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EDITORIAL

It is our immense pleasure to present International Journal of Law and Social Sciences (IJLS), a flagship double blind peer reviewed journal of Alliance School of Law, Alliance University, Bengaluru, the IJLS 2021 issue having ISSN number 2454-8553 which addresses many legal realms in order to produce conducive research output and plays a significant role in legal research and provides a platform to Academics, Practitioners, Research Scholars, and students from all over the world contribute to the enhancement of legal concepts through this Journal.

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The Hon'ble Chancellor and Vice-Chancellor as well as the Editorial Advisory Board need special thanks for their support and guidance. The Peer Review Panel deserve special applaud for their constant assistance and reviewing the articles on time. We thank our valued scholarly contributors for their intellectual contributions to the Journal. We would also want to thank our Editorial Board members for their critical inputs in making this edition possible. We are also grateful to those all who have contributed to the publication of this Journal.

To ensure the journal's future Endeavour, we would want to invite more contributions from academics and Research Scholars.

Dr. Kiran Dennis Gardner
Editor-In-Chief
Dean, Alliance School of Law,
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Regulation of The Competition Commission on Foreign Investment Combination Agreements with Special Reference to Vodafone Case

B. Priya[1] *and Dr. R. Haritha Devi*[2]

Introduction

According to the World Investment Report 2020, India stands in the status as 9th largest Foreign Direct Investment (FDI) holder in 2019, with 51 billion dollars of FDI inflows in this year.[3] India's embrace of the free-market paradigm in 1991 considerably expanded the economic policymaking autonomy of subnational governments.[4] The rich resources of India attract many foreign investors to pour investment in India. India is also in need of FDI for the fulfilment of investment, technology, managerial skills and market access.[5] Foreign investment bringing in goods and services helps not only in the increase of GDP rate but it is also accused of anti-competitive impacts on domestic companies.[6] In 1999, the conservative and restrictive Foreign Exchange Regulation Act (FERA) of 1973 was repealed and replaced with the flexible Foreign Exchange Management Act (FEMA) of 1999.[7] Competition is the life force of markets that create the best incentives for businesses to increase efficiency, drive their productivity and fuels innovation.[8] The Competition Commission of India (CCI) safeguards the corporate market from anti-competitive impacts. This paper analyses the regulations of the Competition Commission on FDI combination agreements through its anticompetitive impacts for understanding its consequences on the consumer's adhesion agreements and impacts on crowding in or out of domestic investors. The main objective is to study on the indispensable need of Foreign Direct Investment flow in India and to make a study on the monitoring role of the Competition Commission in the approval of FDI Combination agreement.

Foreign Direct Investment

Foreign Direct Investment (FDI) means investment by non-resident entity/person residing outside India in the capital of the Indian company under Schedule 1 of FEMA (Transfer or Issue of Security by a Person Resident Outside India) Regulations 2000.[9] In the Foreign investment process, the resident of the home country acquires assets to control the activities of the firm in the host country.[10] Trade Liberalization as a result of GATT-WTO agreements and Competition policy share the common objective of eliminating the

[1] Assistant Professor, Government Law College, Namakkal, Tamil Nadu
[2] Associate Professor, The Tamil Nadu Dr. Ambedkar Law University, Chennai
[3] World Investment Report, 2020, *CHAPTER I GLOBAL INVESTMENT TRENDS AND PROSPECTS*, 12 https://unctad.org/system/file
[4] Loraine Kennedy, *The Politics of Economic Restructuring in India: Economic Governance and State Spatial Rescaling*, 20 (Routledge, 2nd ed. 2013)
[5] FDI India, (Jul.,25,2020,03.00PM), https://fdiindia.in/about-us,
[6] Badri Narayan Rath and Debi Prasad Bal, *Do FDI and public investment crowd in or crowd out private domestic investment in India*', 48 J Dev. Areas, 269, 269 (2014)
[7] Chanchal Kumar Sharma, *Federalism and Foreign Direct Investment: How Political Affiliation Determines the Spatial Distribution of FDI–Evidence from India* 1–7(GIGA Working Papers No. 307, 2017)
[8] CCI Annual Report (2018–19), (Nov. 22, 2020, 9.00PM), https://www.cci.gov.in/sites/default/files/annual reports/
[9] Department of Industrial Policy and Promotion (DIPP)Ministry of Commerce and Industry Government of India, Circular Consolidated FDI Policy,2015, *Dipp manual definition* Chapter 2-1-12, p.4, (Nov 05, 2020, 9.00AM), https://dipp.gov.in/sites/default/files/FD
[10] B.K. Lokesha, and D.S. Leelavathy, *Determinants of Foreign Direct Investment: A Macro Perspective*, 47(3) IJIR 459, 460 (2012)

barriers of foreign investment in trade and commerce.[11] FDI benefits the host country if the domestic firms avail similar sophisticated technologies.[12] On April 17, 2020, the Department for Promotion of Industry and Internal Trade (DPIIT), India altered its Foreign Investment policy to protect Indian companies from "opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 Pandemic".[13]

Types Of Combinations

The Foreign Direct Investment can be made by Horizontal, Vertical and Conglomerate Combination agreements executed between investors and acceptors. According to Section 5 of the Competition Act, 2002, the Combination of Enterprises is defined as the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises.[14] Horizontal merger or Combination related to FDI refers to the merger of foreign and domestic companies at the same level of production or distribution in the relevant market. In the acquisition of Monsanto by Bayer[15], the Commission recognised that, as both the parties were active in the downstream market for commercialization of Bt. Cotton seeds in India, it resulted in horizontal merger. The global acquisition by the German chemical and pharma major Bayer AG on US-based biotech major Monsanto of $63million was justified on the grounds of innovation in the agricultural field.[16] A Vertical Merger is a combination of a firm in the upstream market with a firm in the downstream market.[17] According to the SVS Raghavan Committee, the horizontal merger proves to be anti-competitive than vertical mergers.[18] However, the Vertical mergers can be anti-competitive if it results in foreclosure or enhanced co-ordination.[19] The Conglomerate merger is a merger between businesses that operate in different product markets happening between diversified companies. According to the SVS Raghavan Committee the Conglomerate Mergers do not prove to be anticompetitive. The Corporate mergers and acquisitions are aimed at enhancing competitive advantage and amplifying efficiency of firms.[20]

FDI's Impact On Consumers And Domestic Investors

The Indian consumer market creates major opportunities and challenges for both the Indian and multina-

[11] UNCTAD, Report by UNCTAD Secretariat, UN Conference on Trade & Development, (Empirical Evidence of the Benefits from applying Competition Law and Policy Principles to Economic Development to attain greater efficiency in International Trade & Development((TD/B/COM.2/EM/10).) pp.1–22, (1998)

[12] 12Christian Fons-Rosen et al., *Foreign investment and domestic productivity: Identifying knowledge spill overs and competition effects*, 2(National Bureau of Economic Research, 2017), w23643.pdf (nber.org),

[13] FDI Policy Section Press Note No. 3(2020 Series) Government of India Ministry of Commerce & Industry Department for Promotion of Industry and Internal Trade, ch5.2.27.3 Para3.1.1

[14] 14The Competition Act,2002, Act No.12 of 2003, Ministry of Law and Justice, §5.

[15] Competition Commission of India, Combination Registration No. C-2017/08/523 dated June 14, 2018 `Order_14.06.2018.pdf` (`cci.gov.in`)

[16] 16PTI. Leverkusen, *Bayer completes acquisition of Monsanto*, The Hindu Business Line.com, June 07, 2018, `https://www.thehindubusinessline.com/` (Lastly Visited Dec.2, 2020).

[17] Steven C. Salop, & Daniel. P. Culley, *Potential Competitive Effects of Vertical Merger, A How-To Guide for Practitioners*',4(2014) `https://scholarship.law.georgetown.edu/cgi/`

[18] Justice SVS Raghavan, High-Level Committee of Competition Law, (May 22,2000) Government of India, Report of the High-Level Committee on Competition Policy and Law (May 2000), `https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition _policy_law_svs_raghavan_committee.pdf`.

[19] Jeffrey Church, *Vertical Mergers, Issues in Competition Law and Policy*, 2 AA Section of Antitrust Law, 1455, 1461–63 (2008)

[20] Onyanko Mark Omondi, *Effect of Merger and Acquisition Strategy on Competitive Advantage of ICEA and Lion Group, Kenya*, 1, 53–55 (Research project submitted to School of Business, the University of Nairobi,2016) `https://pdfs.semanticscholar.org`

[21] Jonathan Ablett, Aadarsh Baijal, Eric Beinhocker, Anupam Bose, Diana Farrell, Ulrich Gersch, Ezra Greenberg, Shishir Gupta, and Sumit Gupta, 'The Bird of Gold - The Rise of India's Consumer Market', McKinsey and Company, (2007).

tional companies in a similar way.[21] The Foreign investment occupies from Energy sectors to Retail sectors and the Government invest or investigate to invest only for improving its image in global competition. The advent of foreign investment in Retail sectors such as Wal-Mart displays altogether numerous products in single and convenient locations, thereby decreasing the transaction costs of consumers.[22] It has been found that Wal-Mart is largely responsible for the demise of small discount retailers.[23] The elevated competitive pressures by foreign investors through logistics discounts on the competitive products may pave way for the exit of some marginally profitable domestic firms out of the corporate market absolutely.[24] These consequences may lead to the monopoly establishment of foreign investors and may prove to be anti-competitive. In these circumstances, the monitoring role of CCI may prove to be indispensable to maintain the competitive efficiency of India. The entry of foreign investors to an existing industry may provide sizeable impact on the structure and level of competition by giving valuable innovative updated knowledge to domestic firms thereby increasing export propensity paving way for economic development.[25] According to ASSOCHAM report 2012, the investment of FDI in Automobile, Telecommunication and IT has brought them global market recognition. According to ICRIER (Indian Council for Research on International Economic Relations) survey on FDI retailing in India, mostly 85% of consumer durables manufacturers favoured for FDI in retailing in India.[26] Hence, foreign investment has both pros and cons which has to be balanced for economic development. The two main types of efficiency promoted by competition are "static efficiency" (optimum utilization of existing resources at least cost) and dynamic efficiency (optimal introduction of new products).[27] The competition in market is necessary to maintain both efficiencies. The Role of Competition Commission's broad tent approach is imperative and indispensable to balance the efficient foreign direct investment and also the protection of consumers and domestic investors.

CCI's Control On Fdi Before Combination

The CCI's control on FDI before Combination can be analysed based upon the Combination thresholds, CCI approval procedure, CCI analysis on main clauses of Combination agreements and factors on CCI approval of Combinations.

Combination Thresholds In India

The Competition Act, presently in the transitional stage is fairly recent legislation vital to the economic growth of the country.[28] According to Section 5 of the Competition Act, 2002, the foreign investors have to get CCI approval for the Combinations with domestic investors based on the thresholds on the value of assets and turnover for Enterprises or Group Level. The Competition Commission also provides the De Minimus exemption for boosting FDI investments. The De Minimis Exemption is provided to the enterprises with control, shares, voting rights or assets of value not exceeding Rs. 350 Crore in India or turnover not greater than Rs. 1000 crore in India from the application of Section 5 of the Competition Act for a duration of 5 years and for the group exercising less than 50% voting power, an extension of the exemption for

[22] Leonardo Iacovone, Beata Javorcik, Wolfgang Keller & James Tybout *Walmart in Mexico: The impact of FDI on innovation and industry productivity*, 1, 14–17 (The University of Colorado, 2009)

[23] Panle Jia, What *Happens when Wal-Mart comes to Town? An Empirical Analysis of the Discount Retailing Industry*, 76(6) *Econometrica* 1263, 1302(2008).

[24] E.A.S. Sarma, *Need for caution in retail FDI*, 40(46) Economic and Political Weekly, 4795, 4798 (2005).

[25] P. Enderwick, Attracting *desirable FDI: theory and evidence*, 14(2) Transnational Corporations, 93, 106 (2005)

[26] M. Arpita & P. Nitisha, *FDI in retail sector, India*. 104 (Academic Foundation in association with ICRIER and Department of Consumer Affairs, New Delhi, 2005)

[27] UNCTAD, Report by UNCTAD Secretariat, UN Conference on Trade & Development, (Empirical Evidence of the Benefits from applying Competition Law and Policy Principles to Economic Development to attain greater efficiency in International Trade & Development((TD/B/COM.2/EM/10).) pp.1, 6(1998)

[28] T. RAMAPPA, (2014) *Competition Law in India, Policy, Issues and Development*, 30 (3rd ed., Oxford University Press, Oxford.2014)

[29] Central Government Notification, *Revised Thresh holds in Section 5 of the Competition Act, 2002*, Ministry of Corpo-

further five years is granted.[29] The Competition Commission regulates foreign investment through combination thresholds with De Minimis relaxation.

CCI's Approval On FDI Combination

According to Section 6[30] in the Competition Act, 2002, the combination which causes or likely to cause an appreciable adverse effect on competition are held to be void. The CCI approval can be obtained through the Green channel procedure or Normal procedure. The combinations that are not likely to have an Appreciable Adverse Effect on competition in India are exempted from filing of an application with the Competition Commission through Green Channel Approval. Green Channel procedure automatically approves the mergers reducing transaction costs. If the declaration is found to be deceptive, approval will be declared void-ab-initio after a reasonable opportunity to the companies.[31] Out of the total of 33 filings received from 1st January 2020 to June 2020, eight (8) filings are under the green channel as not likely to cause adverse impacts in competition. The reducing of approval stand still period of 210 days by Green Channel Procedure improves the foreign investment in India.[32] The normal approval procedure involves the inquiry or cooling period of 210 days after notification and regulation 19(2) provides for approval after modification by parties of the combination agreements.[33] Thus, CCI has every right to revoke combination approval orders if the combination results in anti-competitive effects.

CCI's Analysis On Main Clauses In Combination Agreements

The Competition Commission analyses the clauses in Combination agreements on deciding the approval of Mergers and Acquisitions. As per the Material Adverse Event clause, the risk of loss on events has to be borne by any one of the parties if it incurs in the interim period between the signing and execution of merger agreements.[34] These clauses empower the acquirer, investor or buyer to terminate the transaction on occurring of any material adverse change.[35] The non-competition clause imposes restrictions on both buyer and seller. As noncompete clauses create an artificial barrier to trade, they also fall outside the basic principles of free trade.[36] In[37] notice under Section 6(2) for the proposed combination of Advent International Corporation and MacRitchie Investments Limited, Singapore incorporated company (acquirer), CCI directed for modification u/s 31(1) for the reduction of non-compete clause period from 5 to 3 years. The Competition Commission also permitted Rescue mergers as failing firm defence to prevent the closure of companies in Covid-19 situation. Hence, CCI also proposed to omit Non-compete restrictions in paragraph 5.7 in Form-I of Combination agreements for Foreign Investments flexibility. The Umbrella Clause commonly refers to the parties abiding by the obligations of state and giving additional protection to investors concerning the contractual obligations in the

rate Affairs MCA *through* Notification No. S.O. 674(E) & 673(E) dated March 04, 2016, Notification — Competition Commission of India, Government of India (cci.gov.in) SO 673(E)-674(E)-675(E).pdf(cci.gov.in)

[30] The Competition Act,2002, Act No.12 of 2003, Ministry of Law and Justice, at 6.

[31] M.P. Ram Mohan, and R. Vishaka, *Merger control for IRPs: Do acquisitions of distressed firms warrant competition scrutiny?* 2, 4(Indian Institute of Management Ahmedabad, WP No.2020-05 2020)

[32] CCI, *Fair Play*, 33 The Quarterly Newsletter of Competition, 10 (2020).

[33] CCI (Procedure regarding the transaction of business relating to combinations) Amendment Regulations, 2018 (October 9, 2018)

[34] R.T. Miller, *The Economics of Deal Risk: Allocating Risk through Mac Clauses in Business Combination* 50 Wm. & Mary L. Rev. 4 (2008) https://www.osborneclarke.com/insights/mac-clauses-in-ma-agreements/

[35] R.J. Gilson & A. Schwartz. *Understanding MACs: Moral hazard in acquisitions*, 21(2) J.L. Econ. & Org. 330, 331 (2005)

[36] N. Hanni, *Exclusive Distribution and Non-Compete Clause in Trade: Transnational Agreements in the European Union and the United States*', 3(2) Udayana Journal of Law and Culture 141,145(2019)

[37] Competition Commission of India, Combination of Advent International Corporation and MacRitchie Investments Limited, Combination of Registration No. C-2015/05/270 (June 12, 2015), Order under Section 31(1) of the Competition Act, 2002. C-2015-05-270_0.pdf(cci.gov.in)

provisions of the state.[38] The domination of parties through any of these clauses can be scrutinised by Competition Commission and the agreements may be approved after the inclusion of suggested modifications and rectifications.

Factors In CCI Approval

As two sides of a coin, the performance of FDI has been impressive on some fronts, satisfactory on several other fronts, and inadequate in certain respects.[39] According to Section 20(4) of the Competition Act, 2002,

i) Adverse factors are barriers to new entrants and increase in price

ii) Determining factors are sustainability and elimination of competition based on market share and alternatives.

iii) Defence factors are Combinations outweighing adverse impacts and Economic development. To meet the demands of the competitive market forces, Mergers and Acquisitions are crucial growth catalysts to sustain in the business world.[40] The CCI's analysis and determination of appreciable adverse effect can be explained through Vodafone-Idea merger case.[41] On 17.04.2017, Vodafone India Limited (VIL) the Indian subsidiary of UK-based Vodafone Group, Vodafone Mobile Services Limited and Idea Cellular jointly filed a Notice under Section 6(2) of the Competition Act,2002 for merger and amalgamation of telecommunication business of VIL. The Commission analysed the following factors under Section 20(4) of the Competition Act, 2002. The analysed factors are;

a) Concentration Analysis[42]- As the Vodafone Idea Ltd. holds 25% of the assigned spectrum and 50% of specific band spectrum exceeding 50% share the Commission observed that the Proposed Combination is likely to result in significant market shares and change in concentration in 14 telecom circles

b) Competitive constraints post the Proposed Combination- On deciding closeness of competition, out of 14 telecom circles, the Parties appear to be close competitors in 10 telecom circles namely Andhra Pradesh, Mumbai, Punjab, Uttar Pradesh (East), Uttar Pradesh (W), West Bengal, Gujarat, Haryana, Kerala and Maharashtra.

c) Buyer Power[43]- As per Mobile Number Portability Regulations, 2009, Telecommunications Service Priority, the near-zero switching cost ensures that there is price competition amongst the TSPs (Telecom Service Providers) to retain customers.

d) Competition Extent after the Proposed Combination[44]- The Commission on examining the potential of the competitors like Bharti Airtel, RCOM and Aircel, Jio, Tata and BSNL/MTNL opined that they are in a position to exercise adequate competitive constraints on the Merged Entity and to eliminate any likelihood of adverse effect on competition resulting from the Proposed Combination.

[38] OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives, OECD Publishing, Paris, https://doi.org/10.1787/9789264042032-3-en.(2008)

[39] S. Chandrachud & N. Gajalakshmi, *The economic impact of FDI in India*, 2(2) Int. J Humanit. Soc Sci. Inv., .47, 52 (2013)

[40] A. Mishra, A. Pradhan, & O. Bisht, *The impact of trust on leadership during mergers and acquisitions: case studies from the Indian telecom sector*'. 4(2) People: Int.J. of Soc.Sci., 1035,1036(2018)

[41] Vodafone-Idea Merger Approval, Combination Registration No. C-2017/04/502 (CCI, Oct 03, 2017) Order_C-2017-04-502.pdf (cci.gov.in)

[42] Id. At 4-6

[43] Vodafone-Idea Merger Approval, Combination Registration No. C-2017/04/502 (CCI, Oct 03, 2017) Order_C-2017-04-502.pdf (cci.gov.in) at p.7

[44] Id At 8-10

e) Level of combination in the market- The increase in the number of subscribers requires significant investments by operators to build coverage, data capacities and quality. The Commission analysed that out of 220 countries 213 countries have 4 or fewer operators, 6 countries have 5 TSPs and only India will have more than 5 TSPs. Hence, the Commission is of the opinion that a reduction in the number of competitors at this stage is not likely to have any adverse effect on competition in mobile telephony markets. After analysing these adverse and determining factors, CCI approved the Vodafone-Idea merger as it does not result in adverse impacts on competition. The analysis of the factors affecting competition in corporate sectors before and after the Combination helps to maintain a healthy competition for economic elevation. On analysing with Michael Porter's five forces model, the reasons for the merger is given to be Threat of entrants & substitutes, bargaining powers of buyers & suppliers and the competition rivalry.[45] These reasons make a need for larger investment through mergers.

CCI'S Control After Combination

The CCI also has the power to order a demerger under Section 28 of the Competition Act 2002, if the merged entity is abusing its dominant position. This means that if the merged entity engages in any form of exploitative or exclusionary practice, the CCI can take appropriate action inclusive of the order to segregate the merged firm.[46] In Mohit Manglani v. Flipkart India (P) Ltd,[47] the informant alleged exclusionary agreements by e-portals with the sellers. The Commission analysed and opined that e-commerce accounts for less than one portion of total retail market. Hence, ordered that there is no dominant position creating adverse effects in competition. The Competition Commission also has powers to impose penalty extending 1% of turnover or assets value whichever is higher for non-furnishing of the information under Section 43A of the Act and penalty of fifty lakhs to one crore for furnishing of false information under Section 44 of the Act. CCI can also monitor the cartels and vertical agreements executed by the company u/s 3 and also abuse of dominant position u/s 4 of the Competition Act after combination. The monitoring power of the CCI after Combination helps to regulate FDI investments even after the approval of combination

Result Analysis And Implications

Foreign investment brings about innovations and improvements in Indian industry.[48] The retailers have the fear of their eviction from market due to foreign investment but the manufacturers are gearing themselves to face the global investors.[49] The Competition Commission has powers to reject or suggest modifications if foreign investment combinations prove to be anti-competitive.[50] The study on the regulation of the Competition Commission on Foreign investment before and after the Combinations clearly portrays the indispensable regulating and monitoring position of CCI and it also shows that the administrative and executive powers of CCI have to be strengthened for efficient functioning. Liberalisation and the elimination of distortions within an economy do not automatically lead to growth in the absence of the supply capabilities to take advantage of new opportunities, and the prevalence of competition is only one factor determine

[45] Saurav Kumar, *Restructuring of Indian Telecom Industry: Emergence of Reliance Jio and M&A Cases Involving Airtel-Telenor And Vodafone-Idea*, 14(1) *Management Insight*, 42, 45 (2018)

[46] M. Tewari, what *does India think*?',(GODEMENT F., ED.). European Council on Foreign Relations, 79,83, (2015)

[47] Mohit Manglani v. Flipkart India (P) Ltd., Case No. 80 of 2014, `http://www.cci.gov.in/sites/default/files/802014.pdf`

[48] Enderwick, P., supra.20 at 204–207

[49] ARPITA MUKHERJEE, NITISHA PATEL, AND ARVIND VIRMANI, *FDI in retail sector, India*, 69 (Academic Foundation, 2005)

[50] Ram Mohan, M. P., and Vishaka, R., supra. 27 at 28.

[51] Report by UNCTAD Secretariat, UN Conference on Trade & Development, (Empirical Evidence of the Benefits from applying Competition Law and Policy Principles to Economic Development to attain greater efficiency in International Trade & Development((TD/B/COM.2/EM/10).)1–22, 13(1998)

countrie's growth rates.[51] The Competition Laws usually allow the competition authorities to assess the trade-off between the injury to consumers on permitting a monopoly versus potential benefits.[52] The study on the impact of FDI on domestic investors and consumers portrays the need for effective participation of CCI for balancing the protection of domestic investors and FDI investment much needed for the economic development of India. Though Foreign Investment is often perceived as a channel of progress and development; it is also criticised as an instrument employed by rich countries to control resources in developing economies.[53] In this stage, Foreign Direct Investment and Competition has to be balanced to compete with Globalized countries in the world market. The main limitation of this study is the lack of analysis on the efficiency of CCI and there is further scope of study on analysis of efficiency of CCI based on its current functioning.

Conclusion and Suggestions

The Foreign investment liberalisation by removing formal barriers to the entry of FDI has increased the competition among the national markets. The weighing balance of economic growth has to be balanced between Foreign Direct Investment and Competition in the Corporate sectors. The control of CCI on FDI through fixation of Combination thresholds, approval procedures, factor analysis in Combination agreements with reference to Vodafone- Idea merger brings forth the regulation of FDI in India. The monitoring role of CCI after Combinations also paves way for the protection of domestic investors. In light of the above considerations, a welfare-oriented competition regime could adopt a preventative approach to abuses of buyer power, and the remedies proposed should be prophylactic in nature. The Provisional powers of Competition Commission have to be strengthened to segregate the beneficial effects of Foreign Investment from the bad effects affecting consumers and domestic investors.

In the Vodafone case discussed above the role of CCI in approving FDI is commendable. The CCI while approving any combinations takes into consideration as provided in the Competition Act. But, it is also seen that combinations are analysed only in terms of the net worth of companies and whether there is any appreciable adverse effect on combination and the consumer perspective is missed in most cases. In Vodafone case by this merger the reduction in the number of telecom companies in the market before and after the said combination has come down. This results in the reduction of choice for customers in accessing the service. Reduction in choice may lead to monopoly and also reduce the quality of services provided. In any combination the CCI has to give importance to customer's choices which will in turn uphold the objectives of the Competition Act. Bringing in more FDI is important to the economy of the nation but at the same time it is equally important that customers rights are safeguarded. Hence a customer-oriented approach is needed in analysing combinations in the future. The upcoming changes in the Indian consumer market will create major opportunities and challenges for both the Indian and multinational companies and the strengthening of Competition Commission with consumer- oriented approach will pave way for better economic development.

[52] R. Gupta, & P. Malik, *FDI in Indian retail Sector: Analysis of competition in Agri-food sector*, 40 (Internship Project Report, Competition Commission of India,2012)

[53] M. PANT & S. DEEPIKA, *FDI in India: History, policy and the Asian perspective*, (Orient Black swan Private Limited, New Delhi,2015)

The Uniform Civil Code: A Triple Divorce Under Muslim Personal Law

Dr. Faisal Ali Khan[1]

Introduction

The Uniform Civil Code (hereinafter referred as "UCC") is enumerated under Article 44 of our Constitution, which says that the Legislature has to pass the law related to UCC for all over India but Indian society always resides with their different traditional aspects related to the religious, rituals, cultural and sociological aspects related to the personal laws of the Country. So, it would not be advisable to implement the same in the present scenario because we are residing in diversity of group of the people in one unity.

