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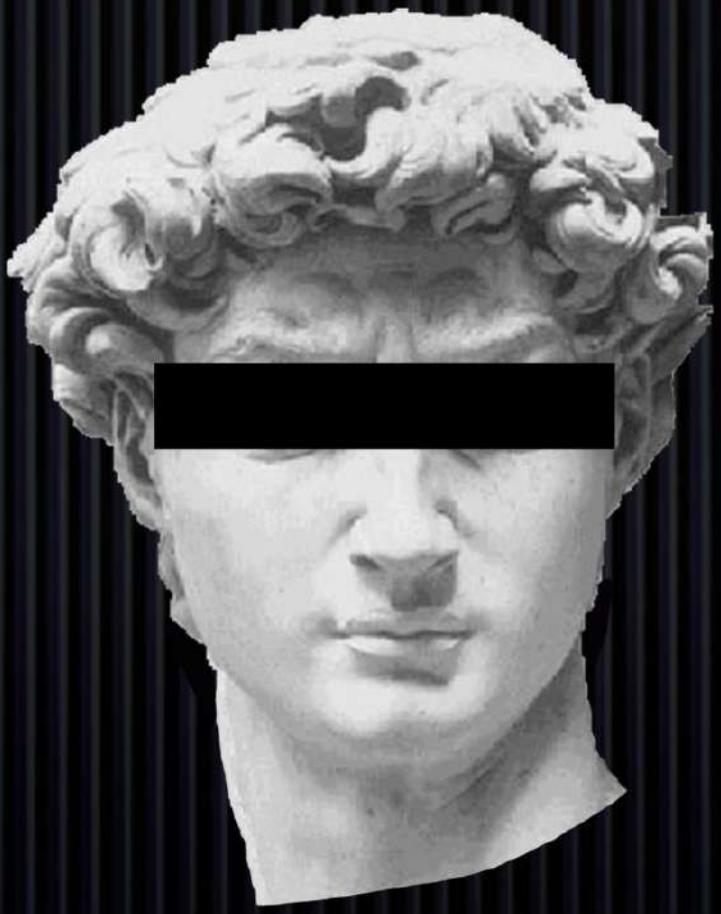

COMMON KNOWLEDGE. UNCOMMON DIALECT.

ABOUT THIS ISSUE

The **Publication Committee** presents:

A marriage of the legal tradition dating back millennia, with the digital age we live in today, highlighting the point of intersection between classic and modern, traditional and post-modern, often obscured by a fixation on the past or a longing for a future.

We proudly present, our now, **The Legal Arc.**

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Mr Gajendra Maheshwari, Data Privacy

Mr Gajendra Maheshwari is a Managing Partner at Reina Legal, based in Delhi/NCR. He is a qualified Chartered Accountant, a Certified Management Accountant, and a lawyer with an LL.M, LL.B from Jai Narain Vyas University, Jodhpur. His areas of interest are taxation laws, and data protection and privacy laws.

INTERVIEWER

What are your thoughts on the proposed data protection legislation, the Personal Data Protection Bill, 2019?

MR GAJENDRA MAHESHWARI

The single most important aspect of the data protection legislation is that it is going to make us (i.e., individuals) an 'owner' of our data. Today, willingly or unwillingly we share a lot of our personal data both online and off-line. Most of us cannot foresee how such data can be used, commercially exploited or even manipulated.

PDPB will require data collectors to notify the individual and obtain his consent for the collection and use of the data. It would also mandate the data collectors not to gather data more than what is required. Further, several obligations would be cast on the persons collecting or processing data depending on the type and magnitude of data they collect.

Thus, PDPB will be a big contributor in implementing the 'right of privacy' insofar as it relates to the personal data of individuals.

INTERVIEWER

How effective and efficient do you think it would be in comparison to foreign legislations like the California Consumer Privacy Act, or the EU's General Data Protection Regulation?

MR GAJENDRA MAHESHWARI

Let us first understand that the basic framework of PDPB and CCPA is based on EU GDPR. All these laws call for transparent privacy policies, accountability of data fiduciaries, etc. In a nutshell, the law expects very high standards in the realm of data privacy.

From the implementation standpoint, in the EU the regulator is very strict. Within a short span of the introduction of GDPR, hefty fines have been imposed on internet giants like Facebook, Google etc. for violation of the law.

The draft law in India also envisages the creation of a regulator (like TRAI for telecom, Competition Commission under Competition law, Anti Profiteering Authority under GST law etc.). The Data Privacy regulator is supposed to act as a watchdog for ensuring various compliances under the law.

The effectiveness and efficiency of the law would eventually depend on the functioning of the regulator, i.e. how strict and autonomous is the regulator in ensuring the compliances.

INTERVIEWER

How do you think law students can make themselves more useful as interns considering the switch to virtual modes of operation?

MR GAJENDRA MAHESHWARI

We all know that law internships are usually for a short span of time. However, an intern who is physically present in the office even for a shorter duration does not go unnoticed. Conversely, in virtual mode, the Partners/ Senior Counsels, etc. may not even get to know who all are doing an internship with them.

In these circumstances, it is important for students to make their presence felt even while interning through the virtual mode. There are practical ways of doing this, such as:

- Offering to hold a webinar on any new legal development, important case law etc. for the office team;
- Writing an article and getting the same published along with the senior;
- Trying to keep the seniors in the loop on the emails etc. containing material prepared/ researched; and

- Updating their social media/ LinkedIn profile with the internship status, while tagging the firm, seniors etc.

It is obvious that the interns who can stand apart will be presented with more learning opportunities which will help them get the best out of their internship.

INTERVIEWER

What was your motivation to pursue law as a profession considering your background in Chartered Accountancy and Cost and Works Accountancy?

MR GAJENDRA MAHESHWARI

The beauty of law as a profession is that it presents each individual an opportunity to excel in the area of his liking. For example, a person having IT bent of mind can choose data privacy as his field. Likewise, a person good at science can select patent law to be his area of practice. Within law practice, there are numerous areas of specialization like environment laws, labour laws, civil or criminal laws, real estate laws etc. Apart from the subject matter expertise, one can choose to become an arguing counsel or work with a firm or even take a corporate/ government job, depending on his strengths, liking, etc.

For me, after qualifying as a CA and CMA and having handled numerous tax appeals at the Tribunal level, switching to the legal profession and arguing tax matters beyond the Tribunal level was a very instinctive choice. Getting into the court practice after tax tribunals, was like entering an ocean after flowing through a river. Practising in the areas beyond taxation, enhanced my understanding of laws and the overall spectrum of knowledge.

The beauty of the legal profession is that it gives an individual unrestricted opportunity to grow, to the extent of his potential and that's the reason I love my profession.

INTERVIEWER

What are some qualities and skills that you would consider essential in an ideal potential employee?

MR GAJENDRA MAHESHWARI

The foremost quality for any employee is 'common sense'. There is no substitute for this. Then comes, 'legal sense' for those who are in the law profession. The top-up requirement for the firm like us is 'commercial sense'.

Additionally, if the candidate is 'hardworking' and 'street-smart', i.e. who can handle the client as well as the court smartly, then success is guaranteed. Needless to say, a person with good common sense would know the relevance of honesty.

INTERVIEWER

Do you think the novel GST system of taxation is profoundly different from the previous method?

MR GAJENDRA MAHESHWARI

The past regime was complicated due to the interplay of various taxes at the Centre and the State levels. As many as seventeen such indirect taxes applicable in the past regime merged into GST.

Thus, at the concept level, GST is much simpler in comparison to the past regime. However, on account of various legal and political reasons, the GST we have is still not the ideal one. Sectors such as petroleum, alcohol are still outside the ambit of GST. Plus, the requirement of obtaining multiple registrations in different states for a person having pan-India operations makes it tedious in terms of compliances.

We should also remember that GST is largely an Information Technology based taxation system. Accordingly, the effectiveness of the government's GST network, as well as IT preparedness of the taxpayers, is crucial for the success of GST.

INTERVIEWER

What is your take on the virtual court proceedings? In your opinion do the advantages outweigh the costs?

MR GAJENDRA MAHESHWARI

Well, there used to be a debate about multiple benches of the Supreme Court. Now, with internet connectivity, the apex court can be accessed by a lawyer present anywhere on this planet. Counsels are happy because they can earn more by attending hearings in multiple forums without the hassle of managing dates. Clients are happy because they can save litigation costs. Courts can now expand without much capital outlay.

The benefits would be more eminent once the courts start substituting the archaic process related to filing, serving copies etc. with the smart e-

processes. Such a change could make our justice delivery system much more efficient.

INTERVIEWER

If courts were to resume offline, would you still consider virtual proceedings as a viable option?

MR GAJENDRA MAHESHWARI

Absolutely. With the infrastructure and technology already in place, the virtual mode will run parallel with the physical one. The best part is that the leader himself has set the right example – if the apex court of the country having senior-most judges can run in the online mode then why can't the rest?

