

1 Article 5 of the General Data Protection Regulation 2016.
2 Case C-131/12, CJEU Grand Chamber, decided on May 13, 2014.
3 AIR 1950 SC 27.
4 1950 SCR 1077.
5 AIR 1963 SC 1295.
6 1975 SCR (3) 946.

compelling interests of the State can restrict right to privacy. In *Malak Singh v. State of Punjab*,[1] the court recognised right to privacy against the surveillance powers of the State.

In *People's Union for Civil Liberties v. Union of India*,[2] the Supreme Court held that wiretapping is a serious invasion of an individual's privacy. In *District Registrar and Collector v. Canara Bank*,[3] the court struck down Section 73 of the Indian Stamp Act 1899 as amended by the Andhra Pradesh Act (17 of 1986) as permitting an overbroad invasion of private premises or the homes of persons in possession of documents in a power of search as seizure without guidelines as to who and when and for what reasons can be empowered to search and seize, and impound the documents. The Court held that the right to privacy dealt with persons and not places. The court, however, held that no right to privacy could be available for any matter which is part of public records including court records.[4]

In *Selvi v. State of Karnataka*,[5] the Supreme Court held that compulsory administration of any of the techniques, like narco-analysis, polygraph examination and Brain Electrical Activation Profile (BEAP) test, is an unjustified intrusion into the mental privacy of an individual.[6] It was also recognised that forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences.[7]

In *Shreya Singhal v. Union of India*,[8] the Supreme Court invalidated Section 66A of the Information Technology Act 2000. The court said that it conferred arbitrary, excessive and disproportionate powers on the law enforcement agencies. It violated online freedom of speech and expression.

In 2017, the Nine Judges Bench of the Supreme Court in *K.S. Puttaswami v. Union of India*,[9] unanimously held that right to privacy is a fundamental right to life and personal liberty under Article 21 of the Indian Constitution. In *Navtej Singh Johar v. Union of India*,[10] the Supreme Court held that LGBTIQ (lesbian, gay, bisexual, transgender/transsexual, intersex and queer/questioning) people have right to live with human dignity. They have right to personal autonomy

1 AIR 1981 SC 760.
2 AIR 1997 SC 568.
3 AIR 2005 SC 186.
4 *Ibid.*, p. 192.
5 2010 (4) SCALE 690.
6 *Ibid*., p. 783.
7 *Ibid*., p. 778.
8 AIR 2015 SC 1523.
9 (2017) 10 SCC 1.
10 (2018) 1 SCC 791.

over their sexual orientation. The Court held that Section 377 of the IPC violates their right to privacy. In *NALSA v. Union of India*,[1] the Court said that the State should protect transgender persons from any kind of social stigma.

Personal Data on the Social Networking Sites: An Analysis

Meaning and scope of the social networking site is not limited to few social media groups only. Its length and breadth has covered all the aspects of an individual's private life. In general sense, the social networking site is a virtual space where the individual users communicate with other; make friends; and make associations. However, currently, the individuals are using the digital platforms of the social media for infinite purposes, and the users share their personal information in abundance with these intermediaries. Social media sites provide the opportunities to everyone to develop the inter-personal relationships.[2] Facebook, WhatsApp, Instagram, Myspace, etc. are some of the most popular social media sites. The social media apps carry the entertainment and recreational utilities, including online gaming. PUBG and other internet gaming apps have astronomical number of users which include children, teenagers, adults and old persons. Increasingly, the social media groups have tremendous capabilities to impart education among all persons across the world. Like other online services, educational apps are accessible to all. The apps are cheap, user-friendly, and mesmerising that allure people to download them on their smart phones and other electronic devices. The users now utilise these social media platforms for shopping and business purposes also.

Online shopping through social media platforms is in vogue. Options of buying food, grocery or other necessary items through online portals fascinate every person to create digital profile. Cab services *via* social media apps enable the users to reach their destination easily. Meeting people for dating and matrimony purposes on the dating apps is another feature of the new media. Health information is very crucial for developing medicinal sciences and pharmaceuticals; for fighting diseases; for diagnosis and prognosis; and so on. Social media sites provide platforms to fitness wearables, which are capable of collecting vast amount of health information upon the users. Digital money

1 AIR 2014 SC 1863.

2 Danah M. Boyd and Nicole B. Ellison, "*Social Network Sites: Definition, History, and Scholarship*", JOURNAL OF COMPUTER-MEDIATED COMMUNICATION, Vol. 13, No. 1, October 2007, pp. 210-230, https://doi.org/10.1111/j.1083-6101.2007.00393.x provides that, "*We define social network sites as web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. The nature and nomenclature of these connections may vary from site to site*".

running through social media apps enables the users to make financial transactions without touching any tangible money. Mutual friends share digital money to help out each other. Family members remain connected through electronic money apps. During the Coronavirus Pandemic, the use of all these social media apps has surged. In order to get the home delivery of all the basic necessities and to observe the social distancing rules, the individuals have become totally dependent upon the social media apps.

However, easy accessibility to the astounding capabilities of the social media apps demands excessive personal information of the users. The trade-off is that the social media apps want the complete control of the users' electronic devices including smart phones, laptops, iPads, computers, smart televisions, smart watches, smart Alexa, smart fitness wearables, etc. Unless the users give consent to the absolute terms and conditions of the apps developers, they would not be able to download them on their devices. Mere downloading of the social media apps means that the apps developers can now have an easy access to the users' call logs, call records, text messages, email, friends, associations, daily activities, web history, location, personal photos and videos, banking information, credit details, political ideology, religion, race and so on. This is disproportionate accumulation of the individuals' personal information. There is no transparency in the use of the personal information. The social media apps use the personal information for the unintended purposes without taking any explicit consent from the users. Personal data is valuable for the big corporate and manufacturers. They process the personal information in order to sell their products to the targeted individuals. Currently, the big data companies are capable to construct every individual's behaviour and choices, which will serve the ends of the big corporate. The demand and supply would not be consumer-oriented. Rather it will be decided by the manufacturer. Price-fixing by the big data companies negates the freedom of competition. Humans would be treated as a means to achieve the manufacturers' market goals. It is a violation of human dignity, which is an end in itself.

Cyber bullying, cyber stalking, internet trolling, cancel culture, phishing, identity theft, etc. are on rise because the users' personal information on the social media apps is not being protected. Indubitably, freedom of speech and expression in the public interest includes critical evaluation of an individual on the internet sites. But it should be balanced against the individual's right to privacy and access to justice. Cyber bullying, internet trolling and cancel culture is a disproportionate treatment of an individual's wrong. If the individual has committed a wrongful act or wrongful omission, the judgment will be delivered only by the justice system, and not through the extra-judicial modes. On the contrary, discussing the individual's case on the internet without any sense of social responsibility smears reputation and violates his or her right to fair trial.

State is under the positive obligation to protect the individual users' personal information and privacy against the cyber abuse, including online sexual offences. The victims of cyber abuse should have right to access to an independent redressal agency, which has sufficient powers to solve the crime.

