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EDITORIAL

In the midst of a global pandemic and political unrest, the need for good governance and regulation has become more apparent than ever. It is vital that we put humanity first and make sure that no one is left behind while the globe continues to struggle with these issues. With this focus, it is an honour to write this editorial comment on such a significant subject, which is the focus of the most recent issue of the RLR Issue XII, No. I & II

It is critical to consider inclusivity and diversity in leadership roles as we work towards effective governance. There has been improvement in getting more women in leadership roles in academic publications, according to recent data. However, there is still much work to be done to ensure that all voices are heard and represented in the decision-making processes. Moving from social cohesion towards the rise of the dawn of digital age, it would not be out of context to stipulate that contemporary era is grappled with various legal challenges and opportunities. The legal system has been obliged to adapt and evolve in order to deal with the novel difficulties that have emerged in the digital space as a result of how pervasive technological innovations have become in society.

Various constitutional issues requiring meticulous investigation have been part of the cohort of paper being selected for the publication. In this regard, it is pertinent to draw on scholarly sources to support arguments and provide insights into legal issues. It is also important to consider the role of the Constitution of India in shaping the issues and to analyze how it can impact the interpretation of the various legislation. In that attempt, the scholarly work necessarily considers the current events, judicial decisions, and the unique structure of India's government in shaping the legal landscape. This debate then brings us to statutory rights available in the form of copyright protection- which has also been the bone of contention in various research analysis. The artistic work shall always be at perils of piracy and other form of exploitation unless we don't have robust regime to address those concerns. This is where copyright protection steps in, as it is one of the most fundamental regime dealing with promoting creativity, protecting the rights of creators, and playing a crucial role in the functioning of the information society.

In light of the above, various manuscripts under RLR Volume XII, January-December 2022, Number I & II has been painstakingly scrutinized and edited

through its Editorial Team and is published by the Eastern Book Company (EBC). This endeavour resonates with a continual collaboration between Rajiv Gandhi National University of Law and EBC to publish a quality paper in the RLR Journal. It is no gainsaying that, the present issue is culmination of various manuscripts dealing with range of issues such as apprising about constitutional crisis in the form of crippling of federalism during Covid-19, dire need to regulate the realm of multiverse, gauging the nuances of law pertaining to triple talaq, apprising the legal rights of surrogate child, testing the efficacy of Indian Bankruptcy and Insolvency Code in resolving corporate insolvency, constitutional scrutiny of Criminal Procedure (Identification) Act 2022, deciphering choice of law issue in governing the International Arbitration Agreement, comparative analysis of the online infringement and unauthorized access liability under the copyright laws of India vis-à-vis the US and UK, moral rights under the copyright law for protecting Indian folklore. Multiverse of Social Media, Covid-19 and addressing the Constitutional Crisis, Prevention of Begging Act, Insolvency and Bankruptcy proceedings and the role of technology sharing and temporary patent waiver in times of Covid-19.

This editorial note accentuates the evolving paradigms in the legal community and the ramifications which ensue from paradigm shifts have for various stakeholders. Through continuous learning, engagement, and collaboration, the legal community can navigate these complex challenges and champion justice and fairness in the ever-evolving landscape. To that end, the editorials and publications cited in this note emphasize the value of inclusiveness, appropriate scholarly dialogue, and good governance. Additionally, they show how vital academic journals are in tackling significant social and political concerns, encouraging creativity, and defending the rights of creators. It's crucial to think about the future as we proceed and to keep working towards a more just and equal future. Additionally, we have been conscious about the language and metaphors we employ in our writing and endeavour to advance respect and inclusivity in academic discourse. The editorials and articles cited in this post generally serve as a reminder of how crucial academic publications are to influencing the legal community and fostering progress.

Dr. Kamaljit Kaur
Professor of Law, RGNUL, Punjab

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Book Review

EFFECTIVENESS OF INDIAN BANKRUPTCY AND INSOLVENCY CODE-2016 IN RESOLVING CORPORATE INSOLVENCY

Prof. (Dr.) D. Mukhopadhyay & Akhilesh Kumar***

'Corporate rescue is a major intervention necessary to avert eventual failure of the company'

— Professor Belcher

1. INTRODUCTION

Bankruptcy followed by insolvency is a state where an individual or any other business entity and corporate entity in particular are unable to pay its debts as and when they fall due or when the realizable value of assets are insufficient to meet the liabilities. Corporate financial management is embodiment of three major constituentsviz financing, investing and dividend declaration and payment activities (Van Horne, J. C.,2011). Determining Financing mix is technically known capital gearing (Brown & Howard, 1975). Bankers and creditors are the worst sufferers in the event of bankruptcy and insolvency. Equity holders are entitled to recover their claims in event of dissolution and winding up from the residuals if any after meeting the claims of the creditors including Debenture holders and other financers of the bankrupt companies. Financing activities are keenly related to raising financial resource for a new as well the existing projects. Major sources of financing are equity and debt being the components of a capital structure. (Greenberg, C.W., 1959, Weston, J.F.,&Brigham, 1975) Collins English Dictionary 2018). IBC 2016 facilitates ease of doing business and World Bank is the authority for declaring ease of doing business. India is placed at 63rd Rank against the previous 77th Rank which substantiates improvement. Liquidation is the ultimate legal process of realizing assets for paying off the debts in order priority as the Companies Act 2013 read with the NCLT and Courts Decisions. Banks and Assets Reconstruction Companies are the potent beneficiary of the IBC-2016 Lallation. The IBC 2016 as amended from time to time provided for 270(180+90)

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days (raised to maximum number of Days 330), The Law provides that the creditors and borrowers are entitled to knock at the door of the NCLT and Debt Recover Tribunal for initiation the resolution process of insolvency plea with 14 days, the Committee of Creditors(CoC) is to be formed for appointing the Insolvency Professionals (IPSs with the definition and meaning of the IBC 2016 .The Ips shall frame a strategy for debt recovery but beyond 270 days since appointment. If it fails to rejuvenate the operations of the concerned company, the CoC is to resolve for realization of the assets for repayment of the debts and the resolution to be made within 180 days and the whole process must be completed within 330 days which was 270 days prior to the IBC (Amendment) Act 2021[1].

2. PROBLEM STATEMENT

The IBC 2016 is an outcome of the persistent efforts of the Government of India to promote ease of doing business and simply the corporate exist process in case of failures in commercial operation. India adopted market driven economic policy dated back 1991-92 which enabled India in achieving the status of 'Emerging Economy' as an elevated status of developing economy. Foreign investors are observed to have interested in making investment in different sectors and different formats. In order to make them more attractive, the IBC 2016 was enacted by the Parliament and two significant Amendments have been affected in 2019 and 2021. The stakeholders and policy makers are interested to understand the degree of effectiveness of the law and this made the researchers inquisitive to have an enquiry to the cause of operationalization of the IBC 2016 as amended from time to time. Therefore, research problem concentrates on administering a study reflective on the title of the papers being self-explanatory in nature.

3. RESEARCH GAP

Under the forgone backdrop, a comprehensive review of the existing findings of the studies undertaken by various researchers including research journals and magazines in the chosen domain prior to taking up the present study has been conducted in order to find out the research gap for justifying conduct of the present study. The existing research studies concentrated mostly on the structural proceedings of liquidation depending on the definitions of incapacity of debt repayment capacity. The researchers sincerely attempted to define multidimensional perspectives of insolvency. They are observed to have been unanimous that economic failure is the genesis of being defaulter. They consider the definition, principles and guidelines under Basel II and Basel III more appropriate to deal with the cases of bankruptcy and insolvency in the cases of banks and financial institutions and the concept of 'Going Concern' in conjunction with the GAAPs for other companies. However, examining the magnitude of effectiveness of the IBC -2016

[1] Diankov, Simeon, "Debt Enforcement around the World", *IJIR* 116(6), 2008.

is not directly found to adequate extent because it is a domain and country specific. Though there is conceptual commonness how to deal with the bankruptcy and insolvency of the defaulter companies but it substantially varies from country to depending on the judicial administration. Under the given context, present study is based on the rationale to examine effectiveness of IBC-2016 as amended from time to time. The volume of default in debt servicing and failure to honour the creditors claim is on alarmingly upward trend and this study is likely to be of great assistance for the lawmakers, policy formulators and the policy implementers for curbing the alarming growth in corporate bankruptcy and failures and restoring healthy commercial practice.

4. OBJECTIVES

The study aimed at achieving the following objectives determined on the basis of the research problem and research gap.

a. To examine the effectiveness of the IBC-2016 as a juridical instrument for expediting Corporate Insolvency Resolution Process (CIRP) leading to rescue or liquidation of the operationally and financially distress companies.

b. To examine the rationale for enhancing the period for completion of the resolution process to 330 days from 270 days by IBC(Amendment) Act, 2021

c. To evaluate the performance of the resolution machinery, IPs, NCLT and the Courts

d. To offer suggestion and recommendations for further improvement in the modus-operandi

5. HYPOTHESES

The study is based on the following null hypotheses in order to achieve the set objectives:

Ho1: Effectiveness of insolvency resolution process is independent of modus-operandi of the IBC 2016 as amended from time to time.

Ho2: Enhancement of time limit for completion of resolution process is likely to cause delay in assets realization and debt settlement.

6. RESEARCH QUESTIONS

The following research questions are framed in order to achieve the purpose of the study. In other words, research questions assist the beneficiaries of the study in understanding why such enquiry into a particular domain has been has been made by the researchers. Moreover, research questions narrow down the topic into specific segments and it also act as a support to shape the research process. Keeping this in view, following research questions are framed:

1. What is legal definition bankruptcy?
2. Does insolvency process precede bankruptcy or the reverse?
3. Why the IBC-2016 was required to be codified?
4. What is the backdrop that causes such enactment?
5. Does it achieve the intention of the legislators?
6. When may the Code be signified to be effective?
7. What is shortcoming of the Code?
8. How can the identified shortcomings be bridged?

7. TYPE AND SCOPE OF THE STUDY

It is a qualitative enquiry into performance evaluation of the Code since it came into force against the background and rationales that made the law makers to legislate in the Parliament of the IBC Bill 2015 in 2016(No 31 of 2016). The scope of the study is confined within the Indian perspective against available reference of the bankruptcy and Insolvency addressing mechanism in the economically advanced countries[2].

8. SIGNIFICANCE OF THE STUDY

The study is likely to assist the researchers, corporate captains, Insolvency Professionals (IPs)such as Chartered Accountants (CAs), Cost & Management Accountants (CMAs), Company Secretaries (CSs), Advocates (Adv), Bankers, Key Managerial Personnel, Independent Directors, Financiers, Investors, Financial markets Regulators, Ministry of Corporate Affairs, Ministry of Finance and other stakeholder of the commercial establishments and entrepreneurs.

[2] Simeon Dijankov, Oliver Hart, Caralee McLiesh, Anderi Shleifer, "Debt Enforcement around the World" *Journal of Political Economy,* Vol. 116, No. 6, pp. 1105-1149, available at <https://scholar.harvard.edu/files/hart/files/debtenforcementaroundtheworld-jpe.pdf> (last accessed on 4-7-2023).

Corporate failures in the country have been the order of the day and therefore investors must beware of the credential of the companies, their financial performance and effectiveness of corporate governance in place while taking any decision. The study on Effectiveness of the IBC 2016[3] examined the current status of the Code for finding out the weakness and shortcomings of the Code so that law makers and policy formulators can adopt appropriate measures to secure the interest of the stakeholder as 'a stitch in time saves nine' is aptly applicable to the IBC-2016 since it is still in evolving stage and in the process of gaining maturity.[4]

9. LITERATURE REVIEW

Understanding the work of previous researchers in the chosen domain is assistance to the researcher to ascertaining the research gap. Literature of existing enquiries presents the current status of the study consequence of which justifies undertaking a proposed study in the chosen discipline. In this case, inclusivity and exclusivity approaches to literature survey have been followed in order to give the research process a scientific shape. Since this is relatively a new domain, there is no substantial research output available in the public domain. However, let us present the available works and arguments relevant to the topic in order to reason undertaking the proposed enquiry. Prior to enactment of the IBC 2016, India had a basket of legislations such as the Sick Industrial Companies Act (SICA), 1985, Recover of Debts and Bankruptcy Act, 1993, the Securitization and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002 and there was more emphasis on protection of the companies, employment and many a time it was at the expense of the credit discipline and Efficiency of the economy (Rao Rajeswari, M., 2022). Earlier laws were subject to time consuming process and the new law is supposed to take care of such limitations (Das, Upasana (http://blog-ipleaders.in).mODEL of collective decision making should not be applied to liquidation process as this leads to conflict of interest since it is time and cost consuming approach to liquidation decision making and finally it is proved to be non-beneficial to liquidation expediency (IBBI Discussion Paper, Team Resolution, 2022). As regards the objectives, IBC-2016 was enacted with objectives of time-bound insolvency resolution and value maximization. Since then, the successful impact of IBC has been evident with the jump in India's rankings in World Bank's Index on Ease of doing business, where India now stands at 63, a massive improvement from 130 in 2016; with India's score in the 'Resolving Insolvency' parameter almost doubling from 32.6 to 62.0 (MCA, 2022).

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[3] Rajeswari Sengupta, Anjali Sharma, Susan Thomas, "Evolution of insolvency framework for non-financial firms in India", available at <http://ifrogs.org/PDF/WP-2016-018.pdf> (last accessed on 4-7-2023).

[4] Chemin, Matthieu., "Does court speed shape economic activity ? Evidence from a Court Reform India" JL&EO 2023.

A period of five years since enactment of the IBC-2016 witnessed not very easy going for the beneficiaries of the Code. However, these five years have not been a smooth ride for the stakeholders and experts are of the opinions that the IBC–2016 has been able to achieve its mandate partially as the creditors and prolonged CIRP periods in some cases evidence slow progress rate. But view is tenable to be highly myopic as it fails to c factors like the stage at which such entities entered CIRP, the value left in their assets. In support of this argument, it may be mentioned that IBC was never mandated as a recovery mechanism but it is a beneficial legislation to put the corporate debtor back on its feet. Secondly, the value destruction of insolvent entities is partly attributable to the litigation delays – on average; a successful resolution has taken 459 days, as against the prescribed under IBC. Indian banks and financial institutions are the victims of the adverse impact of the serviced debts taking the form of Non-Performing Assists (NPAs) as NPAs badly and severely affect the performance and liquidity of the banks (Tandon, Deepak, 2019, Hari Kumar, P. N. & Sushi, D., 2017). As far as effectiveness of operations is concerned, shortage of skilled experts, NCLT Seats, Development and Monitoring of IP's and absence of Consensus among Lenders are the active variables. Similarly, significant quantum of expense of bankruptcy resolution process and non-accessibility to the relevant information amount to be additional burden on the distressed companies and this is a challenge in the way of smooth resolution (Katich, Rupinder, 2017). The Code needs to be simplified and less expensive for execution so that it can achieve its purpose in time bound manner (Valech, Jayish&Xalxo, Anupriya (2017). The Code needs to be revisited as the advisory group expects to discover the arrangements in the interest and working on the suitability and seriousness of the business and privileges of the business but in reality, it is lacks (Sri DurgaPriya, K.G. &Kannappan, 2018). The IBC -2016 was enacted to bring about reform in the economy with turnaround proposition but in many cases, liquidation is the end result (has gotten a change the economy by focussing on turnaround plan which assuming doesn't work, results to liquidation (Endure, Srilekha, 2018). The administration of the Code is being orchestrated in proper manner subject to insignificant tits-bits (Nishith Desai & Associates, 2019). Recent amendments are expected to cover up the shortcoming of the Code for making it more effective in addressing the bankruptcy and corporate insolvency issues imperiously. The threshold limits for filing the cases have been raised to Rupees. One crore from Rupees One Lakh. Besides brought about provisions in force relating to insolvency and bankruptcy financial service providers (FSPs) and this is applicable to non-banking financial companies including housing finance companies attributed with an asset size of ₹500 crore or more as a category of FSP under the regulatory authority of the Reserve bank of India(RBI)authorised r(with the RBI and the First such FSP undergoing CIRP is Dewan Housing Finance Corporation Limited(DHFCL)[5].DHFCL owed about Rs 90,000 crore to assorted

[5] Reserve Bank of India superseded the DHFCL Board, appointed an administration and filed (November, 2019) for the non-banking financial companies' resolution under the IBC, 2016 as amended.

creditors, subsequently became defaulter on loan service obligations besides failure in corporate governance mechanism and Yes Bank suffered casualty severely .The NCLT approved the resolution plan for reverse merger with Piramal Capital and Housing Finance Limited.

So far literature survey was confined within the boundary of operational perspectives and effectiveness of the IBC 2016 and it will be much easier to understand the implications of bankruptcy and insolvency if the definitional meaning and significance are highlighted objectively and therefore let us undergo the views of J Armour (2021) on definitional perspectives of the term 'insolvency'. In his seminal paper on corporate insolvency, Armour (2001) makes a distinction between six different meanings of the term 'insolvency'. Departing from the colloquial sense of the word that has to do with an inability to pay creditors, he clariid through bringing about distinction between the accounting concepts of balance sheet insolvency, cash flow insolvency, and economic failure on the one hand and the judicial and legal aspects of default that follow a path from insolvency proceedings and restructuring or reorganization to liquidation on the other. This expediency approach to firms in financial distress presents considerable advantage of encompassing the diversity of possible judgments delivered by courts in cases of corporate insolvency. Moreover, I this situation is hardly compatible with an empirical analysis of the phenomenon as most of the time it is cantered on the determination of a discriminant function to distinguish two classes of firms according to their economic health (Rahman et al. 2004; Bose and Pal 2006).The researchers are of the views that problems in resolving corporate insolvency persists as corporate insolvency is devoid of having a broadly accepted definition.

Generally, a firm is considered to be financially distressed when the book value of its assets is less than its liabilities. From this point of view, the Basel II criteria define a firm as being 'in default' when its scheduled payments are delayed for more than 90 days. This approach focused on a cash flow concept of insolvency which is advantageously complemented by a stock perspective that compares the available assets to current liabilities (Belcher 1997). If such a definition presents an indisputable use as far as one is interested in the particular situation of a specific company, the expert judgment hardly fits with the study of the general situation of a large number of companies or with the determination of a function that separates operating firms from insolvent ones and in order to address this issue, a simple and operational definition of insolvency is necessary and this justifies why most of the studies dealing with understanding the distinction between the concept of 'going concern' and 'insolvent' which refer to the judicial interpretation to draw a clear demarcation between these two definitional categories. In this case, a company is considered as insolvent when its files for bankruptcy or when a court decides it should be liquidated. To be specific, the term 'insolvency' maybe defined as the state of being an incapacitated to honour indebtedness or pay the debt when it falls in the ordinary course of business. This definition makes a

clear-cut distinction between financially healthy companies who are able to honour their contractual obligations and financially distressed companies having no options left with other than filing for a petition. However, this kind of definition creates confusion between insolvency and default which refers to the event of non-repayment of a debt. Under the given circumstances, a robust definition of 'insolvency' is imperatively called for. In this context, the definition offered by Base lie for the banks is mandatory as the parameter for determining solvency and insolvency and Basel III Norms hold good to define the financial distress situations. To cope with the problem, two dimensional definitions of insolvency are currently used by the researchers and the first one is economic definition whereas the second one refers to judicial definition.

The economic approach to define 'insolvency' refers to a set of situations of failure such as the non-repayment of a debt, inability to pay dividends to the shareholders, financial distress, etc. which may lead to the beginning of a judicial proceeding. Under such situations, suspension of a company is conceived. Zopounidis(1995) asserts default is just another word to describe a company unable to make profit, whose capital fails to create value primarily because the continuum of enterprise-produced goods market has become inconsistent and this company is also a defaulting one because it does not contribute to solve socioeconomic problems such as unemployment or increase in purchasing power. This definition seems to be too large to be operating what leads another part of the literature to focus on payment problems. Indeed, the inability to repay the debt in when it falls due is a clear signal of default which separates the default company from those of otherwise. This definition is accepted and adopted by Ooghe and Van Wymmersch (1996) and according to these authors, a company may be said to be insolvent when it fails to achieve economic goals in a socially and legally constrained environment. Further, the company characterized with this kind of financial distress is unable to fulfil its. Beaver (1966) considered a company as insolvent if it is no longer able to meet its economic, financial, and social objectives on a regular basis Bose and Pal (2006 adopted this approach to define the state of insolvency and default and this fetched them prediction rates ranging between 65% and 75% in their works to separate companies a priori considered as financially healthy from those which are not. The problems encountered in testing the different borderlines between viable firms and those that are going to fail come from the fact that the separation between these two situations is both porous and blurred. That is why numerous studies agree that the cessation of payments is the final step of a process, sometimes called 'a spiral of failure'[6]from which a firm can escape thanks to the adoption of corrective and preventive measures consisting in a modification of its operating cycle.

[6] Nadine Levratto, "From Failure to Corporate Bankruptcy: A Review", Journal of Innovation and Entrepreneurship (2013) <http://www.innovation-entrepreneurship.com/content/2/1/20> accessed on 20-10-2022.

It is time to consider the judicial approach to define the term 'insolvency' which is defined on the basis of judicial criteria introduced in the Insolvency Act enacted in a given country at a given period. Most of the judicial views tag a company as bankrupt when the judge decides it is not able to make its repayments when the claims fall due (Cabrilloand Deported 1999). Insolvent companies always are such companies who are unable to repay their debts under the Generally Accepted Accounting Principles (GAAPs) in conjunction with the provisions of the concerned law of the land. At each stage of the judicial process, accounting interpretations and implications are referred to the cause of rationale of the decision made by the judges in the event of delivering judgment with regard to insolvency.

Turnaround process or otherwise always begins with default in servicing debts or payments and it comes to an end with a liquidation ordered by court or activating continuation plans as the case may be. Failures occur from the point of time a company presents to the courts the legal documents required for its liquidation, restructuring or reorganization. Corporate Insolvency proceeding is an exit mode from the corporate sector resulting from commercial incompatibility with the magnitude of the outstanding debt and liabilities. The robustness of concept of insolvency is more inclined to the judicial interpretation-based perspectives. The judicial definition of insolvency has gained legal acceptance in the cases of corporate insolvency proceedings. However, Agarwal et al. (2001) observed that differences between legally insolvent companies and those only reporting financial distress determine performing function whose exact classification rates are above 93% for both groups i.e., both economic perspective-based definition and that judicial perspective-based definition of insolvency.

Form the foregone discussions; it is argued that the differences between failing and viable companies are distinct as one is closer to the incapacity to service debts. Therefore, in the judicial order, the sequence is of three phases commencing with preparing the statement of cessation of payment, followed by an arbitrage between restructuring and complete liquidation which culminates to deciding whether to continue or shut down and if to continue, then in what formats i.e., restructuring format as a rescue plan judicially approved (Levratto Journal of Innovation and Entrepreneurship)[7].

Studies by Baum and Mezias (1992), Greening and Johnson (1996) and Swaminathan (1996)) stressed on the importance of one factor, i.e. debt servicing incapacity leads to defaulting which leads to bankruptcy and it ends on getting the tag of insolvent status. It may be summed up the result of the forgone review of the existing research observations of the various researchers and almost all the researchers are observed to be unanimous that insolvency definition under the ambit of judicial interpretation under the light of GAAPs is superior to the

[7] Nadine Levratto, "From Failure to Corporate Bankruptcy: A Review", Journal of Innovation and Entrepreneurship (2013) <http://www.innovation-entrepreneurship.com/content/2/1/20> accessed on 21-10-2022.

economic definitional perspectives as far as liquidation procedures are concerned for the default companies. Whereas, in the context of recue and turnaround strategy, economic viability of the default companies is relevant and significant. The literature reviews assist in finding out the research gap as shown above under the caption 'Research Gap'.

10. RESEARCH DESIGN AND METHODOLOGY

The study is qualitative in nature and descriptive by type. The investigation period is 2012-2022 i.e. for a decade. As far as research design is concerned, data set used in the study are collected from secondary sources such as various reports, research journals, periodicals, MCA websites, Ministry of Finance Websites, RBI, SEBI, and other allied and relevant sources. Diagrammatic and tabular approach of data presentation is used to answer the research questions. Descriptive in conjunction with causal-comparative research design is adopted in this study. The Data relating to Indian perspective involving corporate bankruptcy and insolvency are used. Besides, the landmark judgments delivered by the High Courts and Supreme Court are used to understand the judicial direction and perspectives to handing the problems of corporate bankruptcy, insolvency, rescue and liquidation i.e., exit routes from the market under the ambit of the IBC-2016 according to the requirements of the study. Hypotheses shown above are part and parcel of the research design as it is customary to start with certain suppositions and discussion and analysis are administered keeping in view the essence of the formulated hypotheses and the framed research questions.

11. DATA PRESENTATION AND ANALYSIS

The following Bar-Chart shows recovery through the interventions of Debt Recovery Tribunal (DRT), Securitization and Reconstruction of Financial Assets Enforcement of Security Interest (SARFAESI), Act, 2002, LokAdalat under the Legal Services Authorities Act, 1987 during the period 2007-08 to 2018-19.

Exhibit 1 Leading Corporate Defaulters as on October 2017)

Sl. No	**Defaulters**	**Total Debt (Rs in Crore)**	**Lead Creditor**
1	Bhushan Steels Ltd	44, 778	State Bank of India
2	LancoInfratech Ltd	44,364	Industrial Development Bank of India
3	Essar Steel Ltd	37,284	State Bank of India and other Banks
4	Bhushan Power & Steel Ltd	37,248	Punjab National Bank

Sl. No	Defaulters	Total Debt (Rs in Crore)	Lead Creditor
5	Aloke Industries Ltd	22,075	State Bank of India
6	Amtek Auto Ltd	14,074	Statement of India
7	Monnet Ispat& Energy Ltd	12,115	JSW-AION
8	Electrosteel Ltd	10,273	State Bank of India with 38% and 62% to 25 other Banks and Companies
9	Era Infra Engineering Ltd	10,065	Union Bank of India
10	JaypeeInfratech Ltd	9,03	Industrial Bank of India
11	ABG Shipyard Ltd	22,842(up to 2022)	28 Banks such as State Bank of India, ICICI Bank, Bank of Baroda, Industrial Development Bank of India, yes bank, LICI, Bank of India, Punjab National bank etc
12	Jyoti Structures Ltd	5,165	DBS Bank Ltd and others

Source: IBC Quarterly Newsletter

Exhibit 1 shows the major companies declared default and referred to the NCLT and the lead creditors having interest in insolvency resolution process. Involving total debt INR 2,64, 121 crores owed to lead creditors. Actual figure up to 2017 is not available in minute details and the figure may be more than what is reflected in Exhibit 1. So far Essar Steel shows that above figure and the picture may be clearer from the following Tabular presentation of financial information.[8]

Trend in Realization of the Admitted Claims

The following tabular presentation offers an objective view of the trend of realization of the admitted claims till March, 2022 since inception. Our sampled firms are 10companies whose data have been manipulated after collecting from the IBC Website and IBC Quarterly Newsletters.

[8] IBC Laws, "Short Note on Insolvency and Bankruptcy Code, 2016", available at <https://ibclaw.in/short-note-on-insolvency-and-bankruptcy-code-2016> (last accessed on6-7-2023).

Exhibit 2 Top 10 Companies Approved Resolution Plan till March, 2022

Sl. No.	Default Companies/ Corporate Debtors	Date of CIRP Start	Date of Approval by NCLT	Admitted Amount (Rs. In Crore)	Realized Amount (Rs in Cores)	% Of Realization
1	DHFL	03-12-2019	07-06-2021	87,247.68	37,167.00	42.60
2	Bhushan Steel Limited	26-07-2017	15-05-2018	57,505.05	36,771.32	63.94
3	Essar Steel India Limited	02-08-2017	08-03-2019	54565.22	42,231.78	77.40
4	Bhushan Power & Steel Limited	26-07-2017	05-09-2019	47,901.61	19,894.86	41.53
5	Reliance Infratel Limited	17-05-2018	03-12-2020	42,394.16	4,267.44	10.06
6	Aircel Limited+ Dishnet Wireless Limited+ Aircel Cellular Limited	12-03-2018	09-06-2020	36,101.92	6,677.38	18.50
7	Lanco Thermal Power Limited	09-05-2019	26-04-2021	33,331.13	136.25	0.40
8	Alok Industries Limited	18-07-2017	08-03-2019	30,706.69	5,115.20	16.65
9	Jet Airways (India) Limited	20-06-2019	22-06-2021	15,432.33	1, 133.46	7.35
10	Electrosteel Steels Limited	21-07-2017	17-04-2018	13,958.36	5,320.00	38.11
11	Total	-	-	4,19,144.15	1,58,714.69	37.87

Source: IBC Website /Quarterly Newsletter

Exhibit 2 shows a gloomy picture of realization except Bhushan Steel Ltd and Essar Steel Ltd. In case of Bhushan Steel Ltd and Essa Steel Ltd realization out of the admitted claims are 63.94% and 77.40% respectively. Next comes DHFL in which the realization is 42.60% of the admitted claims. Worst and second

wore cases of realization is 0.40% and 7.35% of total admitted claims of Lanco Thermal Power Ltd and Jet Airways (India) Ltd respectively.[9] It is evident from the above tabular presentation, position of realization expressed in percentage of the admitted claims in order of ranks are Essar Stell Ltd, BhushanStel Ltd, DHFL, Bhushan Power & Steel Ltd, Electro steel Ltd, [Aircel Limited, Dish net+ Wireless Limited+ Dish netAircel Cellular Limited], Alok Industries Ltd, Reliance Nitrate Ltd, Jet Airways (India) Limited and Lanco Thermal Power Limited representing 77.40%, 63.94%, 43.60%, 41.53%, 38.11%, 18.50%, 16.65%, 10.06%7.35$ and 0.40% respectively . In other words, Essar Steel Ltd tops the ranks and Lanco Thermal Power Limited is the worst hit occupying the bottom most rank in the rank list. Further, only 37.87% of the admitted claims have been realized from CIRPs and the overall picture is very gloomy as far as realization is concerned.

As far CIRPs time CISPs taken is concerned, DHHL is more or less 18 Months, Bhushan Steel Ltd about 11 months, Essar Steel Ltd, about 24 Months, Bhushan Power & Steel Ltd about 24 months, Reliance Infratel Limited27 months, [Aircel Limited+ Dishnet Wireless Limited+ Aircel Cellular Limited]- 27 months, Lanco Thermal Power Limited-23 months, Alok Industries Limited21 months, Jet Airways (India) Limited-24 months and Electro steel Steels Limited- about 10 months and all the case took substantially more than the stipulated period prescribed in the IBC-2016 and to be specific, the resolution process should have taken more than 270 days and in term of months, it should not have been more than 9 months. Again, the IBC-(Amendment) Act, 2022 has enhanced the stipulated time limit for completion of the resolution process to 330 days from the existing prescribed time limit of 270 days. The law makers should take into consideration the fact that stretching CIRP time costs heavily to both the creditors, employees, investors and the government. Time over run normally implies incurrence of avoidable cost and the Hon'ble Supreme Court has expressed its displeasure on consuming more time in completion of resolution process and took a serious note of taking more time in e of Essar Steel Ltd. And it shows pessimistic approach to rescue and liquidation process as the case may be and consequently all the stakeholders are the losers[10]

Corporate Insolvency Resolution Process Status Up to March, 2020

Exhibit 3 shows a bird's eye view of the CIRPs till March 2020 and total number of CIRPs initiated was 3,774 and the same comprises of 1,874, 1,646 and 254 cases intimated by Operational Creditors, Financial Credits and Corporate

[9] Nishith Desai Associates, "A Primer on Insolvency and Bankruptcy Code, 2016", available at <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/A-Primer-on-the-Insolvency-and-Bankruptcy-Code.pdf> (last accessed on 6-7-2023).

[10] Ravi, Aparna. "The Indian Insolvency Regine in Practice: An Analysts of Insolvency and Debt Recovery Proceedings", E&PW, 2015.

Debtors respectively. Operational Creditors, Financial Creditors and Corporate Debtors initiate dabout 49.65%, 43.60% and 6.75% respectively.

Exhibit 3 Corporate Insolvency Resolution Process Status Up to March, 2020

Quarter	No. of CIRPs Initiated by			
	Operational Creditors	Financial Creditors	Corporate Debtors	Total
Jan - Mar, 2017	7	8	22	37
Apr - Jun, 2017	58	37	35	130
Jul - Sep, 2017	98	99	38	235
Oct - Dec, 2017	65	65	14	144
Jan - Mar, 2018	89	85	22	196
Apr - Jun, 2018	129	102	18	249
Jul - Sep, 2018	126	100	16	242
Oct - Dec, 2018	146	114	16	276
Jan - Mar, 2019	164	197	21	382
Apr - Jun, 2019	154	130	17	301
Jul - Sep, 2019	294	279	9	582
Oct - Dec, 2019	329	267	17	613
Jan - Mar, 2020	215	163	9	387
Total	**1874**	**1646**	**254**	**3774**

Source: IBC Quarterly Newsletters

Status of Corporate Insolvency Resolution Process till March 2020

Exhibit 4 shows the status of CIRP till March 2020 and admitted number of CIRPs was 3,774.

Exhibit 4 Status of Corporate Insolvency Resolution Process since IBC-2016 Came into Force till 2020

Status of CIRPs	No. of CIRPs
Admitted	3774
Closed on Appeal / Review / Settled	312
Closed by Withdrawal under section 12A	157
Closed by Resolution	221
Closed by Liquidation	914
Ongoing CIRP	**2170**
>270 days	738
> 180 days ≤ 270 days	494
> 90 days ≤ 180 days	561
≤ 90 days	377

Source: IBC Quarterly Newsletters Report

Exhibit 3 shows the status of 3774 CIRPs. Out of 3774 initiated CIRPs,2,170 i.e. about 57.50% are disposed of or settled through closure of appeal or settlement, withdrawal of the of procreating by dint of invocation of Section 12A. Section 12A of the IBC 2016 read with the IBC (Secondment) Act, 2018 empowers the Adjudicating Authority to allow withdrawal of application admitted under Section 7, 9 or Section 10 of the Code on an application files made by the applicant with approval of 90% voting share of the Committee of Creditors (CoC) in prescribed manner. The remaining 1,604 admitted cases are yet to be disposed of i.e., by 42.50% and this was taken with seriousness for expedition of the admitted cases.

Recover Status for the Period 2017-18:

Recovery status can be had from the following tabular presentation.

Exhibit5 Recovery Status of 2017-18

Recovery Channel	2017-18			
	No. of cases Referred	Amount Involved (cr)	Amount Recovered (cr)	Proportion of Amount Recovered in Amount Involved
Lok Adalats	33,17,897	45,728	1,811	4.0%
DRTs	29,345	1,33,095	7,235	5.4%
SARFAESI	91,330	81,879	26,380	32.2%
IBC	704	9,929	4,926	49.6%
Total	**34,39,276**	**2,70,631**	**40,352**	**14.9%**

Source: Report on Trend and Progress of Banking in India: 2017-18

Exhibit 4 shows a picture recovery made during 2017-18 Financial Year. Out of the total involved amount of Rs. 2,70, 631 crores, recovered amount is Rs 40,352 crore representing 14.91% which is significantly low though it was in 2017-18 i.e., just immutably after the Code came into force.[11]

Recover Status of 2018-19

Exhibit 5 shows the recovery status during 2018-19

[11] Insolvency and Bankruptcy Board of India, "Report on Trend and Progress of Banking in India: 2017-18", available at <https://ibbi.gov.in/publication> (last accessed on 7-7-2023).

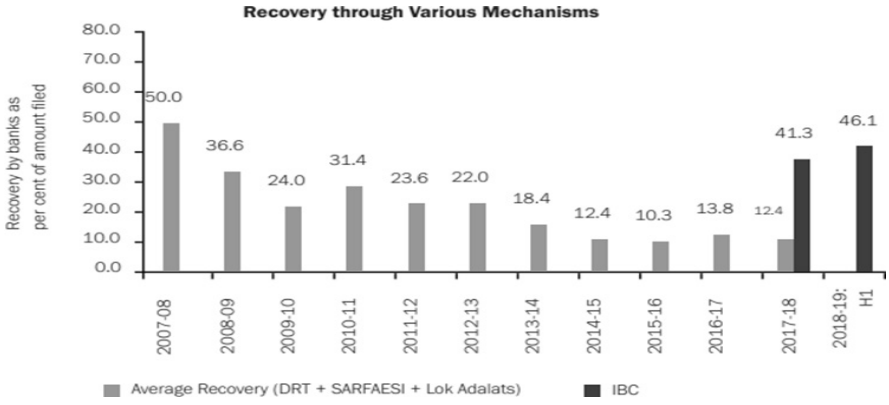
Exhibit 6 Recovery Status- 2018-19

Recovery Channel	2018-19 (P)			
	No. of cases Referred	Amount Involved (cr)	Amount Recovered (cr)	Proportion of Amount Recovered in Amount Involved
Lok Adalats	40,80,947	53,506	2,816	5.3%
DRTs	52,175	3,06,499	10,574	3.5%
SARFAESI	2,48,312	2,89,073	41,876	14.5%
IBC	1,135	1,66,600	70,819	42.5%
Total	**43,82,569**	**8,15,678**	**1,26,085**	**15.5%**

Source: Report on Trend and Progress of Banking in India: 2018-19'

Exhibit 5 shows marginal improvement in recovery status compared to the recovery status in 2017-18 as may be observed in Exhibit 4. 14% of the recoverable amount was recovered in 2017-18 and the same 15.50% of the recoverable amount of Rs. 8,15,678 crores have been recovered i.e., Rs. 1,26,085 crores. However, in terms of volume, magnitude of increase in recoverable amount in 2018-19 is (Rs 8,15,678 crores – Rs 2,70,631 crores) =Rs 5,45, 047 crores and increase in recovered amount is Rs (Rs1,26,085 crores – 40,352 crores) =85, 733 i.e. marginal rate of recovery is15.73% in 2018-19 and it more than the average rate of recovery by (15.73% - 15. 50% = 0.23% and it is also not very optimistic trend in recovery improvement till 2018-19.[12]

Mechanism Variants of Recovery: 2007-08-2018-19



Source: Data on average recovery (DRT + SARFAESI + LokAdalat': RBI and IBB Report

[12] Reserve Bank of India, "Report on Trends and Progress of Banking in India", available at<https://www.rbi.org.in/scripts/AnnualPublications.aspx?head=Trend%20and%20Progress%20of%20Banking%20in%20India> (last accessed on 7-7-2023).

The Bar-Chart shows that recovery rate out of Non-Performing Assets(NPAs) had a sharp decline from 50% in 2007-08 to 36.6% in 2008-09, which declined further to 24% in 2009-2010 and it shows an improvement in recovery trend in 2010-11 but there was persistent declining trend from 2011-12 to 12.40% in 2017-18 and there was no recovery at all during 2019-2020 , 2020-21 and this may be lenient policy of the concerned authorities because of the ongoing pandemic situation remaining prevalent all over the world including India.

India's Insolvency Resolution Status 2015-16-2020-21

Exhibit 7 India's Insolvency Resolution Status 2015-16-2020-21

Particulars	2016	2017	2018	2019	2020
Rank in Resolving Insolvency	136	136	103	108	52
Score for Resolving Insolvency	32.6	32.8	40.7	40.8	62
Time (years)	4.3	4.3	4.3	4.3	1.6
Recovery Rate (cents on the dollar)	25.7	26	26.4	26.5	71.6
Strength of insolvency framework index (0-16)	6	6	8.5	8.5	7.5

Source: Ease of Doing Business Report 2020

It is evident from the above table that India has achieved lo of improvement in insolvency processing cases during last five years. Rank in insolvency resolving cases has been improved to 52nd from 136th Rank in 2016 when the IBC-Came into force and at the same insolvency resolving score has been attributed with considerable improvement with 60 against 32.60 in 2016. Most eye-catching improvement has been in timeframe for resolving the cases and it is 1.6 Years in 2020 against 4.30 years in 2016. As far as recovery rate is concerned, it is 71.60% against just 25.70% in 2016 and finally, the index showing the strength of insolvency framework is 7.50 in 2020 against 6.00 in 2016 in16-point scale.[13]

Comparative Status of Ease of Dong Business:

Average OECD High Income Group can be had from the following exhibit.

[13] PRS Legislative Research, "The Banking Regulation (Amendment) Ordinance, 2017", available at <https://www.prsindia.org/uploads/media/Banking%20Ordinance%202017/The%20Banking%20Regulation%20Amendment%20Ordinance%202017.pdf> (last accessed on 7-7-2023).

Exhibit 8 Average OECD High Income OECD

Parameter (EODB 2020 Report)	India	South Asia	OECD High Income
Resolving Insolvency Rank	52	104	28
Resolving Insolvency Score (1-100)	62	40.8	74.9
Recovery Rate (Cents on the Dollar)	71.6	38.1	70.2
Time (Years)	1.6	2.2	1.7
Cost (% of Estate)	9	9.9	9.3
Strength of Insolvency Framework Index	7.5	6.5	11.9

Source: Ease of Doing Business Report 2020[14]

Ease of Doing Business Report 2020 published by the UNO shows that New Zealand toped the Rank List followed by Singapore occupying the second position, Hong Kong-3rd, Denmark 4th, Korea-Republic 5th, USA6th,Georgia 7th, UK8th, Norway 9th, Sweden 10th……. Germany 22nd, Canada 23rd, ……. Japan 29th,China 30th, France 31st ……..…… India 63rd in the List of 190Ranks. Resolving insolvency is one of parameters being the weighted average of sub-parameters such as Time, cost, outcome, recovery rate of commercial insolvency and the strength of the legal framework for addressing the addressing the judicial issues are the most important variables in order to strengthen effectiveness for efficient administration corporate insolvency resolution process. Let us examine some of the landmark spirit of the bankruptcy and insolvency cases relating to corporate insolvency resolution process that paved the way for meaningful and significant way forward for bankruptcy and insolvency problems handling both for rescue from commercial unavailability and speedy liquidation of the companies referred to NCLT as the case may be.[15]

12. JUDICIAL INTERVENTION PERSPECTIVES

The IBC-2016 (31 of 2016) is one of the leading pieces of legislation, Indian Parliament enacted in post partitioned era that came into force on 28th May 2016. The IBC 2016 provides resolution of corporate insolvencies under one umbrella which was a long standing and complicated process previously and multiple quasi-judicial and laws were in place to handle bankruptcy and insolvency cases and more particularly none of the legal mechanisms used to offer any economically viable solutions and none but corporate death was the end result once an entity becomes insolvent. In recent past, operational rescue plan of Essar Steel Ltd under the IBC-2016 heard and approved by the Hon'ble Supreme court of India

[14] Verma, Aprajita , "Data: Review of the Insolvency & Bankruptcy Code (IBC)", 2020.

[15] Goel, Shivam, "The Insolvency and Bankruptcy Code, 2016: Problems & Challenges"[2017], IJIR.

is a landmark judgment in Essar Steel Ltd and Others[16].Based on the analyses of the Apex Court of the country, it may be asserted that the Hon'ble Supreme Court rightfully reinforced the supremacy of the financial creditors in decisions relating to the assets, liabilities and business of the corporate debtor including the distribution of proceeds among creditors besides clarifying that the nitty-gritty involving CIRP is well within the jurisdiction of the court for interference.[17] The Apex Court also applied the doctrines of "equality among equals" by appreciating the demarcation only between the financial and operational creditors but also the secured and unsecured creditors. While quashing the NCLAT Order[18], the Supreme Court give in judgmental Note that if the NCLT Order would have been upheld by Apex Court would result in 'catastrophic consequences on the Indian banking sector, including more stressed assets being sent for liquidation as opposed to resolution through the CIRP'.[19]

The ruling of the Supreme Court on extinguishment of all past claims including undecided claims also brings much respite to resolution applicants, who may otherwise have not been interested to invest in insolvent companies within the juridical stipulations of the IBC-2016 due to the discomfort and fear of unknown and prolonged litigation proceedings likely to continue even after acquisition. Further, by emphasizing on the need for timely resolution within 330 days the Supreme addressed the issues that may derail the preceding laws and regulations governing resolution process of non-performing and stressed assets. It simply implies that the Judgment of the Supreme Court is absolutely consistent with the economic and financial principles of the banking sector and it is a way forward efficient and progressive approach to resolve the issues of financially distress companies including banks through the CIRP mode under the IBC-2016. However, it may be observed in the referred cases heard by the Apex Court remained silent on the permissibility issues of invocation of the guarantees against the erstwhile promoters of a corporate debtor in pursuance to acquisition of such corporate debtor by a successful resolution applicant and the same issues may be addressed by the Apex while hearing and delivering judgments with regards to the effectiveness of CIRPs under the ambit of the IBC-2016 as amended from time in near future. The Apex Court was observed to be critical about timely completion of the CIRPs not beyond 330 days as it will jeopardize the essence of the mandate of the IBC-2016 which is to attempt to rescue at first instance in the best interest of economic interest of the company in particular and the nation in general.

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[16] The judgments delivered by the NCLT/Hon'ble Supreme Court of India after hearing the cases relating to Corporate Insolvency Resolution Process of financially distress Essar Steel Ltd. may please refer to the references.

[17] *Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 937.

[18] The NCLAT determined that security and security interests of the creditors were irrelevant at the stage of resolution for purposes of allocation of payments.

[19] *Standard Chartered Bank* v. *Essar Steel India Ltd.*, 2017 SCC OnLine NCLT 10751 [34].

13. FINDINGS

From the results emanating from the forgone analysis that hypothesis with regard to CISPs implemented by juridical force of the ICB-2016 as amended from time is yet to gain momentum as the performance of the Insolvency Professionals, Regulatory Authorities, NCLT and Courts is subject to the note interrogation. In most of the cases, actual time for completion of CIRP is more than the stipulated time to the extent of higher magnitude. Most of cases for CIRP have taken more or less 24months which is more than 200% that of the stipulated time. The purpose of the IBC-2016 is to generate economic results as early as possible whether through turnaround reorganization of the business or liquidation. Hence, the rescue and liquidation process could not be proved to efficient and effective. The study was administered to feel the pulse of efficient functioning of the CISPs agencies and the framed research questions are objectively satisfied with the findings based on statistical analysis.[20]

14. POLICY ISSUES AND CONCLUSION

The study evidences that the IBC-2016 as amended from time to time is quite effective in expediting CIRPs. Operationally and financially distress Essar Steel Ltd taken over by Arcelor Mittal Nippon Steel India Ltd., formerly known as Essar Steel India Ltd., (ESIL)is a success story of wisdom of the Indian Judiciary which examined all parts and bits of the complicated issues and it was concluded after two years of CIRP. Though it took more time for rescue, yet it deserves appreciation being one of the more complicated corporate giants in steel manufacturing sector. It saves employment of people though turn around restructuring and started contributing to the national exchequer. This is a prominent case study for the students of Legal Professions, Chartered Accountancy, Cost and Management Accountancy, Corporate Secretarial and Governance, Management, researchers, corporate captains, regulatory authorities, law makers and policy formulators.

However, insolvency cases should be handled taking the references of the foreign Apex Court stand regulatory authorities besides Indian refences as this is likely to judge the relevance of CIRPs more authenticated because the IBC-2016 is at its infancy stage and it need more time to evolve into a mature legislation. Provisions relating to prevention of bankruptcy and financial injury are kept out of the law. It comes into picture after an organization has been detected to be fallen sick that defaulter. May a separate legislation be enacted in due course. It may be worthwhile to mention that many countries have already adopted the United Nations Commission on International Trade Law known as the UNCITRAL Model Law on International Commercial Arbitration (1985) s

[20] *SBI* v. *V.Ramakrishnan,* (2018) 17 SCC 394 [25], [26]; *Manish Kumar* v. *Union of India*, 2021 SCC OnLine SC 30 [280], [282].

amended in 2006 for handing Cross Border Insolvency with or without modifications. May be useful as an important reference.

Moreover, the relevant treaties and arrangements entered into by India with different countries across remaining in place may be also helpful as a complementary tool for resolving the issues of corporate bankruptcy and insolvency including prevention and control of the corporate deaths. For instance, cost audit is an effective tool for cost management and cost is one of the most vital and critical success factors for any organization. Whatever, laws are in place, they come into place to play the role either post-mortem analytical tools or they simply become operative just before issuing the corporate death certificates. The scope and mandate of cost audit is time tested for a period of a half century in the country but it is nothing but a toothless lion due to absence of legal teeth. If the cost audits are periodically administered, life of many companies can be saved and IBC-2016 can be referred to in marginal cases as most of the company become operationally and operationally non-performers and uncompetitive because of insignificant approach to manage cost.

As far as limitations of the study are concerned, it suffers from non-availability of data and it was difficult for administering statistical manipulations of the data for arriving at a logical conclusion. Therefore, the results obtained from the study should be generalised subject to the inherent limitations. As far as the future direction for the researchers is concerned, future studies can be undertaken with an objective of developing a multiple regression model with a time series data for making the CIRP more effective.

RIGHTS OF THE SURROGATE CHILD: LEGAL AND BIOETHICAL PERSPECTIVES

*Dr. Vani Kesari A**

Generally, the instinct to have children is inherent in most of the marital relationships. However, there might arise situations wherein the couples are medically declared to be infertile, or a spouse may not wish to conceive or where pregnancy risks are greater or previously existing health conditions may warrant avoiding pregnancy. Moreover, youngsters who are averse to marriage and family might want children born to them rather than going in for adoption, similarly, same sex couples, single individuals, aged people etc. will also want children to be born to them. In all such situations the option of "*surrogacy*" has become an opening available to all. Surrogacy helps in building up family relationships. Thus, it has an innate impact on individuals, family, and society. Therefore, questions of law, rights, ethics, and obligations interplay about surrogacy. To truly comprehend the challenges involved in surrogacy and its impact on the child born out of a surrogacy, it is pertinent to understand the process undertaken for surrogacy.

1. SURROGACY: CERTAIN BASIC INSIGHTS

The word "surrogate" is rooted in the Latin phrase "*Subrogare*" which implies" *to substitute*" or "*appointed to act in the place of*." Therefore, the surrogate mother may be understood as a woman who becomes pregnant and gives birth to a child with the intention of giving away this child to another person or "intending or commissioning" parents.[1] therefore generally surrogacy is the product of an arrangement and therefore creates certain rights and obligations.[2]

It is also known as third party reproduction. There are different forms of surrogacy. In earlier times, traditional surrogacy was in vogue as technology was less developed. In traditional surrogacy, normally the traditional surrogate is considered to be the biological mother of the child wherein her egg is combined with the donor's sperm or the intended father by way of Intrauterine Insemination (IUI). The other name for this type of surrogacy is full surrogacy or genetic surrogacy. With the advancement of science, the surrogate mother will just have to carry the embryo created in the laboratory by way of fusion wherein the egg of the intended mother is fused with the sperm of the intended father by

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1 Nayana Hitesh Patel et al., "Insight into Different Aspects of Surrogacy Practices", (2018) 11 *Journal of Human Reproductive Sciences* 212.

2 "Births, Deaths, Marriages and Divorces", Queensland Government <https://www.qld.gov.au/law/births-deaths-marriages-and-divo> accessed on 9-7-2022.

virtue of the process of invitro fertilization (IVF). The embryo created thus created by way of IVF technique is then implanted to the surrogate's uterus at the IVF clinic[3] This form of surrogacy is also called as partial or host surrogacy. It is also known as gestational surrogacy. Generally, traditional surrogacy is said to be much more legally complex compared to gestational surrogacy the reason being that, the surrogate is actually the biological mother of the child. Therefore, the surrogate mother's parental rights over the child are much more stronger and more justifiable based on the genetic link between the surrogate mother with that of the child. Gestational surrogacy on the other hand, is the most common form of surrogacy practiced and that which provides the most solid legal protection for both intended parents and the surrogate.[4]

The other type of surrogacy is compensated surrogacy or commercial surrogacy and altruistic surrogacy. Compensated surrogacy is where in addition to the coverage of all pregnancy-related costs, a surrogate mother will receive a base compensation for carrying baby for the intended parents. Thus, she receives monetary benefits for the entire surrogacy process which includes medical costs, travel costs etc apart from the compensation. In altruistic surrogacy the surrogate mother does not receive any monetary benefit beyond the medical cost incurred during pregnancy and post -partum.

The timeline of the history of surrogacy is often traced back to the biblical era wherein a surrogacy agreement was made between Abraham, Sarah and Hagar, the Egyptian slave/surrogate in the Book of Genesis.[5] Stories of surrogacy is prevalent even in Hindu literature such as Mahabharatha, Bhagavatha Purana etc.[6] However, the development of the practice of surrogacy in the modern times can be traced back to United States since 1980. In 1985, the first successful gestational surrogacy took place in America. The first surrogate child known as" *baby M"* alias Melissa Stern was born in 1986. The issue regarding the custody of the surrogate child took its wings from then on wards. The biological mother of" baby M" was not willing to cede the custody of the baby with whom she had made contract. The matter was taken up before the New Jersey Supreme Court in *Baby M. In re*,[7] wherein the court allowed the legal custody of the child to the intended parents i.e., after applying the best interest standard the custody was given to the father and his wife. The court however granted visitation privileges to the

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3 Understanding the Differences of Gestational vs. Traditional Surrogacy, Southern Surrogacy <https://southernsurrogacy.com/surrogacy-information/gestational-vs-> accessed on 9-7-2022.

4 Important Differences between Compensated Surrogacy and Altruistic Surrogacy, Adoption Choices of Colorado <https://www.adoptionchoices.org/important-differences-between-> accessed on 16-7-2022.

5 Genesis 1:16 Old Testament, Holy Bible, SJ Marston III, (Thomas Nelson & Sons, 1952).

6 Norman Witzeb and Anurag Chawla, "Surrogacy in India: Strong Demand, Weak Laws", in P. Gerber, and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (Ashgate Publishing Limited 1st edn.,) 167.

7 109 NJ 396 : 537 A 2d 1277 (NJ 1988) <http://www.kylewood.com/familylaw/babym.htm> accessed 12-7-2022.

surrogate mother. This case revealed the legal dilemma with which the court found itself in questions relating to surrogacy.[8] However one can find that what the court was attempting to do in this case is a balance of interest of both the parties under the label of 'best interest of the child principle". The question which crops up in our mind is the content of best interest of the child which the court was attempting to protect since the child is not a party to the contract but is the object of transaction for which consideration is paid. Moreover, how can the interest of the child be protected wherein the child is not a party itself to the contract?

Legal question such as the maternity of the child i.e., whether the mother of the child is the woman who provides the ovum for fertilisation or the woman who bears the baby and ultimately delivers it has always been debated and discussed.[9] Similarly, the custody of the child is again often raked as a problem. Issues as to whether custody needs to be given to the intended parents or the person who mooted surrogacy or the person who delivered the child? has always been controversial and subjected to judicial scrutiny. In 1993, the Californian Supreme Court in Johnson v Calvert[10] happened to deal with these questions. The case dealt with the question of custody of the child. Mark and Crispina Calvert were infertile couples but was desirous of having a baby. Their friend Anna decided to help them by carrying the baby through invitro fertilisation as a surrogate mother. It was agreed to pay the surrogate mother 10,000 for the pregnancy, as well as take out a life insurance policy on her. On the other side Anna made her promise to relinquish her parental rights upon the birth of the child. Their relationship became strained after Anna found that the Calverts did nothing though within all their powers to obtain the required insurance policy, and the Calverts on the other hand found that Anna had previous history of stillbirths and miscarriages. The Supreme Court observed that the intended parents i.e., Calverts had full parental rights, because they were the ones who intended to bring about the birth of the child and intended to raise the child as their own at the time of formation of the contract. Thus, the intent test or originators concept of as in whose mind the idea of having a child through surrogacy as a determinant for the parentage of the child was emphasised in this decision. On the contrary the dissenting opinion high lightened the danger of treating child as a property if the intent test is to be applied in surrogacy contracts. The minority observed thus:

> ´The problem with this argument, of course, is that children are not property. Unlike songs or inventions, rights in children cannot be sold for consideration, or made freely available to the public. Our most fundamental notions of personhood tell us it is inappropriate to treat children as property. Although the law may justly recognize

[8] Judith T. Younger, "What the Baby M Case is Really All About", (1988) 6, Minnesota Journal of Law & Inequality 75.