Mr Jayant Bhatt, Contemporary Law Practice

Interviewed by Ghazal Bhootra

Jayant Bhatt is an independent lawyer based in New Delhi, India. He holds a dual LL.M from New York University, USA and the National University of Singapore. He is a member of the Supreme Court Bar Association and Delhi High Court Bar Association. Besides being a practising advocate, Mr Bhatt is a prolific speaker and believes in greater societal good. He has a keen interest in mentoring young minds and is an advisory member of various organizations.

INTERVIEWER

Who or what was your inspiration or motivation in becoming a lawyer?

MR JAYANT BHATT

My failures in life, because in 11th and 12th I actually failed in science except for English and then my uncle told me to look at law as a profession as I had a good hold over my language. So he gave me the prospectus of the National Law School, Bangalore, and it really inspired me because I did not know much about law back then. My view of lawyers was very much like in Bollywood; Blackcoats, arguing before the courts, in a very filmy style. The prospectus gave me a lot of insight and that helped me to surf on the internet and search about what lawyers do and the five-year law course as it was very new in India even back then. That is what inspired me to become a lawyer in the first place.

INTERVIEWER

Considering that you are well connected with, and take great interest in the academic and holistic development of today's youth, what advice do you have for today's aspiring lawyers?

MR JAYANT BHATT

My advice is very simple: do not overburden yourself with expectations because this is a very slow profession. If you want instant success, then maybe try becoming a sensation on Instagram, Snapchat or YouTube because it has a very good scope of getting viral. For a lawyer, people value you for your legal skills and that comes with a lot of training, and that training requires a lot of man-hours which requires undergoing tutelage under law firms and different lawyers.

Young people don't understand this because when your peers are making millions of dollars either on YouTube, TikTok or Netflix, then naturally we think that we are comparatively slow. But the law has always been and will always be a go-to profession for people in trouble or people in problems, and we will always need good lawyers, so stick around.

I think five years is a long course, it should be two years or three years and not more than that. The time period can be tinkered with by the Bar Council. I know it's not related to the same question but just saying that as youth, you can appeal to the Bar Council to revise its schedule as now the New Education Policy is in line for all of India on the education front. It's a slow journey but it's worth its time. Do not rush and enjoy the walk.

INTERVIEWER

How do you manage your busy schedule, and keep your calm in stressful situations?

MR JAYANT BHATT

I look very calm but there is always a thought process running in my mind as there are multiple things that I am juggling with. There are court cases that I have to deal with almost on a daily basis via VCs, then I have clients seeking advance, then you have to manage the office, and then other commitments too. Having said this, I think I am comparatively a less busy person, and there are a lot of successful people out there. At the end of the day all of us have twenty-four hours to manage, and I keep saying that having post-its helps you clear your mind, and structuring it by making a to-do list and by putting your agendas on it then it's the easiest way to do things. For example, ten agendas that I have to finish in a day and then I keep finishing the agendas, and striking them off, and that's also why you need a good team to support you where you share a common equation of understanding and commitment, because I think that also helps a lot.

Team-building is as important as managing your time, rest of it is an interplay between the two.

INTERVIEWER

What is your take on NLSIU Bangalore's decision to conduct its own examination?

MR JAYANT BHATT

I think there was an objection to it too saying that they should not be doing this as when there is a structure of common law entrance tests except NLU Delhi, all the other National Law Schools subscribe to it. One school of thought might say that you are an autonomous university and you have a right to take a call for the betterment of the students, but once there is a consortium of National Law Schools then you have to take the interest of all the students in account. It can't be a self-serving thing; you can't think that we are the only institution producing brilliant legal minds, that's not true as there are equally good institutions that are producing great legal minds in the country, so, please don't put yourself on a pedestal.

Yes, it was a good experiment in 1988 and it has produced many good lawyers and I have the utmost respect for the National Law Schools, but having said that, for the future generations to come if you create confusion in the market then there would be other people suffering resulting in unrest. There is already a lot of unrest in the world, do not add to the chaos, especially as legal bodies because you have to think it through. I don't know much about what is going on in the legal world as I am not faculty or a decision-making body, but from an outsider's view I'm saying that let's create less chaos.

INTERVIEWER

Recently Mr Prashant Bhushan was penalised with a fine of Re. 1 for criminal contempt for his comments on Twitter. What is your opinion on the situation?

MR JAYANT BHATT

My comment was already out through my post. I agree with the Supreme court as far as the conviction was concerned because I read the judgement, all the 108 pages. It was scandalous, and as a senior lawyer you can not say that. You are a product of this institution, and so are we. You can't start tarnishing the image of the very institution which has put you on a particular pedestal. I am not saying that you have to be true to it, hold the mirror to the judges if they are wrong but have cogent evidence to support it.

Your tweets are not right and that is what the Supreme court observed too. As for the fine of rupee 1, I think that was very fair by the Supreme court. In my post I have mentioned that: as a senior member of the Bar, there has to be a good equation between both, the Bar and the Bench. They must not be harsh on people because it was just a tweet. Rupee 1 was right and as I said, he is a very respected senior member of the Bar, so it was a good way to put the heated debate that generated in the civil society to rest.

INTERVIEWER

Considering the above, how do you think social media acts as a powerful tool of expression, and how should it be used judiciously?

MR JAYANT BHATT

Social media is extremely powerful because now there is a parallel media because normally, you will be hooked to news, but today we have multiple forums to express our views. Twitter, of course, and then Facebook, LinkedIn, Instagram where you express your views, but I still find LinkedIn to be the most favourable as it does not have a word limit. I am not on Twitter because I think that how does one express their thoughts in 280 characters. A classic example is Prashant Bhushan's case, had he written on LinkedIn with a thought process and a logical flow to it, then people would have read it properly. Tweets may be misconstrued; as either you are jumbling up, or specifically targeting those characters. Your thoughts have to be cogent, they have to be seamless, and I think that is one problem with social media today. 'The Social Dilemma', a movie on Netflix, shows how all of us are being controlled. We are just hooked to our phones constantly. Earlier we just had ET, TV, or Doordarshan, but last time I checked there were so many news channels that you start doubting the credibility. Being neutral about the information is the fundamental goal of journalists, and to give people neutral news, and then let them decide. Today social media and media tend to manipulate you, so people are sitting with agendas. I am not saying that agendas are wrong, but when an agenda becomes propaganda, then it's an issue.

INTERVIEWER

Did you have an opportunity to work on both civil and criminal matters? If yes, then what helped you to recognize your passion?

MR JAYANT BHATT

As a law student, I got an opportunity to intern a lot on the criminal side, but when I started practising, especially as a first-generation lawyer, I did not have the luxury to say that I want to be a criminal lawyer. Although somehow I always got criminal matters in the beginning. I was a junior at Mr Sibbal's office and he practices both civil as well as criminal matters. There I had an opportunity to learn, and then I joined Mr Jadhav in the Supreme court for six to seven months where he handled both civil and criminal matters. I did a hardcore criminal practice in the High court and the trial court, and handled appeals on the criminal side.

When I ventured on my own, I used to tell people that I am a criminal lawyer because I had a lot of clients. Now seventy percent of the cases are criminal and the thirty percent hovers around commercial matters. I want to convey to the readers that you do everything when you are a junior lawyer for a good four-six years as it gives you a good grounding, and that also helps you understand how the law works. You do not become the master, of course, as the law is a vast ocean, but then keep reading and keep evolving. Do everything but in the end, do what you are passionate about.

INTERVIEWER

Being a successful and an inspiring first-generation lawyer, what advice do you have for aspiring first-generation lawyers?

MR JAYANT BHATT

Slog and work hard, there is no substitute for this. People have been saying this to my generation and I feel that I am bound to convey this to you. Get up, suit up, and show up. That is my mantra, and there are no two ways about it. You have to work hard day in and day out. As I said earlier, law is a slow profession in terms of the progress you make as you cannot know how to function in the court, argue, or research about any matter. All these things take time, and a lot of rigour, hard work, and focus. Sometimes you might feel dejected or disoriented, perhaps from the work environment, or the client has been nasty to you, or maybe the judge has been rude. As a young lawyer when you move out to work, you have to face all these challenges and you have to take it in your stride. These challenges make a lawyer an enabled lawyer, and teach you advocacy skills. Be prepared to work extremely hard, and that is for any profession. There is no shortcut to hard work. It requires your time and energy, so do not compromise on this.

Mr Alok Vajpeyi, Arbitration Practice

Interviewed by Rashi Goel

Mr Alok Vajpeyi is an Associate, working with the Disputes Team at Khaitan & Co., Mumbai, and a qualified Tribunal Secretary certified by Hong Kong International Arbitration Centre. He completed his B.A. LL.B (Hons.) from Institute of Law, Nirma University, Ahmedabad. His core practice areas are commercial arbitration, litigation under Indian Arbitration, and Conciliation Act, 1996, White Collar Crimes, and general commercial litigation before the National Company Law Tribunal. In the past he has acted as Remote Coach at the Moot Academy of Swiss International Law School and has adjudicated several Alternate Dispute Resolution Moots.

INTERVIEWER

What drew you to the world of arbitration and when did you start laying the foundation for a career in this field?