The discussions have been made in the Constituent Assembly that if our cultural, sociological aspects and thinking would be similar in future because every progressive society can change their usage and custom under these circumstances the UCC can be made. Let us take an example that the marriages among Northern Indian Hindus cannot take place within family but similar in South Indian Hindus Marriages can take place among Uncle and niece (Mama & Bhanji). Besides, marriages can take place amongst the Muslim within 1st Cousins. So, each & every religious group and castes have their own traditions and values. It cannot be bound under UCC. Although, every progressive society can make changes its customs and traditions as per the reforms and necessity of the period. So, if there may arise such a situation that the future of our country to be found similar in term of UCC then it can be considered.

Normally, the triple divorce in Muslim Personal Law is related to the religious sentiments but it is well settled it in an inappropriate form of divorce under Muslim Personal Law and it is irrevocable after the pronouncement of simple assertion of 'divorce' at a same time. Besides, it is Talaq-e-Biddat.

It is occasionally misused by Muslim husbands according to their whims and fancies. As such Sarla Mugdal case in which Hindu Male who tried to escape from the liability of criminal case by converting to Islam, but the Apex Court did not accept this sort of plea.

The Parliament has already passed a good piece of legislation for the protection of the victim Muslim women i.e. The Muslim Women (Protection of Rights on Marriage) Act No. 20 of 2019; however, the problems of our Muslim sisters cannot be resolved related to Triple Divorce. Still, they are the victim of triple divorce.

Uniform Civil Code: Debates of Constituent Assembly and Judicial Precedents

The purposes of the Constituent Assembly have incorporated an Art. 44 of the Indian Constitution which has made the provisions for the State to take initiative for passing appropriate law for enacting the UCC which can be applicable to the entire Nation. Besides, it has opposed on the grounds that it would be infringement of the fundamental rights enumerated in the Art. 25 of the Constitution by alleging that "right to freedom of religious" and it may be harsh to the minority.[2] The first issue can be raised that it is essential to the legislature to pass appropriate law for UCC for the implementation upon all religions and in term of Articles 245 and 14 of the Constitution is uniform law for all and it is desirable but its enactment in one go can be counterproductive to unity of nation and Articles 25 / 26 is right to religious freedom and not denied to Hindu who are majority in population.[3] The provision of UCC is enumerated under Art 44 of our Constitution which says that State can make such law which is capable to apply within the entire territory of our country in term of Uniform Civil Code (UCC). Although, these sorts of provisions are enumerated under Articles 25 which gives us fundamental right to freedom of religious and Art. 44 of the Constitution that

[1] Associate Professor of Law, Galgotias University, Greater Noida
[2] V.N. SHUKLA, CONSTITUTION OF INDIA 378 (Eastern Book Company 2013)
[3] Pannalal Bansilal Patel v. State of Andhra Pradesh, A.I.R. 1996 SC 1023-4

it may reflect that the first one guarantees religious of personal law freedom and second one divests religion from social relations and personal law. In addition, no doubt at all the subject matters solemnisation marriage, Law of Successions, Law related to Maintenance, Law of Divorce and the like matters such as of a secular character and cannot come within the ambit of Articles 25 and 26 of the Constitution. If any legislation is passed in terms of succession and other matters of secular character under Articles 25 and 26 is a suspect legislation[4] . Article 44 of the Constitution that the Legislature is in the process of passing such law in term of Uniform Civil Code in India and it is a matter of regret. Apart from this, UCC will provide an opportunity for National Unity, Communal Harmony, Brotherhood and Integration by avoiding the conflicts of opinion and ideologies[5] , The Apex Court has dismissed a petition for seeking a direction in the nature of Writ of mandamus to issue for the implementation of UCC by the Govt. of India. The Apex Court has held that it is in the domain of legislature to pass appropriate law related to UCC and the Court can not intervene into these matters[6] . The Supreme Court has also held the similar views that the Courts can exercise the discretionary powers for directives under Art.142 of the Indian Constitution. Hence, the Apex Court has directed the legislature to pass appropriate law for "Talaq-e-Biddat" and said prospective law related to the "Talaq-e-Biddat" will reform/advances in Muslim Law – "Shariat". Right now, it has been reformed by other countries' legislations at globally even by Muslim Countries. Whereas legislation is in the domain of the Parliament till the appropriate legislation will not pass, ultimately, we have to issue injunction against the practice of such divorce up-to six months. Besides, if the process for making law will begin against the Triple-Divorce before expiry of six months, then it will continue till the legislation takes place in the form of enactment, failing which such injunction order shall be vacated. By virtue of the decision of Apex Court held that practice of triple divorce is set aside by a majority of 3.2.[7]

The *prima facie* of the first objection is not maintainable in the eye of law related to the Part IV of the Constitution which says that the Directive principles of State policy as enshrined under Article 44 of the Constitution does not violate, the fundamental rights of the "freedom of religious" enshrined under Article 25 (2) of the Constitution which asserted that especially the secular activities in consonances with religious practices as such guarantee religious freedom as enshrines under clause (1) of Article 25 .[8] Apart from this, the Apex Court has dismissed the contention to abrogate the discrimination between men and women under Section 10 of the Indian Divorce Act, 1869 (applicable to Christians). The Judicial approach is related to their "limit" of the Courts' jurisdiction. The Court has categorically held that when Indian Divorce Act, 1869 mentioned the grounds of divorce and restricts the Courts' jurisdiction and the Court cannot rewrite the law for the addition or subtraction of certain grounds of divorce[9] . Whereas the Courts are the real interpreter of the statutes but it is not advisable to act in such a manner to make the law in term, of "Judge Made Law".

That Sri K.M. Munshi has asserted at the meeting of Draft Committee of the Constituent Assembly regarding the second objection:

He had put forwarded an advanced argument that if the UCC would be passed, it may be painful/ tyrannical to the minorities. Is it tyrannical? There are so many advance Muslim countries which have also enacted a Civil Code. Let us take the example of Turkey or Egypt. Besides, no minorities are enjoying such types of privileges of personal laws. I make a quotation that the process for making the law took the place and as a result the Shariat Act was passed by the Parliament in the British regime. Some sections amongst

[4] John Vallmatton v. Union of India, A.I.R. 2003 SC 2906
[5] *Id.*
[6] Maharishi Avadhesh v. Union of India, (1994) 1 SCC 713
[7] Shayara Bano v. Union of India, (2017) 9 SCC 298
[8] John Vallmatton v. Union of India, A.I.R. 2003 SC 2902
[9] Reynold Rajamani v. Union of India A.I.R. 1982 SC 1261

the Muslim were also dissatisfied such as Khojas and Cutchi Memons. They want to preserve their own usages, customs and old traditions.[10]

Because, they have reserved some usages and customs of the Hindu religions although, they had converted to Islam religions. But they did not want to confirm to the Shariat Act, however, other members of the Muslim community were desirous to enforce Shariat Act, but such enactment is applicable to the entire community of Muslim to follow it. The Khojas and Cutchi Memons did not desir to follow the Shariat Act, but legislation has intended to bring a uniform legislation which is applicable to the whole of community. As we take the example of the European countries, civil code, each & every person would follow the civil code. Besides, it seems to be not applicable before us that the said civil code adopted by so many countries is not harmful/painful to the minorities. The policy of our legislature to bring a uniform and consolidated law to unify our personal laws and such laws would be applicable to the matter of divorce, inheritance, succession, etc. Although, what all those things to do? What radical reduction point is involved? Which I actually fail to understand. . . .[11]

Let us take the instance of the applicability Hindu Law there can be different schools of laws followed by different State/ parts of our country. Such as, Muyukha Law which is also applicable in a few parts of our States and the same Mitakshara School's law also follow in so many parts of India. Besides, Dayabhaga school's law is also applicable in urban parts of India like Bengal. Although so many Hindus are also governed by separate personal law but the Law of Mayukha is applicable in few States of India; let us take for instance the law related to the Mayukha, Mitakshara and Dayabhaga are different from each other. Besides, the Personal Laws of Hindus are separated in term of separate schools like Mayukha, Mitakshara and Dayabhaga. Right now, the question may arise that it is a good piece of legislation on the basis of which can affect the personal laws of our country? Uniform Civil Code does not confine to affect the rights of the minorities, but it has to affect the rights of the majority community.[12]

It is speculated that so many Hindus are not in opinion to apply uniform civil code. India's ethics and culture is a multi-religious society which has followed different religious tenets, usages & customs by different religions. So, it is not advisable to apply uniform civil code for religious group. If we consider that Personal Law is related to divorce, maintenance, inheritance and so on, it would be difficult to maintain the principles of equality as enshrined in our Constitution which says that men and women are equal, and they cannot be discriminated on the ground of sex. To see Hindu Law; if the question arises related to issues of exploitation, discrimination against women; if it is considered a part of Hindu religion or practice, then we are not in a position to pass such which can be helpful for the betterment of the Hindu women. So, we think that there is no appropriate ground why there must not be a UCC for this whole country.[13] But the Supreme Court has observed that if the uniform law is necessary, the legislature should make law is necessity for the unity and integrity of the nation for which we can say that one nation is enough for one law and applicable to the entire nation. So, uniform civil code can be passed as enshrined under Article 44 of the Constitution.

The religions must be restricted to spheres which legitimately ascertain to religious and other things which might be involved in our life to be recognised as an organ which can work for the national integrity, unity, brotherhood, peace loving and law abiding citizens. It would be better to follow the notion of unity and integrity of the Country. We think that there is a national unity. Although so many important factors will often disturb our national consolidation. It is essential for us to follow the secular sphere which unifies and we will be capable to say 'Well because our country is not simply a nation but actually our personal laws are implemented as we are a strong and consolidated nation. Besides, if I argue to the contrary to this view that it

[10] SHUKLA, *supra* note 2, at 379.
[11] *Id.*
[12] *Id.*
[13] *Id.*

may not be a chance to argue with our friends that they could never think that it can be harmful or painful attempt to the minorities.[14]

Although Munshi's observations, have not lost their relevance, no major steps were taken in order to achieve the goal of uniform civil code except that it succeeded to the codification of the Hindu Laws after the commencement of the Indian Constitution. But the Apex Court has held that the divorcee Muslim lady can get maintenance under Section 125 Cr. P. C.[15] Although, the U.P. Government has made the provisions for getting Rs. 6000/- p.a. to the victim of triple divorcee as a maintenance amount from the Government and provide free legal assistance to contest their cases before the Courts. So, it is an initiative step that has been taken for the development of the separate branch of the Law of Maintenance. The Supreme Court has also held that it is an obligation under this article and issued the directions to take the steps into the matter.[16] The Apex Court has also stated not to issue direction to pass a common civil code.[17] The Apex Court has also held that divorced Muslim lady can get maintenance after *iddat* period as such provisions enshrined under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act No. 25 of 1986.[18]

Triple Divorce or "Talaq-e-Biddat" : a Critique

The triple divorce is recognised under Islamic law but it has been disapproved form of divorce. The holy Quran did not give any command and that the holy Prophet did not approve the triple divorce. Besides, it was not a practice during the early regime of more than 2 years of Caliph Abu Bakar. However, he had allowed the triple divorce under the peculiar situation at later stage of his Calilafat. Because the Arabs conquered Syria, Egypt, Persia etc. then the women of those areas were so beautiful compared to the Arabian women. Ultimately, the Arabians were attracted to marry them. But those women had put a condition before the Arabian to marry that they must first divorce their existing Arabian wives in one sitting means triple divorce. This proposal was really accepted by the Arabian just for the sake of marriages with these beautiful women because they knew such type of triple divorce is not recognised among the Arab. Besides, there was a provision for divorce that one divorce can be given in first period of menstruation (*tuhr*) and thereafter second divorce can also be given after second period of menstruation (*tuhr*) but triple divorce at one time is un-Islamic. It is null and void. So, the Arabs could be in a position to marry these beautiful women but also to retain their Arabian wives. The matter of divorce and marriages with Persian beautiful women came to the notice of the Second Caliph Hazart Umar that they had taken an action for preventive measures to avoid the misuse of the power of divorce by the husband. They had passed an administrative order that if the husband had given a triple divorce to his wife, it would be complete and irrevocable divorce and marriage will be annulled. It was merely an administrative order just to tackle the emergent panic circumstances of that time but it was never intended to be a perpetual law of divorce in nature. But later on, the Hanafi Jurists would follow this administrative measure in the form of valid divorce and also paved religious sanction on it.[19]

Besides, it seems to appear that Hazart Umar had taken punitive action against the persons who had given triple divorce and Hazart Umar did not like the triple divorce and discouraged the persons from doing so. The Sunni jurists are of opinion that triple divorce pronouncement at the same time is irreconcilable.[20] But nowadays, it is unconstitutional and a punishable offence. Besides, there would be differences arising between husband and wife which would be better to refer

[14] Pannalal Bansilal Pitti & Ors v. State of Andhra Pradesh & Anr., JT 1996 (1) S.C.
[15] Mohd Ahmad Khan v. Shah Bano Begum, A.I.R. 1985 SC 945-54 and the Muslim Women (Protection of Rights on Divorce) Act 1986; Jorden Diengdeh v. S.S. Chopra, A.I.R. 1985 SC 935
[16] Sarla Mudgal v. Union of India, A.I.R. 1995 SC 1531
[17] Lily Thomas v. Union of India, (2000) 6 SCC 224; John Vallamatton v. Union of India, A.I.R. 2003 SC 2902
[18] Danial Latifi v. Union of India, A.I.R. 2001 SC 3958
[19] AQIL AHMAD ET. AL., MOHAMMEDAN LAW 165-166 (Central Law Agency 2003).
[20] *Id*. at 168.

them to the arbitration who would resolve the disputes by amicable settlement.

Nowadays, much emphasis is laid upon a cardinal point that there would be a Uniform Civil Code in India. As we know India is a secular State where different Communities live together, practice different religions and follow different rituals and customs and the citizens of India have "Fundamental Rights", guaranteed under the Constitution, and thus, enjoy freedom at large accordingly. So in such a pluralist State like India, would it be probable to have an effective and unabridged UCC in India? We should also bear in mind that the Legislature frames the law/legislation in accordance with the need and varied circumstances of society. Consequently, some of the legislations that are passed in the Parliament even without deliberations, which do not prove to be much effective and conducive to some communities.

So, if the UCC is formulated, as enumerated under Article 44 of the Constitution, considering and maintaining the spirit of respective religions, rituals, customs and culture of all the communities of India and unifying them, appeasing all sections of the society, then, perhaps, it may prove to be effective and achieve its objectives, which are an arduous task, indeed.

DIVORCE under the Muslim Law has been regarded as "The worst of all the permitted things". A divorce under Muslim Law pronounced by a husband three times consecutively is called Triple Divorce or Talaq-e-Biddat which is irrevocable and dissolves the marriage straightaway. Right now, it is null and void. It can be prosecuted under the Law.

The law on the Triple Divorce, passed by the Parliament, contains provisions for sentence and a fine for the husband, liable for the Triple Divorce, though, is apparently detrimental to him, but we still come across the cases under the said law which has not served the very purpose it is meant for. Proper implementation of the said law and general awareness is required in the society. NGOs can play a vital role to create awareness in our society and take initiatives to create awareness camps among the women and educate them about their legal Right now, the Govt. of India has passed the Muslim Women (Protection of Rights on Marriage) Act, 2019, and enumerated the provisions that if the husband would pronounce triple divorce, then he may be prosecuted and awarded a sentence up-to 3 years and shall also be liable for a fine as the case may be. The provisions have been made under Section 3 of the Act for the pronouncement of talaq-e-biddat by the husband to the wife is void and illegal. It would amount to be prosecuted under Section 4 of the Act and can be awarded sentence up-to 3 years and shall also liable to a fine. Besides, Section 5 of the Act has also made provisions for the subsistence allowances to the divorcee and her children from her husband. Apart from this, an offence of triple divorce is cognizable and compoundable under Section 7 of the Act; which can be compromised by the wife with her husband. rights.

Triple Divorce OR Talaq-E-Biddat: A Judicial Trend

The common phrase used by the Courts is that the talaq-e-biddat or triple divorce is good in law though bad in theology or religious point of views.[21] The Privy Council has recognised the triple divorce pronounced at one time as validly effective.[22] The Madras High Court has held that divorce can be given in the absence of the wife by saying/pronouncing repeated three times I divorce forever.[23] The Family Court has exclusive jurisdiction to entertain the petition under Section 125 Cr. P. C for maintenance of the wife and divorced wife is also entitled to file petition under Section 125 of the Cr.P.C even after iddat period as long as she does not remarry and the amount of maintenance to be awarded not to be restricted for iddat period only.[24] The Apex Court has held that the divorced wife can also be entitled to get maintenance from her husband after the period of *iddaat* if she does not remarry with some other person or unable to maintain herself. Thus, being a beneficial piece of legislation,

[21] *Id.* at 170.
[22] Saiyida Rashid Ahmad v. Mst. Aneesa Khatoon, A.I.R. 1932 PC 25
[23] Aisha Bibi v. Qadir Ibrahim, (1910) 3, Mad. 22
[24] Shabana Bano v. Imran Khan, A.I.R. 2010 SC 305

the benefit thereof must accrue to the divorced Muslim women.[25] Merely facts narrated in the pleadings of the Written Statement is not sufficient to pronounce a divorce but the husband would take the plea and proof of the divorce by adduce the necessary evidence unless and until the obligation comes to end under Section 125 of the Cr.P.C[26] . The Apex Court has held that the burden of proof lies on the husband to prove that he has pronounced the triple divorce under the Quaranic reasons. Besides, the Apex Court has held that the practice of triple talaq or talaq-e-biddat violates fundamental rights of Muslim women and it is unconstitutional.[27] There is a lack of option of the attempt for reconciliation and revocation as the case may arise. The triple talaq is against basic tenets of Holy Quran, violating Shariate. Apart from this, religious freedom does not include triple talaq under Article 25(1) of the Constitution and therefore protection under Article 25(2)(b) does not apply.[28] The Apex Court has further held that the Court is competent to entertain the petitions under Article 32 of the Constitution to challenge the personal laws which can violate the fundamental rights and not by the Legislature.[29] The Apex Court has also observed that the valid divorce amongst the Muslims must follow certain things to be considered that (1) There must be a valid divorce to be based on genuine reasonable cause and must not be a ground of husbands wish, whim and caprice (ii) It must not be a confidential act (iii) Between the declaration of divorce and finality, there must be a gab for an amicable settlement between the husband and wife with the aid of arbitration and conciliation (Minority view) (Per J.S. Khehar, C.J.I. for himself and on behalf of S. Abdul Nazeer, J.)[30] .

Conclusion

To wind up, the above discussions which are the limelight to the issues and challenges of Uniform civil code and triple divorce, it is an acute problem before us that it is not purely problem related to our law, but it is a mixed problem of law, religious, sentiments, customs and usage. As far as the issue of uniform civil code is concerned, we will follow up the views of the Constituent Assembly which has said that our society is multi-religious and multicultural society and uniform civil code might be applicable in such an advanced situation whenever our cultural, customs and usages becomes similar to each other. There would be uniformity of norms related to the issues of divorce and marriage etc. Besides, the issue of triple divorce is concerned as the aforesaid origin at the regime of Hazrat Umar how it came in practice since long but it is well recognised law related to divorce in the present era to the followers of the Hanafi Law but Shia and others did not recognise it. It is occasionally misused by male Muslims and it is painful rule to the female. Besides, Our NGOs and the Islamic Scholars will propagate the massages of our Quran and Prophet Mohammad who says that it is most disliked and disapproved form of divorce. Hence, it should be avoided. Ultimately, our sisters may not be compelled to come to the Court for their redressal of the grievance. Disputes may be settled amicably out of Court. It may be a milestone to the cheap and speedy justice to our mothers and sisters. Besides, the Apex Court recently has rightly banned the practice of triple divorce at a time. It was an arbitrary exercise of powers by the husbands and our sisters have faced acute problems under these circumstances which is resolved by the Apex Court and our legislature has also passed the legislation for prohibition of the Triple Divorce and for prosecution for the same practice of talaq-e-biddat.

Suggestions:

1. To Establish Rehabilitation Centre for the victims of triple divorcee/ victim of acid attack.
2. To give free medical facility to the victims of triple divorcee/victim of acid attack.

[25] DINSHAW FARDUNJI MULLA ET. AL., PRINCIPLES OF MOHOMEDAN LAW 366 (Lexis Nexis Publication 2014).
[26] Shamim Ara v. State of U.P. & Anr., 2002 (7) SCALE 183
[27] Shayara Bano v. Union of India, A.I.R 2017 SC 4609
[28] *Id.* at 4612.
[29] *Id*. at 4613.
[30] *Id*. at 4614

3. To give them free vocational training just to earn their livelihood.
4. To give scholarship and free education to the children of triple divorcee/victims of acid attack.
5. To provide free legal aid and advocate to contest their cases and provide legal assistance.
6. To provide a loan at concessional rate of interest with subsidies to initiate their own cottage industries like swigging and tailoring centre, food and craft centre.
7. To provide them accommodation, in case they do not have any shelter.
8. To provide free home under different Govt. schemes on priority bases.
9. To provide employment under different Govt. Schemes on priority bases.
10. To establishment counselling centres to reduce their mental agony.
11. . To provide free education to the children of the triple divorce/acid attack victims.

Whether Artificial Intelligence is a Person or Machine: An Analysis Under Patent Law

Janist Dhanol[1]

Introduction

For the first time in 1956, the word 'Artificial Intelligence' was mentioned in the Dartmouth Summer Research Project on Artificial Intelligence. Since then, it has taken a remarkable journey with more than 1.6 million AI-related scientific publications and nearly 3,40,000 patent applications for AI-related inventions.[2] However, it was not before the AI DABUS case, that many people considered the prospects of Artificial Intelligence as an inventor. It would be justified to state that inventors in patent applications mentioned AI's role in the invention but before the AI DABUS case, as a rule, inventors after discussing the matter with their lawyers, used to show themselves as the main inventor and AI in supportive role, which was a smart decision, considering the existing law of Patent. With the change in technology and its application, it is necessary to address the issue. Many countries in the world have already started their journey toward legal implication of AI as an inventor but, in India our legislature has failed to address the issue on an earlier date and thus India started its journey in 2017, when India's Ministry of Commerce and Industry set up the 18-member Task Force on Artificial Intelligence, with the mandate to advise inventors on the creation of a framework to promote and deploy Artificial Intelligence, after taking all social and technological factors into account. After the Ministry of Commerce and Industry's first step, the NITI Aayog, an Indian government think tank, published a discussion paper called, 'India's National Strategy for Artificial Intelligence'[3] which discussed global developments in Artificial Intelligence and discussed the role of Artificial Intelligence in the Indian society along with the challenges faced by it. However, it was highly concerning that such detailed discussion failed to address an essential aspect of AI, i.e., the legal implication of Artificial Intelligence. In this research paper we will discuss the legal implication of Artificial Intelligence with special reference to the AI DABUS case.

Different Aspects of AI as Personality

The History of Intellectual property laws can be traced back to the 19th century and since then suitable changes have been made according to the dynamic field of science and art. However, one thing which remained constant is that rights are always granted to human beings or in legal terms, to a natural person. The reason behind the concept was that, at that time in history, technology was not as advanced compared to the current times and at that time only a human being was capable enough to invent or create. But in the past 50 years, the entire scenario has changed; now with the development of Artificial Intelligence, possibilities for new inventors have increased. This leads us to the most important question, whether Artificial Intelligence should be considered as a legal entity with capabilities to hold property right or not. For that purpose, we need to understand the nature and characteristic of artificial intelligence.

According to Salmond, to be a legal person is to be the subject of rights and duties. To confer legal rights or impose legal duties, therefore, is to confer legal personality.[4] In 1956 John McCarthy, invited the lead-

[1] LL.M. (IPR Specialization), Legal Researcher

[2] WIPO, *The Story of AI in Patents*, https://www.wipo.int/tech_trends/en/artificial_intelligence/story.html (last visited Nov.01, 2020).

[3] NITI Aayog, http://niti.gov.in/sites/default/files/2019-01/NationalStrategy-for-AI-Discussion-Paper.pdf (Last visited March 3, 2021)

[4] Salmond, *Jurisprudence* (5th edition)(London: Stevens and Haynes,1916)

ing researches from different fields to discuss a new topic of 'thinking machine' and the topic was so novel that he had to coin his own term for reference and it was termed as artificial intelligence.[5] Over time, the definition of artificial intelligence evolved with according to the functions of artificial intelligence and the goals which humans tried to achieve. According to English Oxford Living Dictionary, artificial intelligence means "The theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decisionmaking, and translation between languages."[6] From this definition we can say that, artificial intelligence possess as the ability to communicate, to achieve the identified aims, creativity, and to develop itself by cognitive process. Even though it has human replication, artificial intelligence fails to be sufficient to consider it as a legal personality. After going through the details of legal personality it would not be difficult to realize that there are entities other than human beings which are considered as legal personality, like corporations. So, the question here is, what makes artificial intelligence different? One explanation to this which could be given is that, in case or corporations, (even though the corporation has a separate legal identity from its creators) in cases of criminal liability, humans are considered to be responsible for the act because a corporation doesn't have its own mind or consciousness hence, it works as per the sweet will of its controller i.e. a human being. However, the situation is entirely different in case of artificial intelligence, because it has its own decisionmaking ability. But then again, the entire artificial intelligence system works on codes, which were made by human beings. It is also questioned whether it is safe to say that, just like in case of a corporation a human being can be held liable in case of an act of criminal nature of an artificial intelligence? The answer to this question is not a straightforward yes or no, because it is mentioned that artificial intelligence can develop itself from cognitive process, as it happened in Facebook AI bot,[7] so even though the correct codes are made, it is possible for an artificial intelligence system to develop its own rationality and take a wrong decision. Thus, a new question arises, that who would be liable for that act and hence before granting a status of legal personality to artificial intelligence all this issue must be taken into consideration.

Another issue with the granting Intellectual Property (IP) rights to an artificial intelligence is that it will not justify the Incentive Theory related to IP rights. When it comes to justifying the granting of IP rights, Incentive Theory makes a strong point in favour it. According to incentive theory, IP rights should be granted to the creator so that it would help him to earn monetary benefit and providing an incentive to create more. As we all know the basic psychology of the human mind, that a person's needs motivation to complete a task, and if there is no incentive in creation eventually the rate of invention will drop which would hinder the progress of our society. When it comes to artificial intelligence, there is no need to provide incentive since they are not human beings and therefore does not require motivation to perform tasks.

Furthermore, if we work on hypothesis that AI can be granted IP rights, it brings up another question of how AI would exercise the rights granted to it as an IP owner. Rights like licensing and franchising require parties to enter into a contract and AI, not being given human entity recognition, cannot enter into a contract. Hence it cannot exercise the right given to it as an IP owner therefore it would defeat the purpose of granting IP rights. It is also worth mentioning that a similar situation would occur in case of the violation of IP rights of an AI, as till date AI has not granted the right

[5] J. McCarthy, M. L. Minsky, N. Rochester, C.E. Shannon, A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence, www-formal.stanford.ed (Aug. 31,1955), http://wwwformal.stanford.edu/jmc/history/dartmouth/dartmouth.html.