[9] Mark Rose, "Mothers and Authors: Johnson v. Calvert and the New Children of Our Imaginations, (1996) 22, Critical Inquiry 613.

[10] https://caselaw.findlaw.com/ca-supreme-court/1774439.html ,accessed 12, July,2022.

> that the originator of a concept has certain property rights in that concept, the originator of the concept of a child can have no such rights, because children cannot be owned as property. Accordingly, I cannot endorse the majority's "originators of the concept…'[11]

The debate on the ethics of commodifying child began in America in 1978 itself, wherein the justification for the same was put forth by Justice Richard Posner and Elizabeth Landes in their seminal article titled, The Economics of the baby shortage[12] in which they advocated that on an experimental basis some adoption agencies may permit American woman to forego abortion, to bear the baby and then put them for adoption. The criticism levelled against them was that they were demeaning a child's life or encouraging baby markets.[13] Similar arguments against surrogacy has been raised about motherhood too. The question as to whether motherhood is a form of labour especially when surrogacy is through IVF or other ART's? has raised discourses among the feminist circles. Apart from this the enforceability of surrogate contracts, the question of parentage, most importantly the recognition of the child as a person and bearer of rights in relation to surrogacy have been some of the prominent legal issues under discussion. There is currently no international regulatory framework on surrogacy. Different countries follow different practices. Hence there are opportunities for the children becoming vulnerable and susceptible to violation of basic dignity.

2. THE "CHILD" IN A SURROGATE ARRANGEMENT

Till date there is no international regulatory framework on surrogacy, nor a precise definition been attributed to surrogacy. The current International human rights frameworks are also silent on the aspect of protection of the interest of children born out of surrogacy. There is a dearth of guidance been provided to countries having surrogacy and the norms which primarily need to be incorporated in the International Surrogacy Agreements (ISS's) to protect the interest of the child born out of such an agreement. The governing norms at the international level include, Concluding Observations and Recommendations of the Child Rights Committee under the UN Convention on the Rights of the Child (UNCRC) , in which in the thematic reports on children and surrogacy of the UN Special Rapporteur, on sale and sexual exploitation of the children as well as the principles for the protection of the rights of the child born through surrogacy or commonly known as the Verona principles,2021.

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[11] <https://caselaw.findlaw.com/ca-supreme-court/1774439.html> accessed on 13-7-2022.

[12] Justice Richard Posner & Elizabeth Landes, The Economics of the baby shortage, (1978) 7 Jnl of Legal Studies 323.

[13] <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/chilflq11&id=352&men_tab=srchresults> accessed on 13-7-2022.

Some of the major human rights challenges which surrogacy poses is that of the right to identity which includes within its fold nationality, status, family relations, origin etc, right to health, Right not to be discriminated and to be treated with dignity, basically the most sacred of all rights, the right not to be treated as a chattel to be sold. The Optional Protocol to the CRC ie., on the sale of children, child prostitution and child pornography, 2002, specifically obliges not to give legal authenticity to sale of children. Similarly, questions of discrimination of the child based on gender or disability which might arise because of decision making by adults in ISS may be contrary at times to the best interest of the child which are human rights violations.[14] The element of commercial nature is present in surrogacy agreements and therefore there are chances of child being sold or exploited in such arrangements. However, there are certain areas which remains unsettled and complex in relation to a child born out of a surrogacy agreement.

3. CHILD AND ITS IDENTITY IN SURROGACY

From a child's perspective, its identity is always connected with its parentage. The Convention on the Rights of the Child 1989, (UNCRC) under Article 2 asserts that a child may not be subjected to discrimination based on birth or origin or any other status. Article 7 mandates the registration of the birth of a child immediately after birth as well as stresses on the right to a name and nationality. Similarly, the right to know one's parentage and to be cared for by the child's parents as far as possible is also recognised. Article 8 requires states to protect the child's rights to identity, which includes nationality, name, and family relations etc The decisions made by the parties to surrogacy can have a negative impact on the child who is not a party to the decision and there might arise situations wherein the rights of the child recognised under Article 2, Article 7 and Article 8 are seriously affected. Questions about whether to retain the confidentiality of the arrangement or to divulge it not only to the child but to others as well has raised ethical debates. However undoubtedly, knowledge about one's origins is fundamental and critical not only to the child's physical development but also its psychological, cultural and spiritual development. In most of the surrogate arrangements there is absence of systems to preserve the child's identity and related rights. Moreover under certain circumstances the restoration of the child's identity may be quite impossible especially in the context of where there is donor and/or surrogate anonymity. The legal parentage of the child has also raised several matters of concern. Some of the surrogacy arrangements have resulted in legal battles especially the International surrogacy agreements. This was subjected to a detailed discussion at the Hague Conference on Private International Law (HCCH).[15] The Experts Group on Parentage/Surrogacy Project under HCCH also recognised the mounting

[14] <https://www.unicef.org/media/115331/file> accessed 15,July,2022.

[15] J. Alexandra Harland "Surrogacy, Identity, Parentage and Children's Rights – Through the Eyes of a Child", (2021) Family Court Review- An Interdisciplinary Journal, <https://onlinelibrary.wiley.com/doi/full/10.1111/fcre.12554> accessed on 18-7-2022.

problem of children becoming stateless and questions of legal parentage as a major problem. In its report of 2019, it suggests that unified conflict-of-law rules would have the capacity to ensure the continuity of cross-border legal parentage and to a certain extent resolve issues though not completely and this is through reforming the International adoption procedures.[16] Thus the minimal standards through which the legal parentage of the child can be established is hardly taken care off. The minimum standards for legal parentage is nothing but the pre-surrogacy safeguards which includes the best interest determinations (BID) which includes consent of all parties to the arrangement, protecting the child's right to access their origins etc The question of any considerations or payments made prior to the birth of the child is a definite impediment for establishing legal paternity.

4. CHILD AS A COMMODITY: LEGAL AND BIOETHICAL CONSIDERATIONS

The ethics of surrogacy has been questioned often. The religious approaches on surrogacy has been conflicting. The Catechism of the Catholic Church upholds the view of the disassociation of the husband and wife by the intrusion of another person for any purpose whatsoever, such as either for donation of sperm or ovum or surrogate uterus is utterly immoral.[17] As for Islam, the Shia sect permits surrogacy whereas the Sunni sect treats it as haram since surrogacy is carrying of an egg which is not of a legal marriage and so akin to adultery. This approach of Islam is more or less similar to Jewish approach wherein it is considered that introduction of another man's sperm into a woman's body would constitute adultery, which is against Torah.[18] There are no objections to surrogacy under Hinduism as well since the ancient epics like Mahabharata do not object the same. There are secular philosophies which question the ethics behind surrogacy. Supporters of Kantian philosophy view both altruistic and commercial surrogacy as unethical as certain things can be either a person or property but not both. Babies born out of surrogate arrangements are persons, pure and simple, meaning they should not be treated as property.[19]

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[16] Jasmina Alihodziciet al., International Surrogacy Arrangements-Perspectives on International Regulation, (2020) 13 Medicine, Law & Society 1.

[17] Raywat Deonandan, "Thoughts on the Ethics of Gestational Surrogacy: Perspectives from Religions, Western Liberalism, and Comparisons with Adoption, (2020) 37, Journal of Assistant Reproduction Genetics 269, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7056787/> accessed on 6-8-2022.

[18] Raywat Deonandan, Thoughts on the Ethics of Gestational Surrogacy: Perspectives from Religions, Western Liberalism, and Comparisons with Adoption, (2020) 37, Journal of Assistant Reproduction Genetics 269, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7056787/> accessed on 6-8-2022.

[19] Donna Dickenson and Britta Van Beers, Surrogacy : New Challenges to Law and Ethics, (2020) 26 The New Bioethics, <https://www.tandfonline.com/doi/full/10.1080/20502877.2020.1835205> accessed on 10-8-2022.

> "*The practice of surrogacy also disregards the rights and human dignity of the child by effectively turning the baby in question into a product",* wasone of the observations made in the Motion moved in the Parliament Assembly of the Council of Europe in 2014.[20] In 2018 the Special Rapporteur to UN again warned that children cannot be treated as mere commodities and observed thus:
>
> > if a surrogate mother or third party receives remuneration or any other consideration for the transfer of the child, a sale occurs, as defined under international human rights law.…[21]

Therefore, insisted that there should be strict regulation of surrogacy especially commercial. Sale of children born through surrogacy is one of the dangerous challenges posed by surrogacy as quoted by UN Special Rapporteur in 2019 report. The report quoted the incident of Theresa Erickson which took place in 2012, wherein a Californian surrogacy broker was sentenced to imprisonment for having led an international baby-selling ring.[22] Erickson who was a former board member of the American Fertility Association had recruited women surrogates and had sent them to Ukraine, wherein they were implanted with embryos created from donated eggs and sperm without any surrogate agreements. She then put the resulting babies up for adoption, informing the prospective buyers or parents that they were the result of surrogacies in which the original intended parents had backed out and thus fraudulently collected between $100,000 and $150,000 for each baby.

Thus, a child in a surrogate arrangement is purchased even before it is coming into existence. The surrogate who is paid, is bound to surrender the child and if the surrogate mother does not, then there is a breach of contract, wherein she has to pay back all the amount paid to her by the intended parents. Thus, in essence it's a sale of child. Thus, the child is severed of all its maternal bonding and with its siblings, if any.

5. THE SURROGATE CHILD AND DISCRIMINATION

Children born out of surrogacy can be discriminated primarily based on the circumstances through which they are born. It has been reported that there have been instances of the child born out of surrogate arrangements being

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[20] <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21092&lang=en> accessed on 10-8-2022.

[21] <https://www.ohchr.org/en/press-releases/2018/03/children-risk-being-commodities-surrogacy-spreads-un-rights-expert-warns> accessed on 11-8-2022.

[22] <https://www.ohchr.org/sites/default/files/Documents/Issues/Children/SR/Surrogacy/CivilSociety/ SSN.pdf>.

abandoned or left stateless or discriminated.[23] Cases of abandonment of disabled children born out of surrogacy has also been reported. The famous Baby Gammy case reveals this aspect. In this case, Wendy and David Farnell, an Australian infertile couple, sought out a surrogate in Thailand. Through a surrogacy agency, the Farnell couple hired Pattaramon Chanbua, who was a poor food vendor and a mother of two children. After coming to know that one of the babies had Down syndrome, Chanuba[24] refused to go in for abortion as she believed abortion to be a sin[25] and that amongst the twin foetus one was healthy. In the year 2013, Baby Gammy and his twin sister were born and the Farnells took only the baby which was healthy back to Australia and not baby Gammy. The sad part was that the surrogate mother did not have sufficient financial capacity to care for the child with down syndrome. Moreover baby Gammy also had a congenital heart defect which required a surgery and the cost of it was huge for which Chanuba could not afford the same. The Australian family court held that though the Fernells had taken Pipah, the twin sister of Gammy, taking into consideration the best interest of baby Pipah, the child may continue with the Fernells. Thus, it can be inferred that without proper law on the subject there can be discrimination between children and abandonment of children as well.

The courts generally have taken a hands-off approach regarding recognising the rights of the surrogate child not to be abandoned or discriminated upon. The absence of legal framework might be one amongst the reason. *Manji Yamada* v. *Union of India*[26] is a classic illustration of the same. November 2007, an infertile Japanese couple came to India looking for surrogates and made an agreement with a fertility clinic in Anand, Gujarat which was globally famous for its commercial surrogacy services. A surrogacy contract between the intended parents and the surrogate mother was signed. Thereafter the biological father provided the necessary sperm for embryo creation and the egg donor being an anonymous Indian woman. Thereafter, the embryo was implanted inside the womb of the surrogate mother (gestational carrier). In June 2008, the matrimonial discords between the commissioning parents led to the couple getting divorced. The intended mother did not want to raise the child as she was biologically or legally unrelated to it and the genetic father wanted to take possession of the child, but he had to fly back to Japan due to the expiration of his visa. After the divorce of the commissioning parents, the Baby Manji was born on 25th July 2008 in a hospital in Gujarat and its paternal grandmother, flew from Japan to take care of the child. In August 2008 the Anand Municipality issued a birth certificate to the baby Manji Yamada indicating the name of the genetic father in it. A Public interest

[23] Jerome Courdurieus, At the Nation's Doorstep: The Fate of Children Born out of Surrogacy, (2018) 7 Reproductive Biomedicine & Society Online, Vol. 7 (2018) 47 <https://www.ncbi.nlm.nih.gov/ pmc/articles/PMC6351347/> accessed on 12-8-2022.

[24] <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2809&context=hlr> accessed on 12-8-2022.

[25] <https://fortefamilylawyers.com.au/the-baby-gammy-case/> accessed 12-8-2022.

[26] (2008) 13 SCC 518.

litigation was filed before the High Court of Rajasthan, by M/s SATYA an NGO. It was against the Union of India and the High Court of Rajasthan passed certain directions on the issue of custody/production of the child. The grandmother of the child, Ms Emiko Yamada filed a writ petition under Article 32 of the Constitution of India in the Supreme Court challenging the order passed by the High Court of Rajasthan. The court held that the Commissions for Protection of Child Rights Act, 2005 will deal with it and if any decision at all is taken it is to be taken by the Commission. Recent times the courts are confronted with intricate questions of the after effect of surrogacy. In *P. Geetha* v. *Kerala Livestock Development*[27] the question was whether the maternity leave claim under Maternity benefit Act 1961 applies to intended mother as well. The Kerala High Court held that the child specific statutory benefits, if any, can, and ought to, be extended to the intended mother. However, the question as to its applicability to surrogate mother as well might probably arise in future. However the uncertainty due to absence of law in this area might have an impact on the care to be given to the child.

Article 3(1) of the UNCRC insists that in all actions relating to children the best interest of the child needs to be taken into consideration. The Verona Principles 2021, which is a document grounded on Second Optional Protocol on the sale of children, child prostitution and child pornography of the UNCRC and other relevant international human rights instruments explicitly recognised these problems and asserts under Principle 3 that the children being independent right holders have right not to be discriminated by virtue of its birth or aspects connected with its origin, parentage, sex, religion etc.[28] However, in the case of a child born under surrogate arrangement the conditions entered into in pre-birth agreement need to not necessarily be taking into account the best interest of the child. Hence often it is relative and contextual. A child born out of surrogacy may be prevented from being with the parents who created it. Finally, 'the best interests of the child'may be found to be a holistic standard which mandates an evaluation based on the specific context and focusing on real effects and impact rather than being abstract.[29] Since same sex couples can also get a surrogate child, the chances of bullying of the child born out of it is also high.

[27] <https://indiankanoon.org/doc/162798767/> accessed on 12-8-2022.

[28] <https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples_25February 2021.pdf> accessed on 12-8-2022.

[29] Human Rights Implications of Global Surrogacy, a report by The International Human Rights Clinic of the University of Chicago Law School, submitted to the UN Office of the High Commissioner for Human Rights available at <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1009&context=ihrc> accessed on 12-8-2022.

6. BEST INTEREST OF THE CHILD AND SURROGACY ARRANGEMENTS

Under the legal framework, countries who had adopted UNCRC are required to apply the principle of best interests of the child while legal questions crop up in relation to surrogate child. The principle applies to all actions concerning the interest of the child and requires active measures to be undertaken to protect their rights and promote their survival, development and wellbeing. It also includes initiating measures to support and assist parents and others who have day-to-day responsibility regarding the child to ensure full realisation of their rights so as to develop their personality. It requires a systematic assessment by all governmental agencies including the legislative, administrative, and judicial bodies as to how child rights and interests are or will be affected directly or indirectly by their decisions and actions. Thus Article 3 of the UNCRC which incorporates the best interest concept is a right, a principle as well as a procedure which needs to be complied by all whether public or private.

There is no clear cut criteria as to what constitutes the best interest of the child in a certain issue. The meaning, content and its application needs to be determined from the facts and circumstances of each case in hand, by analysing the situation the child is placed, as far as individual decisions, are concerned and the need of the children as a group when the matter related for decisions concerning children in general.[30] In certain countries, surrogacy itself had been prohibited as it violates best interest standard. For eg Countries like Switzerland, Germany, France, etc. Countries like Portugal, UK, Greece etc allows altruistic surrogacy. Inter country surrogacy is bound to happen even if nation states prohibit surrogacy.[31] It is found that in the inter country surrogacy this standard is often violated than respected. Moreover, there has been certain ambiguities and judicial inconsistencies while applying best interest standard in litigations involving surrogacy.

For instance, in US, although for determining custody of the surrogate child the courts in US apply the "best interest of the child" standard, courts faced with disputes surrounding surrogacy contracts have looked more often at issues related to the adults or the surrogate mother /intended parents who entered the contract. This may involve questions surrounding the intent, contract, genetics, gestation etc.[32]

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[30] Orsolya-Zsuzsanna Csortán, Surrogacy Arrangements and Best Interest of the Child- European Perspectives <https://www.diva-portal.org/smash/get/diva2:1457025/FULLTEXT01.pdf> accessed on 15-8-2022.

[31] Roberto Andorno, "Intercountry Surrogacy and Best Interest of the Child, <https://www.researchgate. net/publication/32910602> accessed on 12-8-2022.

[32] Angela Kintominas, Surrogacy Law and Policy in the US: A National Conversation Informed by Global Lawmaking <https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files> accessed on 15-8-2022.

It needs to be understood that the best interest principle is introduced with the intent to provide boundaries and focus through which those adults who are empowered to make decisions on behalf of children as individuals undertake decisions beneficial for the child. Though at the first instance it primarily applies to parents, but it also to all others with authority over children's lives or whose actions impact on children. Thus, it includes courts, social workers, police, doctors, nurses, teachers, law, policy makers etc However, this concept has been subjected to criticism as well. Apart from the usual criticism of it being indeterminate, inconsistent etc the question is its fundamental application to surrogacy itself. While theorists view that it is justifiable to apply the concept to existing children, they question its application and question it as to how one can assess and determine the best interests of the child when that child itself has even yet to have been created? Moreover, at the time of entering into a surrogate arrangement it is impossible to know anything much about either the health which includes both the physical and the mental condition of the child-to- be-born, therefore the best interests may be determined mostly generally with assessing or on an evaluation of a child´s parents-to-be be it the surrogate or the donor/intended parents. Again, as there are no reliable predictive criteria for inadequate parenting, which inversely means that there is no criteria which can be used to guarantee the best interests of the child. The best interests of the child involving surrogacy may be evaluated from different standpoints. Predominant among them are the physical needs of the child such as nutrition and care, may be assessed. The second determinant element is the need for an assessment of the emotional needs of the child. Undoubtedly, every child deserves to lead his/her life in a caring and loving family environment which enables him/her for future development and education. The best interest standard also incorporates the child's right to know about his origins especially the genetic ties. While applying the best interest standard the possible or potential harm to the child´s physical and psychological welfare and to his /her human dignity because of a decision also needs to be assessed. In certain jurisdictions paramountcy of surrogacy agreements is considered rather than the best interest of the child. For instance in a Californian decision, *C.M* v. *M.C.*[33], a surrogate mother gave birth to the triplets. The surrogacy was based on a surrogacy contract concluded between the intended parent who was a 50-year- old poor deaf-mute man. The intended parent i.e., man, worked as a postal worker. During the pregnancy, the intended parent repeatedly persisted the surrogate to abort one or more of the fetuses amongst the triplets, as he was financially incapable of taking care of all the triplets and providing them with all basic necessaries. However, the surrogate refused which prompted the intended father to file the petition in the court for a pre-birth order, she filed a counterclaim stating that the intended parent is not capable of raising the children. However, the Californian court held that the statute requires a court to enforce the contract irrespective of the objections being raised by the surrogate

[33] <https://law.justia.com/cases/california/court-of-appeal/2017/b270525.html> accessed on 15-8-2020.

mother regardless of the fact the enforcement of the contract is contrary to the childs best interests.[34]

7. CROSS BORDER SURROGACY AND THE SURROGATE CHILD

There has been enormous increase in cross border surrogacy and parallel increase in parental applications. This demonstrates that although there exist laws banning commercial surrogacy in many countries, they aren't fruitful enough in the modern context. Cross border surrogacy poses a great threat to children and are against public policy since they expose children to the risks of trafficking and becoming stateless orphans.

The domestic laws of nation states relating to surrogacy vary from prohibitionist to permissive legal jurisdictions. This variation occurs across nation state boundaries and sometimes within a particular nation itself, as in the case of Australia, Mexico, and the United States. France and Germany are the prohibitionist jurisdictions which bans all forms of surrogacy whereas there are jurisdictions with laws governing surrogacy, including Australia, Greece, New Zealand, South Africa, and the United Kingdom which prohibit "commercial", "for profit" or "compensated" surrogacy, while permitting "altruistic" surrogacy. Many countries, like Argentina, Belgium, Guatemala, Ireland, and Japan etc do not even have legislations regarding surrogacy.

At no stage of an international agreement for surrogacy the interest of the child is being taken into paramount consideration. The common practice in such arrangements is that the intended parents avail themselves of international system shopping to evade their home prohibitive laws and pay surrogacy agencies to undertake the necessary process for them. After that a contract is entered between the intended parent and the surrogate mother and thereafter usually the IVF is undertaken. Once the child is born, sometimes even before the birth of the child, the intended parents approach the local court at the place of its birth and obtain a parental order or similar official document establishing their legal parentage. In every step of this process the child is not a subject but an object of the contract. Even before the birth of the child, the surrogate mother is already being paid and contracted for. At times the contract may provide for the intended parents' right to order an abortion within certain permissible limits. Thus, the child's dignity is forsaken at every stage. One may argue that these as mere ethical objections to surrogacy. However, there are certain legal and jurisdictional issues in this regard. Cross border surrogacy provokes international legal conflict in the sense that it facilitates the system-shopping or jurisdictional /forum shopping scenario between a surrogacy-prohibiting receiving State and a surrogacy-allowing State

[34] <https://www.projustice.sk/obcianske-pravo/the-best-interest-of-the-child-principle-and-the-surrogacy-motherhood> accessed on 15-8-2022.

of origin[35] The reason is that intending parents travel from prohibitive jurisdictions i.e., which bans commercial surrogacy, such as Australia, France, or Italy, to jurisdictions permitting commercial surrogacy. They then seek to return with surrogate- born children to their home countries. Such travel is solely with the intention to evade prohibitionist laws and this indirectly creates dilemmas for the jurisdictions involved. Often, competent authorities of the state and courts are often placed in a predicament to validate, international surrogacy arrangements that are illegal in one or both jurisdictions keeping in mind the transaction rather than the welfare of the child. Article 35 of UNCRC obligates the member states to take all appropriate, measures at several levels such as national, bilateral and multilateral level so as to prevent the abduction of the sale of or traffic in children for any purpose or in any form whatsoever. There exists views that the phrase "for any purpose or in any form" ican include surrogacy within its fold since surrogacy is no exception to the article's prohibitions.[36]

8. SURROGACY IN INDIA AND THE WELFARE OF THE CHILD

Surrogacy has been legal in India including the commercial surrogacy markets remained active since 2002. It turned to be one of the most lucrative business in India and raised concerns like unethical practices, due to it the middlemen and commercial agencies profited the most, the exploitation of surrogate mothers being rampant, rising abandonment of children born out of surrogacy, rackets like organ trade, embryo import, etc India continued to be the largest provider of commercial surrogacy services in the world and the absence of regulations, low cost of fertility clinics, and a large supply of poor women willing to provide this service, converted India to a hub for transnational surrogacy. Public attention of the legal questions arising out of commercial surrogacy came to the forefront in *Manji Yamada* v. *Union of India*.[37] However, the Supreme Court was reluctant to interfere and infact entrusted the matter to be decided by National Commission for Child. In 2009, the Gujarat High Court in *Jan Balaz* v. *Anand Municipality and ors*., conferred on two twin babies, Indian citizenship, fathered through compensated surrogacy by a German national in Gujarat. While looking into the legal intricacies of nationality and parentage the court observed thus:

> "We are primarily concerned with the rights of two new born, innocent babies, much more than the rights of the biological

[35] Chris Thomale, State of Play of Cross-Border Surrogacy Arrangements – Is there a Case for Regulatory intervention by the EU?, (2017) 13 Journal of Private International Law, <https://www.tandfonline.com/doi/full/10.1080/17441048.2017.1353783> accessed on 16-8-2022.

[36] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material (2018) <file:///C:/Users/IND%20-%20MIN/Downloads/A_HRC_37_60-EN%20(1).pdf> accessed on 16-8-2022.

[37] (2008) 13 SCC 518.

> parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance. Surrogate mother is not the genetic mother or biologically related to the baby, but is she merely a host of an embryo or a gestational carrier? What is the status of the ova (egg) donor, which in this case an Indian national but anonymous. Is the ova donor is the real mother or the gestational surrogate? Are the babies motherless, can we brand them as legal orphans or Stateless babies? So many ethical and legal questions have come up for consideration in this case for which there are no clear answers, so far, at least, in this country. True, babies conceived through surrogacy, encounter a lot of legal complications on parentage issues, this case reveals. Legitimacy of the babies is therefore a live issue. Can we brand them as illegitimate babies disowned by the world." [38]

The court also insisted on parliamentary intervention in making a law on the subject. The guidelines made by Indian Council of Medical Research (ICMR) in 2002 was approved by the government in 2005 thereby, regulating Assisted Reproductive Technology procedures. The Law Commission of India in its 228th Report of 2009, relating to Assisted Reproductive Technology procedures also discussed the importance and need for regulating surrogacy. Subsequently through government notifications and bills commercial surrogacy was sought to be regulated. In the year 2013, surrogacy by foreign homosexual couples and single parents came to be banned and thereafter in 2015 commercial surrogacy came to be prohibited. Thereafter in 2016, a Surrogacy (Regulation) Bill was brought in. The bill promoted altruistic surrogacy but was against commercial surrogacy. The bill brought in restrictions based on gender and age which was challenged in *Devika Biswas* v. *Union of India*.[39] The apex court in this case held that reproductive right was an essential aspect of the 'Right to Life' under Article 21. Right to Reproduction incorporates within its fold the right to carry a baby, giving birth to it and raising it. Therefore, restricting surrogacy to a particular group of age and among heterosexual couples only, creates a partial imbalance. The communities such as single people, older couples, LGBTQIA+ couples, are all completely denied the right to have reproductive choices, which, undoubtedly, is a violation of Article 21 as well as Article 14 of the Indian Constitution. However, the bill lapsed. Again in 2019 the Surrogacy Regulation Bill as well as ART bill was introduced. Prohibiting commercial surrogacy and allowing altruistic surrogacy, the bill stipulated purpose for which surrogacy may be permitted such as for proven infertile couples who intend for surrogacy or for altruistic purposes not for commercial purposes etc. The bill made it clear that the surrogacy should not be undertaken for producing children for sale, prostitution, or other forms of exploitation. The

[38] <https://www.lawyerservices.in/Jan-Balaz-Versus-Anand-Municipality-and-6-Others-2009-11-11> accessed on 16-8-2022.

[39] (2016) 10 SCC 726.

bill was thoroughly revised and in 2020, both the bills were again tabled after major changes and with lot of discussions it was tabled in the parliament and finally passed. The Presidential assent was received on January 2022. One of the prominent aspects regarding this legislation is that it declares under Section 8 of the Act that a child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple or intending woman and the said surrogate child shall be entitled to all the rights and privileges available to a natural child. It reinforces the faith that the child born out of surrogacy may not be deprived of any legal entitlements. The Act is silent on the legal entitlements which a surrogate child may have since it might face more challenges in comparison to a natural child. Some of the other salient features of the Act include:

a) It only permits altruistic surrogacy. This means that commercial surrogacy is prohibited and that only the medical expenses and insurance coverage is provided by the couple to the surrogate mother during pregnancy and no other compensation.[40]

b) A married couple can opt for it only on medical grounds. However, the couples should procure certificates of eligibility and essentiality to have a child via surrogacy.[41]

c) The intending couple is deemed 'eligible' only if they have been married for five years and the wife is aged between 23-50 years and the husband is between 26-55 years. The couple must not have any living child.

d) The Act allows single women to resort to surrogacy. However, such a woman should be either a widow or a divorcee, between the age of 35 to 45 years. Single men are, however, not eligible.[42]

e) The Surrogate mother should be a close relative of the intended parents and she should be a married woman with a child of her own, aged between 25-35 years, and should have been a surrogate only once in her life. Surrogate mother should possess a certificate of medical and psychological fitness for surrogacy[43]

f) A National Surrogacy Board (NSB) at the central level and the State Surrogacy Boards (SSB) at the state level needs to be constituted by the appropriate government, within 90 days of the passing of the Act. This body is vested with the responsibility of enforcing standards for surrogacy clinics, investigating breaches and for registration of surrogate arrangements as well.[44]

[40] S. 4.
[41] S. 12.
[42] S. 4(IV).
[43] S. 4(*b*)(*i*).
[44] Ss. 17 and 26.

One of the positive aspects of the legislation is that it penalises for abandonment of child born out of surrogate arrangement.[45] However, the amount of fine is just up to 10 lakhs which is very nominal. The ART Act states that the registration of ART clinics shall be with the NSB and SSB's. The Surrogacy Act is often criticised as suffering from gaps and ambiguities. It excludes live in relationships, LGBTQIA+ community, etc There are also criticism that this legislation is highly restrictive in nature[46] which can lead to underground booming of surrogacy on the commercial lines. Presently, a petition is pending before the Delhi High Court challenging the validity of the provisions of the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 on the grounds that these legislations do not allow single men and married women who already have children from opting for surrogacy.[47] The Act is silent on the application of best interest standard in surrogacy. There exist criticism that the legislation as discriminatory against children with disabilities.[48] The proviso to Section 4 encourages considering surrogacy if the intended parents has a child who is suffering with a life-threatening disorder. This clause may be deemed to violate the right of the children with the disability, thus denying them treatment with dignity. Hence, there is a need for a revamp of the national and international legal framework on surrogacy in terms of the child being the centre of such an arrangement.

9. CONCLUSION

Child is the central element in all the surrogate arrangements. However, it can be inferred that either in the contract, laws or policies or decision making by courts this identity of the child is lost. Often children are deprived of their identity and basic rights. Information on one's identity is crucial. Moreover, no child should suffer by virtue of an institution to record the mode by which their citizenship /legal identity is established. Hence civil registration and vital statistics (CRVS) systems needs to be established and preservation of the information pertaining to identity needs to be ensured. A best interest determination post birth of the child may be undertaken. Specific provisions relating to non - discrimination needs to be incorporated in the laws. Their right to know about their biological ties at a certain age needs to be recognised by the national law.

When an analysis is made of the surrogacy laws in the world including the Surrogacy Act, 2021 of India the child is not the point of main discussion. A plain reading of Section 2 of the Act itself reveals the fact that surrogacy is treated as a practice wherein the surrogate woman bears and gives birth to a child

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45 S. 7.

46 <https://www.adda247.com/upsc-exam/surrogacy-act-in-india-surrogacy-law-controversy/> accessed on 16-8-2022.

47 <https://www.thehindu.com/news/cities/Delhi/delhi-hc-seeks-centresstand-on-challenge-to-provisions-of-surrogacy-law/article65466513.ece> accessed on 16-8-2022.

48 <https://feminisminindia.com/2022/02/02/the-surrogacy> accessed on 16-8-2022.

for an intending couple and primary basis of it is with the intention of handing over such child to the intending couple after the birth. Though, the entire transaction is based on the child, the Act is not clear as to the way the interest of the surrogate child will be protected. The law today considers the surrogate child not as a life but rather an object. Rather it fails to recognise the interests and welfare of the surrogate child. Undoubtedly, surrogate-born children have the right to know about their gestational, genetic, and legal parents. The law should specifically contain provisions regarding it. The Indian law is silent on this. Provisions for involvement of child welfare professionals in surrogacy arrangements needs to be made mandatory so that the interest of the child is given paramount importance. There is a need for international regulation of surrogacy arrangements and greater international collaboration, so as to enable alignment of data collection across relevant agencies which will lead to greater protection to surrogate children in cross border surrogacy.

TRIPLE TALAQ AND THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019

*Dr. Neelam Batra**

1. INTRODUCTION

The social status of Muslim women in India is a matter of debate for decades. There is prevalent misconception that in Islam, woman holds inferior status in comparison to man. There are many practices which are still prevalent in Muslim community leading to oppression of Muslim women, such as instant triple talaq *(talaq-e-biddat)*, in spite of its disapproval by the Quran and also the Supreme Court judgment in *Shayara Bano* v. *Union of India*[1] declaring it to be unconstitutional. Marriage and divorce are generally considered to be the part of personal laws of the Muslims. Every law needs to be amended and reformed according to the changed societal conditions. But no serious efforts have been made for a long time for codification and modernization of the Muslim personal laws and reforms in it. In the year 2019, a much-awaited legislation has been enacted known as Muslim Women (Protection of Rights on Marriage) Act, 2019. The present research intends to study the provisions of this newly enacted legislation and to critically analyse whether the legislation is really beneficial to Muslim women and is likely to achieve its objective in the proper sense or not. This research also attempts to suggest suitable amendments to be made under the Act so as to make this law more beneficial for the Muslim women.

2. THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019

The Supreme Court declared the practice of instant triple talaq as unconstitutional by 3:2 majority. Khehar, CJI, and S. Abdul Nazeer, J. in their minority judgment in *Shayara Bano case*[2] had directed the Union of India to consider the matter of triple talaq and reforms and advancements in Muslim personal law through appropriate legislation and advised different political parties of the country to keep their different political advantages to one side bearing in mind the vital measures of paramount importance. Resultantly, the Central Government

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1 (2017) 9 SCC 1.

2 (2017) 9 SCC 1.

introduced the Muslim Women (Protection of Rights on Marriage), Bill, 2017[3] in the Parliament which provided that it is intended to provide relief to the married Muslim women, who are continuingly harassed because of practice of *talaq-e-biddat*.[4] The Bill provided that pronouncement of *'talaq'* as defined in clause 2(b)[5] shall be punishable with up to three years imprisonment and fine.[6] The Bill made pronouncement of talaq to be void and illegal[7] and made it a cognizable and non-bailable offence[8]. It vested the jurisdiction in Magistrate of First Class[9] to deal with cases of instant talaq. It provided the provisions for subsistence allowance[10] and custody of minor children[11]. On Dec. 28, 2017, the Muslim Women (Protection of Rights on Marriage) Bill, 2017 was passed by the Lok Sabha, but it could not be passed in the Rajya Sabha on Jan. 2, 2018.

On Sept. 19, 2018, failing to pass the Bill in the Parliament, there was promulgation of Muslim Women (Protection of Rights on Marriage) Ordinance, 2018[12] for protection of married Muslim women's rights and for prohibition of divorce by their husbands by pronouncing talaq. The ordinance provided provisions similar to the Bill of 2017 relating to punishment for pronouncing *talaq*[13], subsistence allowance[14] and custody of minor children[15], and also provided an additional

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3 Available at <http://164.100.47.4/billstexts/lsbilltexts/asintroduced/247_2017_LS_Eng.pdf> (last visited on 10-10-2020).

4 Muslim Women (Protection of Rights on Marriage) Bill, 2017, Statement of Objects and Reasons.

5 *Id*. S. 2(*b*) states: *talaq* means *talaq-e-biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband.

6 S. 4 states: Whoever pronounces *talaq* referred to in S. 3 upon his wife shall be punished with imprisonment for a term which may extend to three years and fine.

7 S. 3 states: Any pronouncement of *talaq* by a person upon his wife, by words either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.

8 S. 7 states: Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under this Act shall be cognizable and non-bailable within the meaning of the said Code.

9 S. 2(*c*) states: Magistrate means a Magistrate of the First Class exercising jurisdiction under the Code of Criminal Procedure, 1973, in the area where a married Muslim woman resides.

10 .S. 5 states: Without prejudice to the generality of the provisions contained in any other law fir the time being in force, a married Muslim woman upon whom *talaq* is pronounced, shall be entitled to receive from her husband such amount of subsistence allowance for her and dependent children as may be determined by the Magistrate.

11 .S. 6 states: Notwithstanding anything contained in any law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of *talaq* by her husband, in such manner as may be determined by the Magistrate.

12 Available at <https://bombayhighcourt.nic.in/libweb/ordinc/2018/2018.07.pdf> (last visited on 10-10-2020).

13 The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018, S. 4. Any Muslim husband who pronounces talaq referred to in S. 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

14 S. 5 states: Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom talaq is pronounced shall be entitled to receive from her husband such amount of subsistence allowance for her and dependent children as may be determined by the Magistrate.

15 S. 6 states: Notwithstanding anything contained in any law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement

provision relating to compounding of offence and bail of husband upon hearing the woman.

However, this ordinance was challenged in *Shahid Azad* v. *Union of India*[16] as unconstitutional, claiming it to be excessive and unnecessary legislation. The Delhi High Court dismissed the petition considering it to be based upon vague and unspecified allegations against the ordinance. The Court further observed that the ordinance has been brought into force in furtherance to the decision given by the Supreme Court in *Shayara Bano case*[17] to protect the married Muslim women rights and to impose criminal liability upon any person who has practiced instant triple talaq. The Supreme Court has declared the practice of instant triple talaq to be arbitrary and unconstitutional in this case. If in spite of such declaration, triple talaq is still practiced and the Union of India, in its wisdom, brings a legislation to declare it a punishable offence as a measure of deterrence, then it is not arbitrary or unreasonable.

The Central government again introduced the Muslim Women (Protection of Rights on Marriage) Bill, 2018 passed by the Lok Sabha on Dec. 27, 2018. However, it again could not be passed in the Rajya Sabha and on Feb. 13, 2019, the Rajya Sabha adjourned sine die as a result of which the Bill lapsed. The President promulgated the Muslim Women (Protection of Rights on Marriage), Ordinance (1 of 2019)[18] on Jan. 12, 2019. The provisions contained in the ordinance were same as that of ordinance 7 of 2018. Another ordinance (4 of 2019)[19] was promulgated on Feb. 21, 2019, which repealed the Ordinance 1 of 2019. The provisions contained in the Second Ordinance were same as that of First Ordinance of 2019. Again the Muslim Women (Protection of Rights on Marriage) Bill, 2019 was introduced in the 17th Lok Sabha. Despite severe criticism of the opposition parties demanding that the Bill to be considered by the Standing Committee of Parliament, the Bill was finally passed by Lok Sabha on July 25, 2019 with majority of 303 votes in its favour.[20] The Bill was moved in the Rajya Sabha and was passed on July 30, 2019 with 99 votes in favour[21] and received the President's assent on July 31, 2019.[22] It shall be deemed to have come into force on 19th Sept., 2018. The provisions of the Act are same as that of the Ordinance 4 of 2019.

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of *talaq* by her husband, in such manner as may be determined by the Magistrate.

16 2018 SCC OnLine Del 11620.

17 (2017) 9 SCC 1..

18 Available at <https://bombayhighcourt.nic.in/libweb/ordinc/2019/2019.01.pdf> (last visited on 10-10-2020).

19 Available at <http://legislative.gov.in/sites/default/files/legislative_references/ Ordinance%20 2019%20Dec.pdf> (last visited on 10-10-2020).

20 Available at <https://www.indiatoday.in/india/story/triple-talaq-bill-passed-in-lok-sabha-with -303-votes-1573568-2019-07-25> (last visited on 26-10-2020).

21 Available at <https://theprint.in/judiciary/parliament-passes-triple-talaq-bill-after-rajya-sabha-votes-99-to-84-in-favour/270040/> (last visited on 26-10-2020).

22 Available at <https://m.economictimes.com/news/politics-and-nation/president-gives-assent-to-triple-talaq-bill/articleshow/70476125.cms> (last visited on 26-10-2020).

3. SALIENT FEATURES OF THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019

The title of the Act, 2019 is similar to that of "The Muslim Women (Protection of Rights on Divorce) Act, 1986 (Act 25 of 1986), with the word 'divorce' in the title replaced with 'marriage' in it. The Preamble of this Act of 2019 affirms that it is legislated for protection of married Muslim women's rights and for prohibition of divorce by pronouncing talaq by their husbands. In *Nahas* v. *State of Kerala*[23] the Kerala High Court observed that the Act of 2019 has been passed with the salutary object to ensure the greater constitutional objectives of gender justice and gender equality of married Muslim women and aid to sub serve their fundamental rights of empowerment and non-discrimination.

3.1. Definition of Talaq under the Act

The Act defines the term 'talaq' under Section 2(c) as *talaq-e-biddat* or any other similar form of talaq having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband. Thus, from the definition, it is clear that the Act prohibits only that form of triple divorce, which has the effect of both instantaneous and irrevocable divorce at the instance of the husband. Thus, the other forms of divorce, such as *talaq-e-ahsan* or *talaq-e-hasan* are not covered under it, because both the forms provide opportunity for revocation of divorce by the husband.[24] The provisions contained in Sections 3[25] and 4[26] of the Act merely prohibit the pronouncement of triple talaq having effect of irrevocable dissolution of marriage without any attempt for reconciliation and settlement. But it does not delimit or take away the proper method of divorce as approved in Islam, such as *talaq-e-ahsan* or *talaq-e-hasan*[27] or divorce through judicial decree, which provide ample safeguards for the protection of rights of both the parties.

3.2. Consequences of Pronouncement of Triple Talaq

The Act under Section 3[28] declares the pronouncement of talaq by a Muslim husband as void and illegal. The result of the prohibition of instant triple

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[23] 2020 SCC OnLine Ker 3175 : 2020 (3) ILR (Ker) 1045.

[24] Rajya Sabha Debates on 30-7-2019. Available at <https://rsdebate.nic.in/handle/123456789/698886?viewItem=browse> (last visited on 22-8-2020).

[25] Muslim Women (Protection of Rights on Marriage) Act, 2019, S. 3 states: Any pronouncement of talaq by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.

[26] *Id*., S. 4**.** Any Muslim husband who pronounces talaq referred to in S. 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

[27] Lok Sabha Debates on 25-7-2019. Available at <https://eparlib.nic.in/handle/123456789/786550?view_type=search> (last visited on 22-8-2020).

[28] *Supra* note 26.

talaq is that if the husband, in momentary anger or in jest or with deliberate intention, pronounces triple talaq, divorce is not followed as its consequences and the pronouncement has the same effect as if it has never been pronounced at all. The marital relationship between the husband and wife remains unchanged. The Act provides the greatest relief to Muslim women, who were earlier forced to leave their matrimonial homes upon the unilateral order of their husbands of the severance of marital tie. The Act makes pronouncement of triple talaq by the husband having no adverse impact on the matrimonial relationship. It means that the declaration of triple talaq will have no effect in the eyes of the law. Now as the marital relation between the husband and wife subsists even after the triple pronouncement of divorce, the husband has no right to ask his wife to leave the matrimonial home.

3.3. Punishment for Pronouncement of Triple Talaq and Cognizance of the Offence

The Act under Section 4[29] makes pronouncement of triple talaq punishable with maximum three years' imprisonment and also with fine. The penal provision of making utterance of triple talaq punishable with three years' imprisonment is enacted to serve the purpose of having necessary deterrent effect upon the unscrupulous husband, to prevent repetition of the same in future and also to discourage others to commit the offence.

The punishment under Section 4 of the Act can be meted out only against Muslim husband who has pronounced triple talaq. There is no provision under the Act for taking action against in-laws of the married Muslim woman. In *Rafique Ahmed* v. *State of M.P.*[30] the M.P. High Court has observed that the provisions of the Act of 2019 are applicable only against the husband and not against in-laws.

In *Nadeem Khan* v. *Union of India*[31] the petitioner sought the declaration that Section 4 of the Act, to be declared as ultra vires, because once practice of triple talaq has been struck down, now it will not have any adverse effect on the marital relationship; therefore, there is no justification of criminalisation of the same. The Delhi High Court, in its order dated 13.10.2020, stated that object of Section 4 of the Act, 2019 is to prohibit the practice of triple talaq and to provide deterrence against the said practice. Merely because the said practice is declared as void, that does not mean that legislature cannot make it an offence, if practiced by anyone.

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[29] *Supra* note 27.
[30] 2020 SCC OnLine MP 1521.
[31] 2020 SCC OnLine Del 1336.

The offence is made cognizable under Section 7[32] of the Act. To prevent misuse of the provision, the cognizance of the offence under the Act depends upon the information regarding the triple talaq being given by the lady herself or through any one related to her by blood or marriage to the officer in charge of the police station. The police suo motu cannot register a case against the wrongdoer husband. The police can lodge an FIR upon the information given by the aggrieved woman or her relative only, regarding the commission of the offence under the Act. Otherwise, even if the police come to know about the commission of such offence, the police itself is not authorized to lodge the FIR and arrest the husband. If the husband and wife resolve dispute within family and the husband agrees to resume cohabitation, it is obvious that there is no need of invoking provisions of the Act. If reconciliation is made within family without the interference of external authority and both the parties resume cohabitation, the wife will not generally file the complaint against the husband. In fact, the offence under the Act is committed only when after the triple pronouncement, the husband refuses to accept the woman as his wife and insists on irrevocability and finality of divorce. Only then upon the complaint of the aggrieved woman or her relative, the police can take action against the husband.

3.4. Provision for Subsistence Allowance

To safeguard the interests of the aggrieved woman, she is entitled to subsistence allowance for her and her dependent children from the husband under Section 5[33] of the Act. The amount of subsistence allowance is to be determined by the Magistrate. While deciding for the amount of subsistence allowance, the general factors such as lifestyle enjoyed by the wife and economic capacity of the husband and similar other factors are considered by the Magistrate.

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[32] Muslim Women (Protection of Rights on Marriage) Act, 2019, S. 7 states: Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), —

(*a*) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom talaq is pronounced or any person related to her by blood or marriage;

(*b*) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom talaq is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;

(*c*) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom talaq is pronounced, is satisfied that there are reasonable grounds for granting bail to such person.

[33] Muslim Women (Protection of Rights on Marriage) Act, 2019, S. 5 states: Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom talaq is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate.

3.5. Custody of Minor Children to be given to the Mother

In common parlance, the mother is considered to be the best guardian of her children's interests. Therefore, under Section 6[34] of the Act, the custody of minor children is given to the woman, irrespective of any other law providing for contrary provisions.

3.6. Compounding of the Offence: A Provision for Reconciliation

The offence under the Act is made compoundable under Section 7(b)[35] of the Act with the Judicial Magistrate's (First Class) permission and only at the instance of the wife. Through the provision of declaring triple talaq as void and nonest and the provision of compounding of offence under the Act upon the terms decided by the Magistrate, an opportunity for reconciliation and settlement of dispute between the husband and wife is provided for the great purpose of preservation of marriage. Thus, the marital relationship could be preserved, without undergoing the traditional practice of *nikah-halala,* because as per the provisions of the Act, triple pronouncement of divorce has no effect at all, therefore the question of dissolution of marriage does not arise and therefore, there is no need of undergoing the procedure of *nikah-halala* for remarriage between the parties.

3.7. Provision for Granting Bail to the Husband

Under the Act, the provision is made under Section 7(c)[36] for granting bail to the accused husband upon his application for bail being filed in the court. After arrest, the husband shall be released on bail, if the Magistrate is satisfied after hearing the aggrieved wife that there are sufficient reasonable grounds of granting bail to the accused husband. Thus, hearing the opinion of the aggrieved wife is made necessary for the Magistrate before granting bail to the husband. If the Magistrate is convinced about the relevant grounds for granting bail, then upon the bail application of the husband, bail would be granted. However, if the wife opposes the bail of the husband and the Magistrate is convinced about the reasonableness of those grounds, bail shall not be granted. The Act of 2019 does not make the presence of the accused husband necessary in the court while deciding upon his bail application.

In *Nahas* v. *State of Kerala*[37], the husband charged with the offence of triple talaq pronouncement under Section 4 of the Act filed bail application

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[34] *Id*., S. 6 states: Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband, in such manner as may be determined by the Magistrate.

[35] *Supra* note 33.

[36] *Ibid*.

[37] *Supra* note 24.

under Section 438 of CrPC, 1973. The Kerala High Court observed that under the Act, there is special provision under Section 7[38] regarding grant of bail, then the petition should be presented before Magistrate under Section 7(c) of the Act, before filing application under section 438 of the CrPC, 1973. Section 7 starts with 'notwithstanding' (nonobstante clause) which will have overriding effect over any other provision. But there is no bar to entertain an application under Section 438 of CrPC, 1973. Section 7(c) is a complete code for consideration of bail application under the Act; where separate procedure for disposal of bail application of the accused husband charged of the offence under the Act is contemplated, under which hearing the married Muslim woman is necessary while considering the bail application of the accused husband. The presence of accused in the court is not necessary. Also the order passed while entertaining a bail application should be a speaking order.

3.8. The Act is not against Muslim Personal Law and Freedom of Religion

The Act is not an interference in the Muslim personal law. As the Supreme Court in *Shayara Bano case*[39] has held by majority that practice of triple talaq is not an integral part of the Muslim personal law and also declared it invalid, the Act which makes punishable its practice, cannot be against the Muslim personal law. The Act is not an encroachment of freedom of religion guaranteed under Article 25 of the Constitution. It is generally accepted view that any legislation which upholds the gender equality and empowerment of women in the society cannot be considered as violative of freedom of religion. The State is empowered to make laws under Article 25(2)(b) to eradicate anti-social practices, particularly for social reforms and also for women empowerment.

3.9. Powers of the Judicial Magistrate

Under the Act, very wide powers have been given to the Judicial Magistrate First Class exercising jurisdiction in the area where the married Muslim woman resides,[40] in regard to various matters, such as deciding amount of subsistence allowance for the aggrieved wife and children, custody of minor children, hearing the bail application of the accused husband and granting of bail upon reasonable grounds and for deciding the terms of compounding of offence.

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[38] *Supra* note 33.

[39] *Supra* note 1.

[40] Muslim Women (Protection of Rights on Marriage) Act, 2019, S. 2(*b*). "Magistrate" means a Judicial Magistrate of the First Class exercising jurisdiction under the Code of Criminal Procedure, 1973, in the area where the married Muslim woman resides.

3.10. A Step Towards Gender Justice

The Act is a bold step towards ensuring gender equality and gender justice in India. Various instances across the country have shown that Muslim women, not only from poor and backward families, but also of well-educated and rich families have become victims of the gender discriminatory practice of triple talaq. Innumerable instances show that because of three words spoken in momentary anger by the husband, many families have been ruined and deserted women live under highly miserable conditions. Many women have lived under constant fear of severance of marital relationship through instant triple talaq, even on small or no grounds, because of which they have been tolerating the atrocities committed by their husbands silently. The practice of triple talaq has always been against the principle of gender equality. The practice of triple talaq has been a form of divorce under which the woman has been kept subservient and has no say in the matter of severance of marital relationship, therefore, it has no place in a civilized society. The Act provides punishment for the perpetrator, thus, upholds the dignity and empowerment of Muslim women.

4. SIGNIFICANCE OF THE ACT

The continuance of marital relationship even after unilateral utterance of divorce thrice by the husband is the greatest safeguard provided to millions of Muslim women, because now they will not live under the fear of dissolution of their marriages, on trivial or no issues. Keeping in view the importance of marital tie in a civilized society, the Preamble of the Act itself declares the great objective of prohibition of divorce through triple talaq and thus for preservation of marriage. Another greatest safeguard provided to women is that as now the marital status is not changed upon triple pronouncement of talaq, there is no need to go through the detestable practice of *nikah-halala* only for the sake of re-marriage between the parties. After the passing of the Act, it can firmly be said that Muslim women belonging to Sunni sect will get equal status with that of men, because now the husband has no unilateral right of dissolving the marriage through utterance of triple talaq. After the Supreme Court declaring triple talaq as invalid under *Shayara Bano case*[41], cases of triple talaq did not come to an end. There were still cases of triple talaq being reported in Indian society, the reason being lack of sufficient deterrence in the form of punishment. Now, the husband has no right to divorce his wife unilaterally and arbitrarily. The marital tie is not dissolved after instantaneous triple talaq, so the wife is equally entitled to residence in the marital home with husband. Earlier, there was no such legislative protection available to women, although the Supreme Court had declared it invalid in *Shayara Bano.* Earlier, after pronouncement of triple talaq, the marriage was considered to be dissolved irrevocably and the aggrieved woman had no choice but to accept it as her fate and to live

[41] *Supra* note 1.

under miserable conditions, denied of rights and respect within society. The aggrieved woman was unable to enforce her rights, because earlier, deterrence in the form of punishment was not available and also police was not empowered to take action against the wrongdoer husband in the absence of any legislative provision. The Muslim Women (Protection of Rights on Marriage) Ordinances promulgated in 2018 and 2019 as discussed earlier also served the same purpose to empower the police to take action against the wrongdoer husband. Now, if the offence under the Act is committed and the woman's right to reside in marital home is infringed, she can take recourse to the police to enforce her rights. As the utterance of triple talaq through any manner whatsoever, is of no consequences, therefore, the husband and wife has to resume cohabitation in the same way as before the utterance of triple talaq. If, in a particular case, that does not happen and woman's rights as wife are infringed, then the Act provides safeguards to her to protect her rights through invoking the provisions of the Act. It is obvious that only when someone's rights are infringed, then he can seek the protection of the law to enforce his rights. So, if husband and wife settle the dispute and resume cohabitation after triple talaq, no wife would lodge complaint against her husband generally. If the husband insists on dissolution of marriage and refuses to take the woman as his wife, abandons her or throws her out of marital home, then the wife's rights are infringed. Although, the wife is entitled to residence in the matrimonial home; but even if she lives separately, she is entitled to adequate subsistence allowance to be paid by her husband for herself and her dependent children.

Thus, the Act is brought into force to combat the unjust and inhumane practice of instantaneous triple talaq, which is not an integral part of Islam. The Act provides various safeguards to women belonging to Sunni sect of Muslim community. The Act provides them protection from arbitrary and unilateral divorce, the perpetrator husband is to be punished with maximum three years' imprisonment, the woman is entitled to subsistence allowance and custody of minor children, the cognizance of the offence can be taken only at instance of herself or her relative, hearing to the woman is made compulsory while granting bail to the accused husband, the offence of triple talaq is made compoundable at the instance of the woman. The Act is a bold step towards abrogation of gender discriminatory practice of instant triple talaq and for reforms in Indian society. The Act is in accordance with spirit of the Indian Constitution and its ideals to ensure equality and justice to all.

5. CRITICAL ANALYSIS OF THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019

The Act has been severally criticised by a number of Islamic scholars, renowned leaders, social workers and even from a large number of women from Muslim community claiming that this Act of 2019 is passed due to political motive of the government for the purpose of victimization of Muslim men and it

will not serve the purpose of women empowerment in its present form. Some also say that because of this legislation, the position would be that the husband and wife will neither live together because of marital discord, nor they would be allowed to get separated. Here, the researcher shall study the grounds of criticism from various aspects and several loopholes and other incidental matters, which have not been addressed in the Act of 2019.

5.1. Criminal Punishment for Civil Wrong

This Act makes a civil wrong as a criminal offence. According to Montesquieu, "every punishment which does not arise from absolute necessity is tyrannical"[42] For this very reason, criminal law and punishment should be used as a last resort for the prevention and punishment of offences of grave nature. Marriage under Muslim Law is not a sacrament, but is in the nature of a civil contract. Generally, breach of a civil contract does not result into criminal punishment. When divorce under Hindu law or Christian law is not made punishable, so pronouncement of triple divorce by Muslim husband, which is offence of civil nature, should not be penalised. A criminal action upon the husband for triple talaq will not fully serve the interests of arbitrarily divorced women, but it will further victimize them, as it will further deteriorate their living conditions.