MR ALOK VAJPEYI

In the third year of my law school, I was allotted NLS-Trilegal International Arbitration Moot which is organized by NLS, Bangalore. Arbitration was a completely new field for me, and numerous seniors in my college told me that it is a very tough moot and arbitration in itself is very tough. We were adjudged as Semi Finalists in the moot and in hindsight, I think that moot defined me. Prior to the release of the problem; I read about International Arbitration, domestic arbitration, and Investment Treaty Arbitration, and during this process, my interest developed towards arbitration. I understood how important it is for India considering the huge backlog of cases and how important it is for any investor investing in any other country. So, conceptually, I liked arbitration.

Considering a bright future of arbitration in India, I improved my understanding of the subject and did internships involving arbitration related work.

INTERVIEWER

What do you think is the future of Arbitration and Alternate Dispute Resolution in India? Do you think there are any legislative aspects that need to be ironed out to make arbitration more feasible, accessible, and popular?

MR ALOK VAJPEYI

In India, there are numerous problems when it comes to arbitration. Indian courts have struggled a lot with regard to concepts of seat and venue in arbitration. Consequently, there are parallel legal regimes which are running. The general impression of India has been that it carries a lot of uncertainty when it comes to arbitration procedure. Lately, Indian courts are trying hard to portray India to be a pro-arbitration jurisdiction. However, considering frequent amendments to the Indian Arbitration Act, a level of uncertainty remains. So, as an investor who wants to decide whether we need to choose a particular jurisdiction as a seat of arbitration or not,

I'll prefer those countries whose arbitration procedure does not changes frequently.

Considering the huge backlog of cases, the future of ADR in India seems to be promising but there's a lot of groundwork which is required to be done, for example, in India the mindset of people is that arbitration is mostly a weekly affair or an evening affair; so it's not running parallel to litigation. There is a hierarchy, you still see litigation to be more promising. In several foreign jurisdictions, there is a dedicated arbitration bar. There are practitioners who only do arbitration, unlike India. In India also, there is a conscious effort to make an arbitration bar but it's still under process because people who are doing litigation and arbitration are the same.

We need institutions to train the arbitrators. I think the legislature as well as the judiciary is trying hard to push institutions in India. Mediation has also got a lot of push through legislation. And there's a committee appointed which is working on the mediation law in India as India has signed the Singapore Mediation Convention. So, there are a lot of efforts in that arena. We can anticipate that India might have a bright future in ADR but the stakeholders have to work diligently to achieve that goal.

INTERVIEWER

What are some skills that a successful arbitrator must have, and how are they different from that of a conventional lawyer, advocate, or judge?

MR ALOK VAJPEYI

Well, numerous tool kits and guides are available which contemplate the qualities of an arbitrator. I will just mention four or five skills that an arbitrator must have. I think the role of the arbitrator is quite similar to the role of a judge. As an arbitrator, you need to have a subject-area expertise. For all the young practitioners who want to be future arbitrators, you need to understand that arbitration in itself is a procedure. You need to develop a subject-area expertise to become an arbitrator. So, the first quality is subject-area expertise.

Knowing the arbitration procedure, what powers you have, how you can expedite the arbitration and what interim measures you can give, what kind of jurisdiction you have; I think all of these things the arbitrator needs to be aware of.

Another important quality would be strong communication skills as throughout the arbitration, no party should feel, or no lawyer should feel, that the arbitrator is biased towards a particular party. The arbitrator has to conduct himself or herself in such a way that it is apparent that he's giving equal opportunities to everyone.

Fourth point is that the person should be of integrity. In international arbitration as well as in domestic arbitration, we see numerous conflicts arising. There are IBA guidelines on conflict of interest in International Arbitration which gives guidance on such relationships which can be a ground for challenge for the arbitrator. The arbitrator should ensure adequate disclosure of any such relationship.

Fifth is the commitment towards arbitration procedure. In arbitration statute of India, certain

time-limits are prescribed for several stages and the Arbitrator should be committed to all the timelines and the deadlines which he gives to the parties as well as for himsel for giving the award.

Finally, I think the Arbitrator should have sound judgement and is a pro at critical reasoning because once he writes the award, he needs to back it up with reasoning. It has to be a reasoned order with proper analysis of all the evidence which the parties have given. These are the broad skills which an arbitrator must have.

INTERVIEWER

How has the pandemic altered the working environment in your opinion?

MR ALOK VAJPEYI

The working environment has been affected to a great extent because you don't have the network of people around you, there is no professional environment. When you are at home, you are managing everything: washing clothes, washing utensils, etc., which luckily, I am not doing now. So, to manage all those things with your work is not that easy. Earlier, I use to think that work from home would be the best thing but that's not true, because the work is going on continuously in your mind and there is no start-time and end-time, it goes on throughout. You need to be ready whenever your senior/partner says that you need to get this. So, I think there's less time for yourself because you need to divide time between your personal life and your professional life.

INTERVIEWER

How adequate do you think virtual proceedings are? According to you, what are the advantages and limitations of conducting legal procedures over virtual platforms?

MR ALOK VAJPEYI

Principally or theoretically, virtual/online dispute resolutions are effective, and it has been in discussion prior to the pandemic. However, every change requires certain time, there's a transition time for every change. Similarly, if the litigation proceedings are happening through virtual platforms, there will be certain time which will be required by the stakeholders to adjust with it.

In the Indian scenario, adoption of virtual hearing has been there, and the courts are hearing various matters through remote hearing. I personally believe that there would be some kind of virtual court which would remain active after the pandemic as well, hearing certain kinds of disputes. There are numerous advantages of virtual proceedings:

First being accessibility, people or witnesses don't have to travel, they are just a laptop away. I think accessibility has increased to a great extent.

Second is the reduction in time with regard to filing of the proceedings since physical filing of documents consumes more time. Further, it will save your physical space with respect to physical legal proceedings. In courts, a lot of files are kept and the whole court is filled with files. However, if we do it on a virtual platform, then everything is electronically stored. So, you can save one room which is filled with files if all those files can be stored electronically. I think it would lead to better

accountability because everything is uploaded virtually, so you can see who has removed what things and who has uploaded what. So, the accountability will be increased to a greater extent which is another plus point in doing virtual hearings.

Now coming to the cons or the problems, there are certain limitations to virtual proceedings. First is the technology. You need better technology which can work throughout the country giving great support to all the lawyers with not many disruptions. One doesn't want a situation where lawyers have bad network and there are technical glitches throughout. For the implementation of virtual hearings, you need a very strong network across the country wherein every lawyer cannot come up with the excuses that they don't have a good internet connection. More importantly, the government should also come up with certain free WiFi spaces. Otherwise, access to justice will be dependent on having a WiFi connection, we don't want that scenario to happen. There has to be a continuous supply of electricity and power, you cannot imagine a virtual hearing going on and then the power goes off and then everything goes off.

The courts and lawyers will require a lot of investment in the hardware and software. Moreover, there is requirement of frequent training sessions for the lawyers in terms of using the technology, that is, how to upload different soft files on the platforms given by the courts. So, training for lawyers is a must. Then, translation-related services on platforms need to be stringent because there would be some witnesses speaking in regional languages. So, you need to have some translators on the virtual platform itself. The courts should also ensure that there is no misuse of documents since all the documents are on a virtual platform, there is a chance that some hacker can just take all of the documents. So, there has to be a very stringent policy in terms of maintaining confidentiality and security of the documents. And I think these are the broad areas where the government needs to work.

INTERVIEWER

What was law school like for you? Looking back, is there something that you wish you had done differently?

MR ALOK VAJPEYI

There are a lot of things which I wish I would've done differently. I hardly interacted with people when I was in my law school. So that's definitely one thing which I would have changed: to network with more people, to know more people, to interact with more people because this profession requires a lot of networking; it's part and parcel of a lawyer's work to network with people. Your client referral comes through networking, your invitation to conduct guest lectures, etc. comes through networking.

The second thing which I believe is of immense importance is reading judgements. In law school, we hear that from all our teachers, and in fact, during our internships also. I think it's an art, it's so important that it cannot be emphasized enough. Whoever wants to do well in law should read at least a couple of judgements in a day. Your learning improves by reading judgements.

I think these are the two key things I would've worked upon. Of course, there are other small things as well, but these are the two major things.

INTERVIEWER

Do you have any memorable experiences in your experience with arbitration mooting? Could you divulge stratagems to be deployed to ensure victory in these tournaments?

MR ALOK VAJPEYI

Okay, the second part of this question is a little tough, nothing can ensure victory. Be it actual cases or be it moot court, the world is subjective; the judges sitting there in the courts, the judges sitting in arbitration moots, the arbitrator sitting, everybody has their subjective viewpoint. There is nothing which can ensure your victory.

Coming to the first part of the question, a memorable experience would be my first arbitration moot where I went till semi-finals, and the best part was that our semi-finals were conducted at the Taj, Bangalore. I was delighted to argue before Murli Neelakantan, Rishabh Gupta, and Anuradha Agnihotri. It was a great experience which I had in my mooting journey. There are few others as well, I went to Kuala Lumpur and Hong Kong to represent my college in different moots.