[6] *Artificial Intelligence*, LEXICO, https://www.lexico.com/definition/artificial_intelligence (Nov. 4, 2020).

[7] Roman Kucera, *The truth behind Facebook AI inventing a new language*, TOWARDS DATA SCIENCE, (Nov. 4, 2020, 9:29 PM), https://towardsdatascience.com/the-truth-behind-facebook-ai-inventing-a-newlanguage-37c5d680e5a7.

to sue, therefore the purpose of granting IP rights to inventor will be defeated.

After considering the points above mentioned, it would be safe to assume that the answer to the question whether AI is eligible to hold IP rights or not, is not straight forward and the problem lies in the jurisprudence of IP laws.

Artificial Intelligence and Indian Patent Law

When it comes to legal implications of Artificial intelligence with respect to patent law, it would be safe to say that it is an uncharted territory, and we are still trying to figure out our first step. When we look at the Indian Patent law, it is clear that there is no provision to address the issue. To discuss the possibility of patentability of Artificial Intelligence related invention, we need to understand the essence of AI related invention. AI related invention is a combination of several other inventions and not a single invention, which includes algorithms, mathematical formulae or methods and calculation or combination of both. With this clarification another thing comes into equation i.e. Section 3(k) of Indian Patent Law. According to Indian Patent Act, mathematical or business methods or a computer programs or algorithms are not eligible for patent protection.[8] Since the law is not clear, the next reliable source of information is the guidelines issued by Indian Patent Office. Till this date, Patent Office approach is to react to the situation rather than being proactive. It suggests that decisions of Indian Patent Office are heavily influenced by outside pressure and opinions. In recent years, the Indian Patent Office issued a few guidelines with respect to Computer related invention but rather than solving the problem they left applicants with more doubts and speculations regarding future guidelines. The reason behind this is that it is the Patent Office's habit to react to a situation rather than being proactively solving the issue because with every guideline there were new rules and requirement to be followed.

Recently in 2019 the Delhi High court took different approach in Ferid Allani[9] case. In this case the Delhi High court, while emphasizing on the principles discussed in draft guideline2013, relating to Computer related invention, held that Computer related inventions are not barred from patentability, subject to investigation assessing the "technical effect" and "technical contribution" of the underlying invention. In this judgment the court rightly held that Section 3(k) put bar on computer programs per se and not on all invention based on computer program.

The Judgment of the Delhi High court has shown to us the opening towards the uncharted territories.

Approach Till Date and AI Dabus Case

In recent years, with the increase in developments of the AI field, the debate related to AI as IP rights holder has also increased. But, the IP law has failed to match the speed of these developments; hence uncertainty among the AI inventors has also increased. When we look at the precedents set, it is clear that the judgments are not in favour of granting IP rights to a AI. These judgments revolve around the possibility of considering AI as a legal personality.

AI DABUS case was the latest development in the debate. In this case, the problem revolved around legal personality of AI. According to Stephen Thaler, owner of AI DABUS, inventorship should be granted to AI since his contribution in invention in zero and it would be correct to recognize AI DABUS as an inventor and he be made himself an assignee and successor in title, hence he will perform all the rights and duties attached to a person as an IP rights holder. From a simple look at this statement, the solution to the entire problem can be assessed, but it is not simple enough. Under the patent law, there are specific methods through which ownership can be assigned. These methods are, the inventor is the employee of the company or working as a contractor of the company. In both these cases, ownership can be assigned at the time of applying for the patent. These methods take us back to the real problem i.e., legal personality. In both the cases the parties are considered as a legal personality, but AI is not a legal personality hence it cannot perform the above-

[8] The Patents Act,1970, § 3(k), No. 39, Acts of Parliament, 1970 (India)
[9] FeridAllani V. Union of India, W.P.(C) 7/2014 & Cm Appl. 40736/2019

mentioned functions. Similar opinion was given in the famous Monkey selfie case.[10] In the judgment, judges of the 9th circuit held that animals are not human, lacks statutory standing under the Copyright Act hence denied Copyright. If we apply same statement in case of AI, it is evident that AI cannot claim IP rights.

Moreover, since AI does not have any legal personality and entity, it cannot be an employee of a company. AI can be owned by the company or an individual, but it cannot be hired for employment.

In the AI DABUS case, another argument was given that in case of a minor or incapacitated person; their rights are exercised by their legal guardian, so the same can be done in case of AI. For that, the judges held that the situation in case of a minor and incapacitated person is different from AI, in the former case they have a legal personality and legal right which they can transfer but in case of AI, it cannot be done since an AI doesn't have any legal personality.

Conclusion and Suggestions

Granting AI any IP right would be a challenge to our legislators. Since the problem is related to jurisprudence of legal personality, it is essential to categories AI as a legal personality, in 2017, the European Union parliament discussed the matter of AI and suggested that selflearning robots such as AI can be granted a legal personality and they categorized them as 'electronic personalities. The motive behind this is that it will allow robots to be personally liable if they go rogue and start hurting humans and damaging property. Nathalie Navejans, a French law professor at the Universitéd'Artois, while giving her opinion on the motion said, "By adopting legal personhood, we are going to erase the responsibility of manufacturers." In a sense it could be true, for example if a person develops an AI and teach it, through cognitive process, to do some illegal act, it would be helpful for the manufacturer to escape from liability since the AI has legal personality and can be held liable for action.

There is another side of the problem, and it is correctly put by Ryan Abbott is AI DABUS case. According to him if AI cannot be registered as an inventor due to the lack of legal personality and humans cannot be registered since they are not directly involved, then the invention may not be patentable at all and it would be wrong because it will prevent inventors from investing money and time in AI technologies and as a result, it will prevent major breakthrough in important areas of science. It is also true, since the purpose of IP right is to promote development in society and by refusing AI as inventor, we are hindering the development.

In the end, it could be concluded that there is a huge gap between the current requirements and existing legal framework and with each passing day Artificial Intelligence creates new challenges for our legislatures. Since Artificial Intelligence is inevitable in future, it is necessary to match the pace to promote and limit the Artificial Intelligence. Till then it is the duty of stakeholder like us to do our bit by voicing concerns at different stages.

After discussing various issues related to the patentability of AI invention the following suggestions are made to help to curb the issues:

a. There should be a uniform treatment of AI related invention at the global level, for that all the member nations of TRIPs must come together to bring a suitable amendment in the agreement.

b. At the national level, government should start research work from an academic level and should establish research department related to the subject and should provide financial help to these institutions for conducting research and development of the subject.

c. Furthermore, legislatures should commence work towards developing a law with respect to AI in connection with IPR laws, while keeping in mind all the issues discussed in the paper and while developing AI related law, legislatures can borrow principle from other laws, for instance, while deciding accountability for consequences of AI invention, a well-established principle of 'Lifting of Corporate Veil' in company law can be included to hold actual people working behind the AI accountable for the consequences.

[10] Naruto v. Slater, 2018 WL 1902414 (9th Cir. April 23, 2018)

Covid-19 and the Plight of Animals in India: Safety and Prevention Approaches

Nimita Aksa Pradeep[1] *and Noureen Siddique*[2]

Introduction

COVID-19, commonly known as coronavirus, has brought numerous changes in the world as a whole as well as on the individual lives of human beings. From a decrease in economic growth to a reduction in human interaction and psychological fear and panic, coronavirus has covered it all through its rapidly spreading nature.[3] Along with the daily lives and well-being of human beings it has affected on a large-scale. Animals also have their share of hardships and changes in the atmosphere. As there are several instances recorded that showed cruelty towards pet animals, stray animals, etc.

Pet animals are abandoned in large numbers in many areas. Misconceptions had spread throughout the world regarding the spread or transmission of the virus by animals.[4] With very few incidents of animals being affected by the virus and due to the impact of false news spread through different media sources, cruelty towards animals witnessed a steep increase during this difficult period. Hunger and starvation of animals remain another issue that needs action along with the improper treatment of animals by pet shop owners by locking them without food, etc.

In the case of India, though the Indian Constitution stresses the importance of compassion towards animals and the existence of the Prevention of Cruelty to Animals Act, 1960, the condition of animals during such a pandemic situation is getting worse. This gives rise to the need for intensive research and better formulation of laws considering different scenarios.[5] The fine structure and punishment for such offenses need to be reconsidered taking into consideration the present situation.[6] Lack of proper treaties and guidelines also pave way for the increase in such cruelty. The involvement of the Judiciary and Animal Welfare Authorities and the steps taken to reduce these atrocities along with hunger of stray animals., are worth appreciating.

Cases such as ***Sangeeta Dogra v. Central Zoo Authority of India***[7] have been of great importance in promoting the welfare of animals by reducing their hunger. More initiatives of similar nature along with the active involvement of people in protecting their pets and other animals during such a difficult period shall be the base for bringing into existence a proper environment for them to live in. This should be accompanied by stricter laws to punish those in violation of the provisions.

Background

"Ahimsa" or "non-violence towards all living beings" is one of the *"Pancha maha vratas"* of Jain-

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[3] Matias Carvalho Aguiar Melo & Douglas de Sousa Soares, *Impact of Social Distancing on Mental Health During the COVID-19 Pandemic: An Urgent Discussion*, 1 International Journal of Social Psychiatry 1 (2020).
[4] Coronavirus Disease (COVID-19) Advice for the Public: Myth Busters, World Health Organisation (May 31, 2020, 12:28 am), `https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/mythbusters`.
[5] Abha Nandkarni & Adrija Ghosh, *Broadening the Scope of Liabilities for Cruelty Against Animals: Gauging the Legal Adequacy of Penal Sanctions Imposed*, 10 NUJS Law Review 1 (2017).
[6] Id.
[7] Sangeeta Dogra v. Central Zoo Authority of India, Writ Petition (Civil) No. 10856/2020.
[8] What Each Major Religion Says About Animal Rights, Sentient Media, Nov. 15, 2019.

ism as well as one of the "five precepts" of Buddhism and thereby form an integral part of both religions.[8] *"Ahimsa"* also finds mention in several ancient Hindu texts such as the Chandogya Upanishad, Sandilya Upanishad, Rig Veda, Yajur Veda, etc.[9] Furthermore, some of these Upanishads and Vedas explicitly prescribe *"pashu ahimsa"* or "non-violence towards animals".[10] The concept of *"ahimsa"* also finds mention in the Indian epics such as the Mahabharata and Ramayana. In furtherance to this, the Mahabharata reiterates the phrase *"ahimsa paramo dharma"* or "non-violence is the highest moral virtue" multiple times.

Furthermore, different animals were considered to be avatars of various Hindu deities or associated with them in some manner or the other under the Sanatana Dharma.[11] These animals were hence not only treated well, but they were also oftentimes worshipped and treated at par with the associated deity.[12] Thus, the protection of animals and animal rights have both religious and cultural backing in India. Although animal sacrifice was prevalent to a considerable degree during the ancient period, kings and rulers considered the abovementioned religious and cultural aspects which were duly reflected in their policies.

However, with the continuance of British colonial rule in India, the condition of animals in the country went from bad to worse. Subsequently, after observing the pitiable and deplorable state of animals in the country, English animal rights activist Colesworthey Grant established an SPCA (Society for the Prevention of Cruelty to Animals) in the Bengal Presidency in the year 1861. Later on, several other SPCAs also came up in different parts of the country. They advocated the prevention of cruelty to animals and campaigned for the enactment of laws and legislation in this regard.

At around the same time, a branch of the Humanitarian League, an English organization advocating the rights of sentient beings, i.e., both humans and animals, was established in India. However, their campaigns were influenced to a considerable degree by religion and religious preferences, and they confined their advocacy to topics such as vegetarianism and cow protection, ignoring most other aspects of animal protection.[13] More or less, during the same period, cow protection movements became extremely popular in the northern parts of the country.[14]

Post-independence, the constitution-makers incorporated "to have compassion for living creatures" in the Directive Principles of State Policy. In furtherance to this, the Prevention of Cruelty to Animals Act, 1960 and the Wildlife Protection Act, 1972 were enforced.[15] There also exist various provisions for punishment of certain forms of cruelty to animals in the Indian Penal Code, 1860.[16]

Covid-19 and The Condition of Animals in India: Current Scenario

The advent of coronavirus or COVID-19 has led to some major changes in the protection and welfare of animals throughout the world. There are many cases of harassment and cruelty reported in India against animals of different nature in recent times. The major ways in which animals are affected during the spread of the virus are starvation and cruelty against stray animals, abandonment of pets due to misconceptions

[9] Louis Caruana S. J., Different Religions, Different Animal Ethics?, 10 Animal Frontiers 8 (2020).
[10] E. Szucs, R. Geers, T. Jezierski, E. N. Sossidou & D. M. Broom, *Animal Welfare in Different Human Cultures, Traditions and Human Faiths*, 25 Asian-Australasian Journal of Animal Sciences 499 (2012).
[11] Aaron S. Gross, *Internal Diversity of Animals in Religion, Religion and Animals* (May. 31, 2020), https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935420.001.0001/oxfordhb9780199935420-e-10.
[12] Id.
[13] S. A. A. Tirmizi, *The Cow Protection Movement and Mass Mobilization in Northern India 1882-93*, 40 Proceedings of the Indian History Congress 575 (1979).
[14] Id.
[15] Gilles Tarabout, Compassion for Living Creatures in Indian Law Courts, 10 Religions 383 (2019).
[16] Id.
[17] Pragya Tiwari, *Amid COVID-19, Are We Really Looking Out for Stray Animals and Pets?*, The Quint, Apr. 12, 2020.

of people, animals being left in pet shops without requirements, lack of veterinary facilities and pet food.[17]

Abandonment of pets is a major concern that has arisen during this pandemic. It is observed by the People for Animals (PFA) that about 15-20 pets are being abandoned daily in Delhi alone. Even though it is made clear that animals do not spread coronavirus, people are ruthlessly abandoning pets in different parts of India and abroad. Also, there are some instances which include dog, cat, and tiger, having tested positive for the virus. The situation is becoming worse due to fear and negligence on the part of pet owners. The elders in the house are tempted to throw away their pets due to the fear of being infected.[18]

There are other incidents of cruelty where animals are brutally beaten up with hard objects such as rods, etc. Even though these offenses are punishable under Section 11(1) of the Prevention of Cruelty to Animals Act, 1960, many incidents have been reported of similar nature.[19] People for the Ethical Treatment of Animals (PETA) have raised a plea to take necessary action regarding this issue.[20] Misleading and misinformative advertisements that led to people abandoning their pets have been made to strike down by authorities such as Brihanmumbai Municipal Corporation, etc.[21]

Another area of concern is, animals being locked up without providing due care and protection in pet shops that remain locked due to the nationwide lockdown. NGOs working for animal welfare have stated that the situation is horrific wherein the animals are famished, thirsty, and afraid. There is no proper ventilation in these shops. Most of the dogs, fish, cats, and birds remain dehydrated and the condition is so worse that they require hospitalisation immediately. Due to the unavailability of transport facilities and doctors, many of these fishes and birds lay dead. Various organisations are on a mission to rescue them.[22]

Stray animals have also been targeted to a great extent during this situation of fear and panic. There have been instances of stray dogs being shot with airguns, etc. Cruelty against stray animals increases daily due to the misconceptions of people. All this started due to the headlines in several newspapers stating that stray animals may have played a role in transmitting the coronavirus disease and other misinformation that spread through social media and other platforms.[23]

Even though Former Union Minister for Women and Child Welfare and Chairperson of People for Animals, Smt. Maneka Gandhi had issued a statement bursting the myths regarding the spread of SARS-Cov-2 by animals, such instances continue.[24] But one good news is that some people and organisations are putting tremendous efforts into reducing the hunger of stray animals by feeding them at regular intervals which also has great involvement from the part of the Animal Welfare Board of India (AWBI) and other authorities.[25]

Legal Provisions for The Protection of Animals in India

Though the Government of India is "of the people, by the people, and for the people", animals and animal rights should not be forgotten. The Parliament of India as well as the State Legislative Assemblies of the country have power under Article 246 of the Indian Constitution to enact laws and legislations for the

[18] Neha Kirpal, *Friendicoes Society for the Eradication of Cruelty to Animals Rescues Dogs Amid COVID-19*, The New Indian Express, Apr. 26, 2020.
[19] 9Manka Behl, *Strays and Pets Do Not Spread COVID-19, Treat them Well, Times of India*, Apr. 30, 2020.
[20] Special Correspondent, *COVID-19: Assam Police to Book Pet Deserters After PETA India Plea*, The Hindu, May 12, 2020.
[21] Vijay Singh, *BMC, Other Civic Bodies to Delete False Info Regarding Animals in COVID-19 Advertisements*, Times of India, Mar. 20, 2020.
[22] Aditi Chattopadhyay, *COVID-19: Animals Left to Die as Owners Abandon Pet Shops in Bengaluru*, The Logical Indian, Apr. 7, 2020.
[23] Mittur N Jagadish, *COVID-19: Do Not Target Stray Dogs*, Deccan Herald, Apr. 24, 2020.
[24] Theja Ram, *Pet Abandonment, Cruelty Against Strays Rise as COVID-19 Rumours Trigger Fear*, The News Minute, Apr. 13, 2020.
[25] Feeding Stray Dogs and Other Animals During COVID-19 Lockdown: Delhi HC Seeks Centre, AAP Govt. Stand, The Indian Express, Apr. 27, 2020.

"prevention of cruelty to animals" as it falls under Entry 17 of the Concurrent List.[26] In addition to that, in the case of ***Animal Welfare Board of India v. A. Nagaraja***[27], the Supreme Court stated that the right to life guaranteed under Article 21 of the Constitution applies to animals as well.[28] Article 51A(g) of the Constitution also confers the fundamental duty "to have compassion for living creatures" on all citizens of the country.[29] In furtherance to this, the Prevention of Cruelty to Animals Act, 1960 was introduced by the Parliament.[30]

Section 3 of the said Act prescribes that all owners of animals in the country have the duty "to prevent the infliction of unnecessary pain or suffering" on animals in their custody as well as "to take all reasonable measures to ensure the well-being" of animals under their care.[31] Dumping household pets on the street or abandoning them in front of animal shelters during a global pandemic such as COVID-19 can hence be considered as a violation of the abovementioned duty. Furthermore, Section 11 of the Act stipulates that abandoning an animal "in circumstances which render it likely to suffer starvation or thirst" is punishable with a fine ranging from Rs. 10 to Rs. 50 in case of first-time offenders and fine ranging from Rs. 25 to Rs. 100, imprisonment up to 3 months or both together in case of subsequent offenders; if the subsequent offense is committed within 3 years of the first one.[32]

The above-mentioned Section also makes the act of "beating, kicking, torturing or causing unnecessary pain or suffering" to an animal, pet, or otherwise punishable.[33] Furthermore, "rendering useless, killing, poisoning or maiming" an animal is punishable with fine, imprisonment up to 2 years or 5 years or both together as per Sections 428 and 429 of the Indian Penal Code, 1860.[34] Owners who resort to throwing their pets, onto the street or in front of animal shelters, from moving cars, etc. can hence be brought under the ambit of the above-mentioned Sections. Despite several countries across the globe having animal protection laws in place, there is currently no international law or legislation in this regard though Universal Declaration on Animal Welfare (UDAW) as well as other similar international treaties have been proposed in recent years.[35]

Legal Provisions for The Protection of Animals in Other Jurisdictions

In the **United Kingdom**, the laws regarding cruelty towards animals and protection are very strict. The legislation speaks about both cruelties committed towards animals and negligence. In case if such acts are done, the wrongdoers can obtain a lifelong ban on ownership of pets, a maximum prison term of 51 weeks, and a fine which can extend up to £20,000.[36]

In **Germany**, the constitution itself states that it is the responsibility of the state to protect the interests of future generations by conserving natural beings and animals. Germany is the very first country to protect animals under the Constitution.[37]

[26] Bhavya Srivastava, *Laws Relating to Animals*, 3 Journal of Law and Public Policy 1 (2018).
[27] Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547.
[28] Jessamine Therese Mathew & Ira Chadha Sridhar, *Granting Animal Rights Under the Constitution: A Misplaced Approach? An Analysis in Light of Animal Welfare Board of India v. A. Nagaraja*, 7 NUJS Law Review 349 (2014).
[29] Rhyddhi Chakraborty, *Animal Ethics and India: Understanding the Connection the Capabilities Approach*, 8 Bangladesh Journal of Bioethics 33 (2017).
[30] Supra 3.
[31] Id.
[32] Supra 27.
[33] Id.
[34] Supra 24.
[35] Sabine Brels, *A Global Approach to Animal Protection*, 20 Journal of International Wildlife Law and Policy 105 (2017).
[36] Iyan Offor, Animal Welfare, Bilateral Trade Agreements, and Sustainable Development Goal Two, 3 The UK Journal of Animal Law 3 (2019).
[37] Erin Evans, *Constitutional Inclusion of Animal Rights in Germany and Switzerland: How Did Animal Protection Become an Issue of National Importance?*, 18 Society and Animals 231 (2010).

In the **Netherlands**, The Animal Welfare Act has provisions that deal with cruelty against animals and its punishments. Also, the duty to care for animals is enumerated in the Act. The protection also extends to the ban on testing cosmetics on animals.footnoteB. K. Boogaard, *Elements of Societal Perception of Farm Animal Welfare: A Quantitative Study in the Netherlands*, 104 Livestock Science 13 (2006). The law prohibits animal suffering and recognizes the sentience of animals.

In **Austria**, the Animal Welfare Act, 2004 states that the welfare and protection of animals are equally important to that of humans. The country hosts one of the harshest anti-cruelty laws in Europe. The law bans owners of pets from cropping their dogs' ears, tails, etc., has a provision that states farmers to not put their chicken in cages and ensures that small pet animals do not swelter in pet shops.[38]

Switzerland, has recognized the rights of animals through its constitution and separately states the importance of protecting the dignity of animals. Any activity that is violative of the right to dignity of animals is banned in the country.[39]

Critical Analysis

Social distancing and strict sanitation are becoming an essential part of our lives due to the effect that COVID-19 has brought. Our constant efforts are being channelled for protecting ourselves and ensuring our safety. During this hustle, there are many instances where animals, who also have an equal share in safe and protected lives, are being targeted due to misconceptions and the spread of false information. Due to fear of transmission of the disease by pets, many of them are being abandoned on the roads and animal welfare homes. This has led to emotional trauma and hardships for the pet animals.[40] The situation is also such that the treatment of stray animals has become ruthless and cruel. Animals on the street are being pelted with stones, beaten up with sticks, etc. and there is also widespread hunger among these animals due to the lockdown period.[41] Pets are locked up in pet shops without ventilation and food.

The Supreme Court of India has directed the Central Government to look into the matter of animal welfare during COVID-19 which includes improving the condition of wild animals, pets, strays, zoo animals, etc. Food shall be served to these animals, rescue centres shall be set up, medical facilities be provided in zoos, etc. Also, the police shall have all due right to take strict action against those who show cruelty towards animals during this period.[42] The Animal Welfare Board is also taking measures to ensure the protection of animals during the current situation. These measures are appreciable to a great extent. But the fact that until and unless the mentality of human beings changes and more importance is given to the welfare of all types of living beings, the situation will persist and similar incidents will continue to occur. The fact that animals also go through their share of physical and mental difficulties due to acts of human beings should be kept in mind.

To ensure animal welfare to its truest meaning, instead of fearing the least probability of spread of the virus by animals, reduction in human interaction should be focused on which is a sure transmission area.[43] A multidimensional approach must be brought into force which involves the government, protection authorities, and laymen for animal protection. This must include methods to reduce animal hunger, educating people about the spread of incorrect information, taking steps to take better care of pets, etc. We should also not for-

[38] Martina Pluda, *Important Novelties in Austrian Animal Welfare Legislation as of 1/4/16*, 8 Derecho Animal Forum of Animal Law Studies 1 (2017).
[39] Stefanie Schindler, *The Animal's Dignity in Swiss Animal Welfare Legislation: Challenges and Opportunities*, 84 European Journal of Pharmaceutics and Biopharmaceutics 2 (2013).
[40] Akhil Kadidal, *Owners Throw Pets on Streets Amid Coronavirus Scare, Deccan Herald*, Apr. 9, 2020.
[41] COVID-19: Stray Animals Feel the Bite as Pandemic Spreads Across World, Indian Express, Apr. 9, 2020.
[42] Badri Chatterjee, *SC Directs Centre to Look into Animal Welfare Concerns During Lockdown*, Hindustan Times, Apr. 22, 2020.
[43] Nicola M. A Parry, *COVID-19 and Pets: When Pandemic Meets Panic*, 2 Forensic Science International Reports 5 (2020).

get the fact that the advent of coronavirus started from the rampant mistreatment and improper fostering of animals in sweat markets.[44]

Considering the situation around the world, it is also noticed that to fight loneliness and boredom during the lockdown, many people have adopted pets and brought them home. The adoption rate has increased to a great extent during this pandemic. Though it sounds positive at first sight, there are high chances of the pets feeling mentally frustrated once the lockdown gets over as there shall be instances of lack of care due to a change in the routine of the pet owners. Also, there are chances of abandonment and taking back pets to animal welfare centres.[45] To avoid such a situation, adopting pets only when one can commit to them after this period shall be highly recommended.