5.2. Provisions of the Act are against Popular Muslim Beliefs

Generally, matters of marriage, divorce, inheritance, custody of children, etc. are considered to be part of the personal laws of the community. It is considered by some to be an unwanted interference in the Muslim personal law and particularly discrimination against Muslim husbands. The law declared in the Act is unique, because it ordains to the orthodox Hanafi Muslim woman to continue in the marital relationship with the husband but if she thinks that as according to her religious beliefs, her marriage has come to an end, then continuing in such marital tie would be considered to be sinful by her. In such a situation, she herself and the society will consider her as divorced, but the law will not consider so. Thereafter in such a situation, continuance of marital tie would adversely affect and weaken the rights of individual choice and autonomy in the matters of marriage and divorce. The Act ordains the woman to continue to live with same abusive husband who has given her triple talaq. Further, it was presumed by some Islamic scholars that the Act will consider triple pronouncement of talaq as one revocable divorce, means treating *talaq-e-biddat* as other form of divorce – *talaq-e-ahsan* or *talaq-e-hasan* and thereby paving way for reconciliation and mutual settlement. In this way, marital tie could be preserved in accordance with dictates of the Prophet and there would be lesser interference in the religious beliefs of orthodox group

[42] Available at <https://www.laits.utexas.edu/poltheory/beccaria/delitti/delitti.c02.html> (last visited on 4-2-2020).

of the Muslim community. However, this Act lacks this objective. Accordingly, it is alleged that the law will not empower the Muslim women, rather it will further victimize them in the society.

5.3. Excessive Punishment for the Husband

Although the Act purports to be in consonance with the judgment of the Supreme Court of *Shayara Bano* declaring triple talaq as unconstitutional, however the Supreme Court nowhere stated pronouncement of triple talaq to be made punishable offence in its judgment. Various studies show that the incidences of triple talaq in India are negligible. There may be other alternative means to combat this evil practice, rather than making it a punishable offence. The provision of three years imprisonment appears to be excessive, as after the Supreme Court judgment, the pronouncement of triple talaq, which now having no adverse consequences, the matrimonial tie remains unaffected and intact and thus will not affect society or anything else; thus if the act has no effect at all, then it appears irrational that the husband be punished with three years' imprisonment. As most of the Muslim people have the objection regarding making utterance of triple talaq a punishable offence with three years' imprisonment, even Muslim women, to whom the law purports to protect from tyrannical practice of triple talaq, in many parts of the country held protest against it and wanted that no alterations should be allowed to the Muslim personal law and that every family dispute should not result in a criminal action.[43] There are several instances where women from Muslim community itself opposed the provisions of the law declaring it to be unwanted interference in personal law because of sheer political motive of the government. Flavia Agnes (a women's rights lawyer) has quoted, "Behind this law is the formulation of opinion that the Muslim woman must invariably be projected as devoid of rights and lacking agency, and the Muslim male as premodern, lustful, polygamous and barbaric."[44]

5.4. Burden to Prove the Offence is upon the Woman

The provisions of the Act imply that burden of proving the pronouncement of triple talaq is put on the woman. Practically, it is very difficult for the woman to prove it. The husband would plainly refuse the utterance of triple talaq or he would simply say that he had given only one talaq to his wife and not instant triple talaq to her, as happened in *Intekhab Alam Riaz Munshi* v. *State of Maharashtra*[45], where the husband refused to have given *talaq-e-biddat*, but

[43] Available at <https://wap.business-standard.com/article/current-affairs/muslim-women-hold-protest-in-rajasthan-s-sikar-against-triple-talaq-bill-118031300095_1.html> (last visited on 21-10-2019).

[44] Flavia Agnes, "The Politics behind Criminalising Triple Talaq", 53 *Economic and Political Weekly* 12 (2018).

[45] 2018 SCC OnLine Bom 20735.

pleaded that he has followed the procedure of *talaq-e-hasan*. Then, in such circumstances, the wrongdoer husband would not be arrested or punished, as only instant triple talaq has been prohibited and not one revocable talaq. The provisions may also be misused at various levels. In false cases, chance of getting bail is more difficult under the provisions of the Act. Also, it is also be possible that the abandonment of woman may be done by the husband without pronouncing triple talaq to find an escape from the law and punishment. The Act of 2019 does not deal with such cases.

5.5. Welfare of Minor Child while Deciding upon Question of Custody not Considered

Under the Act of 2019, the power regarding custody of minor children is given to the Magistrate and it provides the entitlement of a woman as far the custody of her minor children is concerned. It thus implies that custody of the child is to be given to the mother irrespective of the welfare of the child, which is against the public policy at large. Also, as per the provisions of the Act, the triple talaq being void having no consequences at all, then it appears irrational that children are being separated from the father and custody is given to mother without considering their welfare, thus causing prejudice to children also.

5.6. Provisions Regarding Welfare of Family is Lacking in its True Sense

The provisions of the Act of 2019 are contradictory with each other. The government alleged that the Act was passed in the Parliament keeping in view the plight, suffering and oppression faced by Muslim women and to grant them relief against the arbitrary and irrevocable divorce. It purports to serve the objects of promoting marital harmony, peace and unite the broken families. But, in practical terms, it will causes great financial hardship to the woman and her children. Imprisonment of the husband will not be in the welfare of the wife in any sense. The woman, in such cases, generally will not get financial and other support from her family and society at large.

5.7. Provisions for Reconciliation and Settlement of Dispute are Lacking

The biggest loophole of the Act in practical terms is how a woman could be benefitted by the imprisonment of her husband. Sending the husband to prison for a period of three years, in fact, shuts the doors for any possibility of reconciliation between spouses. A husband will not live peaceably with such wife, at the instance of whose complaint, he was imprisoned for three years and it will also

bring grave financial crisis in the poor families. Under the provisions of the Act, the police can arrest the husband without warrant and send him to prison. It will not solve the family dispute, but aggravate it. The husband while in prison, will not be in a position to earn money, thus will not be able to provide adequate financial support to his family. Therefore, it creates a big financial problem for the women more than for the men in prison.

6. CONCLUSION AND SUGGESTIONS

The Muslim Women (Protection of Rights on Marriage) Act, 2019 is a beneficial legislation enacted for the purpose to prohibit unilateral divorce through method of instant triple talaq, for the purpose of which the Act has incorporated criminal punishment to unscrupulous husband for triple talaq pronouncement. However, the Act needs some important amendments in its provisions, so that the Act may prove to be really more beneficial enactment for Muslim women. Some of such desirable amendments may be discussed under following heads:

6.1. The Act should be in Pace with Traditions of the Prophet

Instead of making the pronouncement as of no consequences at all, it should be treated as one revocable divorce having all possible opportunities for reconciliation, as it was treated during the time of the Prophet[46] and many of Shia theologians have also suggested the same. In the Act elaborate provisions for reconciliation and settlement should be provided, which should take into consideration the true essence of Quranic law. In this way, the guidances given under the Quran for preservation of marital tie could be given effect appropriately and this would be more acceptable to the Muslim community and sentiments of the orthodox people would not be disturbed.

6.2. The term of Imprisonment for the Offence should be Reduced

The term of imprisonment which may extend to three years is excessive. Taking into consideration financial and other hardships that will be caused to the woman and her children and the family at large, because of the imprisonment of the husband, it is suggested that the Act should be amended and the term of imprisonment for triple talaq pronouncement should be reduced.

[46] Available at <http://www.legalserviceindia.com/legal/article-630-triple-talaq-and-its-essential-in-islam.html> (last visited on 8-10-2020).

6.3. Right to Ratify Divorce should be given to Woman

It is also suggested that right of revocation of divorce should be given to the woman and should be exercised according to her free will and consent. If she doesn't agree to revocation of divorce, divorce may follow. In reality, instant triple talaq is indicative of unhappy matrimonial relationship. Therefore, the Act should include a provision by which the woman should be given the option to ratify or revoke the annulment of marriage. The right to take decision upon the continuation or annulment of marriage should be given to her. It should be made obligatory upon the court to hear the woman, not only in the matters of subsistence allowance, or custody of children or while granting bail to the husband, but also on the matter of ratification or revocation of divorce pronounced upon her by her husband. In this way, the woman has to be empowered and given a choice to elect whether she wants criminal consequences or civil consequences for the pronouncement of triple talaq by her husband.

In *Firdaus Bano* v. *Abdul Majeed*[47], the wife filed petition for divorce before the Family Court on the ground that because of grave marital discord and reconciliation attempts having been failed, the husband had pronounced triple talaq to her, which was accepted by the wife. The wife pleaded that the husband solemnized another marriage after talaq. Divorce petition was not challenged by the husband, but the Family Court declined to grant divorce decree on the ground of the Supreme Court judgment of *Shayara Bano case*[48] for not upholding triple talaq as valid in the case in hand. While hearing the appeal against the said judgment of the Family Court, the Rajasthan High Court set aside the impugned judgment, stating that in this case, triple talaq pronouncement was accepted by the wife; and passed divorce decree to annul the marriage.

Thus, considering the essence of judgment of the Rajasthan High Court, it can be stated that depending upon the facts of each case, if woman is also willing for talaq or pronouncement of talaq has been accepted by the wife, it is not prudent to force her to continue in such marital relationship. The provision should be made under the Act, whereby after triple talaq pronouncement by the husband, the court should be empowered to grant divorce decree according to the free will of the wife.

6.4. The Offence of Triple Talaq to be Equated with Offence of Domestic Violence

It is also suggested that offence of pronouncement of triple talaq should be equated with offence of domestic violence under the Protection of

[47] D.B. (C) Misc. Appeal No. 4335 of 2018, decided on 28-11-2018 (Raj). Available at <https://www.casemine.com/judgement/in/ 5e979abc4653d048ca2bdcb0> (last visited on 26-10-2020).

[48] *Supra* note 1.

Women from Domestic Violence Act, 2005 because as the pronouncement of triple talaq is void and nonest, the marital tie remains subsisting. Also, this offence is a kind of mental harassment, emotional abuse and cruelty on woman in essence, the real offence being the desertion of the wife by the husband without reasonable cause; therefore it should be considered as offence of domestic violence and should be made punishable as offence under the Protection of Women from Domestic Violence Act, 2005. In this manner, women would receive more benefits, such as protection against violence, right to residence in matrimonial home etc., which are not available under the current provisions of the Act of 2019. If the offence of pronouncement of triple talaq is equated with the offence of domestic violence under the Protection of Women from Domestic Violence Act, 2005, then the court shall depute a Protection Officer appointed under the Act of 2005 who shall take all the steps and perform such duties, which are necessary to ensure that the rights of the married Muslim woman are ensured and protected without delay. It is also suggested that utterance of triple talaq itself should not be made criminal act per se, unless this can be linked to domestic violence or other criminal law issues.

6.5. Provisions for Reconciliation to be Incorporated Under the Act

The Act while provides for the provisions of subsistence allowance for women and custody of minor children, does not contain provisions for reconciliation and settlement of the differences between husband and wife. The proper and exhaustive provisions for counselling of the couple and settlement should be provided and also, the panel of mediators should be appointed by the court itself, so that attempts to preserve matrimonial relationship should be made effectively. In this way, the rights and interests of women would be safeguarded in its true sense.

6.6. Provisions for Free Legal Aid to be Provided to the Woman

The Act of 2019 should include a provision through which the woman should be given adequate legal aid and assistance. In India, although provisions for free legal aid have been provided under the Constitution and the Legal Services Authorities Act, 1987, but adequate awareness in weaker sections of the society of their right to free legal aid is still lacking. Therefore, effective legal aid should be provided to the affected women at the State cost. For this purpose, it is also necessary that women should be made aware of their right to free legal aid.

6.7. Family Courts should be Empowered to take Cognizance of the Offence

It is also suggested that the Family Courts established under the Family Courts Act, 1984 instead of the Magistrate of First Class, should be given

the jurisdiction to deal with the offence of pronouncement of triple talaq by the husband and provisions of bail and compounding of the offence with the consent of the wife. The proceedings of the cases of marital discord should not be publicized. As the Family Courts have been established primarily with the object of promoting conciliation and to secure speedy settlement of marital disputes, the proceedings held before the Family Courts will cause less suffering and hardship to woman, who is already undergoing mental pain, agony and stress, in comparison to that of proceedings under the Magistrate's court.

CONSTITUTIONAL VALIDITY AND LEGAL SCRUTINY OF THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT 2022

Dr. Malvika Singh[*]

1. INTRODUCTION

The Identification of Prisoners Act 1920 (IPA)[1] was enacted to provide legal authority and establish procedure for the taking of measurements of finger impressions, foot prints and photograph of persons convicted for or arrested in connection with certain offences. Despite this in *State of U.P.* v. *Ram Babu Misra*[2] the Hon'ble Supreme Court expressed the need to enact a suitable legislation to provide for the investiture of magistrates with the power to issue directions to any person, including an accused person, to give specimen signature and handwriting sample. The Law Commission of India also recommended amendments in the IPA[3]. Following this, several states made local amendments in the IPA but comprehensive amendments in the IPA were long overdue. Meanwhile, technology developed by leaps and bounds and several other measurements were invented for fixing identify of a person with more precision than ever before. The discussion on amendment in the IPA was cut short by citing the constitutional prohibition against self incrimination provided in Article 20(3) of the Constitution of India[4]. Whereas, in a series of judgments, the Hon'ble Supreme Court ruled that the compulsion to procure "non-communicative" evidence is not prohibited by the Constitution. At the same time, the Hon'ble Supreme Court has made it clear that any identification procedure requiring slightest interference with the human body or use of force to compel the furnishing of even non-communicative material would requires a statutory authority and a procedure established by law in absence of which such action would attract tortuous liability.

Investigation of offences has become so complex over the years that it requires services of forensic experts from several scientific disciplines. The Hon'ble Supreme Court understood this necessity and in *State of U.P.* v. *Ram Babu*

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1 Act No. 33 of 1920.

2 (1980) 2 SCC 343, 346, Part 3, , para 8.

3 87th Report (1980).

4 The Constitution of India was authenticated by the President of the Constituent Assembly, Dr Rajendra Prasad on 26-11-1949 and came into force on 26-1-1950.

Misra[5] the Hon'ble Supreme Court agreed that a direction by the Magistrate to the accused to give specimen signature or hand writing sample, when the case is still under investigation, would surely be in the interest of administration of justice. During investigation, information comes to police in different ways. Further in the process of collecting scientific evidence, different types of coercive tactics/measures need to be applied including interference with the human body and collection of body-fluids from the person. It has, therefore, become necessary to clarify and demarcate what coercive measures can be legally permitted to take measurements during investigation. In fact the whole process of taking various types of measurements needs specific legal sanction.

The issue of identification of prisoners needs to be examined in view of two distinct imperatives; firstly, that of fixing the identity of the accused person accurately in order to filter innocent persons from the list of suspects to help the cause of justice and, secondly, the need to guard sanctity of the rule of evidence against testimonial compulsion guaranteed under Article 20(3) of the Constitution[6]. Additionally, safe custody of the Identity related data procured by the investigators during the investigation is another important issue which was not adequately addressed in the IPA. In fact, theft of identity related data has emerged as a new white collar crime, which has already generated a privacy related debate in the country.

Thus, there are in conflict two competing interest to be balanced, namely, the interest of the citizens to be protected from invasion of their physical privacy and the interest of the state to collect evidence for prosecution of offenders in order to ensure security of the state and maintaining general law and order in the society of the state and justice to the people.

In view of the above, it became necessary for the law makers to give a balanced law on the subject of identification of prisoners and other persons. It is in this backdrop that the Parliament has enacted "The Criminal Procedure (Identification) Act, 2022[7]" (CPIA) on the subject recently and the IPA has been repealed. It thus becomes necessary to critically examine various provisions of the CPIA.

2. NECESSITY OF A NEW LEGISLATION FOR TAKING MEASUREMENTS

It was being felt for long that the IPA has outlived its utility and requires complete overhauling in order to meet the present day requirements of the police, prison officers and courts to ensure impartial investigation, fair trial and

5 *Id.*, 2.
6 *Id.*, 4.
7 Act No. 11 of 2022.

complete justice to all the stakeholders. The necessity of enacting an altogether new legislation is apparent for the forthcoming reasons.

(1) The scope of IPA extends to taking of finger impressions, foot prints and photograph only. New "Measurement" techniques and technology being used in advanced countries as well as in India are giving credible and reliable results and are recognized world over. The IPA does not provide for taking of these measurements as many of the techniques and technologies had not developed at the time of enactment of the IPA. It is therefore essential to make provisions for giving legal base to these modern techniques and processes to capture and record appropriate body measurements in place of the existing limited measurements.[8]

(2) The IPA provides access to limited category of persons whose body measurements can be taken. It is considered necessary to expand the ambit of "persons" whose measurements can be taken, as it will help the investigation agencies to gather sufficient legally admissible evidence against the accused persons in order to establish their crime.[9]

(3) Expanding the definition of the term "measurements" and ambit of "person" whose measurement could be legally taken, will make the investigation of crime more efficient and expeditious and will also help in increasing the conviction rate.

(4) Under the IPA, only police officers of the rank of Sub-Inspector and above were authorized to take measurements. There was no mention of prison officer in the IPA although they are also required to take measurements for the purpose of identification under the Prison Rules. It was, therefore, required to include prison officers as competent authority who could take measurements.

(5) One of the important objects behind taking measurements is to collect evidence. There are certain types of evidence which can be procured only by active physical participation of the accused. For this purpose, it was necessary to provide a law requiring the accused to do so. It is important to know that law confers protection to all against physical interference without lawful authority.[10]

(6) The short title of IPA namely "The Identification of Prisoners Act 1920" appears to be misleading. It gives an impression that the IPA deals with the subject matter of the Identification Parade etc. The emphasis of the title seems to be on the process of identification. Similarly, the sense of

[8] "Statement of Objects and Reasons" of the Criminal Procedure (Identification) Bill, 2022.
[9] Supra.
[10] Law Commission of India, 87th Report, 1980, Para 3.4.

word "Prisoners" in the title is also misleading. The word "Prisoners", to an ordinary layman, carries the sense of a convicted person, whereas, the IPA is applicable not only to convicted person but also to those persons who have been arrested. These confusions were to be removed by suitably amending the IPA[11] or by enacting a new legislation.

(7) Preservation, storage, dissemination, sharing and destruction of the measurements are important aspects which were not adequately dealt with under the IPA. Keeping in view the Fundamental Rights to Privacy guaranteed to the people it becomes imperative to prescribe a comprehensive scheme of preservation, storage, sharing and destruction of measurements.

All the above mentioned requirements and necessities could be fulfilled only by writing a new comprehensive law on the subject. It was in this background that the CPIA was enacted.

3. THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022 (CPIA)

With the advent of new "measurement" techniques and their use world over, it became imperative to introduce such techniques and technologies to the Indian Criminal Justice System, in order to make identification of prisoners and other persons credible and reliable. These techniques will help the investigation agencies to gather required legally admissible evidence to establish the crime of the accused person.[12] The CPIA *inter alia* seeks:-

(i) To define "Measurement" to include finger impressions, palm print and foot print impressions, photographs, iris and retina scan; Physical and biological samples and their analysis; behavioural attributes including signatures handwriting or any other examination referred to in section 53 of Cr.PC.[13]

(ii) To empower the National Crime Record Bureau of India to collect, store and preserve the record of measurements and for sharing, dissemination, destruction and disposed of records.[14]

(iii) To empower a magistrate to direct any person to give measurements,[15] and

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[11] Law Commission of India, 87th Report, 1980, Para 4.1.
[12] Statement of Object and Reasons, Criminal Procedure (Identification) Bill, 2022 (No. 93 of 2022).
[13] CPIA, S. 2(*b*).
[14] *Id.*, S. 4.
[15] *Id.*, S. 5.

(iv) To empower police or prison officers of a particular rank and their seniors to take measurements of a particular class of persons and use ways and means as prescribed, if someone resists taking of such measurements.[16]

The following categories of persons shall be required to submit on asking to a police officer of the rank of Officer-In-Charge of a police station or an officer of the rank of not below the Head Constable of police for taking his measurements. Similarly, a Prison Officer of the rank of Head Warden and above is authorized to take measurement of the below mentioned classes of persons:-

(a) Convicts for an offence punishable under any law for the time being in force; or

(b) Persons ordered to give security for good behavior or maintenance of peace under section 117 of the CrPC for a proceeding under Sections 107, 108, 109 or 110 of the Cr.PC[17]; or

(c) Persons arrested in connection with an offence punishable under any law for the time being in force or detained under any preventive detention law.[18]

It is pertinent to note that a person arrested for an offence punishable for less than seven years is not legally obliged to give his biological sample.[19] If, still, the police want to take his measurements, they can do so after taking orders from the magistrate.[20]

4. PRACTICE OF TAKING OF MEASUREMENTS IN OTHER COUNTRIES

In the context of taking measurements, it would be worthwhile to study the practice in other important countries of the world. In England, initially there was no common law right vested in police to take finger prints without the consent of the accused.[21] Such consent must be free.[22] Later, this situation changed keeping in view the investigation needs of police. Now the magistrate may order taking of finger prints and palm prints of the accused, if an application is made by a police officer not below the rank of Inspector. This power cannot however, be invoked when the accused is under 14 years of age.[23] For the purpose of taking finger prints, such reasonable force may be used as is necessary.

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16 *Id*., S. 6.
17 Act No. 2 of 1974.
18 *Id*., S. 3.
19 *Id*., Proviso to section.
20 *Id*., S. 5.
21 *Leachinsky* v. *Christie*, 1946 KB 124, 142..
22 *Dumbell* v. *Roberts*, (1944) 1 All ER 326, 330.
23 Magistrates' Courts Act, 1952, S. 40(*i*); Criminal Justice Act, 1967, S. 33.

In Australia, Section 81(4) of the Police Officers Act, 1953[24] permitted the taking of photographs of a person in lawful custody on a charge of committing an offence, for the purpose of establishing the identity of such person with a person known to have committed the crime under investigation. It is, however, mentioned that both in England and Australia the fact that an evidence was illegally obtained does not make it inadmissible. If the evidence has been obtained by "oppressive conduct" or unfairly, the judge would exclude it in exercise of his discretion.[25]

The position was made clear in America in a number of recent decisions. The Hon'ble Supreme Court of United States of America (USA) has indicated that not all evidences which an accused is compelled to supply are protected by the rule of protection against self-incrimination. In *Schmerber* v. *State of California*[26], the Hon'ble Supreme Court stated:

> The distinction which has emerged… is that the privilege is a bar against compelling "communication" or "testimony" but the compulsion which makes a suspect or accused the source of "real or physical" evidence does not violate the privilege

Employing this distinction, the courts have upheld validity of the following acts-

(i) Compelling an accused to participate in line up;[27]

(ii) To provide hand writing samples;[28]

(iii) Voice exemplars;[29]

(iv) To provide blood samples;[30]

(v) To dress in clothing relating to the crime;[31] and

(vi) To identify himself as being present at the scene of accident[32]

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[24] Act No. 55 of 1953.

[25] D.C. Pearce, "Judicial Review of Search Warrant", (1970) ALJ 467, 481, *R*.v. *R*., (1969) 1 AC 304 : (1968) 3 WLR 391.

[26] 1966 SCC OnLine US SC 124 : 16 L Ed 2d 908 : 384 US 757, 764 (1966).

[27] *United States* v. *Wade*, 1967 SCC OnLine US SC 153 : 18 L Ed 2d 1149 : 388 US 218 (1967).

[28] *Gilbert* v. *State of California*, 1967 SCC OnLine US SC 154 : 18 L Ed 2d 1178 : 388 US 263, 265 (1967).

[29] *United States* v. *Dionisio*, 1973 SCC OnLine US SC 23 : 35 L Ed 2d 67 : 410 US 1 (1973).

[30] *Schmerber* v. *State of Californiaa*, 1966 SCC OnLine US SC 124 : 16 L Ed 2d 908 : 384 US 757 (1966).

[31] *United States* v. *Evans*, 359 F 2d 776 (3d Cir 1966).

[32] *California* v. *Byers*, 1971 SCC OnLine US SC 96 : 29 L Ed 2d 9 : 402 US 424 (1971).

The Supreme Court of USA explained that such procedures do not violate the privilege because they compel the accused only to "exhibit his physical characteristics", and not… to disclose any knowledge he might have. [33]

5. CONSTITUTIONAL VALIDITY OF THE CPIA 2022

Every legislation has to conform to the constitutional guarantees, otherwise, such legislation may be declared void by the courts while exercising the power of judicial review. Therefore, it would be necessary to examine the constitutional validity of the legislative process as well as various provisions of the CPIA 2022[34].

5.1. Legislative competence

Most of the scholars agree that the subject matters relating to taking of measurements (finger prints and photograph etc) were not included in the Criminal Procedure Code, at the commencement of the Constitution and, therefore, the mandate of the subject entry in the Seventh Schedule relating to "Criminal Procedure" of the constitution may not literally apply to them so far as legislation on the subject matter is concerned.[35] But this view point is debatable and needs further examination. Though the subject matter of taking of measurements is not specifically mentioned in the Cr.PC, it cannot be denied that it is an integral part of the process of police investigations which can only be done as per the provisions of the Cr.PC. The object of taking measurements is to arrive at certain conclusions on the basis of material so collected, during the course of investigation.

The amplitude of the term Criminal Procedures is very extensive. It describes the entire field of criminal prosecution, beginning with the police investigation.[36] The principal purpose of identification is to achieve certain objects essentially connected with criminal justice.[37] Therefore, there should be no doubt that the subject matter of IPA can be legitimately regarded as connected with and falling within the scope of "Criminal Procedure" as listed at Entry 2, List III-Concurrent List, in the "Seventh Schedule" of the Constitution[38]. Accordingly, it can safely be concluded that the Parliament has the legislative competency to enact a law on the subject. Moreover, there is no "Entry" having the subject matter "Identification of Prisoner" specifically mentioned in any of the Lists in the "Seventh Schedule" of the Constitution.

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[33] *United States* v. *Wade*, 1967 SCC OnLine US SC 153 : 18 L Ed 2d 1149 : 388 US 218, 222 (1967).
[34] *Id*., 7.
[35] Law Commission of India, 87th Report (1980), Para 4.3.
[36] Peter Hay, *An Introduction to United States Law* (1976) at 103.
[37] Law Commission of India, 87th Report (1980), Para 4.7.
[38] *Id*., 4.

5.2. Right Against Self Incrimination

Article 20(3) of the Constitution of India provides that no person accused of an offence may be compelled to be a witness against himself. "What amounts to testimonial compulsion?" has been an ever evolving concept of criminal jurisprudence in India. In the beginning the Hon'ble Supreme Court interpreted the provisions of Article 20(3) in *M.P. Sharma* v. *Satish Chandra*.[39] The Hon'ble Supreme Court held that "to be a witness" meant furnishing any evidence and declared that even personal search under the provisions of Section 94 and Section 96 of Cr.PC (old Cr.PC)[40] is violative of Article 20(3) of the Constitution[41]. This interpretation was soon revisited by the Hon'ble Supreme Court in *State of Bombay* v. *Kathi Kalu Oghad*.[42] The Hon'ble Supreme Court restricted the scope of Article 20(3) and held that "to be a witness" meant only imparting of knowledge in respect of relevant facts either orally or in writing, by a person who has personal knowledge of the facts, to be communicated to the court.

In order to provide a legal and level playing field to investigating officers for collecting scientific evidence against the offenders viz-a-viz the constitutional rights of the accused person, a new Section 53 was inserted in the Cr.PC in 1974 to provide for examination of an arrested person by a medical practitioner at the request of a police investigating officer. While examining constitutional validity of Section 53 Cr.PC, the Hon'ble Supreme Court in *Neeraj Sharma* v. *State of U.P.*[43] held that Section 53 did not violate Article 20(3). Further in *State of Maharashtra* v. *Dnyanoba Bhikoba Dagade*[44], the Hon'ble Supreme Court held that investigation was a task of police and such functions (under Section 53 Cr.PC) must be performed by them. No consent of magistrate is required.

In *Selvi* v. *State of Karnataka*[45], the Hon'ble Supreme Court held that psychological tools of investigation, including Polygraph Test, Norco Analysis and Brain Finger Printing etc, are violative of Article 20(3), though their utility as an aid to investigation was recognized by the Hon'ble Supreme Court. The Hon'ble Supreme Court approved limited validity of such psychological tools/processes undertaken with the informed consent of the subject, for the purpose of investigation. Though, the evidentiary value of the result of these tests was restricted and kept at par with that of confession before police under Section 27 IEA.

From the above legal provisions and scrutiny by the SC, it is fairly clear now that compulsion to procure "non-communicative" evidence is not prohibited by the constitution. At the same time, it is also made clear that slightest of

[39] AIR 1954 SC 300 : 1954 SCR 1077.
[40] Act No. V of 1898.
[41] *Id*., 4.
[42] 1961 SCC OnLine US SC 74 : AIR 1961 SC 1808 : (1962) 3 SCR 10.
[43] 1992 SCC OnLine All 1131 : 1993 Cri LJ 2266.
[44] 1978 SCC OnLine Bom 212 : 1979 CriLJ 277.
[45] *Selvi* v. *State of Karnataka,* (2010) 7 SCC 263.

invasive procedures on the human body or use of force to compel the furnishing of non-communicative material requires an express statutory sanction, in absence of which, such action would *prima facie* attract tortuous liability.[46]

5.3. Right to Privacy

It can also be argued that provisions of the CPIA violates fundamental right to privacy of an individual whose measurements are taken by police or prison officers during investigation and other criminal proceedings. Privacy is a very wide and ever evolving concept and it has evolved in a number of Hon'ble Supreme Court decisions, including in *A.K. Gopalan* v. *State of Madras*[47], *Kharak Singh* v. *State of U.P.*[48], *Charles Sobraj* v. *Supt., Central Jail*[49], *Sheela Barse* v. *State of Maharastra*[50], *Pramod Kumar Saxena* v. *Union ofIndia*[51], *Maneka Gandhi* v. *Union ofIndia*[52] and *K.S. Puttaswamy* v. *Union ofIndia*[53]. Right to privacy is inherent in right to life and includes privacy of space, privacy of body, privacy of information and privacy of choice.

The Constitutional Bench in *Puttawamy case*[54] held that invasion of life and personal liberty must meet threefold requirements i.e. (i) legality; which postulates the existence of law; (ii) Need: defined by a legitimate state; and (iii) Proportionality: which ensures a rational nexus between the objects and the means adopted to achieve them. The mandate in *Puttaswamy* is loud and clear. The right to privacy may be breached by the State agencies as per the procedure established by law in order to meet a rational state objective.

The objectives behind the CPIA, as explained by the Union Home Minister are to ensure investigation of crime more efficiently and expeditiously and increase the conviction rate.[55] The Act is designed to ensure quality investigation for doing justice to the parties involved in criminal proceedings and protecting unity and integrity of India. The need to have legislation like the CPIA is paramount even in view of the three standards laid down by the Constitutional Bench in *Puttaswamy case*[56]. In various provisions of the CPIA, A balance has been struck keeping in view the need of the state to identify perpetrators on one

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46 Law Commission of India, 87th Report (1980), Para 1.4.
47 1950 SCC 228 : AIR 1950 SC 27.
48 1962 SCC OnLine SC 10 : AIR 1963 SC 1295.
49 (1978) 4 SCC 104.
50 (1983) 2 SCC 96.
51 (2008) 9 SCC 685.
52 (1978) 1 SCC 248 : AIR 1978 SC 597.
53 (2017) 10 SCC 1.
54 *Id*., 53.
55 Statement of Objects and Reasons dated 23-3-2022, New Delhi as read out by Shri Amit Shah, Union Home Minister, while introducing the Criminal Procedure (Identification) Bill, 2022, in the Parliament.
56 *Id*.,53.

hand and the right to privacy of an individual on the other. Various provisions of the CPIA prescribe magisterial permission for taking measurements in some cases[57] and providing for safe custody and destruction of measurement records in majority of the cases[58]. These provisions appear to be sufficient safeguards to prevent breach of privacy of an individual whose measurements have been taken.

Security of State and maintaining public order as well as doing justice to people in order to protect their dignity are the most sacred duty of the State, enshrined in the preamble to the Constitution. In performance of these duties invasive action by the State agencies in privacy of some of the offenders following the procedure prescribed by law may not be termed as breach of their fundamental right to privacy, keeping in view the overall interest of the society and the nation as a whole. Even otherwise national security would be a just exception to an individual's right to privacy and would be a reasonable restriction on such right.

5.4. Right to be Forgotten

In Justice *K.S. Puttaswamy*[59], right to be forgotten was recognized as one of the most essential part of right to privacy. Right to be forgotten includes right to get personal data and record removed or deleted from the storage. In the context of CPIA, right to be forgotten signifies destruction of measurements, when no longer required. Section 4(2) of the CPIA[60] allows the retentions of measurement records for 75 years in some cases. It is argued by some scholars that retention of measurements for so long breaches the right to be forgotten. This criticism may be understood and settled in view of following observations:

(i) The number of offenders whose measurements are to be kept in record for 75 years would be very small. Measurements of all the offenders who are acquitted or discharged or released without trial would be destroyed immediately after the criminal proceedings against them are over, unless the offender is a repeater of crime. It is pertinent to mention that conviction rate in all criminal cases in India is approximately 30% and the incidence of recidivism (repeat offenders) is 6 to 7%.[61] Thus, measurements of more than 60% of the offenders shall be destroyed as and when proceedings against them are over. The measurements of remaining approximately 40% of the offenders shall be kept in record for 75 years because they are proven criminals and keeping of their record for long is essential for the purpose of security of the State and maintenance of public peace and

[57] CPIA, Act No. 11 of 2022, S. 5.
[58] CPIA, Act No. 11 of 2022, S. 4.
[59] *Id.*, 53.
[60] *Id.*, 7.
[61] As per statistics given in Crime in India 2020, a NCRB Government of India Publication.

order in the society. Such offenders only would be denied the right to be forgotten in larger public interest.

(ii) The measurements shall be persevered by the National Crime Record Bureau and nobody shall have unauthorized access to this record. In this way, indirectly, the right to be forgotten of evens those offenders, whose measurements are to be preserved for 75 years, has been protected.

At the same time, it is observed that there is scope of further improvement in the provisions of Section 4(2) of the CPIA. Following suggestions are worth the consideration:-

(i) The period of 75 years for retention of record is too long a period. It is stated that measurements of juveniles (of age below 18 years) are not recorded. It is admitted that a person may hardly remain active by choice in the world of crimes after the age of 80 years. Therefore, there is some merit in reducing the period of retention of the measurements of an offender. The record may be preserved not for a period of 75 years but up to the date the offender attains the age of 80 years. After that the record should be automatically erased from the storage.

(ii) Measurement of all convicted persons need not to be preserved. There appears to be no logic in preserving measurements for such a long period of those convicted for fine only or sentenced to undergo imprisonment up to 3 years. Such convicts are petty offenders and are not a threat to peach in the society or danger to security of the state. This single exercise would reduce the number of offenders whose records are to be preserved to the time of at least 70%, as the number of petty offenders is more than 70%. This will save a lot of time, energy and resources required in preserving measurements of such a large number of offenders. For petty convicts, the measurements may be preserved even for a shorter duration than 80 years of age.

6. LEGAL ISSUES INVOLVED

Besides constitutional guarantees pertaining to CPIA there are some other legal issues which require thorough examination. The following criticism or legal issues are worth the discussion.

6.1. The CPIA is in violation of International Covenants

India is a signatory to the United Nations Charter on Human Rights[62] and the International Covenant on Civil and Political Rights (ICCPR)[63]. In *Vishaka*

[62] United Nations Charter, 1945.
[63] General Assembly Resolution 2200A (XXI) adopted on 16-12-1966.

v. *State of Rajasthan*[64] the Hon'ble Supreme Court has held that India is under moral and legal obligations to follow the provisions of International Treaties Conventions and Covenants which they have signed at the United Nations. The ICCPR which provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.[65] The critics argue the provisions of the CPIA violate this most important article of the ICCPR. This criticism may be rebutted by the singular logic that no provision of the CPIA protects unlawful or arbitrary interference with the privacy of an individual. The CPIA provides a well reasoned lawful base to the law enforcement agencies to interfere with the privacy of an offender of law and that too by following the procedure established in law.

6.2. Duplication of Laws Authorizing Taking Measurements

It is being argued that there are enough provisions in Sections 53, 53A, and 311A of the Cr.PC[66] which provide for taking of measurements and no further provisions are needed. A special legislation in CPIA would amount to duplication of the laws on the subject and it will create conflicts and confusions. There appears to be some merit in this argument to the extent that there is some duplication so far as provisions authorizing taking of same measurements under Sections 311A, 53 and 53-A of the CrPC[67] and under the provisions of the CPIA[68] are concerned. It is however stated that CPIA is a comprehensive special law on the subject. It not only provides for taking of measurements but also provides for storing, preservation and destruction of measurements so taken. Moreover, the above mentioned provisions in the Cr.PC do not provide for taking of all kinds of measurements. Several other matters relating to an incidental to taking of measurement, which are provided in the CPIA, are missing in the CrPC provisions in question. It is established principle of law that after the enactment of a special legislation in the form of CPIA on the subject, its provisions shall hold field over any other such provisions in the Cr.PC.[69] In *Sharat Babu Digumarti* v. *State* (*NCT of Delhi*)[70], the Hon'ble Supreme Court also held that provisions of special law would prevail over that of the general law.

(c) Absence of Data Protection Law

The CPIA allows the police and prison officers to take a variety of measurements containing personal information. In the absence of a potent Data

[64] (1997) 6 SCC 241 : AIR 1997 SC 3011.
[65] Art. 17 of the ICCPR.
[66] *Id*., 17.
[67] *Ibid*.
[68] *Id*., 7.
[69] A per provisions of Ss. 4 and 5 CrPC.
[70] (2017) 2 SCC 18.

Protection Law, it is a real challenge to maintain secrecy of personal information so gathered by the state agencies. The CPIA does not have sufficient provisions to ensure data protection; neither has it prescribed any punishment for unauthorized leak, possession or use of personal information by the custodian or by anybody else. The Personal Data Protection Bill 2019 (PDPB) seeks to bring about comprehensive overhaul of India's current data protection policies. The PDPB could not become a law and something more is required to be done to ensure protection of measurement related data.

6.3. Convicts, Under-trials, Detainees and Suspects Treated Alike

Use of the words "any person" in Section 3 has very wide implications. All persons who have been arrested, convicted or suspected in connection with an offence punishable under any law or persons detained under any preventive procedures or detention laws fall under the purview of this section. This leaves ample scope for its misuse against political opponents and other adversaries. This is in sharp contrast to the Law Commission's Report (1980) which is based on the idea that less serious the offence, the more limited the power to adopt coercive measures should be. The idea finds support even from the provisions of the DNA Technology (Use and Application) Regulation Bill 2019, which seeks to waive the consent requirement for collecting DNA samples from persons arrested only in offences which are punishable with death or imprisonment for a term exceeding seven years.[71] This bill prescribes taking of DNA samples of persons arrested in offences entailing punishment up to 7 years only after taking his consent. There is a genuine case to differentiate between convicts, under-trials, suspects and detainees for the purpose of taking measurements as well as to distinguish persons charged with petty offences from those charged to be more serious ones.

6.4. "Doctrine of Purpose Limitation" Violated

"Doctrine of Purpose Limitation" is the best practice so far as data protection is concerned, which means data collected legitimately for one purpose must be used for that purpose only and it should not be used for any other purpose. Under the CPIA[72], NCRB is allowed to share and disseminate personal data with any law enforcement agency for the purpose of investigation and prosecution of crimes. This provision violates the principle of purpose limitation. No doubt the need of maintenance of public order and security of the State require sharing of measurement of offenders with the law enforcement agencies, there is no distinction between "those crimes" and "other petty crimes". The CPIA[73] provides very wide and sweeping powers to the NCRB to share the measurements with any law

[71] DNA Technology (Use and Application) Regulation Bill, 2019, S. 21.
[72] *Id.*, 7.
[73] *Ibid.*

enforcement agency, without any restriction. This provision certainly needs revisit to make doctrine of purpose limitation more specific and transparent so far as is application in the context of CPIA[74] is concerned.

6.5. Ambiguity in Definition of "Measurements"

In Section 2(1)(b) of the CPIA[75], the word "Measurements" has been defined to include "such other tests" and "behavioural attributes".[76] It is unclear whether "such other tests" and "behavioural attributes" also include Narco Analysis, Polygraph Test, Brain Finger Printing and Psychiatric Examination etc. or not. These issues would require clarification in the enactment.

6.6. No Appeal Mechanism Available

The CPIA[77] does not provide for any appeal mechanism to an aggrieved person if he decides to contest the decision of the magistrate ordering taking of his measurements. In a society governed by Rule of Law, a window for grievance redressal should always be made available to the people.

6.7. Illegal Taking of Measurements

Some provisions to punish overzealous police officers who indulge in taking measurements unauthorizedly should have been there in the CPIA[78], to guard against misuse and malicious exercise of powers under the law.

7. SUGGESTIONS

In view of the above discussion, following suggestions are worth considering:-

(i) The CPIA[79] is deficit in protecting the integrity and unauthorized dissemination of data relating to measurements. Section 8 of the Act should be suitably amended to include the provision relating to making of rule for data protection. The Data Protection Bill, 2019 should also contain a separate provision to guarantee protection of measurements recorded under the CPIA[80]. Punishment may be provided for those who take, obtain, steal,

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74 *Ibid.*
75 *Ibid.*
76 "Such other tests" find mention in S. 53 CrPC which is mentioned in S. 2(1)(*b*) of the CPIA. "Behavioural Attributes" is an undefined terms.
77 *Id.*, 7.
78 *Ibid.*
79 *Ibid.*
80 *Ibid.*

receive, store, disseminate, share or use data relating to measurements unauthorizedly.

(ii) The idea of allowing taking measurements of all those who are arrested or convicted or bound to give security for maintenance of peace or good behavior or detained under any preventive detention law needs to be reviewed. In order to balance the individual's right to privacy and right against self incrimination viz-a-viz the need of the investigation agencies, it is desirable that some more safeguards than that are prescribed in the CPIA[81] should be provided. Following safeguards are suggested.

(a) Collection of all biological samples, behavioural attributes, signatures and handwriting samples should be permissible only under the orders of the magistrate, in order to prevent their misuse.

(b) Measurements of petty offenders, who are arrested in offences entailing punishment up to three years of imprisonment or fine only, need not to be taken. It will prove to be a futile and purposeless exercise. It is, however, suggested that taking of measurements of all convicts sentenced to undergo imprisonment is necessary for the purpose of identification. Recording of measurements of those ordered to give security for good behavior or maintaining peace under the provisions of the CrPC[82] also appears to be a purposeless exercise, having no utility at all. These preventive proceedings are undertaken by the executive magistrates, where no facility to take measurements is available, neither the executive magistrates are having any coordination with the NCRB for storing such measurements. Needless to mention that it would prove to be a costly exercise, with no utility. It is not advisable to burden the public exchequers for a purposeless procedure.

(iii) The concept of allowing "use of force" for taking measurements is vague, ambiguous and impractical. How much and of what nature of force is permitted to be used has not been prescribed in the Act. Imagine a situation where an arrested person refuses to give his blood sample. Should police be permitted to immobilize him? Can it be done without crossing all civilized limits? Should such a person be sedated by giving him drugs? What will happen if such a person dies during such a process? All these questions are relevant and need to be answered. Use of force is a concept which should be clearly defined and stated. It is a very dangerous proposition to empower a Head Warden of Prison Department or a Sub-Inspector of Police to decide about the type of force to be used while taking measurements.

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81 *Ibid*.

82 *Id*., 17.

(iv) The "Doctrine of Purpose Limitation" needs to be engrained in the Act to rationalize and restrict the scope of sharing of measurement in some notified heinous offences only, which have implications on public peace and order and security of the state. Sharing of such measurements should be allowed only with the permission of a competent authority in the NCRB, as well as on the request of a notified authority of the investigation agency. Accordingly provisions of section 4 of CPIA[83] may be suitably amended.

(v) The definition of "Measurements" in section 2(1)(b) of the CPIA[84], may be reviewed. The ingredients of "measurements" are so varied, diverse and complex in nature that it is not advisable to put them together under one classification. The measurements may be classified under following categories:

(a) Physical attributes;

(b) Photograph;

(c) Body fluids;

(d) Psychological interventions;

(e) Behavioural attributes;

(f) Signature and handwriting;

(g) Voice samples; and

(h) Other test.

It may further be qualified which of the measurements could be recorded by police officers and prison officers separately. Prison officers are not required to take all the measurements. They should be allowed to take measurements sufficient for the purpose of identification of the prisoners only. Taking of some of the measurements like body fluids, signature and handwriting, voice sample and psychological interventions, etc. should only be allowed to be taken by police officer and that too by order of a magistrate. There is ample scope to improve and further qualify the definition of the term "Measurements" to address the objections relating to privacy and testimonial compulsion.

(vi) A least one appellate authority at administration level should be prescribed in the CPIA[85], before whom the aggrieved person may lodge his protest against taking of unlawful and unauthorized measurements by an overzealous or biased police officer or prison officer. In a country like

[83] *Id*., 7.
[84] *Ibid*.
[85] *Ibid*.

India, where misuse and abuse of power is rampant, provision for appeal is necessary in order to safeguard interest of the masses.

(vii) There is enough scope to improve the provisions relating to retention of measurements, as discussed in this article.

8. CONCLUSIONS

Taking of measurements by law enforcement agencies and prison officers is essential for efficient investigation, effective prosecution and overall administration of criminal justice and in order to maintain public peace and order and ensure security of the State. At the same time, constitutional and legal rights of individuals are equally important. Certain genuine concerns related to possible breach of fundamental rights of the masses have surfaced during critical examination of the provisions of the CPIA[86]. These, concerns and objections need attention of framers of the law. Above all, the masses need to be reassured that their privacy and dignity cannot be violated by the police or prison officers arbitrarily, without the authority of law. The critical analysis undertaken here leaves no doubt that there is ample scope to revisit and improve the provisions of the CPIA[87].

[86] *Ibid.*
[87] *Ibid.*

VALIDATION PRINCIPLE: DECIDING THE ISSUE OF LAW GOVERNING THE INTERNATIONAL ARBITRATION AGREEMENT

Dr. Prasenjit Kundu & Akanksha Yadav***

1. INTRODUCTION

The international arbitration agreement derives its effectiveness from the *lexarbitri* of the seat of the arbitration. But, in practice, all the aspects of an arbitration agreement are not necessarily to be governed by the *lexarbitri*. This has resulted in the necessity of distinguishing the law of the seat of arbitration (*lexarbitri*) on the one hand, and the law applicable to an international arbitration agreement, on the other hand.[1] Also, the arbitration agreement, even though a part of the underlying contract, is treated as separate and independent of the underlying contract by virtue of the Separability Presumption[2] which is considered as one of the intransigent principles of international commercial arbitration. The most important consequence of the separability presumption is the possibility of application of different laws to the underlying contract and the arbitration agreement. Therefore, the choice of law applicable to an international arbitration agreement (hereinafter, referred to as "arbitration agreement") is a complex subject.[3]

Different jurisdictions have tried to address this choice of law by opting from either of the following approaches: the law of judicial enforcement forum, the law expressly or impliedly chosen, the law of the seat of arbitration,

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1 Poudret. l., *Comparative Law of International Arbitration* 254 (2nd edn., 2007).

2 The principle of separability is a universally recognisable principle as per which an arbitration agreement or arbitration clause has to be treated separately from the underlying contract. The legal consequence of the principle of separability is that where the underlying contract is void, the arbitration agreement can still survive and be enforced by the parties; *e.g.,* the English Arbitration Act, 1996, § 7, the Indian Arbitration Act, 1996, § 16, the Arbitration Law of the People's Republic of China which incorporates the separability principle; *Heyman* v. *Darwin's Ltd.*, 1942 AC 356.

3 The validity of an arbitration agreement is one of the most important questions that if answered negatively can jeopardise the arbitration, therefore, it is very important to have the existence of a valid arbitration agreement as per the law governing the arbitration agreement to proceed further with the arbitration; *See also*, Helen H. Shi et. al., *International Arbitration: When East Meets West* 237 (2020); Blackaby Nigel et. al., *Redfern and Hunter on International Arbitration* 335 (2015).

the international law and the validation principle. These approaches can be categorized into the following two categories:[4] (i) traditional approaches: applicability of the law of judicial enforcement forum, or the law expressly or impliedly chosen, or the law of the seat of arbitration; and (ii) contemporary approaches: applicability of the international law and validation principle. With the passage of time, for creating a pro-arbitration regime, many jurisdictions as well as arbitral institutions had shifted from the traditional approach towards the contemporary approach including by endorsing the applicability of validation principle either in their legal instruments or by adopting the same through their judicial pronouncements which has been elaborated in detail in the III part of the paper.

2. VALIDATION PRINCIPLE

The validation principle allows an adjudicating authority to choose that law from available options which would give effect to the arbitration agreement instead of declaring it void when there arises a question before it to decide the law that will govern the substantive validity. For example, if a Chinese Party enters into an arbitration agreement with a Swiss Party, fixes the seat of arbitration as London, and decides that the arbitration agreement has to be governed by Indian law. Let's say the situation is such that application of Indian law (law expressly chosen by the parties) or Common Law (*lexarbitri*) will make the arbitration agreement void, however, application of Swiss law will give effect to the arbitration agreement. Then, if a suit is filed before the Swiss Court for giving force to the arbitration agreement, applying the Validation Principle under Article 178(2) of the Swedish law (discussed in Part III), the Court can choose the application of Swiss Law to enforce the arbitration agreement over Indian or Common law which would have turned the arbitration agreement into a mere paper with no value. Therefore, the purpose of the application of the validation principle is to provide promising avenues for reducing the complexities and uncertainties that could be produced by the possibility of different issues to an international arbitration agreement to be governed by different applicable laws.

The principle is based on the premise that the parties had always the intention of application of that law which will validate the arbitration agreement and save them from pursuing litigation.[5] The principle presumes that the parties entered into the arbitration agreement to give effect to it and not for treating it as a useless paper. Therefore, it allows the application of law that enforces the arbitration agreement by validating it, over any other law that might nullify the arbitration agreement.

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4 Gary B. Born, *International Commercial Arbitration* (2014).

5 Gary B. Born, "The Law Governing International Arbitration Agreements: An International Perspective", 26 SAcLJ, 817 (2014), <https://cutt.ly/Hv9ukYU>.

As already mentioned, the validation Principle was not one of the traditional approaches, and therefore, was not one of the popular mechanisms unlike the law *of judicial enforcement forum or the law expressly or impliedly chosen or the law of the seat of arbitration*.[6] Still, it has found its place in the international commercial arbitration by various jurisdictions adopting it and endorsing it to facilitate the arbitration regime in their countries along with some arbitrational institutions. However, there are some jurisdictions that are alien to this principle or deny applying this principle and prefer the traditional approach by usually applying *lexarbitri* to decide the issue of law governing the international arbitration agreement which has been explained in detail under Part III and Part IV.

3. LEGAL BACKING TO THE VALIDATION PRINCIPLE

When it comes to the recognition of the validation principle by legislation, then there are some jurisdictions that have incorporated national legislation that specifically recognizes the validation principle. On the international level, there are various legal instruments including conventions and institutional rules, which have been read upon by some eminent authors[7] and adjudicating authorities to implicitly incorporate the validation principle.[8] These two categories are discussed below:

3.1. Expressed Recognition

3.1.1. National Legislations

3.1.2.2. Switzerland

Article 178(2) of the Swiss Law provides for in favorem validitatis rule[9] for international arbitration agreements, holding an arbitration agreement to be valid if it complies with any of the following laws:[10]

a. the law chosen by the parties, or

b. the law governing the main contract, or

c. Swiss law.

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6 *Ibid*.

7 Gary B. Born, *International Commercial Arbitration* 507-674 (3rd edn., 2020); *See also*, Helen H. Shi et. al., *International Arbitration: When East Meets West* 237 (2020).

8 Gary, *supra* note 6, at 823-26.

9 Gary, *supra* note 8.

10 The Swedish Federal Act on Private International Law, 1987, Art. 178(2).

3.1.3.3. Spain

Article 9(6) of the Spanish Arbitration Act which is a mirror provision of Article 178(2) of Swiss law also incorporates the validation principle. It provides that, the arbitration agreement in the cases of international arbitration can be held valid and the dispute to be considered arbitrable if it complies with any of the following laws:[11]

a. the requirements established by the juridical rules[12] chosen by the parties to govern the arbitration agreement, or

b. the juridical rules applicable to the merits of the dispute, or

c. Spanish law.

3.1.4.4. Algeria

Modeled on the lines of Swiss law provision, Algeria has also incorporated a validation principle in its new Arbitration Act, 2008 which forms part of the New Algerian Code of Civil and Administrative Procedure. Para 3 of Article 1040 holds an arbitration agreement to be valid if it conforms with any of the following laws:[13]

a. the law chosen by the parties; or

b. the law governing the substance of the dispute i.e., the law governing the underlying contract; or

c. the law that seems appropriate to the arbitrator.

3.1.5.5. China

Article 14 of the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Judicial Review of Arbitration Cases was enacted in 2017 to expressly give recognition to the validation principle under the Chinese laws.[14] It provides that if the validity of an arbitration agreement has to be de-

[11] The Spanish Arbitration Act, 2003, Art. 9(6).

[12] Juridical rules in Spanish jurisdiction cover both sets of laws or rules including national as well as international instruments as mentioned in the Spanish Arbitration Act, 2003, Art. 9(6).

[13] Civil and Administrative Procedure Code, 2008, Art. 1040.

[14] Before the enactment of this provision, the adjudicating authorities had to apply the application of law expressly chosen by the parties to decide the validity of the agreement. In the absence of the explicit choice of law, it provided for the application of the law of the seat of arbitration and where parties had not decided the seat of arbitration, it provided for the application of Chinese law, see, the Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, 2006, Art. 16; In 2010, a change was made by the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations, when an option was given to opt either between the law of the place where the

cided as per *Article 18 of the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations*,[15] then it can be considered valid if it is valid under any of the following laws:[16]

a. the law of the place of the arbitral institution; or

b. the law of the seat of arbitration.

3.1.6. International Instruments

3.1.7.7. Resolution of the Institute of International Law

Article 4 of the 1989 Resolution of the Institute of International Law was one of the first laws that expressly recognized the validation principle by allowing the tribunal to use favorem validitatis. It provided that in cases, where the tribunal has to decide the validity of the agreement, it can choose one or more from the following options of law to resolve the arbitral dispute:[17]

a. the law chosen by the parties, or

b. the law indicated by the system of private international law stipulated by the parties, or

c. general principles of public or private international law, or

d. general principles of international arbitration, or

e. the law of the seat of arbitration.

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arbitration institution is located or the law of the seat of arbitration as given under, the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations, 2010, Art. 18; this provision cleared the ambiguity that existed between Articles 16 and 18 i.e. to apply which law, the law of the seat of arbitration or law of the place of arbitration by providing for the application of law which makes the arbitration agreement valid over the law that will turn the arbitration agreement void.

[15] The Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations, 2010, Art. 18, which was adopted by the Standing Committee of the 11th National People's Congress of the People's Republic of China provides for this option in the absence of express i.e. where parties are silent about the law that should govern their arbitration agreement.

[16] Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Judicial Review of Arbitration Cases, 2017, Art. 14, which was the adoption of the validation principle to endorse a pro-arbitration mechanism in China.

[17] Resolution of the Institute of International Law, 1989, Art. 4.

3.1.8.8. WIPO Arbitration Rules

Article 59(c) of WIPO Arbitration Rules expressly recognizes the validation principle.[18] It provides for an arbitration agreement to be effective if the agreement complies with the requirements of any of the following mentioned laws:[19]

a. the law or rules which are chosen by the parties; or

b. the law or rules which are chosen by the arbitral tribunal; or

c. the law of the seat of arbitration.