Moreover, totalitarian regimes use the personal data, which has been collected by the digital intermediaries, for the purposes of their mass surveillance programs. By passing strict laws, the governments compel the social media sites and internet service providers to retain the individuals' personal data for longer period of time, and to provide them the easy access to their databases. Tik Tok has been accused of sharing the users' personal data with the Chinese government. For security reasons, India has banned Tik Tok along with other China-based apps. Following India's decision, President Donald Trump has also issued an executive order that prohibits the citizens from using Tik Tok in the United States. The order would stop the business of Tik Tok in their territory. Security reasons and the data privacy issues are the reasons for the executive order. The mass surveillance programs that collect meta-data upon the whole population allow the governments to know about an individual's most sensitive information including his or her thoughts and emotions. It affects the individual's freedom of speech and expression. The individual would be afraid of saying and of thinking anything against the government's decisions. Mass surveillance has the potential to destroy the basic values of democracy. Religious and sexual minorities experience the worst treatment in the big brother society.

Conclusion

Mass surveillance violates the basic principles of rule of law. It does not value principles of checks and balances and judicial review. Rule of law demands the prior authorisation of the secret surveillance by the independent body or judicial body, the provision enabling post-surveillance judicial review, the right to notify the victim of unlawful surveillance, and the right to compensation to the victims. However, surreptitious surveillance techniques can easily avoid the prior and post judicial or independent oversight, and in almost all countries of the world, the power to review the use of invisible means of surveillance is being exercised by the executive only. It is a paradox. How can one branch of executive review the other branch of executive? It is violation of principles of natural justice including rule against biasness.

Fake news and hate speech on the social media are tearing the fabric of the social solidarity and the democracy. Cambridge Analytica showed the world how the social media can easily manipulate the opinion of the individuals' right to vote. In developing nations, where the primary democratic institutions, including education, health, media and civil society, are weak, such kind of manipulation would be disastrous. Online freedom of speech is not absolute.

Spreading fake news is a cyber-offence. Online media can be restricted by the State on the basis of reasonable grounds. State can intervene into an individual's use of social media to pursue legitimate aims, including the protection of the public interest and the democratic standards. But the intervention should be in accordance with the rule of law. Social media has developed some community standards to remove the online content that promotes hate speech. Court's order can also compel the social media site to remove the online content. But judicial review of the removal of the online content is the rule of law.

Democratisation of the Big data needs to be done on the lines of the constitutionalism and basic structural principles. It will fix the accountability and transparency in the processes of the collection and use of the Big data. Reasonable expectation of privacy cannot be sold out just to receive better goods and services. The welfare State needs to play its positive obligation to ensure the protection of the individuals' personal information against both public and private abuses. Surveillance capitalism should be tackled by the State. Human dignity is inviolable. Big data cannot be allowed to make the humans only as a means to achieve the *so-called world's development model* that gave two world wars and coronavirus pandemic. Human dignity is an end in itself.

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REFLECTIONS OF DHARMASASTRA IN NARRATIVE TRADITIONS OF INDIA: A LESSON FOR MODERN CONSTITUTIONAL CULTURE

Sopan Shinde[♣]

Abstract

The Indian narrative tradition, in its variety of textual, oral, and performative forms of discoursing in Indian culture, has deep interconnection with Sastras in general and Dharmasastra in particular. The dissemination of values, ethics, and principles imbedded in Dharmasastra has been central preoccupation of this narrative tradition. As a result, they had successfully evolved a legal culture in consonance and compatibility with jurisprudence in vogue during their development as cultural artefacts of Indian society. So deep into the ordinary and illiterate populace was the penetration of the values and principles of Dharmasastras that the ordinary people spoke in its vocabulary while resorting to it in resolving the mundane complexities of life. As India switched to the western rights centric legal framework adopting a constitutional democracy post-independence, the Indian society has been in the process of adopting a constitutional culture, a difficult task for any constitutional democracy to perform. Do the cultural narrative traditions or artefacts have a path to show in this direction? This paper analyses the role of Varkari Kirtan; one of the narrative traditions from Maharashtra and a live performance consisting of oral and aural rendering of poetry of saint poets; in disseminating the legal culture in consonance and compatibility with Dharmasastra.

Keywords: Legal Culture, Constitutional Democracy, Constitutional Culture, Narrative Tradition, Varkari Kirtan.

Introduction

Drawing a connection between law and culture, Soli J. Sorabjee writes in his article titled 'A Rule of Law Culture', "*The true foundation on which the rule of law can rest is its willing acceptance by people so that it becomes part of their own way of life. Therefore, we should strive to instil the rule of law temperament and culture at home and in educational institutions.*"[1] Culture is a complex phenomenon and amalgamates several aspects of a given human society or a group. As Justice Mukul Mudgal has rightly pointed out, "*Meaning of culture could vary from love of the ethnic, fondness for classical music and dance, pursuit of literature, propagation of our traditional fine arts abroad,*

♣ Assistant Professor of English, Maharashtra National Law University, Nagpur, e-mail: sopan@nlunagpur.ac.in.

1 Soli J. Sorabjeeh, "*A Rule of Law Culture*", THE INDIAN EXPRESS, Tuesday, September 22, 2015, ttps://indianexpress.com/article/opinion/columns/a-rule-of-law-culture, (visited August 14, 2020).

behaviour in, and response to, day to day events, respect for elders, veneration for learning".[1] Justice Mudgal also goes further to connect law to culture stating that all laws and the law-makers reflect the cultural ethos of the society.

Both the instances of commentary on law and culture are academically poignant in themselves. However, their reference to culture needs to be put in perspective. They are not locating the internal legal culture i.e., legal culture of those 'inside' the legal system (lawyers and judges), but the external legal culture i.e. the legal culture of everybody 'outside' the formal and functional legal system. It is quite obvious though that these two forms of legal culture are not independent of each other. The external legal culture may seem more generalised a term. But when the apex court of the country makes a reference to Dworkin's notion of constitutional morality while insisting on adherence to the core principles of constitutional democracy, it is paving the way for a legal culture called as constitutional culture, which penetrates the values and principles of the constitution in the society. By definition, constitutional culture is more inclusive and direct reference to external legal culture. In the US context, Robert Post explicates constitutional culture as how the constitution is understood outside of courts; and Reva Siegel uses it to explain how constitutional understandings outside of courts get assimilated into judicial interpretation.[2] Friedman, defines legal culture to be encompassing public knowledge of and attitudes and behaviour patterns toward the legal system, their willingness to rely on the judicial system, and the general population's knowledge about the law.[3] Similarly, Jason Mazzone states,

> *The constitutional culture is said to include such things as the disposition of regular citizens to recognize and accept that they are governed by a written document,….the accepted belief that the governing charter is created by the citizenry; the knowledge that the charter is not timeless, but rather that the citizens may change it or revoke it under certain circumstances; and the understanding that until the charter is changed we are bound by it and required to go along with its ultimate results even though we are free to disagree with them.*[4]

Diagnostics of how far the constitution penetrates in the life of people that it is ratified by and for is the enquiry that the idea of constitutional culture raises. Therefore, the need for popular constitutional culture is strongly felt in the

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1 Mukul Mudgal, "*Law and Culture*", CENTRE FOR CULTURAL RESOURCES AND TRAINING, http://ccrtindia.gov.in/readingroom/nscd/ch/ch9.php, (visited on August 15, 2020).