Though sufficient legal provisions to protect pets and strays do exist in India, several of them are obsolete and irrelevant in the present context.[46] Section 11 of the Prevention of Cruelty to Animals Act, 1960 prescribes a fine ranging from Rs. 10 to Rs. 50 in case of first offenders and Rs. 25 to Rs. 100 in case of subsequent offenders is a prime example of such a provision.[47] The amount of fine that has to be paid as punishment for violation of the Section has not changed since the time of the Act's inception, thereby effectively ignoring the fall in the value of money and rise in income of people that has occurred to date.[48] Though Rs. 50 and Rs. 100, the maximum fine prescribed by the Section for first and subsequent offenders respectively, was a huge amount at the time the Act was enacted; the same has close to no value now and is therefore no longer a deterrent to crimes committed against animals.[49]

Though amendments to the Act have been proposed in the Parliament more than once, none of these Bills ever became Acts.[50] It is hence highly advisable that the fine amount be enhanced. The said Section also alternatively provides for imprisonment up to 3 months.[51] In this regard, increasing the quantum of imprisonment and thereby making the Section more stringent is advisable to truly deter violation of animal rights in the country. This would also be in adherence to the judgment in the case of ***Animal Welfare Board of India v. A. Nagaraja***[52] in which the Supreme Court held that the Parliament would do well to amend the Prevention of Cruelty to Animals Act, 1960 such that the "object and purpose" of the Act are met.[53] In this case, the Supreme Court also further opined that sufficient "penalty and punishment" for violation of the provisions of the Act, especially Section 11, should be imposed.[54]

Another point for consideration is that despite the existence of the Disaster Management Act, 2005 exclusively for the "effective management of disasters and for matters connected therewith or incidental thereto", there is no legal provision concerning the protection of animals during pandemics such as COVID-19. The fact that the Act does not provide for the same despite containing provisions to prevent "false warning, false claim, misappropriation of money or materials, etc." During disasters it is truly disheartening as this indirectly connotes that animal rights are not given due

[44] David Benatar, *Our Cruel Treatment of Animals Led to the Coronavirus*, New York Times, Apr. 13, 2020.
[45] Heather Fraser, *Abuse and Abandonment: Why Pets are at Risk During this Pandemic*, The Conversation, Apr. 15, 2020.
[46] Aarefa Johari, *#NoMore50: Activists are Rising to Demand Harsher Punishments for Cruelty to Animals*, Scroll, May. 16, 2016.
[47] 8Supra 24.
[48] Bill in Parliament Advocates Huge Punitive Measures for Animal Cruelty, India Legal, May. 27, 2017.
[49] Sanya Dhingra, *Modi Govt. to Hike Penalty for Cruelty to Animals*, 120 Times, The Print, Dec. 17, 2018.
[50] Bhumika Sharma & Priyanka Sharma, *Rights of Animals at Practice in India*, 3 Journal on Contemporary Issues of Law 1 (2017).
[51] *Supra 3*.
[52] *Supra 25*.
[53] Vishrut Kansal, *"The Curious Case of Nagaraja in India: Are Animals Still Regarded with No Claim Rights?"*, 19 Journal of International Wildlife Law and Policy 256 (2016).
[54] Id.

weightage in India. Incorporation of such a provision in the Act is hence highly advisable.

Conclusion

"To have compassion for living creatures" is our fundamental duty as per Article 51A(g) of the Constitution of India. Furthermore, Section 3 of the Prevention of Cruelty to Animals Act, 1960 stipulates the duty that all owners have towards the animals in their custody or care. Despite this, incidents of dumping of pets on the street as well as abandoning pets in front of animal shelters are a common feature in newspapers today. Incidents of dogs and cats with their collars intact being mercilessly pushed onto the pavement in front of animal shelters and veterinary clinics from moving vehicles: half-dead or gravely injured, though not as common, also feature in newspapers now and then.

This is truly heart-wrenching as India was once a country where animals were revered and worshipped. Furthermore, the concept of *"ahimsa"* or "non-violence towards all living beings" can be said to be the foundational pillar of several Indian religions such as Hinduism, Jainism, and Buddhism. Religions such as Islam and Christianity also advocate love and kindness towards animals. Furthermore, Indian epics such as Mahabharata also propagate *"ahimsa paramo drama"* or "non-violence is the highest moral virtue". Despite such religious and cultural roots, panic-stricken owners are deserting their pets left and right due to the false information that is being circulated through newspapers as well as other sources.

What we seem to forget, however, is that animals also have the right to life under Article 21 of the Constitution of India. Section 11 of the Prevention of Cruelty to Animals Act, 1960 as well as Section 428 and 429 of the Indian Penal Code-1860, are the legal provisions that punish those who abuse animals and violate their rights. However, despite the existence of such provisions, people continue to make use of the loopholes in the law and escape punishment despite the gross violation of animals' rights that they had committed. Addressing the fallacies in the animal protection laws in the country is hence an absolute necessity and the need of the hour.

Suggestions

- The amount of fine and quantum of imprisonment prescribed as punishment for violation of the provisions of the Prevention of Cruelty to Animals Act, 1960, particularly in Section 11 of the Act, needs to be amended.
- Provisions in other statutes and legislations in India like the Indian Penal Code, 1860 about the protection of animals such as Sections 428 and 429 need to be made stricter and more stringent.
- A legal provision about the protection of animals in the country during pandemics such as COVID-19 needs to be inserted in the Disaster Management Act, 2005.
- The misconception amongst the common masses concerning animals being carriers of the coronavirus needs to be corrected. The general public also needs to be made aware of the importance of protecting animals and their rights.

Environmental Clearance Draft Notification, 2020: A Case of Obscure Visibility?

Dr. Parna Mukherjee [1] *and Rhishika Srivastava*[2]

Introduction

The year 1987, remains to be a significant milestone when the "Brundtland Report" was officially released, curving out the gist of the concept "Sustainable Development."[3] The United Nations in its General Assembly urgently appealed to the World Commission to prepare a vision document for *"A global agenda for change"*.[4] This action UNGA was to create a global alternative to the existing conflicting dynamics of environment and development. The concept of sustainable development was designed to create a synthesis amongst the conflicting dimension of human development and natural environment. The conference at Stockholm in 1972 was partially successful in creating the awareness towards the environmental obligations of mankind.[5]

Thereafter in 1992, at Rio de Janeiro the more detailed blueprint map of sustainability was curved out in the next global conference held on the theme integrating the environment and human development.[6] The principles of Rio Conference along with its two binding instruments are considered as the essential part of the international environmental jurisprudence till date. A few important principles of the Rio Convention such as principle 4,[7] highlights the need for and importance of integration of the developmental growth with environmental protection. Further, in principle 10 it lays down the stress for people's participation for environmental decision making and the need for developing the adequate environmental redressal mechanism.[8] Lastly, the Principle 17 encourages for the adoption of the domestic instrument for guidance in the decision making in cases with potential adverse decision making.[9] Thus, to sum up conceptually, we can say that EIA:

"Environment Impact Assessment (EIA) is a planning tool to integrate the environmental concerns into developmental process right at the initial stage of planning and suggest necessary mitigation measures. EIA essentially refers to the assessment of environmental impacts likely to arise from a project."[10]

According to the aforesaid principles of the Rio Convention, most of the state nations developed envi-

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[3] Our Common Future [Report], https://sustainabledevelopment.un.org/content/documents/5987our-commonfuture.pdf

[4] Report of the World Commission on Environment and Development: Our Common Future, Chairman's Foreword, https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf

[5] Stockholm Conference 1972 [e-book], https://www.un.org/en/conferences/environment/stockholm1972

[6] Sustainable Development vis a vis International Cooperation, https://sustainabledevelopment.un.org/milestones/unced

[7] Principles 4: In order to achieve Sustainable Development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

[8] UNEP Principle 10 and the Bali Guideline, https://www.unenvironment.org/civil-societyengagement/partnerships/principle10#: :text=Principle%2010%20was%20adopted%201992,citizens%2C%20at%20the%20relevant%20level.&te xt=States%20shall%20facilitate%20and%20encourage,by%20making%20information%20widely%20available.

[9] Environment Impact Assessment, Principle 17 UNEP, https://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/17.html

[10] As defined in PARIVESH, FAQ, by the Ministry of Forest and Environment and Climate Change, http://parivesh.nic.in/writereaddata/Draft_EIA_2020.pdf

ronmental legal framework for environmental decision making within their own jurisdiction. India in the early 1980's had no specific legal mechanism for scrutinizing the developed projects for environmental safety. The department of Science and technology was the sole authority to grant environmental clearances having a narrow jurisdiction mostly focused on river-valley projects. Further, it was only post Rio Conference, in 1994 the MoEF(Ministry of Environment, Forest and Climate Change) passed the first exclusively devoted legislative instrument for environmental decision making in India based on the precautionary approach of sustainability popularly known as Environmental Impact Assessment Notification, 1994. The said notification prescribed both the substantive and procedural guidelines for the granting environmental clearances in diverse fields of developmental projects in India.

Journey of EIA Law Till Date

The EIA Notification of 1994 seems to have paved the way for better environmental governance in India. This legislative initiative soon met with several dilution and successive amendments to suit the need of the other socio-economic domains, i.e., trade- commerce, industries, tourisms and other developmental lobbies.[11] Hereafter, in 1997 a welcome change was initiated to make this decision-making tool more effective, and goal oriented by introducing the process of "Public Hearing" *vide* amendment.[12]

Further, in September 2006 a major amendment *vide* S.O.1533 (E) was issued to replace the original EIA Notification of 1994 and to substitute with a new notification with a legislative intent to restore the spirit and objective of law.[13] This new notification introduced several welcome changes by prescribing for seeking the prior environmental clearance at the planning of the project itself, launching of online system to bring about more transparency in the decision making, increase the scope for delegation by bifurcating the projects into category "A"- whereby the Central government is the regulator and category "B"- whereby the respective State is the regulator and establishing the standardization in EIA evaluation process etc. Several amendments were also introduced to the existing 2006 EIA Notification to accommodate the directions of NGT for decentralization and better implementation.[14] Thus, we can say that with successive amendments the letter of the law changed significantly, and its spirit was diluted to defeat the legislative intent.

Proposed Draft, Its Legislative Intent and Challenging Issues and Pitfalls

In November 2014, the High Court of Jharkhand passed an order in respect to the writ petition filed before it in the matter between Hindustan Copper Limited and Union of India.[15] The said High court laid an important precedent stating that all project proposals for environmental clearance must be thoroughly examined solely on the basis of its merits. Any collateral issue of alleged environmental violations must be looked into separately rather than clubbing it with clearance issue.[16] Similarly, the National Green Tribunal in 2018 in the case of Sandeep Mittal v/s MoEFCC[17] directed that the MoEF would make the compliance monitoring system more robust prior to granting any environmental clearance. So, there has been on and off several such judicial pronouncements highlighting the grey areas of the EIA domain and exposing the loopholes of the existing system.

[11] EIA Notification 1994, http://dest.hp.gov.in/?q=eia-notification-1994
[12] EIA Notification No. *SO 319* (E) *dated* 10th May, 1997 issued by the MoEF, India.
[13] *Id.*
[14] Key amendment to Environment Impact Assessment (EIA) Notification 2006, to ramp up availability/production of bulk drugs within short span of time., Press Information Bureau Government of India, Ministry of Environment, Forest and Climate Change., https://pib.gov.in/newsite/PrintRelease.aspx?relid=202284
[15] Hindustan Copper Limited Versus Union of India, W.P. (C) No. 2364 of 2014, in the High Court of Jharkhand
[16] Ministry of Forest and Environment and Climate Change, PARIVESH, http://parivesh.nic.in/writereaddata/Draft_EIA_2020.pdf
[17] Original Application Number 837/2018, NGT, http://parivesh.nic.in/writereaddata/Draft_EIA_2020.pdf
[18] MoEFCC issued the EIA Draft Notification, 2020 under section 3 (2) r/w S 23 of EPA, 1986 r/w EPA rule5 to suppress

Further, in March 2020, a new draft EIA Notification[18] was proposed to substitute the exiting EIA Notification of 2006. The said draft notification was published in April 2020 in the official gazette to invite the objectives and comments but later due to the prevailing pandemic the deadline for same was extended up to the month of June 2020. Soon, the said EIA Notification caught the eye of the activists and environmental experts for wrong reasons. By virtue of a comparative analysis, it was put forth that these newly proposed draft of 2020, i.e. EIA Draft 2020 is weaker even than those of 2006. The question arises can we substitute a legislation with a weaker legislation?[19]

Concept of *"Post-facto Clearance"* is completely opposite of the basic philosophy of the underlying Precautionary principle on which the very EIA process is designed. The concept of granting Post-facto clearance will encourage the overlooking of the potential and adverse impacts of any developmental project. However, inspite of this fallacy the environmental clearance will be granted as proposed under this new draft notification. Those who may argue against this logic and favour the idea of post-factor clearance, they need to consider the recent industrial disasters of Oil India Ltd.

Other Adversities With The Proposed Draft

a. It puts in vain, the very purpose of Public Consultation

The draft gives a deadline to raise feedbacks, inputs and objections by the people within 60 days of the distribution of the notice. These 60 days were inclusive of the Nationwide Lockdown due to the COVID 19 Pandemic. It was not feasible for general society to send in their remarks as the majority of the postal administrations were suspended during these uncommon conditions.

Also, Principle 10 of the Rio Declaration unmistakably expresses that, *"States will encourage a lot of open mindfulness and investment by making data generally accessible"*.[20]

Ironically no regard has been made to the above principle in the present instance. The Central Government has merely circulated the Notice and has not made practical for any State Governments or Organizations to cast their inputs on the same. Owing to the action of Ministry of Forest, Environment and Climate change, no external evaluation whatsoever has been propounded by other authorities.

Subsequently, it is proposed that either as far as possible for submitting remarks be broadened or the draft be circled, even more generally this time, since the lockdown has been lifted, so successful public conference can occur.

b. Reducing duration for written responses by public is a step backwards

By virtue of Rule 3.1. of the draft, 20 days have been provided to the public members for submitting their responses for Public Hearing. This has further reduced the deadline from 30 days under the 2006 Regulations to 20 days.[21]

Principle 10 of the Rio Declaration reads as: *"Environmental issues are best handled with the participation of all concerned citizens"*.[22] Even Brian Clark has emphasized that, *"the input of the public reflects a better understanding of the choices involved than the vote of an elected official who does not have the time to study each issue in depth"*.[23]

If reducing the time is the sole key towards achieving the goal, the time limit for advertisements, endorsements, approvals, etc. could have been reduced. Shift-

the existing EIA Notification of 2006.

[19] Abhijit Mohanty, *"Why draft EIA 2020 needs a evaluation?* Published by Down to Earth, CSE, Delhi, July 2020 , https://www.downtoearth.org.in/blog/environment/why-draft-eia-2020-needs-a-revaluation-72148

[20] *Id.*

[21] Draft EIA 2020, MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, http://parivesh.nic.in/writereaddata/Draft_EIA_2020.pdf

[22] Principle 10, Rio Declaration on Environment and Development, 2020.

[23] Brian D. Clark, *Improving Public Participation in Environmental Impact Assessment*, 20 (4), Built Environment 294, 307, (1994).

ing all the veracities to public shoulders in order to submit a hurried response serves no use. Reducing the response time given to the general population for presenting their composed reactions is really a step-in reverse.

The people at large should be provided with sufficient amount of time in order to make a rational choice and put forth their assumptions and inferences by submitting a detailed composite response. Eventually, it is they who will get straightforwardly influenced by the task and along these lines they would need to endure the worst part of taking a rushed choice.

Hence, the Ministry should ponder over increasing the deadline for response with respect to the general population and strengthen their ability to present a composite reaction.

c. The provision for Post-Facto Approvals is contrary to established principles of law

As per Rule 22 of the proposed draft Notification, the Appraisal Committee is constituted to analyze any cases of violation.

If Appraisal committee grants approval to a project, it then becomes eligible to receive the formulation of a remediation plan, assessment of resource damage and resource and community augmentation plan.[24] Sub-rules 8 and 9 also provide for submission of late fee by the project proponent.

These provisions diverted from being strict in nature and contradicts the very purpose of their presence as against the earlier rules that provided stringent penalties and no possibility of rectification whatsoever. These rules do nothing but grant provisions for post-facto approvals which is a blatant violation of the precautionary principle and defeats the very purpose of an EIA framework. This even runs against the expert committee constituted by UNEP in. 1987 which provided that any framework for EIA must operate "prior" to the beginning of the project.[25]

The Supreme Court in the latest 2020 case of *Alembic Pharmaceuticals Limited v. Rohit Prajapati & Ors.*,[26] has pointed out in specific terms that that no retrospective approvals can be given in matters of environmental clearance. Reliance was placed on *Common Cause v. Union of India*.[27]

In 2014, the NGT held that, it is not lawfully acceptable to consider post commencement examination upon the completion of project. *The importance of conducting an exhaustive EIA before any project is granted Environmental Clearance has been acknowledged internationally*.[28]

d. Increase in land for projects which do not need EIA approval from 20,000 to 1,50,000 square meter a retrograde step

By virtue of Rule 42 of the draft 2020 Notifications, the territorial extent of foregoing the EIA requirement has been increased to 1,50,000 sq mts as against 20,000 sq mts under 2006 rules.[29] This leads to the practice that more such construction activities shall now be outside the domain of the notice.

e. The Number of compliances has been reduced that may lead to incompetency of framework

Rule 20 (4) of the draft EIA Notification, 2020 now limits the submission of compliances reports to annually, i.e., once a year.[30] This is a shift from the present law that provides for half- yearly compliances, i.e., two compliances per year on a gap of six months.

f. Empowering the Central Government to declare certain projects as "Strategic" could have severe adverse implications

Rule 5 (7) of the draft EIA Notification, 2020 further puts that in case the central government decides any

[24] Rule 22 (2), Draft EIA Notification, 2020.
[25] Rule 9 (2), Draft EIA Notification, 2020.
[26] Alembic Pharmaceuticals Limited v. Rohit Prajapati & Ors., MANU/SC/0353/2020.
[27] Common Cause v. Union of India, (2017) 9 SCC 499.
[28] S.P. Muthuraman v. Union of India, MANU/GT/0116/2015.
[29] *9 Supra Note 21.*
[30] Rule 24, Draft EIA Notification, 2020.

area to be of strategic importance, any information regarding to such projects will not be placed in the public domain. This is a regression against transparency of actions.

EIA-Public Hearing: Karnataka High Court Pil W.R.T. Peripheral Ring Road Project in Bengaluru

This EIA Draft Notification not only raised a series on debates and controversies but also gave rise to a number of judicial interventions. For example, in August 2020 hearing a PIL filed by local NGO namely United Conservation Movement Charitable and Welfare Trust, the high court of Karnataka ordered a stay on publication of the said notification till its further hearing31.[31]

Similarly, another collateral petition was filed in the said high court at Bengaluru to highlight a case of procedural and substantive violation of EIA norms of 2006. This PIL was flied by students from NLSIU and JGLS. The matter highlights the call taken by the local regulator KSPCB, directed to only conduct an online appraisal for granting the environmental clearance for a proposed eight lane peripheral ring road project. The high court admitted the matter and ordered an interim stay.[32]

The HC gave notification to Karnataka State Pollution Control Board (KSPCB) and the Bangalore Development Authority (BDA), finding out if virtual hearings were adequate and legitimate under the Environment Impact Assessment notice (EIA), 2006.[33] It requested that they show how a particular hearing could guarantee the soul of the EIA, 2006. Three understudies of law appealed to the court September 20, provoking the choice to hold formal proceedings by means of Zoom — a private, web-based application. The HC just as the public virtual hearings occurred the exact day; the HC one was before recorded for September 22 yet was deferred.[34]

As per the request, the fast EIA study led for the undertaking found that 63 towns, settlements and homes would be straightforwardly affected by the venture.[35] It added that 14.32 percent of the influenced populace had a place with the networks from planned clans and standings; 12.67 percent of influenced family units were going by ladies.[36] The eight-path project, traversing 65.5 kilometers, was proposed twenty years prior to decongest the city. The BDA had before conceded that the development would require the expulsion of 33,838 trees.[37]

What can be the Potential harms?

The project has been in news due to various fears, the major of them include –

non-accessibility of the Detailed Project Report (DPR);

the legitimacy of the Environmental Impact Assessment (EIA) report;

the quantity of trees which will be felled for it.

However, the major issue that the researchers would like to address here is the futility of the Outer Ring Road Project.

[31] EIA Notifications to remain non- implemented, https://www.downtoearth.org.in/news/environment/eianotification-2020-delayed-till-september-7-72673

[32] 2https://www.livelaw.in/news-updates/bengaluru-peripheral-ring-road-project-karnataka-hc-stops-appraisal-ofeia-report-on-law-students-plea-163407

[33] Highlights of EIA Draft Notification 2020, https://www.drishtiias.com/daily-updates/daily-newseditorials/draft-eia-notification-2020

[34] Public Hearing under EIA in times of COVID- 19 Pandemic, https://www.mondaq.com/india/clean-airpollution/990100/public-hearing-amidst-the-covid-19-pandemic

[35] EIA Notification 2020 and its impact on the Environment on the Environment and Society, https://blog.ipleaders.in/draft-eia-notification-2020-and-its-impact-on-the-environment-and-society/

[36] Environment Clearance Report, Press Trust of India, https://environmentclearance.nic.in/

[37] Experts slam EIA 2020 Draft for Lack of Public Participation, https://timesofindia.indiatimes.com/city/nagpur/experts-slam-eia-2020-draft-for-lack-of-public-participation-invetting-projects/articleshow/75543124.cms

A 'ring road', by definition, is a detour street that encompasses a town. Its responsibility is to permit free-streaming traffic that lessens the traffic in the center of the city.[38] At present instance, the city is provided with two ring roads already- The Inner Ring Road and the Outer Ring Road.[39]

In 2015, an investigation demonstrated that The ORR was intended to oblige 5,400 PCUs (Passenger Car Units) each hour, yet is teared up with only 4,000 PCUs each hour and has in no substantial way, reduced the load it was meant to lessen. [40]

Now, after the construction of the ORR, rather than de-congesting, the city, its unchecked commercialization merely multiplied the traffic congestions and issues. An interesting expression, if there ever was one.[41]

PRR may witness the same problem. This is so because it has a similar issue of permitting huge scope business activities in huge lots of land.[42] This shall serve no purpose but to add the thickness of traffic or vehicles and shall serve as a classic example of the Devil and the Deep Blue Sea.[43]

Conclusion and Suggestions

The COVID-19 pandemic has taught humans the lesson in keeping up the perplexing and fragile connection between the nature and development. Human advancement ought not to happen at the expense of harming the environment as this well lead to a total breakdown of the environmental equilibrium. Remembering this, the Central Government explicitly the Ministry of Forest, Environment and Climate Change, need to pay notice to the worries of the different gatherings and work towards fortifying the EIA cycle such that the security and preservation of the climate turns into the point of convergence while additionally pursuing reasonable turn of events.

It appears to be that for the legislators, the driving force behind these modifications have been the ability to get a geared-up approval from the people in the shadow of the Nationwide Lockdown. This works by coupling the fact of scarcity of opposition from the general people in these uncommon pandemics of COVID-19.

Apart from the aforementioned, problems or tricks such as the nitty gritty meaning of each term, presentation of the Technical Expert Committees, presentation of Accredited EIA Consultant Organization (ACO), presentation of online method of entries, diminishing the timeframe for award or dismissal of EC, presentation for arrangement for offer etc have been playing a major role in turning these notifications as a regressive departure from the existing law.

Notwithstanding these arrangements, some other recommendations which are at present lacking under the draft EIA Notification 2020 and might be viewed as added before conclusive inconvenience are as under:

- Strict Timelines for Getting EC and Penalty provisions in case of delay

The council may consider consolidating an arrangement for considered endorsement, is that the candidate may consider the endorsement to have been given on the off chance that the specialists postpone the equivalent past a specific time limit. Administrative postponement in allowing ecological freedom should be cut down. This would guarantee opportune removal on applications for natural leeway.

- Mandate on States for wider circulation of the

[38] Ring Road meaning, Cambridge, https://dictionary.cambridge.org/dictionary/english/ring-road

[39] Bengaluru has Rain Hangover: RIngroads to blame?, https://www.thehindu.com/news/cities/bangalore/Citystill-has-rain-hangover/article16301668.ece

[40] Peripheral Ring road zoning, https://bengaluru.citizenmatters.in/prr-peripheral-ring-road-orr-traffic-land-usezoning-rmp-2031-52237

[41] Ejipura Hosur Flyover, https://lbb.in/bangalore/ejipura-hosur-road-corridor-flyover/

[42] Revision of the Revised Master Plan, https://www.thehindu.com/news/cities/bangalore/bda-withdraws-draftrevised-master-plan-2031-to-review-and-rewrite/article31929610.ece

[43] *Id.*

Notification

The draft EIA legislation does not presently provide for any provision for adding officials from the State Governments into the decision-making process. This, in turn directly infringes Principle 10 of Rio Declaration.

- More Clarity on New Concepts

The draft EIA Notification proposes to present a few new ideas which are strange to the current structure, for instance, an Environment Permission, people group asset expansion plan, Accredited EIA Consultant Organization and so forth. It is along with these lines proposed before the last warning, the Ministry to give some further lucidity.

Smart Contracts: Functioning and Legal Enforceability in India

Sannidhi Agrawal [1]

Introduction

In the words of Milton Friedman, the 1976 Nobel Laureate for Economics, "The three primary functions of a government are law and order, defence, and contract enforcement." The last function is generally performed through deterrence, wherein penal provisions are set for parties who violate the terms and conditions laid down in the contracts; and such provisions are enforced through adjudication, upon their violation. However, keeping the traditional methods of contract enforcement aside, there exists a lot of potential in technology to revolutionise the way contracts are performed. Smart contracts provide the platform to do exactly that.[2]

They are essentially self-executing, digitally encrypted contracts, which make use of block chain technology to ensure due performance and execution of contracts virtually, so as to provide a smooth and trouble-free experience.

Although so far, there is no concrete legislation which deals with smart contracts, the Telecom Regulatory Authority of India (TRAI) released a notification in 2018 which briefly defined the term. It stated that they work on a programmable code which can implement predetermined tasks or rules so as to check regulatory compliance in advance, in the absence of human intervention. Further, it mentioned that such contracts are suitable for a DLT (Distributed Ledger Technology) system to formulate a digital agreement, with certainty (owing to cryptography) that the agreement has been executed in the ledger of every party to the agreement.[3]

Through this paper, the researcher aims to study the following objectives:

- To understand the operation and functioning of smart contracts.
- To analyse the pros and cons of switching to smart contracts.
- To examine whether there are any statutory provisions which could potentially govern contracts in digital form.
- To gauge the applicability of smart contracts across various sectors.
- To ascertain the legal validity and enforceability of smart contracts in India.

What are Smart Contracts?

In 1994, it was uncovered that since cryptography is decentralized in nature, it could be used to improve the process of execution of a contract virtually. This took the shape of 'smart contracts'. Block chain technology eliminates the requirement of any intermediaries (and subsequently, unnecessary human interaction in the form of calls and emails) owing to its decentralized nature. Thus, they operate on P2P (Peer-to-peer) technology instead of being maintained under a central server. As a result, a lot of time is saved and it leads to avoidance of any conflict which may arise owing to a third party.[4] They rule out room for human intervention of any sort, thereby eliminating the risk of human error. Further, they cannot be altered once the agreement is finally codified, even if either party wishes to modify the terms in their favour.[5] Additionally, they

[1] Student, NMIMS School of Law, Mumbai.

[2] Punit Shukla, "How India's government can build better contracts with block chain", World Economic Forum (October 4, 2019).

[3] Telecom Regulatory Authority of India, "The Telecom Commercial Communications Customer Preference Regulations, 2018", Gazette of India (July 19, 2018).

[4] STA Law Firm, "The Enforceability of Smart Contracts in India", "Mondaq (December 13, 2019)."