3.2. Implied Recognition

3.2.1. New York Convention and UNCITRAL Model Law

Gary B. Born who is considered as an eminent authority in the field of international commercial arbitration has interpreted various provisions of the Geneva Convention, **New York Convention, and UNCITRAL Model of law** in a broader sense to give effect to the validation principle.[20]

He observes that Article II of the New York Convention[21] and Article 8 of the UNCITRAL Model law[22] set a substantive rule that international agreements are to be presumed valid and enforceable, therefore, indirectly incorporates the validation principle by giving effect to the arbitration agreement unless the Court finds that arbitration agreement is either null and void, inoperative, or incapable of being performed.[23]

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[18] WIPO Arbitral Rules, 1994, Art. 59(*c*), which was enacted by the World Intellectual Property Organisation is one of the few institutional rules that expressly gives recognition to the validation principle; this provision was considered to yield more favourable results when parties did not expressly choose the law governing the arbitration agreement and there exists a substantive law of the country which is more liberal than the law of the seat of arbitration; *See also,* Gerold Herrmann, "Conference on Rules for Institutional Arbitration and Mediation", WIPO (20-1-1995), <https://www.wipo.int/amc/en/events/conferences/1995/herrmann.html>.

[19] WIPO Arbitral Rules, 1994, Art. 59(*c*).

[20] Gary, *supra* note 8.

[21] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10-6-1958, Art. 2(1), mandates for the Member States to recognise arbitration agreements and refer an arbitrable matter to the Arbitral Tribunal; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10-6-1958, Art. 2(3) also imposes an obligation on the courts to presume arbitration agreement to be valid and refer disputes arising from it to arbitration unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

[22] The UNCITRAL Model Law, 1985, Art. 8, also provides for the presumptive validity of an arbitration agreement unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

[23] Gary, *supra* note 6.

He further explains that under Article V(1)(a) of the New York Convention,[24] the National Courts can apply the validation principle by choosing a law validating the arbitration agreement as *the implied choice of law*[25] rather than applying the law of the seat of arbitration as the default law governing the question of the validity of the arbitration agreement.[26] Article 34[27] and 36[28] of the UNCITRAL Model law also provides for the option of effectuating implied choice of law, which can be invoked by the National Court to validate the arbitration agreement by applying the law which applies to the law of the seat of arbitration, therefore, endorsing validation principle by choosing that law which gives effect to the arbitration agreement.[29]

3.2.2. International Arbitration Rules

Similar to Article V(1) of the New York Convention and Article 34 of the UNCITRAL Model of law, there are institutional arbitration rules governing international arbitration agreements where implied choice of law can be interpreted to give effect to the validation principle.

Article 21 of the ICC Rules empowers an arbitrator to choose that law which deems fit to him/her for deciding the validity of the arbitration agreement.[30] This rule gives an arbitrator a huge discretionary power of invoking validation principle, by choosing the law that validates the arbitration agreement whenever a question arises before him/her about the validity of an arbitration agreement.

The same liberal interpretation was taken up by the arbitrator, whereby she expressly applied the validation principle to give force to the

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[24] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10-6-1958, Art. 5(1)(*a*), allows a party to refuse the recognition and enforcement of the arbitral award before a National Court, if it is able to prove that the arbitration agreement was void either under the chosen law, or where parties do not indicate any law governing the arbitration agreement, under the law where the award was made.

[25] Implied choice of law also known as tacit choice of law, is the law that parties do not expressly choose but is derived by the adjudicating authority considering the agreement.

[26] Gary, *supra* note 8.

[27] The UNCITRAL Model Law, 1985, Art. 34(2)(*a*)(*i*), amongst the other grounds, allows a National Court to set aside the arbitral award if a party is able to prove that there was a lack of valid arbitration agreement either under the law chosen by the parties or under the law where the arbitral award was made.

[28] The UNCITRAL Model Law, 1985, Art. 36(1)(*a*), allows a party to refuse the recognition and enforcement of the arbitral award before a National Court which is similar to Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10-6-1958, Art. 5(1)(*a*) i.e. if the party is able to show before the National Court that the arbitration agreement was void either under the law chosen by them or where parties do not indicate any law governing the arbitration agreement, under the law where the award was made.

[29] Gary, *supra* note 6, at 823-26.

[30] The Rules of Arbitration of the International Chamber of Commerce, 1998, Art. 21, empowers an arbitrator to choose any law that deems fit to him/her for governing the validity of arbitration agreement if parties have not expressly chosen any law to govern the arbitration agreement.

arbitration agreement.[31] The Case involved three parties: Buyer (a New York Company) who entered into a Contract for sale and purchase of goods with Vendor (a Canadian Company) who further assigned it to Assignor (a Panamanian Company). The contract included an arbitration clause that provided New York as the Seat of Arbitration, ICC Rules for governing the arbitration proceedings, and prevalence of US laws in case of any conflict. The assignor contended the invalidity of the arbitration clause on the grounds that the assignment was invalid under Panamanian Law. But the Arbitrator held contrary by giving an arbitral award holding the arbitration clause valid as per the New York Law. She observed that Article 21 of ICC Rules authorizes her to choose the law that seems fit to her, expressly mentioning that she has reached this conclusion of choosing New York Law by applying the validation principle.

Therefore, based on the above-mentioned practices, we argue that wherever the adjudicating authority is provided a discretion of choosing the implied choice of law as the proper law for governing the arbitration agreement, the authority giving a liberal interpretation can take a course to the validation principle under to validate the arbitration agreement. If there is no express choice of law, then the adjudicating authority can consider the intention of parties to enforce the arbitration agreement and choose that law as an implied choice of law which validates and therefore enforces the arbitration agreement instead of opting for a default law like *lexarbitri* that might invalidate the arbitration agreement turning it as a mere waste of paper.

4. THE STANCE OF DIFFERENT JURISDICTIONS ON THE VALIDATION PRINCIPLE: JUDICIAL PRONOUNCEMENTS

4.1. China

With the passage of Article 14 of Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Judicial Review of Arbitration Cases, China has tried to endorse the new approach of validation principle, reconfirming its pro-arbitration attitude[32] like in the China Light case.[33] Plaintiff (China

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[31] Vincent M. DeOrchis, et. al., "Validation Principle May Increase Number of Future Arbitrations", 29 Mealey's IAR (5-5-2014), <https://bit.ly/3v3eO3P>; *See also*, in the Case No. 7920 of 1993 XXIII Y.B. Comm. 80 (1998), which is one of the oldest examples of the application of the validation principle, where the sole arbitrator refused to apply the Spanish law, which would have turned the arbitral clause null and void. The arbitrator applied the ICC Rules and gave a partial award to give effect to the intention of parties holding arbitration in ICC Geneva. It held that the application of Spanish law is against the principle of the effet utile (ut res magis valeat quam pereat) i.e. the principle of effectiveness, which demands the application of the law which would enact the real intention of the parties and would not reduce it to a meaningless formula.

[32] *Supra* 14 and 15.

[33] *ChinaLight Tri-union Int'l Co., Ltd.* v. *Tata International Metals (Asia) Ltd.*, Beijing Forth Intermediate People's Court, Jing 04 Min Te No. 23, Civil Order (2017).

Light) and Defendant (Tata International Metals (Asia) Limited entered into a sales contract that included an arbitration clause. The arbitration clause provided for friendly negotiation on arisal of any dispute, failing which, parties could go to the Singapore International Economic and Trade Arbitration Commission for arbitration, where arbitration proceedings had to be held as per American Arbitration Rules.

The dispute arose and the defendant initiated the arbitration proceedings before SIAC (Singapore International Arbitration Center) but the plaintiff filed a suit in the Beijing Court to obtain a declaration of arbitration clause being void under Chinese law. The Court refused to apply Chinese law and considering that the parties wanted to have arbitration in Singapore allowed the application of the law of Singapore to decide the validity of the arbitration agreement.

4.2. UK

4.2.1. Hamlyn & Co v. Talisker Distillery[34]

One of the earliest decisions that laid down the base for the validation principle in the UK. The Court applied the England law to validate the arbitration agreement, opining that the parties had a common intention to give effect to every clause of the contract rather than to get it treated as a mere waste paper by the application of Scottish law.

4.2.2. Sulamérica Cia Nacional de Seguros SA v. Enesa Engelharia SA[35]

Sulamerica (insurers) entered into an insurance contract with Enesa (insured), which contained an arbitrator clause. The clause provided arbitration as per ARIAS(UK) Rules with London as the seat of arbitration and Brazilian law as the express choice of law for governing the insurance contract along with giving exclusive jurisdiction to Brazilian Courts. The insured claimed before the Court that the law governing the contract was Brazilian law and should also govern the arbitration agreement in the absence of an express choice of law for governing the arbitration agreement applying closest connection doctrine besides the fact that the parties intended the agreement to be governed as per Brazilian law which can also be deduced from the fact that Brazilian Courts was given exclusive jurisdiction. And, if the arbitration agreement was to be governed as per Brazilian law, then the insurer could not have initiated the arbitration without the permission of the insured.

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[34] *Hamlyn & Co.* v. *Talisker Distillery*, 1894 AC 202.

[35] *Sulamérica Cia Nacional de Seguros SA* v. *Enesa Engelharia SA*, (2013) 1 WLR 102 : 2012 EWCA Civ 638; *Arsanovia Ltd.* v. *Cruz City 1 Mauritius Holdings*, 2012 EWHC 3702 (Comm).

The Court agreed on the application of closest connection doctrine but held English law as to be the law of closest connection for governing the validity of the contract considering the fact that the application of Brazilian law would have required the insurer to seek permission from the insured before initiating the arbitration, therefore, making arbitration agreement as a one-sided agreement which did not seem the intention of parties.

4.2.3. Enka v. Chubb[36]

Enka (Turkish Company) entered into a contract with Chubb (Russian Company) which did not have any express choice of law that governed the arbitration agreement. The dispute arose and Chubb filed a suit before Russian Court against Enka for breaching the ICC Arbitration. Enka in response requested an anti-suit injunction before the English Court. Chubb relying on English law conflict of laws principles contended the application of Russian Law which would have turned the arbitration agreement void. The Court rejected the contention and applied the English law to the arbitration agreement, opining that parties had no intention to have an arbitration clause which would be purposively interpreted as void and would be of no use to them. Therefore, considering the intention of parties to execute the arbitration clause, the English Court for the first time expressly applied the validation principle and opted for English law as the proper law for governing the arbitration agreement over Russian law.

4.2.4. Singapore

In *BNA* v. *BNB*,[37] the High Court of Singapore expressly decided on the application of the validation principle under Singapore laws. The case pertained to a takeout agreement that was entered into between BNA (buyer) and BNB (Seller), which had contained an article providing for arbitration in SIAC Shanghai as per its rules and the express choice of law for governing the agreement as Chinese law. The buyer contended for the application of Chinese law which would have invalidated the arbitration agreement and the seller argued for the application of Singapore law as being the law of the seat of the arbitration under which agreement was valid.

The High Court applied Chinese law even though it turned the agreement void expressly ruling that the Singapore law has no place for the validation

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[36] *Enka Insaat ve Sanayi AS* v. *OOO "Insurance Company Chubb"*, (2020) 1 WLR 4117 : 2020 UKSC 38.

[37] *BNA* v. *BNB*, 2019 SGCA 84. In a further appeal, in *BNA* v. *BNB*, 2019 SGCA 84, the Court of appeal also upheld the application of Chinese law to the arbitration agreement but did not consider the issue of validation principle stating that there is only one law i.e. Chinese law that could be applied to the arbitration agreement.

principle which would be against the intention of parties who have expressly chosen the law for governing the agreement.[38]

5. CONCLUSION

The validation principle gives effect to the real intention of parties of enacting that arbitration agreement rather than holding it as void due to some glitch drawing from the substantive law which parties did not foresee while entering the arbitration agreement. Therefore, it is one of the most important contemporary approaches that promotes the pro-arbitration regime. The pro-arbitration countries like Switzerland, Spain, China, have already expressly incorporated the validation principle in their national legislation or have enacted it through judicial pronouncements. The same should be adopted by other jurisdictions as well as by the international instruments including institutional rules and should also be adopted by arbitral tribunals and national courts to facilitate the pro-arbitration regime, therefore, making a better place for international commercial arbitration across the world.

When we look into the Indian jurisprudence, as far as the questions concerning the applicability of the governing law to the arbitration agreement, the practice followed by the Indian judiciary is to apply the rule of closest connection.[39] Earlier the judiciary was inclined towards applying the law governing the substantive contract[40] but this position changed after the Balco decision[41] and now

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[38] The court called the validation principle as impermissibly instrumental and called it problematic for not following the parties intention of applying implied law as the law of contract (expressly chosen law) as given under Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10-6-1958, Art. 5(1)(*a*).

[39] *See British India Steam Navigation Co. Ltd.* v. *Shanmughavilas Cashew Industries,* (1990) 3 SCC 481 at 496.

[40] In *NTPC* v. *Singer Co.*, (1992) 3 SCC 551, the Supreme Court applied the law governing the substantive contract as the proper law for governing the arbitration agreement using the closest and most intimate doctrine. It held that in the absence of express or implied choice of law for governing the arbitration agreement, it is not necessary to apply the law of the place of arbitration but should look at the intention of parties like the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties and reached on the conclusion that law governing the contract has the closest connection with the arbitration agreement; *See also, Citation Infowares Ltd.* v. *Equinox Corpn.*, (2009) 7 SCC 220, where the Supreme Court in the absence of an express choice of law applied the law governing the substantive contract as the law governing the arbitration agreement relying on *NTPC* v. *Singer Co.*'s the closest and most intimate doctrine.

[41] In *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552, while deciding over the application of Part II for a foreign seated arbitration, the Supreme Court adopted an approach more favourable towards *lexArbitri*. The court opined that if parties are choosing a particular place as the seat of arbitration then that can be considered to decide the law governing the arbitration agreement while applying the closest relation doctrine. The court further observed that when a request for annulment of an award is made under Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10-6-1958, Art. 5(1)(*a*), the law governing the

the country is more inclined towards the application of *lexarbitri*.[42] Therefore, in India, there is a need to shift from this traditional approach of applying the law of the seat of arbitration towards the validation principle, which will also facilitate in continuing with the pro-arbitration regime that the country is already trying to create.[43]

arbitration agreement should be the law of the seat of arbitration and not the law governing the contract, therefore, putting the law of the seat of arbitration over the law governing contract.

[42] *Enercon (India) Ltd.* v. *Enercon Gmbh*, (2014) 5 SCC 1. The court differentiated between venue and seat of arbitration. And, on concluding that India is the seat of arbitration, the court applied the doctrine of closest connection to held Indian law as the proper law for governing the arbitration agreement observing, "it would be rare for the law of the arbitration agreement to be different from the law of the seat of arbitration; *See also, Eitzen Bulk* v. *Ashapura Minechem Ltd.*, (2016) 11 SCC 508, *Roger Shashoua* v. *Mukesh Sharma*, (2017) 14 SCC 722, *Reliance Industries Ltd.* v. *Union of India*, (2014) 7 SCC 603, and, *Union of India* v. *Hardy Exploration and Production (India) Inc.,* (2018) 7 SCC 374; Sumeet Kachwaha, et. al., International Arbitration Practise Areas India, ICLG.com (24-8-2020), <https://bit.ly/3n2CCCf>, which confirms that in India, the general rule when it comes to the question of proper law governing arbitration agreement is to apply law expressly chosen by the parties and where there is no such express choice either the Courts apply the law governing the contract or, by applying the closest connection doctrine apply of *lexArbitri*, which is preferred.

[43] *E.g.,* Cabinet approved the Bill New Delhi International Arbitration Centre (NDIAC) Bill, 2019 pursuant to making India as the Hub of International Arbitration as released by Press Information Bureau Delhi, "The Quest for making India as the Hub of International Arbitration", <https://pib.gov.in/> (last visited on 22-4-2021); *See also,* PM Modi in his speech also asserted that his government is working to bring a vibrant arbitration mechanism in India that will attract foreign investors as they will be assured that the commercial disputes can be resolved efficiently via arbitration, see, "Working to Make India an Arbitration Hub: PM Narendra Modi", *The Economic Times*, (23-10-2016, 06.58), <https://bit.ly/3niw1Ul>; "India should Aspire to be a Hub of Neutral Arbitration: SC Judge A.K. Sikri", *The Economic Times,* (26-9-2015, 05.36 p.m.), <https://bit.ly/3tFnJZ8>.

ANALYSIS OF ONLINE INFRINGEMENT AND UNAUTHORIZED ACCESS LIABILITY UNDER THE COPYRIGHT REGIME OF INDIA VIS-A-VIS US AND UK

Dr. Charu Srivastava & Mansi Tiwari***

1. INTRODUCTION

Copyright encompasses all sorts of creativity under the Copyright law of India[1] such as literary work, musical work, cinematographic film, artistic designs, and designs on a web page etc. Websites are packed with information such as an e-commerce website which contains graphics, designs, words, pictures, logos, information regarding the product and the layout of a page. Section 14 of the Copyright Act, of 1957 enumerates various rights associated with a work such as the right of reproduction, issuing copies, publication, translation, adaptation etc. Copyright law and the Internet interact when such creative work falling under copyright law is uploaded online or created online, and the rights over that work are to be exercised over the Internet. The Internet provides a global platform to share and transfer information with a click of a button across the globe. Thus, technological advancements provide the fastest and easiest methods to copy and transfer copyrighted data.

The development of digital technology and the resultant growth of the Internet have threatened the effectiveness of copyright law. This is because, once converted into digital files many copyrighted works (including text, images, sound, photographs, graphics, music and video) can be copied at no cost and within no time. Moreover, once digitalized, the work can be easily, manipulated or merged with other works to create new unauthorized works. These files can be circulated with millions of people at no cost.

Copyright came into existence in the era of the printing press when there was no Internet so the laws were made according to the need of the time but with the advent of new technology in the 20th century, the Protection of content

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1 Copyright Act, 1957, S. 13.

on the website raises many myriad issues. The Websites are immersed with data, most of which are artistic as well and fall under copyright law. The owners and Web site developers put their skill into carefully selecting the content to make their products and services look appealing. Since creating a sophisticated website is expensive, it becomes more important to protect the website from free riders. As websites are designed to be more interactive with consumers, the demand to maintain innovative marketing techniques becomes legally relevant. Earlier it was not so easy to violate someone else's copyright because the means to violate were less but now since most of us have access to computers and the internet, copyright violations have become rampant. Hence, the rules that applied only to a few people now apply to millions of people.[2]

Content owners are concerned about the ease with which content on the Internet can be downloaded and copied. The content owners have to ensure that requisite copyright notices, warnings against copying and express licenses are promptly displayed on the Website. It is not sufficient to simply state that all content is copyrighted and all rights are reserved because such disclaimers are often ignored by the browsers. The emergence of digital and information technology, thus, has posed a whole new set of challenges to the copyright regime. On the one hand, the copyright owners benefit in terms of widened markets but are threatened on the other hand with a loss of control over their property. This is because the websites consist of various elements that are copyrightable which are often copied on the internet, there are various websites, which contain varied information, or content which is copyrightable through its distinctiveness.[3]

With the advent of digitalization, infringers can produce a huge number of ideal copies of copyrighted works cost-effectively which pose threats to the interest of the creators. For instance, a few of the episodes of Game of Thrones leaked before the due date violating the economic rights of the owner and moral rights of the author. To counter such violations, a few techniques have been devised to make copying and accessibility of the copyrighted work difficult without authorization from the owner. Such techniques are commonly known as Technological Protection Measures [TPM] or Digital Rights Management [DRM].[4]

TPM is a mechanism which prevents copying, as well as access to the copyrighted work without the requisite authorization from the author and DRM is the technique that prohibits modification of the information related to the work and the author. However, in some cases, it can be seen that owners put very stringent

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[2] A. Krishnan and A. Chakravarti, "Intellectual Property Rights in the Ensuing Global Digital Economy" 3 *Journal of Intellectual Property Rights* 12-13 (1998).

[3] Raman Mittal, "Copyright Law and the Internet", in S.K. Verma and Raman Mittal (eds.), *Legal Dimension of Cyberspace*, 124-126 (Indian Law Institute, 2004).

[4] Copyright (Amendment) Act, 2012, No. 27 of 2012 recognised legal protection for TPM in the Indian Copyright law through S. 65-A and Rights of Digital Management information through S. 65-B.

restrictions on accessing the copyrighted work which although protects the work from illegal copying also sometimes affects the rights of enjoyment of the lawful possessor of the work. Such as a file lawfully downloaded from the lawful site may only work on a particular system and not on all the systems thereby restricting the possessory rights of the lawful purchaser.

2. COMMUNICATION TO THE PUBLIC

2.1. Linking

A browser is a program for viewing pages on the Internet. Usually, pages on the Internet are constructed by using HTML, a basic text coding technique that provides display instructions to the browser as to how that web page should appear. One of the features of a page in HTML is that one can go from one web page to another through a Hyperlink provided on the web page. Simply put, Linking is a practice which enables a user to form on the website to another through a link. Links appear as highlighted, and underlined, clicking which will lead the user to view the page on which the file is available. The highlighted part selected by the user is popularly known as an anchor.

By clicking on a hyperlink, one can view the contents or go to another web page referenced by the hyperlinks. The file referred to in the links is automatically retrieved by the Internet browsers. A web page usually contains many links to direct the user to other pages; it may also lead to thousands of other links on other pages. Thus, links enable easy access to the content which otherwise would have been very difficult. It diminishes the search cost of the user.[5] Linking is of three types:

(a) Hypertext linking

(b) Deep linking

(c) Inline linking

When a link goes straight to an internal page within the linked site, it is the case of *deep linking*. In it, the link is created not to the home page of the target site, but a subsidiary page. *Hypertext linking* permits "direct access from one website to another, without having to search for the website on a browser or type in an address in the URL (Uniform Resource Locator)".[6] A hyperlink per se does not allow the user to copy the content; it only takes the user to the site where the content is hosted.

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[5] Utilitarian theory of Jeremy Bentham. Greatest benefit for greatest number of people.

[6] Michela Menting Yoell, *Research on Legislation in Data Privacy, Security and the Prevention of Cybercrime*, International Telecommunication Union, *available at* <http://www.itu.int/ITUD/cyb/publications/2005/Cybercrime_M_Menting.pdf> (28-3-2020).

The homepage of a Website is the main page that explains the nature of the site and contains links that allow users to go deeper into the site. However, deep linking is very antithetical to this, it defeats the navigation system of the Web site. The deep links lessen the traffic from the linked site's homepage which ultimately decreases the revenue that could have been generated had the traffic been more on the web page. For instance, if the target site depends on advertising revenues, those may be reduced if users are directed straight to a subsidiary page, bypassing pages with advertising. The technology of hyperlinking may also aid in the dissemination of creative material with multiple sites at the same time.

Inline linking imports an image from another website and when clicked the image opens in a new window.[7] Inline linking enables the designer to create a new web page by collecting elements from different websites. Such linking does not involve copying elements but merely fetches graphics or images from different websites. The user then clicks on the graphics and is directed to the source only.[8] This act of inline linking amounts to dishonest practices and also attracts criminal and civil proceedings.

In *Leslie Kelly* v. *Arriba Soft Corpn.*,[9] the pertinent issue was regarding the validity of the thumbnail images in the light of the right to reproduction of the owner under the Copyright Law. Arriba, a visual search engine produced thumbnail images of copyrighted photographs of Leslie Kelly. Leslie, a photographer had also put his images on his website. Leslie contented the thumbnails created by the Arriba's amounts to the reproduction of his images and hence violates his copyright. The thumbnails also consisted of some text with information concerning the size of the full image. However, the user is directed to Leslie's website to see the full image of the thumbnails. They used in-line linking to display the full images. The US Court applied the four-factor test to decide the infringement. The four-factor test includes an analysis of the given facts on the following four points 1] Purpose of the work created 2] Nature of the work copied 3] Amount of work copied 4] effect on the commercial market of the copyrighted work. On the first factor, the court held that the purpose of the Arriba website was transformative and hence comes under fair use and no copyright infringement. The second factor was not much discussed by the court since the photographs are considered as copyrighted work. On the third factor, the court held that it neither favours Kelly nor Arriba because it was necessary to create the transformative work to copy the whole image and hence no copyright infringement. Regarding the last factor, the court observed that the Arriba website only helped users to identify the images as they were only a visual search engine and were not selling the images. Hence, it was not considered as copyright infringement.

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7 Mittal (n 3) 118.

8 Graham J.H. Smith and Bird & Bird, *Internet Law and Regulation* 33-34 (Sweet & Maxwell London, 3rd Edn., 2012).

9 280 F 3d 934 (9th Cir 2002).

Deep linking raises many problems if done without the permission of the content owner. Competitors deep linking the content of another owner to their websites may amount to unfair advantage or unfair competition. Many publishers are taking measures to completely block permanent deep links, like the requirement of permission to enter the website or content.[10]

The pertinent issue to be addressed is whether the law should govern the procedure of deep linking or should the law provide complete immunity to link one's website with the competitor's website. However, most importantly and specifically concerning the creative work striking a balance between the rights of the owner and the society is of utmost importance because of the dissemination of information. The international laws and treaties do provide for the control of the content in the hands of the owner, but it does not specifically provide for deep linking.

Globally, there is no ban on deep linking. Linking helps to spread information, it is one of the most powerful information tools of the World Wide Web. Linking facilitates quick access to information which otherwise would have taken days to find the content. Linking also permits the user to determine how deeply to explore a particular topic.[11]

2.1.1. Judicial Position on Deep-Linking

Although, as a general proposition, one cannot be held liable for simply linking to another website it may attract legal consequences under certain circumstances.

2.1.2.2. US Position

In *Ticketmaster Corpn.* v. *Tickets.com*,[12] the Ticketmaster Corp alleged Tickets.com of deep linking their content on Tickets.com's website. Federal Judge Hupp concluded that "*hypertext linking does not itself involve a violation of the Copyright Act…since no copying is involved*". Further, the "hypertext linking does not involve the reproduction, distribution or preparation of copies or derivative work, therefore there was no infringement of copyright since the link was one to the original author's website".

In another dispute between *Ticketmaster Corpn.* v. *Microsoft Corpn.*[13] the plaintiff, Ticketmaster Corp. sued Microsoft for deep linking without permission. It was alleged by the plaintiff that Microsoft diverted the traffic which affected their potential revenue. Ticketmaster Corp. had arrangements with other

[10] *Id.*, 119.
[11] *Id.*, 120.
[12] Case No. 99-CV-07654.
[13] Case No. 97-3055.

firms whereby other firms had consented to pay Ticketmaster Corp. for linking to Ticketmaster's site. Linking without consent leads to unfair commercial gains. Besides,

In *Universal City Studios Inc.* v. *Reimerdes*[14] a permanent injunction was granted under the anti-circumvention provisions of the Digital Millennium Copyright Act, preventing the defendants from posting source code as well as linking to the source code, of a computer program that decrypts the copyright protection scheme for DVDs.

2.1.3.3. UK Position

In the Scottish case of *Shetland Times Ltd.* v. *Wills*[15], the plaintiff operated a Web site through which it made available many of the items in the printed version of its newspaper. Its primary function was to distribute news and other items. The defendant also operated a service wherein they published news. Some of the posts of defendants reproduced verbatim copies of the headlines of the Shetland Times. The headlines were linked to the plaintiff's site. By clicking on the headlines of the defendant's site the user was directed to the exact page on the plaintiff's site where the content was posted instead of the home Web page of the plaintiff's. He found that the articles were being sent by the Shetland Times but through the Web site maintained by the defendants. In the process, the front page of the Shetland Times site was dodged, significantly diminishing the value of the site to potential advertisers. The issue here concerned deep linking and whether such links to internal or embedded pages of The Shetland Times' website by the Shetland News through the use of the plaintiff website's news headlines was an act of copyright infringement under the United Kingdom's Copyright Designs and Patents Act of 1988.[16] The injunction was granted by the court to the plaintiff restricting the defendants from deep linking to the plaintiff's webpage. Eventually, the Shetland News agreed not to deep-link but to directly link to the home page of the Plaintiff.

2.1.4.4. EU Position

The Court of Justice of the European Union [CJEU], in *GS Media BV* v. *Sanoma Media Netherlands BV*,[17] held that the act of linking to someone else's website amounts to infringement if done without the copyright owner's consent. In this case, a Dutch news website Geen Stijl posted hyperlinks to the pictures of popular models of Playboy magazine. Playboy sent several notices to stop linking however GS Media blatantly ignored the notices. The court held that although GS

[14] 82 F Supp 2d 211.

[15] 1997 FSR 604 : 1997 SLT 669 : 1997 SC 316.

[16] *Linking, Framing and Meta Tagging*, 1997, *available at* <http://www.netlitigation.com/netlitigation/cases/shetland.htm.> (9-3-2020).

[17] 2016 Bus LR 1231.

Media was not directly displaying the pictures of Playboy but was linking the pictures on their website and despite receiving several notices to desist from linking they continued linking from third-party websites hosting Playboy images illegally. The pertinent question raised in this case was what amounts to 'communication to the public", the court stated that it is a legal assumption rather than a factual one. However, in earlier cases, the CJEU ruled that posting a link to the content which is already in circulation does not amount to the communication of the work to the 'new public' and hence does not amount to copyright infringement.

However, it is against this rule that the court has extended some caveats whereby an individual can be held liable firstly, where it is known to the infringer that the material he is linking to is hosted at a third-party website without authorization. In the instant case, Playboy had sent several notices stating that posting a link to their images is not authorized which satisfied the knowledge requirement and hence liable for copyright infringement. Secondly, when commercial gains are involved the person who is using hyperlinks should ensure that the content is not posted illegally. This relates to the existence of implied knowledge and imposes a duty of ensuring the legitimacy of the copyrighted materials. This ruling is important to understand the limitations and rights of operating a website subject to EU Laws. If it is known that the content is posted without the owner's authority, the poster must immediately remove the link or face copyright liability. The website owners need to ensure that they do not fall into the category of knowing to be it is expressed or implied and conduct due diligence before posting any link on their website which takes the user to someone else's website where the content was posted.

2.2. Framing

Another issue related to web linking is the use of frames on a website. Frames are an HTML enhancement which enables the website designer to split the screen into several separate areas or frames. Frames are used to subdivide web pages. Each frame can be made to act independently, so that while one frame accesses new pages the others remain in place. The use of frames as a way of navigating the content on one site is permitted. However, frames can be used to access other sites.[18] A site using frames can be designed so that when the user clicks on a link to an external site, he sees the contents of the external site within a border generated by the original site. Frames provide an opportunity to encase someone else's site in advertising generated by the linking site.[19]

When the user clicks on a link to another site from within a frame, instead of the target site's content completely replacing the pointing site's content, it appears surrounded by the material in the frames remaining from the pointing

[18] Mittal (n 3) 40.
[19] *Id.*, 6.

site. This arrangement has the potential to undermine the assumptions on which advertising and sponsorship deals are done. A programmer can frame another's web content beneath his navigation or banners, this permits him to use creative content owned by others to sell advertising on its site.[20]

Netscape has developed and introduced the technology of framing in 1996. Though it can lead to many legal disputes, many Web pages commonly adopt this technique. In *Washington Post Co.* v. *Total News Inc.*,[21] Total News, the publisher of online news services *www.totalnews.com* employed frame technology to display news sites from around the world. They used to aggregate web news sources and created pages with frames that consisted of hyperlinks to other web-sites including the Washington Post, CNN, USA Today and many more. Website users can make use of totalnews.com to reach different articles from various sources. This type of exhaustive information-led website benefited the owners by generating good revenue by advertising. The hyperlinks on the totalnews.com if clicked will show the Washington Post within the Total News Web page within a frame that was surrounded by the total News URL, banner, advertisements, logo and other information related to other website content including that of CNN, the Wall Street Journal and the LA Times. All these website owners sued Total News, alleging that such framing amounts to piracy of the copyrighted content and also leads to trademark infringement and trademark dilution. It was further alleged that Total News designed a parasite Web that copies the content of other sites and publishes with Total News advertisers. However, Total News agreed to remove the farming technology and only link the content.

In *Futuredontics Inc.* v. *Applied Anagramic Inc.*,[22] respondents framed the content of the dental service of the rival site. The frames linked related to the information about the Applied Anagramic and trademarks. U.S. District Court rules that the addition of the frame changed the appearance of the linked site which is done without authorization and hence amounts to infringement.

2.2.1. Position in India

To understand the legality of framing a reference can be made to Sec 51 read with Sec 14 of the Copyright Act, 1957. The framing does not amount to the reproduction of the copyrighted content. The framer does not copy the content, it only provides a browser with instructions to retrieve the content, which is then displayed on the overall page of the user's site. The copying happens at the hands of the final users, who however never come to know that their browser is attracting different elements from different sites. Also, there is no direct issuing of copies of the work by the framers nor communicating nor distributing the work to the

[20] *Ticketmaster* (n 13).
[21] 97 Civ.1190 (SDNY1997).
[22] (1997) 46 USPQ 2d 2005 (CD Calif. 1997).

public as the user's browser is fetching the content from the owner's website itself. However, the act on the part of the framer may amount to aiding such communication and distribution.

It may also amount to an adaptation of the work as provided under section 14(a)(vi), the framing site takes an element from the framed site and creates its site, thereby affecting to some extent the right to create derivative or adaptation of the copyrighted work by the owner.

2.3. Caching (Mirroring)

Caching involves the storage of an entire site or another complete set of materials from a source for later use. In computer science, a cache is a component that transparently stores data so that future requests for that data can be served faster. Caching may be Local Caching and Proxy Caching. Proxy caching leads to public distribution, public performance and so on and hence amounts to copyright infringement. Catching results in the loss of control over access to information at a site. In print media version of the information is in the control of the copyright owner but in the case of caching the control of the version moves from the hands of the website controller to the Online Service Providers (OSP) of the end-user.

3. LIABILITY OF INTERNET SERVICE PROVIDERS

Copyright consists of several rights such as the right of reproduction, communication to the public, adaptation, etc. Online copyright infringement occurs when copyrighted work is digitally copied, issued to the public, circulated to the public etc. without the owner's consent. Having said that, it is not easy to find the infringer in case the violation happens online, because of the complications created by the technology involved in the case, it becomes all the more difficult to provide justice to the copyright owner. The courts in the United States of America have examined the issue relating to the liability of Internet Service Providers in several cases.

In *Religious Technology Center* v. *Netcom On-Line Communication Services Inc.*,[23] the issue addressed was "whether the operator of a computer Bulletin Board Service (BBS) and Internet access provider that allows BBS to reach the Internet should be liable for copyright infringement committed by a subscriber of the BBS?" The plaintiff alleged defendants Netcom was liable directly, contributorily, and vicariously for copyright infringement. The court held that RTC's claims of direct and vicarious infringement failed, but genuine issues of fact precluded summary judgment on contributory liability and fair use.

[23] 907 F Supp 1361 (ND Cal. 1995).

There has been a constant debate in India and worldwide regarding whether any liability can be imposed on the ISPs. for example, YouTube, Facebook and other similar platforms for publishing content without the authorization of the copyright owners if yes, to what extent can these service providers be held liable or what shall be their duties or responsibilities? The Information Technology Act, of 2000 is the governing law in India which refers to Internet Service Providers as network service providers and defines the same in Section 79(a) as an "intermediary". The meaning of intermediary is given under Section 2(w) of the Information Technology Act as "intermediary concerning any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service for that message".[24]

Section 51 of the Copyright Act, of 1957 lays down what amounts to infringement but it does not cover the liability of the internet service providers. The provisions about the Internet service providers are provided under Section 79 of the Information Technology Act, 2000 which limits the liability of the said providers.

The Internet service providers will not be held liable if:

(i) ISPs have exercised all due diligence to prevent the commission of offence, and

(ii) Offence so committed is without the knowledge of Internet service providers.

The above-stated provisions provide exemptions from the liability of the intermediary in certain cases. According to the proviso to Section 81, "nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) of the Patents Act, 1970 (39 of 1970)."

In *Super Cassettes Industries Ltd.* v. *My space Inc.*[25], suit was filed by SCIL against Myspace for infringing their copyright under Section 51 of the Copyright Act, 1957. My Space is an intermediary on the internet which provides a conduit for videos, songs, etc. SCIL argued that the defendants were liable for primary infringement through the unauthorized communication of copyrighted work to the public. The website provided users with web space for profit which enabled further infringement through the upload of content by users. The defendant was aware of the infringement and was making commercial gain from the same. The Single Bench of the Delhi High Court stated that "…there is no impact of provisions of Section 79 of IT Act (as amended on 2009) on the copyright infringements relating to internet wrongs where intermediaries are involved and the said

[24] Internet service providers, web-hosting service providers, search engines, online payment sites, online market places and so on are the examples of intermediary.

[25] 2011 SCC OnLine Del 3131 : (2011) 48 PTC 49.

provision cannot curtail the rights of the copyright owner by operation of proviso of Section 81 which carves out an exception cases relating to copyright or patent infringement."[26] The Single Bench issued an interim direction against Myspace that "they shall immediately take remedial measures to remove the same from its website not later than one week from the date of such communication"[27].

The Division Bench set aside the single-bench decision on the ground that "…in the case of internet intermediaries contemplates actual knowledge and not general awareness. Additionally, to impose liability on an intermediary, conditions under Section 79 of the IT Act have to be fulfilled." Further, "in case of Internet intermediaries, interim relief has to be specific and must point to the actual content, which is being infringed".[28]

4. PROTECTIVE MEASURES

New advances can frequently upset the harmony among public and confidential interests in intellectual property regulation. For instance, the Internet has worked with the dispersal of creative works by permitting clients to mass-appropriate records in no time. DRM is a procedure that permits copyright proprietors to uphold their freedoms by controlling how clients can manage their computerized records, for example, by confining the stage on which the document can be gotten. Likewise, the DRM conspire is safeguarded against avoidance regulations, which keep clients from "breaking" the DRM. Albeit the primary objective of DRMs is to forestall robbery, this strategy can unfavourably influence different interests, like security and fair use.[29]

4.1. Contours of Digital Rights Management

The dilemma of copyright law is to strike the balance between the technological advances which make it possible in a fraction of time to make exact copies of music, movies, literature, software etc., distribute the same to the world and the control and regulation of the content by the owner over the digital platform. To regulate the access and copying of the content available online, the owner employs certain techniques popularly known as Technological Protection measures [TPMs].

TPMs make it possible for the owner to control the access as well as copying of the content, the effect of which would be that the distributors of the digital works not only preserve the existing market but also create a new market as

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[26] *Ibid*.
[27] *Ibid*.
[28] *Myspace Inc*. v. *Super Cassettes Industries Ltd*., 2016 SCC OnLine Del 6382.
[29] Dan L. Burk, "Legal and Technical Standards in Digital Rights Management Technology" 74 *Fordham Law Review* 537-38 (2005).

per their choice. Thus, even the content that has fallen into the public domain may still be controlled by the owner because of the inbuilt TPMs in the content.[30] TPMs like digital watermarking, passwords, encryption and trusted systems are used in today's digital market to assert the rights of copyright holders.

To offer a better solution for the protection of content, technological standards have been integrated with operation software programs. According to some authors, these standards carry legal norms, as they influence user behaviour. The emerging Digital rights management [DRM] technology, is extensively used in copyright industries. When such commands are promoted through legal rules, they are backed by an authoritative executing mechanism that leaves little place for judicial discretion.[31]

4.1.1. Trusted Systems

A trusted system is another mechanical measure which empowers the system overseer to restrict the number of individuals that can get to the data coursed through its organization. In some cases, the trusted system can likewise restrict the times a genuine client can get to the substance. For instance, Real Audio [alternative to MP3], conveys such computerized content that can confine the client's capacity to play, save or duplicate documents. Limitations can likewise apply to the system on which a specific record can play, model documents saved with Real Audio configuration must be played with a Real Audio player, and in some cases, the player is additionally empowered to decide if the utilization is approved or unapproved.

Fixed capacity is one more method of trusted system in DRM by which the client is kept from working the record with an unapproved PC or requires a far-off confirmation wherein the system creates a declaration to demonstrate the realness of the product running on a PC. In this kind of system, the organization can keep a mind the altering of their product by the client and can likewise recognize any unapproved change made to dodge the TPMs.

Desktops and laptops with pirated software flash a message every time the system is booted indicating that the Windows copy is not genuine. Pay per View is also an example of a trusted system which enables a user to watch a movie on authorized television. The trusted system enables a secured network since it enables the user to verify the authenticity of the message relating to the claims of authorization to read a digital copyrighted work.[32] They also allow the content

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[30] David Nimmer, "A Riff on Fair Use in the Digital Millennium Copyright Act" 148(3) *University of Pennsylvania Law Review* 673-742 (2000).

[31] Daniel Benoliel, "Technological Standards, Inc.: Rethinking Cyberspace Regulatory Epistemology" 92 *California Law Review* 1080 (2004).

[32] Jonathan Weinberg, "Hardware-Based ID, Rights, Management, and Trusted Systems" in "Symposium: Cyberspace and Privacy: A New Legal Paradigm?" 52(5) *Stanford Law Review*

provider to make the works available only to the paid users. Therefore, even after getting a hefty amount for the content, the owner can still control the scope and extent of the rights of the buyer of the software. Usually, the buyer is bound by the license agreement of the software.

4.1.2. Digital Watermarking and Fingerprinting

DRM technology also functions by identifying the digital version of the copyrighted, the digital works are usually created by two well-known existing technologies namely watermarking and fingerprinting. The identification function tracks the movement of work electronically, such as when they are shared over the peer-to-peer network through emails or instant message attachments. Such a system also restricts the rights of the buyer to access the work and their ability to copy and redistribute the work.[33]

Watermarking in digital form is the act of hiding a message related to some copyrighted work. The added watermarks help the user to identify the user as well as that the data is copyright protected and the rights of users are restricted to some extent. The watermark also helps in making the work product, extra space is not required to write down the copyright notices, and the owner could simply embed the watermark in the work itself.

Watermarking can be used to control the copy of the copyrighted work as well. The copy control can be used to prevent unauthorized copying by embedding a watermark in them that would instruct a compatible CD or DVD writer to not write the work because it is an authorized copy. For example, the motion picture of the US has used a similar technique with their digital copies of movies, songs etc. Each DVD or CD is encrypted by a Copy Protection System popularly known as the Content Scramble System. Further, the player or the instrument is preset to allow the user to play, but not copy, the movie also acts as a trusted system.[34]

5. ANTI CIRCUMVENTION LAWS

Anti-circumvention laws protect DRM systems that could be circumvented by the infringer to copy the work to get unauthorized access to the work. Article 11 of the WIPO Copyright Treaty, 1996 provides for adequate legal protection and remedies against the circumvention of TPM as well as DRM. Several signatory member countries have incorporated similar provisions in their domestic laws. As Burk states, "the rationale behind such laws maintains that where

1255 (2000).

[33] *Id*.,1277.

[34] Raymond Shih Ray Ku, "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology" 69(1) *The University of Chicago Law Review* 264 (2002).

technology provides the first line of defence against unauthorized uses of copyrighted works, the legal protection needed to encourage creativity may not necessarily be deterrence against violation of copyright or similar proprietary rights, but rather legal deterrents against circumvention of technological protections."[35]

In the U.S., the Digital Millennium Copyright Act of 1998 provides anti-circumvention laws. DMCA protects two types of technologies firstly technological protection measures that control access to work and secondly technological protection measures that protect the rights of the copyright owner. These technologies can be infringed by two types of conduct: (1) the production and distribution of tools or devices that are (a) primarily designed to circumvent; (b) have a limited commercial purpose other than to circumvent; or (c) are marketed for circumvention and (2) individual acts of circumvention. While the first type of conduct is penalized when applied to both technologies, the latter is only penalized for access controls. The exception for individual acts of circumvention regarding usage controls aims to ensure that the public can make fair use of copyrighted works. It is also important to note that fair use is not a valid excuse to practice circumvention in situations prohibited by §1201.[36]

"In the Indian, Copyright Regime *vide* the 2012 Amendment, Section 65A & 65B[37] has been introduced. The provisions provide Anti-circumvention provisions in the form and along with Digital Rights Management provisions. However, the objective of harmonizing the Indian Copyright provisions with the provisions of the WIPO Copyright Treaty and WIPO Performers and Phonograms Treaty (WPPT), sounds much more plausible. Even though India is not a signatory of any of the WIPO Internet Treaties, the legislature has realized the need for the Indian copyright to be in harmony with the International provisions to ensure proper Copyright protection to the right holders in cyberspace, as well as to protect several other economic interests and considerations. Majorly, the changes are said to be targeted against the ever-rising menace of Piracy, particularly the Indian Film Industry."

5.1. Technological Protection Measures

The new Section 65A[38] provides the provisions for prohibiting the circumvention of technological protection measures applied to copyrighted works. The provision uses the term effective as a prefix to the technological protection measures. This approach can be compared to the one taken by the WCT, DMCA

[35] Stefan Bechtold, "Digital Rights Management in the United States and Europe" 52(2) *The American Journal of Comparative Law* 323, 344 (2004).
[36] *Id*., 348.
[37] Copyright (Amendment) Act, 2012, S. 65-B.
[38] Copyright (Amendment) Act, 2012, S. 65-A.

and EUCD. However, WCT and DMCA do not define the term effective; only EUCD has gone a step further to define the term.

However, the Indian provision leaves the element of ambiguity in the first provision itself, for the Judiciary to come up with required interpretations. However, In the recent case of *Tata Sky Ltd.* v. *YouTube LLC*[39], Tata Sky sued YouTube because the latter had failed to take down videos which taught viewers to circumvent certain technological protection measures to view HD channels broadcast by Tata Sky, without paying for access. The main cause of action in the lawsuit was trademark infringement because Tata Sky's logo was displayed on the videos – the judge does point out the weakness of such a claim. The judgment however also discusses issues of TPM circumvention under Section 65A of the Copyright Act, the duty of intermediaries etc. The problem with the judgment is that it doesn't lay down any law because YouTube agreed to take down the videos after what appears to be a lot of confusion between YouTube and Tata Sky. The suit was thus decreed after laying down the various arguments in the case.

The basic drawback of section 65A is the lack of any civil remedies in the Copyright Act for the circumvention of TPM. The section makes the circumvention of TPM a criminal offence which is punishable with 2-year imprisonment and a fine. On the other hand, Section 65B does provide for civil remedies in the case of circumvention of Rights Management Information (RMI). Yet, the Delhi High Court appears to be dealing with the circumvention of TPMs in civil suits. In a case filed by Sony alleging the circumvention of TPMs the Delhi High Court issued an injunction in that case. But again, there was no discussion of the remedies permissible under the law. If the Copyright Act does not provide for civil remedies, a court cannot grant an injunction. The only remedy for rights holders in such a scenario is to file a criminal complaint."

The second problem with the Tata Sky lawsuit is that the Copyright Act criminalizes only the act of circumvention of TPM – it does not criminalize the act of teaching a person to circumvent a TPM. Therefore, Tata Sky had every right to criminally prosecute the people who conducted the circumvention but it had no remedy against YouTube for hosting such a video as it is not provided under the act.

The steps should be taken by the legislature to improve the scenario of anti-circumvention laws as the laws should be competent enough to deal with the upcoming technological challenges.

[39] 2016 SCC OnLine Del 4476.

5.2. Effectiveness

Copyright law has evolved with the evolution of technology and the internet changing thereby the contours of infringement of copyright in cyberspace making it more complicated than ever. The nature of cyberspace has changed the fundamental concepts of subject matter and the rights of the owner under copyright law. Many scholars wonder whether the concept of copyright will cease to exist one day. The Indian copyright has been amended to keep pace with technological advancement and to counter the evils of piracy. The recent changes have given a new outlook to copyright enforcement.

New provisions were introduced to comply with international standards and hence keep the domestic law of India in sync with the international conventions. Such provisions are added to tackle the losses suffered by the Indian economy due to acts of piracy. However, the pertinent question is whether the purpose of Anti-circumvention is not only to put a restriction on unauthorized use but also to ensure that the rights of the public to authorized access are not hampered. It is not doubted that the Indian Law on Anti-circumvention Law is at a nascent stage however it is a positive step to uphold the sanctity of the rights of copyright authors and owners.

6. CONCLUSION

Intellectual property rights are an outcome of human intellect and the fundamental inspiration for its protection is to protect the innovative exercises and creations. Therefore, the balance needs to be carved out to protect an author's intellectual property from unauthorized use without hampering innovation. The international developments regarding internet treaties have tried to maintain the balance by adopting digital rights management. Though the United States was a signatory to the treaties and gave effect to the provisions of such treaty by making competent legislation on the Digital Millennium Copyright Act, 1998 India not being a signatory gave effect to anti-circumvention provisions keeping in mind the global technological advancement and the need of being compatible with international instruments due to globalization of the market.

In the light of the analysis done it is proved to be true and the competition laws should be made to deal with the issue. Despite all the developments, one can easily find that several frauds and piracies are mounting in the digital world. The entire globe is influenced by competitive spirit. It is virtuous to have competition to boost socio-economic development but it has ascended to a level where individuals turn to pirates to achieve their objective or to exploit their competitor's work to make it underdeveloped or inferior in the world of digitalization. In such circumstances people with aptitude fear to produce their work before the world and considering this the legislations of various countries created advanced

rules and laws to shield copyright of the owner's literary work and protection from encroachment of rights. Though computer-related software and databases have today come under the protection of copyright and the Information Technology Act, of 2001 gives protection to our data beyond copyright, we have not fully achieved protection. Therefore, the analysis of Indian, US and other countries' Legislation is done so that developing countries along with developed countries can flourish in the area of copyright law regime and measures should be taken to embrace new strategies and agreements to safeguard the protection of copyright in the digital era. The idea of the study is not to focus on the competent copyright law system of the United States with not so effective system in India but another way to look at the broader aspect of the analysis which is being done to make society and lawmakers that the vigilant judiciary has effectively dealt with the technological advancement in developed countries with the help of comprehensive legislation which tried to cover every niche of the issues that may arise and keeping the check and balances for making it more effective but, In India, the copyright act of 1957 was effective till copyright amendment act of 2012, which makes major changes regarding digitalization in copyright law. So, therefore, we can see that the 52 years old legislation was dealing with technological issues. Thus, analysis shows that the effective judicial responses of the United States should be taken into account while dealing with copyright issues in India. This study will help developing countries to be compatible with the international instrument only if they make their domestic legislation more wisely according to the needs of the hour.

MORAL RIGHTS UNDER COPYRIGHT LAW: PROTECTION OF INDIAN FOLKLORE

Dr. Vandana Mahalwar & Himani Mishra***

In English society as an author, I was not of much account, but….in France, where an author just because he is an author has prestige, I was[1].

1. INTRODUCTION

Intellectual Property Rights are the legal rights that result from intellectual activity in industrial, scientific, literary, and artistic fields. These are intangible and incorporeal rights which can be broadly classified into two parts:

- Copyright
- Industrial property.2

The creator's economic and moral rights are safeguarded by the copyright law. Every artist's work is protected by the copyright law, including any substantial form of production that reflects the personality and work of its author, such as a photograph, book, video, song, or film. Owners who have economic rights are able to profit financially from the usage of their creations. Moral rights allow authors and creators to take certain actions to preserve and protect their attribution to the work.

1.1. Origin of Moral Rights

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention hereinafter), adopted in 1886, was the first multilateral treaty protecting the works and rights of their authors. The Rome Act of 1928 included the provision of Droit moral to the Berne Convention of 1886.[3] Moral rights flow from the fact that a literary or artistic work reflects the creator's personality, just as much as economic rights demonstrate the author's need to keep

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1 W. Somerset Maugham, *The Razor's Edge* 9 (Vintage 2003) (1943).
2 Alka Chawla, *Law of Copyright: Comparative Perspective* 2, (LexisNexis, 2013).
3 Nidhi Kumari, "The Moral Rights of an Author", Academike (6-4-2015) <https://www.lawctopus.com/academike/moral-rights-author/>.

body and soul together.[4] The Berne Convention for the Protection of Literary & Artistic work mandated international standards for moral rights through Article 6bis.[5] Article 6b is of the Berne Convention provides that:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

All signatories to the Berne Convention are obligated by Article 6b is to guarantee the authors two categories of rights:

Right to Attribution - This right guarantees that the person who has created the work has the right to be acknowledged as the author.

Right of Integrity - This right enables the author to prevent or pursue damages in the case that his work is altered, mutilated, modified, or subjected to any other undesirable behaviour.

The Moral Rights of attribution and integrity are different from the economic rights of owners that enable them to prevent others from reproducing the work without copyright owner's consent. Before the intellectual property rights were established, the IP rights were of moral nature. Creators were not granted any economic rights, but were granted only public recognition.[6] It was during the Renaissance period when Italy started granting economic rights to creators. While, the non-economic rights were recognized by the Berne Convention in 1928. Parties to Berne convention object to any harm to the creator's reputation and any distortion, mutilation, or other modification to the author's work is not allowed.

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[4] V.K. Ahuja, *Law of Copyright and Neighbouring Rights: National and International Perspective* 95 (LexisNexis, 2015).

[5] Berne Convention for Protection of Literary and Artistic Works, Article 6(*b*) is (1886) reads as:
(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.
(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

[6] Frank D. Prager, "The Early Growth and Influence of Intellectual Property", 34 Journal of the Patent Office Society 106, 111-12 (1952).

2. RECOGNITION OF MORAL RIGHTS: THE INDIAN APPROACH

2.1. Different approaches in France and Canada

Countries have incorporated different versions of the moral rights. In countries like France, the moral rights are perpetual, inalienable, and imprescriptible; they cannot be transferred and renounced and ought to be respected even if they enter the public domain. After the author's death, moral rights are transferred to his legal heirs.[7] Moral rights belong to the author even though he might have shared the economic rights with someone else. While on the other hand in Canada, the Copyright Act provides the protection to the moral rights of authors. Canadian copyright law talks about the waiving of the moral right contractually.[8]

2.2. Moral Rights in India

In India's Copyright Act, 1957, Section 57[9] deals with the author's special rights. Section 57, as initially enacted, categorically mentioned that the moral fitting vests with the author irrespective of other copyrights and even after the author assigns his copyright.

Provided that in addition to the right to claim authorship, the author of the work may restrain or claim damages arising specifically out of either

a. *any distortion, mutilation, or other modification of his work; or*

b. *any other action about their work would be prejudicial to their honor or reputation*.

The right covered under subsection (a) is also available to the legal representative of the author.

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[7] Copyright in France, Casalonga (15-9-2022) <https://www.casalonga.com/documentation/Copyright/copyright-in-france-230/Copyright-in-France.html?lang=en>.

[8] Lesley Ellen Harris, "Moral Rights in Canadian Copyright Law", *LawNow* (June 2010) <http://www.copyrightlaws.com/wp-content/uploads/2010/07/Moral-rights-for-LawNow.pdf>.

[9] The Copyright Act, 1957, Section 57 reads as:
[(1) Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right—
(a) to claim authorship of the work; and
(b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation: Provided that the author shall not have any right to restrain of claim damages in respect of any adaptation of a computer programme to which clause (*aa*) of sub-section (1) of Section 52 applies. Explanation.—Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section.]

The new provision excluded any copying or adaptation of computer programs for specific purposes from the ambit of the right to integrity. The exclusion was made due to the very nature of computer programs requiring copying and adaptation for such programs to meet their intended purposes adequately. The proviso to section 57 extends the moral rights in a restricted fashion to computer programs. It allows the lawful possessor of the copy of the computer program to make adaptations and utilize the computer program for its intended purpose, including making its temporary backup copies.

The last change incorporated by the amendment Act concerning moral rights was the explanatory note to the section that lays down that the failure to display work or display it by the author's wishes will not violate the author's moral rights.