Coming to what should be done to perform well, as I said, it's very subjective. People have different opinions, and the sooner you accept this fact, the better it is for you. So, how I would recommend people to do well in moots would be firstly, to work on your oral skills. If you enter international moots, there is one thing which is extremely important, and that's your oral skills which is not the case with the domestic moots. In domestic moots, you need to have great subject-area knowledge because the judges will grill you a lot. So, mostly they're hot benches asking you numerous questions, and they test you on the concepts involved. Therefore, you should be well-versed with the concepts and its related issues involved, and should know the case of the opposite party. Because mostly, judges sitting in a moot court, or in actual court also, would question relating to the case of the opposite party.

Structuring your arguments and laying down a road map in front of the judges is extremely important too.

The third point, which is of immense importance, would be how you tackle the questions of the judges. So, one smart way of doing that is to use various fillers to avoid any kind of abrupt pauses. Let's say the judges ask some questions, you can say "The counsel understands the concern of the tribunal/the court". When you say that line, you get time to think. Various participants, when the question is asked, take a moment and they are silent for a good five to ten seconds. To avoid that, you can use certain fillers. Do not overdo it. But yes, using fillers is a good strategy.

The other strategy could be to structure your arguments in such a way that the question of the judge takes you to your other submission. Just imagine you're anticipating a question from the judge, and the judge asks you that question, you can say "and that precisely brings me to the second part of my argument". So, this is how the structuring has to be done for your whole issue which you are arguing. A lot of time goes into it.

The final point is wait and see if the tribunal or the court is with you. Don't follow a rigid speech because I have seen participants reading a speech without even noticing whether the tribunal or the judge is with them. Same goes for the courts as well. Wait until the bench opens that page of the

judgement, and then you proceed. These are broad areas, there are a lot of things to talk about. Mooting in itself requires a separate session altogether. But these are the broad points.

INTERVIEWER

Is there any additional advice or insight that you would like to share for students who want to enter the field of arbitration, or are contemplating arbitration as a career?

MR ALOK VAJPEYI

I would give a word of caution to all those who want to venture into the field of arbitration or ADR. If you're fascinated by seeing the success stories of people who are into arbitration, be ready to read a lot. Moreover, written advocacy is extremely important because arbitration is more about written advocacy, that needs to be worked upon.

That could be a starting point if you have interest in arbitration. I think there's no one who can tell you that this is the right way, because it depends on what's the best scenario at that particular point of time; let's say you are in your fifth year, how is the market, which kind of matters are increasing, accordingly you have to strategize. Also, working on subject-area expertise is important. Seeing that construction law matters are coming up, you need to build a knowledge of construction law. Similarly, maritime law, sports law, so on and so forth.


ARTICLES

IN THIS SECTION

ADMISSIBILITY OF PRIVILEGED COMMUNICATION: AN OVERVIEW

*By Tithi Neogi**

INTRODUCTION

Chief Justice Warren Burger once said, "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."

It is often said that one must never lie to one's doctor and lawyer. However, for such candour to exist in a legally recognised relationship such as that of a lawyer and his client, there must be complete privacy in which the client can feel mentally secure to open up completely before his lawyer or any such service provider. No individual can speak of his problems in the fear that his communication with the other person may subsequently be revealed before a court. In any criminal case, any communication relevant to the fact in issue might qualify as evidence to be produced before the court. However, when two people enter into a legally recognised relationship, the communication that takes place between them is protected, i.e. they cannot be forced to divulge the details of such communication before the court. Such communication is called privileged communication.

MEANING OF PRIVILEGED COMMUNICATION

William Theobald defines privileged communication as "a communication either in words or writing, made on such an occasion as takes it out of the ordinary law relating to slander or libel, and exempts the party making it from an action, unless malice instigated the communication."

Justice Bayley had the following observation regarding privileged communication- "Under certain circumstances, words which would otherwise be actionable, are prima facie excusable by the occasion; these, however, are excepted cases." Further, in ***Wright v. Woodgate***, Baron Parke defined it as a communication "made on such an occasion as rebuts the inference prima facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact; that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made."

In ***Wolfle v. United States***, it was held that in order to qualify as privileged communication, the utterance must neither be overheard by a third party, nor the communication must get into the hands of a third party.

A simple understanding of the phrase 'privileged communication' may be had from the Legal Guide on Privileged Communications issued by the State of Connecticut Judicial Branch, which defines privilege as "a legal rule that protects communications within certain relationships from compelled disclosure in a court proceeding."

In India, Sections 126-129 of the Indian Evidence Act deal with privileged communication connected to the relationship between an attorney and her/his client. Further, the Bar Council of India Rules also stipulate that an advocate shall not breach Section 126 of the Indian Evidence Act, for breach entails punishment.

CATEGORIES OF PRIVILEGED COMMUNICATION

Communications between an attorney and a client are privileged and not required to be disclosed before a court. Husbands and wives also enjoy the right to privileged communication in the sense that they are not needed to testify against each other. Physicians and their patients in several jurisdictions enjoy protection under privileged communication, as doctors and their patients are entwined in a fiduciary relationship, i.e. a relationship based on trust. The ground for such relationship would be broken if a doctor is forced to reveal the communication between him and his patient. Yet, in certain circumstances, doctors may be required to disclose certain information, if it is determined that the right of the defendant to receive a fair trial outweighs the patient's right to confidentiality. Some jurisdictions allow members of the clergy the 'priest-penitent privilege'- granting them limited rights to refuse to testify on matters communicated to them in confidence. Some jurisdictions accord reporters a limited right of privileged communication over the source of their information, but they can be ordered to divulge such source, if the circumstances require so. The same happened in ***Branzburg v. Hayes***, in which the U.S. Supreme Court rejected a news reporter's claim of confidentiality.

WAIVER OF PRIVILEGE

Sections 126 to 129 of the Indian Evidence Act provide for the protection of the client. Hence, protection accorded under privileged communication can be waived away only by the client. Section 126 of the Act requires the express consent of the client for the waiver of privilege. Moreover, under Section 128, mere summoning of attorney by his client as witness before the court does not amount to waiver of privilege; however, if during examination, the attorney is asked specific questions the answers to which would require the disclosure of privileged attorney-client communication, then the client will be implied to have waived away his protection under privileged communication. Merely testifying before the court that one consulted an attorney or went to see a doctor does not amount to waiver of privilege if no details as to specific communication were disclosed.

Exceptions to the attorney-client privilege under Section 126 include communication made in furtherance of any illegal purpose, and any fact observed by an attorney in the course of his or her employment that shows a crime or fraud has been committed since the start of his or her employment.

The scope of a waiver extends to related communications on the same subject if two communications should for reasons of fairness be considered together, in a situation where a part of a privileged communication is intentionally disclosed in a court proceeding.

Further, if a privilege-holder fails to assert the privilege despite being present in court, or fails to object to a discovery request, it amounts to a waiver. Thus, a client who does not object to disclosure gives his implied consent to disclosure.

In order for privilege to be waived, the disclosure must reveal a significant portion of the privileged communication. Thus, a client discussing with outsiders the same facts that she discussed with her lawyer would not have waived her privilege.

CONFIDENTIALITY AND PRIVILEGED COMMUNICATION

It was held in ***Hill v. Hill*** that "communications made to an attorney for the purpose of being conveyed by him to others are stripped of the idea of a confidential disclosure and therefore, are not privileged." Thus, courts will hold privileged communication to be waived if there is no confidentiality. Where there is no confidentiality, there can be no privilege even if there is a privilege statute. In support of this statement, Wigmore, a stalwart of Evidence law, quoted Lord Eldon- "the moment confidence ceases, privilege ceases. This much is universally conceded."

Confidentiality refers to the ethical duty of the professional not to disclose information learnt from the client to any other person or organization without the consent of the client or under proper legal compulsion. Moreover, "the duty to keep matters confidential is governed by ethics. The right to refuse to disclose them is governed by law." In Indian law, Article 21 of the Constitution of India guarantees the right to life and personal liberty, of which right to privacy is a part. The right to privacy is safeguarded by the protective shield of privileged communication over any confidential communication. In the case of ***Vishal Kaushik v. Family Court***, it was held that if the conversation between two spouses is recorded by one of the spouses without the knowledge of the other spouse, then such evidence will not be admissible before a court, and will amount to breach of privacy.

Thus, confidentiality is an ethical duty of a professional, upon the violation of which there is a sanction by law (disciplinary action). Legal privilege (that of privileged communication) on the other hand, is governed by an evidentiary rule protecting confidential communications from disclosure during litigation or other proceedings. Legal privilege is held by the client, and it can be waived by the client. Confidentiality cannot be waived away, without some form of disciplinary action, for doing so violates the law.

ROLE OF PRIVILEGED COMMUNICATION IN LITIGATION

Litigation privilege applies in a situation where a prospect of litigation or arbitration is contemplated. The chance of entering into litigation does not have to be more than 50 percent. Even when litigation is set to be contemplated, the dominant purpose for the communication must be for use in litigation. Even if litigation is in near sight at the time of creation of that document, litigation privilege will not be available unless the document was created for the dominant purpose of that litigation. In ***Waugh v. British Railways Board***, the court stated that, "The report was prepared for a dual purpose: for what may be called railway operation and safety purposes and for the purpose of obtaining legal advice in anticipation of litigation, the first being more immediate than the second, but both being described as of equal rank or weight." Thus, the court concluded that the litigation purpose would have to be the dominant purpose, and hence, privilege was not available.