[5] Vijay Pal Dalmia, "India: Blockchain And Smart Contracts – Indian Legal Status", Mondaq (February 5, 2020).

help in doing away with transactional and procedural costs associated with negotiations (paperwork) and verification (commissions); since there is no intermediary.[6]

The key feature of a smart contract is that it is self-performing in nature, i.e. the terms of the agreement between the parties to the contract are directly incorporated into lines of the code. The code is contained in a distributed block chain network, and it comprises all the agreement terms. Apart from the agreements, it consists of information that enables execution of the transactions and makes sure that these transactions are fully tracked, permanent, irreversible and time stamped.[7] Every transaction carried out by the smart contract is placed as a block on the platform, which helps in establishing a clear audit trail, and erasing or wiping- it out is an arduous task.[8]

The important characteristics of a smart contract are as follows:

- Once it has been released, it is not possible for anyone, including the owner or creator to alter its terms.
- Its performance and completion do not require submission of any physical documents.
- Although users may be anonymous, the details of each transaction are recorded and registered.
- Transactions under smart contracts are irreversible in nature.[9]

There can be two types of smart contracts, the first one being contracts which are entered into in the absence of any enforceable text-based contract governing them. For instance, when two parties agree in oral terms, the business relationship they wish to maintain and proceed to capture that understanding into executable code; it is termed as a "code-only smart contract". The second type of contract can be used to execute certain clauses of a conventional textbased contract when it consists of provisions for the same. They may be termed as "ancillary smart contracts".[10]

The main point of difference between a smart contract and a traditional contract is that the former is a self-executing computer programme, which cannot be tampered with by parties and works on complicated block chain technology. On the other hand, the latter relies on the performance of the legal terms agreed upon by the parties, which can be modified at any given parties with their mutual consent and leaves room for conflicts.[11] Further, the risk factor associated with conventional contracts is very high, as there are chances of nonperformance. Whereas in case of smart contracts, since they are automated, the risk is minimised.[12]

How do Smart Contracts Work?

The code contains the terms of the smart contract. Thus, the contract comprehends, approves and automatically executes any transaction which in line with the terms. The contract triggers itself once the predetermined terms and conditions are met. Moreover, once the contract is executed, the obligations (which are encoded) cannot be paused mid-way; making the contract self-enforcing.[13]

At present, such contracts can smoothly carry out two types of transactions that are present in numerous contracts: ensuring the payment of funds post the occurrence of a certain event; and imposing monetary penalties upon lack of fulfilment of certain conditions.[14]

[6] *Id.*
[7] *Supra note 3.*
[8] Rishi A, "The Legality of Smart Contracts in India", India Corp Law (December 10, 2017).
[9] *Supra* note 3.
[10] Stuart Levi and "Alex Lipton, "An Introduction to Smart Contracts and Their Potential and Inherent Limitations", Harvard Law School Forum on Corporate Governance" (May 26, 2018).
[11] *Supra* note 4
[12] Kashish Khattar, "Everything you need to know about Smart Contracts", iPleaders (June 2, 2018).
[13] *Supra* note 7.
[14] *Supra* note 9.

For instance, if a contract of rent is converted into a smart contract so as to assess its effectiveness and efficiency; then the tenant will pay the rent to the landlord in cryptocurrency. Once the payment is made, the code will carry out the respective transaction according to the terms of the contract that were entered into the code. If the said transaction is successfully carried out, a receipt will be delivered to the landlord. Post that, they will release the key to the house. This system is based on the 'If-then' principle, and everyone involved in the block chain will observe the transaction and become witness to the contract. If the landlord releases the key, then they will definitely receive the amount. Likewise, if the tenant pays the rent amount, they will definitely receive the key. Therefore, one transaction cannot be completed in the absence of the other, which ensures effectiveness and efficiency of this mode of transaction.[15]

The if-then principle can be explained best by- "If 'x' condition is fulfilled, 'then' y obligation must be enforced". This feature makes smart contracts extremely lucrative for the insurance industry and the financial services sector. Moreover, creation of smart contracts is easier when there are bare minimal to none non-operational clauses involved. Since such clauses are ambiguous and leave room for interpretation, they are unsuitable for smart contracts[16]. They are well suited for cases where the agreement has mechanical and straightforward clauses, and well defined outcomes".[17]

The functioning can be further explained with the help of another example. Say, one A wishes to buy a flat in a building being constructed by B, but is unable to afford the full price of the flat. Thus, they avail the loan facility from C, which is a bank. Conventionally, A would have to provide personal information to verify their identity, and also undergo a credit verification process. The process would be time consuming, and it would involve multiple people who would demand compensation in the form of commission for the services rendered. All this would add to the overhead costs. However, with the help of block chain technology, C would be able to download the required information from one of A's blocks so as to make a quick decision about their identity and credibility; thereby significantly reducing the turnaround time for all parties involved. Post this verification, all parties to the transaction would enter into a smart contract wherein the loan amount will be disbursed by C to B, and ownership of the flat will be transferred to A. However, C would hold charge on the flat till the full and final repayment of the original loan amount is made. The transfer of ownership is automated as the transaction gets recorded on a block chain, which is visible to all the participants on the block and its status can be viewed at any given point.[18]

Apart from listing the rules and penalties in relation to an arrangement (similar to a traditional contract), smart contracts perform the function of executing these obligations automatically. Implementation of these contracts is carried out through a platform called "Ethereum", which comprises two key elements: currency and contracts.[19]

How do Smart Contracts Ensure Secured Transactions?

They enable the enforcement of a safe and secured transaction between the two parties to the contract. Further, they ensure that while one party gains something of value from the other party for some collateral, the other party is the only prioritized party to that specific collateral. Implementing the same in case of traditional would undoubtedly be difficult, as several other factors would come into picture, such as third parties partaking in the contract.

Further, data protection is ensured through cryptography and the operation of the distributive ledger system. Every block consists of information and in order to modify that, each block in a chain will have to be hacked since they are related to each other.

[15] *Supra* note 3.
[16] *Supra* note 4.
[17] John Ream et al., "Upgrading blockchains: Smart contract use cases in industry", Deloitte Insights (June 8, 2016).
[18] Sanmith Seth, "What's blocking the chain?", India Business Law Journal (July 20, 2020).
[19] *Supra* note 3.

This has been transformed into reality by Ethereum. Its network is very transparent and possesses the ability to determine and formulate which party has priority over the specific collateral. Thus, it can conveniently accept or reject that collateral, and enable faster and more efficient implementation of contracts.[20]

Smart Contracts in India: A Statutory Overview

Section 10 of the Indian Contract Act of 1872 (hereinafter referred to as the 'ICA'), predominantly governs contracts in India. Section 10 of the Act lays down that "all agreements are legally binding contracts, provided they are entered into with free consent of parties to the contract, for a lawfully accepted consideration and in order to achieve a lawful object."

The essential features of a traditional contract are: a legitimate offer; acceptance which is duly communicated; consideration which is lawful and pertinent to the subject matter; consideration; and free consent of all competent parties to the contract with regards to all aspects of the contract.[21] Thus, by definition, it would seem that a smart contract is legally permitted under the ICA, since it fulfils the above mentioned essentials to a contract. However, since they are not legally recognised in India yet, such a proclamation would be too bold and immature, since several factors come into play while determining the legality and enforceability of smart contracts.

For instance, 'consideration' aspect is problematic, because if it is in the form of cryptocurrency, then it further raises the question as to whether cryptocurrency is accepted as valid consideration under Indian law.[22] The ambiguity surrounding legality of cryptocurrency poses as one of the many challenges to the usage of smart contracts in India. The Supreme Court, in a March 2020 judgement, lifted the ban on cryptocurrency imposed by the RBI, which forbade banks and other financial institutions from providing banking services to those individuals and business entities which were engaged in dealing in cryptocurrency. Prior to that, trading was restricted to crypto-to-crypto, and not crypto-to-INR.[23] However, the Indian Government's stance towards cryptocurrency is not very forthcoming, owing to concerns such as safety of consumers, market integrity and white collar crimes such as money laundering. A lot of prominent media houses have reported in the recent past that the Government is planning to introduce a law which bans trading in cryptocurrencies. If implemented, it could severely hamper the functioning of smart contracts.[24]

Furthermore, there is no governing authority to evaluate whether the object is lawful or not. All these factors raise doubts about the legal validity of smart contracts.[25]

Some of the more pertinent questions with regards to enforceability are:

1. Will an electronic signature generated through the block chain technology deemed to be valid for authenticating an agreement under a smart contract?

2. Can a smart contract be placed as an evidence on record in a Court of Law if a dispute arises?[26]

It is imperative to analyse the Information Technology Act, 2000 (hereinafter referred to as the 'IT Act') and the Indian Evidence Act in order to arrive at suggestive answers to the above.

Section 5 of the "IT Act permits digital signatures and holds a contract to be legitimate and enforceable." It states that under any law, when a document or information produced needs verification or authentication through attachment of signatures, the requirement shall be considered to be fulfilled if it is done by means of a digital signature. Thus, a digital signature helps in

[20] *Supra* note 3.
[21] *Supra* note 3.
[22] *Supra* note 4.
[23] Dipen Pradhan, "Supreme Court Allows Trading In Cryptocurrency", Outlook Money (March 4, 2020).
[24] Archana Chaudhary and Siddhartha Singh, "India Plans to Introduce Law to Ban Cryptocurrency Trading", Bloomberg Quint (September 15, 2020).
[25] Alok Vajpeyi and Gauri Bharti, "India: Smart Contracts: a Boon or a Bane?", Mondaq (December 3, 2019).
[26] *Supra* note 7.

proving consent to an electronic document.[27] Further, Section 65B of the Indian Evidence Act 1872 states that electronic records, i.e. documents signed digitally shall be admissible in the Courts.[28]

However, as per Section 35 of the IT Act, an electronic signature certificate can be obtained only though a certifying authority designated by the Government. In order for a smart contract to commence, the generation of a hash key is required, which is done by block chain technology. The same is used as an identifier to authenticate the contract instead of any legal authority. Thus, the electronic signature created by block chain technology is self-generated, and in contrast to the one authorised by the IT Act.[29] Moreover, "Section 85B of the Indian Evidence Act states that an electronic document will be deemed valid only if it is authenticated with a digital signature."[30] The problem is further compounded by "Section 88A of the Indian Evidence Act whereby it is mentioned that the Court presumes that an electronic record placed as evidence is genuine, but does not make any presumptions about the originator of the message." Thus, if a signature for authenticating the smart contract is obtained through block chain technology, the admissibility of the document will only become more problematic as the signature was not obtained under the IT Act. Not only does this impair the legal validity of the method of encryption used for smart contracts, but it also impedes the "admissibility of such contracts as evidence in a Court of law", as uncertified signatures do not hold much value.[31]

Areas of Concern With Respect to Smart Contracts

An important question for business entities looking at the technology as a prospect is whether the regulatory and legal compliances are being met. Thus, in order for parties to enter into a binding contract, enforceability is a key aspect which must be looked at.[32]

One significant legal question which subsequently arises is that of fixing the responsibility. In case an incorrect code is entered owing to its complexity and an error of judgement, then it will become difficult to determine the Defendant party in that case, or the person who could be held liable for committing a negligent or wrongful act, since there is no governing body to do the same.[33]

Though automating a transaction is easy, remedies for non-performance or breach of contract are difficult to code in a smart contract. In specific contracts such as insurance, this problem is further compounded by "insurance-specific aspects such as pre-contractual disclosure obligations." Further, since it is a regulated industry, concerns of regulators must be taken into account.[34] Artificial Intelligence is infamous for the risks it poses to humankind. Since smart contracts leave limited room for human intervention or revocation of control, there is a high possibility of the computer wrongfully assessing a particular situation and implanting an incorrect step. This could result in multiple ramifications for either the parties to the contract, as once the damage is done, it cannot be reversed. Therefore, a high degree of caution is required to be exercised.[35] Furthermore, entries on the block can be tampered with by bad actors, be it contracting parties or miners who add past transaction records to block chain ledgers. A study discovered that close to 3.4% of Ethereum smart contracts are vulnerable to hacking.[36]

Smart contracts enable "provision of a platform for parties who may or may not know each other" to

[27] *Supra* note 4.
[28] *Supra* note 3.
[29] *Supra* note 3.
[30] Anirudha Bhatnagar, "India: Smart Contract In The Indian Crucible", Mondaq (June 19, 2018).
[31] *Supra* note 3.
[32] Norton Rose Fullbright, "The future of smart contracts in insurance" (2016).
[33] *Supra* note 24.
[34] *Supra* note 31.
[35] *Supra* note 24.
[36] Kati Suominen et al., "Top 10 big questions and myths surrounding block chain", JSTOR (2018).

enter into a contract. Excessive caution is required to be maintained while contracting with another party, as in case of a failed transaction, the cost must be borne by the suffering party alone. The Indian legal system provides no legal recourse with respect to such contracts as there is a dearth of regulatory framework to govern the same.

For ensuring consumer protection, there must be a redressal mechanism that the aggrieved parties can resort to. However, there exists no such provision, which stirs doubts in the minds of the potential users. Further, force majeure events might lead to frustration of a contract in case conventional contracts; or either party, in order to maintain good business relations, may condone the other party's performance. But in case of smart contracts, this is not possible since the contract is automated. Thus, cordial business relations may be compromised at the cost of effectiveness.[37]

Moreover, conventional contracts provide for termination of the contract at either party's behest, the option is not available in case of smart contracts. If a party comes across an error in an agreement, which leads to the counterparty gaining more rights than intended, or would result in greater costs if fulfilled; they cannot terminate the contract.[38]

Furthermore, although the 'automatic payment' feature of smart contracts is revered, it does not rule out the adjudication of payment disputes in case of complex commercial contracts. For example, the chances that the party obtaining the loan will deposit the entire loan amount in a specified wallet linked to the contract, are low. Instead, the required repayments would be funded on an ad hoc basis. However, if the borrowing party does not fund the wallet regularly, a smart contract may not be able to find the necessary funds for transfer of money from that wallet or any other source specified to be used in case a contingency arises.[39]

Smart contract writers also need to be mindful of the semantics and foresee how words can be interpreted by the smart contract, since it does not possess the human intuition to deduce the intentions or behaviour of parties. For instance, technology may not be able to interpret open ended terms such as "reasonable efforts". Thus, the language of the contract needs to be adjusted according the limited vocabulary of the code.[40] This makes the application of smart contracts restricted to standardized processes. It cannot be extended to agreements where evaluation of the terms and conditions might be required.[41]

When it comes to code-only smart contracts, the execution of the code and its outcome would be the only objective evidence of the terms of the contract, since no paperwork is involved. E-mail exchanges between the contracting parties regarding the functions which the smart contract should carry out, or verbal discussions would determine the code and represent their intent. Lack of evidence could serve as another barrier.[42]

All these factors combined posit a very bleak scenario for the adoption of smart contracts in India, currently.

Regulation of Smart Contracts in The us

In 1999, 47 states in the United States adopted the "Uniform Electronic Transactions Act" (UETA), which governs laws relating to e-contracts, electronic records, electronic signatures and so on. The Act approves of the usage of an electronic signature as a valid method of consenting to contracts. However, to keep up with the technological advancements, in 2017, several states in the US felt the need to draft separate regulations for the adoption of smart contracts on a larger magnitude. Consequently, Arizona passed laws recognizing digital signatures for smart contracts via block chain technology, and granting them enforceability. Vermont and Nevada also gave recognition to smart contracts.[43] Thus, it is high time that the Indian Government steps up and provides some clarity

[37] J Dax Hansen, "Legal Aspects of Smart Contract Applications, Perkins Coie (2017).
[38] *Supra* note 9.
[39] *Supra* note 9.
[40] *Supra* note 35.
[41] Anirudha Bhatnagar, "India: Smart Contract in the IPR paradigm", Mondaq (June 19, 2018).
[42] *Supra* note 9.
[43] *Supra* note 7.

on how the feasibility of operation of smart contracts in the country, since the benefits are immaculate.

Potential Applicability of Block Chain-Based Smart Contracts

In 2018, what was considered as a giant technological leap forward, the SBI legitimised sharing of KYC data among banks through block chain technology through the conglomerate of 27 banks called 'BankChain'.[44] Even the pharmaceutical industry makes use of this technology for record-keeping. Unfortunately, however, the acceptance has been restricted to information sharing and maintenance of records, and the Government is evidently not inclined towards cryptocurrency, which poses as an obstruction for smart contracts. There exists a lot of untapped potential in the Indian market with respect to these contracts, and it could change the way that household supplies are purchased and e-commerce is carried out by streamlining the entire process and reducing costs substantially.[45]

Furthermore, they could revolutionise how trading systems on the securities markets work; by taking on the arduous function of managing approvals between market players; estimating accurate trade settlement amounts; and ultimately transferring the funds automatically once the verification and approval of transaction is carried out. The purpose of settlement is to ensure irrevocable delivery of a security to a buyer from the seller, for which the latter receives final and irreversible payment of money. The possibility of settlement failures could be negated with the help of smart contracts, since they are irreversible in nature. In status quo, parties engage in expensive labour-intensive methods to corroborate each other's performance and reconcile records. Thus, the problem of lack of trust between the parties could also be solved by trusting the smart contract.[46]

Conclusion

A study conducted by Capgemini reported that the effective adoption and implementation of smart contracts could help retail banking and insurance companies save around 3 to 11 billion in USD as a result of diminished overhead costs, which in turn could help every individual customer save up to USD 980. This proves that the execution and growth of smart contracts could undoubtedly become the 'next big thing', resulting in savings of billions of overhead costs, while making the entire procedure more efficient. Block chain can be a complete game changer when it comes to the execution of contracts. However, the grey areas with respect to the law, make it a less lucrative option in India. Owing to the absence of a regulatory body that certifies the admissibility and enforceability of a smart contract under the existing legislations, smart contracts have not gained the traction they deserve; with uncertainty looming large. A pressing question which needs to be answered is that, "Is a smart contract purported to constitute a contract, or to simply carry out the aspect of one?" This could possibly clarify whether the current legal provisions can govern smart contracts or not.

Since the entire process is decentralized, and there is no single entity which handles the data arising out of any transaction, the imposition of "reasonable security practices and procedures" as prescribed under the IT Rules, 2011 remains a challenge. The aforementioned rules set out various guidelines in order to protect sensitive personal data, and safeguard the same from any potential damage by third parties through a computer resource.

Several sectors (for instance, syndicated loans) still rely on faxes and paperwork, which results in inefficiency. It is high time they start adopting innovative technologies such as smart contracts. But in order for this transition to take place, the Government needs to break its silence on this topic and come up with ways to permit businesses and individuals to make the switch to efficient, cost-effective systems.

[44] ET Bureau, "SBI to use block chain for smart contracts and KYC by next month" "Economic Times (November 20, 2017)."

[45] *Supra* note 29.

[46] Adam David Long, "How Smart Contracts for Finance Will Make Stock Markets Faster, Cheaper and Less Error-Prone", Medium (September 17, 2018).

Undoubtedly, smart contracts do not have a pervasive applicability, i.e. they cannot be blindly applied to every industry, since they come with their own set of limitations and risks which have been discussed in the paper. They are more suitable where calculation of risks is relatively easier, and the limited vocabulary of the code is able to interpret the commands given.

Smart contracts are a part of the surging wave of technological advancements which seek to minimise the risks and costs associated with human capital. Indeed, they do minimise the risk of human error to a great extent but it is an undeniable fact that machines come with their own set of biases and errors; in addition to the Herculean task of regulating their operations. Thus, there are innumerable challenges when it comes to establishing legal accountability.

Currently, smart contracts are in a nascent stage, and they require an impetus to penetrate the Indian market. In order to facilitate the same, lawmakers must be vocal about their stance on the various legal questions postulated in this paper.

Suggestions

A major hindrance to smart contracts being viewed as a norm is that the Government and lawmakers may not be willing to invest the requisite financial and human capital to pave way for their development; especially in developing nations. However, the potential benefits of switching to this technology must not be ignored.

Furthermore, regulatory concerns pose a major threat in the Indian market. Even if no separate regulation is developed, the Government must amend the relevant provisions of the Indian Evidence at, 1872 and the IT Act; so as to incorporate smart contracts into their purview and keep up with the changing times. For smart contracts to become operational in India, the Government will have to amend certain existing statutory provisions and confront challenges on multiple fronts. It will be interesting to see whether the lawmakers are able to keep up with the ever-expanding realm of block chain and smart contracts.

The precarious status of the legality of cryptocurrencies also serves as a major roadblock to progress in the field of smart contracts. Thus, a clear stance must be adopted by the Government, when it comes to its legal validity.

If smart contracts do become a reality in India, on a large scale, then the legal industry would have to keep up with changing demands of clients. This paradigm shift could potentially lead to loss of jobs and make professionals in the legal sector rethink the way they function. But on the bright side, it could also encourage collaborations between law firms, software firms and start-up companies, for the greater good. Embracing technology and using it in their favour would help legal professionals in rendering improved services. Thus, smart contracts must not be looked at as a potential threat.

COVID-19 Lockdown: A Refuge from the Pandemic or the Harbinger of a Woman's Agony

Shreyaa Mohanty [1] *and Swikruti Mohanty*[2]

"Domestic violence is a burden on numerous sectors of the social system and quietly, yet dramatically, affects the development of a nation... batterers cost nations fortunes in terms of law enforcement, health care, lost labour and general progress in development. These costs do not only affect the present generation; what begins as an assault by one person on another, reverberates through the family and the community into the future."

-Cathy Zimmerman

Introduction

Gender-based violence expounds violence that is inflicted upon a woman on the sole basis of her sex. It entails physical, mental or sexual harm, coercion and denial of a basic liberty. Such violence includes domestic violence (DV), non-consensual sex and other forms of sexual violence, trafficking in women, female genital mutilation and dowry-related deaths. Not only does this have an adverse effect on health status of a woman but also affects her degree of productivity, the belief of self-sufficiency, confidence and overall quality of life.

In 1983, domestic violence was finally recognized as a criminal offence in India. However, until the enactment of the PWDVA[3] , which came into effect in 2006, there wasn't any specific civil law as such to discuss the complexities of domestic abuse, including the underlying existence of violence within family networks, the urgency for protection and maintenance of the victims of abuse. The mere punishment and imprisonment of the abuser does not entail the fact that justice has been served through and through. The in-Toto recovery of the victim should be the main goal.

As per the Crime in India Report of 2018 released by the National Crime Records Bureau (NCRB), every 1.7 minutes in India, there is a crime against women and every 4.4 minutes, a woman is subjected to domestic violence.[4] The COVID-19 outbreak has only worsened the case. The National Commission for Women (NCW) registered an increase of 94 per cent in complaint cases where women were assaulted in their homes during the lockdown. Another factor that has not received coverage is the growing number of cases where migrant women walked hundreds of miles with men, some with their children in their advanced stage of pregnancy, without basic amenities like food. Therefore, owing to the pandemic, nearly half a billion women are at risk in India. Yet, no formal policy or any detailed COVID response plan has been proposed by the government to overcome these issues.

Rise in Domestic Violence During Lockdown

In a study, conducted by an American organization, on the aftermath of Hurricane Harvey, it was observed that stress borne out of disasters increased the occurrence of violence in families during and post the disaster[5] . A WHO report, upon comparing the violence rates before and after any disaster, suggests that the shortage of basic amenities, lack of social support, disruptions to the economy, feelings of helplessness, powerlessness and paucity in access to basic means of

[1] 2nd year BBALLB student at National Law University Odisha
[2] 2nd year BBALLB student at National Law University Odisha
[3] Protection of Women from Domestic Violence Act, 2005, No. 43 of 2005, India Code [Hereinafter "PWDVA"].
[4] *Crime In India 2018 Statistics*, 1 NCRB (2018), https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf.
[5] Ashley Abramson, *How COVID-19 may increase domestic violence and child abuse*, AMERICAN PSYCHOLOGICAL ASSOCIATION (September 12, 2020, 3:44 PM), https://www.apa.org/topics/covid-19/domesticviolence-child-abuse.

livelihood could have both sudden and indelible effects on violence in society. The report showed a general trend of increase in sexual violence and intimate partner violence rates whenever there was an occurrence of disaster.[6]

Conditions during COVID-19 appear strikingly similar to those during disasters- loss of jobs, alienation from social support and economic strain, to name a few. It wouldn't be ludicrous to say that such analogous circumstances following the pandemic could actually harbour the chances of violence in families. Several startling figures were revealed from the first quarter by the NALSA reports which also revealed that a total of 144 domestic violence cases were reported in Uttarakhand. Moreover, Haryana reported 79 cases while a total of 69 cases were reported in Delhi.[7]

Economic Stress and Domestic Violence: A Reciprocal Relationship

Researchers have found out a direct link between financial stress and domestic violence. The rates of domestic violence seemingly rise with an increase in financial stress. Research also shows that the repeat victimization of women is seen to be more frequent in cases where the family is under some sort of financial strain.[8]

Now, the cause-and-effect relationship could be applied the other way round as well. Domestic violence may even bring distress and poverty to women, entrapping them in a vicious cycle of poverty and abuse. The decision of a woman to leave her abusive partner, more of often than not, depends on her economic backing or condition. For example, a woman with not much resources and means to support herself economically could experience severe financial stress while deciding to leave her abusive partner. Sometimes, women just succumb to these financial ambiguities, coupled with the lack of empowerment and selfworth, and decide to stay with their abusers for the rest of their lives.

On March 24th, India entered into the first phase of lockdown together with the lockout of all public transport systems, restaurants, offices, factories and educational institutions. In what we envisaged would last for only 21 days but continued for months-long and disrupted the Indian economy to the core. By the first week of April, economists had stated that there had been a job loss of approximately 40 million people in the unorganised sector.[9] Stringent lockdown rules restricted most of the economic activities, causing millions to lose their source of income. By June, more or less 84% of the Indian households had seen a decrease in their income.[10] Such economic distress stemmed anxiety and feelings of helplessness among people. The abusers projected their frustration by inflicting a higher level of abuse on women.

By the end of May, the numbers of domestic violence complaints were on a ten-year high. India generally has an underreporting problem when it comes to do-

[6] Krug EG et al., eds. *World report on violence and health*, World Health Organisation (2002) [Hereinafter "WHO Report"].

[7] *Domestic violence cases in India on the rise during lockdown, says reports*, TIMES OF INDIA (May 18, 2020, 2:00 PM), https://timesofindia.indiatimes.com/life-style/relationships/love-sex/domestic-violence-cases-inindia-on-the-rise-during-lockdown-says-report/articleshow/75801752.cms.

[8] Traci Pederson, *Is Financial Stress a factor in domestic violence*, PSYCHCENTRAL, (2016), https://psychcentral.com/news/2016/04/26/is-financial-stress-a-factor-in-domestic-violence/102318.html.

[9] Tanisha Mukherjee and Nilanjan Ray and Sudin Bag, *Opinion: Impact of Covid-19 on the Indian Economy*, ET GOVERNMENT, (Oct. 20, 2020), https://government.economictimes.indiatimes.com/news/economy/opinionimpact-of-covid-19-on-the-indian-economy/75021731.