3. PROTECTION OF TRADITIONAL CULTURAL EXPRESSION UNDER INTERNATIONAL IP REGIME

The WIPO Performances and Phonograms Treaty, 1996 and the Beijing Treaty on Audio-visual Performances, 2012, both include the moral rights of attribution and integrity, which, notably, apply to performances of expressions of folklore (a synonym of TCEs).[10]

> ''Traditional cultural expressions'' or ''expressions of folklore'' consist of both "tangible and intangible form of expressions:
>
> (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
>
> (ii) musical expressions, such as songs and instrumental music;
>
> (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and,
>
> (iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:

[10] Brigitte Vézina, "Ensuring Respect for Indigenous Cultures: A Moral Rights Approach", CIGI Papers No. 243, Centre for International Governance Innovation (2020) <https://www.cigionline.org/ publications/ensuring-respect-indigenous-cultures-moral-rights-approach/>.

(v) the products of creative intellectual activity, including individual and communal creativity; characteristic of a community's cultural and social identity and cultural heritage; and maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community."[11]

There are an estimated 370-500 million indigenous population in the world.[12] They comprise small of the population but their traditional knowledge is a treasure house covering every field of intellectual property rights.

A document was prepared by the WIPO and UNESCO for providing protection to the folklore, which stated:

- "Model provisions should be framed for promoting legal protection at national levels.
- Such model provisions should be so elaborated as to be applicable for adoption in countries having no existing legislation for protection, as well as those where there is scope for development of existing laws.
- Such model provisions should allow for protection under copyright and neighboring rights wherever possible.
- Model provisions for national laws, should lead to sub-regional, regional and, ultimately, international protection of creations of folklore."13

3.1. Model Provisions (1982)

The "Model Provisions in 1982 (Model Provisions for National Laws on the Protection of Expression of Folklore against Illegal Exploitation and Other Prejudicial Actions)" were adopted following several rounds of discussion, and they were submitted to the Joint Committee Meeting of the Expert Committee of the Berne Convention and Intergovernmental Copyright Committee of the UCC in 1983. UNESCO- WIPO model has provision for "protecting folklore, acknowledgement of source, civil remedies, authorities, seizure and other actions and also protection of folklore of foreign countries."[14]

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[11] Michael Blakeney, "Protecting the Knowledge and Cultural Expressions of Aboriginal Peoples", University of Western Australia Law Review, Vol. 39(2) 180-207 (2015).

[12] Mario C. Cerilles, Jr. & Harry Gwynn Omar M. Fernan, "Indigenizing the Intellectual Property System", *IPWatchdog*, (8-8-2021) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjvj-fwtI_7AhW03HMBHX7YDUQQFnoECBUQAQ&url=https%3A%2F%2Fipwatchdog.com%2F2021%2F08%2F08%2Findigenizing-intellectual-property-system%2Fid%3D136555%2F&usg=AOvVaw2uMQD9Lco2yjD2zxK74SaT>.

[13] "Model Provisions for National Laws on the Protection of Expression of Folklore against Illicit Exploitation and Other Prejudicial Actions, with a Commentary", World Intellectual Property Organisation (1983) <https://unesdoc.unesco.org/ark:/48223/pf0000220160>.

[14] *Supra* note 12.

4. PROTECTION OF MORAL RIGHTS UNDER INDIAN LAW

Copyright Act, 1957 provides for the protection of moral rights under the section 57 but does not include within its ambit the protection of traditional folklore. Time and again the judiciary has stood for the recognition of moral right to the author and has widened its scope.

Taking for instance the celebrated judgement of *Amar Nath Sehgal* v. *Union of India*[15], the court held that section 57 is a special right that gives the right to the author or any person who has made anything to claim damages regarding mutilation, distortion, and modification of his work without his consent. On the creation of a work, the first right which comes into existence is the right of paternity while the second right is the right to disseminate his works, "divulgation or dissemination right." The third right which flows from these two rights is the right to maintain the purity of his career. There cannot be any purity without integrity. A treatment of work that is derogatory or degrades the author can object to the author's creation as it would infringe the moral right of integrity.

The plaintiff assisted "Chapaak" movie director Aparna Bhatt in the production of the film in *Fox Star Studio* v. *Aparna Bhatt*[16] .She helped by giving inputs, helping with the procedure of court for shooting the film, explaining legal nuances, editing the script, etc. The court held that right of paternity is an integral part of the moral right. Referring to the *Neha Bhasin* v. *Anand Raaj*[17], the court allowed the singer's request to be credited as a lead female singer instead of just a female singer. These case laws show that the court has given very broad respect to anybody who contributes in any way to a work.

Given this, it appears unreasonable that the rights of the folk artist or community whose work is being utilised are not acknowledged. Their moral right will always exist, even if it is claimed that their work has been in the public domain. Traditional Cultural Expression is not protected by the Copyright Act of 1957.

4.1. Folklores Remain Unprotected

The laws governing intellectual property or any other type of regulation do not include any protections for folkloric expressions. Therefore, using folklore without getting permission from the community or compensating the affected groups is lawful. The exploitation of resources that are already in the public domain is the general posture of business interests that frequently appropriate folklore from communities or tribal villages. They often and willingly assisted

[15] *Amar Nath Sehgal* v. *Union of India*, 2005 SCC OnLine Del 209: (2005) 30 PTC 253.
[16] 2020 SCC OnLine Del 36.
[17] 2006 SCC OnLine Del 440: (2006) 32 PTC 779.

in the moral rights of the indigenous population being violated. Giving pop and traditional music more opportunity is a contemporary trend in the music industry. Particularly among young music, this mix-and-match items has experienced tremendous growth in popularity across the country.

4.2. Practical Issues – Folk Music, Folk Art

Numerous recordings of well-known folk songs with traditional instruments like vivacious drumming and other wind and string accompaniments are readily available on the market. The aforementioned businesses obtain the music from the local communities or, more often than not, the artists themselves take on the task of locating such music in the nearby villages or tribal belts. Music labels and artists are misappropriating or distorting the traditional art form. The replicated or altered folkloric musical genres sometimes have religious connotations or are associated with regional traditions like harvest and festivals. More folklore is used in current Indian film productions, similar to the music industry.

Beats, melodies, and lyrics from local folk music are routinely appropriated by music producers and songwriters. These infusions of modern culture enormously publicised and promoted the sporadic and vanishingly present Indian folk music, but they had no beneficial consequences on the communities that produced the tunes. The originators of folk music are still unknown and derided.

The same is true of indigenous songs from Rajasthan and Punjab that have been altered and incorporated to Bollywood tunes. The primary issue in the legal battle between Coke Studio and the song producer and writer of the "Sambalpuri folk song Rangabati" was that the song was incorrectly marketed as a remix of an Odiya number despite being initially written as a Sambalpuri song, which is against moral rights.[18]

Conventional musical structures are broken down and interpreted in such wildly different ways in these situations that they are mostly forgotten and despised. The Bengali folk song "Boroloker biti lo" by Ratan Kahar was recently included into the song "Genda Phool," a type of rap song with a fusion of Punjabi lyrics, by well-known rapper "Badshah" and "Jacqueline Fernandez".[19]

Ratan Kahar's original literary work "Boroloker biti lo" in this case was protected even without registration since it complied with the

[18] Priyanka Dasgupta, "Remake of Sambalpuri Song Runs into Copyright Storm", *The Times of India* (7-7-2015) <https://timesofindia.indiatimes.com/city/kolkata/remake-of-sambalpuri-song-runs-into-copyright-storm/articleshow/47979477.cms>.

[19] Tanay Akash, "Genda Phool Row: Where do we stand with the Economic and Moral Rights?", Legal Angles Patna (9-4-2020) <https://www.legalangles.org/post/genda-phool-row-where-do-we-stand-with-the-economic-and-moral-rights>.

originality, idea-expression, and fixation requirements.[20] According to section 17 of the Copyright Act, the author of the work is the first owner of the copyright[21], and is entitled to the exclusive economic rights provided by Section 14[22] of the Act. A work that is considered to be in the public domain or to be generally known covers even the extent of moral rights. Indigenous tribes' moral rights are frequently violated without providing any sort of recompense to the community.

4.3. Communal Moral Rights – South Africa & Australia

Many countries that have recognized moral rights have indirectly worked upon communal moral rights. South Africa has enacted the Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019.[23] The act provides for the grounds for the eligibility of Indigenous knowledge as:

1. "Must be passed down through the generation.
2. Developed into Indigenous culture.
3. Associated with the social and cultural identity.
4. To provide for the protection, promotion, development and management of indigenous knowledge; to provide for the establishment and functions of the National Indigenous Knowledge Systems Office; to provide for the management of rights of indigenous knowledge communities; to provide for the establishment and functions of the Advisory Panel on indigenous knowledge; to provide for access and conditions of access to knowledge of indigenous communities; to provide for the recognition of prior learning; to provide for the facilitation and coordination of indigenous knowledge-based innovation; and to provide for matters incidental thereto."

In 2003, the Australian government enacted the bill for the recognition of moral rights of the aboriginals, which is in contrast with the moral rights given to the author, and are recognized automatically on the creation of the work. In the aboriginal culture, the moral right should be restricted to copyrights and be extended to other forms of knowledge.[24]

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[20] Ibid.

[21] The Copyright Act, 1957, S. 17.

[22] The Copyright Act, 1957, S. 14.

[23] Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 (18-10-2022) <https://www.gov.za/documents/protection-promotion-development-and-management-indigenous-knowledge-act-6-2019-19-aug>.

[24] Samantha Joseph and Erin Mackay, "Moral Rights and Indigenous Communities", Art + Law, No. 3, Arts Law Centre of Australia, 6–7 (2006).

Countries have started coming up with legislation and included provisions for protecting indigenous communities' copyright and moral rights.

5. SUGGESTION

It's time to create an indigenous culture's equivalent of the Traditional Knowledge Digital Library, which was created with the aim of incorporating a list of India's codified TK practises. More than 30,000 pharmaceutical formulations are included in this dynamic list, which is made available online to give relevant information to patent and trademark examiners in offices of separate jurisdictions, preventing a grant. The data is available in five UN languages, viz., 'French, German, English, Spanish and Japanese' for convenience irrespective of the fact that data originated in languages like 'Sanskrit, Urdu, Persian and Hindi.'[25] In 2001, the Indian Permanent Mission to the United Nations submitted a paper on studying the existing IPR law's scope of protecting the TKs, TCEs, and GRs and the scope of developing new laws wherever the existing laws fall short of protection.[26] However, the IGC is still working on creating an international instrument that is mutually agreed upon by all nations, therefore such a legislative system has not yet become a reality.

The concept can be utilised to provide for indigenous groups' moral rights. While drafting the provisions, the following issues need to be taken into consideration:

- What elements comprise Indigenous cultural and intellectual property?
- The criteria used to identify who owns what rights;
- Protection from the arbitrary use of their work, i.e., that it be used in accordance with their Indigenous Cultural and Traditional Laws;
- Continuity of moral rights For example, in Australia, moral rights are only granted to the Indigenous community for the duration of the copyright protection, which is the author's lifetime plus 70 years. On the other hand, the cultural work continues to be an essential component of Indigenous group culture. Indigenous people and their culture will always uphold their traditions. The author is granted unending moral rights.
- Whether a member of the community can waive out his moral or copyright rights linked with a Traditional Cultural Expression;

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[25] Traditional Digital Knowledge Library (20-10-2022) <https://www.wipo.int/meetings/en/2011/wipo_ tkdl_del _11/about_tkdl.html> (last visited on 20-10-2022).

[26] Mithra Thiruchangu, "Intellectual Property Rights and Protection of Indigenous Cultural Identity", Know Law: Prudence of Your Rights (20-10-2022) <https://knowlaw.in/index.php/2021/01/28/ intellectual-property-rights-protection-indigenous-cultural-identity/>.

- Whether these individuals should be given full respect and attribution for their cultural history and heritage.

6. CONCLUSION

A global agreement or treaty protecting traditional cultural expression is required, similar to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization (ABS), which is an addendum to the UN Convention on Biological Diversity (CBD). This agreement provides a framework for implementing one of the goals of the Convention on Biological Diversity, which is the equitable and fair distribution of benefits from the use of genetic resources.[27] This is also intended to help indigenous peoples to avoid exploitation of traditional knowledge and expertise.

Article 5[28] of the Nagoya Protocol provides for fair and equitable benefit distribution. The Nagoya Protocol might be considered as addressing concerns over patent or traditional knowledge that is utilised in the production of medicines, pharmaceutical products, etc. For the protection of traditional knowledge in relation to copyrights, particularly the moral rights, a similar convention or agreement is required. The necessary adjustments should be made to the current laws and agreements to include the acknowledgment of moral rights for the indigenous tribes. For instance, "performers" are defined as actors, singers, musicians, dancers, and any other individuals who act, sing, deliver, declaim, play in, or otherwise perform literary works, or artistic works under Article 3(a) of the Rome Convention."[29] The definition of "performers" under the Rome Convention does not appear to include performers who perform expressions of folklore, in the same way that expressions of folklore do not match to the concept of literary or artistic works.

Different nations continue to develop the idea of moral rights at their unique rates. On the one hand, India's legislation on moral rights is constrained, while the judiciary favours a more expansive interpretation of the idea. On the other hand, nations like Australia are taking the ICMR's potential status as a legal reality a step further. India must take steps to provide the legal recognition to the community moral rights, taking the South African statute, ICMR, and the model

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[27] "The Nagoya Protocol on Access and Benefit–Sharing", Convention on Biological Diversity (2010), (21-10-2022) <https://www.cbd.int/abs/>.

[28] Nagoya Protocol on Access and Benefit- Sharing, Article 5 (2010) reads as:
Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilisation of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge.

[29] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Article 3(*a*), (1961), defines "performers" as actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.

clauses into consideration. Traditional cultural expression is something which is intrinsically connected to communal moral rights and distortion or modification of those cultural expression which they have treasured for years for economic benefits should not be tolerated at any cost.

FEDERALISM AND COVID-19: ADDRESSING THE CONSTITUTIONAL CRISIS IN INDIA

*Neha Tripathi**

The spread of Covid-19 in the world exposed the string of vulnerabilities in the healthcare system and brought to light various discourse surrounding federalism and fundamental rights, the matter was further complicated by the fact that India lacked an effective legislation to deal with such unprecedented situations. Nevertheless, in March 2020, the central government via mere administrative order advised the states and union territories to mitigate the situation by invoking the provisions of the Disaster Management Act, 2005 and the Epidemic Diseases Act, 1897. The Novel Coronavirus Pandemic has made the countries realise the importance of the right to health and affordable healthcare. The Epidemic Diseases Act, a colonial legislation that was used as a tool by the Union Government brought out a need for overhauling the legislation in the light of contemporary standards. The law also brought about various issues of competency and conflict between Union and the States to deal with the situation at hand, leading to a lot of important constitutional questions which needs to be duly analysed and studied. A high-level group on health, constituted by the Finance Commission in the year 2019 recommended that "health" as a subject be shifted from the State List to the Concurrent List of the Seventh Schedule under the Indian Constitution. This recommendation raised a question on whether the centralisation of health will be helpful in the light of existing Indian federal structure. This paper focuses on analysing the deeper issues surrounding federalism as a basic structure in relation to various constitutional questions which have arisen in the wake of Covid-19 and critically evaluates the existing constitutional and legal framework to deal with the public health crisis.

1. INTRODUCTION

The covid-19 pandemic has exposed a string of vulnerabilities underlying all forms of political systems and governance models.[1] The pandemic raises various questions on the ability and preparedness of the states to deal with crises. In a situation where no parts of human lives remain untouched, the role of government has come under exacting scrutiny. India with such a huge population and

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1 For further details on comparative analysis, see, Rupak Chattopadhyay, Felix Knüpling et al. eds. *Federalism and the Response to Covid-19 A Comparative Analysis* (Routledge India) 2021.

having a distinct presence in Asia showcased its lack of preparedness in dealing with the Covid-19 crisis.[2]

The crisis was accompanied by restrictions on certain liberties and mandatory ban along with other mechanisms to curb the spread of the virus in the densely populated country.[3] Much of these measures which were undertaken by the Government were done through Executive Orders and there was huge centralisation of power which was seen in the country raising much attention and debate on the dilution of federal structure and autonomy of states in dealing with the crisis.[4]

The legislative division of powers between the federal government and the state government and its complexities relating to public health response were unearthed in the wake of Covid-19 pandemic. The threats which Covid-19 posed forced the states to battle and curb the transmission of the virus at various fronts. Dealing and managing the pandemic, unearthed various facets of federal systems: firstly, the federal government's responsibility to deal with such emergencies and ensure co-ordination, secondly, the issue of state's autonomy in case of health related crises and thirdly, the role of local governments in ensuring the effective supply of basic amenities.[5] There was an enhanced need for effective co-operation and co-ordination between different levels of government. Lastly, the need for resource availability; the state and the local governments were dependent on the federal government for allocation of funds to deal with the pandemic.[6]

The paper thereby attempts to study federalism in the light of public health responses during covid-19, in doing so; the authors have also briefly discussed the concept of federalism. Secondly, the paper specifically, discusses the issues surrounding federalism in the wake of covid-19 crisis in India. Thirdly, the authors also discuss the discourse surrounding "health" as a subject under the current constitutional framework. Lastly, the authors have also analysed the approach of the Supreme Court in certain landmark issues which arose in the wake of covid-19 crisis.

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2 See, "India under COVID-19 Lockdown." *The Lancet,* 25-4-2020, <https://doi.org/10.1016/S0140-6736 (20)30938-7>.

3 For further discussions, see, Sophia A. Zweig et. al., "Ensuring Rights while Protecting Health: The Importance of Using a Human Rights Approach in Implementing Public Health Responses to COVID-19", Health and Human Rights Journal, Vol. 23/2 (December 2021) 173-186.

4 Gautam Bhatia, "India's Executive Response to Covid-19", *The Regulatory Review*, 4-5-2020, https://www.theregreview.org/2020/05/04/bhatia-indias-executive-response-covid-19/.

5 Nico Steytler, *Comparative Federalism and Covid-19 Combating the Pandemic* (Routledge, London and New York) 2021, <https://www.taylorfrancis.com/books/oa-edit/10.4324/9781003166771/comparative-federalism-covid-19-nico-steytler>.

6 See, President Joseph R. Biden, Jr., "National Strategy for the Covid-19 Response and Pandemic Preparedness", January 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf>.

2. UNDERSTANDING FEDERALISM

Federalism basically envisages a compact or an agreement entered between sovereign and independent constituent units to surrender their authority partially, the agreement entered by the constituent unit is based on their common interest vesting the powers with the Union government and retaining the residue of the authority with themselves.[7] Each of these constituent units has their own separate sphere within which they operate except those which have been surrendered to the federal government, and the constitution of the federal government primarily operates upon the administration of these constituent units.[8] The concept of federalism implies the sharing of constituent and political power.[9] Further, it provides for the division of powers between the federal and state Governments ensuring that both are independent in their own sphere and are rather not subordinate to each other. In a federal state, both the governments, the centre and the local, derive their respective powers from the constitution itself.[10] Each government has its own defined limits and operates within its own sphere whereby they exercise their powers without being controlled by the federal government; they work in coordination and co-operation with each other, whereby neither is subordinate to each other.[11] This system is based upon a compromise reached in the backdrop of maintaining the unity and regional diversity of a nation, balancing the need for establishing an effective centralized power and furthering the need for creating effective checks and balances or constrains on the guaranteed power.[12] It thereby ensures effective participation of the regional or local government in the decision-making process.

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7 See generally, K.C. Wheare, *Federal Government* (Oxford University Press, 1964). See, *State of W.B.* v. *Union of India*, 1962 SCC OnLine SC 27 : AIR 1963 SC 1241. Also see, M. Asad Malik, "Changing Dimensions of Federalism in India: An Appraisal", ILI Law Review, Vol. 12 (2019) 85-114. Also see cases like, *Keshavanada Bharti* v. *State of Kerala*, AIR 1973 SC 1461; *State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592 : AIR 1977 SC 1361; *State of Karnataka* v. *Union of India*, (1977) 4 SCC 608 : AIR 1978 SC 68; *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1918; *Kuldip Nayar* v. *Union of India*, (2006) 7 SCC 1 : AIR 2006 SC 3127; *State of W.B.* v. *Committee for Protection of Democratic Rights*, (2010) 3 SCC 571 : AIR 2010 SC 1476, *State (NCT of Delhi)* v. *Union of India,* (2018) 8 SCC 501.

8 See, Ambar Kumar Ghosh, "The Paradox of 'Centralised Federalism': An Analysis of the Challenges to India's Federal Design," ORF Occasional Paper No. 272, September 2020, Observer Research Foundation.

9 See, Anurag Deep, "Coalition Government and Uni-Federal Nature of the Power Sharing: (Whether Federalism is Promoted?)", Journal of the Indian Law Institute 54, No. 1 (2012): 84–94. Also see, Sharda Rath, "Federalism: A Conceptual Analysis", The Indian Journal of Political Science 39, No. 4 (1978) 573–86.

10 See, S.A. Paleker, "Federalism: A Conceptual Analysis", The Indian Journal of Political Science 67, No. 2 (2006) 303–10. Also see, Ronald L. Watts, "Federalism, Federal Political Systems, and Federations" Annual Review of Political Science, 1:1 (1998) 117-137.

11 See, Durga Das Basu, *Comparative Federalism* (Wadhwa, Nagpur, 2008). Also see, K.C. Wheare, *Modern Constitutions* (Oxford University Press, London, 1975).

12 See, L.T. Mengie, "Federalism as an Instrument for Unity and the Protection of Minorities: A Comparative Overview: Ethiopia, India and the US", Mizan Law Review 10, No. 2 (2016) 265-295. Also see, Harman, Brady. "Maintaining the Balance of Power: A Typology of Primacy Clauses in Federal Systems." *Indiana Journal of Global Legal Studies* 22, No. 2 (2015) 703–35.

In this light, let's analyse the advantages and disadvantages of centralized versus decentralized federal public health response to pandemic.

In the wake of Covid-19 pandemic, decision-making was hugely centralized and the implementation was best left to the states, in certain cases even without effective consultation with states.[13] The states were hugely dependent upon federal support and in turn local authorities were dependent on state support.[14]

The advantages of federalism include flexibility to design responses in accordance with the unique requirements of local population, budget and policies.[15] However, in some countries, states had to devise their own mechanism to deal with the pandemic in absence on any effective control and coordination with the national government which led to a disjointed effort and delayed response to curb the spread of the virus.[16] Divided governance creates unnecessary challenges for states to adopt national policies. Pandemic poses an emergency situation and needs effective and emergent steps to be taken, lack of coordination and cooperation in such cases can overcomplicate the matter.[17]

Needless to state, effective responses to pandemic require coordination not only within but also across governments.[18] There was huge centralisation of power across the spectrum during the first wave, however, the second wave saw less centralisation in comparison to the first wave in various nations around the globe, when they started to ease off restrictions due to comparatively few numbers of cases in comparison to the first wave.[19] Centralisation took place within

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[13] "Policy Responses to Covid-19", last accessed on 15-12-2021, <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>.

[14] See, Shashank Atreya, "Health a State Subject, but Covid Proved how Dependant India's States are on Centre," *The Print*, 18-6-2020, <https://theprint.in/opinion/health-a-state-subject-but-covid-proved-how-dependant-indias-states-are-on-centre/442602/>. Also see, Haug, N., Geyrhofer, L., Londei, A. et. al. "Ranking the Effectiveness of Worldwide COVID-19 Government Interventions", Nature Human Behaviour 4, (2020) 1303–1312.

[15] See, Pietro S. Nivola, "Why Federalism Matters", *Brookings,* 1-10-2005, <https://www.brookings.edu/research/why-federalism-matters/>

[16] See, Christopher M. Weible et al. "COVID-19 and the Policy Sciences: Initial Reactions and Perspectives." *Policy Sciences* (2020) 1-17. Also see, Mihir R. Bhatt, "Humanitarian Systemwide Changes in Data Gathering: How Virtual Evidence is Unfolding?" Covid-19 Impact in India, Issue No. 190 (2020), <https://reliefweb.int/sites/reliefweb.int/files/resources/190%20COVID-19%20Impact%20in%20India.pdf>.

[17] See, Giliberto Capano, Michael Howlett, Darryl S.L. Jarvis, M. Ramesh and Nihit Goyal, "Mobilizing Policy (in) Capacity to Fight COVID-19: Understanding Variations in State Responses", *Policy and Society* (2020) 39:3, 285-308. Also see, R. Lencucha, S. Bandara, "Trust, risk, and the challenge of information sharing during a health emergency," *Global Health* (2021)17**,** 21.

[18] See, Shadmi, E., Chen, Y., Dourado, I. et. al., "Health Equity and COVID-19: Global Perspectives", International Journal for Equity in Health (2020) 19, 104.

[19] See, Frances Z. Brown, Saskia Brechenmacher, Thomas Carothers, "How Will the Coronavirus Reshape Democracy and Governance Globally", 6-4-2020, <https://carnegieendowment.org/2020/04/06/how-will-coronavirus-reshape-democracy-and-governance-globally-pub-81470>.

governments and between governments.[20] However, centralisation, even though it was perceived in the wake of the rising need and importance to deal with the situation effectively with uniform policies and schemes, was meant to be temporary. Centralisation happened in the wake of the need to undertake combined efforts and devise a plan to stop the spread of virus. We have seen that with the situation returning to normalcy, centralisation has now eased off. Concentration of power has advantages if used effectively, but not always. Adopting wrong decisions, lack of leadership and preparedness can render the centralisation ineffective.[21]

Like, in India, in wake of centralised power during pandemic, the states faced huge revenue gap and there was lack of coordination to provide health care facilities and treatment during second wave, which deteriorated the situation, created chaos and left states in confusion to deal with the situation themselves and without any proper means and mechanism in place.[22] Also initially, in relation to the issue of vaccine distribution, there was a lack of centralised effort to undertake effective policy decision regarding the availability and administration of vaccines.[23]

Also, in case of decentralisation, there is always an increased risk of responses being undertaken by the local government being inadequate because there can be lack of supplies or lack of capacity to manufacture the supplies, which might lead to lack of meeting the demands arising within the time frame stipulated to deal with the disaster.[24] There may be an increased risk of local hoarding of supplies and a lack of supplies being produced when responses are decentralized.[25]

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[20] See, Scott L. Greer, Holly Jarman, Sarah Rozenblum and Matthias Wismar, "Who's in Charge and Why? Centralisations within and between Governments", Eurohealth 26(2) (2020) 99-103.

[21] See, A.S. Bhalla, "Leadership Challenges and the COVID-19 Pandemic" ORF Occasional Paper No. 299, (February 2021), Observer Research Foundation.

[22] See, Ronojoy Sen, "Politics and Covid-19: Will the Pandemic Result in State Power Expanding?" *The Wire*, 11-5-2020, <https://thewire.in/politics/india-politics-coronavirus-state-power>. Also See, Gautam Bhatia, "India's Executive Response to Covid-19", *The Regulatory Review*, 4-5-2020, <https://www.theregreview.org/2020/05/04/bhatia-indias-executive-response-covid-19/>.

[23] See, The Lancet Covid-19 Commission India Task Force, "Managing India's Second Covid-19 Wave: Urgent Steps, (April 2021) <https://static1.squarespace.com/static/5ef3652ab722df11fcb2ba5d/t/6076f57d3b43fb2db4a7c9c9/1618408831746/India+TF+Policy+Brief+April+2021.pdf>. Also *see*, Holly Ellyatt, "India is the Home of the World's Biggest Producer of Covid Vaccines. But it's Facing a Major Internal Shortage", *CNBC,* 5-5-2021, <https://www.cnbc.com/2021/05/05/why-covid-vaccine-producer-india-faces-major-shortage-of-doses.html>.

[24] *See*, Emily Berman, "The Role of the State and Federal Governments in a Pandemic," Journal of National Security Law and Policy 11(61) (2020) 61-82. Also see, OECD Policy Responses to Coronavirus (Covid-19), "Building Resilience to the Covid-19 Pandemic: The Role of Centres of Government" (2020), <https://www.oecd.org/coronavirus/policy-responses/building-resilience-to-the-covid-19-pandemic-the-role-of-centres-of-government-883d2961/>.

[25] *See*, Serpil Aday, Mehmet Seckin Aday, "Impact of COVID-19 on the Food Supply Chain", Food Quality and Safety, 4(4) (2020) 167–180. Also see, OECD Policy Responses to Coronavirus (Covid-19), "Removing Administrative Barriers, Improving Regulatory Delivery" (2020), <https://www.oecd.org/coronavirus/policy-responses/removing-administrative-barriers-improving-regulatory-delivery-6704c8a1/>.

At the same time, the need for centralized allocation of resources entails a large cost in terms of procurement, storage, transport and logistical organization, for an effort to be successful.[26] However, there is an equally strong argument to support decentralisation in such cases because local authorities have advantages over centralised authorities and they can easily gain information and act at the ground level.[27]

3. CONSTITUTIONAL, LEGISLATIVE AND JUDICIAL RESPONSES TO COVID-19 CRISIS IN INDIA

In most federal countries, health care is a responsibility of states.[28] Even in unitary set-up the health sector is significantly dealt with by the regional governments. In some countries, the role of municipalities in this regard is also monumental.[29] Covid-19 presented a long-lasting and significant pressure on social expenditure. Providing health care facilities requires expenditure and the majority of the federal countries project interdependence on the federal government by the regional and local institutions because the federal government enjoins major revenue sources.[30]

In India, the existent inequities were also exacerbated in the wake of Covid-19, as certain states had undertaken less investment in the healthcare sector which over complicated the issue and availability of healthcare facilities; secondly, states were not duly equipped to deal with the crisis due to poor infrastructure and lack of governmental support, especially those states which did not have the ruling government as that at the centre.[31]

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[26] *See*, OECD Policy Responses to Coronavirus (Covid-19), "The Territorial Impact of Covid-19: Managing the Crisis and Recovery Across Levels of Government" (2021) <https://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-covid-19-managing-the-crisis-and-recovery-across-levels-of-government-a2c6abaf/>.

[27] See, Anwesha Dutta, Harry W. Fischer, "The Local Governance of COVID-19: Disease Prevention and Social Security in Rural India," World Development, 138 (2021) 105234.

[28] See, MacKay, Douglas, and Marion Danis, "Federalism and Responsibility for Health Care," Public Affairs Quarterly 30, No. 1 (2016) 1–29.

[29] See, OECD Policy Responses to Coronavirus (Covid-19), "The Territorial Impact of Covid-19: Managing the Crisis and Recovery across Levels of Government" (2021) <https://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-covid-19-managing-the-crisis-and-recovery-across-levels-of-government-a2c6abaf/>.

[30] *See*, Institute of Medicine (US) Committee on Assuring the Health of the Public in the 21st Century, *The Future of the Public's Health in the 21st Century* (Washington (DC): National Academies Press (US) 2002) 3, The Governmental Public Health Infrastructure, <https://www.ncbi.nlm.nih. gov/ books/NBK221231/>.

[31] *See*, Huberfeld N., Gordon S.H., Jones D.K. "Federalism Complicates the Response to the COVID-19 Health and Economic Crisis: What Can Be Done?" Journal of Health Politics, Policy and Law 1; 45(6) (2020) 951-965. Also see, PTI, "Covid-19: Congress CMs Blame Centre for not giving any Financial Assistance to States," *The Economic Times*, 23-4-2020, <https://economictimes.indiatimes.com/news/ politics-and-nation/covid-19-congress-cms-blame-centre-for-not-giving-any-financial-assistance-to-states/articleshow/75316189.cms>. Also *see*, Greer S.L.,

There is a relationship between political and fiscal federalism evidenced by the huge interdependence of regional or local governments on the federal government when it comes to financial distribution of resources.[32] Indeed, the pandemic presented an insight and a need to deliberate on the creation of a stronger mechanism to deal with future exigencies.

3.1. Constitutional Framework with respect to Federalism

The Indian federal structure, is *sui generis* in itself, it has the characteristic of cooperative and interdependent federalism.[33] Under the Constitution of India, 1950, the distribution of powers between different levels of government, showcases a tilt towards a strong centre.[34]

The Constitution of India provides for the distribution of powers between the central and the state governments thereby delineating their legislative powers in terms of Article 246 read with the Seventh Schedule.[35] The Seventh Schedule comprises three lists; Union List, State List and the Concurrent List. Public health, sanitation and public order are entries provided in the State List which ensures that the State Government has the autonomy to deal with matters relating to public health and public order, however, these powers are subject to effective control from the centre.[36] Additionally, the Centre in terms of the concurrent list has powers over preventing the spread of infectious and contagious diseases from one State to another.[37]

Jacobson P.D., "Health Care Reform and Federalism" Journal of Health Politics Policy and Law 35(2) (2010) 203-26.

[32] N.K. Singh, "Fiscal Federalism in India," in *Local Public Finance and Capacity Building in Asia: Issues and Challenges,* Junghun Kim and Sean Dougherty eds. (OECD Publishing, Paris, 2020).

[33] See, *Automobile Transport Ltd.* v. *State of Rajasthan,* 1962 SCC OnLine SC 21 : AIR 1962 SC 1406, 1415-16. *State of W.B.* v. *Union of India*, 1962 SCC OnLine SC 27 : AIR 1963 SC 1241. Also see cases like, *Keshavanada Bharti* v. *State of Kerala*, (1973) 4 SCC 225 : AIR 1973 SC 1461; *State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592 : AIR 1977 SC 1361; *State of Karnataka* v. *Union of India*, (1977) 4 SCC 608 : AIR 1978 SC 68; *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1918; *Kuldip Nayar* v. *Union of India*, (2006) 7 SCC 1 : AIR 2006 SC 3127; *State of W.B.* v. *Committee for Protection of Democratic Rights*, (2010) 3 SCC 571 : AIR 2010 SC 1476. In *State (NCT of Delhi)* v. *Union of India*, (2018) 8 SCC 501, the Supreme Court stated "the Union and the State Governments must embrace a collaborative federal architecture by displaying harmonious coexistence and interdependence so as to avoid any possible constitutional discord."

[34] *See*, *State of W.B.* v. *Union of India*, 1962 SCC OnLine SC 27 : AIR 1963 SC 1241.

[35] *See*, Constitution of India, Art. 245 read with Art. 246.

[36] *See*, Nico Steytler, *Comparative Federalism and Covid-19 Combating the Pandemic* (Routledge, London and New York) 2021 <https://www.taylorfrancis.com/books/oa-edit/10.4324/9781003166771/ comparative-federalism-covid-19-nico-steytler>.

[37] *See*, Constitution of India, Sch. VII List III Entry 29.

3.2. Legislative Framework relied on in the wake of Covid-19 Crisis

However, during the Covid-19 crisis, the Central government effectively used the DMA and the EDA to supersede the States and assume ultimate control to deal with the control, care and management of the pandemic.[38]

In absence of having any constitutional or legislative mechanism to deal with the major health emergency faced by India since its independence, the Central Government placed effective reliance on the Epidemic Diseases Act, 1897 (EDA), a colonial legislation, the Disaster Management Act, 2005 (DMA) and the Criminal Procedure Code, 1973 (Cr.P.C.).[39] The EDA was used to declare Covid-19 a national pandemic and the DMA to declare it a 'notified disaster' and 'national health emergency'. In addition, Cr.P.C. was brought to use to empower police and other authorities to take preventive and punitive action in case of breach of governmental orders issued in the wake of Covid-19.[40] So, basically India created a three tier mechanism to deal with the pandemic: central government issuing guidelines under DMA; state governments issuing regulations under EDA and then local authorities issuing orders under Criminal Procedure Code.[41]

The Epidemic Diseases Act, 1897 consists of four sections and there is no definition provided for an epidemic or even epidemic diseases, it also fails to provide a criteria based on which and when the Act may be brought to use.[42] Additionally, it does not provide any standard operating procedure or the manner in which the extraordinary powers under the Act may be exercised. It merely enables the state governments to assume extraordinary powers under the Act in case the Government thinks that its ordinary powers do not suffice while mitigating the epidemic. The EDA was previously used during the outbreaks of malaria, cholera and swine flu.[43] The pre-independence Act therefore, fails to provide for a reasonable checks and balances mechanism and thereby leaves matters in the hands of the Government to decide and act in accordance with the situation at hand,

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38 *See*, Constitution of India, Sch. VII List II Entry 6.

39 *See*, Gowd, Kiran Kumar et. al., "COVID-19 and the Legislative Response in India: The need for a Comprehensive Health Care Law", Journal of Public Affairs, e2669 (21-3-2021) doi:10.1002/pa.2669

40 *See*, Nomani, M.Z.M., Tahreem, M., "Constitutionality and Legality of Corona Virus (COVID-19) in India: Limits of Sanction and Extent of Liberation" International Journal on Emerging Technologies, 11(3) (2020) 14-18.

41 *See*, Ministry of Home Affairs, Government of India, Order No. 40-3/2020-DM-I(A) <https://www. mha.gov.in/sites/default/files/MHAorder%20copy_0.pdf>.

Also see, Ray, D., Subramanian, S. India's Lockdown: An Interim Report. *Ind. Econ. Rev.* 55, 31–79 (2020).

42 *See*, Epidemic Diseases Act, 1897, <https://legislative.gov.in/sites/default/files/A1897-03.pdf>.

43 *See*, Bahurupi Y., Mehta A., Singh M., Aggarwal P., Kishore S., "Epidemic Diseases Act 1897 to Public Health Bill 2017: Addressing the Epidemic Challenges" Indian Journal of Public Health 64, Suppl S2 (2020):253-5.

thereby leading to lack of transparency and accountability in the functioning of the enactment.[44]

The DMA, 2005 was invoked for the first time to declare a national health emergency.[45] The DMA empowers the central government to issue directives and orders related to pandemic, the orders issued are binding on State and local authorities. Using the DMA and the EDA, the Centre centralized its sphere of operations, giving the federal government overriding powers of enforcement.[46] The guidelines issued ranged from providing for the closure of establishments, restrictions upon transport, bans on gatherings, and requirements of social distancing and kept on being modified and amended subsequently over a period of time.[47]

Various steps taken in regards to dealing with Coronavirus showcase a trend towards dominance of Centre, even though initially the position of the Centre was to encourage States to exercise their powers under the EDA. The imposition of nation-wide lockdown saw a heavy dominance of the centre that was marked by the central government issuing various guidelines and notification, and all successive lockdowns. Throughout lockdown, the States relied on the use of the provisions of EDA and DMA to assume powers in order to ensure consistency with the Centre's guidelines and to implement the same. Wherever this was lacking, the Centre was quick to intervene and demanded strict compliance, like the Kerala Government was directed not to ease off the restrictions, even when the state had achieved a better recovery rate.[48] Though during the subsequent stage, states had their autonomy restored, but still were grappling with huge functional, institutional and fiscal deficits.[49]

There was a constant state of lurch, confusion, fear and chaos over non-availability of health care facilities, essential medicines, basic necessities of life like food, clothing and shelter, loss of livelihood, led to not only depletion and dilution of federalism which has been essentially held to be the basic structure but

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44 *See*, Parikshit Goyal, "The Epidemic Diseases Act, 1897 Needs an Urgent Overhaul", *Economic and Political Weekly*, 55(45) (2020).

45 Chetan Chauhan, "Covid-19: Disaster Act invoked for the 1st time in India," *Hindustan Times,* 25-3-2020, <https://www.hindustantimes.com/india-news/covid-19-disaster-act-invoked-for-the-1st-time-in-india/story-EN3YGrEuxhnl6EzqrlreWM.html>.

46 *See*, Sanjoy Ghose, "Is the National Lockdown in India Constitutionally Valid?" *The Wire,* 28-3-2020, <https://thewire.in/law/is-the-national-lockdown-in-india-constitutionally-valid>.

47 *See*, Prashant Bhushan and Shyam Agarwal, "Riding Roughshod over State Governments" *The Hindu,* 13-5-2020, https://www.thehindu.com/opinion/op-ed/riding-roughshod-over-state-governments/article31568039.ece>.

48 *See*, Prashant Bhushan and Shyam Agarwal, "Riding Roughshod over State Governments" *The Hindu,* 13-5-2020, <https://www.thehindu.com/opinion/op-ed/riding-roughshod-over-state-governments/article31568039.ece>.

49 See, Vidhi Centre for Public Policy, "What Should a Public Health Emergency Law for India Look Like?", March 2021, https://vidhilegalpolicy.in/wp-content/uploads/2021/03/What-Should-a-Public-Health-Emergency-Law-for-India-Look-Like.pdf>.

also, the basic human dignity and rights which has been constitutionally guaranteed to the citizens.[50]

3.3. Supreme Court, Public Health Responses and Covid-19 Crisis in India

The Courts across the globe responded to the challenges to arbitrary and irrational executive policies undertaken in the garb of dealing with the pandemic which were violative of rights of the citizens. The Supreme Court of India in consonance with its image as the protector and the defender of the Constitution, came up to the rescue of the plight of the citizens and intervening in certain matters pertaining to availability of essential resources during the covid-19 crisis. ome notable judgments of the Supreme Court have been discussed in this subpart.

The Court in the case of Court in *Gujarat Mazdoor Sabha* v. *State of Gujarat*, on the issue of labour rights, stated that the policies to counteract a pandemic must continue to be evaluated "*from a threshold of proportionality to determine if they, inter alia, have a rational connection with the object that is sought to be achieved and are necessary to achieve them."*[51] In *Distribution of Essential Supplies and Services During Pandemic, In re*, while taking the *suo motu* cognizance and issuing guidelines on the vaccination policy, the Supreme Court stated that Sections 35 and 36 of DMA has been enacted in spirit of cooperative federalism, to basically ensure that the Central Government can assist and enable the states to effectively deal with the disaster.[52] The Court in this case, reiterated the importance of deferring executive decision-making, however, yet highlighted that the judiciary cannot be a silent spectator in case the rights of citizens are being violated.[53]

In *Reepak Kansal* v. *Union of India*, the Supreme Court issued directions for the National Disaster Management Authority to frame guidelines for issuance of compensation for those who dies due to Covid-19 in terms of Section

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[50] For federalism see cases like, *State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592, *Powers, Privileges and Immunities of State Legislatures*, *In re,* AIR 1965 SC 745 : (1965) 1 SCR 413, *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1, *ITC Ltd.* v. *Agricultural Produce Market Committee*, (2002) 9 SCC 232, *Kuldip Nayar* v. *Union of India*, (2006) 7 SCC 1. Also see cases like, *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 SCC 542 : AIR 1986 SC 180 (Right to Livelihood); *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416, *Sunil Batra (2)* v. *Delhi Admn.*, (1980) 3 SCC 488 (Right to Human Dignity); *State of Punjab* v. *Ram Lubhaya Bagga*, (1998) 4 SCC 117. Also *see*, *Paschim Banga Khet Mazdoor Samity* v. *State of W.B.,* (1996) 4 SCC 37 : AIR 1996 SC 2426,2429, para 9 and *Parmanand Katara* v. *Union of India*, (1989) 4 SCC 286 : AIR 1989 SC 2039.

[51] *Gujarat Mazdoor Sabha* v. *State of Gujarat*, (2020) 10 SCC 459 : AIR 2020 SC 4601.

[52] *Distribution of Essential Supplies and Services During Pandemic, In re,* 2021 SCC OnLine SC 390.

[53] *Distribution of Essential Supplies and Services During Pandemic, In re,* 2021 SCC OnLine SC 390.

12 of DMA, 2005.[54] While dealing with the migrant crisis, the Supreme Court in *Problems and Miseries of Migrant Labourers with Bandhua Mukti Morcha* v. *Union of India*, re-iterated that right to live with human dignity includes the right to food and other basic necessities.[55] Hearing the matter of *Union of India* v. *Rakesh Malhotra*, the Supreme Courthighlighted the issue of shortage of oxygen and directed the Union Government to ensure supply of oxygen for which the Supreme Court had also set-up a 12 member task force to formulate the methodology of allocation of oxygen to states and the union territories.[56] In *The Proper Treatment of Covid 19 Patients and Dignified Handling of Dead Bodies in the Hospitals, In re,* the Supreme Court passed an order regarding the deficiencies and lapses in patient care in hospitals around the country.[57]

The Supreme Court did came under criticism for the inordinate delay in hearing urgent matters like the migrant crisis and its interference with the working of high courts during the pandemic, however, these notable judgments do bring about a ray of hope in a scenario where the country was headed towards a state of chaos and utter disregard for rule of law by the executive excesses and delays in taking effective steps and measures to curb the situation of panic, fear and anxiousness due to non-availability of basic necessities of life ensuring the dignity of an individual.

4. CONCLUSION

The pandemic exposed the vulnerabilities in the system, India's lack of unpreparedness to deal with such crises and the lack of adequate health care facilities posed a greater threat to maintenance of human rights. The actions undertaken by the Central Government were definitely at odds with the federal constitutional scheme, and was certainly not the most efficient way of tackling this crisis. The state of confusion and mayhem also fuelled the migrant crisis wherein the country witnessed mass exodus of migrants, the situation worsened without any proper planning and support from governmental authorities. The excessive centralisation of power during the covid-19 crisis was not only in defiance with the constitutional standards but also disturbed the constitutionally mandated balance which needs to be maintained with respect to distribution of power between the Union and the states. The unpreparedness to create a holistic plan by enjoining and devising an effective plan incorporating the state and local authorities overcomplicated the matter and made it difficult to deal with the pandemic. Despite measures undertaken by the Central Government during the first wave, the cases kept increasing, and the country witnessed the worst second wave. The imposition of

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[54] *Reepak Kansal* v. *Union of India*, (2021) 9 SCC 251.
[55] (2022) 13 SCC 504..
[56] *Union of India* v. *Rakesh Malhotra*, (2021) 9 SCC 241.
[57] *The Proper Treatment of Covid 19 Patients and Dignified Handling of Dead Bodies in the Hospitals, In re,* (2020) 5 SCC 304.

sudden lockdown, has been attributed as one of prime contributors that enhanced the chain of transmission. The federal reporting and the data released by the government were insufficient, coupled with curbs on media reporting, these factors furthered the state of confusion the citizens were already in, the grim portrayal of the lurking dead bodies in the river ganga was horrifying and projected negative attention worldwide in government's failure to contain the virus. There is a need to review and amend DMA and EDA, as these laws are highly insufficient to deal with such kind of emergencies and provides scope for centralisation and excessive executive interference. The States and local governments need to be fiscally empowered with training programmes focused on best practices adopted by various states undertaken to curb the spread of pandemic. Governmental decisions and initiatives should be conscious of guaranteed human rights and balanced steps which are carefully tailored and minimally intrusive should be undertaken.

REGULATION OF THE FEDIVERSE: THE MULTIVERSE OF SOCIAL MEDIA

Sharath Chandupatla & Nikhil D. Mahadeva***

1. INTRODUCTION

India has recently enacted new rules for the regulation of intermediaries, with a specific focus on 'Social Media Intermediaries' ("**SMIs**") (Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("**IT Rules or the Rules**")). The Rules were enacted in the wake of a disagreement between the Government of India and Twitter over a denial to take down tweets from its platform.[1] The move is part of a greater strategy to regulate speech on typical social media platforms, by putting their protected intermediary status at risk in cases of non-compliance.[2]

The prevailing presumption is that the Government has defined 'social media intermediaries' widely enough to have the ability to enforce these regulations in their current form on all kinds of social media platforms[3], and even possibly other services unrelated to social media.[4] Through this article, we seek to prove that this presumption is flawed when placed in the greater context of the different forms social media is taking, in contrast to what social media is popularly known to be.

Prima facie, States find it difficult to regulate and control the internet; it transcends control by any individual State because it does not represent a singular, definable entity but a larger collective outside of the reach of unitary control. This sort of unitary control and regulation is, however, exercised by conventional social media (like Facebook and Twitter). These platforms, through their

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1 Soutik Biswas, "The Indian Government's War with Twitter" (12-2-2021), <https://www.bbc.com/news/world-asia-india-56007451>.

2 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139 (hereinafter "IT Rules"), R. 7 (India).

3 Shrey Fatterpekar, "IT Rules 2021 Explained: Non-Compliance will Expose WhatsApp, Facebook, Twitter to Significant Liability" (27-5-2021) <https://www.firstpost.com/india/it-rules-2021-explained-non-compliance-will-expose-whatsapp-facebook-twitter-to-significant-liability-9661461.html>.

4 See *X* v. *Union of India*, 2021 SCC OnLine Del 1788, where a Single Judge held that even a search engine such as Google would qualify as an SMI under the prevailing definition.

Terms of Service and Community Standards,[5] let users use them in a certain permitted manner while retaining control in the hands of the singular provider. Users are simply renters of a platform - they do not personally exercise any control. To add to this, we live in a world where a massive conventional social media network like Twitter is owned by a single person, which only further centralises control over the use of these platforms.[6] Since his takeover, that company has faced significant internal disruption[7], including mass resignations and employees protesting against his new policies.[8]

It is doubly important to consider what the future of social media looks like at this juncture, as Governments across the globe are discussing how to mitigate the power conventional social media exercises. The typical manifestation of this is in antitrust actions, such as the case arguing for the breaking up of Meta.[9] However, another method that is seeing growing support is "adversarial interoperability".[10] Adversarial Interoperability is effectively where a platform does NOT explicitly want third parties to be able to connect to or work with them, whether for reasons of revenue or maintaining a 'walled garden', but third parties are still able to do so.[11] Adversarial interoperability is the reason cars can be fixed with parts made by someone other than the original manufacturer, or third party ink can be used in a printer. Crucially, it can be forced by lawmakers by enacting laws. For example, legislators can mandate Facebook to allow a Twitter user to post on Facebook, or vice versa. In fact, in its most recent move to regulate big tech companies, the European Union has passed the Digital Markets Act, a part of which mandates interoperability between messaging platforms such as WhatsApp, iMessage, Telegram, etc.[12] In the same vein, experts on social media regulation strongly recommend a shift of focus, from building platforms to building protocols.[13]

To add to this, the European Parliament also commissioned the Greens/EFA group to submit a report on community led platforms, in comparison to conventional social media platforms.[14] The study report made several recommendations in relation to content moderation on social media platforms,

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5 Terms of Service, Facebook, <https://www.facebook.com/terms.php>; Twitter Terms of Service, Twitter, <https://twitter.com/en/tos>; Snap Inc. Terms of Service, Snap Inc., <https://snap.com/en-US/terms>.

6 <https://www.wired.com/story/elon-musk-takeover-twitter/>.

7 <https://www.yahoo.com/entertainment/celebrities-react-to-elon-musk-buying-twitter-013305340.html>.

8 <https://www.nbcnews.com/business/business-news/twitter-elon-musk-timeline-what-happened-so-far-rcna57532>.

9 <https://www.vox.com/recode/22166437/facebook-instagram-ftc-attorneys-general-antitrust-monopoly-whatsapp>.

10 <https://www.eff.org/deeplinks/2019/10/adversarial-interoperability>.

11 <https://www.swyx.io/adversarial_interoperability>.

12 <https://www.wired.co.uk/article/digital-markets-act-messaging>.

13 <https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech>.

14 <https://extranet.greens-efa.eu/public/media/file/1/6979>.

suggesting that they democratise platforms' terms of services, have community led content moderation and support community led platforms which will help in building a healthy social media space, in comparison to the authoritative style of content moderation employed by conventional social media platforms.

This is where decentralised social media comes in. While conventional social media platforms centralise power with the company who created it, decentralised social media, also known as 'Federated Social Networks' ("FSN"), do exactly the opposite.[15] They give power to individual users and exercise minimal power themselves.[16] They represent a manifestation of everything mentioned above - they are interoperable by design, community led, and built on protocols that are open source and platform agnostic. Knowingly or unknowingly, the measures and discussions mentioned above all lead to making conventional social media more like FSNs, or adoption of FSNs in place of conventional social media. However, these platforms already exist, and are growing in popularity - and whether it is in their existing form, or when conventional social media is eventually forced to take on all of their requisite features, we argue that they represent the future of social media: private, flexible and user-centric.[17]

Currently, no country in the world regulates or has legislated on FSNs. The discussion on whether they need to be regulated or not, and how that may be achieved, is sparse (with the exception of the above mentioned report) despite their growing popularity. The intention of this article is to raise the question of how FSNs are treated under the law currently, and how they ought to be in the future. The rapid development and virality of technology regularly outpaces legal regulation. Thus, it is imperative that we address the issues a new technology may present sooner rather than later, so action can be more expedient when it inevitably becomes necessary. The lessons learned from the failure to regulate conventional social media until recently serve to underscore this point.[18] If the nature of social media is inevitably to change, then FSNs may prove to be the natural next step in that evolution, whose regulation needs to be discussed now given the user privacy and data autonomy they offer to users.

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[15] Adi Robertson, How the Biggest Decentralised Social Network is Dealing with its Nazi Problem (12-7-2019), <https://www.theverge.com/2019/7/12/20691957/mastodon-decentralized-social-network-gab-migration-fediverse-app-blocking>.

[16] Richard Esguerra, An Introduction to the Federated Social Network (21-3-2011), <https://www.eff.org/deeplinks/2011/03/introduction-distributed-social-network>.

[17] What You Need to Know About Decentralised Social Networks, Tulane University, <https://sopa.tulane.edu/blog/decentralized-social-networks>.

[18] Andrew Arnold, "Do We Really Need to Start Regulating Social Media?" (30-7-2018) <https://www.forbes.com/sites/andrewarnold/2018/07/30/do-we-really-need-to-start-regulating-social-media/?sh=69cac1a2193d>; Michael A. Cusumano, Annabelle Gawer, and David B. Yoffie, "Social Media Companies Should Self-Regulate. Now." (15-1-2021), <https://hbr.org/2021/01/social-media-companies-should-self-regulate-now>.

As of now, the Indian Government's only response to the discussion on regulating any kind of social media is the IT Rules. Through the IT Rules, the Government intends to seize power over speech from conventional social media.[19] Experts opine that "[t]hese Rules are another tool in the hands of the government to use law enforcement agencies and other means to go after individuals who express opinions which run contrary to its ideas and interests".[20] Yet, the existence of FSNs raises the question of how a government can take power away from an entity that does not have any effective regulatory powers in the first place, and how enforcement under the new IT Rules is going to impact these platforms.

This article will attempt to address these concerns. *First*, we explain what an FSN is, and how it works; Second, we examine whether an FSN falls under the definition of an intermediary and/or a SMI under the existing law; Third, we discuss how these laws may become applicable to such platforms and the issues that would arise from attempting to enforce them, in particular, the IT Rules; Finally, we moot whether FSNs should be regulated at all, and if so, how?

2. WHAT IS AN FSN AND HOW DO THEY WORK?

FSNs are functionally similar to conventional social media networks; most permit you to share statuses, message friends, and upload content, among other things. Mastodon is a good example of an FSN - it is built to be parallel to Twitter. There is a feed, on which one can see 'toots' (the Mastodon equivalent of tweets), which can be 'boosted' (retweeted), or 'favorited' (liked). Similarly, messages can also be sent. Overall, the interface is quite similar.[21]

However, being an FSN, Mastodon has a significantly different structure than Twitter. On Twitter, all activity is carried out on Twitter's servers, and all information remains stored on those servers.[22] On an FSN, user's do not all go through a single server or a single provider to use these features.[23] Instead, the provider here, like Mastodon, gives an individual access to their software. This software is open source,[24] and an individual can use it to host information on their own server or choose to register with a server hosted by someone else. In the example of Mastodon, these servers are called 'instances.'[25]

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[19] Raghav Tankha, The Information Technology Rules 2021: An Assault on Privacy as We Know It (9-3-2021) <https://www.barandbench.com/columns/the-information-technology-rules-2021-an-assault-on-privacy-as-we-know-it>.

[20] *Ibid*.

[21] Mastodon, What is Mastodon?, YouTube (23-3-2018), <https://youtu.be/IPSbNdBmWKE>.

[22] Twitter – How to Access Your Twitter Data, <https://help.twitter.com/en/managing-your-account/accessing-your-twitter-data> (last visited on 18-10-2021).