2 Moshe Cohen-Eliya and Iddo Porat, PROPORTIONALITY AND CONSTITUTIONAL CULTURE, 1st ed. 2013.

3 Jason Mazzone, "*The Creation of a Constitutional Culture*", TULSA LAW REVIEW, Vol. 40, No. 4, 2005, pp. 671-698.

4 *Ibid.*

constitutional democracies.[1] However, creating a constitutional culture is believed to be not an easy task as Kaleeswaram Raj in his article titled 'Towards a Constitution Culture' quotes a remark of human rights lawyer K.G. Kannabiran.[2]

Whether cultural artefacts could penetrate legal culture effectively is the question this paper seeks answer. Both law as well as culture, whether constitutional culture or culture as a general notion, are complex in nature to arrive at definite definitions. Therefore, the interface could be scaled down on a modular level for a meaningful analysis of their interface which this paper attempts. It does not tread into the legal scholarship of the debates on precise meanings of law or the rule of law and an accurate definition of culture. Instead, it conducts a modular exploration and analysis of the interface between law and culture. It takes up a comparative analyses of a notion of legal culture in the contexts of the *Dharmasastra* on the one hand and constructional culture in modern India on the other. Culture being a complex amalgamation of several preoccupations of specific human societies, this paper limits itself to one of the many cultural products of medieval Maharashtra, namely the narrative and performative tradition of *Varkari Kirtan*[3] in its historical context to discover if such cultural artefacts are potent media for generating and disseminating legal or constitutional culture.

The analysis of a cultural artefacts in the context of legal or constitutional culture are prompted from some observations into ancient India's narrative traditions and their engagement with the body of *Dharmasastra*- Indian narrative traditions are invariably connected to the *Shastras* in general and the *Dharmasastra* in particular. In fact, it gives an impression that different narrative forms have been conceived to disseminate the knowledge of *Dharmasastra* or to penetrate its body of legal culture orally among the illiterate populace. The narrative texts include snippets from discourses contained in treatises such as *Arthashastra* and *Natyashastra*. For example, *Nitidharma*, instructions on polity and statecraft, are given on different occasions in the *Ramayana* and the *Mahabharata* indicating them to be the *Rajadharma*[4]. In fact, ethical virtues and polity are considered as integral to dharma according to

1 Lael K Weis, "Does Australia Need a Popular Constitutional Culture?", Ron Levy, et al. (eds.), NEW DIRECTIONS FOR LAW IN AUSTRALIA: ESSAYS IN CONTEMPORARY LAW REFORM, 1st ed. 2017, pp. 377-385.

2 Kaleeswaram Raj, "*Towards a constitution culture*", THE NEW INDIAN EXPRESS, Wednesday, June 12, 2019, https://www.newindianexpress.com/opinions/2019/jun/12/towards-a-constitution-culture-1989142.html, (visited on August 15, 2020).

3 The most common way to consume the songs of the *Sant* of Maharashtra is through a live performance, called *kirtan*. Though *kirtan* is a pan-Indian performance art, it as different in its many articulations as the traditions that use it. In Maharashtra, a *kirtan* is essentially a didactic public performance.

4 '*Rajdharma*' is a Sanskrit term for the duty of the rulers.

the great Indian epics.[1] These two great Indian epics as oral literary narratives, depict basic principles of the *Dharmasastra* which is the ancient body of Indian jurisprudence. The oral literary practice of the times is so clearly connected to the jurisprudence of its times that even the characters allegorically represent some of its founding principles. For Example, Yudhishthira as personifying and symbolizing *Dharma*. Indian narrative traditions including animal fables such as *Panchatantra*, stories of *Baital Pachisi* or *Vikram Aur Betaal,* the epics such as the *Ramayana* and *Mahabharata*, the *Puranas* containing several mythological narratives, and the several texts of *Sastras* propagate the principles embedded in *Dharmasastra*. As a result, ordinary people have reservoir of ideas and beliefs which they draw on while thinking or making simple or complex decisions of life. Rajeev Dhavan summarises these ideas as:

> *The Dharmasastra of India seeks to portray and influence the ideology of everyday life of the Hindus and other communities. Located in spiritual literature, it, nevertheless, concerns itself with the nature of civil society. Neither the edicts of a king nor the pronouncements of judges or juriconsults, it authoritatively pronounces on the legal relationship between persons inter se and the state while diluting the differences between legal and moral obligation.*[2]

Because the cultural artefacts are varied and complex, this paper chooses *Varkari Kirtan* as an oral narrative tradition of Maharashtrian culture, which lives on even today, as a single cultural artefact for the analysis of its connection with the legal culture and legal discourse of the times i.e., *Dharmasastra*.

Concept of *Varkari Kirtan*

Kirtan is known in Maharashtra as a dance-drama performance of a sermon interspersed with stories, songs, and music. It explicates the literature to illiterate masses while simplifying it with entertainment and instruction. It has been accepted as one of the *Navidha Bhaktis* (nine forms of devotion to Lord).[3] In this performance tradition, *Varkari Kirtan, Ramadasi Kirtan*, and *Rashtriya Kirtan* are major forms of *Kirtan. Varkari Kirtan* among them is the most prevalent category and a popular form of devotional performance in *Varkari Samraday* that is popular in the Western Maharashtra even till date. *Varkari Samraday* is a *Bhakti* cult of India which has its origin in Vedas. This cult has created a great impact on the life style of people in the region due to its

1 Dhananjay Singh, FABLES IN THE INDIAN NARRATIVE TRADITION: AN ANALYTICAL STUDY, 1st ed. 2011, pp. 55-79.

2 Rajeev Dhavan, "*Dharmasastra and Modern Indian Society: A Preliminary Exploration*", JOURNAL OF THE INDIAN LAW INSTITUTE, Vol. 34, 1992, pp. 515-540.

3 Pathak Yashwant Tryambak, "*Kirtan Samnsta_Udgam Va Vikas*", DEPARTMENT OF MARATHI, SAVITRIBAI PHULE UNIVERSITY OF PUNE, 1978, http://hdl.handle.net/10603/153738, (visited on April 15, 2018).

simplicity and inclusiveness.[1] Its origin could be traced back to the thirteenth century. It was established by Sant Janeshwar as a shift from *Jana* (Knowledge) based on *Bhakti* (Devotion) to God. Sant Janeshwar, himself a poet and writer, translated the Gita into a colloquial language and also wrote poetry in the same language that was simple and rustic for the downtrodden to understand. This shift from *Sanskritik* tradition gave a way to sporadic upsurge of poetry of the downtrodden. As a result, a number of people took to sainthood from *Shudra* castes, wrote poetry and gave sermons in the vernacular form of Marathi.[2]

Nonetheless, the vernacular literature remained inaccessible to a large number of downtrodden people from *Shudra* and *Vaishya* castes and women in general, because literacy was meagre in this section of the society. Therefore, *Varkari Kirtan* was devised as a medium of simplification and explication of this *sant* poetry in vernacular varieties of language. Sant Namdev is considered the first *Kirtankar* in Marathi context.[3] He was himself from a *Vaishya* community of tailors and a contemporary of Sant Janeshwar, who took the lead role in establishing *Kirtan* as a means of providing the illiterate masses an access to literature and *Bhakti*. In fact, all *sant* Poets are credited as great *Kirtankars* and they perform *Kirtan* as a form of *seva* (service) to the audience and God. They also believe in performing it for free, charging no fees to the organisers; this faith is diluted in the modern times though.