[10] How the COVID-19 *Lockdown Is Affecting India's Households*, KNOWLEDGE@WHARTON, (Jun. 09, 2020), https://knowledge.wharton.upenn.edu/article/covid-19-lockdown-affecting-indiashouseholds/#::text=Rural%20households%20have%20seen%20disproportionately,resilience%E2%80%9D%20than%20their%20rural%20counterparts.

[11] Vignesh Radhakrishnan and Sumant Sen and Naresh Singaravelu, *Data — Domestic violence complaints at a 10-year*

mestic violence, where 90% of the victims seek help from their friends and immediate family members.[11] However, given the lockdown, the victims faced a dearth of social support, where otherwise they could have sought shelter and help. Generally, victims could flee and find shelter elsewhere, which isn't possible during lockdown. Lack of social support is one of the major factors that foster domestic violence. This situation is not something exclusive to India; many women across the globe are facing similar problems of being locked up with their abusers.

More Complaints From Red Zone Areas

The Central Government mandated the nationwide lockdown, dividing all the districts in the country into three zones: Red, Orange and green, with 130 districts being listed under 'Red Zone' with the most stringent lockdown provisions.[12] Several researchers from the University of California, Los Angeles and UCLA studied the variations in the number of reported crimes between 2018 and 2020, categorising the crimes into four types- domestic violence, harassment, cyber-crimes and rape and sexual assault. After scrutinizing the reports, they found out that the districts with more stringent lockdown measures (Red Zones) recorded a 131% increase in domestic violence complaints compared to that in the green zones where there were less stringent lockdown provisions.[13] The same report also showed the cases of rape, and sexual assault fell down by almost 66% in the red zone areas. This could be attributed to the fact that people barely came out of their homes which meant less mobility in offices and public places. The researchers also gathered Google Trends data and Google Community Mobility Reports which indicated that the frequency of search of the terms "domestic abuse" and "domestic abuse help-lines" had been increasing since mid-March. Perhaps, this report made one thing certain - violence against women remained constant. While the lockdown took the edge of certain crimes like rapes and sexual assaults, it definitely aggravated the prevalence of other forms of violence like cybercrimes and domestic violence.

The Psychological Ramification Post Abuse

The deleterious effect of Lockdown is no secret, and the plight of the victims, being locked in with their abusers, coupled with the general state of uncertainty has led to a surge in the number of domestic abuse complaints in the past few months. The victims are subjected to a portfolio of abuse, both physical and psychological. The general emphasis is given on physical sufferings; however, not much is anticipated or discussed about the psychological trauma that these victims go through.

Economic and psychological stress, followed by isolation due to being locked-in had disrupted the natural and social environments of a lot of people, making them feel helpless and vulnerable. The abusers now compensate for their lack of control by exerting mental and physical violence on the victims.[14] The physical injuries endured by the victims are no secret: bite marks, cuts, bruises, loss of vision and hearing, knife

high during COVID-19 lockdown, THE HINDU, (Jun. 22, 2020, 12:04 AM), https://www.thehindu.com/data/data-domestic-violence-complaints-at-a-10-year-high-during-covid-19- lockdown/article31885001.ece.

[12] Bindu Shajan Perappadan, Corona virus — *Health Ministry identifies 130 districts as red zones*, THE HINDU, (May 01, 2020, 11:07 AM), https://www.thehindu.com/news/national/coronavirus-india-lists-red-zonesas-it-extends-lockdown-till-may-17/article31478592.ece.

[13] *Domestic violence complaints peaked in red zones during lockdown: Study*, DECCAN HERALD, (Jul. 24, 2020, 11:41 AM), https://www.deccanherald.com/national/domestic-violence-complaints-peaked-in-red-zones-duringlockdown-study-864965.html.

[14] Shelly M. Wagers, *Domestic violence growing in wake of corona virus outbreak*, THE CONVERSATION, (Apr. 08, 2020, 10:11 PM), https://theconversation.com/domestic-violence-growing-in-wake-of-coronavirus-outbreak135598.

[15] Kavita Alejo, *Long-Term Physical and Mental Health Effects of Domestic Violence*, 2 Themis: Res. J.J.S.F.S. (2014), https://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=1016\&context=themis.

cuts, and sexually transmitted diseases which sometimes even lead to death.[15] A study conducted on domestic violence victims shows that among the women that have reported being abused, nearly 50% of them were found to be malnourished.[16]

Women are also subjected to psychological abuse like demeaning, belittlement and insults, threats of being abandoned, threats of hurting someone they care about or general infidelity of the husband. The psychological effects of abuse are more deep-seated and unrealized. More often than not, domestic abuse victims get diagnosed with depression and PTSD. It has been found out that depression in abused women tends to be chronic and has a life-long effect even in the absence of abuse for a long time.[17]

The rate of PTSD among women who have a history of domestic violence ranges from 30% to 81%, which is way more than the rate of PTSD among the general community of women.[18] The victims have frequent episodes of anxiety attacks. Research shows that women that have been sexually abused have faced more severe physical abuse than the women that were only battered. When it comes to psychological disorders, there is no stark difference between the victims of marital rape and stranger rape.[19] Feelings of unworthiness and hopelessness, coupled with a lack of self-esteem and apprehension of future abuse often culminate into suicidal thoughts in the minds of the victims. Needless to say, the lack of social and emotional support often leaves the victims feeling isolated and alone in their battles.

Several women have lost their jobs and sources of earning, owing to the pandemic. This has led to the loss of some level of empowerment that these women had. Several researches back "economic dependence" of women on their husbands as a predominant reason for women to stay in abusive relationships. With the loss of empowerment, women have now accepted their fates, being juggled in the hands of their abusers. Being trapped with their perpetrators, women are left with little to no hope to ask for help or find shelter, and in the meantime, they have to fight their abusers, being isolated from any support.

Laws Dealing With Domestic Violence in India

There are several laws which protect a married woman from being abused by her husband or any in-laws for that matter.

Section 498A of India Penal Code

It states that if a woman's husband or his relatives subject her to harassment or any act of cruelty, they'll be liable for imprisonment that might extend up to three years as well as fine. The term cruelty has been defined under the same section as any act that amounts to coercion for dowry demands from the woman or her family members or any activity that abets the woman to commit suicide or inflict grievous injury upon herself (mental or physical). But, since marital rape for women above 15 years of age has not been explicitly recognised under the ambit of "cruelty", victims often have to rely on PWDVA to seek justice.

Protection of Women From Domestic Violence Act 2005

It prohibits a broad range of physical, mental, sexual and economic violence against women, and all of these are exhaustively described under the Act. The ambit of the Act includes women who are in a live-in relationship as well. Under this Act, a woman has

[16] Leland K. Ackerson and S.V. Subramanian, *Domestic Violence and Chronic malnutrition among women and children*, 167 (10) Amr. J. Epi. (2008), https://academic.oup.com/aje/article/167/10/1188/232214.

[17] Dr R.C. Ahuja, et al., *Domestic Violence: A Summary Report of a Multi-Site Household Survey*, International Center for Research on Women and The Centre for Development and Population Activities, (2000), https://www.icrw.org/wp-content/uploads/2016/10/Domestic-Violence-in-India-3-A-Summary-Report-of-aMulti-Site-Household-Survey.pdf.

[18] Mindy B. Mechanic and Terri L. Weaver and Patricia A. Resick, *Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse*, NCBI (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2967430/#R31.

[19] Jennifer A. Bennice and others, *The Relative Effects of Intimate Partner Physical and Sexual Violence on Post-Traumatic Stress Disorder Symptomatology*, NCBI (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2981038/#R16.

the right to be free from abuse and can choose from different recourses. She has the right to get a restraining order against her husband and his relatives, to continue living in the same house, i.e. even after reporting her abusers, to claim maintenance, to have custody of her children and to claim compensation and to not be thrown out of her marital home.

Family Court Act, 1984

The 59th report of the Law Commission laid emphasis on the institution of distinct courts to deal with matrimonial, personal and family issues. Upon establishment, such courts would help in speedy disposal of matrimonial and personal issues that are long pending in civil and criminal courts. The Supreme Court in *K.A Abdul Jaleel v T.A. Shahida*[20] had said ,"The Family Court was set up for settlement of family disputes and the reason for the enactment of the said Act was to set up a court that would deal with disputes concerning the family by adopting an approach radically different from that adopted in ordinary civil proceedings."

Delay in Criminal Justice: The Loopholes

As collected by the National Crime Records Bureau (NCRB), data under PWDVA covers entirely the criminal violation of the orders of the courts under PWDVA, including the cases of the contempt of a court's protection order passed when the case is still in trial. According to NCRB data, cases reported under the PWDVA breach rose by 8 percent, from 426 in 2014 to 461 in 2015.[21] This implies that the data does not include the actual data recorded under Section 306, 304B and 498A addressing dowry deaths, torture and cruelty by the husband and in-laws, and abetment to commit suicide respectively. However, under PWDVA, which is a civil law, cases are directly listed with the court with respect to matters dealing with maintenance in domestic abuse cases, and protection of the victim from the in-laws and the husband and not recorded by the NCRB. There have been numerous attempts made by women's rights organisations, however, this data on court proceedings have remained unavailable.

What makes the process more tedious is the involvement of different authorities like protection officers (PO), service providers, lawyers, magistrates to ensure justice and rehabilitation of the victim. Each level of implementation comes with its own sets of complexities. POs are frequently overwhelmed with various cases simultaneously and are not adequately guided and trained in enforcing such provisions of the law. More than 50% of PO still consider domestic violence as more of a family affair and urge the complainant to sort it amongst the family.[22]

Another drawback in the law's implementation is that service providers do not have a standardised protocol. In such scenarios, service providers are primarily NGOs, and usually have no contact with the POs or the police. They are mostly not qualified under the Domestic Violence Act or instructed on how to deal with domestic violence cases. While some of the aggrieved women are directed to shelter homes, they are mostly overcrowded and in poor conditions with no means for women to be self-sufficient. So, the victims have no option but to relocate or be homeless.

A lot of lawyers are not acquainted with the notion of service providers (SP) and hence fall back in coordinating with the domestic violence victim in the timely delivery of proper legal services. Moreover, the judiciary is not even remotely aware of the SP's roles in counselling or even the filing of the Domestic Incident Report (DIR). Neither do the magistrates follow the procedures provided for speedy trials.

Under Reporting Problem in India

The NFHS report that is published every 10 years shows that a majority of the victims of domestic violence don't register any formal complaint or follow the institutional routes. Both personal (humiliation, fear of retribution, financial dependency) and social influences (distorted power dynamics of men and women in society, family privacy, victim-blaming tendencies) are the reasons too many cases go unreported. But we still need to know whether all those unreported inci-

[20] K.A. Abdul Jaleel v. T.A. Shahida, Appeal (civil) 3322 of 2003 (India).
[21] Manisha Chachra, *Ten Years Of Domestic Violence Act: Dearth Of Data, Delayed Justice*, HINDUSTAN TIMES (2017).
[22] *Id.*

dents are still invisible to the victim's social community or not. The silence and repression of those who know and victim blaming behaviours lead to the creation of an environment of tolerance that decreases inhibitions towards abuse, making it more difficult for women to come forward, and encourages social defeatism.[23] Among the social aspects that influenced violence rates are those that create an environment conducive for violence.[24]

Healthcare providers hardly ever search for signs of abuse or ask women about abuse experiences, though most women prefer regular questioning about domestic violence by their doctors. India appears to lack mandated mechanisms such as regular screening and monitoring by hospitals when women visit with suspected injuries.[25]

Fundamental Barriers to Seeking Remedy

Like any other case, cases under domestic violence also require the investment of time, energy, courage and money. Although women, under the Indian Constitution, are entitled to free legal aid[26] and although the statute clearly states the duties of disclosing to the woman, who has been subjected to domestic violence, that they are entitled to free legal aid,[27] we don't see such provisions being disclosed to the victim. Thus, they end up appointing advocates and paying for the costly process.

The PWDVA talks about the first hearing happening within three days[28] and thereafter the application to be disposed of by the court in 60 days.[29] Nevertheless, it seldom happens in reality. That is because, to a certain extent, the Act itself provides for a provision of appeal.[30] So, the moment one order is passed by the court, and there is a slimmest of chance to appeal against it, immediately an appeal is filed. Thereafter, the matter keeps dragging, ultimately moving up to the High Court. The cumbersome process ultimately bears down on the victim.

There is a provision under section 23 in the PWDVA[31] for granting ex parte interim relief. Most of the time, when a complaint is filed, we hardly see the court exercising this power. Rather the court adopts the other option, serves notice, lets the other side appear, lets them file an objection and then takes up interim hearing. This oftentimes acts as a disadvantage for the victim whose safety is at imminent risk.

Home is a site of violence, where violence is normalised. The victim and the perpetrator are in the same place, and this happens because of power imbalance. The Act definitely changed the general regime of laws dealing with violence against women in India; however, the Judiciary needs to approach the cases in a prompt manner. Apart from the mandatory physical and sexual medical exams post abuse, a psychological evaluation should also be done because the moment psychological trauma enters in to play, it strengthens the victim's case and helps in getting relief. Ex parte interim orders should be passed in cases where there is imminent danger to the victim, and not just in exceptional cases. Also, there should be an adequate number of protection officers present at any given time. The *Gujarat High Court in Suo Moto v State of Gujarat &Ors*,[32] while deciding on the matter of an inadequate number of protection, the officers present in Ahmadabad, held that "need of the hour was that Government assesses needs of each District and accordingly,

[23] Elizabeth Shrader and Monserrat Sagot, *Domestic violence: women's way out*, PAN AMR. H. ORG. (2000), https://www.paho.org/hq/dmdocuments/2011/GDR-Domestic-Violance-Way-Out-EN.pdf.
[24] WHO Report, *supra* note 4.
[25] Fiona Bradley, et al., *Reported frequency of domestic violence: cross sectional survey of women attending general practice*, NCBI (2002), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC65059/>.
[26] INDIA CONST. art. 39A.
[27] PWDVA, § 5(d).
[28] PWDVA, § 12(4).
[29] PWDVA, § 12(5).
[30] PWDVA, § 29.
[31] *Id.*
[32] Suo Motu v. State of Gujarat and Ors., MANU 2013 GJ 0302 (India).

appoint an adequate number of Protection Officers in each District to receive and attend complaints in time".

The Response of The Judicial System Based on Deep Rooted Prejudices

While Section 498(A)[33] provides a massive list of activities that are considered aggressive, judgement analysis indicates that adjudicators frequently let their perception of progressivism, patriarchal hegemony and family responsibilities affect their evaluation of the degree of crime and violence involved in these cases. Besides, many judges order detailed medical and forensic evidence before convicting suspects, a few judges convict on the basis of testimony from eyewitnesses, dying statements and precedents, and the absence of medical proof demonstrating previous violence is not considered necessary for convictions to be obtained. Therefore, what qualifies as facts in the court of one judge might not be scrutinised by another judge, highlighting contradictions inherent in the evidentiary procedures and the arbitrary handling of domestic abuse proceedings by judges.

While the concept of a 'Dynamic Court' tends to suggest that courts are capable of establishing systemic change and there are instances of such revolutionary jurisprudence in India, there are also various ways in which the criminal justice system fails victims of domestic violence like the innate prejudices of police and lack of efficiency in investigation, to name a few. Some defence interventions, with the implicit or outright collusion of the judicial system, take a shape which is often obscure and invisible. These are intentionally used in cases that have a gender aspect; for example, the systemic negation of victims' statements of abuse by the use of particular discursive devices such as the passive voice to minimise the perpetrator's accountability, deflecting the blame from perpetrators to victims and making assumptions about the mental health of victims without any legitimate medical reason.

Measures Taken in India to Combat Increase in Domestic Violence Post COVID-19 Lockdown

Lockdown 1.0 saw a rapid upsurge in the complaints that were being reported at the National Commission for Women (NCW). In between the first week of March and the start of April, the number of domestic violence cases increased by twice the previous rates in India.[34] While most of the countries had rolled out a lot of safety measures in anticipation of a rise in domestic violence cases, it wasn't until April 10 that the NCW announced a special WhatsApp helpline number. Various other helpline numbers by different state government and the central government followed suit. In the initial lockdown period placed as of March 25th 2020, the Courts constrained their operation to dealing with demanding and necessary matters via video-conferencing. The primary statute that deals with domestic violence matters, Protection of Women from Domestic Violence Act 2005, falls within the ambit of civil laws, and the Court during this period, did not hear matters and cases falling under this category. Additionally, Solicitor General in *"All India Council of Human Rights, Liberties and Social Justice v Union of India311"* said that, a complaint portal has been started by the National Commission of Women as well as a WhatsApp number has also been released to help women facing violence.[35] Further, Information and Broadcasting Ministry has called on all the radio channels and private satellite TV channels to assess information on the emergency response support system (121) operating for safety of women and women in difficult situation.

The High Court of Kashmir, in matter of *Court on Its Own Motion v Union Territories of Jammu & Kashmir and Ladakh*,[36] took suo motu cognizance of the

[33] Indian Penal Code, 1860, § 498A.

[34] Jagriti Chandra, *National Commission For Women Records A Rise In Complaints Since The Start Of Lockdown*, THE HINDU (Apr. 03, 2020, 2:22 AM), https://www.thehindu.com/news/national/nationalcommission-for-women-records-a-rise-in-complaints-since-the-start-of-lockdown/article31241492.ece.

[35] Gananath Pattnaik v. State of Orissa, (2002) 2 SCC 619 (India).

[36] Court on Its Own Motion v. Union Territories of Jammu & Kashmir and Ladakh, WP (C) PIL No. 14/2020 (Through Video Conferencing) (India).

rise in the intimate partner violence cases in the state and issued a verdict recommending various measures like increased call-in service availability to encourage anonymous and protected reporting of violence, establishment of dedicated funding to resolve issues of violence against women and girls in relation to the Jammu and Kashmir Union Territories and Ladakh Territories' response to COVID-19, providing immediate media coverage with regard to all the abovementioned steps, as well as the provision of services for finding relief and redress against domestic abuse urgent designation of safe spaces as shelters for women obliged to flee their household situation. It is important to treat these shelters as open and accessible shelters. The court also ordered the assigning of informal safe zones for women, such as convenience stores, local pharmacies, where domestic violence or harassment can be reported without alerting the offenders. Lastly increased legal and counselling support for girls and women through an online medium was also suggested.[37]

While these measures seem achievable in theory, the same cannot be said for the practical implementations. A complete transition to therapy across phones and online media exposed the disparities in women's access to communication networks as it left women with little opportunity to reach out from underprivileged communities. It was further pointed out by the women advocacy groups that NCW received grievances only (and no longer by post) through emails and WhatsApp. Women from only a few sections of the vast demographic section of women have access and are literate to use these technologies. The NCW president, too, noticed that most complaints were generally received by the commission (NCW) not by mail, but by post.[38]

While making all kinds of stringent policies to ensure an effective lockdown, the government certainly didn't take the downside of lockdown into consideration, and hence no explicit exemption measures as such were provided for the victims of domestic abuse.

Curious Case of South Africa and Sweden

While the world was preparing to go under lockdown amidst the chaos of the pandemic outbreak, South Africa was dealing with another despairing crisis of its own: the genderbased violence, which was anticipated to hit an all-time high with the abusers and the victims being locked away in the same house for months to come. What the country wasn't expecting was a drop in the cases being reported by 69.4% between March and April.[39]

In several provinces, this rising concern regarding the intimate partner abuse had a constructive effect. In such scenarios, the Social Welfare Department had partnered actively with NGO-run shelters to ensure resources and help are open and available to the domestic abuse victims.[40] It also helped NGOs like Rape Crisis to adapt rapidly by providing accessible online and supplementary resources for telephone reporting and therapy. Thuthuzela Care Centres remained open (one-stop facilities for victims of sexual offence at state hospitals). And there had been extensive pollicisation of a nationwide gender-based abuse hotline. Neither of these programmes had, however, seen a major rise in incidents.[41] At three Thuthuzela centres in the Cape Town metro, the National Prosecuting Authority closely worked with the Rape Crisis Cape Town Trust, the police and the Social Development Department. In rape and sexual harassment cases against women during this time, Director Kath-

[37] *Id.*

[38] Nomfundo Ramalekana and Aradhana Cherupara Vadekkethil and Meghan Campbell, *Increase Of Domestic Violence*, OX. H. R. HUB (2020), https://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2020/06/OxHRHSubmission-to-UNSR-on-Violence.pdf.

[39] Elizabeth Dartnall and Angelica Pino and AnikGevers, *Domestic Violence During COVID-19: Are We Asking The Right Questions?* (Jun. 26, 2020), https://reliefweb.int/report/south-africa/domestic-violence-during-covid19-are-we-asking-right-questions.

[40] *Gender-Based Violence During Lockdown: Looking For Answers - ISS Africa*, ISS AFRICA (May 11, 2020), https://issafrica.org/iss-today/gender-based-violence-during-lockdown-looking-for-answers.

[41] *Id.*

[42] *Id.*

leen Dey reported an approximately 50 percent decrease.[42]

This change in trend might seem shady from afar, but there are a few possibilities that can substantiate the same, one of them being the ban on alcohol sales. The ban on sale of alcohol reduced the prevalence of cases of domestic abuse and the risk of stranger rape. Sober partners, despite still having the tendency to be aggressive and oppressive, would be less inclined to device excess physical abuse.

Refuge, a British domestic violence NGO, recorded a 700 percent rise in victim's calls and a 25 percent rise in men's calls to change their actions.[43] This means that the ban on sale of alcohol and the mandated lockdown might be the reason behind the fall in the number of recorded cases and the decrease in cases of serious abuse and injuries in South.

On the flip side, there was an increase in the cases of police brutality (with a 12 percent increase in the cases being reported to the Independent Police Investigative Directorate) and the tight lockout may also have kept women stuck in their homes. This might deter them from venturing out since they do not have any legitimate excuse to offer to their perpetrator, or they might be afraid of fear questioned by the police.[44] This might lead to women not being able to report the violence since they might not be able to call one of the helpline numbers without the fear of being caught by their perpetrators or they simply can't get to a police station. This will contribute to the number of recorded cases declining. Under the lockdown law, people are authorised to travel in order to provide access to essential resources. The Lockdown Regulation describes essential services that include social work, gender-based abuse and recovery therapy services. In principle, therefore, domestic violence victims are being able to leave their homes and seek help and support, getting access to relief homes and shelters for domestic abuse. However, in actuality, reports of military and police brutality against individuals deemed to be contravening the lockdown regulations, especially in poor low-income areas, are likely to dissuade many women from leaving their homes and seeking support.

Another possibility – one that we may have disregarded – is that the shutdown and the situation brought about by the COVID-19 pandemic has altered habits of violence, for good, and there has indeed been a drop in incidence of violence. Notwithstanding how strange this scenario might be, it would be an error on the part of researchers and activists not to consider every possible alternative.

A topsy turvy trend was seen in Sweden, which is deemed as one of the most progressive countries on the gender-based aspects. Since the beginning of the Covid-19 crisis, there has been a strong soar in domestic violence incidents in Sweden, despite the fact that the Swedish policy response was comparably lax and that an absolute lockdown had so far been avoided. One argument that might possibly explain the increased domestic violence during the outbreak and lockdowns elsewhere could be the decreased availability of sex services. A conjecture is sure to be checked in future work.[45]

Domestic violence seems to be the systemic adverse effect of limiting the availability of sex services. A likely reduction in prostitution offering during the Covid-19 pandemic may also have encouraged domestic violence. As the first anti-symmetric criminalization of prostitution was introduced in Sweden in 1999, punishing buyers, but not sellers of sexual services,

[43] Jamie Grierson, *UK Domestic Abuse Helplines Report Surge In Calls During Lockdown*, THE GUARDIAN (Apr. 09, 2020, 10:30 AM), https://www.theguardian.com/society/2020/apr/09/uk-domestic-abuse-helplinesreport-surge-in-calls-during-lockdown.

[44] Katie Trippe, *Pandemic Policing: South Africa's Most Vulnerable Face A Sharp Increase In Police-Related Brutality* (Jun. 18, 2020), https://www.atlanticcouncil.org/blogs/africasource/pandemic-policing-south-africasmost-vulnerable-face-a-sharp-increase-in-police-related-brutality/.

[45] Giancarlo Spagnolo, et al., *The Role of Prostitution Markets In The Surge of Domestic Violence During Covid-19*, VOX CEPR (September 13, 2020), https://voxeu.org/article/role-prostitution-markets-domestic-violenceduring-covid-19.

[46] Arthur Gould, *The Criminalisation Of Buying Sex: The Politics Of Prostitution In Sweden*, 30 J. SOC. POL. (Aug. 06,

a third path between criminalization and legalisation seemed to have been identified.[46] Therefore, it is important to recognise the implications and counter-productive consequences, that such policies can have, while contemplating different types of criminalization or prohibitions on conduct, such as those introduced during the pandemic.

International Organizations on The Impending State of Affairs

Amid the struggles of battling the virus, the rise in domestic violence post the onset of the pandemic has become a global issue. Several International Organizations have raised their concerns towards the deteriorating conditions of women around the globe and have urged the governments of all countries to pay heed towards the safety of women and make it their utmost priority.

United Nations

The United Nations reported a steep rise in the number of calls made to domestic helpline numbers in countries like Malaysia, Australia, China and Lebanon. The UN Secretary General Antonio Guterres appealed to various nations to make sure that women don't have to face violence in their homes, where they should be safest.[47]

The United Nations had passed two resolutions: one in 1993- DEVAW[48] and the other in 2004- Resolution 58/147.[49] The former addressed the violence against women in general and puts forth comprehensive guidelines and standards to protect women from all forms of violence while the later specifically addressed domestic violence against women, condemning it and addressed the different forms of domestic violence. During times like these, where all governments have to fight battles on two fronts: one against the virus and one against the violence against women, these resolutions and international obligations should be given utmost importance.

The United Nations People Fund

The UNFP issued a public warning that the continuing lockdown is estimated to cause nearly 31 million extra gender-based violence all across the globe. The pandemic resulted in the delay of various programmes targeted to end violence against women, which would lead to nearly 2 million more cases of female genital mutilation, child marriage and domestic abuse.[50] The UNFP asked the countries to formulate measures to curb the violence against women that is on the rise and to expressly make protection of women a priority.

The European Union

Joseph Borrell, High Representative, speaking on behalf of the European Union, addressed the challenge that faced the countries globally and reaffirmed that role of civil liberties and human rights defenders be given utmost importance and solicited extensive support and solidarity to the women battling with violence all over the globe stating that human rights cannot be forgotten during a global crisis.[51]

2001), https://www.cambridge.org/core/journals/journal-of-social-policy/article/criminalisation-ofbuying-sex-the-politics-of-prostitution-in-sweden/4349F5BC49487E902AD4ECD95AA22753.

[47] *UN chief calls for domestic violence 'ceasefire' amid 'horrifying global surge'*, UN NEWS (Apr. 06, 2020, https://news.un.org/en/story/2020/04/1061052.