[23] Esseguara, *supra* note 16.

[24] The term "open source" refers to something people can modify and share because its design is publicly accessible.

[25] Divya Kala Bhavani and Naresh Singaravelu, "What is Mastodon, the New Social Media Kid on the Block" (8-11-2019), <https://www.thehindu.com/sci-tech/technology/internet/

These 'instances' can then, through the software, communicate with any other server running the same or similar technology.[26] The key here however, is that the FSN has no control over any of the user's information - they simply provide a software framework for these functions to happen and for these instances to be connected.[27] The actual information is stored not by the FSN, but by the user on their own private instance, or with the instance they choose to register with, hosted by another individual. Though FSNs are technically 'public' in nature, these instances are usually tight-knit communities with limited intake; this can depend on factors like capacity or a unifying characteristic like a specific interest. These communities are governed by themselves or the persons who host them - not by the FSN itself.

While a user's information is on a single instance, they can still communicate with the potentially infinite other instances on the greater 'network' of instances operated by others. This means a user's information is in their control, but they can still connect with other people as they would normally on a social media network.[28] They can post a message across instances, or choose to make it as private as possible, and the distinction would be far more meaningful as it is not just the viewability of the information being changed, but the dissemination of it across actual servers.[29] This is of course not discounting the ability to freely communicate within a user's own instance, should it be one with other people.

While we have used Mastodon as an example, it is only one of many FSNs. Just as with conventional social media, there are many other FSNs with different features. Another example is PixelFed,[30] made by the same developers behind Mastodon. PixelFed is an Instagram alternative focused on image sharing. Similarly, there are Diaspora,[31] Friendica,[32] Peertube[33] (an alternative to YouTube), Plume,[34] and a multitude of others.

The presence of so many alternatives leads us to another central function of FSNs: the connection between services. Not only can instances communicate within the network of the software they are using, but also, to some extent,

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what-is-mastodon-the-new-social-media-kid-on-the-block/article29924482.ece>.

26 *Ibid*.

27 Sabai Technology, "Distributed Social Networks and Federation: Why They're Important For Privacy and Online Safety" <https://www.sabaitechnology.com/blog/distributed-social-networks-and-federation-why-theyre-important-for-privacy-and-online-safety/> (last visited on 1-2-2022).

28 Esseguara, *supra* note 16.

29 *Ibid*.

30 PixelFed Home Page, <https://pixelfed.org/> (last visited on 19-10-2021).

31 JoinDiaspora Home Page, <https://joindiaspora.com/> (last visited on 19-10-2021).

32 Friendica Home Page, <https://friendi.ca/> (last visited on 19-10-2021).

33 PeerTube Home Page, <https://joinpeertube.org/> (last visited on 19-10-2021).

34 Plume Home Page, <https://joinplu.me/> (last visited on 19-10-2021).

with servers running other FSN software.[35] This is achieved by using common communication protocols across software – meaning a person using Mastodon could communicate with another person using Friendica – all without ever leaving their instances, sharing information with either Mastodon or Friendica, or having to use a different service. This system is aptly called the 'Fediverse.'[36]

The advantages of this system are apparent. It ensures maximum user privacy and data autonomy, while not compromising on the core purpose of social media – communicating with others and/or having a wide audience. That being said, FSNs currently enjoy far fewer users compared to conventional social media networks. However, we argue that it is only a matter of time before the technology is more widely adopted. Mastodon currently boasts almost 4000 instances, and over 3 million known users spread across these instances.[37] The largest instance has over 600,000 users, while the instance operated by the founders of Mastodon has over 500,000. The latter instance (known as mastodon.social) is connected to over 17,000 instances in the Fediverse – the vast majority of those on Mastodon but also a large number of instances running other FSN software like PixelFed, Friendica, PeerTube, etc.[38] The Fediverse as a whole has over 4.5 million known users as of date.[39]

These numbers may not seem impressive in comparison to conventional social media, but they are still significant - Mastodon had 1 million users by 2017 (a year after release)[40], 2.2 million by 2019[41] and is currently at 3.1 million.[42] This shows a definite pattern of growth. Further, this was achieved despite the adoption of FSN technology not being nearly as easy as signing up to Facebook; a potential user would need to either know how to set up an instance, which involves significant technical knowledge,[43] or how to find and register with one. Both involve significantly more effort than a simple sign up on a single website. As tech literacy and privacy concerns grow, or as governments or bodies such as the EU push for interoperability and other functions uniquely served by FSNs, it can be

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35 Bertel King, "What is the Fediverse and can It Decentralise the Web?" (13-8-2021), <https://www.makeuseof.com/what-is-the-fediverse-and-can-it-decentralize-the-web/>.

36 James Holloway, "What on Earth is the Fediverse and Why Does It Matter?" (18-9-2018), <https://newatlas.com/what-is-the-fediverse/56385/>; Fediverse Home Page, <https://fediverse.party/en/fediverse> (last visited on 19-10-2021).

37 The Federation Home Page, <https://the-federation.info/#projects> (last visited on 1-2-2022); About Fediverse, <https://fediverse.party/en/mastodon/> (last visited on 1-2-2022).

38 Mastodon Instances, <https://instances.social/list/advanced#lang=&allowed=&prohibited=&min-users=&max-users=> (last visited on 19-10-2021).

39 *Supra* note 28.

40 James Holloway, "What on Earth is He Fediverse and Why Does It Matter?" (18-9-2018), <https://newatlas.com/what-is-the-fediverse/56385/>.

41 Tyler Cave, *What is Mastodon and Why is Everyone Talking About It?* (8-11-2019) <https://www.androidauthority.com/what-is-mastodon-1052151/>.

42 *Supra* note 28.

43 For an understanding of the process of setting up an instance, see: Mastodon, Running Your Own Server, <https://docs.joinmastodon.org/user/run-your-own/> (last visited on 1-2-2022).

expected that this number will increase. In fact, chaos on Twitter has also emerged as a major factor pushing the popularity of FSNs, with users leaving Twitter for Mastodon.[44] Further, while ease of access may be a barrier to a regular person, it is quite the opposite for persons with the requisite technical skills or the means of finding them - FSNs being open source allows for any person to use the software to create their own social network within the Fediverse.

A recent example of this is Truth Social, created by former President Donald Trump. Truth Social is an FSN,[45] built on Mastodon's code,[46] a fact admitted to by its own makers.[47] Truth Social is thus part of the Fediverse, and interoperable with every other FSN by virtue of this.[48]

All of these factors only serve to show how FSNs, and the underlying technologies that they are based on, are on the rise. Most recently, Tumblr announced that it was going to adopt FSN technology.[49] How then will the laws apply to them? The Government of India has shown that it is adamant in its goal of regulating social media, but the nature of FSNs make this regulation far more difficult compared to regulating conventional social media. These differences also bring us to the first question we have to ask when considering the applicability of Indian laws related to Intermediaries as they stand with regard to FSNs: Do they even qualify as 'Intermediaries' and, by extension, as 'Social Media Intermediaries'?

3. THE DEFINITION OF 'SOCIAL MEDIA INTERMEDIARIES' AND FSNS

The IT Act, 2000, defines an intermediary as the following:

> with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.[50]

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44 <https://www.nytimes.com/2022/11/21/style/mastodon-twitter-adam-davidson.html>.

45 <https://www.theverge.com/2022/2/21/22944179/truth-social-launch-ios-donald-trump-twitter-platform>.

46 <https://blog.joinmastodon.org/2021/10/trumps-new-social-media-platform-found-using-mastodon-code/>.

47 <https://mashable.com/article/trump-social-media-mastodon>.

48 <https://www.pcmag.com/opinions/trumps-truth-social-can-only-make-mastodon-stronger>.

49 <https://techcrunch.com/2022/11/21/tumblr-to-add-support-for-activitypub-the-social-protocol-powering-mastodon-and-other-apps/>.

50 Information Technology Act, 2000, No. 21, § 2(1), Acts of Parliament, 2000 (India) (hereinafter "IT Act").

It is from this definition that the IT Rules derive their definition of SMIs as a subcategory of intermediaries. The IT Rules employ the following definition:

> *An intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services*[51]

The third and final definition relevant to this discussion is for a subcategory of SMIs, known as 'Significant Social Media Intermediaries' ("SSMIs"), which are defined in the IT Rules as follows:

> *a social media intermediary having number of registered users in India above such threshold as notified by the Central Government*[52]

For the definition of SSMIs, the threshold number of users notified by the Government is currently 5,000,000.[53]

Conventional social media services such as Facebook and Twitter are covered under all three of these definitions, but the lines become slightly blurred with FSNs. At the outset, the initial definition of an intermediary does not seem to cover the operation of an FSN – while a conventional social media service does in fact receive, store, and transmit electronic records on behalf of people, and provides services in relation to such records, FSNs ostensibly do none of these things themselves. The FSN itself is functionally just providinga **framework** to receive, store and transmit electronic records to the end user, or to other individuals who may operate an instance. The FSN does not control the use of any of these functions and does not actually carry them out themselves.[54] Hence, the alternative interpretation leads to absurd conclusions. Considering an FSN as an intermediary would be equivalent to considering the creator of an operating system as an intermediary – they simply provide a framework for computing, which may include activities in the nature of being an intermediary. The creator of an operating system cannot conceivably be held responsible for every action taken by a user of their software.

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[51] IT Rules, R. 2(1)(*w*).

[52] IT Rules, R. 2(1)(*v*).

[53] Ministry of Electronics and Information Technology, S.O. 942(E) <https://www.meity.gov.in/writereaddata/files/Gazette%20Significant%20social%20media%20threshold.pdf≥ (last visited on 19-10-2021).

[54] Prasid Banerjee, "Moving to Mastodon? You May have Missed the Social Network's Point" (8-11-2019), <https://www.livemint.com/technology/tech-news/moving-to-mastodon-you-may-have-missed-the-social-network-s-point-11573222761247.html>.

This disconnect carries forwards into the definition of SMIs as well. The definition in the IT Rules begins with the premise that the SMI is an 'intermediary' as per the IT Act definition, and narrows it down to an intermediary which **primarily or solely enables online interaction and sharing information** using its services.[55] It could certainly be said that an FSN, in providing a software framework, enables online interaction and the sharing of information. It is slightly more debatable whether one could be considered to be doing this using **their** services if the activity is being conducted on a private server, but such an interpretation may not be entirely unrealistic. The problem, however, is that these criteria are prefaced with the requirement of being an 'intermediary,' which, as we have seen, is questionable in the context of FSNs.

Even presuming that an FSN could be considered an intermediary, and no other issues arise, the definition of an SSMI also raises a notable concern. – When tabulating the number of users, are we to evaluate an FSN on the basis of its overall user base, i.e., including the users of every known instance within its network, or are we going to evaluate each individual instance as its own independent existence? While an FSN overall may have well over 5 million users, individual instances can have as little as 1.

This question also encapsulates the issue of defining an FSN as an intermediary in the first place. While an FSN does not engage in the handling of electronic records itself, the persons who create and operate instances do, having been enabled by the FSNs software. Do we then evaluate the FSN as a whole, or do we evaluate every instance of that FSN on its own? If the goal is to bring FSNs under these definitions, and by extension under regulation, which approach is more viable?

The former possibility is fundamentally impractical. FSN software is open source; the makers do not have control over who may use it to create an instance, much less control over how it is used within an instance. An example of this is the migration of the users of far-right social network Gab from their original software to a version of Mastodon.[56] The founders of Mastodon released press statements denouncing Gab and their users but could not prevent them from using Mastodon. Ultimately, they managed to convince the major instances and their operators to block interaction with instances in the network related to Gab.[57] It is important to note however, while they did manage to effectively isolate Gab, they

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[55] IT Rules, R. 2(1)(*w*).

[56] Copia Institute, "Decentralised Social Media Platform Mastodon Deals with an Influx of Gab Users" (13-1-2021) <https://www.tsf.foundation/blog/decentralized-social-media-platform-mastodon-deals-with-an-influx-of-gab>.

[57] TechDirt, "Content Moderation Case Study: Decentralised Social Media Platform Mastodon Deals with an Influx of Gab Users" (3-3-2021), <https://www.techdirt.com/articles/ 20210303/ 14474346357/content-moderation-case-study-decentralized-social-media-platform-mastodon-deals-with-influx-gab-users-2019.shtml?__cf_chl_jschl_tk__=pmd_ qtvLscCYqtqzCth1EF4n TjI_fmxIop.7ZpEtrD7UCrc-1634022223-0-gqNtZGzNAxCjcnBszQjR>.

did so solely because of the willing support of the operators of the major instances and apps facilitating access to Mastodon instances – by no means could they have forced any person to do so.[58] In differing circumstances, the founders of Mastodon may well have only been able to denounce the migration, as without the support of the users themselves, they are constrained from taking any actual measures. It is worth noting that Gab still operates on Mastodon, even if their servers are isolated.[59] As such, applying any standard in the above definitions to the FSN as a whole would have no impact or meaning since the FSN cannot exercise enough power to fulfill any kind of substantive legal obligation, except perhaps facilitating the necessary software features.

That leaves us with the latter possibility, which seems more tenable, if undesirable (as we will discuss when considering substantive obligations). Instances with multiple users and their operators can be said to both actively fulfil the requirements of the definitions in the Act and IT Rules and have sufficient control over their instances to make substantive obligations possible to fulfil, at least in principle. They are technically handling electronic records and enabling communication, in what is arguably in the nature of service as their operators employ their own private servers to enable others.

However, in the case of instances set up by a single user for themselves, it is arguable whether they could be considered an SMI. This may not be a concern in regular circumstances, as any attempt at communication by an individual would most likely be posted on another instance that has more users (which does fall under the definition and can thus be regulated). However, what happens if the individual has a following? In that case, users from other instances can view what they may be posting on their private instance. Can this be considered an interaction between two or more persons? Is the individual providing themselves with a service? Or can the sharing of their thoughts and making them accessible be considered a service to others? The issue of such instances is notably greyer. We are of the opinion that it would be unreasonable to hold that these individuals are providing themselves or someone else a 'service' simply by creating a space for them to express an opinion on the internet. The viewing of their posts, on the other hand, could be considered an interaction. The greatest issue however is the same as with the FSNs themselves - they are not handling the electronic records of another person in this situation, and thus missing a core ingredient of an intermediary.

In conclusion then, the current law only reasonably provides for instances of an FSN with multiple users to be recognized as SMIs or SSMI (in the event an instance has greater than 5 million users). These instances would all independently bear this status. While the Government of India may not have intended this outcome, and would prefer a wider ambit of accountability, reality remains

[58] Robertson, *supra* note 15.
[59] *Supra* note 42.

that this is the reasonable construction of the legislative framework in its current form; this omission is not surprising considering that FSNs were never in consideration when the IT Rules were formulated to govern SMIs, but the lacuna will become problematic should their popularity grow.

The difficulty in governing FSNs could lead to the Government of India taking the stance they did with cryptocurrency;[60] making them illegal outright. However, that would be an action with no basis in law - no feature of an FSN is barred under law, and the inability to fit the FSN provider into a workable definition of an SMI is a legislative fault, not a legislative prohibition. Similarly, interpreting the FSN provider into existing law without an appropriate amendment would be an unreasonable expansion on the definitions as they are, and would ultimately serve no functional purpose due to their inherent lack of power.

Having addressed how far FSNs are covered under the current laws in India and to what extent they can be considered SMIs, we arrive at the second question relevant to this discussion: Applying this understanding, what rules become applicable to FSNs and what problems would arise in their enforcement?

4. THE ENFORCEMENT OF SUBSTANTIVE OBLIGATIONS ON FSNS

Assuming that instances with multiple users qualify as intermediaries, and by extension, as SMIs or SSMIs, they face a host of obligations. While the nature and content of these obligations are established and not unique to them in any way, the impact and outcomes of these obligations will vary greatly from a typical intermediary or SMI.

It is important at this juncture to remember that FSN instances are often operated by private persons - they derive no commercial benefit from doing so. Instead, such persons incur costs to run an instance as they operate one independently.[61] They may split the maintenance costs with the users in their instance, or they may bear it themselves for the sake of the community they have built. It is also important to note that when we discuss instances with multiple users, as little as 2 users would qualify as 'multiple'.

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[60] Reserve Bank of India – Notifications, <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11243≥ (last visited on 19-10-2021).

[61] For a guide on all the services needed to host a Mastodon instance, including domain names, a VPS, storage and other requirements which involve taking on costs, see: Mastodon, Running Your Own Server <https://docs.joinmastodon.org/user/run-your-own/≥ (last visited on 1-2-2022); For breakdown of cost of operating a personal instance, see:
AndrewKvalheim, Personal Mastodon Instance
<https://gist.github.com/AndrewKvalheim/a91c4a4624d341fe2faba28520ed2169≥ (last visited on1-2-2022).

These considerations are important because the laws are evidently drafted from the perspective of regulating companies, who derive profit from their activities as intermediaries or SMIs, and who have a certain degree of capital available to them. These presumptions fundamentally fail in the context of FSNs, and raise several issues in the process.

Keeping that in mind, obligations on FSN instances arise from the IT Act, 2000, the SPDI Rules, and the IT Rules. We will address these in order:

4.1. IT Act

The relevant obligations under the IT Act are Sections 67C, 69, 69A, 69B and 70B.[62] Sections 69 and 69A obligate compliance with requests by the Government for access to information, or to block access to information. Section 67C contains the obligation to maintain information for a period and Section 70B prescribes obligations during a data breach. Most of these obligations (such as Sections 69 and 69A) only arise where there is a threat to the sovereignty, integrity or security of India.

However, compliance with Sections 69, 69A, 69B and 70B of the IT Act would require the operator of the FSN instance to have the technical ability to follow through on monitoring, decryption, blocking and so on. Setting up an instance is an activity that requires a degree of technical skill, but ultimately the software used is not created by the operator themselves - there exists a distinct possibility that their familiarity with its operation is insufficient or that the software itself is not amenable to these requirements and will need modification. It is also of significant concern that all these obligations bear penal consequences. If they do lack those skills, they face the risk of imprisonment[63] (whose punishment ranges from three to seven years of imprisonment), as it is unlikely they may be able to comply even if they are willing.[64]

Any hardline enforcement of these obligations will then result in dissuading private individuals from making the foray into operating an FSN instance if they lack these skills, raising the barrier to entry and making the technology less accessible, unless developers find a way to make the fulfilling of these obligations easier for potential operators.

4.2. 2021 IT Rules

Part 2 of the 2021 IT Rules comprise the primary obligations on SMIs and SSMIs, and the bulk of what FSN instances would be expected to comply

[62] IT Act, Ss. 67-C, 69, 69-A, 70-B.
[63] *Ibid.*
[64] IT Act, Ss. 69, 69-A.

with. Rule 3 covers the obligations relevant to SMIs.[65] Rule 4 is unlikely to apply to the instances at this point, as no instance has more than 5 million users.[66]

Several clauses of Rule 3 may be unviable for a large cross section of FSN instances. For example, responding to a take-down order within 36 hours.[67] An operator may not comply with this for a multitude of reasons, ranging from as simple as their internet connectivity failing for that period, to as complicated as bugs in their instance preventing them from doing so. Another example is the obligation to not modify the software to circumvent any law – this may well be outside of the operators control for a period, as the software is not made by them.[68] While operators can modify software themselves, most will employ the official releases of the open source FSN software they are using, and migrating data to a different software or otherwise rectifying a situation where the open source FSN software violates this obligation may take time.

Other obligations also present challenges. For example, maintaining the data of deleted users and other taken down data for 180 days represents a cost in the form of storage. This may not be an insignificant cost for a private individual who makes no money from operating an instance.[69] Similarly, complex legal documents such as privacy policies may be beyond the ability of most to make themselves, thus requiring engaging a lawyer and bearing that cost as well.[70] Providing information to the Government and assisting their investigations within 72 hours may also be untenable for the same reasons as complying with a takedown order in 36 hours.[71]

Possibly the most egregious would be the obligation to appoint a Grievance Officer who must respond within 24 hours for complaints of obscene material featuring the complainant, and who must acknowledge any other complaint in 24 hours and act on them within 15 days.[72] This may well comprise a full-time job for the appointed individual depending on the size of the instance. Appointing a person to this role full time would most likely prove prohibitively expensive for the vast majority of operators, as they derive no commercial benefit from their operating of an instance.

If an instance was to ever become an SSMI with more than 5 million Indian users, the requirements become even harsher. A Chief Compliance Officer and Resident Grievance Officer need to be hired. They must publish compliance reports, create automated tools for identifying certain objectionable material,

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65 IT Rules, R. 3.
66 IT Rules, R. 4.
67 IT Rules, R. 3(1)(*d*).
68 IT Rules, R. 3(1)(*k*).
69 IT Rules, Rr. 3(1)(*g*) &(*h*).
70 IT Rules, R. 3(1)(*b*).
71 IT Rules, R. 3(1)(*j*).
72 IT Rules, R. 3(2).

maintain a physical address in India, and bear a host of other obligations and requirements to operate, all of which represent a cost.[73]

The consequence of non-compliance in either case is the stripping of protections afforded to them by the intermediary status, and making them liable to criminal action under the Indian Penal Code.[74] Many operators have full time jobs and bear the hosting costs of an instance solely because of their interest in creating a community. These requirements are a deterrent to FSN instances operating in India or foreign FSN instances accepting Indians users, as these requirements represent a cost and time investment that such an individual may be unable or unwilling to make.

4.3. SPDI Rules

The SPDI Rules have general obligations regarding security and the management of personal data.[75] However, the SPDI Rules apply only to 'body corporates,' as defined in S.43A of the IT Act, 2000:

> 'body corporate' means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities[76]

This makes it unlikely for these rules to apply to most FSN instances as they are rarely operated by companies or commercial entities; most instances are operated by individuals or informal groups of persons with no real commercial interest. That said, it is not impossible for a company to operate an instance.

In the event that a company does create an instance, the obligations under the SPDI Rules for the handling of personal data and security are largely possible to comply with, depending on the FSN software used. Regardless, a company may have better means than an individual to modify software for their purposes. Similarly, an individual may be hard pressed to appoint a Grievance Officer, but a company may be capable of doing so.

4.4. The Problem with Enforcement

We have presumed so far in this discussion on the obligations on FSN instances and their impact, that they would choose, or at least try, to comply. Another issue that arises, however, is that it is functionally difficult to attempt

[73] IT Rules, R. 4.

[74] IT Rules, R. 7.

[75] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, G.S.R. 313(E) (India).

[76] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, G.S.R. 313(E) (India), R. 2(1)(*c*).

to enforce these obligations on instances should they choose not to comply. If an instance is hosted in India, action may be taken against them, but what about an instance hosted outside India?

Conventional social media most often operates for-profit. India is a large user base from whom they collect data which they monetize in various ways. They have employees to pay, shareholders to satisfy, and targets to meet. All of these represent interests which the Government can act against, obstruct, or otherwise regulate using the law, in order to control how these companies behave. None of this is true of FSNs.

FSN software is open source. Any person may operate an instance for any reason, and is highly unlikely to be deriving any kind of monetary benefit from doing so. Should the operator be outside India, they have no reason to comply with Indian law - they do not need to collect data from Indian users, nor are they likely to have any interest in India for the Government to use against them. Any kind of action against such instances would be untenable since there is simply no way to enforce any negative outcome on them. Realistically, the Government could only block Indian users from accessing such services.

This is hardly a solution. It would deny Indian users the benefit of FSN technology. Conventional social media is not a merit good which we seek to promote, with the scope for abuse being established by past events.[77] - FSNs represent a viable solution to maintaining the merits of social media, while removing the aspects of conventional Social Media that users need to be protected from, such as the abuse of their data. The core tenet of FSNs is privacy and control over one's own identity. By decentralising control, you prevent the kind of abuse the law attempts to address.

However, because the law presumes the existence of SMIs with commercial interests and corresponding resources and capital, it creates a framework where only an SMI with commercial interests and the corresponding resources could conceivably operate. This leaves a vast majority of FSN instances with two choices: expensive compliance for no actual gain or willful non-compliance. Neither of these outcomes is ideal, and the only loser is the Indian user who may well have benefited from the privacy afforded by FSNs, as opposed to conventional Social Media that will inevitably operate by monetizing their data, and who they will need to be protected from by the Government.

This brings us to the last question we must answer: How do we regulate FSNs?

[77] *Supra* note 10.

5. THE REGULATION OF FSNS

While FSNs may not be as amenable to regulation, that does not mean they should not be regulated at all. Rather, the approach to FSNs should be one of guiding their development, as opposed to the control method adopted with conventional social media. One of the primary ways the Government of India could engage with the Fediverse is by influencing the technical specifications of FSN software itself. There is a long history of governments influencing the development of technology through means such as funding research, for example.[78] They could similarly invest in FSN technology, backing developers and researchers working on it and thereby influencing the nature of the technology.[79] For example, FSNs rely on a common 'social networking protocol' in order to communicate with each other;[80] funding research into improved protocols could come with the benefit of ensuring that these protocols are better equipped to enable compliance. This does not happen in the status quo because the law is focused on the intermediaries themselves – the developers of FSN software are not intermediaries, as we have established. Therefore, the burden to adapt is placed on operators of instances who may not have the required skills. This is not a problem for the developers, who can make these adaptations, and are more equipped to do so when engaged with and supported by the Government.

However, given the likely preference of FSN developers to remain removed from governmental interference (given the nature of their work) and the possibility of that kind of interference pushing FSNs away from decentralisation due to the presence of governmental interests, exercising such a macro level of influence may not be wholly viable or desirable.

That being the case, on a more micro level, the Government could simply contribute their own work, such as in the form of plugins[81] that help enable quick compliance with Indian law, or even just enable easier content moderation. For instance, Singapore has recently launched AI Governance Testing Framework and Toolkit providing a means for companies to measure and demonstrate how safe and reliable their artificial intelligence (AI) products and services are.[82] It also launched Data Anonymisation tool to help organisation to better comply with

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78 Jon Pietruszkiewicz, What are the Appropriate Roles for Government in Technology Deployment? A White Paper with Author's Response to Comments, (December 1999) <https://www.nrel.gov/docs/gen/ fy00/26970.pdf≥ (last visited on 1-2-2022).

79 *Ibid*.

80 Jay Graber, "Decentralised Social Networks: Comparing Federated and Peer-to-Peer Protocols" (10-1-2020), <https://medium.com/decentralized-web/decentralized-social-networks-e5a7a2603f53>.

81 Plug-ins are software programs that make operating computers easier by customisation. Extensions on web browsers like Google Chrome is an example of plug-in. See Cambridge Dictionary, Plug-in, <https://dictionary.cambridge.org/dictionary/english/plug-in≥ (last visited on 1-2-2022).

82 <https://www.pdpc.gov.sg/news-and-events/announcements/2022/05/launch-of-ai-verify---an-ai-governance-testing-framework-and-toolkit>.

privacy law.[83] By facilitating the creation of tools for that kind of oversight in FSN software, operators can better comply with take down notices or other concerns. For example, plugins that facilitate automated flagging of certain types of content (as the Government requires of SSMIs in the IT Rules).[84] In the same vein, automated grievance redressal tools akin to the Online Dispute Resolution (ODR) technology implemented by UPI could make compliance with Rule 3(2) significantly easier.[85] Conventional social media can create such tools for themselves due to their resources (for example, Facebook uses PhotoDNA technology to detect child abuse material on its platform),[86] which FSN operators or even developers may lack, and the Government is uniquely positioned to fill in that gap without necessarily acting as an investor or overseer or some other capacity that may be seen as motivated or adverse.

Beyond this, the more logistically demanding requirements can be slightly relaxed in order to better suit this context; for example, perhaps permit for extensions of timelines given appropriate circumstances, or limit requirements around grievance redressal and compliance officers. As mentioned, these requirements currently envision compliance by a for profit entity with significant resources. An individual, even with improved tools, may find it difficult to meet a demand for information under Rule 3(1)(j) within the prescribed 72 hours, or to dispose of a complaint within 15 days.[87] By placing more realistic requirements on operators of FSN instances, you increase the likelihood that they can and will comply. The alternative would discourage the operation of FSNs by anyone without the ability to devote the time and resources to achieve the same degree of compliance required of large companies.

Another avenue is to take the same approach as Mastodon did with Gab – regulate the connections within the Fediverse. Instead of placing complex obligations on individual operators such as retention periods and grievance redressal, the Government can instead focus on roping off problematic parts of the Fediverse, such as those featuring illegal material or facilitating criminal activities. Any operator of an instance chooses the range of other instances they are connected to; ordering operators to avoid a certain subsection of instances would be feasible with the existing tools, and effective at curbing concerns regarding content. This is a fairly simple requirement to place on instances, and the consequence

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83 <https://www.pdpc.gov.sg/news-and-events/announcements/2022/05/data-anonymisation-tool-now-available>.

84 IT Rules, R. 4(4).

85 <https://inc42.com/buzz/npci-orders-banks-payment-service-providers-others-to-set-up-online-dispute-resolution-system/>.

86 <https://blogs.microsoft.com/on-the-issues/2011/05/19/facebook-to-use-microsofts-photodna-technology-to-combat-child-exploitation/>.

87 IT Rules, R. 3(2)(*j*).

need only be geo-blocking of URLs of[88] non-compliant instances if they aren't based in India, or using legal means if they are.

This would be in line with how FSNs tend to govern themselves. Mastodon has what it calls the 'Mastodon Server Covenant'[89], which requires instances to commit to active moderation against racism, sexism, homophobia, and other objectionable content. While it cannot force instances to comply, they refuse to list non-compliant instances on their server listings,[90] limiting their reach. Wider implementation of this kind of 'Covenant' as a common understanding between FSN platforms is a valid self-regulatory model that could address some concerns regarding content moderation, but ultimately falls short. Firstly, this approach would require a common understanding of what would constitute objectionable content or problematic instances - which is difficult to reach for a collection of platforms that may well have distinctly different priorities. Truth Social, for example, may not see fit to follow something akin to the Mastodon Server Covenant. Secondly, the lack of enforceability of any kind of 'good faith' standard is exacerbated with FSNs, where there is no profit imperative or other motivation that can be inconvenienced to incentivise compliance.

6. CONCLUSION

The Fediverse and FSNs represent the future of social media – one where we can connect with other people through technology, without the pitfalls of monetization and corporate abuse. Of course, no system is free of issues, and any system can be abused by those motivated enough to do so. However, FSNs lower the scope for this to happen by giving people agency over their data, allowing them to keep their online identities in a space they deem safe as opposed to trusting it to an entity who views them as a product.

For this reason alone, it is important that the Government of India adapts to the growth of FSNs. Controlling the power of vast corporations over our freedom of speech is a losing battle, for as much as we regulate them, we continue to let them grow and exert more power and influence. Decentralisation is the key to breaking this power up and restoring it to individuals and communities rather than

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[88] For example, pornographic websites are banned in India while they are accessible in other countries. See Kushaghra Singh et al., How India Censors the Web (30-5-2020) <https://cis-india.org/internet-governance/how-india-censors-the-web-websci≥; Anisha Mathur, "Explained: Indian and UK Laws on Pornography as Kundra case has a London Link" (21-7-2021) <https://www.indiatoday.in/india/story/explained-indian-and-uk-laws-on-pornography-as-kundra-case-has-a-london-link-1830918-2021-07-21≥.

[89] Mastodon, Mastodon Server Covenant, <https://joinmastodon.org/covenant> (last visited on 1-2-2022).

[90] Mastodon, Introducing the Mastodon Server Covenant, <https://blog.joinmastodon.org/2019/05/introducing-the-mastodon-server-covenant/> (last visited on 1-2-2022).

monolithic entities, especially considering the recent turn of events with Twitter. FSNs, we believe, will be the future of social media.

At the highest level, the Fediverse would be a vast network of individuals operating their own private instances, representing their personal identities on the network. This kind of implementation is far off, but it represents the pinnacle of privacy in social media – the online equivalent of in-person interaction, and a worthwhile future to work towards.

The current law is clearly insufficient for regulating FSNs. We believe that either alternative between not regulating or strong regulation by the Government, would be less than ideal. Excessive Government regulation would likely make FSNs impossible to legally operate in their intended form. Not regulating the space is also dangerous, with potential for them to become spaces for conducting illegal activities. We believe the approach of working with FSNs in guiding their development is the ideal middle ground. Governments involve themselves in and push scientific and technological development in many other areas; there is good cause for them to facilitate social media in the same way, given how indispensable they have become for our daily lives.

CONSTITUTIONALITY OF THE BOMBAY PREVENTION OF BEGGING ACT, 1959

*Dewangana Chhillar**

Poverty is one of the greatest polluter in our society

—Indira Gandhi's Speech at
the Stockholm Conference in 1972

1. INTRODUCTION

Several terminologies have been used to describe people who beg such as beggars, panhandlers, tramps, rough sleepers, cat goes and homeless. Very commonly they are highlighted as street beggars which comprises individuals including children, elderly, disabled and even families making a living by begging on the streets and in public places. Such public places would include commercial areas, religious areas such as temples and churches and mosques, various shopping areas and any other kind of crowded publicly used common spaces.

Statutorily, the expression "beggar" is used to create an economic other as differentiated from those who are in a position to earn money through work. Which leaves us with no doubt in stating that Beggary in the contemporary times is perceived as a very demeaning activity.

1.1. Meaning and concept

Who is a "beggar" and what is "begging" has been debatable and the answers to these questions are inextricably intertwined.

Section 2 of *Bombay Prevention of Begging Act, 1959* defined begging as:

> Soliciting or receiving alms in a public places, whether or not under any pretence such as singing, dancing fortune telling, performing or offering any article for sale, entering on any private premises for the purpose of soliciting or receiving alms, exposing or

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> exhibiting with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease whether of a human being or animal, or having no visible means of subsistence and wandering, about or remaining in any public place in such condition or manner, as makes it likely that the person doing so exist soliciting or receiving alms.

Hence, "beggar" is a person found begging as defined in section 2(1)(i) of the Act. All provisions from clauses (a) to (e) deal with soliciting or receiving alms in one way or the other. As per Section 5(4) of Act, the Court has to record a finding that the person is a beggar on the basis of summary inquiry made it as per the terms of Section 5(1) of the said Act.[1]

Furthermore, according to the *Black's Law Dictionary*:

> Beggar is a person who communicates with the people, often in public places, asking for money, food or other necessities for personal use, often as a habitual means of making a living.[2]

It is pertinent to note that the foremost anti-begging legislation in India was passed in the year 1959 as the *Bombay (Prevention of Begging) Act*. This *Act* was immediately adopted in Delhi followed by the *Delhi Prevention of Begging Rules, 1960*. The ***BPBA**, 1959* in India has been perceived by many law thinkers as unconstitutional leading to the callous treatment of the poor and the denial of rights to them. However, many[3] sociologists such as Dr. Mohammed Rafiuddin, Director of Hyderabad Council of Human Welfare, have contradicted the unconstitutionality of the statute arguing that it is just a case of bad implementation and asserting that a law on this subject is indispensable and must be allowed to continue.

Hence, the question remains to be decided is 'Whether the Bombay (Prevention of Begging) Act 1959 is intrinsically unconstitutional or is it just a case of bad implementation curable by ensuring strict adherence with the principles and procedures enshrined in the Statute?'.

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1 *Ram Lakhan* v. *State*, 2006 SCC OnLine Del 1501 : (2007) 137 DLT 173.

2 Retrieved from, <https://thelawdictionary.org> accessed on 20-3-2022 at 6 p.m.

3 Azad India Foundation, "Beggary in India", 2010, Retrieved from, <http://www.azadindia.org/social-issues/beggary-in-india.html> accessed on 18-4-2022 at 4 p.m.

2. THE BOMBAY PREVENTION OF BEGGING ACT, 1960 IS CONSTITUTIONAL: ARGUMENTS IN FAVOUR OF THE CONSTITUTIONALITY OF THE ACT

Poverty is the worst form of violence

—Mahatma Gandhi

The constitutionality of the Act is discussed in details in this chapter and it has been felt that this Act is very well within the ambit of Article 21 as the 'right to life' cannot include immoral and undignified activities and therefore, there is no Deprivation of Article 21. This Act also ensures beggars' 'Right to Shelter' under Article 21, the Act makes provisions for food and medical care of the beggars, protects the beggars' 'Right to Education', secures to the beggars their 'Right to Earn Livelihood', provides for the rehabilitation of disabled persons etc.

The main purpose of 'Detention' under this Act is 'Rehabilitation' and not providing punishment. On the other hand begging leads to violation of Article 19(1)(d), amounts to 'Public Nuisance' and hence cannot be permitted, cause obstruction to people's right to movement, cause annoyance to the public, injury or danger to the public and Act is in furtherance of 'Right to Health' under Article 21 and Article 47.

Lastly, nexus between 'Begging' and 'Other Crimes' is discussed in details.

2.1. The Bombay Prevention of Begging Act, 1960 is not Ultra Vires of the Constitution

First and foremost, we must have a positive outlook towards the constitutionality of a statute. Arguments asserting its unconstitutionality must be proved beyond reasonable doubt. According to the "*doctrine of presumption of constitutionality*"[4], whenever a statute is challenged on the *vires* of its constitutionality, there shall be a prime facie presumption to the contrary and shall have to

[4] *Ram Prasad Narayan Sahi* v. *State of Bihar*, (1953) 1 SCC 274 : 1953 SCR 1129; *All Saints High School* v. *State of A.P.*, (1980) 2 SCC 478; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625; *B.B. Rajwanshi* v. *State of U.P.*, (1988) 2 SCC 415; *State of Bihar* v. *Bihar Distillery Ltd.*, (1997) 2 SCC 453; *B.R. Enterprises* v. *State of U.P.*, (1999) 9 SCC 700; *PUCL* v. *Union of India*, (2004) 2 SCC 476; *State of U.P.* v. *Kartar Singh*, 1964 SCC OnLine SC 66 : (1964) 6 SCR 679, 687; *Govind Dattatray Kelkar* v. *Chief Controller of Imports & Exports*, AIR 1967 SC 839 : (1967) 2 SCR 29, 34; *Banarsidas*v. *State of U.P.*, AIR 1956 SC 520 : 1956 SCR 357; *All India Station Masters* v. *Central Railways*, AIR 1960 SC 384 : (1960) 2 SCR 311; *Southern Railways* v. *Rangachari*, AIR 1962 SC 36 : (1962) 2 SCR 586; *United States* v. *Carolene Products Co.*, 1938 SCC OnLine US SC 93 : 82 L Ed 1234 : 304 US 144 (1938); *Kramer* v. *Union Free School Distt. No. 15*, 1969 SCC OnLine US SC 151 : 23 L Ed 2d 583 : 395 US 621 (1969).

be rebutted in order to challenge it successfully. The party challenging the statute must make a legal argument so convincing that unconstitutionality must be proven beyond doubt. So let us proceed with the primary presumption that the *Act* is in fact constitutional.

2.2. Grounds for declaring an enactment Unconstitutional

Now let us go step by step. A law may be declared unconstitutional by the courts on any of the following grounds:-

a. Contravention of any fundamental right, specified in Part III.[5] (Article 13(2))

b. In case the legislative acts *ultra vires* the power granted to it under the Constitution.

c. Legislating on a subject which is not assigned to the legislature under 7th Schedule.[6]

d. Law made in contravention of any limitations imposed on the powers of a legislature.[7]

e. Extra-territorial operation of State law.[8] (Article 245)

f. In case of excessive delegation of legislative function.[9]

In the instant case, the latter five grounds clearly do not apply. '*Public health*' and '*maintenance of law and order*' are state subjects and hence the act is within the purview of state legislation. So the Act remains to be tested only as per the first two grounds to test its vires.

2.3. Application of Doctrine of Reading Down

A direct consequence borne out of the above doctrine is the "*doctrine of reading down*"[10]. It states that where some provisions of an act are capable of

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5 *Public Services Tribunal Bar Assn.* v. *State of U.P.*, (2003) 4 SCC 104; *State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709; *State of W.B.* v. *EITA. India Ltd.*, (2003) 5 SCC 239, 244.

6 Ibid.

7 Ibid,*Atiabari Tea Co.* v. *State of Assam*, AIR 1961 SC 232.

8 *State of Bombay* v. *R.M.D.Chamarbaugwala.*, 1957 SCC OnLine SC 12 : AIR 1957 SC 699.

9 *Hamdard Dawakhana* v. *Union of India*, 1959 SCC OnLine SC 38 : AIR 1960 SC 554; *Devi Dass Gopal Krishnan* v. *State of Punjab*, AIR 1967 SC 1895.

10 *Hindu Women's Right to Property Act, 1937, In re,* 1941 SCC OnLine FC 3: (1941) 3 FCR 12; *R.M.D. Chamarbaugwalla* v. *Union of India*, 1957 SCC OnLine SC 11 : (1957) SCR 930; *DTC* v. *DTC Mazdoor Congress*, 1991 Supp (1) SCC 600 : AIR 1991 SC 101; *R.L. Arora* v. *State of U.P.*, 1964 SCC OnLine SC 19 : (1964) 6 SCR 784; Nalinakhya Bysack v. Shyam Sunder Halder, (1953) 1 SCC 167 : (1953) 1 SCR 533; Kedar Nath Singh v. State of Bihar, 1962 SCC OnLine SC 6 : 1962

multiple interpretations and the object of the legislators with respect to those provisions is constitutional, the Court may "*read down*" the unconstitutional interpretation(s) of the impugned provision. It is because if there are various interpretations possible of a provision (which is highly possible) and some interpretations have led to bad implementation, but at the same time there is a righteous interpretation, then the Court may, instead of striking down the statute simply read down the unconstitutional interpretations and uphold the law with the lawful interpretation.

It has been held that the possibility of abuse of any statute does not impart to it any element of instability.[11] When the constitutionality of a law is challenged on the ground that it infringes a fundamental right, what the Court has to consider is the "*direct and inevitable effect*" of such law.[12] If the abuse that has occurred, or is anticipated, is a "*direct and inevitable effect"* of the law in question, only then can the Court exercise its extraordinary power of judicial review. Otherwise, the Court must avoid striking down laws made by the Parliament.

As regards the violation of fundamental rights, it can be contended that the provisions of the *Act* do not constitute any violation of any fundamental right. Whatever instances of fundamental right violations are contended are in the nature of abuse of an otherwise constitutional statute which do not impart any instability to the *Act*.[13] Such violations are in no way the "*direct and inevitable*" effect of such law. They have resulted as a consequence of multiple possible interpretations of the provisions of the impugned *Act*. The "*doctrine of reading down*" may be applied to them.

Now as per this doctrine, the Court may read down the unconstitutional interpretations of a statute where it is possible to interpret the statute in such a manner that does not render it unconstitutional. Keeping in consideration the object behind the law which clearly states that it is rehabilitative in nature, every alleged violation of fundamental rights can be rectified if the Court were to read down the unconstitutional interpretations. The Apex Court, has, time and again

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Supp (2) SCR 769; Jagdish Pandey v. Chancellor, University of Bihar, (1968) 1 SCR 231; Umed v. Raj Singh, (1975) 1 SCC 76 : (1975) 1 SCR 918; *Mohd.Yunus Saleem* v. *Shiv Kumar Shastri*, (1974) 4 SCC 854 : AIR 1974 SC 1218; *Sunil Batra* v. *Delhi Admn*., (1978) 4 SCC 494; *Excel Wear.* v. *Union of India*, (1978) 4 SCC 224 : (1979) 1 SCR 1009; Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625 : (1981) 1 SCR 206; *Union of India* v. *Tulsiram Patel*, (1985) 3 SCC 398; *Elliott Ashton Welsh* v. *United States*, 1970 SCC OnLine US SC 136 : 26 LEd 2d 308 : 398 US 333 (1970); *Federal Steam Navigation Co. Ltd.* v. *Deptt. of Trade and Industry,* (1974) 2 All ER 97.

[11] *Collector of Customs* v. *Nathella Sampathu Chetty*, 1962 SCC OnLine SC 30 : AIR 1962 SC 316 (332).

[12] *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597; *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248 : AIR 1970 SC 564; *Sakal Papers (P) Ltd.* v. *Union of India*, AIR 1962 SC 305; *Express Newspaper (P) Ltd.* v. *Union of India*, 1958 SCC OnLine SC 23 : AIR 1958 SC 578.

[13] *Collector of Customs* v. *Nathella Sampathu Chetty*, 1962 SCC OnLine SC 30 : AIR 1962 SC 316 (332).

asserted[14] that the Courts should avoid blatantly nullifying statutes and should only do so as a last resort.[15] If the doctrine of reading down can come to the rescue of a statute, then the Courts should not declare it unconstitutional.[16]

3. PROHIBITION OF BEGGING IS IN FURTHERANCE OF ARTICLE 21 OF THE INDIAN CONSTITUTION

3.1. Article 21 cannot be extended to Immoral and Undignified Activities

The Apex Court has held that the right to livelihood as enshrined in Article 21 "*cannot be extended to carrying on trade or business which is injurious to public interest or has an insidious effect on public order.*"[17] Begging involves pestering law abiding civilians and forcing them to part with their hard earned money. People indulging in begging violate the modesty of pedestrians by disgracefully touching them and pulling them until they part with their money and give it to the beggars. It is not a request, but a coercive method by means of which a person forces another to satisfy his demands under duress. The victim chooses to submit to the beggar's demands so as to avoid harassment.

If somebody wants to voluntarily give money to beggars, there are various institutions that lawfully collect alms and distribute them among the poor. Begging is, therefore, an undignified act which is against morality eventually leading to harassment of people. It is, in no way, justifiable as it is a horrendous activity undertaken by a person just to earn extra money in process of doing which he tends to violate the person of the victim. Thus, the protection of Article 21 cannot be extended to such activities.

3.2. There is no Deprivation of Right to Life as Enumerated in Article 21

The term '*deprived*' in Article 21 as explained by the Apex court means that "*deprivation in the senses of total loss*"[18] In the current case since the beggars are choosing this undignified way of life inspite of possible viable options, they cannot claim that there has been violation of Right to life. As already mentioned, 60% of able bodied persons prefer to beg rather than work due to daily earnings considerations. So, in the existence of alternative options, beggars are choosing this way of life. Hence there is no deprivation in the real sense.

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[14] *Federal Steam Navigation Co. Ltd.* v. *Deptt. of Trade and Industry,* (1974) 2 All ER 97.
[15] *Jit Ram Shiv Kumar* v. *State of Haryana,* (1981) 1 SCC 11 : AIR 1980 SC 1285.
[16] *DTC* v. *DTC Mazdoor Congress,* 1991 Supp (1) SCC 600 : AIR 1991 SC 101.
[17] *Dalmia Cement (Bharat) Ltd.* v. *Union of India*, (1996) 10 SCC 104.
[18] *A.K. Gopalan* v. *State of Madras*, 1950 SCC 228 : 1950 SCR 88.

The Apex Court has noted[19]:

> in order to constitute 'deprivation' there must be some direct, overt and tangible act which threatens the fullness of the life of a person as distinguished from vague or remote acts threatening the quality of life of the people at large.

In this case the *Bombay Prevention of Begging Act* is only depriving the beggars from earning a higher income from an immoral and undignified activity. It must be pointed out that these people still have the chance of working as casual workers for sustenance. They simply choose not to do it for the chance of earning a higher income and working less.

Moreover, there is no deprivation of right to livelihood as begging is against the principle of true livelihood. Right to livelihood is attracted when some form of legitimate work is done. In the case of begging, a beggar essentially does no proper work but merely pleads for alms. The money received by him cannot be called consideration in the real sense of the term. Hence a beggar does no work and yet claims the right to livelihood.

3.3. The Act is in Furtherance of Article 21 of the Indian Constitution

Right to life, enshrined in Article 21 means something more than mere survival or animal existence.[20] It ensures dignified life.[21] With the enactment of this *Act* the government is giving colour to the rights of these beggars by rescuing them from an undignified way of life. Moreover, the Act contains various provisions for their betterment and rehabilitation.

3.4. The main purpose of 'Detention' under this Act is 'Rehabilitation' and not providing punishment

The main purpose of detention under the *Act* is not punitive but rehabilitative as is clearly signified from the provisions and object of the *Act*. The detention under the *Act* is preventive. The object of the *Act* has been clearly laid as: "The Act is not a penal measure but a social legislation for the protection,

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[19] *Ramsharan Autyanuprasi* v. *Union of India*, 1989 Supp (1) SCC 251 : AIR 1989 SC 549; *Samatha* v. *State of A.P.*, (1997) 8 SCC 191.

[20] *State of Maharashtra* v. *Chandrabhan Tale*, (1983) 3 SCC 387 : AIR 1983 SC 803; *Noise Pollution (V),In re,* (2005) 5 SCC 733; *Noise Pollution (VI), In re,* (2005) 8 SCC 794.

[21] *Francis Coralie Mullin* v. *Administrator,UT of Delhi*, (1981) 1 SCC 608 : AIR 1981 SC 746; *Olga Tellis* v. *Bombay MunicipalCorpn.*, (1985) 3 SCC 545 : AIR 1986 SC 180; *DTC* v. *DTC Mazdoor Congress*, 1991 Supp (1) SCC 600 : AIR 1991 SC 101; *Consumer Education & Research Center* v. *Union of India*, (1995) 3 SCC 42.

treatment, care and rehabilitation of the beggars."[22] The Introduction of the *Act* states the primary purpose and object of the *Act*: "… for the detention, training and employment of beggars and their dependents in certain institutions…". The institutions provide for food, shelter, medical care and educational and training facilities.[23]

The Court has been given the power, under Section 9, to order the detention of even the dependents of the beggars clearly confirms this intent as the dependents are not being punished but they form a part of the rehabilitation scheme under the *Act*.

Moreover, under Section 10, provision has been made for the further detention of beggars who are "*blind, crippled or otherwise incurably helpless*" on the discretion of the Chief Commissioner or on application by the beggars.

Section 13 makes the provision for the inclusion of "*teaching of agricultural, industrial and other pursuits, and for general education and medical care of the inmate*." Furthermore, Section 26 provides for the medical care and safety of beggars who are of unsound mind or lepers.

Thus it can be seen that overall the *Act* is a welfare legislation envisaged to be rehabilitative in nature and not punitive.

3.5. Begging leads to violation of Article 19(1)(d)

In the instant transaction concerning the *Act*, the beggar is not the only stakeholder. The rights of the person from whom alms are being solicited must also be taken into consideration. One cannot afford to ignore the alms-giver while holistically considering the effects of the *Act.* The act of begging violates his rights as well and hence the current legislation is indispensable.

Beggars, while soliciting alms, obstruct people's way and hinder their movement. They obstruct them and keep doing the same until their demands are fulfilled. The victim in order to unrestrictedly enjoy his right to freedom of movement often submits to his demand under compulsion. As long as he continues to remain righteous and not part with his hard earned money, there is a continuous violation of his fundamental right.

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[22] *Law, Order and Justice*, Maharashtra State Gazetteers, Ch. 12, Vol. III.

[23] Bombay Prevention of Begging Act, 1959,Ss. 13 and 26.

3.6. Begging amounts to 'Public Nuisance' and hence cannot be permitted

Section 268 of the *Indian Penal Code* defines "*Public Nuisance*" as "*any act or an illegal omission, which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right*."

Beggars often cause nuisance to people by indulging in "*aggressive panhandling*". Beggars are often aggressive while soliciting alms. They inappropriately touch people and pull their clothes until they part with their hard earned money. Some groups of beggars are also known to throw curses at people who refuse to give them alms condemning them in the judgment of God thus using fear and force to solicit alms. This is an extreme form of public nuisance.

In *Chhitar* v. *Chhoga*[24], it was held that a nuisance cannot be excused on the ground of some convenience or advantage, i.e. no prescriptive right can be acquired to commit nuisance.

3.7. Beggars cause obstruction to people's right to movement

In the *Noor Mohomed case*[25], the Court held that where obstruction was caused to the persons using the public way, public nuisance was caused. Beggars often pester passers-by begging for money and cling to them touching them inappropriately; and do not give in until their demands are satisfied.

3.8. Beggars cause annoyance to the public

In the case of *Santosh* v. *State of Kerala*[26], it was held that causing annoyance to persons upon a public road would be a public nuisance. The act of pestering passers-by, obstructing their way, clinging to them etc. causes annoyance and hence results in public nuisance.

Also, intent manifestation of grave injury, disease or disability causes grave nuisance to the public. Theirs is not a peaceful demand for subsistence; but a coercive attempt to solicit alms from innocent passers-by.

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[24] *Chhitar* v. *Chhoga*, 1974 SCC OnLine Raj 67 : 1974 Cri LJ 1230.

[25] *Noor Mohomed* v. *State,* Bom 368: 13 BLR 209; *Bombay Hawkers' Union* v. *Bombay Municipal Corpn.*, (1985) 3 SCC 528; *Municipal Corpn. of Delhi* v. *Gurnam Kaur*, (1989) 1 SCC 101; *Olga Tellis* v. *Bombay Municipal Corpn.*, (1985) 3 SCC 545; *Janki Prasad* v. *Karamat Husain*, 1931 SCC OnLine All 352 **:** ILR (1931) 53 All 836.

[26] *Santosh* v. *State of Kerala,* 1985 SCC OnLine Ker 332 : 1985 Cri LJ 756 (Ker).

Some groups of beggars are also known to throw curses at people who refuse to give them alms condemning them in the judgment of God thus using fear and force to solicit alms. This is an extreme form of public nuisance.

3.9. Beggars may cause injury or danger to the public

Beggars usually live in unhygienic conditions and carry filth and infections wherever they tread. By touching passers-by and clinging to them, they pose a threat to their health and injury. Consider a beggar who is carrying a communicative disease touches passers by constantly and continuously until they give in to his demands. He exposes them to a grave threat of disease and poses a danger to public health. Their act of showcasing grave injury, disease or disability exposes the passer-by to further risk of injury or danger to health and life.

3.10. The Act is in furtherance of 'Right to Health' under Article 21 and Article 47

As already stated, beggars usually live in unhygienic conditions and carry filth and infections wherever they tread. By touching passers-by and clinging to them they pose a threat to their health and injury. Their act of showcasing grave injury, disease or disability exposes the passer-by to further risk of injury or danger to health and life. Hence criminalising them and protecting people from possible exposure to health risks, the State is fulfilling its duty under Article 47.

Moreover, the Court has always recognized the right to health as being an integral part of the right to life.[27] Hence the *Act* is in clear furtherance of Article 21 and 47 of the Constitution.

One must also consider here, the other party, i.e., the innocent passers by who are as much the subjects of the state as are the beggars. In the instant case, their health and life is under grave threat from the possible risks posed by the beggars due to their unhygienic conditions and aggressive panhandling conduct.

3.11. Nexus between 'Begging' and 'Other Crimes'

In the case of *Ram Lakhan* v. *State*[28], the Court classified beggars into four types:

> Firstly, it may be that he is down-right lazy and doesn't want to work. Secondly, he may be an alcoholic or a drug-addict in

[27] *Parmanand Katara* v. *Union of India,* (1989) 4 SCC 286; *Paschim Banga Khet Majoor Samity* v. *State of W.B.*, (1996) 4 SCC 37; *Drug Action Forum* v. *Union of India*, (1997) 9 SCC 609; *Consumer Education & Research Centre* v. *Union of India*, (1995) 3 SCC 42.

[28] *Ram Lakhan* v. *State*, 2006 SCC OnLine Del 1501 : (2007) 137 DLT 173.

the hunt for financing his next drink or dose. Thirdly, he may be at the exploitative mercy of a ring leader of a beggary "gang". And, fourthly, there is also the probability that he may be starving, homeless and helpless.

In the first class of beggars, criminalization is absolutely justified as every able-bodied person who can work is pestering people and causing nuisance. So, he must be punished.

In the second class, de-criminalizing begging would encourage alcoholism and drug-addiction. Beggars who beg solely for this purpose must be criminalized and rehabilitated under this *Act*.

In the third class, de-criminalizing begging would result in an increase in "*beggary*" gangs as the act that they are forcing individuals to do would now be legal.