Christian Lee Novetzke has shown in his research how *Kirtan* performance mediates between literary and orality. He advocates that instead of harping over this distinction under the influence of post-modernistic thought we should value the relationship between performance and permanence. According to him, *Varkari Kirtan* is the most common way of consuming the songs of the *sants* of Maharashtra. It is didactic public performance with a clear moral or political theme. There are often stories about lives and experiences of *sants* (hagiographies) that go along well with the selected *abhang*. One of the important aspects that Novetzke highlights is that the *Kirtankar* as a link between text and orality. He treats performing *Kirtan* as a profession with *Kirtankar* as a jack-of-all-trades, who maintains information of his geographical area in a journalistic style which his reflected in notebooks maintained in achieves.[4] Though this academic work restricts to orality and *textuality*, it reflects on the role of *Varkari Kirtan* as politically and ethically didactic apart from harnessing equality in terms of access to knowledge in texts, spiritual

1 Ingale Sudhir D., "*Impact of Saint Janeshar Palkhi Procession on Route Region: A Study in Tourism Geography*", DEPARTMENT OF GEOGRAPHY, SHIVAJI UNIVERSITY KOLHAPUR, 2007, http://hdl.handle.net/10603/140680, (visited on April 17, 2018).

2 Christian Lee Novetzke, "*Note to Self: What Marathi Kirtankars' Notebooks Suggest about Literacy, Performance, and the Telling Performer in Pre-colonial Maharashtra*", Fracesca Orsini and Katherine Butler Schofield (eds.), TELLINGS AND TEXTS MUSIC, LITERATURE AND PERFORMANCE IN NORTH INDIA, 1st ed. 2015, p.172.

3 *Ibid.*

4 *Ibid.*, pp. 169-175.

discourses, temples, and thereby access to God that the contemporary people valued.

Varkari Kirtan has sustained as a form of art through the ages and remains a popular folk art in Maharashtra with its inherent structure being maintained though centuries. There are several *Kirtankars* throughout Maharashtra and they relate the literature of saint poets to the modern literate as well as illiterate rural population that attends to it as a form of *Bhakti*. However, the literary tradition has not paid much attention to this art though there is inherently a classical aesthetic pattern in it. The modern art and literary tradition has moved away from these traditions and borne influences of the western artistic traditions while the local art forms remaining unexplored form the literary and artistic aesthetics point of view. This literary movement of *Bhakti* tradition was all-inclusive in terms of caste and class focusing on access to knowledge and devotion to God. Therefore, this revival has a natural focus on social justice which makes it relevant in the modern context of Human Rights discourse on liberty, equality and fraternity.

The main purpose in the performance of *Varkari Kirtan* is *nirupan* (explication) of a selected *abhang* (a *sant* poem). The *nirupan* is done in a systematic manner while appreciating the layers of meaning of the selected *abhang* while giving references to other *abhangs* of the same *sant* poet or others. References are also made to the *Vedas*, *Puranas*, *Shastras*, the *Bhagwat Gita*, the *Janeshwari*, and hagiographies of *sant* poets. These references are given with the aim of establishing the credibility of the interpretations the *Kirtankar* is giving. They serve as another opportunity to touch upon literature that *Varkari Sampraday* considers sacred. *Varkai Kirtan* follows a set pattern and *Kirtankars* do not deviate from the established pattern. In order to explore the aesthetic values and a framework, it is pertinent to discuss the physical setting and inherent pattern of *Varkari Kirtan.* There is a *Kirtankar* standing at the centre with *bhajnis* (singers) behind him in a semicircle with *tals* (brass cymbals) around their necks. Between the audience and the audience are *murdung* (a two sided drum that works similar to *tabla*), a *vina* player, and a harmonium player, who accompany the *bhanjnis* and *kirtankar* in recitations of *abhangs.* The audience participate in singing while clapping in the rhythms made by *tals*. The setting itself keeps the audience completely engaged in the process of *nirupan* and bhakti.

There are two main sections of *Varkari Kirtan* and they are known as *Purvanga* and *Uttaranga*, which could be grossly translated as first phase and second phase respectively. *Purvanga* is full of singing, music and dance and *Kiratankar* enters the stage in the later part of *Purvanga.* The *Uttarang* is the core of *Varkari Kirtan* and it is interspersed with songs and stories of *sants* of *Bhakti* tradition of Maharashtra. Thus, it could be said that it is a sermon interspersed with singing and references from other literature including *Shastras*. It starts with the *Kirtankar* reciting a selected *abhang* without music. It is more like reading a poem aloud. Explication or explanation of the *abhang* remain to be the central preoccupation of *nirupan*. In the *nirupan* of *Uttarang*

section of *Varkari Kirtan, Praman* (demonstration for substantiation) and *Drushtant* (precedent or exemplification) are two major interpretative and literary elements.

Dharmasastra and Narrative Tradition of *Varkari Kirtan*

The *Bhakti* movement of *Varkari Sampraday* propagated liberty, equality, and fraternity on everyday basis which Christian Lee Novetzke terms as a 'the Quotidian Revolution' in his book with the same title. According to him, the thirteenth century upsurge of vernacular Marathi literature was a momentous yet enigmatic period in Indian history. This literary development in Marathi created space for social justice. It challenged the social inequities of language, caste and gender.[1] It needs to be observed here that *Varkari Kirtan* played a central role in creating this field of debate and pulled the people of all castes and classes together; *aathra pagad jati* (eighteen sub castes) as they say in the vernacular language. This narrative tradition disseminated the knowledge enshrined in *Dharmasastras* in the following ways:

Access to Knowledge in Sanskrit Texts

The thirteenth century nascent public sphere was transformed by the movement of vernacularisation. Novetzke defines vernacularisation as, "*the strategic use of everyday life within a social, political, artistic, linguistic process in which the quotidian (ordinary/everyday) expands at the centre of a given region's public sphere.*"[2] The artistic and linguistic use of Marathi expanded the reach of *Sastra* contents. It made it possible for illiterate lower caste people to get closer to texts. For example, Janeshwara offered a precis and commentary; a quasi-translation of the *Bhagwad Gita* that remained in the custody of upper caste learned men alone. Therefore, the vernacularisation made knowledge accessible not only to the men of lower castes but also to the women of upper as well as lower castes. *Varkari Kirtan* further expanded the movement of vernacularisation *via* oral rendering the new literature in Marathi. It became an art that challenged the cosmopolitan aesthetics of Sanskrit tradition and ventured into creating simpler form of oral aesthetics to make the 'sacrosanct' knowledge a part of everyday experience for the masses. Thus, it could be said that *Vakari Kirtan* was instrumental in expanding the horizons of 'access to knowledge' which was objective set by the founding fathers of *Varkari Sampraday* (sect).

Access to Temple/ God and Right to Bhakti

Sant Chokhamela's pleadings to gain access to the temple of Vitthala in Pandharpur are well known throughout Maharashtra. Temples in India have remained under the control of upper castes and the concept of 'impurity due to inherited labour' and 'stigma of being born a lower caste due to *papas* (sins)' have always provided the most convenient justifications for upper castes to keep

1 Christian Lee Novetzke, THE QUOTIDIAN REVOLUTION: VERNACULARIZATION, RELIGION, AND THE PREMODERN PUBLIC SPHERE IN INDIA, 1st ed. 2017, pp. 1-2.

2 *Ibid.*, p. 8.

the lower castes on periphery of villages that are built around the temples and *agraharams* (upper caste Brahmin houses).[1] The bhakti movement of *Varkari Sampraday* did not aim to bring a radical change that will destabilize the socio-political structure of the political order of the thirteenth century. It was not in any way the same as modern democratisation.[2] On the contrary, using literature, *Bharud* (another form of performing sant poems) and *Varkari Kirtan* as means of mobilisation, access to God and Right to Bhakti were personalised. It was a common scene in the public sphere to have small gatherings around the learned person, who transliterated and translated the highly upheld edicts of *Sastra* to men and women of lower castes and classes in their own language.[3] *Varkari Kirtan* made this transliteration and translation of knowledge and people's Right to *Bhakti* an everyday reality rather than some oral or written promise. In this way, access to God and Right to *Bhakti* became the quotidian reality for the downtrodden masses.