[48] *Declaration on the Elimination of Violence against Women*, G.A. Res. 48/104, (Dec. 20, 1993), [Hereinafter DEVAW].

[49] *Elimination of domestic violence against women*, A/RES/58/147, (Dec. 22, 2003).

[50] *Millions more cases of violence, child marriage, female genital mutilation, unintended pregnancy expected due to the COVID-19 pandemic*, UNPF (Apr. 28, 2020), https://www.unfpa.org/news/millions-more-casesviolence-child-marriage-female-genital-mutilation-unintended-pregnancies.

[51] *Declaration by the High Representative Josep Borrell, on behalf of the European Union, on human rights in the times of the coronavirus pandemic*, EC-CEU (May 5, 2020, 3:20 PM), https://www.consilium.europa.eu/en/press/press-releases/2020/05/05/declaration-by-the-high-representativejosep-borrell-on-behalf-of-eu-on-human-rights-in-the-times-of-the-coronavirus-pandemic/.

The Committee on The Elimination of Discrimination Against Women (CEDAW)

The Committee expressed its serious concerns regarding the heightened disadvantages and the risks of violence that women face globally due to the pandemic and the subsequent lockdown measures adopted by various countries to curb the spread of the virus. The committee stated that all the signatory states of the 'Convention on the Elimination of All Forms of Discrimination against Women' should ensure that the lockdown measures do not put the women at a disadvantage, abridging them from seeking any form of shelter, health care and economic life. The Committee asked the state signatories of the convention to be accountable for the economic, social and overall wellbeing of women and to do so by ensuring their participation and involvement in various decision and policies that need to be formulated for various preventive and recovery measures.[52]

Possible Makeshift Approach Towards Addressing The Issue

The lockdown severely curtailed the mobility of people, thus restricting the victims to register complaints with the police. Even though a complaint could also be lodged via an online portal or via a helpline number, it would be rather ludicrous to assume that all women are aware, have access and are literate to lodge a complaint online, given the wide demographic sections that women belong to, with only 45% of women in India owning cell-phones. This calls for law enforcement agencies to come up with pertinent awareness measures.

1. It has become imperative for the law enforcement agencies to come up with the innovative policies which could come in aid of the victims. In several countries, such policies have helped temporarily in backtracking of the gender-based violence issue at hand.

   The Supermarkets and pharmacies in Columbia were declared as safe spaces for victims to report for abuse and were given training on how to aptly respond if women approached them seeking help for domestic abuse. In Spain and France, victims are seeking help in pharmacies by using code-words. In France, grocery stores have turned into temporary counselling homes for women and the French Government has reserved thousands of hotel rooms to serve as shelter for the victims, in light of the social distancing norms.[53]

   Several media sources reported that the Police in Gardai, Ireland, have launched 'Operation Faoiseamh', so as to contact every domestic abuse victim proactively, those who had previously contacted the police about any domestic abuse, with an immediate arrest policy.[54] Similar measures have been undertaken by the police in Odisha and Tamil Nadu. The Canada government is lending cell-phones and free services to vulnerable people. Civil societies have tied up with Uber to provide free emergency rides for victims.[55]

   In India, government authorities can learn from the same and adopt such innovative initiatives as well as take the support from the private sector to scale up the initiatives.

[52] Alyssa Cannizzaro and Eduarda Lague, *International Women's Human Rights: COVID-19's impact on domestic violence and reproductive rights*, PENN LAW (Apr. 20, 2020), https://www.law.upenn.edu/live/news/9986-international-womens-human-rights-covid-19s-impact.

[53] *How Egypt, France and Other Countries Took Measures to Support Women During COVID-19 Crisis*, EGYPTIAN STREETS (May 12, 2020), https://egyptianstreets.com/2020/05/12/how-egypt-france-and-othercountries-took-measures-to-support-women-during-covid-19-crisis/.

[54] *Operation Faoiseamh*, AN GARDA SIOCHANA (Jun. 09, 2020), https://www.garda.ie/en/about-us/ourdepartments/office-of-corporate-communications/press-releases/2020/june/operation%20faoiseamh%20- %20domestic%20abuse%209th%20june%202020%20.html.

[55] Meg Black, *Uber Offers Free Rides for People Fleeing Domestic Violence During COVID-19 Pandemic*, GLOBAL CITIZEN (Apr. 29, 2020), https://www.globalcitizen.org/en/content/uber-offers-free-ries-for-peoplefleeing-domestic/.

2. Fifty-two helpline numbers have been made operational throughout India, some being national while some being state-specific. However, steps must be taken to make women across the country aware of such helpline numbers. Further, free and immediate counselling should also be provided to victims over calls, should a victim seek for help, regarding possible escape plans and child care during abuse, to name a few.
3. More number of NGOs, feminist organisations and domestic abuse shelters should be added in the list of essential services and be allowed to operate, even in strict containment areas. In Quebec and Ontario, similar measures have been implemented; along with the inclusion of shelters for domestic violence as 'essential services' during the period of lockdown.[56]
4. Frontline workers working for the National Commission for women for physical rescue of women should be provided with adequate PPE suits and training to follow appropriate social distancing norms while rescuing victims.
5. Vigorous nationwide and state-wide awareness campaigns must be launched to spread awareness about domestic violence along with other safety and hygiene measures relating to COVID-19.
6. An app called 'one love' which enables the users to answer certain questions and post the assessment of the answers, tells the users if they are being abused by their partners or if their partners could potentially turn aggressive in future. It also suggests a proper response or a safe road plan to escape in case an emergency situation should arise. Similarly, an app called 'Aspire news' disguises as a regular news app, but caches a 'help' option which stores suggestive measures for domestic abuse victims.[57] An app called Victims-Voice allows the victims to document their experience of abuse, store pictures of cuts or injuries and medical reports after the abuse. All the information is encrypted and kept off-device so that the abuser may not destroy them and the victims could use the data, if in future they wish to pursue any legal action.

   In India, even though we have numerous apps that target domestic violence, we need an app, developed on the similar lines to those mentioned above, which could perhaps help us with the demanding state of gender-based violence.

Conclusion

O' Cruelty, why thy victim is generally a woman!

While another hindrance to the prevention of domestic violence has been generated by the COVID-19 outbreak and isolation, studies on this problem have already suggested the prevalence of the crisis before the pandemic. The pandemic has only amplified the limitations of current domestic violence preventative initiatives. Conditions during COVID-19 appeared strikingly similar to those during disasters- loss of jobs, alienation from social support and economic strain and it wouldn't be farfetched to say that such analogous circumstances following the pandemic could actually harbour the chances of violence in families. Women have also been subjected to psychological abuse like demeaning, belittlement and insults, threats of being abandoned, threats of hurting someone they care about or general infidelity of the husband. Despite there being several laws to prevent domestic violence such as the PWDVA and the penal provisions under IPC, these laws hardly came to the aid of the domestic violence victims during the lockdown. The reason for the same seems to be the major under-reporting issue in India caused due to general unawareness, victim blaming mentality, casual attitude of police authorities, and even the unbalanced power dynamics in families has deterred the victims from reporting their cases. Some-

[56] Cillian O'Brien, Essential services: *What's staying open when shutdowns expand in Ontario, Quebec, CTV* NEWS (Mar. 24, 2020, 8:24 AM), https://www.ctvnews.ca/health/coronavirus/essential-services-what-sstaying-open-when-shutdowns-expand-in-ontario-quebec-1.4865643.

[57] Kevin McCarthy, *3 apps that can help those experiencing domestic violence*, NUEMD (Nov. 13, 2016), https://nuemd.com/news/2016/11/30/3-apps-can-help-those-experiencing-domestic-violence.

times, even the cumbersome process of investigation, and proceedings under the PWDVA have acted as major barriers for recourse. Further, the response of the judicial system is also plagued with deep rooted prejudices. We need to encourage and reinforce policies of action to tackle domestic violence in every region. This virus outbreak has exposed the limits of existing domestic violence prevention measures and has shown that there is still a lot of work that must be done. Several International Organisations such as the UN, UNFP, and the EU have strongly called on the nations to take steps towards mitigating the rising violence against women amidst the severe lockdown restrictions. India could learn from the countries implementing several make-shift approaches towards alleviating the plight of the women. The COVID-19 pandemic may be seen as a window to rethink our future and to take longlasting steps. Homes should not be relegated to torture chambers for women. In the so-called 'private' spaces, the protection of women should not be violated, further reducing women to second-class citizens who rob them of their identity and their beings. In order to build a better society, smashing patriarchal hegemony and gender bias at home and in public spaces is imperative. It is vital that actions are taken to stop abuse in order to ensure that homes remain as 'safe spaces' for everyone. The corona outbreak is new and scientists are seeking a solution to deal with it, but the patriarchal virus is ancient and there is still no remedy for it. To build a better world, addressing patriarchy and all other types of injustice and prejudice is necessary. In addition to taking these suggestions into account, the government has to take other important measures to combat domestic abuse. Only then can it alleviate the brunt of violence that women face.

India's Migrant Issue During COVID-19: a Crisis Within a Crisis

Tusharika Vig[1]

Introduction

The situation of migrant labourers in India has been characterized with insufficient wages, irregular and unorganized employment conditions, lack of financial security and a constant struggle to make ends meet for survival and livelihood. According to the figures of Census 2011, India witnessed movement of around 4.5 crore migrant workers in the year 2011.[2] In spite of the massive and indeed continuous contribution of migrant workers in the growth and development of small-scale businesses, enterprises and industries ultimately adding a significant percentage to the national economy, their socio-economic conditions remain precarious and has worsened even more in the past year of crisis.

The Corona Virus officially called as the COVID-19 virus started as an epidemic affecting only a few parts of the world in small communities or regions unexpectedly took a dramatic turn and spread across the globe in no time forcing the governments across nations to shut down schools, colleges, workplaces and every other activity part of our daily normal life. The first case of COVID-19 in India was reported in January 2020 and soon after the world shut down, the Prime Minister of India announced a 21-day national lockdown under the Disaster Management Act, 2005 which gives power to the Central Government to impose restrictions and pass specific policies with the aim of managing the disaster and thereby preventing its risks.[3] Globally, the World Health Organisation officially announced on 4th April 2020 that the world had crossed 1 million cases with emphasis on the tenfold increase in the previous month i.e. March 2020. [4]

At the time of such a chaotic health crisis faced in the recent years of modern history, it was obvious that the misery would be unequally directed towards the most disadvantaged and socio-economically backward sections of society. Moreover, the disadvantaged class were rendered even more helpless without any safety net or government support when the announcement of lockdown came without any prior intimation to the public. While a huge chunk of the privileged population of the country faced the pandemic inside the safe walls of their comfortable homes with all facilities, the migrant labourers on the flipside suffered and fought the pandemic in the scorching summer heat while struggling to meet the basic needs of food, clothing and shelter. Being a democratic state that chooses its own representatives through the process of Universal Adult Franchise, it is bare minimum to expect a sense of responsibility and full disclosure of information from the authorities especially such information that has potential to immediately disrupt the survival and daily functioning of a large section of society. Mere prior notice could also aid them in the process of preparation and prevent any additional damage to their health and livelihood.

Evolution of Labour Movement and Labour Laws in India

The history of labour exploitation in India can be dated back to the colonial period and recalled from well-known events that unfolded during Gandhi's Satyagraha movements in Champaran district, Kheda and in form of Ahmedabad Mill strike in the pre-independent era.[5] The events highlighted the marginalization and economic suffering of the class of agricultural labourers, peasants and mill workers. Despite several instances of labour exploitation in the Indian territory including the Chargola Exodus where large number of strikes were witnessed in the rich tea gardens of As-

[1] Student, BA.LLB. 3rd year, Christ (Deemed to be University), Bengaluru

[2] Madhunika Iyer, *Migration in India and the impact of the lockdown on migrants*, (10 June 2020, 10:00am), `https://www.prsindia.org/theprsblog/migration-india-and-impact-lockdown-migrants`

[3] The Disaster Management Act, No.53 of 2005, INDIA CODE (2008), Vol. 12

[4] WHO Coronavirus Disease (COVID-19) Dashboard, WHO, (4 June 2020, 6:14 A.M), `https://covid19.who.int/`

[5] BIPIN CHANDRA & ORS, India's Struggle for Independence 1857-1947 335 (8th. Ed. Penguin Book House, 1988)

sam, labour struggles and their problems were not in the limelight or covered in literatures by academicians and scholars for a long time. The Labour movement in India started taking an uproar only after the Royal Commission on Labour came about in 1931 further triggering publication and research on labour history. A clear parallel can be drawn between the attitude of colonial government and the current authorities pertaining to lack of enough emphasis on labour issues and problems especially the migrant workers. It was not until the 1960s when study of labour and their issues became a part of curriculum for students and academicians. The Commission also led to the fulfillment of some of the then existing demands of the labour class by passing historical labour legislations like Trade Unions Act, 1926, Workmen's Compensation Act, 1923 etc.[6]

The establishment of the International Labour Organization which came as a result of the World War I led to widespread demands pertaining to labour problems such as reforms in wages, social security, general welfare and social justice for the working class across borders.[7] With the development of the International Labor standards and labour conventions and treaties, India's labour movement also started taking a drastic yet progressive turn. Moreover, with the enactment of the Constitution of India after independence, new goals and aims emphasizing on social welfare were established for new India. Adhering to the goals and desires of the founding fathers behind the Constitution, the concepts of Right to Work, Dignity of Labour and Social Equality became the source and reasons for several legislations enacted in the post-independence era.[8]

The Industrial Disputes Act, 1947 was one of the first legislations of newly independent India. It aimed to prevent disputes between workers within the industry and help in establishing healthy and harmonious working environment for labour. The Act also attempted to balance the interests of the workers as well as the employers by providing for dispute resolution which would prevent any unnecessary halt in the production process as well as safeguards for the employees pertaining to the conditions of work.[9] Payment of Bonus Act, Equal remuneration Act, Payment of Wages Act, Payment of Gratuity Act, Unorganised Sectors Social Security Act etc are other post-colonial legislations that were enacted to line with the social justice aims of the constitution. With the changing circumstances, globalization and increasing complexities in markets and trade, the Industrial Disputes Act and other labour laws have been amended and reformed in theory multiple times to keep them up to date and promote better working conditions for labourers.

However, the recent migrant issue rendered all these detailed legislations covering almost all aspects of the lives of labourers redundant and ineffective owing to the poor application of the laws and ineffective implementation on the target population at the ground level.[10]

A Crisis Within a Crisis

With the close down of all shops, collapse of businesses, production and manufacture units during the lockdown, it was obvious to predict the devastating impact on the economy of the nation and the world at large leading to grave effects for the common man such as salary cuts and loss of jobs to millions. The biggest concern of the crisis was that most migrant workers are daily wage labourers who were left with nowhere to go when they were rendered jobless overnight especially without the creation of any social support mechanism mandated by the government. The nature of work of the migrant labourers is informal as they are unskilled in comparison to the educated population thus, their migration from their rural hometown/villages to cities in search of big money often leaves them in an unsecure often low waged oc-

[6] Sanat Bose, *Indian Labour and Its Historiography in Pre-Independence Period*, 13 Social Scientist 3, 3-5 (1985).
[7] Nobel Prize History, (15 June, 2020, 7:15 P.M), `https://www.nobelprize.org/prizes/peace/1969/labour/history/`
[8] INDIA CONST. art 38-39
[9] Industrial Disputes Act, No. 14 of 1947, INDIA CODE (1993), VOL. 15
[10] S.I.A. Muhammed Yasir, *Labour Legislation in India – A Historical Study*, 6 I.J.A.R 34, 35 (2016)

cupation. The sad reality of poverty traps them in the same poverty ridden cycle because of the inability to afford good education or gain skill for a formal, secure job. The living conditions of migrant workers who come from rural households have been deplorable since years, even before the pandemic with the urban poverty level getting strained without any improvement in the lifestyle of migrant workers.[11]

The announcement of the lockdown led to a heightened sense of fear and panic for these individuals who had already been living a hand-to-mouth existence further causing confusion and distress to the mass of daily wage earners, seasonal migrant workers, contract labourers etc who were most often the breadearners of their respective families. On top of that, with the abrupt suspension of all means of transport mandated by Clause 6 mentioned in the 2020 Guidelines of Essential Commodities Act, 1955 without the creation and establishment of any kind of alternative arrangements for commuting worsened the situation even more for this section of society. The guidelines strictly restricted the use of transport only for the purpose of essential goods and case of fire, law, order and emergency services.[12]

At a time when directions, policies and new guidelines were passed on a daily basis to handle the crisis at hand, it is a thing to ponder why no central or even state authority/institution consider the return of thousands of migrants as an unprecedented 'emergency' for the ones who were walking miles on road risking their lives and of the fellow others during a global health crisis. Even after amendment of the guidelines after relaxation of lockdown rules, operation of flights, waterways and railways was kept mainly limited to the movement of cargo. The railway stations and bus terminals became overcrowded during this time because of the sudden emergency outflow of migrant labourers.[13] Due to this situation, safety measures such as social distancing that was mandated by the orders and directions of the government were violated. The migrant workers from unprivileged section of society were simply left trapped without any safe shelter wandering around the inter-state boundaries struggling to fend for themselves. Further, the state of affairs was aggravated due to the absence of coordination between the central and state governments with the ineffective implementation of existing policies and orders put in place in an attempt to handle this unfolding humanitarian crisis.

The Continuing Loss and Suffering

The uncertainty in the time of the pandemic has also led to a lack of financial security for the working poor, as about 89% of all workers in India fall under the category of informal workers. Of these workers about two-thirds are not covered by any minimum wage laws. This is especially the case with inter-state migrants who constitute the "footloose laborers"[14] of the country. Between 2011 and 2016, the magnitude of inter-state migration was estimated to be approximately nine million over a period of year in India. According to the *Economic Survey*, 2017, workers mostly from the states of Uttar Pradesh, Bihar, Madhya Pradesh, and Rajasthan migrate to states like Delhi, Kerala, Maharashtra, Gujarat, and Tamil Nadu in search of jobs. In cities, they are usually employed in menial jobs leading a precarious existence working long hours for low wages, often in poor working conditions and living in squalid surroundings. Among these workers include agricultural laborers, coolies, street vendors, domestic servants, rickshaw pullers, garbage pickers, auto-rickshaw and taxi drivers, construction workers, brick kiln workers, workers in a small way-side hotels and restaurants, watchmen, lift operators, delivery boys, etc that we often see and interact with in our day-today lives.

[11] Sengupta, A, *Migration, Poverty and Vulnerability in the Informal Labour Market in India*, 4 TBDS, 99, 110-116 (2013)
[12] The Essential Commodities Act, No. 10 of 1955, INDIA CODE (1988), Vol. 27
[13] Amlegals, *COVID-19 Outbreak: How About Essential Commodities*, (5 May 2020, 10:20 P.M), https://www.mondaq.com/india/operational-impacts-and-strategy/928382/covid-19-outbreak-how-aboutessential-commodities
[14] Sunanda Sen, *Rethinking Migration and the Informal Indian Economy in the Time of a Pandemic*, THE WIRE, (1 June 2020, 8:14 P.M), https://thewire.in/economy/rethinking-migration-and-the-informal-indianeconomy-in-the-time-of-a-pandemic

A closer look at the history and situation of informal labour sector in India produces the immediate inference that most existing laws, policies and institutions which are in place to advance the goals of the labour class merely emphasize on or are accessible to the formal sector only whereas the bulk of labour class in India is filled with unorganised, informal and seasonal migrant workers. With the ease of doing business which has been promoted in the recent years by the current government, small businesses, enterprises and industries have become common. This expansion of freedom and opportunity for the employers comes at a cost to the workers of the informal sector. The small businesses cannot afford the extra cost that comes with providing better employment conditions and social security benefits to their employees which is relatively easier for large-scale businesses that are capable of balancing risks and costs equitably between both the employer and employees. Unfortunately, in the informal sector, the entire brunt of suffering and costs falls on the labour.[15] The results of which, one can witness with the Migrant Crisis of 2020.

The difficulty in organisation of the informal sector due to problems of irregularity, nonregistration, unincorporated business worsens the situation even more and renders even the law-making bodies helpless. At such a difficult crossroad, the only question that the scholars and law-makers need to address is whether there is a solution to provide the informal sector the benefits of the formal sector with the existing irregularities or is it more feasible to attempt to transform the entire labour class of India to formal sector?[16]

An Issue of International Importance

During a year where everyone was confined to their homes, social media became the main source and platform where people interacted with one another and also got their share of information. The social media avenues and *whatsapp groups* were consistently flooded with tips, tricks and myths about the novel pandemic where everyone tried to give their expert opinions on the future and present. Amidst the chaos of fake chaos and a dilemma about what to believe and what not, the citizens became aware about the instances of police brutality across the globe. Unfortunately, India was not left behind in this race and this is aimed at bringing the same into broad daylight. There have been recent instances of Police Brutality that took place and came to the forefront through the circulation of inhumane videos on media and sadly the instances have continued ever since then for some reason or the other.

India being one of the founding members of the International Labour Organisation (ILO) which has ratified a total of 47 conventions and 1 protocol of the same brings into the spotlight various lapses in the sphere of labour law and the alarming state of rural workers at large which needs to be improved.[17] The situation of migrant labourers is not merely an issue of national importance but an international humanitarian crisis by the virtue of India's ratification of various international treaties and conventions concerning human rights and rights of labourers, children and women.

Though Guidelines issued by the Ministry of Home Affairs as per the Essential Commodities Act, 1955 categorically exempt "essential services" from the lockdown, lack of coordination and miscommunication resulted in mayhem and fear among the general masses even after the existence of enough authorities in place in theory as per the legislations. In this unexpected situation, a lot of statutes were reviewed and directions, notices and orders were passed every day by State Governments in pursuance of safety measures directed by the Central Government. Section 188 of the Indian Penal Code[18] was a recurring of these orders. Since the announcement of the lockdown, the police machinery had adopted various techniques, ranging from non-violent method of clicking a picture of the violators holding placards saying how they are 'samaj ke dushman' (enemy of society) to

[15] Meghnad Desai, *Informal Work*, 48(3) IJIR 387, 387-389 (2013)
[16] *Bose, Supra* note 5 at 6
[17] Ministry of Labour and Employment,(June 19th 2020, 8:34 P.M), `https://labour.gov.in/lcandilasdivision/indiailo`
[18] Indian Penal Code, No. 45 of 1860, INDIA CODE (2002), Vol. 18

causing direct physical violence against public ranging from vicious lathi charges to dragging 'violators' on the roads. A live example would be the events that unfolded in several parts of Gujarat where tear gas and lathis were used to tame helpless migrant workers. More than 90 workers were immediately detained for violating the orders imposed under the Epidemic Diseases Act, 1897.[19] It is important to note as previously stated that these workers usually had no safe housing in the city/town of work thus thousands of them walked miles in groups to reach home struggling to make ends meet for them and their families. Furthermore, there is the case of a man who died after being beaten up by the police in West Bengal. The 'violator' had stepped out of his house to buy milk. Imagine the lack of humanity and the plight of the family whose breadwinner stepped out to buy milk and come back home in a coffin. Even the Disaster Management Act, 2005 which was the primary central law in force to contain the spread of coronavirus provides for a maximum arrest for a period of one year for proven non-compliance of orders by the concerned authorities.[20] However, the police taking the law in their hands with the blatant use of force and violence is a clear violation of Human Rights to say the least but to look at it legally, one needs a closer look into relevant provisions.

Legal Aspects and Provisions

Constitutional Provisions

The COVID-19 crisis not only saw loss and suffering every single day but also an uneven and inequitable treatment of the persons suffering from the same crisis. The divide between the privileged and unprivileged section started becoming clearer when one side had the ability to stock up necessities, food supplies and toiletries lasting for over a month while on the other hand, some persons on the road could not even procure one meal a day. Right to Equality enshrined in Article 14 of Constitution of India[21] was unfortunately denied to more than half of the Indian population when the government failed to treat everyone facing the same health crisis equally. The effects of the money and muscle power is evident from the time and effort used by the government to organize flights for students and other residents mostly from good income families who were stranded abroad while thousands of migrant workers often from marginalised sections were denied even train tickets from one part of the country to their homes. The migrant crisis also brings focus on the blatant breach of the principle of 'equal pay for equal work' enshrined under Article 14. The same principle was elaborated and argued in State of *Orissa v. Balaram Sahu*[22] where there was a contention on the entitlement of equal pay by the daily wage, casual workers in the State of Orissa for undertaking the same responsibilities and duties as the permanent employees. The Supreme Court elaborated on this point of law by upholding the dissimilarity between the duties and responsibilities of casual workers and permanent employees. The Apex further emphasized on the qualitative difference under Article 14 of the Indian Constitution. However, the Court made it clear through the judgement that the State must ensure that minimum wages are prescribed and paid to workers in an attempt to bring socio-economic parity.[23]

Article 19 of the Indian Constitution is an umbrella provision constituting six freedoms within its purview.[24] The ones applicable to the migrant crisis are Article 19 (1) (e) that specifically provides for the right to reside and settle in any part of the territory of India read with Article 19 (1) (g) which allows for any person to practise any profession, or to carry on any occupation, trade or business.[25] True economic

[19] Mahesh Langa, *Migrant Workers, police clash in Ahmedabad*, THE HINDU, (May 18 2020, 9:43 P.M), https://www.thehindu.com/news/national/other-states/migrant-workers-police-clash-inahmedabad/article31613118.ece
[20] The Disaster Management Act, No.53 of 2005, INDIA CODE (2005), Vol 12
[21] INDIA CONST. art 14
[22] State of Orissa v. Balaram Sahu, AIR 2008 SC 5165
[23] State of Orissa v. Balaram Sahu, AIR 2008 SC 5165
[24] INDIA CONST. art 19
[25] INDIA CONST. art 19

growth and realization of these fundamental rights in its true sense without compromising on the lifestyle would occur only with even and equitable territorial development all over the country. In the present situation, the workers are often forced by their dire circumstances to migrate in order to run their households often doing menial jobs.

The current issue at hand where there are instances of denial of basic necessities like food, clothing, shelter with safe and healthy living conditions for the migrant workers can be termed as a clear violation of Article 21 provided by the Constitution of India.[26] Over the course of legal development, the scope of Article 21 has been evolved and made more inclusive through various judicial pronouncements across the world. In *Munn v. Illinois*,[27] the meaning of life which is recognised as a human right which became a fundamental right in most civilised nations was transformed to include quality of life. The same principle was laid down in the Indian landmark judgement of *Kharak Singh v. State of Uttar Pradesh*[28] expanded the phrase personal liberty to include more than mere animal existence.