And the fourth class beggars are already being rehabilitated by the *Bombay Prevention of Begging Act*, *1959*.

4. THE BOMBAY PREVENTION OF BEGGING ACT IS UNCONSTITUTIONAL: ARGUMENTS AGAINST THE CONSTITUTIONALITY OF THE ACT

"Poverty is Punishment for a Crime you didn't commit."

—Eli Khamarov, writer

In India the lack of a proper central law on begging calls for a lot of confusion as to what exactly is the position. However, various states have their own laws and the crux of the matter boils down to the fact that a person can be arrested for begging if he/she is poor. In this chapter the unconstitutionality of the various Beggary laws prevailing in our country is laid down on various grounds. The Bombay (Prevention of Begging) Act 1959 (**BPBA**), which was extended to Delhi in 1960, has acquired a wealth of experience over the years, providing stark proof of the inherent injustice of this law and laws of similar ilk. A quartet of encounters with the law, in Mumbai and in Delhi, provides a context to exploring the relationship between poverty and criminality, and the extensive loss of rights that emerge as a consequence. It reflects on the depleting obligation of the state where poverty persists, and the onus cast on the person in poverty to procure gainful employment or, at the least, to make poverty invisible. Interestingly, this is a law without a "good faith" clause – the element that is routinely introduced into legislations to protect persons acting under the law from being prosecuted by a presumption of "good faith". Yet, documented incidents of executive outreach in the

guise of enforcing the BPBA 1959 have not led to the prosecution and punishment of those abusing their power; nor has it resulted in changes in the law to prevent, or at least discourage, the exploiting of the already vulnerable. This marginalization, and exiling from constitutional treatment, of the poor stands demonstrated. This may reasonably lead to the conclusion that the law relating to begging and ostensible poverty is unconstitutional, and must be either repealed, or struck down by a competent court.

4.1. The Act is in Contravention of Article 21 of the Constitution

The *Bombay Prevention of Begging Act,* 1960 violates Article 21 of the Constitution in many aspects as enumerated below:

> Failure to ensure a 'dignified life' Article 21 covers within its ambit not merely the right to life but also the right to live with dignity. Such right would include all those rights which ensure a person's life meaningful, complete and worth living.[29]

Now, begging is not a dignified way of life. A person who has to beg must plead to people for basic necessities. People whose lives are such must be protected and this right must be secured to them by the state. The Supreme Court in various cases[30] has imposed a positive obligation on the State to take steps for ensuring to the individual a better enjoyment of his life and his dignity. However, when on the other hand, the State instead of fulfilling its positive obligation to ensure this dignity to the poor, instead criminalises them for an act which is obviously consequential to their condition is absolutely intolerable. It must be understood that this condition of theirs which forces them to beg is only attributable to the state which must take responsibility for their plight and rectify it rather than penalising them for it.

In the case of *Ram Lakhan* v. *State*[31], the Delhi High Court observed:

> They are persons who are driven to beg for alms and food as they are starving or their families are in hunger. They beg

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[29] *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 : AIR 1984 SC 802; *Obayya Pujary* v. *Karnataka State Pollution Control Board*, 1998 SCC OnLine Kar 377 : AIR 1999 Kar 157 (161); *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597.

[30] *Vincent Panikurlangara* v. *Union of India*, (1987) 2 SCC 165 : AIR 1987 SC 990; *M.C. Mehta* v. *Union of India*, (1987) 4 SCC 463 : AIR 1988 SC 1037; *Rural Litigation and Entitlement Kendra* v. *State of U.P.*, 1986 Supp SCC 517 : AIR 1987 SC 359; *Kali Dass* v. *State of J & K*, (1987) 3 SCC 430; *State of H.P.* v. *Umed Ram Sharma*, (1986) 2 SCC 68 : AIR 1986 SC 847; *Sher Singh* v. *State of Punjab*, (1983) 2 SCC 344 : AIR 1983 SC 465; *Neeraja Chaudhary* v. *State of M.P.*, (1984) 3 SCC 243 : AIR 1984 SC 1099; *M.C. Mehta* v. *Union of India*, (1999) 1 SCC 413 : AIR 1999 SC 301; *Olga Tellis* v. *Bombay Municipal Corpn.*; (1985) 3 SCC 545 : AIR 1986 SC 180.

[31] *Ram Lakhan* v. *State*, 2006 SCC OnLine Del 1501 : (2007) 137 DLT 173.

> to survive; to remain alive. For any civilized society to have persons belonging to this category is a disgrace and a failure of the State. To subject them to further ignominy and deprivation by ordering their detention in a Certified Institution is nothing short of de-humanising them... prevention of begging is the object of the said Act. But, one must realise that embedded in this object are the twin goals – Nobody should beg and nobody should have to beg.

The Court further added that beggars who beg out of duress[32] or necessity[33]should not be criminalized. Anti-begging legislations must protect the rights of the beggars instead of penalising them for the state's failure. The state essentially has a positive obligation to provide a job to the beggar or to teach him some skill instead of penalizing him. The provisions contained in the Act in this respect are not mandatory and thus the Superintendent almost always chooses to ignore them.

4.2. Violation of Right to Work and Right to earn Livelihood

The right to work and right to earn livelihood have been held in various cases[34] as covered under Article 21. They are also a part of Directive Principle of State Policies under Articles 39(a) and Article 41. Right to earn livelihood and work is an important facet of Article 21 because no person can live without the means of living.[35] The state must ensure to everyone some form of work through which he can earn livelihood.

Under Section 2(1)(i)(a) the *Act* criminalizes individuals who earn their livelihood by singing in buses, dancing, fortune telling or selling articles at traffic signals etc. by labelling them as "*beggars*". Hence it is a violation of right to livelihood guaranteed under Article 21. Moreover, such an act of selling articles can in no way be compared to begging.

4.3. The Act violates Right to Education

In *Unni Krishnan* v. *State of A.P.*[36], the Supreme Court said that the right to education up to the age of 14 was implicit in Article 21 and was a funda-

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[32] *Hibbert* v. *The Queen,* (1955) 2 SCR 973; *R.* v. *Howe,* 1987 AC 417.

[33] *Ibid*; *Perka* v. *The Queen,* 1984 SCC OnLine Can SC 40 : (1984) 2 SCR 232.

[34] *Olga Tellis* v. *Bombay Municipal Corpn.,* (1985) 3 SCC 545 : AIR 1986 SC 180 (193,194); *N. Jagadeesan* v. *Distt. Collector, North Arcot*, (1997) 4 SCC 508 : AIR 1997 SC 1197; *Consumer Education & Research Centre* v. *Union of India,* (1995) 3 SCC 42; *Delhi Development Horticulture Employees' Union* v. *Delhi Admn.*, (1992) 4 SCC 99; *Daily Rated Casual Labour* v. *Union of India*, (1988) 1 SCC 122.

[35] *Olga Tellis* v. *Bombay Municipal Corpn.*, (1985) 3 SCC 545 : AIR 1986 SC 180 (193, 194).

[36] *Unni Krishnan* v. *State of A.P,* (1993) 1 SCC 645; *Mohini Jain* v. *State of Karnataka*, (1992) 3 SCC 666, 679, 680; *Francis Coralie Mullin* v. *Administrator, UT of Delhi*, (1981) 1 SCC 608 : AIR

mental right. The Constitution (Eighty-sixth Amendment) Act, 2002 added Article 21-A in Part III dealing with fundamental rights which states that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine.

The *Act* makes no special exception for children of the age group of 6-14. Section 13 makes a provision for education of detainees but does not impose any obligation on the Superintendent.

Detaining a child in an institution with no obligatory provisions for compulsory education is not merely a failure, but a violation of his fundamental right by the State. The state is under an obligation to ensure that everyone has access to and is given education up to the age of 14. Failure on the part of the state to ensure the same is a blatant violation of his fundamental right to education. However, the situation is unfortunately much worse. The state is not just failing to ensure the enjoyment of a fundamental right but the present situation is a case of a conscious violation being done by the state itself. Hence the Act must be struck down.

4.4. Violation of Right to Privacy

Section 29 of the *Act* and Rule 8 of the *Delhi Prevention of Begging Rules,* 1960 violate right to privacy.[37] Section 29 of the *Act* mandates that every detainee must give his fingerprints to the District Magistrate and in case he refuses to do so, he shall be liable to imprisonment of up to three years. Rule 8 of the *Delhi Prevention of Begging Rules,* 1960 states that a person must undergo a mandatory medical examination after which he may be directed to trim or shave hair on any part of his body or he may have to undergo forceful cleansing of his body for which removal of his clothes by the respective authorities is allowed. Moreover the Act does not mandate that a female must be examined by a female officer but merely lays down that "as far as possible", a lady medical officer be used. This provision leaves unfettered scope for misuse by the authorities. The condition of using "minimum force" in securing the above is also not mandatory. Also, in light of the recent Apex Court case of *Puttuswamy* v. *Union of India*,[38] 'Right to privacy' is now a fundamental right and hence guaranteed under Article 21 of the Constitution.

1981 SC 746; *Bharat Bhushan* v. *G.B. Pant University of Agriculture and Technology,* 2004 SCC OnLine Utt 42 : AIR 2005 Utt 12 (15); *Mullipudi Mukunda Rao* v. *Sub-Inspector of Police* , 2003 SCC OnLine AP 561 : (2003) 4 ALD 884.

[37] *Kharak Singh* v. *State of U.P.*, 1962 SCC OnLine SC 10 : AIR 1963 SC 1295; *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : AIR 1975 SC 1378; *'X'* v. *Hospital 'Z'*, (1998) 8 SCC 296 : AIR 1999 SC 495; *Malak Singh* v. *State of P & H*, (1981) 1 SCC 420 : AIR 1981 SC 760; *Prem Chand* v. *Union of India*, (1981) 1 SCC 639 : AIR 1981 SC 613; *Rupinder Singh Sodhi* v. *Union of India*, (1983) 1 SCC 140 : AIR 1983 SC 65; *Moti Sunar* v. *State of U.P.*, 1996 SCC OnLine All 921 **:** 1997 Cri LJ 2260; *Khushwant Singh* v. *Maneka Gandhi*, 2001 SCC OnLine Del 1030 : AIR 2002 Del 58.

[38] *K.S. Puttaswamy* v. *Union of India*, (2018) 1 SCC 809 : AIR 2017 SC 149.

4.5. Violation of Other Rights

It is also contended that the *Act* violates right against torture[39], right to live with one's family[40] and freedom from fear and everyday threat.

4.6. The Act is in contravention of Article 19 of the Constitution

The *Bombay Prevention of Begging Act, 1960* violates Article 19 of the Constitution as has been elaborated below:

4.7. Violation of Article 19(1)(a)

The freedom of speech and expression is encoded in Article 19(1)(a) of the *Constitution* and is embraced by the Indian judiciary.[41] A person who is begging for alms is essentially exercising his fundamental right of freedom of speech and expression as his act of begging is an expression by virtue of which he is describing his plight and his state of poverty.

In *Ram Lakhan* v. *State*[42], the Court held:

> After all, begging involves the beggar displaying his miserable plight by words or actions and requesting for alms by words (spoken or written) or actions. Does the starving man not have a fundamental right to inform a more fortunate soul that he is starving and request for food?" [And would the consequence of being detained and denied his liberty not run] "counter to the fundamental right to speech and expression?[43]

The right to plead for help from society in a peaceful and unthreatening manner is a basic inalienable right derived from free speech and expression.[44] The act of begging is a reflection and manifestation of the "*deeper social and*

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[39] *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416 : AIR 1997 SC 610.

[40] *Lata Singh* v. *State of U.P.*, (2006) 5 SCC 475 : AIR 2006 SC 2522.

[41] *Bennett Coleman & Co.* v. *Union of India,* (1972) 2 SCC 788; *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641; *LIC* v. *Manubhai D. Shah*, (1992) 3 SCC 637 ; *Kameshwar Prasad* v. *State of Bihar,* 1960 SCC OnLine SC 30 : AIR 1962 SC 1166; *Gajanan Visheshwar Birjur* v. *Union of India*, (1994) 5 SCC 550; *Ministry of Information & Broadcasting,Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; *Tata Press Ltd.* v. *MTNL*, (1995) 5 SCC 139; *Kameshwar Prasad* v. *State of Bihar*, 1960 SCC OnLine SC 30 : AIR 1962 SC 1166; *Union of India* v. *Naveen Jindal*, (2004) 2 SCC 510; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248.

[42] *Manjula Sen* v. *Superintendent, Beggars' Home*, Writ Petition No 1639 of 1990, in the High Court of Bombay.

[43] Ibid.

[44] John Stuart Mill, *On Liberty (Illinois: Crofts Classics)* Ch. 2, edn. Alburey Castell, 1947 as cited in Arthur Schafer, *The Expressive Liberty of Beggars,* Canadian Centre for Policy Alternatives, (2007), *See also Loper* v. *New York City Police Deptt. P. Nyc*, 999 F 2d 699 (2nd Cir 1993)

political problems of government's poverty and employment policies".[45] A beggar makes a claim of need and help, although there is an express demand or request for money.[46] Begging, being a "*display of miserable plight by words or actions*"[47], necessarily involves a communicative or expressive activity and is worthy of Article 19(1)(a) protection.

Hence it can be argued that the whole idea of punishing the poor for begging is a violation of Article 19(1)(a) as it denies them their invaluable right to express and display to the masses their pitiable condition and poverty.

4.8. Violation of Article 19(1)(g)

According to Article 19(1)(g), "*All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business*." Section 2(1)(i)(a) of the *Act* criminalizes individuals who earn their livelihood by singing in buses, dancing, fortune telling or selling articles at traffic signals etc. by labelling them as "*beggars*".

Moreover, in the instant case, street hawkers have been labelled as "beggars" and are being criminalized on that basis. Street trading or hawking is a fundamental right.[48] If properly regulated, hawker trade can never be a public nuisance; rather the small traders can considerably add to the convenience and comfort of the general public, by making available ordinary articles of everyday use for a comparatively lesser price.[49] The Courts have held[50] that the right to carry on trade or business mention in Article (19)(1)(g) of the Constitution on street pavements, if properly regulated, cannot be denied on the ground that the streets are made exclusively for passing and re-passing and for no other use.

("begging involves a form of communication worthy of First Amendment Protection"), *People of the State of New York* v. *Eric Shrader*, 617 NYS 2d 429.

45 Richard Moon, "Begging and Freedom of Expression, Constitutional Forum", February 2000.

46 *Ibid*.

47 *Ram Lakhan* v. *State*, 2006 SCC OnLine Del 1501 : (2007) 137 DLT 173.

48 *Shaik Dastagiri* v. *Executive Officer, Udaygiri Gram Panchayat*, 2002 SCC OnLine AP 196 **:** AIR 2002 AP 384 (386); *Sodan Singh* v. *New Delhi Municipal Committee*, (1989) 4 SCC 155 : AIR 1989 SC 1988; *Ahmedabad Municipal Corpn.* v. *Nawab Khan Gulab Khan*, (1997) 11 SCC 121 : AIR 1997 SC 152; *N. Jagadeesan* v. *Distt. Collector, North Arcot*, (1997) 4 SCC 508 : AIR 1997 SC 1197; *Maharashtra Ekta Hawkers Union* v. *Municipal Corpn., Greater Mumbai*, (2004) 1 SCC 625 : AIR 2004 SC 416; *Olga Tellis* v. *Bombay Municipal Corpn*., (1985) 3 SCC 545 : AIR 1986 SC 180.

49 *Maharashtra Ekta Hawkers Union* v. *Municipal Corpn., Greater Mumbai*, (2004) 1 SCC 625 : AIR 2004 SC 416; *Olga Tellis* v. *Bombay Municipal Corpn*., (1985) 3 SCC 545 : AIR 1986 SC 180; *Sodan Singh* v. *New Delhi Municipal Committee*, (1989) 4 SCC 155 : AIR 1989 SC 1988; *Bombay Hawkers' Union* v. *Bombay Municipal Corpn.*, (1985) 3 SCC 528 : AIR 1985 SC 1206; *M.A. Pal Mohammed* v. *R.K. Sadarangani*, 1984 SCC OnLine Mad 147 : AIR 1985 Mad 23.

50 *South Calcutta Hawkers' Assn.* v. *State of W.B.*, 1996 SCC OnLine Cal 388 : AIR 1997 Cal 234 (240); *Self-Employed Workers Org.* v. *Municipal Corpn.*, 2003 SCC OnLine Guj 85 **:** AIR 2003 Guj 317.

In the present case, street hawkers are being denied their fundamental right to by the *Bombay Prevention of Begging Act* as the *Act* penalises them for hawking. Hence it inarguably deserves to be struck down.

4.9. The Act is in contravention with Article 14 of the Constitution

Article 14 strikes at arbitrariness.[51] In *K.A. Abbas* v. *Union of India*[52], it was held that an act may be declared unconstitutional on the ground of vagueness. The definition of "begging" under clauses (a) and (d) of Section 2(1)(i) make a whole array of poor people vulnerable to arrest and lodgment in the custodial institutions designated for beggars. Section 2(1)(i)(d) of the *Act* states that "Begging" means "having no visible means of subsistence and wandering, about or remaining in any public place in such condition or manner, as makes it likely that the person doing so exist soliciting or receiving alms". Furthermore, Section 2(1)(i)(a) states that "Begging" means "soliciting or receiving alms, in a public place whether or not under any pretence such as singing, dancing, fortune telling, performing or offering any article for sale". Such overbroad generalisation of definition confers unfettered powers to the executive and widens room for arbitrariness.

4.10. The Act violates Article 25 of the Constitution

Article 25 secures to all persons the freedom of conscience and the right to freely profess, practice and propagate religion.[53] In various religious sects in our country, begging for alms is an integral part of one's religious beliefs and practice, Thus, the*Act* which disallows begging and thus prevents a person from fulfilling his religious obligations is undoubtedly in contravention of Article 25.

4.11. Rights of Children

State laws on begging differ fundamentally in their approach towards the treatment of children found seeking alms. Under the Juvenile Justice (Care and Protection of Children) Act, 2015, children found begging are treated as victims in need of care and protection to be dealt with by child welfare committees. Some of the state laws, on the other hand, treat them as criminals who can be sent to an institution.[54]

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[51] Ibid.

[52] *K.A. Abbas* v. *Union of India,* (1970) 2 SCC 780 : AIR 1971 SC 481 : (1971) 2 SCR 446.

[53] *Ratilal Panachand Gandhi* v. *State of Bombay*, AIR 1954 SC 388; *Commr., Hindu Religious Endowments* v. *Lakshmindra Thirtha Swamiar of Shirur Mutt*, AIR 1954 SC 282; *Durgah Committee* v. *Syed Hussain Ali*, AIR 1961 SC 1402; *Rev. Stainislaus e* v. *State of M.P.*, 1974 SCC OnLine MP 16 **:** AIR 1975 MP 163.

[54] Retrieved from, <https://scroll.in/article/833471/in-many-indian-states-and-union-territories-you-can-be-arrested-just-for-looking-poor>, accessed on 12-3-2022 at 5 p.m.

4.12. Person with disabilities

A substantial percentage of people who are found begging are persons with disability, infirm or affected by illnesses such as leprosy. A provision found in most of these laws allows for indefinite detention in a certified institution of a person who is "blind, crippled or incurably helpless". The law does not define "incurable helplessness" and therefore such indefinite detention can be applied arbitrarily.[55]

5. CONCLUSION AND SUGGESTIONS

Begging is fertile ground for nuisance in our country and in the light of the conditions and circumstances prevalent in India, we cannot de-criminalize it completely. The Act apparently looks arbitrary but as it unfolds we derive the basic objects of the Act is actually to prevent the crime arising from 'Beggary' and to try to eradicate the crimes which have a nexus with such kinds of acts falling within the scope of begging. At the same time it doesn't ignore the prospects of rehabilitation and the importance of shelter to the beggars who are subjected to poverty.

Whatever may be the approach, one must realise that the key lies in balancing the interests of the two affected parties. If we consider a stakeholder analysis, there are two stakeholders in the issue of begging. One is the beggar, who is forced to beg out of necessity or duress; and on the other hand is the innocent pedestrian from whom a demand for alms is made by the beggar. Both these parties have rights which are often seemingly in conflict with each other. A beggar may, in the exercise of his right to solicit alms or his right to express himself, may cause harassment and nuisance to the innocent civilian from whom such a demand is made; and the state, in furtherance of its duty to protect the civilian's right, may curtail the beggar's only means to earn livelihood thus exposing him to further hardship where instead he should be protected by the State.

If we give unfettered rights to the beggar, then he will have no regard to the rights of the people. He will inappropriately touch them, cling on to them, showcase severed limbs and disease-infested body parts etc. to solicit alms from them. There will be uncontrolled nuisance running haywire in the streets. By doing this, he will also expose the public to dangerous public hazards and spread diseases. It will undoubtedly be a dreadful situation if such unrestricted freedoms were to be given to the beggars.

On the other hand, if the state acts blindly to protect the rights of the civilians against nuisance, there will be blatant violations of fundamental rights against the poor. The state will punish the poor for begging just to protect the

[55] Ibid.

civilians thus completely ignoring their rights leading to the criminalisation of the poor. Here we must understand that it is the State itself which has failed to provide for their subsistence. Their act of further criminalising them and exploiting them is nothing short of de-humanising them and a desperate attempt to cover up for their failure. Thus, the State must work to protect the rights of the beggars and take care of them.

Thus, the State must strive to strike a balance between the two seemingly conflicting interests. These two interests, in the real sense, are not conflicting. If the beggar has a means of living and to support himself, he shall not feel compelled to make desperate inappropriate attempts which cause nuisance. This can only happen as a result of a conscious and determined effort by the State. Also, if the State can regulate the activity of begging, then even the people do not mind giving alms. We must ensure that there is balance and harmony between the interests of these parties while formulating and implementing law on this matter. Only then can the true purpose of an anti-begging legislation in India be fulfilled.

RESILIENCE AND ADAPTATION: THE INSOLVENCY AND BANKRUPTCY CODE IN THE ERA OF COVID-19

*Parineeta Goswami**

1. INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (IBC) is a new code that was introduced by the Government of India in 2016. The basic purpose of IBC is to consolidate all previous insolvency and bankruptcy laws including the Companies Act for Corporate, Limited Liability Partnership, Individuals, Partnership Firms, and other Body Corporate. IBC is a major economic reform in our country India concerning preventing the risks of credit. This code changes the working and approach of Indian promoters and companies towards borrowings and debts. This Act changes the relationship between debtors and creditors. Earlier it was a 'Debtor in possession' now it is a 'Creditor in a control system'.

For so many years companies are facing losses year after year which results in a decrease in their total net worth. The main intention is to overcome the problem of Non-performing Assets or bad loans and to resolve insolvency in a time-bound manner i.e., 180 days. A maximum number of cases were resolved in the first two years, while some of them are in the last stage of resolution. Five years passed since the code was enacted. So many amendments were carried out by the government in the IBC code. Still, the code was facing many challenges in implementing the provisions.

No insolvency law can neglect the business since there can be no insolvency if there is no business. The main goals of the IBC, which are:

a. Resolution above liquidation, must be kept in mind while we examine the ordinance.

b. Maximization of Corporate Debtor Assets.

c. Advancing entrepreneurialism.

We must recognize that the IBC was created in such a way that it may address both positive and negative situations:

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a. If a firm or business entity is doing well, and

b. If a firm or business entity is not doing well.

The main goal of the code is to save the company's existence. Now, forcing businesses into liquidation results in premature liquidation and the realization of the enterprises' premature obligations. As a result, every effort must be made to prevent the firm from dying too soon, and the IBC must never be used as a weapon to do so. Everyone deserves a fair shot to survive, thus we must consider the firm's objectives and future.

2. WHETHER AMENDMENTS ARE PROSPECTIVE OR RETROSPECTIVE?

The question of whether amendments to a law are prospective or retrospective is a crucial one in legal contexts, The maintainability issue regarding applications that were submitted and were pending before the ordinance's publication is not addressed by the ordinance. However, the NCLT Chennai Bench was able to address this matter in the matter *of ArrowLine Organic Products (P) Ltd.* v. *Rockwell Industries Ltd.*[1], where it was upheld that "*the ordinance shall have retrospective applicability to all applications irrespective of their date u/s 7, 9 & 10 of IBC*". This means that the changes introduced by the ordinance would affect ongoing cases that were initiated before the ordinance was promulgated. However, the above interpretation stands contradictory to the order passed by the NCLT Kolkata in the matter of *Fesco India Ltd.* v. *Om Besco Rail Products Ltd*.[2] where it was upheld that *"the ordinance will not have retrospective applicability in the absence of a specific mention*". This interpretation suggests that the changes introduced by the ordinance would only apply to cases initiated after the ordinance's promulgation date.

The discrepancy in these interpretations arises from the absence of clarity within the ordinance itself regarding its applicability to pending cases. The primary factors influencing whether a legal amendment is applied retrospectively or prospectively are:

Legislative Intent: If the legislative intent is clear, it can provide guidance on whether the amendment should be applied retrospectively or prospectively. A specific mention of retrospective applicability or lack thereof in the ordinance can be a significant indicator of intent.

Interpretation of Courts: Courts play a crucial role in interpreting the intent of the legislature when it comes to retrospective or prospective

[1] 2020 SCC OnLine NCLT 8651.
[2] 2020 SCC OnLine NCLT 9254.

applications. In this case, different benches of the NCLT have provided different interpretations, adding to the confusion.

General Principles of Statutory Interpretation: In the absence of clear legislative intent, courts often resort to general principles of statutory interpretation, including looking at the purpose of the amendment and the potential unfairness or disruption it might cause to existing rights and obligations.

To address this issue and avoid conflicting interpretations, it may be necessary for the legislature to clarify whether the ordinance should have retrospective or prospective applicability. Until such clarification is provided, it is likely that further legal challenges and inconsistencies in interpretation may persist, potentially causing uncertainty and legal disputes in cases affected by the ordinance. Parties involved in such cases should seek legal counsel to understand how these conflicting interpretations may impact their specific situations and whether they should challenge the interpretation in their jurisdiction.

3. DIFFERENT SITUATIONS FOR INTERPRETATION

The post-COVID-19 landscape has brought about a set of complexities in the realm of financial defaults and insolvency proceedings. Three distinct situations have emerged, each likely to remain contentious points of debate as they navigate the legal and economic landscape. The three situations that are likely to happen and will remain a point of debate post-Covid-19 are:

3.1. Default accruing before 25th March 2020

The declaration related to this section specifically stores defaults made before March 25, 2020. As a result, breaches that occur before March 25, 2020, and implicitly those that occur after the conclusion of the six-month or extended term, are not subject to the conditions established by Article 10A for filing insolvency applications. However, there are some contextual restrictions on the submission of such claims for default that start during this time starting on March 25, 2020, and last until the conclusion of six months or the extended period. The clause in Article 10A provides more justification for this stance. This exemption's justification is based on the notion that the pandemic's extraordinary conditions did not have an impact on the defaults in question.

3.2. Default accruing during the suspension period

For defaults that arose during the suspension period, which spans from March 25, 2020, to the end of the six months or any extended period, a more nuanced context comes into play. The provisions outlined in Article 10A of the

legislation further elaborate on this situation. However, it is essential to note that not all defaults occurring within this timeframe are treated equally. Therefore, in contravention of this decision, any unresolved claims arising from such faults that were also presented between March 26, 2020, and June 5, 2020, shall be legally denied. As it affects any ongoing claims submitted between March 25, 2020, and June 5, 2020, this order is practically retroactive.

3.3. Default accruing beyond the suspension period

According to the modification, if a corporate debtor's default amount reaches Rs. 1 Crore, bankruptcy procedures may be started against them. With this modification, a minimum financial requirement is set for the start of insolvency proceedings. No application may be submitted for the same in circumstances when the default amount is less than the prescribed amount. Since they won't be able to collect the amount that debtors owe them, certain financial creditors would suffer losses because of this.

Until the dispute is resolved by the adjudicating authorities, all three of the possibilities will be the subject of litigation. The situations have complex implications for creditors, debtors, and the legal framework surrounding insolvency proceedings. They present a unique set of challenges and ambiguities that are likely to fuel debates and legal disputes until they are clarified and resolved by adjudicating authorities. The key point of contention lies in balancing the interests of creditors seeking to recover their debts with the need to provide relief to debtors impacted by the exceptional circumstances brought about by the COVID-19 pandemic.

4. MEASURES RELATING TO THE INSOLVENCY CODE

Considering the economic upheaval on account of the COVID-19 pandemic and the resultant restrictions on economic activity, the Indian Government announced[3]the possibility of suspension of the right to initiate insolvency resolution proceedings against corporate debtors[4] under the Insolvency and Bankruptcy Code, 2016 (the Insolvency Code) on March 24, 2020, and May 17, 2020. The anticipated 7.7% decline in India's GDP for the fiscal year 2020–2021. The Indian government and Reserve Bank of India (RBI) have outlined several initiatives to assist businesses in coping with this disruption. Although this action was finally put into effect on June 5, 2020, the government introduced a few additional Insolvency Code-related measures in the interim.

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[3] The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 No. 9 of 2020, available at <https://ibbi.gov.in//uploads/legalframwork/741059f0d8777f311ec76332 ced1e9cf.pdf>.

[4] Unless specified otherwise, this post discusses insolvency proceedings in respect of corporate debtors.

4.1. Increases in Payment Default Threshold

As per a notice[5] dated March 24, 2020, the threshold for initiating insolvency resolution processes under the Insolvency Code. was increased from INR 1 lakh to INR 1 crore, this change is necessary to help micro, small, and medium-sized businesses (MSMEs), and corporate debtors are also happy about it because the previous maximum of INR 1 lakh was quite low. Contrary to the suspension of insolvency procedures shown below, this action has no end date, meaning that the notification does not limit the application of the raised threshold to the period surrounding the pandemic or any other time.

4.2. Exclusion of Lockdown Period from Timelines

According to a statement from the Indian government, defaults that happened between March 25th, 2020, and March 25th, 2021 cannot be used as the basis for starting insolvency proceedings under the Insolvency and Bankruptcy Code, 2016. Additionally, the Government declared that even for failures that happened earlier than this time frame, insolvency procedures under the IBC could not be initiated unless a default of at least INR 1 crore had occurred (up from INR 1 lakh previously). These steps were taken primarily to avoid situations where enterprises would be compelled to declare bankruptcy or default due to short-term problems that could only be attributed to COVID-19. This is especially crucial in the context of IBC bankruptcy proceedings because those proceedings include a change of control and frequently prohibit current management or promoters from presenting resolution solutions to alleviate the company's distress. Given the state of the global macroeconomic environment, there were worries that third-party resolution applicants would be scarce and that many enterprises would be forced into liquidation despite having a good chance of being salvaged. Recourse to insolvency proceedings under the IBC may have also been suspended to "flatten the bankruptcy curve" and spare the National Company Law Tribunals (NCLT), which were already dealing with capacity and infrastructure issues, from having to handle a large number of applications for the start of insolvency proceedings, especially since they were only able to hear urgent cases due to COVID-19-related limitations. Additionally, the Government and courts took several steps to guarantee that the IBC's timelines were loosened operationally. The strict requirement to complete CIRP within 330 days was also relaxed by an order of the National Company Law Appellate Tribunal[6], while the requirements to take various steps in CIRP and liquidation processes within stipulated timelines were eased by regulatory changes.

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[5] Ministry of Corporate Affairs Notification, New Delhi, The24-3-2020, available at <https://ibclaw.in/wp-content/uploads/2020/03/Sec.-4-of-IBC.pdf>.

[6] LSI-485-NCLAT-2020 (NDEL).

Guidelines under the Insolvency Code were updated in March–April 2020 to clarify that a lockdown would not prevent any activity from continuing under the CIRP or liquidation process, as applicable. The National Company Law Appellate Tribunal (NCLAT) made a request dated 30 March 2020, according to which the time of lockdown was needed to be barred from such legal period regarding situations where the CIRP was forthcoming. However, this revision did not extend the legal course of events of 180 days (which could be stretched out to as long as 270 days) for the fruition of the CIRP determined under Section 12 of the Insolvency Code. These actions had a result. Compared to the 1517 CIRPs started between April and December 2019, only 283 CIRPs were started between April and December 2020.

The RBI announced a special resolution plan for COVID-19 defaults on August 6, 2020, even though there were no available insolvency procedures. This plan allowed for a straightforward restructuring with current management and classification of accounts as standard, including by extending the remaining loan's term by 2 years with or without the moratorium. There was criticism of this framework since many businesses were not eligible for this program and that the financial standards for plans recognized under this program were seen as being overly stringent.

The RBI had made steps to guarantee that this framework would be an improvement over the traditional resolution structure, where holdout problems were common, but there were still certain flaws, such as its inability to bind creditors that were not under RBI regulation. Due to this, a framework was still required to enable complete resolution of troubled enterprises who were unable to access the RBI special resolution framework.

By introducing guidelines 47A and 40C, the Insolvency and Bankruptcy Board of India (IBBI) ensures that the public shutdown time won't be used as justification for taking any action under their respective guidelines. It will ensure that further defaults are not meaningless. This action would also ensure that the NCLT isn't swamped with procedural requests for additions or even approval of postponements in meeting schedules. It provides a substantial benefit to businesses.

4.3. Suspension of Insolvency Proceedings

In a bid to stay away from organizations everywhere from being constrained into insolvency procedures as organizations get affected because of COVID-19, the public authority is getting ready to present another clause 10A, under section 10 of the code. A law would be proclaimed to suspend Sections 7, 9, and 10 of the IBC for a half year and the suspension time can be reached as long as 1 year.

In any case, IBC suspension will hurt the obligation rebuilding measure. IBC gives the most suitable choice to obligation rebuilding of focused on firms. Rather than suspending the Code, the public authority ought to revise it reasonably. Obligation rebuilding would be especially important after the Covid-19 emergency.

Right now, Indian law gives 3 courses to debt rebuilding. To begin with, the RBI's June 7 Circular, gives an out-of-court rebuilding choice. Second, the IBC, could be utilized for rebuilding under the aegis of the NCLT. Third, a plan of course of action under the Companies Act, 2013, which is not, really utilized practically speaking. Furthermore, presently with the IBC due to be suspended, the solitary alternative for all intents and purposes left is the RBI Circular.

The Circular applies just to RBI-directed lenders. The IBC doesn't experience the ill effects of any such restrictions. It applies to all petitioners of the corporate borrower, including moneylenders, if directed by the RBI. This gives a considerably more comprehensive rebuilding system contrasted with the Circular. In addition, IBC gives a legal ban on recuperation activities to all petitioners. This guarantees each leaser that no other bank can take part in a resource get-to race during the rebuilding.

According to this new clause, no application under sections 7, 9, or 10 of the IBC may be made against a corporate debtor for any default that occurred on or after March 25, 2020. Additionally, the new legislation contains a clause that specifies that "no application shall ever be filed against a corporate debtor during this period, i.e., from March 25, 2020, until the suspended period. The regulation also stipulates that any application made against a corporate debtor before the time of March 25, 2020, must be deemed maintainable to avoid any misunderstandings. Although the ordinance plays a significant part in protecting India's economy from any type of domino effect brought on by force majeure disasters, it leaves room for diverse interpretations of a lot of issues at hand.

On June 5, 2020, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020[7](the "Insolvency Ordinance) became effective.The Insolvency Ordinance changed Section 66 of the Insolvency Code (Fraudulent Trading or Wrongful Trading) and added a new Section 10A (Suspension of Initiation of Corporate Insolvency Resolution Process) to the Insolvency Code.[8]Applications under Sections 7, 9, and 10 of the Insolvency Code (made by financial creditors, operational creditors, and corporate debtors themselves) for the start of CIRP of

[7] The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 No. 9 of 2020, available at <https://ibbi.gov.in//uploads/legalframwork/741059f0d8777f3c11ec76332 ced1e9cf.pdf>.

[8] Under Article 123 of the Constitution, "an ordinance will be on par with an Act of the Parliament and will cease to operate upon the expiry of six (6) weeks from the date of reassembly of the Parliament unless it is approved by the Parliament. An ordinance will cease to operate earlier if both Houses of the Parliament pass resolutions disapproving the ordinance or if it is withdrawn by the President".

a corporate indebted person are prohibited under Section 10A of the Insolvency Code for defaults that occur within the six-month window starting on March 25, 2020, and lasting up to one year (Restricted Period), which may be extended. Additionally, Section 10A of the Insolvency Code prohibits corporate borrowers from making petitions for the start of CIRP with respect to any such default in perpetuity. Notwithstanding, Section 10A of the Insolvency Code won't be appropriate regarding defaults submitted by the corporate debt holder before March 25, 2020.

4.4. Some Winning Bidders look to wriggle out.

Resolutions under IBC may get extreme after the beginning of the COVID-19 emergency as brokers dread winning bidders will audit their premium in bankrupt organizations and rework offers or pull out altogether. Presently, a tight income or cash flow condition is going on in the country, this tight liquidity condition will affect the focused-on firms' worth maximization, prompting a decrease in the quantity of intrigued bidders for these resources. Financiers currently dread that many winning bidders will summon the material antagonistic impact conditions to bring down the value they are paying to purchase organizations.

4.5. Suspension of Liability for Wrongful Trading

Under Section 66(2) of the Insolvency Code, during the CIRP of a corporate borrower and upon an application recorded by the resolution proficient with the significant NCLT, the director or partner knew (in the event of a limited liability partnership) of the corporate account holder can be requested to actually add to the corporate indebted person's resources if the director or partner knew or should have realized that there was no sensible possibility of keeping away from CIRP and didn't practice due to perseverance to limit expected misfortunes to creditors. The Insolvency Ordinance presently embeds sub-section (3) to Section 66 of the Insolvency Code, which forbids making any applications under Section 66(2) regarding any default for which the commencement of CIRP has been suspended under Section 10A.

4.6. Special Insolvency Framework for MSMEs

The RBI provided banks the choice of offering a six-month deferral on loan repayment and maintaining account asset classifications. This made sure that banks wouldn't take coercive measures in response to defaults brought on by COVID-19, a step essential for both small enterprises and individual borrowers to survive. According to the RBI's Report on Trends and Progress of Banking in India, as of August 31st, 2020, consumers who were responsible for 40% of

outstanding bank loans have taken advantage of this moratorium, with MSMEs accounting for as many as 78% of those who did.

On May 17, 2020, the Indian Government declared[9] the introduction of a unique insolvency structure for MSMEs – this is still awaited.[10]

There is no uncertainty that the new changes to the Insolvency Code, taken along with the ban and different measures declared by the RBI, will give some help to stressed organizations. Notwithstanding, the Insolvency Ordinance likewise stretches out to voluntary commencement of insolvency under Section 10 of the Insolvency Code. Section 10 gives that where a corporate entity has submitted a default, it may record an application for starting insolvency subject to specific conditions. While Section 10 is composed as a right, it is more like a commitment in specific cases considering Section 66(2) of the Insolvency Code, which accommodates unfair exchange. Given that the activity of Section 66(2) has been suspended, Section 10 ought to have been allowed to keep on excess in power, especially given that it requires an investors' resolution by 75% vote, The CIRP welcomes examination of the organization's previous dealings, incorporating with related parties, and the CIRP could bring about an adjustment of possession and the executives. It would then keep on leftover open for a corporate substance to make an educated evaluation that it can't proceed as a going concern and to start insolvency procedures under Section 10 on that premise, without a commitment under Section 66(2) to do so. Protecting this capacity for a corporate entity to voluntarily choose to start an insolvency procedure in any event, during any transitory period would be significant for a productive market. A sweeping preclusion on commencement of the CIRP in regard to defaults emerging during the 'Restricted Period' represents some danger of abuse – e.g., a few organizations may decide to default on operational instalments during the ' Restricted Period' regardless of whether they can pay since operational creditors could never have a plan of action to the Insolvency Code in regard of such default, even after the pandemic dies down, and they would likewise not be qualified to utilize the RBI's instruments which are accessible to banks and monetary establishments. The suspension of Section 66(2) of the Insolvency Code may likewise be liable to abuse. Notwithstanding, it is significant that there is no unwinding to directors' fiduciary duties (Section 166 of the Companies Act, 2013) or the arrangement regarding deceitful exchanging (Section 66(1) of the Insolvency Code)) so that suitable checks stay set up.

Further, the above measures are centered principally around new insolvency procedures, be that as it may, the pandemic essentially affects continuous

[9] M S Sahoo, Chairman, Insolvency and Bankruptcy Board of India, if banks are interested in recovery, Insolvency and Bankruptcy Code is not an option, available at <https://www.ibbi.gov.in/uploads/resources/70fcd5225f17f6a85ab362 bec76e0798.pdf>.

[10] Also, in the 5th Press Conference on 17-03-2020, "the Finance Minister indicated that to protect the MSMEs a new framework for MSMEs will be notified under Section 240-A of the IBC".

insolvency procedures. For instance, the NCLT and the NCLAT have been hearing pressing issue through videoconferencing, in any case, this has created setbacks for forthcoming insolvency procedures; and the presumptions and valuations in resolution plans submitted preceding the pandemic may not be fitting in the current conditions.

Lenders, debt investors and borrowers will currently have to consider elective out-of-court authorization/rebuilding choices, for example, under the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019[11] (RBI Directions) and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002,[12] (SARFAESI Act) or in-court restructuring through plans under Sections 230–232 of the Companies Act, 2013. On August 6, 2020, the RBI announced[13] that a window would be given under the RBI Directions to empower moneylenders to execute a resolution plan in regard of qualified corporate openings, without an adjustment of proprietorship, just as close to home credits, while arranging such openings as standard resources, subject to indicated conditions. It is not yet clear whether partners will utilize these instruments viably without reducing esteem or if courts will be immersed with insolvency resolution procedures regarding earlier defaults and defaults happening after the expiry of the 'Restricted Period'. In these conditions, a more prominent spotlight is needed on improving the adequacy of existing out-of-court and in-court rebuilding systems and acquainting new instruments with safeguard esteem, for example, the pre-bundled insolvency resolution measure, which would give legal endorsement to a commonly concurred resolution plan in a financially savvy way.

4.7. Difficult to disburse interim funds to IBC Firms

To keep businesses operating, Resolution Professionals must deal with limited liquidity constraints. The only option left to them at that point is to seek out lenders for interim financing. Since recovery would be a major worry, it is difficult for any bank to provide interim financing to the stressed companies who are through an insolvency resolution step in the current tight income environment.

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[11] The Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019, RBI Circular: RBI/2018-19/ 203 DBR.No.BP.BC.45/21.04.048/2018-19 7-6-2019, available at <>.

[12] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), available at <http://www.drat.tn.nic.in/Docu/Securitisation-Act.pdf>.

[13] Resolution Framework for Covid-19Related Stress, RBI/2020-21/16, DOR.No.BP.BC/3/21.04.048/2020-2,availableat <https://www.rbi.org.in/scripts/Notification User.aspx?Id=11941&Mode=0>.

5. EXPECTATIONS OF IBC 2.0

The standard IBC would have taken effect and "push many viable firms under liquidation" if there had not been such an ordinance.[14] In this context, it was appreciated that the suspension period for the start of IBC proceedings ended on March 25, 2021. For starters, even though it is still unclear whether insolvency proceedings under the IBC can be started for defaults that started during the suspension period and persisted after March 25, 2021, there was a belief that IBC activity would at the very least increase because of the NCLT's decision to resume physical hearings. [15]

IBC has currently prevented "many viable firms from going into liquidation" when it is not in effect. Therefore, in the first case, if you liquidate a viable company, it will no longer exist, and that error cannot be corrected. On the other hand, if you are unable to liquidate a viable corporation for a specific period in the second case, that error can be corrected. To avoid the liquidation of sustainable businesses, it is crucial to raise the barriers in the insolvency procedure.

Some important issues that had been pending resolution were resolved thanks to the development of jurisprudence over the previous year on topics including limitation periods, the importance of the committee of creditors' commercial judgment under the IBC, and the binding nature of a resolution plan. There was also a perception that resolution under the IBC would eventually take less time due to the increased legal clarity.[16]

This new round of effort was anticipated to result in new government facilitation that would further stabilize the IBC regime. It was anticipated that the government would step in to ease the approval process for resolution plans, offer more guidance on how to put resolution plans into action, and establish the long-awaited group insolvency and cross-border insolvency legislation.

To further address the suffering of MSMEs, the government also unveiled a special pre-packaged insolvency resolution process (PPIRP) at the beginning of this year. A "base plan" may be negotiated with creditors by MSME debtors who have incurred defaults of at least INR 10 lakh and qualify for the PPIRP under this new system. The MSME may approach the NCLT to start the

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[14] "Impact of the 2021 Amendment on Corporate Insolvency Resolution in Indiaby Author A. Journal of Insolvency and Bankruptcy Law, (2021), Anurag Singh and Harsha Menon, available at <https://articles.manupatra.com/article-details/insolvency-and-bankruptcy-code-amendment-act-2021-critical-analysis>.

[15] "Analysing the Impact of the Insolvency and Bankruptcy Code (Amendment) Act, 2021 on Operational Creditors", B. Indian Journal of Business Law, (2022), available at <https://www.akmllp.com/lawyers-of-tomorrow/analysis-of-insolvency-and-bankruptcy-code-amendment-ordinance-2021/>.

[16] Economic Consequences of the IBC Amendment 2021: A Quantitative Study", Economic & Political Weekly, Vol. 53, Issue 19, 12-5-2018, available at <https://www.epw.in/tags/insolvency-and-bankruptcy-code>.

procedure after 75% of its members and 66% of its unrelated financial creditors support the proposal to launch PPIRP. A limited moratorium is declared when a PPIRP has been started, and a Resolution Professional is chosen to lead the procedure. The pre-existing management continues to run the business during a PPIRP, but under the watchful eye of the Committee of Creditors (CoC). A list of claims submitted by the debtor serves as the foundation for the CoC itself. The Debtor shall also deliver the Negotiated Base Plan and a Preliminary Information Memorandum with all information necessary to prepare a Resolution Plan. The basic plan may either be approved by the CoC, or additional proposals may be invited to contest it. A plan is deemed accepted and presented to the NCLT if it receives not less than 66% approval from the CoC. A PPIRP must be finished within 120 days of its start date. An application for termination of the PPIRP may be submitted to the NCLT if the PPIRP is not completed within the required time frame or if the CoC rejects any plan. In most cases, the PPIRP would not result in the liquidation of the debtor, but it occasionally does when the management is unreasonable, or a resolution plan is broken. This increased hopes that IBC activity would expand in the MSME sector.[17]

6. CRITICAL ANALYSIS

Stakeholders may not be able to continue commercial activity, including restructuring activity, both inside and outside of IBC until infection rates fall because of the human cost of this current COVID-19 wave. Given this, it is necessary to implement emergency operational steps to shorten the duration of existing IBC insolvency proceedings. This will prevent businesses from going out of business and actors from being punished for being unable to perform due to state lockdowns and/or COVID-19.

If COVID-19-related limitations are not loosened by governments to stop another wave, we may continue to observe a decline in economic activity in the medium term, even after infection rates stabilize. In this case, the government would be wise to provide financial assistance to struggling industries, especially the retail and hospitality industries. The development of funds to give grants and liquidity support to prevent job loss and stimulate reconstruction, particularly in key industries, should be considered by the government.[18]

Additionally, reorganization efforts, including those made under the IBC, shouldn't be stopped entirely. Consensual restructuring should be emphasized more instead. The new PPIRP framework should be used to its fullest extent

[17] "Challenges and Criticisms of the 2021 IBC Amendment: A Stakeholder Perspective", E. Journal of Corporate Finance and Insolvency, available at <https://ibbi.gov.in/uploads/whatsnew/b5fba368fbd5c5817333f95fbb0d48bb.pdf>.

[18] "Policy Recommendations for Strengthening the IBC Post-2021 Amendment", IBC Evolution, Learnings and Innovation, available at <https://ibbi.gov.in/uploads/whatsnew/ 525cbe1dd3b1f9fd9866fe77676a96ae.pdf>.

by participants. Banks and insolvency specialists ought to set up SOPs and get ready to apply this. For its part, the government ought to think about extending the PPIRP to non-MSME businesses as well. In addition, the PPIRP should be modified appropriately to permit out-of-court admissions, resulting in a moratorium for at least a brief period, so that NCLTs are not overloaded with applications, especially given that their activity is likely to be curtailed. The requirement to perform Swiss Challenge may also be relaxed by the government in any circumstances when statutory creditor dues are not fully satisfied, provided that other operational creditors are also satisfied. Certain relaxations to Section 29A, which forbids pre-existing promoters and management from submitting resolution plans, should be taken into consideration even where a typical CIRP is begun. The RBI could also think about lowering some asset classification restrictions for such restructuring in the IBC to make it easier for lenders to restructure with current promoters.

Participants ought to try out-of-court restructuring and one-time settlements as well. The RBI could enable such an out-of-court restructuring by establishing a new scheme similar to the August 6th scheme with potentially more inclusive parameters, even if it is doubtful that another loan moratorium will be issued by the RBI.

Additionally, even if COVID-19 would have an impact on domestic firms and enterprises, global trade is going up as immunization rates rise. More foreign investment should be attracted in light of this, especially to lessen misery. One tool that can entice foreign investors to partner with the debtor to buy shares is the PPIRP. By giving more choices for resolution within the CIRP, this foreign investment might be recruited. For example, it might be made clear that "turnaround and sell" resolution plans might be suggested.[19] Additionally, outside of the IBC, foreign investment in stressed loans may be enticed by establishing a more lenient framework for the sale of credit risks or by going the bad bank route.

The government must also make sure that the industry receives the facilitations that were anticipated by them in the growth scenario a few months ago. For instance, platforms to expedite the receiving of government clearances for the implementation of plans should be developed, as well as legislation to address difficulties with cross-border and group insolvency. In a similar manner, it should keep investing in resources to increase the NCLTs' capacity, not just by adding benches but also by upgrading their virtual hearing and case management technologies.

These adjustments will be necessary to guarantee that the IBC continues to be successful in alleviating economic misery. In a period of unparalleled crisis and unpredictability on all fronts, the government is putting policies in

[19] Case Study: The Impact of the 2021 IBC, available at <https://www.iiipicai.in/wpcontent/uploads/2021/11/CASE-STUDY-of-Successfull-Resolutions-Under-IBC.pdf>.

place to prevent additional stress. However, sector participants should also work together to assure the success of government initiatives.

7. CONCLUSION & SUGGESTIONS

In a global business environment marked by a widespread economic slowdown, the provisions discussed herein offer a lifeline to struggling businesses. It's important to acknowledge that the impact of the pandemic extends beyond mere economic consequences, affecting both social life and human well-being. Imagine a scenario in which there are no provisions for temporary relief, no avenues for resolution, and only a path leading to liquidation – an utterly bleak prospect. This situation poses a critical dilemma, where we find ourselves at the intersection of Health Crisis versus Financial Crisis, and Livelihood versus Life.

At this juncture, the foremost consideration should be the value of enterprises and their preservation. We must ask ourselves, "Are we committed to preserving the value, or are we merely focused on obtaining a price?" In the author's view, the ordinance represents the correct course of action. In a time when ambiguity pervades our surroundings, it is imperative to shield entities from being thrust into liquidation, thereby allowing the resolution objective to be fulfilled.

It is worth noting that the current circumstances have necessitated substantial changes in the insolvency system to safeguard the interests of affected organizations. However, it is equally important to recognize that some of these changes have generated considerable debate due to the uncertainty surrounding their implementation.

Moreover, it remains unclear why, if the government's objective was to aid MSMEs, the alterations did not specifically address Section 240A of the Code. The introduction of a separate framework for MSMEs while excluding non-MSMEs raises questions. Additionally, there is a lack of clarity regarding the duration of these measures. The government has labeled them as temporary, but their permanence or discontinuation in the future remains uncertain.

Nevertheless, it is crucial to acknowledge that the government's proactive stance in implementing these changes sets it apart from other jurisdictions. Furthermore, it is equally vital to recognize that the role of courts and adjudicating authorities will be pivotal in addressing the various ambiguities these mandates have introduced.

Recognizing the urgency of the situation, the author proposes additional measures for the government's consideration:

a. Increase the number of NCLT benches to handle the rising caseload effectively.

b. Allow for amendments to resolution plans after their submission. Given the current circumstances, the impact of COVID-19 may lead to adjustments in the proposed haircut amounts. Hence, the CoC should have the flexibility to reassess and submit revised plans.

c. Temporarily raise the IBC threshold limit from Rs. 1 lakh to Rs. 1 crore. This change should only be temporary, as making it permanent could create confusion among small operational creditors, MSMEs, etc., who may not be able to initiate insolvency proceedings due to the higher threshold.

d. Extend the period specified in Section 29A(c) of the IBC, which concerns the eligibility of corporate borrowers' promoters, from one year to two years, in response to the current circumstances. This extension would provide genuine promoters with a better opportunity to revive their companies.

e. Reduce the requirement for 90% of the CoC's approval under Section 12A of the Code to exit the insolvency process, thereby restoring control to the promoter. This threshold should be lowered to 75% of the committee.

f. Amend Section 30(4) of the Code and increase the requirement for approval of a resolution plan by financial creditors from 66% to 75%.

g. These proposed measures aim to strike a balance between preserving businesses and protecting the interests of stakeholders, particularly considering the ongoing challenges posed by the pandemic.

THE ROLE OF TECHNOLOGY SHARING AND TEMPORARY PATENT WAIVER IN TIMES OF COVID19 - A MULTI-LAYERED CONCEPT

Simrean Bajwa[*]

1. INTRODUCTION

The ongoing pandemic has rekindled a long-running conflict of intersection between intellectual property (IP) law and public policy.[1] Much of the clatter is the result of divided opinion on the patentability of COVID-19 vaccines.[2] The pharmaceutical manufacturers have been shuffling around the clock trying to figure out ways to diagnose, treat and contain the spread of coronavirus. The magnitude of waves of suffering and loss that COVID-19 has produced, has been felt by governments and the state machineries across the globe. IP rights rewards the holder with exclusive monopoly over that IP which in turn encourages innovation and technological developments.

However, there is more to it than meets the eye, this IP protection limits developing and developed countries access to critical medicinal drugs and health care system. Many factors attribute to this, namely, vaccine hoarding, lack of infrastructure, low per capita income, deteriorating to non-existent health care system facilities, being few worth mentioning. Balancing these two opposing interests becomes ever so critical where the policy makers across the world find themselves in a tight spot trying to tread on a narrow path where one small mistake can have repercussions for the future generations to come.

Following the first report of a coronavirus disease outbreak (COVID-19) in the Chinese city of Wuhan in December 2019, and the WHO's declaration of COVID-19 as a global pandemic three months later, there has been a

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[*] The applicant is a gold medallist specialising in IPR (LLM) from NLU Jodhpur, 2021-22.

[1] Nafsika Karavida et al.,"Patent Rights and Wrongs in the COVID-19 Pandemic:EU and U.S. ApproachestoCompulsoryLicensing",*IPWatchdog*,available at <https://www.ipwatchdog.com/2020/05/19/patent-rights-wrongs-covid-19-pandemic-eu-u-s-approaches-compulsory-licensing/id=121709/> (last accessed on 11-2-2022, 9.29 p.m.).

[2] Thomas Kaplan et al., "Taking 'Extraordinary Measures," Biden Backs Suspending Patents on Vaccines", *The New York Times*,available at<https://www.nytimes.com/2021/05/05/us/ politics/biden-covid-vaccine-patents.html> (last accessed on 11-2-2022, 10.05 p.m.).

surge in the total number of confirmed cases reported globally to over 552 million, with the pandemic claiming over 6 million lives worldwide.[3]

With the evolution of coronavirus into new deadlier variants claiming millions of lives, it becomes pertinent to ensure timely access to medical equipment and vaccines in sufficient quantities until herd immunity is reached across the globe.[4] One of the major setback of having a patent regime system as an instrument of managing response to pandemic crisis is the rapid speed of reproduction and mutation amongst these bacteria and viruses being remarkable, making the health care system unresponsive and often times redundant to cope up with the evolutionary framework. Vaccine, like any other commercially useful item, is a private good in terms of trade and commerce. The global pandemic crisis poses a challenge to timely supply of this private good efficiently and in adequate quantity, across the global community, to contain spread of the virus. The author through this paper examines the need to equipoise the competing interests of IP owners versus the need for temporary patent waiver, technology sharing and its many facets, as the pandemic continues to exacerbate the existing inequalities.