Education and Emancipation of Masses (Lokshikshan)

Varkari Kirtan preaches ethics and morality embedded in *Sastras* and religious texts. Since the time of its origin, the literate of *Varkari Samraday* as well as *Varkari Kirtan* have focused on salvation of human soul or liberation from the worldly life which was its primary objective. It challenged all social differences of caste, class and gender that came in the way of this noble cause of the downtrodden population. It was characterised as the critique of cultural inequity in relation to religious salvation.[4] The members of all castes and classes that flooded into the membership of this sect were educated to accept equality before God. It is common in *Varkari Kirtan* to hear the *dristanta*[5] about a humble low caste person moving much ahead of the arrogant high class one. Stories of such figures as Gora Khumbhar, a gardener called Sawata Mali, Kanhopatra who was a dancing girl, and the most poignant one is Chioka Mela feature in *Varkari Kirtan* to emphasise this truth of human existence.[6] *Varkari Kirtan* imprinted this on the consciousness of the masses *via* literature and its performance.

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1 André Béteille, CASTE, CLASS, AND POWER: CHANGING PATTERNS OF STRATIFICATIONS IN A TAJNJORE VILLAGE, 3rd ed. 2012, p. 21.

2 Christian Lee Novetzke, THE QUOTIDIAN REVOLUTION: VERNACULARIZATION, RELIGION, AND THE PREMODERN PUBLIC SPHERE IN INDIA, 1st ed. 2017, pp. 10-11.

3 *Ibid.*, pp. 1-2.

4 *Ibid.*, pp. 1-3.

5 *Drushtant* is the used to make the principles and tenets that come in the process of *nirupan* more practical. It is generally a story from Indian mythology, *sant* hagiographies, and sometimes the *Kirtankar* himself makes up a story that is suitable for the situation.

6 Christian Lee Novetzke, "*Namdev Entry in Brill's Encyclopedia of Hinduism*", Knut A. Jacobsen (ed.), BRILL'S ENCYCLOPEDIA OF HINDUISM ONLINE, 2012, https://www.academia.edu/29185544/Namdev_entry_in_Brills_Encyclopedia_of_Hinduism, (visited on April 21, 2018).

Exercising Equality and Fraternity as Ethics

Equality and fraternity were central contours of *Varkari* literature and *Kirtan.* Janeshvari, the golden milestone in the *Bhakti* movement, itself preached an essential lesson that all are equal and the social distinction is irrelevant to the mechanisations of cosmic *dharma*. This message in itself is conveyed in the language of distinction or the language considered of a lower status by upper caste and class caretakers of dharma. In fact, Janeshwara envisioned a public sphere for religious emancipation to be egalitarian in the first place. He rejected caste and gender distinctions and advocated social equality. As far as goes the caste and inequity, Novetzke observes Janeshawra saying, "*Even if man is walking along the road and meets a pure woman or an untouchable, he touches neither, remaining steadfast in his attention*." It means that a pure mind holds a upper caste and lower caste person in the same way. In the same context the concept of cleanliness and impurity of professions is also challenged.[1] This clearly indicates the challenges the vernacular literature of *Varkari Samraday* challenging the preconditions that were set by upper caste custodians of knowledge for ages. *Varkari* literature is full of such compositions that challenge the set notions in the contemporary society and *Kirtankars* recite such selections to emphasise equality and fraternity. It is consciously related to character formation and ethics of the one who takes to the tradition of *Bhakti*; its remains to be one of its principal teachings.

Through vernacularisation, *Varkari Kirtan* practices a form of social aesthetic having rights of downtrodden masses at its centre. It exhibits that the social aesthetics of literature and art are at a mature stage of practice. In an artistic sense, it does combine singing, music, dance and methods of literary appreciation, but its central preoccupation remains *Bhakti* or devotion, education of masses, and equality before God; thus, not only does it penetrate the teachings of *Dharmasastra* among the illiterate population, but goes back to the *Sastras* themselves with modifications in contents and methods of delivery among the people. It perseveres in its noble aim while disseminating the knowledge jurisprudence embedded in all literary and the philosophical compositions from the ancient past to the contemporary times. With instrumental music, dance, singing, storytelling or narration of hagiographies it simplifies *abhangs* or poems and makes their meaning and message accessible to all irrespective of caste, class and gender. However, the message is always connected to *Dharmasastra*, the jurisprudence. It becomes a process for the furtherance of legal culture of its times.

As far as textual analysis and deciphering of meaning is concerned, *Varkari Kirtan* does it in the most lucid manner, in the accompaniment of music and without making it a monotonous activity. The process remains so simple that even the illiterates have been involved and engaged in the *nirupan* effectively. It plays an important role in propagation equality among the variety of unequal

1 Christian Lee Novetzke, THE QUOTIDIAN REVOLUTION: VERNACULARIZATION, RELIGION, AND THE PREMODERN PUBLIC SPHERE IN INDIA, 1st ed. 2017, pp. 262-263.

people in the sense of socio-economic reality. While maintaining equilibrium in the society and avoiding to be radical in the modern sense, *Varkari Kirtan* contributes in the journey of attaining social justice. As this performance tradition remains popular in Maharashtra till date, it could be looked at as media of resolving communal and caste based conflicts that the state witnesses every now and then. If the social equality and justice is to be achieved, its sense has to ride on the consciousness of the entire population and become their cultural practice. Narrative traditions such as *Varkari Kirtan* have proved over centuries their capability of making these normative ideas of liberty, equality and fraternity experiential in nature.

Conclusion

Varkari Kirtan as one of the performative cum oral narrative traditions disseminates the values embedded in *Dharmasastra*. The four kinds dealt with; namely access to knowledge in Sanskrit texts, access to temple/ God and right to *bhakti*, education and emancipation of masses, and exercising equality and fraternity as ethics; may not seem relevant to the members of modern society. However, the historical period in which this narrative art form was inaugurated and evolved over centuries, social consciousness in the public sphere reflected these demands more prominently than the individualistic right consciousness of today's society. If the knowledge in *Sastras* remained restricted within the walls of Brahman monasteries, the cultural artefact of *Varkari Kirtan* built its understanding outside into public sphere making it accessible in vernacular languages and in oral form for those who were thirsty for it on the periphery of the society in that historical space. Further, this vernacular public sphere and its deliberations became acceptable over a period of time and got assimilated into the body of *Sastras* themselves. Hence, *Varkari Kirtan* as a cultural artefact reflects the power of cultural artefacts in general to generate and disseminate legal culture in consonance with the philosophy of law prevalent during its practice and propagation. Though it will be an overstatement to say that the cultural artefacts could be employed successfully in generating, disseminating, and penetrating the constitutional culture successfully, their study to this effect seems to be a promising area in relation to the need for constitutional culture in constitutional democracies.