In several cases, it was found that the separate purposes of a document were part of a single, all-encompassing purpose related to litigation. This was particularly seen in ***Re Highgrade Traders Limited***- "What then is the purpose of the reports? The learned judge found a duality of purpose because, he said, the Insurers wanted not only to obtain the advice of their solicitors, but also wanted to ascertain the cause of the fire. Now, for my part, I find these two quite inseparable."

In ***Sotheby's Mark Weiss Limited***, the High Court rejected the claim of privileged communication on the ground that the communication had dual purpose- to take a commercial decision as to whether to rescind the sale of the painting, and the litigation that may follow the decision. More importantly, the claimant had failed to establish that the litigation purpose was the dominant purpose.

In ***WH Holding Limited v. E20 Stadium LLP***, the Court of Appeal held that to qualify as litigation privilege, the communication should be prepared for the dominant purpose of acquiring advice or evidence in connection with the conduct of litigation. It is not sufficient to claim that it is for the dominant purpose of conducting litigation in the broader sense.

Normally, when a solicitor arranges a meeting with a potential witness to take a proof of evidence, the conversation or any record of conversation therein shall be protected as privileged communication as they had taken place for the dominant purpose of being produced in litigation, irrespective of the witness's motive for agreeing to meet the solicitor. However, in ***Property Alliance Group v. The Royal Bank of Scotland PLC***, the court rejected the claim of privileged communication, because the witnesses were deceived into believing that the meeting was for discussing business matters. The court held that the meeting was not for dominant purpose of litigation.

FLAWS IN THE INDIAN EVIDENCE LAW RELATED TO PRIVILEGED COMMUNICATION

Section 126 of the Indian Evidence Act is restrictive when it comes to defining a legal professional advisor. In India, privileged communication applies only to litigation practitioners and not to in-house counsels. The phrase 'legal professional advisor' also does not include a patent agent. Hence, there is no statutory protection for the communication between in-house counsels and their employers, which is a matter of grave concern. Further Section 129 restricts the privilege to clients only, and the legal professional advisor does not enjoy such privilege. Thus if the client expressly or impliedly consents to disclose such information or if he fails to object to such disclosure, it might result in a loss for his attorney.

The Bar Council of India Rules provide for enrollment of lawyers as advocates. Under the rules, once a lawyer joins a company full time as an in-house counsel, he is under an obligation to surrender his registration as an advocate. In case he surrenders his registration, he will be treated as a regular employee and his communication with the company will not attract legal privilege. However, in the event he does not surrender his registration and engages in communication with his company, whether or not such communication will attract legal privilege is not clear in the eyes of the law.

Several High Courts have opined that legal privilege be extended to the legal communications between in-house counsels and their employers, but must not be extended to administrative or executive communication. Again, it becomes difficult to establish the right to legal privilege, in case the communication has dual purpose. In ***Satish Kumar Sharma v. Bar Council of Himachal Pradesh***, the Supreme Court held that "If a full-time employee is not pleading on behalf of his employer, or if terms of employment are such that he does not have to act or plead but is required to do other kinds of functions, then he ceases to be an advocate. The latter is then a mere

employee of the government or the body corporate." Communications between a company and other professional can be thus forced to be disclosed before any competent authority as no privileged communication is enjoyed by such other professionals.

In India, due to the investigations involved in determining which communication attracts legal privilege is highly subjective, there is no standard procedure or mechanism provided by statute for conducting such investigations. Further, where the situation is not crystal clear, like for instance where there is dual purpose of a communication or the attorney-client relationship is complicated/unclear, there is no mechanism for judicial interpretation that would give a clear solution. Hence, often clients prefer to hire external legal advisors and forensic experts for even internal investigation, so as to come under the protective shield of privileged communication. In the past there have been recommendations issued in several Law Commission Reports, but they have yet not been enforced by way of statutory amendment.

CONCLUSION

In a country such as India where the judicial system is still heavily dependent on litigation, and transactional methods and mediation are being looked at as a way of lessening the burden of our courts, having a restriction upon who can enjoy legal privilege does not help us in any way. There are several instances, as highlighted in the paper, where the position as to applicability of legal privilege is not clear. Further, the recommendations of the Law Commission Reports regarding extension of the legal privilege have not been enforced and hence remain in a grey area. Hence, it is important that these lacuna are resolved and the privilege is extended to in-house counsels as well as patent agents.

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ENABLING THIRD PARTIES TO ENFORCE ARBITRATION: SETTING UP INDIA'S TRYST WITH VARIOUS LEGAL THEORIES

*By Rupal Jaiswal**

THIRD-PARTY CONUNDRUM IN ARBITRATION: AN INTRODUCTION

Under the general law of contracts, a doctrine called 'privity of contract' prevents a third party from enforcing any obligations or acquiring any rights under a contract. Gradually, common law carved out exceptions to this doctrine. For instance, a non-signatory who was an intended beneficiary of the contract or an agent of the signatory was allowed to enforce the contract.

Although an agreement to arbitrate forms part of a contract, these exceptions were not directly applicable to enable a third party to compel/ be compelled to arbitrate [**this is called 'the third-party issue' in arbitration**]. The rationale was that arbitration is a consent-based dispute settlement mechanism; it bars court's jurisdiction and a party cannot be denied the right to approach national courts without express intention.

In the 21st century, when each jurisdiction wants to portray itself as pro-arbitration, the above-mentioned exceptions get imported to the sphere of arbitration. Enforcing arbitration agreements against a third party is now possible by piercing the corporate veil, equitable estoppel, Group of Companies Doctrine etc. The reciprocal aspect of this problem – whether a third party can enforce arbitration against a signatory to the agreement – has not garnered much attention.

In this article, the author contends that a non-signatory, just like a signatory, can compel arbitration by application of certain legal theories. Further, the author analyses the status of the third-party issue in India to suggest its resolution by incorporation of these legal theories in Indian jurisprudence.

LEGAL THEORIES AS ENABLERS OF THIRD-PARTY ARBITRATION

Legal responses to the third-party issue can be classified into:

(a) use of legal theories that allow arbitration by/against a third party ***based on express/implied consent of signatory/ non-signatory***; consent is inferred after examining intention of the parties for instance, in equitable estoppel, Group of Companies doctrine etc.

(b) in the second approach, regardless of the parties' intention, ***consent is 'deemed' by operation of law or judicial practice*** e.g. by piercing of corporate veil, succession etc.

Adhering to the scope of the article, what follows is an analysis of three such legal theories which can enable a third party to compel arbitration:

1. Third party beneficiary theory

Traditionally, this theory evolved from contract law to allow third parties who benefit from the performance of a contract to sue for breach of the same. For application of this theory, it is necessary to prove the intent of the

signatories to benefit the third party, either by express language in the contract or by the post-contractual behaviour of the parties. An arbitral clause is just another provision in a contract and if a third party is an intended beneficiary under a contract, there is no reason why such dispute resolution clause cannot work to its benefit. In reference to this, the Swiss Supreme Court allowed third parties to enforce arbitration proceedings when it is so intricately connected with a contract's subject matter or involved in its execution that the intention of the signatories appears to afford the benefit of arbitration clause to such third party. In India, the use of this theory is limited to extension of rights/obligations under a contract; there is no judicial precedent utilizing this theory to confer benefits of an arbitration agreement on third parties.

2. **Equitable Estoppel**

This theory propounds that if a non-party derives benefits from a contract, it cannot escape the obligations imposed under it. Acceptance of contractual benefits by a non-signatory amounts to an implied consent to the obligations under the contract including the agreement to arbitrate. Similarly, if a signatory to the contract (containing an arbitration clause) chooses to enforce contractual claims against a non-signatory, the non-signatory can enforce the arbitration clause on the grounds that the claims of the signatory are deeply embedded in the contract. If the signatory can enforce rights under the contract, they are estopped from skipping the obligation to arbitrate under the contract; holding otherwise would amount to judicial support for cherry-picking. This doctrine has been religiously applied in the United States to allow third-party arbitration under two scenarios:

a) the signatory's claims indispensably rely on the terms of a contract containing the arbitral clause; or

b) the signatory alleges "substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories."

Unfortunately, Indian courts have not yet come across an argument based on this theory and hence, it has not been formally recognized in India.

3. **Group of Companies Doctrine**

The Indian Supreme Court in *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors.* **[hereinafter "Chloro"]** held that an arbitral clause can be extended to include all companies within a group of affiliated companies if a mutual intention to bind both signatory and non-signatory companies can be shown.

Notably, this doctrine has been frequently used to bind non-signatories to arbitration. However, its application to enable non-signatories to enforce arbitration agreements has been nil. Arbitration experts like Gary B. Born have opined that this doctrine is linked to the principle of 'implied consent' and helps in determining whether a non-signatory was intended party to an arbitration agreement, notwithstanding the absence of a formal signature. If, in a particular case, application of this doctrine leads to the conclusion that non-signatory was intended party to the arbitration agreement, it must necessarily follow that all the rights and obligations attached to the agreement are conferred on the non-signatory. Thus, when signatories can enforce obligation to arbitrate

against the non-signatory by virtue of the Group of Companies doctrine, it would not be a legal infirmity to argue that a non-signatory can compel arbitration against the signatory relying on this doctrine.