The first segment deals with the foundational understanding of patents and the argument put forth in the favour of the existing default patent regimes. In the second segment a long drawn history of pandemic outbreaks that the mankind has faced up until now are categorically mentioned where the dice rolled in the favour of humanity, and further the reasons of vaccine shortage are examined. In the third segment, the paper throws light at the opposition met by the first proposal of temporary waiver of IP rights tabled by India and South Africa and later the Biden Administration's announcement of policy reversal on its long-standing support for the pharmaceutical industry sector. The role of technology transfer and other factors to ramp up the vaccine roll out across the world is discussed in the fourth segment. The author in the fifth segment strives to look for a more feasible and workable approach towards dealing with the current situation at hand.

Lastly, the author attempts to explore other viable alternatives along with temporary waiver of IP rights that can facilitate cross border equitable distribution of vaccines and other medicinal drugs while emphasising the need for constructive dialogue between the governments and the private player in order to put an end to this menace.

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[3] WHO Coronavirus (Covid-19) Dashboard, available at, <https://covid19.who.int/> (last accessed on10-7-2022).

[4] MSF,"Countries Obstructing Covid-19 Patent Waiver must allow Negotiations to Start",available at <https://www.msf.org/countries-obstructing-covid-19-patent-waiver-must-allow-negotiations> (last accessed on4-2-2022, 10.07 a.m.).

2. PATENTS AND IP RIGHTS

World Intellectual Property Organization (WIPO) defines patent as:[5]

> The exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to the problem.

IP protection rewards the holder for the fruits of his intensive research, labour, time, and effort by giving him the exclusive rights over that IP. This in turn encourages breakthrough technological innovations that keeps astonishing the human civilisation with every passing day.

Under Article 27.1 of the TRIPS Agreement[6],

> Patent protection is available on both products as well process inventions as long as they fulfil the triple test criteria of patentability, namely, novelty, inventiveness, and industrial applicability.

Product patent rule reflects the untapped potential of the global pharmaceutical business which was possible when the IPC (Intellectual Property Committee) and the FLG (Financial Leaders Group) lobbied hard throughout talks to benefit a few global private players.[7] The patent protection regime provides a comprehensive and uniform framework of protection across the member nations, reaching far deep into the domestic regulatory environment of member states, which lays the premise of the market for the inventions.[8]

While the pharmaceutical sector agents and manufacturers, on the one hand, emphasise the importance of current system of patent regime for stimulating research and development (R&D) and that a waiver in current state will jeopardise future innovation,[9] on the other hand, the exorbitant prices charged for patented drugs and medicines impedes the access of medical healthcare benefits across nations and is often criticised for being insensitive during the period of exigencies. This topic has been a bone of contention since the very inception, and in 2001 the Doha Declaration[10] came as a ray of hope affirming certain flexibilities

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5 What is a Patent?, available at <https://www.wipo.int/patents/en/> (last accessed on6-2-2022).

6 Agreement on Trade-Related Aspects of Intellectual Property Rights, 15-4-1994, Marrakesh Agreement Establishing the World Trade Organization,Annex 1-C,1869 UNTS 299, 33 ILM 1197 (1994) (hereinafter "TRIPS Agreement").

7 Sell, Susan K., and Susan K. Sell, "*Private Power, Public Law: The Globalization of Intellectual Property Rights*" Vol. 88 (Cambridge University Press, 2003).

8 Spulber, D.F., How Patents Provide the Foundation of the Market for Inventions, J. Competition Law Econ, 11(2), pp. 271-316 (2015).

9 F. Tigere, *The WTO and Africa: The State of Play and Key Priorities Going Forward* (2021).

10 DOHA WTO Ministerial 2001:TRIPS "Declaration on the TRIPS Agreement and Public Health", adoptedon14-11-2001,WT/MIN(01)/Dec/2/,available at , <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> (last accessed on6-2-2021).

for TRIPS member states in circumventing patent rights to protect public health and to ensure access to essential medicines.[11]

However, invoking compulsory license to increase the supply of vaccine is easy said than done because of the external pressure from the developed countries. There is a lack of will amongst the developed nation, given the pharmaceutical sector of a nation dictates its policy considerations. The classic counter argument that such relaxations and flexibilities will dampen the will of the IP holders to invest time and incur cost on an invention leading to a stagnant situation in the field of science and technology guarantees continuation of the existing IP regimes.

3. HISTORY OF PATENTS AND PANDEMICS

Throughout the three decades of patent and pandemic history, patents have been utilised as a lever in the hands of a few private players to commodify human suffering and deepen existing societal imbalances.[12] The ramifications of patenting vaccines comes at a heavy cost of loss of human lives at a horrific scale, particularly the underprivileged section of the society who are unable to afford the vaccine. However solely blaming the IP holders as the scape goat renders an incomplete picture.

An classic example to elucidate on this point is the impressive amount of public funding that led Jonas Salk to decline the patent on polio vaccine, indicating how it is a two way process.[13] Prior to COVID-19, the 21st century has witnessed five clear instances of pandemic outbreak, namely SARS (Severe Acute Respiratory Syndrome) H5N1 (Avian Influenza), H1N1 (Swine Flu), MERS (Middle East Respiratory Syndrome) and Ebola.[14]

In the present context, one of the underlying reasons for shortage of COVID-19 related vaccines can be attributed to the stockpiling of vaccines by the developed countries directly from the vaccine manufactures by striking limited commercial deals leading to unfair allocation of vaccines and essential drugs. Further, bottleneck in the supply chains has been identified as another factor

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[11] Islam, M.D., Kaplan, W.A., Trachtenberg, D., Thrasher, R., Gallagher, K.P. and Wirtz, V.J., "Impacts of Intellectual Property Provisions in Trade Treaties on Access to Medicine in Low and Middle Income Countries: A Systematic Review" Globalization and Health*,* 15(1), pp. 1-14 (2019).

[12] P. Drahos, "Public Lies and Public Goods: Ten Lessons from when Patents and Pandemics Meet" (2021).

[13] Palmer B., , Jonas Salk: Good at Virology, Bad at Economics, *Slate* (2014) available at, <https://slate.com/technology/2014/04/the-real-reasons-jonas-salk-didnt-patent-the-polio- vaccine.html> (last accessed on15-1-2022).

[14] GHRF Commission (Commission on a Global Health Risk Framework for the Future), *The Neglected Dimension of Global Security: A Framework to Counter Infectious Disease Crises*, 2016,availableat <https://nam.edu/wp-content/uploads/2016/01/Neglected-Dimension-of-Global-Security.pdf> (doi: 10.17226/21891), 19, (last accessed on22-1-2022).

posing a hindrance in the supply and equitable distribution of vaccines. Besides these, there is a combination of various other factors including lack of political will, heavy pharmaceutical industry lobbying, which attribute to obstruction of realising this agenda.

4. CONCEPT OF PATENT WAIVER

In October 2020, India and South Africa proposed the first waiver for all WTO members to temporarily suspend IP rights connected to COVID-19 in order to enable worldwide access to immunizations, medicines, diagnostic kits, and ventilators.[15]The temporary waiver aims to boost the global vaccine production in order to reach the poorest of countries and thereby save precious lives. However, the waiver proposal failed to meet the requisite consensus with strong opposition from the European Union, the United Kingdom and up until now, the United States. Surprisingly, the US has come out in favour of the temporary patent waiver, signalling a policy shift from its prior opposition, and the demand for a temporary suspension of such IP limitations has grown since then.[16] It should be noted that this does not imply that the US has endorsed the waiver request, but rather that it is willing to negotiate the terms of a temporary waiver.

In the context of patent waiver particularly, several caveats remain in order. First and foremost, pushing for patent waiver without adequate incentivisation to the patent holders dissuades further research and development which in turn quells the future manufacturing of vaccines and drugs. If the IP holders hypothetically were to agree to it, lack of infrastructure and technical expertise becomes a major impediment in the expedite access to critical live saving drugs and essential medicines. Besides pushing for temporary patent waiver, there are other factors that need to be investigated.

In the ordinary practice, pharmaceutical companies protect the medicinal drugs and vaccines using a complex combination of patents and trade secrets. Although having these trade secrets in pharmaceutical sector industry is the norm, but one cannot overlook the far-reaching implications it has on innovation, research, and development of vaccines. Patents coupled with trade secrets stifle medicinal research where scientific researchers face a sticky situation of surveying

[15] Communication from India and South Africa, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Cs-19,Council for Trade-Related Aspects of Intellectual Property Rights, IP/C/W/669,2-10-2020. <https://www.google.com/search?q=IP%2FC%2FW%2F669+2+October+2020+(20-6725)+Page+-+World+Trade+...https%3A%2F%2Fdocs.wto.org&rlz=1C5CHFA_enIN966IN966&oq=IP%2FC%2FW%2F669+2+October+2020+(20-6725)+Page+-+World+Trade+...https%3A%2F%2Fdocs.wto.org+&aqs=chrome..69i57j69i58.4296j0j15&sourceid=chrome&ie=UTF-8>.

[16] Office of the United States Trade Representative, Statement from Ambassador Katherine Tai on the Covid-19 TRIPS Waiver5-5-2021, <https://ustr.gov/node/10649>;*Office of the United States Trade Representative*,2021Special301Report,30-4-2021, p. 27, <https://ustr.gov/sites/default/files/files/reports/2021 /2021%20Special%20301%20Report%20(final).pdf>.

and navigating through a complex maze of legal minefield trying to ensure that they do not infringe upon the exclusive rights of the IP holders.

5. TECHNOLOGY TRANSFER AND OTHER FACTORS

While relaxing IP rights can certainly help with exponential vaccine manufacturing scale-up, one must not forget the necessity for technology transfer and technical expertise to generic pharmaceutical companies in order for them to begin production in real time. Furthermore, these vaccines have a short shelf life, thereby implying, that a very efficient and robust system is needed in place to ensure public has timely access to these critical lifesaving medicinal drugs and vaccines. The pivotal role that technology transfer plays in the development of a nation has been emphasised under Article 66.2 as well as one of the Objectives enshrined int the TRIPS Agreement. In order to realise this the WHO (World Health Organization) has set up mRNA technology transfer hub in order to facilitate smooth and efficient dissemination of technical know-how, however there are not my takers.[17]

The WHO has established the COVID-19 Technology Access Pool (C-TAP) platform in an effort to promote and speed the development of novel pharmaceutical drugs, vaccines, and healthcare products.[18] Additionally, a comprehensive and well chalked out policy of compulsory licensing can be used as a tool by the government instead of relying on voluntary agreements with pharmaceutical manufacturers where the latter has a higher bargaining power during negotiations. The WTO members in the past have successfully used compulsory licensing to scale up the production and distribution of antiretrovirals during HIV epidemics which saved millions of lives.[19]

6. THE RIGHT APPROACH

Patent waiver may not be the cure-all for the crisis that the world is currently passing through. WTO negotiations are notoriously elusive given it is based on consensus system and going by the past experiences, it is safe to conclude that getting WTO members to come to a unanimous decision may take a considerable amount of time, even several years for that matter. Other aspects of IP protection need to be emphasised on besides pressing for temporary patent waiver.

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[17] WHO, Establishment of a Covid-19 mRNA Vaccine Technology Transfer Hub to Scale up Global Manufacturing,<https://www.who.int/news-room/articles-detail/establishment-of-a-covid-19-mrna-vaccine-technology-transfer-hub-to-scale-up-global-manufacturing>(last visited on10-11-2021).

[18] WHO, How WHO C-Tap Works?, <https://www.who.int/initiatives/covid-19-technology-access-pool/what-is-c-tap> (last visited on10-11-2021).

[19] Gorik Ooms and Johanna Hanefeld, "Threat of Compulsory Licences could Increase Access to Essential Medicines", 365 BMJ l2098 (2019).

While patent over vaccines forms one facet of the problem, trade secret is often overlooked to a point that it becomes an incidental issue.[20]

During the times of pandemic outbreak, technological know-how kept as a trade secret costs human lives and multiplies suffering at a horrific scale. Further the statistical data from the previous pandemic case studies suggests that it gives the developed countries preference when it comes to treatment and vaccination while the developing and LDC (Least Developed Countries) are left to the mercy of finding a way to navigate and negotiate licensing deals in the labyrinth of complex procedures and substantive regulatory IP policies. One of the many issues associated with manufacturing complex vaccines is the lack of technical expertise that the generic pharmaceutical companies lack in contrast to the global private pharmaceutical players having expansive research and development wings having a team of world class scientific researchers and technicians.

Besides temporary patent waiver, other factors including compulsory licensing along with parallel importation can in the meantime increase the production of vaccines globally. Although anchoring our attention on the aforesaid constraints is crucial, long-term solutions need to be worked out by the world leaders to bring a halt to this catastrophic situation that coronavirus has wrecked world-wide.

7. CONCLUSION

Creating complex procedural and substantive systems of IP regime works antithetical to public health at large. The regulatory authorities while framing policy considerations should juxtapose the opposing interests to strike a balance between the cost incurred by the IP holder against the social benefits that the society reaps and carve out a policy accordingly so as dodge patent troll litigation and granting of monopolies over trivial innovations.

Even after 6 million cumulative deaths, certain governments are still seen obstructing and hindering the 'global solidarity' goal by denying removal of IP rights related to COVID-19 vaccine, which begs us to answer a moral question of how far we can push monopolistic rights in the name of innovation over the right to life. The right to life forms the basis on which all the other rights stem from and therefore it must not be understood in narrow sense of the meaning as absence of disease and infirmity, but a broader interpretative outlook needs to be employed to cover all aspects of life that right to life entails within itself, however, temporary waiver of IP on COVID-19 vaccines does not, by itself, guarantee delivery to the common masses.

[20] Mario Gaviria and Burcu Kilic, "A Network Analysis of Covid-19 mRNA Vaccine Patents", 39 Nature Biotechnology,546–548 (2021).

Undoubtedly a patent waiver is a good place to start from in order to battle this global crisis however the existing patent regime is only a part of the larger problem, and a patent waiver will not miraculously alleviate the existing suffering. To spur technological advancements, the governments should take upon themselves to directly support the pharmaceutical manufacturing entities by way of generous public funding to support the costs of R&D and additionally a profit margin which will stimulate the desired response of accelerating further scientific and technological research.

One possible solution in the short run is that instead of stockpiling vaccines, developed countries should increase its exports to ensure an equitable distribution of vaccines geographically, in terms of access and allocation, to ease the existing tensions and apprehensions. While TRIPS Agreement provides for compulsory licensing, it should be used judiciously to equipoise the interests of the patent holder with that of public lives.

Another factor to be considered by vaccine producing pharmaceutical entities and nations is the capacity expansion of the existing manufacturing infrastructure to not only rattle through the current period of crisis by producing prototypes for the mutated deadlier versions of the coronavirus but also for future pandemics. An efficacious way to go about this is to divert manufacture of vaccines within smaller pocket of nations possessing adequate manufacturing capacity to be later dispatched and exported to other member countries.

For things to change, it requires a constructive dialogue of political commitment and international cooperation between the governments, and the private players. The real challenge that remains to be addressed is to scale up the production of COVID-19 vaccines and to further, have a robust distribution mechanism in place to eliminate the hiccups in supply chains and facilitate cross border trade. This requires a rigorous analysis of the probable outcome that the temporary IP waiver policy will on the biotechnology sector and global supply chains, which needs to be weighed against humanitarian grounds of saving as many lives as possible.

MICRO, SMALL AND MEDIUM ENTERPRISES IN INDIA: ISSUES AND CHALLENGES

*Ms. Jasmine Kaur**

1. INTRODUCTION

The Micro, Small and Medium Enterprises (MSME) sector play a significant role in the socio-economic development of the nation. The majority of developed and developing countries rely heavily on MSMEs, not only because of their sheer size and diversity but also because they touch every aspect of a nation. The MSMEs, both in India and abroad, have shown themselves to be quite robust and resilient by continuing to develop at an appreciable rate and by creating jobs despite the global economic downturn and recession. Both industrialised and developing nations have looked to this sector as a source of economic expansion and social advancement. However, the rapid globalisation has exposed particularly the micro and small enterprises in developing nations, to fierce competition, necessitating the development of competitiveness for their survival and expansion.

The MSME sector in India have emerged as a vital and dynamic sector over the last five decades. This sector has substantially contributed to the Gross Domestic Product (GDP) and play a pivotal role in the overall industrial development of the country. These enterprises are complementary to the large-sized enterprises as ancillary units and contribute immensely in achieving inclusive growth and economic development of the nation. The contribution of the MSME sector to the overall Gross Value Added (GVA) rose from 29.3 per cent in Financial Year (FY) 2018 to 30.5 per cent in FY 2020. However, the economic impact of Covid-19 caused a reduction in the share of the MSME sector to 26.8 per cent in FY 2021.[1]

The Ministry of MSMEs aims at promoting the expansion and development of MSMEs and boosting their competitiveness in the new business environment, in cooperation with concerned ministries/departments and state governments. In order to address policy concerns impacting MSMEs as well as the sector's coverage and investment cap, the Micro Small and Medium Enterprises Development (MSMED) Act was notified in 2006. The Act aims to boost the competitiveness of these enterprises while also facilitating their growth.

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1 Government of India, Ministry of Finance, Department of Economic Affairs, Economic Survey 2022-23, New Delhi, January 2023.

It offers the first-ever legal framework for recognising the idea of an "enterprise", which includes businesses that deliver both goods and services. It aims to unify the three levels of these enterprises—micro, small, and medium—and provides the definition of medium enterprises for the first time. A number of statutory and non-statutory bodies work under the protection of the Ministry of MSME. These include Khadi and Village Industries Commission (KVIC), Coir Board, National Small Industries Corporation (NSIC), Mahatma Gandhi Institute for Rural Industrialisation (MGIRI) and National Institute for Micro, Small and Medium Enterprises (NI-MSME). These organisations are in charge of assisting MSMEs with regard to government programmes and policies.[2]

A new criterion for the classification of micro, small and medium enterprises has been developed by the Ministry of Micro, Small and Medium Enterprises which became effective from July 1, 2020. Currently, the MSMEs are defined on the basis of investment in plant and machinery/equipment and turnover in India. Table 1.1 indicates the old and current definition of MSMEs in India.

Table 1.1: Definition of MSMEs

Category	**Old Definition**		**New Definition for Manufacturing and Service Enterprises (With effect from July 1, 2020)**
	Manufacturing Enterprises (Investment in plant and machinery)	**Services Enterprises (Investment in Equipment)**	
Micro enterprise	Less than Rs. 25 lakh	Less than Rs. 10 lakh	Investment in plant and machinery/equipment does not exceed Rs. one crore and turnover does not exceed Rs. five crore
Small enterprise	More than Rs 25 lakh but less than Rs. 5 crore	More than Rs. 10 lakh but does not exceed Rs. 2 crore	Investment in plant and machinery/equipment does not exceed Rs. ten crore and turnover does not exceed Rs. fifty crore
Medium enterprise	More than Rs 5 crore but less than Rs 10 crore	More than Rs. 2 crore but does not exceed Rs. 5 crore	Investment in plant and machinery/equipment does not exceed Rs. fifty crore and turnover does not exceed Rs. two hundred and fifty crore

Source: Ministry of Micro, Small and Medium Enterprises, Government of India

MSMEs are significant to nations for many additional reasons in addition to their economic importance. A prevalent factor in the development of

[2] Government of India, Ministry of Micro, Small & Medium Enterprises,available at <https://msme.gov.in/about-us/attached-organizations> (last accessed on27-8-2023).

small businesses throughout the developing world, as well as a significant source of employment and wealth creation, is so-called "necessity entrepreneurship" in which unofficial self-employment ventures fill the labour gap. MSMEs, for instance, frequently give women the chance to get over difficulties like flexibility of work that they have historically had to contend with when trying to enter and remain in the workforce.

The growth and entrepreneurship of MSMEs can aid in the implementation of the overall Agenda 2030. The three of the Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development (Agenda 2030)—SDG 1 ("End poverty in all its forms everywhere"); SDG 8 ("Promote sustained, inclusive and sustainable economic growth, full and productive employment, and decent work for all"); and SDG 10 ("Reduce inequality within and among countries")—recognize the significance of MSMEs in these objectives. The SDG 1 might be supported by individual MSMEs employing new business models and solutions in their daily operations. A new range of business models and opportunities are being accessed by the private sector, especially MSMEs, as part of the ambitious effort to end poverty through the SDGs. MSMEs have the ability to encourage entrepreneurship and promote decent work, which are both important for achieving SDG 8. MSMEs are important players in achieving SDG 10 because they support economic inclusion and have the ability to revitalise underserved regions of the world. Furthermore, MSMEs' rising production can aid in reducing wage disparity.[3] The contribution of MSMEs is not restricted to these three goals, they also directly or indirectly help in achieving other goals. The current push for sustainable economic growth, particularly in the context of COVID-19, is relevant to MSMEs in order to increase their competitiveness after the crisis.

2. GROWTH AND PERFORMANCE TRENDS OF MSMES IN INDIA

This section is focused on examining the growth of number of MSME units, their fixed investment, their contribution to employment, production and exports in India. The strength and resilience of MSMEs can be seen through the data mentioned in table 1.2 and table 1.3. Table 1.2 indicates the growth in number of working enterprises and employment. The total number of units of small-scale enterprises had increased from 361.76 lakh in 2006-07 to 633.88 lakh in 2015-16. The employment absorption during the same period had increased from 805.23 lakh to 1109.89 lakh.

[3] UNDESA, 'Micro-, Small and Medium-Sized Enterprises (MSMEs) and their Role in Achieving the Sustainable Development Goals' (2020), Department of Economic and Social Affairs, United Nations,availableat <https://sustainabledevelopment.un.org/content/documents/26073MSMEs_and_SDGs.pdf> (last accessed on 20-7-2023).

Table 1.2: Growth of MSMEs in terms of Number of Units and Employment

Year	No. of Units (in lakh)	Growth Rate	Employment (in lakh)	Growth Rate
2006-07	361.76		805.23	
2007-08	377.36	4.31%	842.00	4.57%
2008-09	393.70	4.33%	880.84	4.61%
2009-10	410.80	4.34%	921.79	4.65%
2010-11	428.73	4.36%	965.15	4.70%
2011-12	447.64	4.41%	1011.69	4.82%
2012-13	467.54	4.45%	1061.4	4.91%
2013-14	488.56	4.50%	1114.29	4.98%
2014-15	510.57	4.51%	1171.32	5.12%
2015-16	633.88	24.15%	1109.89	-5.24%

Source: Annual Report, Ministry of Micro, Small and Medium Enterprises, Government of India

Table 1.3: Growth of MSMEs in terms of Investment, Production and Exports

Year	Fixed Investment (Rs. crore)	Growth Rate	Production (Rs. crore)	Growth Rate	Exports (Rs. Crore)	Growth Rate
2006-07	868543.79	361.71%	1351383.45	171.45%	182538	21.50%
2007-08	920459.84	5.98%	1435179.26	6.20%	202017	10.67%
2008-09	977114.72	6.16%	1524234.83	6.21%	214387	6.12%
2009-10	1038546.08	6.29%	1619355.53	6.24%	391159	82.45%
2010-11	1105934.09	6.49%	1721553.42	6.31%	507739	29.80%
2011-12	1182757.64	6.95%	1834332.05	6.55%	630105	24.10%
2012-13	1268763.67	7.27%	1849940.34	0.85%	698166	10.80%
2013-14	1363700.54	7.48%	1987537.3	7.44%	806878	15.57%
2014-15	1471912.94	7.94%	2128451.48	7.09%	849248	5.25%
2015-16	1549617	5.28%	2268949.85	6.60%	855352	0.72%

Source: Ministry of Micro, Small and Medium Enterprises, Government of India

Table 1.3 indicates the growth of MSMEs in terms of fixed investment, production and exports. The fixed investment have increased from Rs. 8,68,543.79 crore in 2006-07 to Rs. 15,49,617 crore in 2015-16. The increase in fixed investment is mainly due to modernization and diversification by the existing units and also due to the investment in new units. The statistics related

to production and exports also show an increase in number over the same time period. The share of MSME in total exports includes a variety of goods, including textiles, leather goods, processed foods, sports items, gems and jewellery, etc. MSME sector contributes 40 per cent to the exports of India. However, the percentage of MSME contribution in India's exports is reported to be declining in the recent past. Even though India's exports increased by roughly 13.84% in Financial Year (FY) 2022–23, the percentage of MSME-specific goods in total exports decreased. Though the MSME exports increased in value from US $154.8 billion in FY20 to US $190 billion in FY22, the share of MSME exports in total exports of the nation has declined over the period. The data from Directorate General of Commercial Intelligence and Statistics, Ministry of Commerce and Industry show that MSME products made up 43.6% of exports in the FY 2022–23, a steady decrease from 49.77% in FY 2020.[4]

3. CHALLENGES FACED BY THE MSME SECTOR

In India, the MSME sector is fragmented, diverse and largely unorganised. It features a variety of producing facilities, from high-tech businesses to traditional crafts. However, it is frequently believed to be restricted to large small-scale units that deal with high-tech businesses or act as support services for major enterprises.

MSMEs face numerous challenges that impede their performance, including financial issues, lack of knowledge, and poor financial management. Despite the government's endeavours, MSME units nevertheless face a number of difficulties. A few of the challenges in the finance industry include difficulty in obtaining timely financing for working capital needs, production, expansion, and internationalisation needs, lack of consulting support, bureaucratic procedures, burdensome documentation, challenges in providing collateral, etc.

A few of the factors contributing to the technical illiteracy of the MSME sector include a lack of current technology skills, need-based research initiatives, a lack of skilled labour, and lack of literacy regarding Information & Communication Technology. The training of human resources is insufficient to provide them with effective and professional knowledge in manufacturing, production, finance, accounting, marketing, etc. The owners of MSMEs are unaware of cutting-edge industrial technologies. Their production techniques are out of date. Moreover, these enterprises are not able to afford experienced IT professionals due to their high cost. MSMEs face the problems in the availability of skilled

[4] Talotma Lal, "The Conundrum of Declining MSME Share in India's Exports" (22-8-2023),TradePromotionCouncilofIndia,availableat <https://www.tpci.in/indiabusinesstrade/blogs/the-conundrum-of-declining-msme-share-in-indias-exports/#:~:text=In%20FY%202022%2D23%2C%20although,from%2049.77%25%20in%20FY%202020.> (last accessed on 26-8-2023).

labour force, other inputs, and raw materials. It is exceedingly challenging to make the goods at reasonable pricing due to the lack of these essentials. Retaining the labour is particularly harder when it comes to specialised labour.

There exists numerous issues such as complex dispute settlement mechanisms, low foreign quality certifications, lack of competitiveness, low productive capacity, lack of awareness regarding the government schemes, etc. which make it difficult for the MSMEs to compete in the international market.[5] Also, the rules governing every area of the industrial and service industries are extremely complicated, making compliance with them a real challenge. There are chances of red tapes in the functioning of MSMEs because the varied decisions of the enterprise are dependent upon the factory commissioner and inspector.

Also, there are numerous policy and institutional interventions to extend support to the MSME sector. The Office of Development Commissioner MSME implements the policies through its numerous entities, while the Ministry of MSME develops policies for the sector's overall growth at the apex level. All the stakeholders have found it difficult to design targeted policies and effectively implement them in the areas of infrastructure development, formalisation, credit challenges, backward and forward linkages, technology adoption, and timely payments to MSMEs. The government interventions have been largely supply-side focused and unable to adequately meet the demands of the market.[6]

Following are the major issues and challenges faced by the MSMEs-

i. Lack of access to finance and credit
ii. Problem of delayed payments
iii. Too much competition
iv. Lack of timely access to raw material
v. Lack of access to technological information
vi. Lack of access to international market
vii. Low level of Research & Development
viii. Infrastructural constraints
ix. Low availability of skilled labour

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[5] Sushil Kumar Patel and Rajesh Tripathi, "Challenges of MSMEs in India", *Journal of Positive School Psychology*, Vol. 6, No. 6, 2022, pp. 10519-10541.

[6] Reserve Bank of India, *Report of the Expert Committee on Micro, Small and Medium Enterprises* (2019),availableat <https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=924> (last accessed on 20-8-2023).

x. Complex labour laws

xi. Delays in decision making

xii. Lack of awareness regarding the government schemes, etc.

4. LEGAL AND INSTITUTIONAL SUPPORT FOR MSMES

Through different laws and regulations, the government and regulators have made an effort to foster an environment that would support the growth of the MSME sector. The legal measures such as MSME Development Act 2006, Resolution under Insolvency and Bankruptcy Code for resolving MSME Insolvency registration for MSMEs, Registration of MSMEs, Delayed Payments Act 1993 and institutional support such as establishing National Institute for Micro, Small and Medium Enterprises (NI-MSME), Office of Development Commissioner-MSME, National Small Industries Corporation Ltd. (NSIC) and Mahatma Gandhi Institute of Rural Industrialisation (MGIRI) for the promotion of the growth of MSMEs have been discussed in the following sub-sections.

4.1. MSME Development Act 2006

The passage of the MSMED Act in 2006 was one of the key steps in this approach. To facilitate targeted policy interventions in this industry, the Act defines businesses as MSME based on the value of investments in plant, machinery, and equipment. Additionally, the provisions of the Act help MSMEs with governmental contracts, payment delays, marketing assistance, etc. Additionally, it gives Central and State Governments the authority to create organisations that will support MSMEs.

As per the notification received by Ministry of Micro, Small and Medium Enterprises on June 1, 2020, there is no distinction between the manufacturing and service enterprises. A new turnover criterion is also included.

i. Micro enterprise is an enterprise where the investment in Plant and Machinery or Equipment does not exceed Rs. one crore and annual turnover does not exceed Rs. five crore;

ii. Small enterprise is an enterprise with the investment in Plant and Machinery or Equipment does not exceed Rs. 10 crore and annual turnover does not exceed Rs. 50 crore;

iii. Medium enterprise is an enterprise with the investment in Plant and Machinery or Equipment does not exceed Rs. 50 crore and annual turnover does not exceed Rs. 250 crore.[7]

The definition of the MSMEs have been updated to include larger entities, broadening their scope. It aims to account for inflation and promote economies of scale in production by preventing the splitting of unit to avail the government incentives.

4.2. Registration of MSMEs

Prior to 2006, the registration of small-scale units was done with the District Industries Centres (DICs). After the enactment of MSMED Act 2006, the Entrepreneurs Memorandum was introduced for the purpose of registration. MSMEs were required to file Entrepreneurs Memorandum (Part-I) at DICs before starting an enterprise. The Entrepreneurs Memorandum (Part-II) was to be filed by the concerned entrepreneurs after the commencement of production. As per MSMED Act 2006, the filing of entrepreneurs' memorandum (Part-II) is completely discretionary for micro and small enterprises. A registration system named UdyogAadhar Memorandum (UAM), an online-filing mechanism for self-certification of MSMEs has been introduced since September 2015 to promote ease of doing business in India. This UAM system is not mandatory for the MSMEs. The entire registration process has been made hassle-free, cost-free and paperless. Once the registration is done, the concerned applicant receives a Unique UdyogAadhaar Number (UAN). This number can be used for availing the benefits of the MSME schemes which are launched by the government from time to time. A total of 21,96,902 EM-II filings by MSMEs had taken place between 2007 and 2015. Further, 22,40,462 UAM filings took place in a short span of one year from 2015-16.[8]

Figure 1.1 indicates the distribution of MSMEs within the total number of UAM filings. Around 99.6 per cent of the MSEs have filed UAMs in the total number of filings from MSMEs during 2015-16. The medium enterprises constitute less than 0.4 per cent of the total filings of UAMs.

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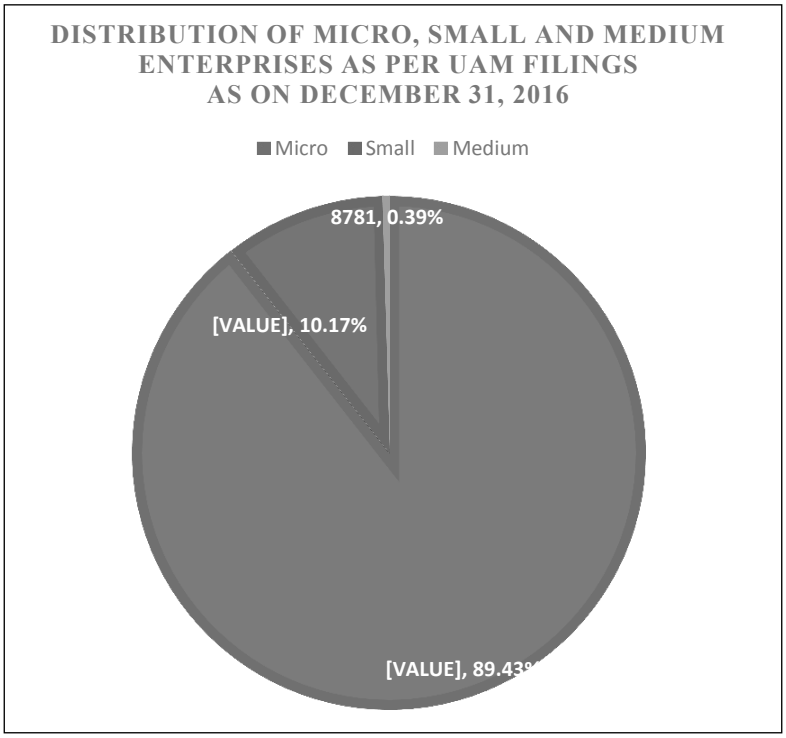
[7] Government of India, Ministry of Micro, Small And Medium Enterprises, The Gazette of India, REGD. NO. D.L.-33004/99,1-6-2020,New Delhi, available at <https://msme.gov.in/sites/ default/ files/MSME_gazette_of_india_0.pdf>.

[8] Government of India, Ministry of Micro, Small and Medium Enterprises, Office of Development Commissioner, "Registration of Micro, Small and Medium Enterprises in India (Udyog Aadhaar Memorandum)" (2020), available at <https://www.dcmsme.gov.in/Uampulication-june2020.pdf>.

Figure 1.1: Distribution of Micro, Small and Medium Enterprises as per UAM Filings



Source: Annual Report of MSME (2016-17), Government of India9

4.3. Resolution under Insolvency and Bankruptcy Code for Resolving MSME Insolvency

MSMEs generally become affected by the Insolvency and Bankruptcy Code(IBC)when they are active creditors of significant debtors. MSME may occasionally act as a financial creditor. The IBC offers a thorough framework for the timely and efficient settlement of insolvency and bankruptcy for corporate entities, individuals, partnership firms, and sole proprietorship firms. By easing the application of the terms of Section 29A of the Code, the Insolvency and Bankruptcy Code (Second Amendment) Act of 2018 (Second Amendment) has provided assistance to MSMEs.[10]

[9] Government of India, *Ministry of Micro, Small and Medium Enterprises, Annual Report 2016-17*, available at <https://msme.gov.in/sites/default/files/MSME%20ANNUAL%20REPORT%202016-17%20ENGLISH.pdf> (last accessed on 20-6-2023).

[10] Prachi Apte and Mr Sushanta Kumar Das, "Treatment of MSME Insolvency under IBC" (2021), Insolvency and Bankruptcy Board of India.

4.4. Regarding Problem of Delayed Payments

MSMEs, particularly micro and small enterprises face problems of delayed payments from not only corporates but also from Public Sector Undertakings and Central and State Government Agencies due to their low bargaining power. On April 2, 1993, the Delayed Payments Act was published in order to address the issue of slow payments in the micro and small-scale industry. The provisions of the Delayed Payments Act have been enhanced by the MSMED Act of 2006, which also makes the following measures:

i. The customer is required to pay the supplier on or before the date that was mutually agreed upon in writing between him and the supplier, or, in the absence of a written agreement, before the designated day.

ii. The time frame decided upon between the supplier and the buyer shall not, from the date of acceptance or the day of considered acceptance, exceed forty-five days. If the buyer fails to pay the supplier the agreed-upon sum, he or she will be responsible for paying compound interest with monthly rests to the supplier starting on the designated day or on the agreed-upon date at a rate equal to three times the bank rate as announced by the Reserve Bank.[11]

4.5. Establishment of Institutions for the Development of MSMEs

The Government of India have established several institutes for the development of the MSME sector in India such as National Institute for Micro, Small and Medium Enterprises (NI-MSME), Office of Development Commissioner-MSME, National Small Industries Corporation Ltd. (NSIC), Mahatma Gandhi Institute of Rural Industrialisation (MGIRI), and many more. NI-MSME was first established in 1960 in New Delhi as the Central Industrial Extension Training Institute (CIETI) by the Ministry of Industry and Commerce, Government of India. In 1962, the Small Industry Extension Training Institute (SIET), a recognised society, moved the institute to Hyderabad. Following the passage of the MSMED Act in 2006, the Institute revised its organisational structure and widened the scope of its goals. The Institute was renamed National Institute for Micro, Small and Medium Enterprises (NIMSME) in accordance with the new Act. The Ministry of Micro, Small and Medium Enterprises, Government of India, now oversees this organisation.

NSIC is a Ministry of Micro, Small and Medium Enterprises (MSME)-affiliated Government of India Enterprise with ISO 9001-2015 certification. The NSIC has been working to support the development of micro, small, and medium-sized businesses in the nation. For the purpose of carrying out its

[11] *Ibid*, at p. 6.

objective, NSIC engages in different categories of operations. It oversees a number of programmes and collaborates in their implementation with the Ministry of MSME on a number of programmes. These plans or actions consist of Consortia and Credit Support for Tender Marketing, Facilitating E-Marketing and Digital Services for MSMEs, Scheduled Caste and Scheduled Tribe National Hub, Technical Services Centres for NSIC, Single Point Registration Scheme for Raw Material Distribution. The technical centres of NSIC offer a variety of technical services, such as material and product testing, skill development in conventional and high-tech crafts, etc.

The Office of the Development Commissioner, Ministry of MSME is run by the Additional Secretary & Development Commissioner, MSME. The MSME-Development Institutes (DI), Production Centres, Regional Testing Centres, Field Testing Stations, and specialised institutes make up the network through which it operates. It offers services including providing MSME units with extension services, shared facilities, and managerial and techno-economic consulting, advising the government on creating policies to support and develop MSMEs, increasing human resources through education and skill development and supplying infrastructure, modernisation, quality-improvement, and infrastructure-related amenities.

The Mahatma Gandhi Institute for Rural Industrialization (MGIRI), formerly known as the Jamnalal Bajaj Central Research Institute (JBCRI), was redesigned with the assistance of the IIT, Delhi as a national level institute under the Ministry of MSME in October 2008. The objective of MGIRI is to promote innovation among traditional craftsmen through field tests and pilot studies, to promote rural industrialization for a rural economy that is sustainable and allows the Khadi and Village Industrial sector to co-exist with the mainstream industry, and to promote the R&D using regional resources for appropriate technology.[12] The Government has also established boards and commissions for the promotion of the rural industries and local artisans such as Coir Board, Khadi and Village Industries Commission, Central Silk Board, Office of the Development Commissioner for Handicrafts, etc. Recently, the Government of India has launched CHAMPIONS portal for resolution, redressal and remedies for MSMEs.

The Ministry of Micro, Small and Medium Enterprises has undertaken this initiative to ensure prompt, easy, and speedy resolution of complaints from MSMEs. It aims at guiding and assisting the MSMEs in availing the benefits of government schemes. It further disseminates the information and create awareness regarding the schemes and policies undertaken by the government for the promotion of MSMEs. It also provides direction and advice in the fields of finance, marketing, technology, raw materials, labour, infrastructure, and capacity

[12] *Ibid*, at p. 2.

building. The portal uses assistance from 69 state control rooms spread across the country to transmit information in eleven regional languages.

5. POTENTIALITIES FOR GROWTH IN THE MSME SECTOR

MSME sector is recognised as the important pillar of the Indian economy due to their significant impact on Gross Domestic Product (GDP), exports, and job creation. The agriculture and food industries in India account for the majority of small and micro businesses. Contrarily, the automotive, pharmaceutical, and chemical industries are home to medium-sized businesses. In order to strengthen India's rural economy, the government of India has been supporting the MSME sector through a number of schemes and programmes for the promotion of these enterprises. In India, there is a wide network of MSME businesses with over 630 lakh units employing around 1110 lakh people and accounting for 30% of GDP.[13]MSMEs have greater access to raw materials, subsidies, and other incentives under cluster development programmes since they are less capital intensive and more employment-friendly. By utilising the available resources, the nation has a significant growth potential to establish and improve the capacity of businesses in the manufacturing and service sectors. The MSMEs have a scope of development which will fuel even more industrial growth in the nation. Therefore, the development of MSME sector is indispensable because it helps in achieving inclusive growth and is essential to the overall development of the nation.

A conducive infrastructural support and environmental friendly regulatory framework for the MSMEs will help them in improving their functional operations. MSMEs in India contribute to the domestic and global value chain as producers, suppliers, distributors, retailers and service providers. With the rise of technological development and e-commerce platform, a favourable impact is seen on the growth of MSMEs. The growing internet and mobile penetration, and creation of innovative models by modern fintech companies has impacted the way business is being done.

The Indian MSME sector would become globally competitive to address the emerging challenges and support their sustainability if measures relating to the provision of adequate financial resources, a supportive policy framework to address areas like entrepreneurial skill development, a competent pool of human resources, application of latest technology and new innovations, adequate international market linkages, etc are undertaken.

The Government of India has envisaged doubling the Indian economy to US$ 5 trillion over a period of five years. In order to attain this goal, the

[13] P.P. Deshpande, "Harnessing the Potential of MSMEs of India-Part-III", *Times of India*, 5-5-2023,availableat<https://timesofindia.indiatimes.com/blogs/truth-lies-and-politics/harnessing-the-potential-of-msmes-of-india-part-iii/?source=app&frmapp=yes>.

government have been creating career opportunities for the youthful population. The MSMEs have the ability to play a significant role in creating jobs and the government is making continuous efforts for increasing MSME export participation and GDP contribution. The lack of technology and R&D spending creates barriers to the competence of the sector. The government subsidies for sophisticated technologies could help MSME businesses to improve the quality of their products while utilising the available resources. Additionally, academic institutions must assist by offering services for product innovation research and development.[14]

6. CONCLUSION AND RECOMMENDATIONS

Despite the fact that the policies and programmes of the government are promoting MSMEs in India, these businesses continue to face a number of important problems. Most of these problems are of a legal, management, or compliance nature. Below are a few of them-

i. Due to a lack of resources and time, maintaining numerous licences, registrations, approvals, and reporting standards while complying to numerous rules.

ii. obtaining rapid certification for trademark copyright, trade name registrations, or patent registrations.

iii. Keeping up with the latest technological developments and how they affect business and legal obligations.

iv. maintaining the integrity of their intellectual property and preventing any instances of infringement.

The concerns mentioned above are not all-inclusive because there may be more depending on the nature of these businesses' products or lines of operation. Therefore, it has become essential to provide robust legal support to the MSMEs to help them in the legal compliance. The emerging enterprises can benefit from the counsel of lawyers and consultants in the following matters-

i. Udyam Registration and advice on matters pertaining to MSMEs' investments, benefits, and compliance.

ii. Advice on financial compliance, shareholding structures, and business structuring, etc.

iii. Procuring loans from the banks and financial institutions without providing any collateral

[14] India Brand Equity Foundation, MSME Industry Report (May 2023),available at <https://www.ibef.org/industry/msme> (last accessed on 28-8-2023).

iv. Keeping track of the adjustments required to move the registration process along.

v. Preparing crucial legal documents for the business, like contracts and agreements.

Further, sound infrastructural facilities and financial incentives should be provided to the MSMEs to promote the growth of MSMEs in India. A conducive business environment should be developed in the nation in order to ease the business activities so that the youth of our nation do not migrate to the other nations.

There has already been a lot of data generated, and it will increase further. In order to support both internal and external business activities, it is important to manage the data that leads to "knowledge development." To provide for universal access for all stakeholders' processes and purposes, data analytics need to be more creative and imaginative.[15]

Also, there should be a web platform showcasing the handicrafts, loom products, and innovations of MSMEs to reach out to the larger national and international markets and to increase their size of market. The government must support clusters in order to promote ecosystem synergies and value chains because the majority of MSMEs lack adequate branding and market connections for their products and services. It is important to provide financial and digital education to MSMEs so they can use digital channels for improving their business operations. Since the customer expectations are changing, the MSMEs need to upgrade and adopt latest technology in order to meet the growing demands of the customers in the national and international market.

[15] Indian Institute of Public Administration, "Draft National Policy for Micro, Small and Medium Enterprises (MSME) in India" (July 2021), Submitted to Ministry of Micro, Small and Medium Enterprises, Government of India, available at <https://www.dcmsme.gov.in/Draft08022022.pdf>.

BOOK REVIEW:

"THESE SEATS ARE RESERVED: CASTE, QUOTAS AND THE CONSTITUTION OF INDIA"

— *ABHINAV CHANDRACHUD*

*Ms. Apurva Thakur**

Citation: Abhinav Chandrachud, *These Seats Are Reserved: Caste, Quotas And The Constitution Of India,* Penguin Random House, India, 2023.

Abhinav Chandrachud, has a number of excellent books to his name which explore the transformational potential of the Constitution of India, 1950. ("**Constitution**"). This book explores the omnipresent question of reservations in India and its effectiveness as a tool of affirmative action

1. HISTORICAL BACKGROUND

Affirmative action in India has been a matter of lengthy debate and deliberations ever since the inception of the Constitution. It was hotly debated by the framers of the Constitution in the Constitutional Assembly, and it continues to be a constitutional conundrum till today. The discussion of '*merit*' versus '*systemic discrimination*' continues to be relevant. The Indian courts have had to balance competing interests of anti-discrimination law, political propaganda and equality of opportunity principles, resulting in a comprehensive albeit confusing, jurisprudence of affirmative action in India.

Reservation of seats as the primary mode of affirmative action in India has remained a flashpoint for the citizens of India. Interestingly, reservation in India has elements of both opportunity and opportunism. Initially introduced to counter the stigma faced by those castes and classes that remained on the fringes of society, it has transformed into a race for a spot in the rapidly diminishing seats available in public education and employment.

* Assistant Professor, SVKM's Pravin Gandhi College of Law, Mumbai.

More recently, the Economic Weaker Section (EWS) Reservation Policy adopted by the Union Government in 2019[1] has permitted reservation of 10% seats in educational institutions and public employment, to those candidates whose gross family income is less than 8 lakhs per annum. This reservation is not available to those who belong to the Other Backward Class (OBC), Schedule Castes (SC) or Schedule Tribes (ST) categories. It must be noted that since EWS is a vertical reservation, it breaches the 50% ceiling as set out in *Indira Sawhney*v. *Union of India* judgment[2], undermining an established principle of affirmative action.

In light of these pertinent questions, the book traces the history, rationale and politics of reservations in India. Divided into 7 chapters, the book delves into various aspects of reservations in India.

2. BRIEF OUTLINE

Chapter 1 addresses the confusion around the term 'backward classes'. The terms: '*depressed classes*' and '*backward classes*' were introduced into the Indian vocabulary through the British rule, and included all who were poor, downtrodden and uneducated; it was not linked to caste alone. Subsequently, Mahatma Gandhi, introduced the term '*Harijans*' in the 1930s, which replaced the term 'depressed classes'. Later, the term '*dalit*' was popularized by Jyotiba Phule, and subsequently formalized in the Poona Pact of 1932. Every alteration pushed the term to mean primarily those who were treated as '*untouchables*' and became synonymous with those who belonged to the scheduled castes. The chapter also traces this history of classification and its mutation through multiple colonial legislations and census reports.

Chapter 2 examines the emergence of '*backward classes*' and '*other backward classes*' into the fold of affirmative action. The term '*other backward classes*' has emerged as a complex tool in reservation politics today, as evidenced by the Maratha, Jat and Patel movements for classification as 'other backward classes' despite owning landed property. A look at these historical movements and modern political developments throws light on the chequered understanding and implementation of reservation policies in India.

Chapter 3 outlines the discussions around affirmative action and reservations in the Constituent Assembly Debates. Dr B.R. Ambedkar is regarded as the primary architect of reservation and believed that reservation was an *exception* to the principle of equality of opportunity and should be limited in its

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[1] Department of Personnel & Training, Government of India, Office Memorandum No. 36039/1/2019-Estt (Res), available at <https://dopt.gov.in/ sites/default/files/ewsf28fT.PDF> (last accessed on 20-7-2023).

[2] 1992 Supp (3) SCC 217 : AIR 1993 SC 477.

applicability. Dr. Ambedkar tried to balance the two opposing claims of equality and equity- that of equal opportunity to all, without discrimination, and the other of reserving a portion seats for backward classes exclusively. In keeping with the spirit of the Constitution, Dr. Ambedkar proposed an "adequate" rather than a proportional representation. It is pertinent to note that at the time of drafting of the Constitution, members of the SC numbered nearly 60 million, and a proportional reservation would mean reserving 70% of the available seats.

Chapter 4 discusses the court's interpretation of the reservation question. The primary draft of the Constitution allowed for reservation in public employment and legislative bodies, and not education institutions. In one of the earliest cases of reservation in educational institution[3], the Supreme Court held that caste based reservations in India are unconstitutional. However, this judgement was overruled by the first constitutional amendment[4] that inserted Article 15(4)[5] allowing governments to make "special provisions for the advancement of any socially and educationally backward classes, or for the SC/ST". This Article opened the floodgates for the government to introduce reservations for who they identified as 'socially and educationally backward'. The book also traces the efforts of the Kaka Kalekar Commission[6] to identify who actually constituted 'backward classes'.

Chapter 5 examines the growing complexities of interpretation of reservation done by the SC. It delves into complex questions of '*carry-forward rule*', '*creamy layer*' and '*catch up rule*'. It analyses the criteria of backwardness as set out by the Mandal Commission, and discusses the different viewpoints undertaken by the Supreme Court.

Chapter 6 discusses the constitutional amendments made by the Parliament in order to counter the 50% rule set out in the Indira Sawhney judgement, by allowing states to breach this limit on the basis of 'quantifiable data on backwardness'[7]. This chapter also discusses in detail the roster system of reservation.

Chapter 7 discusses in detail the effects of marriage, conversion or migration on the status of an individual. Pertinent questions have been raised such as "Does a third generation Christian who converts to Hinduism get back the cast of her forefather" or "does a Brahmin woman married to a SC acquire his caste?"

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3 *State of Madras* v. *Champakam Dorairajan* , AIR 1951 SC 226.

4 The Constitution (First Amendment) Act, 1951.

5 "(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes".

6 *National Commission for Backward Classes*, Government of India, Annual Report 2008-2009, available at <http://www.ncbc.nic.in/Writereaddata/ar0809eng.PDF> (last accessed on20-7-2023).

7 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212.

The answer to these questions are complicated, with each such instance being treated as new case of interpretation.

3. OBSERVATIONS

Dr. Abhina v Chandrachud has presented various views around the concept of reservation as an affirmative action in India. The book is a thorough inquiry into the history of reservations in India and the considerations around it. The book also engages with the current issues plaguing affirmative action in India in a neutral, unbiased manner, putting forth arguments both in favour and against the current system.

The book is predominantly a collation of the historical evolution of reservation. While the author has made a mention of the dilemma that horizontal reservations, such as those for women and persons with disabilities, throws up; this engagement remains superficial. Perhaps it is beyond the scope of the present book, as it would require a rather academic approach, decreasing the reach of the present book. What is commendable however, is that the author has outlined several inconsistencies in the reservation that can be subject matter of further research.

One of the most thoroughly researched part of the book is an explanation of how the reservation quota actually plays out in public employment. It is a complex set of calculations that intends to balance representation, merit, equality and morality. This distilling into numerical values, allows the readers to see a clear picture of how reservation of seats plays out in real life.

At present, reservation as an affirmative action for equality of opportunity stands as a legally muddled, often political tool that has transformed into a quick fix for political representation and appeasement politics.

The book serves as a thought-provoking and significant piece of work to comprehend d the need for reservation in 21st century India. It provides clues on how this format may be tweaked for achieving its real purpose.

The United States Supreme Court has recently grappled with the tricky question of affirmative action in the judgement of Regents of the *University of California* v. *Bakke* wherein[8] it was held that 'racial quotas' as a sole ground for admission was unconstitutional. It may serve India to relook at the classification of 'backward' on the sole ground of belonging to a caste. Affirmative action is here to stay, since there is no denying the disparity of opportunity in India. Nevertheless, whether reservations as the predominant means of affirmative action in India, is effective, continues to be a matter of examination.

[8] 1978 SCC OnLine US SC 154 : 57 L Ed 2d 750 : 438 US 265 (1978).

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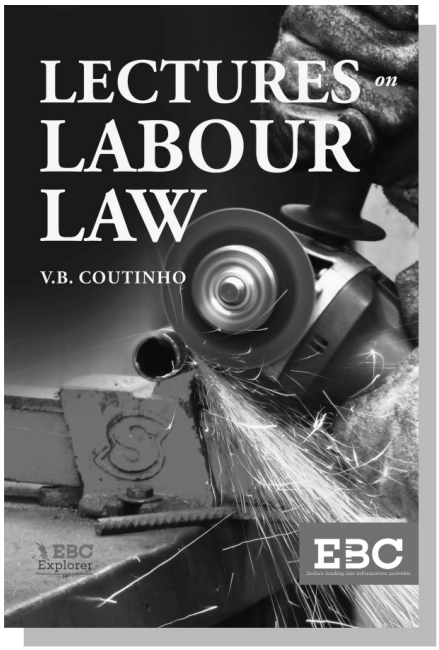

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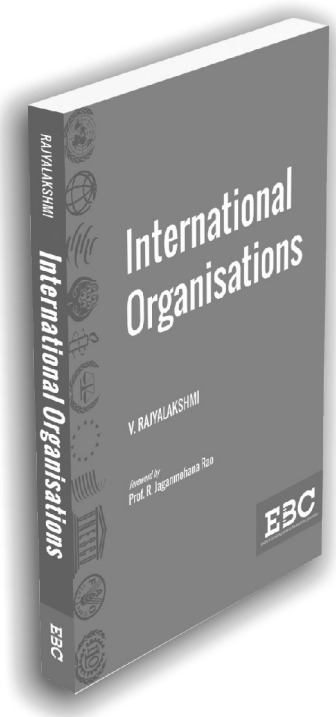

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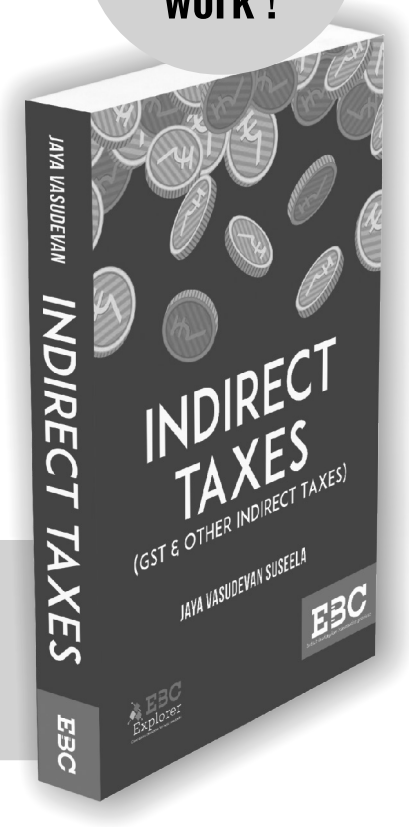

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