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LIAISON OFFICE IN INDIA AND ITS TAX IMPLICATIONS

Chamarti Ramesh Kumar[♣]

Abstract

Foreign companies establish a Liaison Office in India with the permission granted by the regulatory authorities to explore the market and channelise the information. Due to the difficulties in identifying the core activities and ancillary activities performed by the liaison office it is pertinent to deliberate on the substantial question of tax implication of Liaison Office in India. Therefore, the paper examines the effect of interface between the Income Tax Act 1961 and the Double Taxation Avoidance Agreements along with the taxing implications of Liaison Office. Secondly, it analyses the judicial response towards understanding the preparatory and auxiliary activities. Finally, the paper highlights the recent developments at global level with reference to the measures taken by Organisation for Economic and Cooperation Development for elimination of profit shifting.

Key Words: Liaison Office, Permanent Establishment, Preparatory and Auxiliary Character, Artificial Avoidance, Anti-Fragmentation

Introduction

It is a usual practice of foreign companies to establish a liaison office in India for exploring the Indian market. It basically promotes the business activities of the foreign company and acts as a channel of communication for the foreign company. Liaison Offices are not permitted to earn income. They are required to survive on the inward remittances received from the foreign company. Establishment of a liaison office in India is regulated by the provisions of Foreign Exchange Management Act 1999 read with regulations issued by the Reserve Bank of India from time to time.[1] Liaison Office means[2] "*a place of business to act as a channel of communication between the principal place of business or Head Office or by whatever name called and entities in India but which does not undertake any commercial /trading/ industrial activity, directly or indirectly, and maintains itself out of inward remittances received from abroad through normal banking channel*". Foreign Insurance companies

♣ OSD (Academics), Maharashtra National Law University, Nagpur, e-mail: rameshnlu@gmail.com.

1 Section 6(6) of the FEMA reads as: "*Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business*".

2 Regulation 2(e) of the Foreign Exchange Management (Establishment in India of a Branch Office or a Liaison Office or a Project Office or any other Place of Business) Regulations 2016.

can also establish a Liaison Office after receiving the permission from the Insurance Regulatory and Development Authority and Foreign Banks after obtaining the necessary approval from Department of Banking Regulation. Liaison Office is permitted to carry out following activities in India: (i) Representing the parent company/group companies in India; (ii) Promoting export/import from/to India; (iii) Promoting technical/financial collaborations between parent/group companies and companies in India; and (iv) Acting as a communication channel between the parent company and Indian companies.[1]

The examination of the tax implications which arise to a liaison office of a foreign company in India requires contemplation on a substantial question i.e. whether a Liaison Office leads to a taxable presence of a foreign company in India? To understand this, it is essential to appreciate the interface between the provisions of the Income Tax Act 1961(the Act) and Double Taxation Avoidance Treaties (DTAAs) which India has entered with various countries.

Interface between Income Tax Act 1961 and Double Taxation Avoidance Agreements

Section 5(2) of the Act[2] deals with the tax incidence of the Non-resident and Section 9(1)(i) of the Act deals with the instances where Income is deemed to accrue or arise in India.[3] Section 5 also refers to deemed income and Section 9 can always be applied to such income. Therefore, once income that is deemed to accrue or arise is made chargeable under Section 5 of the Act, then the provisions of Section 9 will also be applicable if the deemed income is covered by various clauses of Section 9 of the Act.[4] The Liaison office would *prima facie* constitute business connection, but if it continues its activities only to what is permitted to liaison office under the regulations of Reserve Bank of India, subject to which a non-resident is permitted to open a liaison office in India, there could be no accrual of income in India from its operations.[5] The effect of

1 Regulation 4(b) of the Foreign Exchange Management (Establishment in India of a Branch Office or a Liaison Office or a Project Office or any other Place of Business) Regulations 2016.

2 Section 5(2) of the Income Tax Act 1961 reads as: "*Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which-*
(a) is received or is deemed to be received in India in such year by or on behalf of such person; or
(b) accrues or arises or is deemed to accrue or arise to him in India during such year".

3 Section 9(1)(i) of the Income Tax Act reads as: "*all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India*".

4 Arvind P. Datar (rev.), J.B. Kanga and N.A. Palkhivala, THE LAW AND PRACTICE OF INCOME TAX, 11th ed. Vol. 1 2020, p. 320.

5 S. Rajaratnam (rev.), Sampath Iyengar, LAW OF INCOME TAX, 12th ed. Vol. 2 2016, p. 1682.

Explanation 2[1] to Section 9(1)(i) is that liability arises where the liaison office concludes contracts of sale by resident to a non-resident.

Section 90 of the Income Tax Act 1961 enables the Central Government to enter into agreements with other countries for granting relief from double taxation and for exchange of information. So far India has entered into nearly 97 comprehensive Double Taxation Avoidance Agreements (DTAAs), 8 limited agreements, 5 limited multilateral agreements and 19 tax information exchange agreements. Article 7 of the OECD Model Treaty defines 'Business Profits'[2] and the concept of Business profits is similarly worded in almost all the DTAAs. The Business Profits of a non-resident enterprise are subjected to tax in India through its permanent establishment only. Permanent Establishment means a fixed place of business through which the business of the enterprise is wholly or partially carried on and includes a place of management, a branch office, an office etc., but excludes among others the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character. It should be noted that the wording of the Article 5 of OECD Model Treaty remained identical between 1977 and 2017, even if the concept of permanent establishment evolved considerably through several changes to the Commentary on Article 5 of the OECD Model.[3] The Supreme Court in the case of *Director of Income-tax (International Taxation) v. Morgan Stanley and co. Inc*[4] observed that:

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1 Explanation 2 to the Section 9(1)(i) of the Income Tax Act 1961 reads as: "*For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident*,-

(a) *has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident or habitually concludes contracts or habitually plays the principal role leading to conclusion of contracts by that non-resident and the contracts are- (i) in the name of the non-resident; or (ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that non-resident or that non-resident has the right to use; or (iii) for the provision of services by the non-resident; or…*

(c) *habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident*".

2 Article 7 of the OECD Model Treaty 2017 reads as: "*Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions*….".

3 Ola Ostaszewska and Belema Obuoforibo (eds.), Roy Rohatgi, International Taxation, 1st ed. Vol. 1 2018, P.135; B.J. Arnold, Article 5: Permanent Establishment, Richard J. Vann et al. (eds.) Global Tax Treaty Commentaries, 1st ed. 2014.

4 (2007) 162 Taxman 165.

> *The concept of PE was introduced in 1961 Act as part of the statutory provisions of transfer pricing by the Finance Act of 2001. In section 92F(iii) the word "enterprise" is defined to mean "a person including a PE of such person who is proposed to be engaged in any activity relating to the production....". Under the CBDT Circular No. 14 of 2001 it has been clarified that the term PE has not been defined in the Act but its meaning may be understood with reference to the DTAA entered into by India. Thus, the intention was to rely on the concept and definition of PE in the DTAA. However, vide Finance Act, 2002 the definition of PE was inserted in the IT Act, 1961 (for short, 'IT Act') vide section 92F(iiia) which states that the PE shall include a fixed place of business through which the business of the MNE (Multi National Enterprises) is wholly or partly carried on. This is where the difference lies between the definition of the word PE in the inclusive sense under the IT Act as against the definition of the word PE in the exhaustive sense under the DTAA. This analysis is important because it indicates the intention of the Parliament in adopting an inclusive definition of PE so as to cover service PE, agency PE, software PE, construction PE, etc*.