IS INDIAN JURISPRUDENCE RIPE FOR THE INCORPORATION OF THESE THEORIES IN BOTH DOMESTIC AND INTERNATIONAL ARBITRATION?

Under the Indian Arbitration and Conciliation Act 1996 [hereinafter "the Act"], Section 45 (concerning international commercial arbitration) mandates that wherever an arbitration agreement exists between the parties, the Courts shall refer them to arbitration on the request of a party or 'any person claiming through or under him'. In the ***Chloro*** case, the Supreme Court held that a non-signatory third party may be 'a person claiming through or under' a signatory, provided there exists a well-defined legal relationship between the non-signatory and the signatory through or under whom they are claiming to be. According to the Court, this legal relationship may be based on theories of implied consent or force of law. By virtue of this statement of the Court, all the above-mentioned theories may be used to resolve the third-party issue in India, at least in international commercial arbitration. Although as an *obiter dictum*, the Court further stated that arbitration is possible between a signatory and a third party, even in cases where the claim to arbitration is by a third party. In practice, only the Group of Companies doctrine has been used by the Court, and its usage is limited to enforcement of arbitration against third parties, not by third parties.

However, this case only determined the scope of 'party' under Section 45 of the Act. Section 8 of the Act concerning domestic arbitration was distinguished by the Court from Section 45 as Section 8 did not expressly use the terms 'a party claiming through or under' a signatory until its amendment in 2015. After the amendment of Section 8, the Court in *Ameet Lalchand v. Shah and Ors. v. Rishabh Enterprises and Ors.* allowed some non-signatories to compel domestic arbitration against a signatory (Rishabh Enterprises) because the disputes of Rishabh Enterprises with non-signatories and that with another signatory could not be decoupled. No legal theory was relied upon to reach this outcome. This prompts the question whether amended Section 8 can be interpreted as widely as Section 45 to include the mentioned legal theories when the disputes are not interlinked in this manner.

There are instances of High Courts applying the ***Chloro*** pronouncement to expand the scope of Section 8. On May 21, 2020, the Delhi High Court, in ***Magic Eye Developers Pvt. Ltd. v. Green Edge Infra Pvt. Ltd. & Ors.***, relied on the Group of Companies doctrine as in the ***Chloro*** case to refer two signatories along with the director of the defendant signatory to arbitration under Section 8. The objection of the plaintiff that the director was a non-signatory was rejected by the Court. Earlier in 2019, **the Karnataka HC** held that a third party (in this case, a subcontractor who is not named in the contract) can rightfully compel domestic arbitration against a signatory. These two cases bring some clarity on the standing of third parties under domestic arbitration, however, in the absence of a clear pronouncement by the Supreme Court, uncertainty persists.

It is noteworthy that the above-mentioned theories originate from common law. Therefore, Indian courts could recognize these principles in the spirit of justice and equity, without waiting for the legislature to provide a basis

for them by statutory amendment. This approach could have prevented the narrow interpretation of Section 8 vis-à-vis Section 45.

CONCLUSION

There is enough international judicial practice to suggest that third parties can not only be forced to arbitrate but can also compel arbitration against signatories to a contract. Third parties may rely on implied consent of the signatories to compel them to arbitrate, e.g. by application of theories like third party beneficiary, equitable estoppel and Group of Companies. In line with several pro-arbitration jurisdictions, India has now tacitly imported these theories in its legal system. While there are definite obiter dicta of the Indian judiciary in support of third-party enforcement of international commercial arbitration, its applicability to domestic arbitration under Section 8 is still uncertain.

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CENSORSHIP AND ONLINE DIGITAL PLATFORMS

*By Maarij Ahmad**

ABSTRACT

Censorship is the act of subduing variety of content to a form which is very comprehensive and acceptable by eliminating the parts or acts whose acceptance is debatable or which could cause distress. It is necessary to have censorship in media and movies, but to what extent? Freedom of Speech and Expression have reasonable restrictions imposed on them, but the need of these restrictions is much criticized as it limits the creativity an artist displays.

Online content, which is not under any regulatory body and free of these restrictions, still opts for self-censorship, because of the fear of acceptance by the public in India, which is very much attached to their culture. But the OTT platforms can still offer content which is censored if present in a movie, which must usually be restricted by the CBFC offline, which is indirectly under government control.

The online digital platforms give artists a stage for creativity with little to no boundaries, where they can give or provide the audience with shows, movies, plays etc., which are generally opposed by the right wing, indicating the indirect involvement of the government over censorship of movies. The platforms, to earn profits, also benefit from these controversies created against their content, which helps them gain popularity because of the controversies creating a lot of media reach.

LITERATURE REVIEW

1. Bruce Michael Boyd, 'Film Censorship In India: A "Reasonable Restriction" On Freedom Of Speech And Expression' [1]

Under Article 19, the citizens of India are given the freedom of speech and expression, not completely, but with certain restrictions. One of these is the censorship of movies by the Central Board of Film Certification, described as reasonable restrictions, but debatably. Censorship of films raises a question on democracy, modernization, privacy, and the expression of legitimate artistic expression in society. To what extent should the government dictate the artistic taste of private citizens is the main issue tackled by censorship which is done by a statutory authority under Ministry of Information and Broadcasting, Government of India.

2. Someshwar Bhowmik, 'Politics of Film Censorship: Limits of Tolerance' [2]

[1] Bruce Michael Boyd, *Film Censorship In India: A "Reasonable Restriction" On Freedom Of Speech And Expression*, 14(4) Journal of Indian Law Institute 501.

[2] Someshwar Bhownik, *Politics of Film Censorship: Limits of Tolerance*, 37(34) Economic and Political Weekly 3574.

The drama around the resignation of the chairman of the Central Board of Film Certification has served towards focusing on the issues of film certification/censorship in India and the extent of the limit of tolerance and sensitivity associated with the current censorship standards put forth by the censorship board. Not only did the issue make this a topic of interest, but also overshadowed the subject of politically motivated film censorship, cases of which are becoming much too frequent.

3. Vinay Keshari, 'Censorship in the age of Netflix'

India's censorship started in 1952 through the Cinematographic Act for the movies to obtain certificates before public exhibition. It does not apply to the online movie streaming services, viz. Netflix, Amazon Prime, Hotstar etc. However, these streaming services voluntarily upload only censored versions of content with the certificate, though there are some series which are opposed by many for some scenes which according to the (opposers) is against the local culture.

4. Meghna Mandavia, 'Netflix, Amazon explore voluntary censorship'

OTT platforms, which are uniquely unregulated, adopting voluntary censorship is expected to receive backlash from artistes, activists, and audiences. But the extreme intolerance has made the companies more worried about causing distress to religious organizations or representatives, by hurting their sentiments, criticizing Indian culture, demeaning women, defaming personalities, and obscenity. These could possibly lead to court battles, trolling or making fun on social media, and violence.

5. Suneet Katarki et al., 'Censorship: The Current Regulatory Framework And The Future Of Digital Content'

It will not be right to conclude that OTT platforms are unregulated or free from any form of censorship solely on the grounds that there is no regulating body specially setting out the manner of censorship or certification of online content, or any guidelines or do's and don'ts for online content creators. With reference to the IT Act, the purpose of which is to make sure that sexually explicit and obscene scenes or content are not published online, its extension and applicability to OTT media platforms is also, or can be considered by many, as a form of censorship.

INTRODUCTION

Censorship is the subduing of speech, public statement, or other information, due to such things in common aspect being considered objectionable, damaging, sensitive, or inconvenient. It is practiced by governments, private institutions, and corporations.

Governments or private organisations may engage in censorship; while other groups and/or institutions may propose and petition for censorship. When an individual such as an author or content creator engages in censorship of their own work, it is known as self-censorship. It can be done in various media including books, films, speech, other arts, and the internet over various reasons namely, national security, obscenity, child pornography, hate speeches, protection of children or other vulnerable groups, restriction of religious or political views, and also prevention of slander and libel.

For censoring movies in India, a statutory body named Censor Board of Film Certification (CBFC) has the authority to censor movies by cutting inappropriate scenes, by the power vested in it by the Ministry of Information and Broadcasting, which is an agency falling under the jurisdiction of Republic of India. Its duty is "to regulate the public showing of films under the provisions of Cinematographic Act, 1952."

The Indian Cinematographic Act was passed and came into effect in 1920, though the first movie was released in 1913. Censor Boards were placed under police chiefs in major cities. After independence, the regional autonomy of censors in regional areas was abolished and they were taken under the Bombay Board of Film Censors.

The fundamental principles of CBFC are that the film must be:

- judged thoroughly from the point of view of its overall impact;
- examined in the manner of period depicted in the films and the contemporary standards of the country and the people to which the film is relating, provided that the film is not affecting the morality of the audience;
- not provocative, vulgar, offensive, or violates any of the "guidelines for the certification".