In *Delhi Development Horticulture Employee's Union v. Delhi Administration*,[29] the petitioners who were daily wager employees in the Jawhar Rozgar Yojna filed a petition contending their right to life. They claimed that their right to life under Article 21 included the right to livelihood and thus, they were entitled to the right to work. The Apex Court through its verdict dictated at that time that the Indian State had not found a uniform effective mechanism for the implementation of right to livelihood as part of fundamental rights under Part III of the Constitution. It instead laid down the onus of the Directive Principles of State Policy prescribed under Part IV which directs the State through Article[30] to make effective provision for securing the same according to the capacity of its economic resources within the limits of development.[31]

In another instrumental judgement of *D.K. Yadav v. J.M.A. Industries*, the Hon'ble Apex Court while deciding on the matter of termination of service of a worker held that Article 21 of the Constitution that lays down the fundamental right to life also includes the right to livelihood and therefore no worker could be terminated from their service in an unfair, arbitrary and unlawful manner as that would deprive the person of their means to earn their living.[32]

The Constitution of India also provides for Directive Principles of State Policy under Part IV (Article 38-51) to aid in achieving the goals of a welfare state and social, economic and political justice as well as equality of opportunity and status as mandated by the Indian Preamble. Article 39 of the Constitution aims to secure to the citizens the right to adequate means of livelihood and puts a responsibility on the State to also ensure equal pay for both men and women for the same job or activity.[33] Right to work and secure wages with a good standard of living is provided for in Article 41 and 43.[34] Even though Directive Principles of State Policy are not enforceable in the Court of law and citizens cannot approach the Court to get protection against the violation of these rights, the judgement of the landmark case of *Minerva Mills Ltd. & Ors v. Union of India*, DPSPs were given the equal weightage as the Fundamental Rights and they were placed on an equal footing.[35] The principles enshrined in Articles 39(a) and 41 must be given enough weightage for the true realization of enforceable fundamental rights. The obligation upon the State to secure adequate means of livelihood and the right to work to each and every citizen comes with the unspoken inclusion

[26] INDIA CONST. art 21
[27] Munn v. Illinois, 94 U.S. 113 (1877)
[28] Kharak Singh v. State of Uttar Pradesh (1963) AIR 1295, 1964 SCR (1) 332 (India)
[29] Delhi Development Horticulture Employee's Union v. Delhi Administration, AIR 2010 SC 6645
[30] INDIA CONST. art 41
[31] Delhi Development Horticulture Employee's Union v. Delhi Administration, AIR 2010 SC 6645
[32] D.K. Yadav v. J.M.A. Industries, AIR 2015 SC 5564
[33] INDIA CONST. art 38-39
[34] Id at art 41-43
[35] Minerva Mills Ltd & Ors v. Union of India (1980) AIR 1980 SC 1789

of the right to livelihood within the broad umbrella of right to life. Any denial of the right to livelihood which is outside the exception of procedure established by law is a downright offensive to the principles of Right to life under Article 21.

Legislative Provisions

On account of containing the spread of COVID-19, the Prime Minister of India, Narendra Modi announced a nationwide curfew for a period of 21 days on March 24, 2020 invoking the strict implementation of The Disaster Management Act, 2005. The impact of the same could be seen on everyday basis of almost every citizen of this democratic nation. The legislation has a wide interpretation of the word 'disaster' which is not limited by its name and takes within its purview all man-made as well as natural disasters which have caused or have the potential of causing human loss and suffering and the control of which is beyond the control of society in general.[36] The Act also establishes Disaster Management Authority at National, State and District levels. Section 51 of the Disaster Management Act, 2005 prescribes penal punishments for persons non-complying with the directions and orders of Central or State Government or any other authorities established under the Act.

Another legislation which was in operation during the COVID-19 crisis was the Epidemic Diseases Act, 1897.[37] The legislation was amended by the recent Epidemic Diseases (Amendment) Ordinance, 2020.[38] The original Act which aimed to contain and prevent the spread of dangerous diseases has been modified by the ordinance to include specific provisions for healthcare personnel who are involved at the frontline to fight the deadly virus. The key features of the Act include safeguards and protection against any act of violence committed against the healthcare service workers. It also makes provisions for quarantine facility owing to the specific contagious nature of the disease at hand.[39] Although the legislation claims to cover all dangerous diseases, the lack of any comprehensive definition of a dangerous disease puts blot on the effectiveness of the Act and its application on potential diseases and health catastrophes of future. Moreover, the Act places immense powers in the hands of the government authorities without any provisions prescribing punishments or compensation against their illegal actions which creates a lot of scope for misuse and arbitrary use of power by the State and its agencies.

The recent instances of police brutality that came into the forefront in 2020 forces one to take a closer look at the penal provisions. According to the language of Section 188 of the IPC, the provision mainly deals with any kind of disobedience of orders, summons, directions issued by the State which includes all public servants. The sanction mandated by this provision however in no interpretation implies violence on the violator. Even if the disobedience or omission to do an act required by the State relates to human life, health and safety which was definitely the case with the COVID-19 virus, the punishment cannot be more than imprisonment of 6 months plus fine[40] and that too if the step by step procedure is followed as per the Criminal Procedure Code.[41]

This further takes us to the notion that whether the police officers get an authority to initialize the attempt of lathi charge in case of the irregularity of violators?

The answer to this rhetorical question is no. At most, the police have authority to detain an individual for not adhering to the conditions of lockdown and gives the offender right to be released on bail on account of offence being bailable.

The outcome of lathi charges by police authority and mercilessly beating the people who went out to accommodate essential goods for their mere survival are an example of the major misuse of powers done by the

[36] Supra note 5
[37] The Epidemic Disease Act, No. 3 of 1897, INDIA CODE (2013), Vol. 12
[38] Epidemic Diseases (Amendment) Ordinance, 2020, INDIA CODE (2020), Vol. 6
[39] Epidemic Diseases (Amendment) Ordinance, 2020, INDIA CODE (2020), Vol. 6
[40] Supra note 10, Section 188
[41] Code of Criminal Procedure, No. 2 of 1974, INDIA CODE (2002), Vol. 13

state authority in order to mislead a riot and where the people of the state who chose the government ultimately becomes the victim in such cases. In these instances, what most of the common public can do is to educate one another and make them understand the rights and obligations which the Constitution of India has given to the citizens so that they can understand what rights cannot be infringed if such cases of curfew arise. The curfew is justified on account of public welfare but the disproportionate use of force is not justified. If the curfew is seen from the perspective of public welfare then it can be somehow justified on the grounds of social, secular and republic but when there is use of force in such circumstances then it is not justified.

Affirmative Action

After much chaos and suffering, it was the Apex Court that took *suo moto* cognizance of the daily distress caused to the migrant labourers by recognizing their problems and deciding to pass certain directions in their favour. A group of 20 senior advocates wrote a letter dated 25th May 2020 emphasizing on the issue as a violation of fundamental rights and the situation of migrant workers as a massive human rights crisis.[42] Following this initiative, a three-judge bench of the Hon'ble Supreme Court directed the Centre and State Governments to facilitate the free and safe return of all the migrant workers who were stranded away from their homes or villages without any means to go back.[43] By virtue of good media coverage, several people in the country became aware of this ongoing crisis. As a result of which, many Public Interest Litigation (PILs) were filed seeking fulfilment and redressal of specific demands from the Court of Law. The case *Alah Alok Srivastava v. Union of India*[44] is one such petition demanding a dignified treatment to the migrant labourers by the local administration and concerned police authorities.[45] It also aims to secure provision of food, water, medical treatment and temporary shelter home/accommodation to the needy labourers till the situation gets better.[46] At the territorial level, governments, particularly that of Kerala and Tamil Nadu, spared no idle opportunity to establish instruments, for example, direct benefit transfer and transfer plans to aid the helpless handle the emergency as much as possible. While an economic relief package of ₹1.7 lakh crore was declared by the central government, this amount would not be adequate to cater to the gravity of the issue. Moreover, the accessibility and availability of this sum to the un-registered migrant workers who usually do not possess bank account or ration cards also raises a crucial question and points to the loopholes in the framework.[47]

Seeing the aftermath of the migrant crisis and its continuing financial suffering, the Lok Sabha initiated three new labour bills in the month of September 2020 in an attempt to consolidate, update and simplify laws relating to the matters of trade and commerce.[48] Three instrumental codes pertaining to the present matter came into existence after this major policy change namely The Code on Social Security, 2020,[49] The Occupational Safety, Health and Working Conditions

[42] Kruthika R, Jai Brunner, *COVID Coverage: Migrant Labourers* (9th June 2020, 6:30 P.M), https://www.scobserver.in/the-desk/migrant-labourers-crisis-and-the-supreme-court

[43] The Print, *Supreme Court asks Centre, States to send migrant workers home free of charge*, (19 June 2020, 8:44 P.M), https://theprint.in/india/supreme-court-asks-centre-states-to-send-migrant-workers-home-free-ofcharge/445173/

[44] Alah Alok Srivastava v. Union of India, AIR 2012 SC 4435

[45] Madhunika Iyer, *Migration in India and the impact of the lockdown on migrants*, (10 June 2020, 10:00 A.M), https://www.prsindia.org/theprsblog/migration-india-and-impact-lockdown-migrants

[46] Supra note 1

[47] Pranab R. Choudhury, *The Lockdown Revealed the Extent of Poverty and Misery Faced by Migrant Workers*, THE WIRE, (July 16, 2020,8:34 P.M), https://thewire.in/labour/covid-19-poverty-migrant-workers

[48] Aayushi Kiran, *A Critical Analysis the three Labour Bills 2020*, (20th October 2020, 6:40 P.M), https://www.latestlaws.com/articles/a-critical-analysis-the-three-labour-bills-2020/

[49] The Code on Social Security, No. 36 of 2020, INDIA CODE (2020), Vol 13

[50] The Occupational Safety, Health and Working Conditions Code, No. 37 of 2020, INDIA CODE (2020), Vol 1

Code, 2020[50] and the Code on Wages (Central Advisory Board) Rules, 2021.[51] With proper coordination and sound implementation at the ground level, the Indian legal machinery can avoid the devastating after effects of an emergency situation such as the migrant crisis of 2020 in future.

Conclusion and Suggestions

Since most of these workers are employed in a very small and medium enterprises in the informal sector, in enterprises that are teetering at the edge of collapse, given the deepening economic slowdown. Preventing shutdowns of these enterprises in the informal sector in order to ensure their survival is also essential in testing times. These enterprises should be provided with special assistance, such as a special economic package from the government to stay afloat in drastic circumstances. Most importantly, the need of the hour is to ensure that adequate measures are taken to cushion the impacts of the pandemic on the working poor in the midst of a deepening economic slowdown. This has to be done by both the central and state governments working in tandem not only to ensure adequate resources but also to implement schemes suited to the unfolding situation at the ground level. Unemployment and money problem, along with public goods and transportation shut down, hundreds and thousands of migrant workers who do not have a job security or protection were forced to trek hundreds of miles back to their home towns and villages along with some deaths on their journey.

The crisis which had affected the life and property of thousands of people across different states brought into the limelight the inefficiency of our existing laws and policies concerning this section of population. One silver lining of this situation is that these instances and the plight of the workers were widely reported by the media channels. Without the imposition of lockdown as a side effect of COVID-19, the plight and inefficiency of policies probably wouldn't have been recognised as an early stage. The time is now for the statesmen, legislators and policy makers to take action on this newly spread information and awareness of this human rights issue.

The labour laws have evolved all across the globe since the Industrial Revolution in order to make the workplace and living conditions more favourable for the working class. However, the past transformation does not imply that the present policies are perfect without flaws. The laws are dynamic and policies must continue changing and becoming more inclusive according to changing contemporary social-economic scenarios. The unexpected turn in our normal lives caused by the corona virus has given us time to reflect, become more aware and most importantly be prepared as much as possible for any potential damage to the social structure so as to preserve the dignity of the lives of the citizenry.

Despite the doctrine of sovereign immunity and the fact that the virus could not have been stopped at its origin as it was beyond the control of the Communist-Party led nation, the nation still needs to be made liable for the costs which other great nations have to bear just because of its negligent conduct of not being able to duly inform and give cautions or warning about the transmission of the virus among humans, which could have prevented this massacre or at least reduced the suffering to a certain limit. The pandemic has cost the world nearly 26,40,349 deaths as of 14th March 2021 all across the globe[52] while major economies and developed nations have also been broken. China caused a humongous aftermath which needs to be significantly realised by any way possible. If there would be any case where justice should be done, then this should be it. In the sectorial sector, the Micro Small and Medium Enterprises (MSMEs)[53] which owes 30% contribution to economic development, is now totally out of action. But the government has regarded ₹20,000 crores for this sector including other sectors like real estate, aviation, tourism and au-

[51] Madhunika Iyer, *Migration in India and the impact of the lockdown on migrants*, (10 June 2020, 10:00 A.M), https://www.prsindia.org/theprsblog/migration-india-and-impact-lockdown-migrants

[52] World Health Organisation, Coronavirus disease (COVID-19) Pandemic (14 March 2021, 12:00PM), https://www.who.int/emergencies/diseases/novel-coronavirus-2019

[53] Ministry of Micro, Small & Medium Enterprises, https://msme.gov.in/, last accessed on 20 November 2020

tomobiles which is a view that can pull up the economy back to its development process to a certain level. The status of the health sector in India is in a crucial state and the impact of the pandemic in such a populous nation digs a deep hole in its already suffering state. The private health sector is facing a lot of challenges whether it is for the provision of ventilators, manpower, hospital beds, testing, types of equipment, pharmaceuticals, or other consumables.

The impact of the migrant crisis during the COVID-19 pandemic must teach and serve as a wake-up call to the concerned authorities to prepare for more efficient laws and policies for the migrant labourers along with organised implementation at the ground level so that the nation is better equipped to handle and contain any potential crisis that may arise in future.

To look on the brighter side, India is in its 12th month since the virus took over and the journey has been a rollercoaster ride. With the great cooperation, dedication and selfless efforts of doctors, government officials and manufacturers/workers ensuring us basic necessities, the nation has witnessed an incredible recovery rate from the virus. According to the live data released by the Union Ministry of Health and Family Welfare, the recovery percentage of India as of 23rd December 2020 is 95.65%. However, it is important to note that the crisis is not yet over as the workers are still facing the financial brunt of their displacement even months after the lockdown. With the recognition and detection of a new variant of SARS-CoV-2 virus by the United Kingdom government, there might be a possibility of imposition of lockdowns or restrictions in future with grave impact and further worsening of the situation of these migrant labourers. The adequate precautionary measures need to be taken at this preliminary stage of a potential novel virus to avoid the fatal impacts on the health and situations of people.[54]

[54] Ministry of Health and Family Welfare, `https://www.mohfw.gov.in/`, last accessed on 30 November 2020

Varied Facets of Copyright Law: Special Reference to Performer's and Celebrity Rights

Urvashi Sharma [1]

Introduction

The powerful human mind is an epicentre of lot many creations of various forms of properties which refer to as Intellectual property rights. These properties take various forms which are classified as varied intellectual property like copyright, patent, trademark etc. These are to be protected in the same manner as any physical form of property for the value attached to the same. These creations can generate a fortune for some people and be one of the best ideas of business which can make a country grow. The power is endless, but it requires protection from the countries and Governments to ensure that there is no dearth of the innovation and creation in the society for the reason of not enough protection from and widespread infringement. Thus, the countries have two main reasons to protect the IPs. Firstly, to keep the reward theory in place and not let the economic justification face any setback by way of infringement. Secondly, to keep the innovation and creativity intact in the society that leads to the developed society.

Intellectual Property is divided into two broad categories i.e., the Industrial property and Copyright. When we refer to Copyright, we are specifically referring to author's rights. The rights in the form of creations like books, music, painting, sculptures etc. The main feature of copyright is the originality and the form of expression. Unless something created is original and expressed in a tangible form and not just an idea there will be no protection granted for the same. The ideas cannot always be original, but the form of expression should always be original to gain the protection. Thus, these things make the features to create a copyright that can be protected by law. The copyrights are considered as bundle of rights and not just mere single form of right. Copyright in itself has two important rights economic and moral. The moral form of right is not available in any other form of intellectual property; this is a unique feature which remains attached to the copyright no matter it gets transferred to any other person through license or assignment. Thus, copyright is called the right given to the author and importantly referred as author's rights. Even if the author dies the moral rights in the form of right of paternity and right of integrity. It's not always the economic advantage that these properties create but it is also the direct link to the author and the name and fame that is to be protected in these forms of copyrights. The etymological origin of the word "moral rights," was taken from the French term "droid moral", which denotes the non-commercial or intrinsically attached rights to the author. This concept reduces the original economic approach to copyright with indefinite character rights.[2]

The basic difference when it comes to invention and literary or copyright is the form it takes the creation of mind transferred in a form of book, music, sound, painting etc and an invention would take a different form of technology that is utilised in the industries and in the market by individuals to ease the problems of the humans.

Performer's Rights Under Indian Copyright Act

The Copyright Act, 1957 that was one of the first legislation drafted in by Indian framers as per the needs but the need of changing it and altering it came very soon and thus the alteration happened in 2012. A very important amendment was related to the Performer's right in India. The effect came in the Chapter 8 of the

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[2] PAUL GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS, 295 (University Casebook Series, 2001).

[3] SELVAM & SELVAM(Dec 10, 2020), https://selvams.com/blog/judicial-recognition-of-performers-

Copyright Act and was also in consonance with Article 14 of the TRIPS agreement and the similarity can also be seen in Article 5 to 10 of WPPT Treaty.[3]

When we specifically talk about the rights attached to the cinematograph movies and the cinema, all the bundle of rights attached like the music, acting, singing, dramatics everything becomes the sole economic right of the producer of the cinematography film and the original authors are just left with minimum rights mainly the moral right not to use the work in a manner that derogates the original author. The commercial exploitation of the creative process is useful for the original authors, and it was discussed at various world forum meets but they were not recognised until the Rome Convention 1961.

The international treaty had an intention of providing the protection against any usage that is without permission from the authorized author and thus the broadcasting of the performances which are outside the purview of use or permissions not granted needed to be protected so that the performers are the content creators have their performing rights intact. These rights are essentially very important for the copyright owners.[4]

Indian intellectual property laws are mostly derived from the international legislations which are either the British laws or the international treaties that India becomes signatory to. The actual laws in India related to the performer's right were nonexistent before the amendments made in the IP laws specifically the Section 38 of the Copyright Act. After this amendment the royalty or the imbursement for the performance was being recognised in the Indian laws as well.[5]

If we look at the specific Section of the Act related to the performer, section 2(qq) of the Act defines performer which includes wide variety of people showcasing their talent like an acrobat, a music composer, a singer, actor etc just to name a few. There are the societies also that have now taken the role to highlight these rights like the PRS i.e. Performing Rights Society which acts as an intermediary in supporting the rights and managing the royalty collections for the copyright holders.[6]

To understand the outlook, the importance of the performers is very remarkable in the whole entertainment industry. Nothing works if it is not performed and thus the economic gains are to be protected for the ulterior importance of proper functioning of the same. The performers have lost considerable amount till date for non-recognition of these rights but now protecting and recognising these rights is an important step towards the apt protection of IPs in India. These form a part of not the original form of copyright but the related or the neighbouring rights that are the ancillary rights attached to the main original rights.[7]

Related or neighbouring rights form an ancillary part of the copyright, and they add to the overall enjoyment of the rights. Intellectual property law generally adheres to the theory that performers shall be provided the rights in relation to their performances. Performers shall have the right to manage not only the performing episode but also any further form of utilization of such performances. These kinds of occurrences need to accord noteworthy protection to the rights of performers came about with the expansion of technology that allowed performances to be recorded and broadcast.[8] The early judgments that came in India never recognised the performer's rights and favoured the producer rather than the original author of the work. Like in the case of *Fortune Films International v Dev Anand*[9] it

rights/

[4] Nithin V. Kumar, *Performers Rights under Indian Copyright Act*, (Dec 9, 2020) https://www.bananaip.com/ipnews-center/ip-blog-a-thon-performers-right-under-indian-copyright-law-part-i/

[5] Swetha, *Delusion Over Indian Performance Rights Society Being A Part Of Copyright Society*, (Dec 11, 2020), https://www.mondaq.com/india/copyright/709542/delusion-over-indian-performance-rights-society-being-apart-of-copyright-society

[6] Id.

[7] Aashita Khandelwal, *Performers Rights in India*, Fastforward Justice law Journal. Vol. 2 (1) 2018.

[8] Michael Seadle, *Copyright in the Networked World: Moral Rights*, Vol. 20(1) 124-127 HI-TECH LIBRARY. 2017.

[9] AIR 1979 Bom 7

was said by the court that the actors in a movie do not possess the performer's rights and it is the producer that enjoys the ultimate rights. But with the international recognition of the same and gradual acceptance of the same in the Indian Copyright Act changed the view of the judiciary as well which led to the wider interpretation and the addition to Section 38 and 39 of the Indian Copyright Act. *The Super Cassettes Industries v. Bathla Cassettes Industries*[10] this case and decision in it marked an important step towards the recognition of the performer's rights which in a way stated that the re-recording of any song cannot be done without the proper approval and consent of the author would amount to violation of the copyright and the related right attached to it. Original performer has all the rights to consent for any usage that is done of the copyright, and it was duly recognised in this particular case and it became a precedent to then recognise and protect the performer's rights under the Indian Copyright Act 1957 as well.

Another important case in the same line is *Neha Bhasin v. Anand Raj Anand*[11] the main issue here was of what would constitute "live-performance", it was held in this case that every performance has to be live at the first instance if it is live or if it is recorded in the studio, both have to be performed by the performer in the first instance. If the copyright created in such a manner is exploited without the prior consent of the performer than in such a case, it would be infringement of the performer's right.

Celebrity Rights: Global Perspective

In our country we do not have specific rights identified as celebrity rights, but it is an issue which requires some attention from the public at large. The celebrity life is considered as public life in lay parlance and there is widespread infringement of privacy rights attached to their copyrights. The wide misuse of photographs and morphed images is a day-to-day activity which a celebrity has to be immune with to survive the industry. Tabloids and news reports without prior permission of the celebrity is also massive infringement. The cost of being famous is paid with losing the privacy rights and complete denial of privacy in certain matters. The celebrity at home or walking out in public is always at the risk of losing some repute and information which in normal circumstances would not be used unless a proper consent is sorted. In the famous case of *Martin Luther King Jr Center for Social Change v American Heritage Products Inc*[12] in the present case the facial sculpture of the famous leader was being sold by a company without the official and prior consent of the family members. The use of such art for financial gain without permission does infringe the IP right gained in the form of personality rights being infringed. The damages in such cases are to be calculated as per the fame the celebrity enjoys. The case also identified the right of publicity which was considered as distinct from the privacy. The right of publicity identifies that the name and likeness of the celebrity cannot be used for economic purpose without consent.[13] Looking at the current Copyright Act that we have, the celebrity rights are not identified but the rights of performers are recognised which can be considered as similar to the above ones. The contributions of a few well-known intellects cannot be neglected like Kant and Hegel who have understood the concept of private ownership and property and the theory the not only the labour but the will of a person can also be instrumental in owning the property rights.[14]

This view leads us to the consideration of personality linked to the ownership of any privately owned object or the IP rights. The artist leaves a specific personality in making an art form which can be any form like a song, painting etc and thus creating that kind of extension of personality needs to be protected and even paid adequately so that these authors are motivated to

[10] 107 (2003) DLT 91
[11] 2006 (32) PTC 779 Del.
[12] 250 Ga. 135, 296 S.E.2d 697, 1982 Ga.8 Media L. Rep. 2377
[13] Tabrez Ahmed & Satya Ranjan Swain, Celebrity Rights: Protection under Copyright laws, Vol. 16 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 7-16 (2011).
[14] G.W.F. HEGEL, PHILOSOPHY OF RIGHT (Oxford Univ. Press 1952).

create more such art forms and are not de - motivated by the unauthorized usage of such work.[15]

In the case of Sonu Nigam v. Amrik Singh[16] the case arose when the pictures of famous Indian singer were used to promote an upcoming music award function without the consent. The official award pictures used were consented for but the various billboards that were placed across the city for the promotion were not consented to by the singer and thus violated the publicity rights attached to the fame of the singer. Bombay High Court recognised and identified the existence of the personality and publicity rights attached with the fame of celebrities and thus ordered removal of the hoardings.

In yet another such case *D.M. Entertainment v Baby Gift House*[17] the case arose when the defendants in the present case started selling dolls that were the miniature imitations of likeness of Daler Mehendi. In addition to resemblance of the personality of the singer the doll can also sing few lines of the famous composition of the singer. Aggrieved from the conduct, the singer had filed for a case with the help of his company, the Delhi High Court held that this was the clear infringement of the personality rights that singer Daler Mehendi has gained because of the celebrity status achieved and thus the consent and approval of the singer is pre-requisite before using the personality features for commercial activities.

In the case of *Shivaji Rao Gaikwad v. Varsha Productions*[18] the superstar of the south, Rajnikant had filed for this case in which he alleged that his personality/ dialogue delivery / persona and his intrinsic celebrity features are to be mocked and copied in a cinematography filmed named "Main hoon Rajnikant", which he objected and also stated that the story line and depiction of his name and character in the movie would be derogatory. The court here held that there is no doubt in the level of fame that the celebrity has gained and the rights attached to it and thus the facts in the present case and material evidences are easy to prove the infringement and thus the same were being stopped.

In *Rajat Sharma and Another v. Ashok Venkatramani and another*[19] in the present case the Zee Media house in promotion of their new anchor-less news channel "Zee Hindustan" has made an advertisement where they used the name of the famous news anchor "Rajat Sharma" with a few others and stating that who would want to listen to the famous shows that they telecast once this channel is on Air. This was being alleged as an infringement of the personality rights that are attached to the famous news anchors. The court relied on the earlier decisions passed on the same line and principles and identified the celebrity rights that are a part and parcel of the people who acquire the fame and the use of their name and personality traits or famous things attached to them have to be done only with the prior consent.

Conclusion and Suggestions

The Copyright, considered as bundle of rights, provides varies facets to the intellectual property. The recent trend and addition to these bundles have been the performers or the recognition of the celebrity rights. This facet is unique in its sense as it would focus on the neglected relates to the neighbouring rights which are very important and form a very important form of IP. It is the right time looking at the blatant breach of privacy, performance and celebrity rights in our country that a separate legislation or much improved form of the current laws need to be in place to protect the innovative creations and stop the misuse that is done of the rights which these performers/celebrities acquire by the skill and art that they have.

The secondary set of rights in the form of the performer and celebrity right and its protection is the need

[15] Neil Weinstock Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy:A Normative Evaluation,(Dec 1, 2020)*, https://www.mondaq.com/india/trademark/777368/celebrity-rights-is-itimportant-in-india#_ftn25

[16] MANU/MH/0517/2014.

[17] MANU/DE/2043/2010

[18] (2015) 2 MLJ 548.

[19] CS(COMM) 15/2019

of the hour and the growing litigation in this matter shows the importance and the awareness in this relation which the celebrities have gained, and the courts have also given decisions in the line to protect the same which can be seen as a positive step towards the full realisation and protection of such rights.

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