Further, in *Asstt. CIT v. E-Funds Funds IT Solution Inc*,[1] the Supreme Court held that it is the responsibility of the Revenue to establish that the assessee has a Permanent Establishment:

> *The Income Tax Act, in particular Section 90 thereof, does not speak of the concept of a PE. This is a creation only of the DTAA. By virtue of Article 7(1) of the DTAA, the business income of companies which are incorporated in the US will be taxable only in the US, unless it is found that they were PEs in India, in which event their business income, to the extent to which it is attributable to such PEs, would be taxable in India. Article 5 of the DTAA provides for three distinct types of PEs with which we are concerned in the present case: fixed place of business PE under Articles 5(1) and 5(2)(a) to 5(2)(k); service PE under Article 5(2)(l) and agency PE under Article 5(4). Specific and detailed criteria are set out in the aforesaid provisions in order to fulfil the conditions of these PEs existing in India. The burden of proving the fact that a foreign assessee has a PE in India and must, therefore, suffer tax from the business generated from such PE is initially on the Revenue*.

1 (2017) 251 Taxman 280.

The Income Tax authorities quite often contented that under the cloak of this preparatory and auxiliary character, the foreign companies carried out number of activities which amounts to business activities and income generated out of such activities shall be assessed to tax. In this backdrop the author examines some of the relevant judicial rulings for understanding the issues involved.

Judicial Approach

In Ikea Trading case[1] the applicant is a reputed brand name incorporated in Hong Kong and is a tax resident there. It established a liaison office in Delhi for purchase of goods in India for the purpose of exports. After considering the relevant material on record, the Authority on Advance Rulings, New Delhi held that, "*The applicant does not earn any income in India because its activities are confined to the purchase of goods which are exported by the Indian vendors to the applicant or its nominees…Thus, no income accrues or arises in India*".

In Nike Incorporation's case[2] the assessee, a tax resident of USA was a renowned brand in the field sale of sports apparel having associates and subsidiaries around the world. It arranges various brands of sports apparels for sale to customers for all its associates and subsidiaries around the world. In order to procure materials from the Indian manufacturers, the assessee opened a Liaison Office in India. The Liasion Office rendered its opinion about price and other issues on the sample of the apparels sent to the head office. The final decision on the price, quality, quantity to be shipped, amounts to be billed, etc., was done by the head office. The Liaison Office monitored the quality, time schedule and rendered its assistance in the dispatch of goods. No income has been generated by the Liaison Office and all expenses are met from the remittances received from USA. During the assessment proceedings the Assessing Officer held that the activities undertaken by the liaison office are in the nature of commercial activities and hence a portion of income shall be attributable to the activities in India. While affirming the order of the Tribunal the High Court of Karnataka held that:

> *The person who purchases the goods pays the money to the manufacturer, in the said income, the assessee has no right. The said income cannot be said to be an income arising or accruing in the Tax Territories vis-a-vis the assessee… However, under Section 9, all income accruing or arising whether directly or indirectly through or from any "business connection" shall be deemed to be accrued or arises in India. Now by Explanation 2 "business connection" has been explained which includes any business activities carried out by a person who acting on behalf of the non-resident as a habitual exercise in India. An authority to conclude Contracts on behalf of non-resident unless his activities are limited to the*

1 *In re, Ikea Trading (Hong Kong) Ltd.* (2009) 176 Taxman 344 (AAR-New Delhi).
2 *CIT (International Taxation) v. Nike Inc.* (2013) 34 taxmann.com 170 (Karnataka).

> *purchase of the goods or merchandise for the non-resident. If the said definition is read with Clause (b) of Explanation 1 to sub-section (1) of section 9 in the case of a non-resident, no income shall be deemed to accrue or arise in India to him whether directly or indirectly through or from any "business connection", which are confined for the purpose of export. If we keep the object with which the proviso to clause (b) of Explanation 1 to sub-section (1)(i) of section 9 of the Act was deleted, the object is to encourage exports thereby the Country can earn foreign exchange. The activities of the assessee in assisting the Indian manufacturer to manufacture the goods according to their specification is to see that the said goods manufactured has an international market, therefore, it could be exported. In the process, the assessee is not earning any income in India. If at all he is earning income outside India under a contract which is entered outside India, no part of their income could be taxed in India either under section 5 or section 9 of the Act.*

In Columbia Sportswear Company's case,[1] the applicant company was a tax resident in USA. It established a Liaison Office in Chennai for undertaking various activities in connection with purchase of goods in India. The Liaison Office was engaged in vendor identification, review of causing data, uploading of material prices into the Internal Product Data Management (PDM) system of the petitioner, vendor recommendation and quality control. It also monitors vendors for compliance with petitioner's policies, procedures and standards related to quality, delivery, pricing and labour practices. Considering the application, the Authority on Advance Rulings ruled that the Liaison Office would constitute a Permanent Establishment under Article 5 of India-USA Treaty and income is attributable to the Indian Liaison Office. While quashing the impugned order of the Authority on Advance Rulings the High Court of Karnataka held that:

> *The liaison office of the petitioner identifies a competent manufacturer, negotiates a competitive price, helps in choosing the material to be used, ensures compliance with the quality of the material, acts as go-between, between the petitioner and the seller or the manufacturer, seller of the goods and even gets the material tested to ensure quality in addition to ensuring compliance with its policies and the relevant laws of India by the suppliers. Therefore, it is of the view that the aforesaid activities carried on by the liaison office, cannot be said to be an activity solely for the purpose of purchasing the goods or for collecting information for the enterprise. We find it difficult to accept this reasoning…. That*

1 *Columbia Sportswear Company v. DIT (International Taxation)* (2015) 62 taxmann.com 240.

> *liaison office is established only for the purpose of carrying on business of purchasing goods for the purpose of export and all that activity also falls within the meaning of the words "collecting information*.

In Mitsui Company's case,[1] the assessee was a non-resident having its headquarters in Japan. During the assessment proceedings, it was noticed that the assessee established a Liaison Office in India duly permitted by the Reserve Bank of India which helped the assessee in finding new purchasers and sellers of goods and merchandise. The tribunal after considering the facts held that the Liaison Office cannot be considered as Permanent Establishment within the meaning of India-Japan DTAA. The High Court of Delhi dismissed the appeal made by the Revenue and observed that:

> *The onus was on the Revenue to demonstrate that Liaison Office of the Assessee was a Permanent Establishment within the meaning of Articles 5(1) and 5(2) of the DTAA. In other words, it was not enough for the Revenue to show that the Assessee had an office, factory or a workshop etc. within the meaning of Article 5(2) of DTAA. For the purpose of Article 5(1), the Revenue was required to show that such place was a fixed place of business through which the business of an enterprise is wholly or partly carried out. For the AYs in question, the Liaison Office of the Assessee was not in fact used for the purpose of business. It is here that Article 5(6) of the DTAA assumes significance. The use of facility solely for the purpose of search or display or for the maintenance of place for business solely for the purchases of goods or collecting information or for any other activity "preparatory or auxiliary in character" would take it outside the ambit of a Permanent Establishment*.

In the above case the revenue further preferred a special leave petition which was dismissed by the Supreme Court.[2]

In Jebon Corporation India's case ,[3] while dismissing the appeal of the assessee and relying on the findings of the tribunal, the High Court of Karnataka held that the activities carried on the by the assessee are beyond permitted liaison activities and amounts to commercial activities: hence, the liaison office shall be considered as Permanent Establishment according to Article 5 of DTAA between India and Korea:

> *The tribunal held that the activities carried on by the liaison office is not confined only to the liaison work. They are*

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1 *DIT v. Mitsui Co. Ltd*. (2017) 84 taxmann.com 3.