CBFC certifies films under four categories, namely:

1. U (unrestricted public exhibition) – These films contains universal themes that are family friendly like education, sci-fi, comedy, family, drama, romance, action etc.
2. U/A (children below the age of 12 years requires parental guidance) – These films can contain moderate to strong violence, moderate erotic scenes, frightening scenes, muted abuse or foul language.
3. A (restricted to adults) – These films may contain brutally strong violence acts, sex acts without showing of full frontal and rear nudity, strong abusive language, and sometimes even controversial and adult themes considered not suitable for all viewers.
4. S (restricted to special class of persons) – Films are not to be watched in public, but by those only who are associated with the field or have permission to watch.

5. Refusal to Certify – Another certification or no certification is when the board disallows to certify a particular film at all.

GUIDELINES FOR CERTIFICATON

- Activities which are not social and are causing distress such as violence may not be shown or accepted
- The way an act or crime was done by criminals, and words or visuals likely to incite the commission of act
- Materials including child abuse, abuse against handicapped people, and or unnecessary killing or causing harm to animals
- Scenes justifying consumption of alcohol
- Scenes justifying, glamorizing consumption of drugs
- Scenes encouraging or promoting consumption of tobacco
- Human sentiment getting hurt by obscenity, nudity, etc.
- Scenes showing cruelty against women or degrading women
- Scenes showing violence like rape, torture, etc.
- Scenes showing sexual perversions shall be avoided to minimum
- Visuals or words contemporary to any race which is offending, i.e. racism
- Sovereignty or integrity of India should not be questioned
- Security of state must not be put in danger
- Public order must not be endangered

There are many more guidelines which should be honoured and not jeopardized by the depiction of any such movie or scenes in a particular movie.

CENSORSHIP IN OTT PLATFORMS

The video streaming services play it safe by self-censorship, which is what most sensible companies do. The Cinematographic Act is not applicable to the online streaming services, implying that there is no need for a movie to get a certificate from CBFC if it is released on any streaming service like Amazon Prime, Netflix,

Hotstar etc[3]. Though in practice, the platforms voluntarily upload the censored copy of the film, pre-rolling with the censorship certificate provided by the CBFC. Original shows of theirs are often self-censored, with Netflix also being affected by this phenomenon.

With the rising popularity of these streaming services and demand for online content compared to televised content and movies, the Ministry of Information and Broadcasting (MIB) set up a committee to look into online censorship by providing a regulatory framework for the online content provide by the OTTs, that includes online media, news portals and infotainment sites.

Further, there have also been talks to bring online content within the scope or control of the Indecent Representation of Women Act 1986, which stops indecent representation of women in books, paintings, writings and advertisements.

Since, certain OTT content providers have adopted self-censorship by way of voluntary code of online content in matters relating to language, sex, religion and violence. They have also begun practicing display of censorship certificates before a movie, providing disclaimers in scenes where there is consumption of alcohol or tobacco, and giving details for the discretion of user on the basis of age and nature of the content.

The need for this voluntary censorship exists because of various factors such as suiting regional and local cultures of India, avoiding legal problems arising from offensive content, and also pre-empting any kind of regulations which can curb the creative aspect enjoyed by the online content creators.

The OTT platforms not having any regulatory body helps them offer a variety of content, some of which is against the guidelines of CBFC, like nudity, constant use of abusive language, drug abuse, drinking, and smoking all displayed in 'Sacred Games', which received a lot of criticism because of these acts but still was a great success, often regarded as one of the best web series of the nation. The show went on to have a sequel, the next season showing some other scenes which were not acceptable to a particular audience.

Another Netflix original named 'Ghoul' was a little under the hood, but was criticised because of the plot it carried and critiquing the current socio-political state of the nation. It also displayed the reality which now people are facing with respect to Islamophobia.

Another Netflix original series which caused huge controversies in the media was 'Leila', a series set in a dystopia in the near future, which shows the lynching of a Muslim man, life of single women, caste differences, religious differences, and a hint at the future and what it may hold for us. Often it is considered as a show demeaning the ruling party as it shows the leader of Aryavarta having an authoritarian style of leadership, similar in many aspects to the current leadership in India. The show received a lot of hate before its release, just through its trailer, getting hate comments and being dubbed 'Hindu-Phobic'. It created a lot of controversy after its release when demands for shutting down of Netflix were made on the basis of it opposing the right wing in

[3] RTI application dated October 25, 2016, received online vide registration number MOIAB/R/2016/50541 and MIB's response dated December 2, 2016.

'Ghoul' and 'Leila'. The act of hiding books of literary accomplishment and poems etc., shows how the current generation is missing out on the real works of art, rather enjoying useless media coverage. This negligence may be one of the causes of us leaning towards the nation as depicted in the series, deprived of our fundamental rights.

CONCLUSION

Generally online content, as it stands today, is free of regulations with the creators enjoying their creativity to the fullest. However, it isn't right to conclude that OTT platforms are completely unregulated or free from censorship, solely on the fact that it does not have any regulatory framework specifically designed for setting up censorship and certification like CBFC. In terms of the IT Act, to ensure that sexually explicit or obscene scenes are not published online, these provisions when extended to OTT platforms, can be argued to be a form of censorship.

It may be a challenge to OTT platforms and content creators to segment the audience regarding the explicit scenes, given their varied audience, and the subject of morality. It also raises the question of treatment of films that are censored and shown in halls. Certification and censorship on the display of such films on these platforms, i.e. self-regulating is to be done by these creators to avoid the legal issues or public distress.

There is a mixed trend in India relating to censorship of online content and films by the stakeholders and the general public, where one side argues for freedom of speech and expression, and one side petitions for censorship of online content and removal of content that violates sentiments, or sensibility of others.

The idea of censorship is in good spirit, but because of it the creativity of the creative minds which flow without restriction should not be hampered or subdued by regulatory bodies. Also, the involvement of the government in these commissions makes it very biased, like the CBFC being dominated by right-wing ideology. The OTT platform being free from regulations is one of the great reasons for it to flourish in society as people can have original things to watch and not some censored watered-down versions. They can also view serious things which the society is very hesitant to talk about. OTT platforms are well off without any regulating body and enjoying the option of self-regulation.

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INTERROGATIONS AND CUSTODIAL TORTURES: WHY INDIA NEEDS TO RE-ANALYSE ITS LACUNAE OF ANTI-TORTURE LAWS?

By Mohd Rameez Raza and Ujjwal Singh***

"Nothing inflicts a deeper wound on our Constitutional Culture than a State official running berserk regardless of Human Rights."

- Justice Krishna Iyer

INTRODUCTION: CUSTODIAL TORTURES IN INDIA

For a long time, India has been notorious for custodial tortures and such violation of human rights have recently been on the rise. Despite the entire world speaking up against police brutality, India's police department stands tainted due to recent events of custodial death. These events have stirred a nationwide debate on the diabolical recurrence of police brutality. As the protectors become the destroyers[4], the lives and liberties of the common citizens remain under a constant state of peril. This article seeks to find the root cause of the growing menace of custodial deaths and analyses the lacunae in the Indian legal system through an international comparative study.

INTERNATIONAL LAWS AND PRINCIPLES: GUARDING AGAINST TORTURE

It is erroneously believed that using torture and abuse in interrogations is an effective way to elicit accurate information from the victim. However, the case is not so and sometimes the move can backfire as the application of psychological, emotional, or physical pressure can force the victim to say anything simply to end the painful experience. This defeats the aim of the interrogation since the object of the process of interrogation is not 'to make people talk' but to obtain credible information. Additionally, torture is an inhumane process as it directly infringes the right to life with human dignity.

In order to tackle this situation, legislatures across the world have tried to develop a comprehensive set of laws to prevent torture during interrogations. One of the results of such deliberations is the Miranda Warning. This warning consists of notifications customarily given by the police to suspects in police custody or custodial interrogations, including making them aware of their right to remain silent. By making statements made under such force inadmissible, not only do these warnings prevent the police from using force but they also make the interrogatee aware of the rights available to him. These warnings have helped create a framework around which nations around the world have formulated their laws. One of the best examples of this is the Section 10 of Canadian Charter of Rights and Freedoms, 1982 which requires the arrested individuals to be informed of the reasons for their arrest and grants them the right to procure counsel immediately.

Torture and abusive interrogation techniques are illegal under international law. The major conventions in this regard are the Convention against Torture, the Geneva Convention, and the International Covenant on Civil and Political Rights, all of which bar torture and abuse of prisoners by authorities. India, however, has no framework for any such law. Despite having ratified and acceded to the Geneva Convention and the ICCPR, India has failed to comply with the requisites mentioned therein.

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[4] Raghbir Singh v. State of Haryana, 3 SCC 70 (1980).