2 *DIT (International Taxation), New Delhi v. Mitsui and Co*. (2019) 111 taxmann.com 215.

3 *Jebon Corporation India v. CIT (International Taxation)* (2012)19 taxmann.com 119.

> *actually carrying on the commercial activities of procuring purchase orders, identifying the buyers, negotiating with the buyers, agreeing to the price, thereafter, requesting them to place a purchase order and then the said purchase order is forwarded to the Head Office and then the material is dispatched to the customers and they follow up regarding the payments from the customers and also offer after sales support. Therefore, it is clear that merely because the buyers place orders directly with the Head Office and make payment directly to the Head Office and it is the Head Office which directly sends goods to the buyers, would not be sufficient to hold that the work done by the liaison office is only liaison and it does not constitute a permanent establishment as defined in Article 5 of DTAA. In fact, the Assessing Officer has clearly set out that what was discovered during the investigation and the same has been properly appreciated by the tribunal and it came to the conclusion that though the liaison office was set up in Bangalore with the permission of the RBI and in spite of the conditions being stipulated in the said permission preventing the liaison office from carrying on commercial activities, they have been carrying on commercial activities*.

In GE Energy Parts Incorporation's case,[1] while answering the question of law with respect to existence of a fixed place Permanent Establishment of the assessee in India the High Court of Delhi held that:

> *It is clear that in the kind of activity that GE carries out, i.e. manufacture and supply of highly specialised and technically customized equipment, the "core activity" of developing the customer (identifying a client), approaching that customer, communicating the available options, discussing technical and financial terms of the agreement, even price negotiations, needed a collaborative process in which the potential client along with GE's India employees and its experts, had to intensely negotiate the intricacies of the technical and commercial parameters of the articles. This also involved discussing the contractual terms and the associated consideration payable, the warranty and other commercial terms. No doubt, at later stages of contract negotiations, the India office could not take a final decision, but had to await the final word from headquarters. But that did not mean that the India office was just for mute data collection and information dissemination*.

Recently, the Supreme Court considered the issue of preparatory and auxiliary activities of the liaison office for the first time in U.A.E. Exchange Centre's case[2]. The assessee in this case established liaison offices in India for

1 *GE Energy Parts Inc. v. CIT (International Taxation)* Delhi-I (2019) 101 taxmann.com 142.

2 *Union of India v. U.A.E. Exchange Centre* (2020) 116 taxmann.com 379**.**

extending the remittance services to Non-Resident Indians through which funds were remitted to the beneficiaries in India. The question for consideration was whether the activity undertaken by the liaison office in India of downloading the particulars of remittances through electronic media and printing cheques/drafts drawn on the banks in India, which, in turn, are couriered or dispatched to the beneficiaries in India, in accordance with the instructions of the Non-Resident Indian remitter amounts to specific exemption activity. The apex court took into account the business of the assessee and the approval from the Reserve Bank of India for analysing the preparatory and auxiliary activities and observed that:

> *No income as specified in section 2(24) of the 1961 Act is earned by the liaison office in India and moreso because, the liaison office is not a PE in terms of article 5 of DTAA (as it is only carrying on activity of a preparatory or auxiliary character). The concomitant is- no tax can be levied or collected from the liaison office of the respondent in India in respect of the primary business activities consummated by the respondent in UAE. The activities carried on by the liaison office of the respondent in India as permitted by the RBI, clearly demonstrate that the respondent must steer away from engaging in any primary business activity and in establishing business connection as such. It can carry on activities of preparatory or auxiliary nature only. In that case, the deeming provisions in sections 5 and 9 of the 1961 Act can have no bearing whatsoever*.

While reaffirming the judgment of the High Court of Delhi, the Apex Court analysed the expressions 'Preparatory' and 'Auxiliary' with the help of Black's law and Oxford dictionary meanings. Further, the Supreme Court opined that the term 'Permanent Establishment (PE)' under fixed place of PE as provided under Article 5(1) includes Liaison Office, read with Article 5(2) of the tax treaty, from where the activities are carried on by the taxpayer in India. However, Article 5(3) of the tax treaty is a non-obstante clause and contains a deeming provision to Clauses 1 and 2 of Article 5 that excludes a PE, if any of the prescribed activities referred to in Article 5(3) are effective and only subject to the essential functional test of the activities.

Conclusion

The Organisation for Economic Cooperation and Development (OECD)/G20's Base Erosion and Profit Shifting (BEPS) project has recommended a number of measures in Action Plan 7 in relation to the definition of Permanent Establishment in the OECD Model Tax Conventions and also Anti-Fragmentation rules to counter the aggressive tax planning measures adopted by the multi-national companies which results in Base Erosion and Profit Shifting. With the advancement of technology and business models, sometimes it is very difficult to identify the core activities and the activities by the exceptions. Article 5(4) of the OECD Model Tax

Convention were first introduced, the activities covered by these exceptions were generally considered to be of a preparatory or auxiliary nature.[1] Depending on the circumstances, activities previously considered to be merely preparatory or auxiliary in nature may nowadays correspond to core business activities. In order to ensure that profits derived from core activities performed in a country can be taxed in that country, Article 5(4) is modified to ensure that each of the exceptions included therein is restricted to activities that are otherwise of a 'preparatory or auxiliary' character.[2] Anti-fragmentation rules were also recommended under Action Plan 7 to counter the fragmentation of activities by business entities into small operations and to demonstrate that each of these activities are preparatory or auxiliary activities. To implement the measures recommended under the BEPS Project the countries have negotiated and signed a Multilateral Instrument (MLI). The MLI provides options for amending the 'Preparatory and Auxiliary' clause in the bilateral tax treaties. India also signed the Multilateral Conventions to implement treaty related measures to prevent base erosion and profit shifting.

The lack of a settled principle and guidelines regarding the 'Preparatory' and 'Auxiliary' test, the multi-national companies have gone for aggressive tax planning and taken undue advantage of this exemption by the splitting the core activities. Although, U.A.E. Exchange Centre's case is a significant judgment, but due to the nature of appeal it may not serve as a guiding principle. Of course, the ratio of the judgment has become the law of the land and offers some guidance to the taxpayers relating to the permissible activities of the Liaison Office. To sum up, because of the subjective nature of the issue involved the concept of 'Preparatory' and 'Auxiliary' will remain alive for litigation.

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1 Organisation for Economic Cooperation and Development, "*Executive Summary to Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7*", OCED/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, 2015, https://www.oecd-ilibrary.org/docserver/9789264241220-en.pdf?expires=1606308706&id=id&accname=guest&checksum=F682B1DD2ED017E4E0281C37310C8B10, (Visited on May 15, 2020).

2 *Ibid*.

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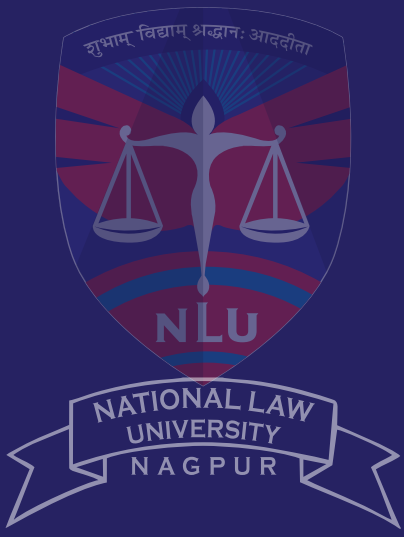

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