INDIAN LEGISLATION: EXISTING LAWS AND LACUNAE

India does not have a distinct piece of legislation which deals with the issue of torture by a police officer and this lack of legislation is justified on grounds that the Constitution and the criminal laws of the county are adequate to deal with the issue. The Supreme Court, through its various judgements[5], has continuously reiterated that the Right to Life guaranteed under Article 21 of the Constitution includes within its ambit an individual's Right Against Torture. Therefore, being a fundamental right, Article 21 provides blanket protection against every arbitrary act of state against an individual and becomes relevant at the time of arrest and remains so in effect so long as one is subjected to criminal prosecution.[6]

When it comes to 'protection' against torture, Article 20(3) gives protection against self-incrimination. This indirectly lays a bar against torture, as the primary reason for subjecting an

accused to torture is to extract a confession. However, this bar is not absolute in nature as the facts arising out of such a confession may be used to corroborate the evidence used against the accused.[7] Section 27 of The Indian Evidence Act, 1872 also states that any facts discovered as a result of a confession or statement may be used against the accused, thereby allowing torture to continue unchecked in India. Article 22(2) of the Constitution also seeks to prevent torturous activities by providing for a bar of 24 hours on detention of an individual on the basis of judicial discretion. Nobody can be detained beyond the period of 24 hours without the orders of a magistrate. Provisions on similar lines are laid out under Section 57 of the CrPC where the Judicial Magistrate is to keep a check on torture by way of a medical examination. Any ill treatment of the accused is to be recorded by the Magistrate after examination of his body and the reason of any injuries is to be inquired upon.[8] This process, however, ignores any injuries which are not physically visible but attack the mental health of the accused. One such noteworthy practise is that of sleep deprivation.

CONCLUSION: SOLVING THE NODUS AND THE WAY FORWARD

The need for anti-torture laws has resurfaced. It is common knowledge that torture in India is professionally accepted and is practiced as a potent means of criminal investigation by the authorities. There are an alarming number of cases where the police, the paramilitary and the military forces have resorted to these barbaric practises in order to extract information from those in custody. Currently, Indian laws deal with torture like any other regular offence and attract penalties under the IPC. However, these laws have their own limitations. The first being that the laws take into consideration only physical tortures and do not cover any other forms of torture the signs of which may not be physically visible. Additionally, the laws fail to distinguish between a civilian perpetrator and a perpetrator who is a government servant. Such demarcation is necessary as the laws in both the consequences in both the scenarios would be completely different.

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[5] D.K. Basu v. State of West Bengal, 1 SCC 416 (1997); *See also:* Joginder Kumar v. State of U.P., 4 SCC 260 (1994); Nilabati Behera Alias Lalit v. State of Orissa And Ors., 2 SCC 746 (1993).
[6] Sheela Barse v. State of Maharashtra, 2 SCC 96 (1983).
[7] Pakkirisamy v. State, 8 SCC 158 (1997).
[8] A. K. Sahdev v. Ramesh Nanji Shah, Cri.LJ 2645 Bom (1998).

Due to the absence of any stringent laws, according to the National Human Rights Commission Report, there have been 2318 cases of death in police custody and 716 fake encounters registered since 1993. These numbers continue to haunt the system since the majority of custodial deaths are generally reported as suicides and these numbers reflect only a minuscule part of the total pool of such cases.

India needs to recognise torture as a systemic problem and to work on laying a stringent legal framework which is in consonance with internationally accepted provisions in order to put an end to such a barbarous practice. The first step towards bringing about reform in the system could be to accede to the various international treaties which govern torture and strictly abide by them. This would help lay the foundation for a torture-free interrogation system. After the signing of international treaties, an enactment of a domestic law would allow the laws to become binding in nature. This law could be the Prevention of Torture Bill, which has been pending for more than a decade.

In addition to these, one of the most effective and long-term strategies for the prevention of torture can be the establishment of an independent authority for the investigation of any accusations of torture by authorities during an interrogation. This would allow for transparency in the investigation of these issues since the investigation of any such accusations is usually done by the very authorities who may be responsible for such torture.

People across the world have protested the death of George Floyd and such protests have forced the government of the U.S. to take stringent steps to prevent such incidents from happening again. It is time to stop waiting for any future incidents to put forth our views and to start voicing our opinion through our elected representatives to raise this issue of anti-torture law in the Parliament so that no other person has to die owing to our failures of enacting effective legislations.

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NEW EDUCATION POLICY: A CRITICAL ANALYSIS

*By Yash Sinha**

INTRODUCTION

India will have the highest youth population in the word in the upcoming decade and it is a shared responsibility of the government to provide contemporary educational opportunities to the students to shape the future of the country. This can be done only if the education policy targets the idea of universal access to quality education which will be a key to social and economic justice. There is a rapid change going on in the world in terms of the knowledge landscape. We have observed how our workforce has moved from manual stages to machines, and now the whole world is trying to move to the next step, i.e. artificial intelligence. This will increase the need for a skilled workforce with the knowledge of data science, mathematics, and computer science in conjunction with multi-disciplinary abilities across the sciences, social sciences, and humanities. The approach of the education system must make children not only learn but learn to learn. The revised policy aims to develop critical thinking in students since the inception of their schooling. To provide a holistic development which not only includes cognitive skills but also social and emotional skills referred to as 'soft skills' including cultural awareness, empathy, teamwork, leadership, among others. The foundational pillars of the policy are access, equity, affordability, and accountability.

No policy could do justice to the system if teachers and teaching measures are not regulated, this policy has addressed these issues and proposes to empower teachers and help them to work as effectively as possible and to ensure teachers their livelihood, respect, dignity, and autonomy, while also having accountability and quality control. The policy is based on certain principles such as flexibility, no hard separations of streams, multi-disciplinary conceptual understanding, creative and critical understanding, constitutional values etc. to provide holistic development to the students.

ECCE AND SCHOOL EDUCATION

There has been a fundamental change in the school education system in every aspect from the elementary, secondary, and Higher education system. The present system is based on a 10 + 2 system where the students study a particular set of subjects for the first ten years starting from class 1 and then respective streams as per their interest. This system will be changed to 5 + 3 + 3 + 4 which means that the state will keep a record since the start of the schooling rather than from class 1. The policy also introduces a term ECCE (Early childhood care and education) which is to ensure that children entering Grade 1 are school-ready. Over 85% of the child's cumulative brain develops before the age of 6. It has been observed that due to lack of investment in ECCE, most of the young children, particularly from economically disadvantaged families are not mentally prepared to go to school easily and are also afraid of the school environment. Keeping all such observations into consideration, the first bracket which is the first five years of school is termed as the foundational stage (3-8 years) based on play/activity-based learning and ECCE. It will also focus on good behaviour, ethics, courtesy, teamwork, cooperation, etc. Exams for this section have been removed to ensure that there is no pressure on

the child in these early stages and the child should be mentally prepared to go to school without any fear. The second stage is the next three years which is also termed as the Preparatory stage (8-11 years) which will begin from grade 3. This stage will observe a transition from play-based learning to more formal but interactive classroom learning, with an introduction to some light textbooks to lay a solid groundwork across subjects such as arts, languages, science, and mathematics. The stage will also include exams and the approach will be based on study and activity. The stage also highlights the language policy which is, that the students till this stage should study in their regional languages. There is some contention with this policy and many people believe that there is an imposition of a language, however, the policy has made it clear that this is not mandatory. The private/public schools can still use English as a language or the medium that they decide, however, no school can impose the same. The next stage is termed as the Middle stage (11-14 years) which is again for the next three years. This stage introduces various courses such as computer coding, vocational courses, Maths, Science, arts, etc. Apart from all these subjects, a child also has to study one Indian language as per his or her interest. There is again a contention among people that this Indian language is an imposition of any particular language such as Hindi, but that is not the case. One could study any of the National languages which are given in schedule 8 apart from the subjects the child is studying. The last four years of the school system from Grade 9 to Grade 12 is termed as the secondary stage (14-18 years). There will be a major change in this stage as compared to the present system. The separation of streams has been removed and one could select subjects from various behavioural science, arts, & commerce streams. This stage also includes an optional foreign language and the exams will be conducted every six months. The idea is to stick with the objective of the policy, which is to provide holistic growth. The teachers will be encouraged to ensure developing a habit of critical thinking in their students.

GRADUATION AND POST-GRADUATION

There is also a major change in the policy in terms of the years required for graduation. At present, graduation is for three years in subjects like Arts, Science, and Commerce. This has been changed to four years, however, the way the certificates will be provided is different. As soon as a student completes the first year, he or she shall receive a certificate by the title 'Graduate Certificate'. Similarly, at completing the second year, he or she will get a certificate by the title 'Graduate Diploma'. When the third year is completed, 'Graduate Degree' will be given to the student, and as soon as the student completes the fourth year, he or she shall receive a certificate by the title 'Graduate research'. The policy has also proposed a new system of re-entry of students in any of the respective years of the graduation. This is done to address the untimely dropping out of students in the middle of the graduation majorly due to economic reasons or personal reasons. So, now if any of the students leave the college after the first year due to lack of money, and after a few years when he or she gets some money to continue his or her studies, they can continue directly from the second year. Also, no student needs to study all four years. A student can apply for a job after the degree received in the third year, if in case the student wants to continue his research in the subject, he or she may study for the fourth year.

In terms of post-graduation, the duration is kept one or two years depending on the number of years completed by the student in his under graduation. If a student completes three years in his under graduation, he shall study for two years to complete his post-graduation. If he studies four years during his under graduation, he may only study one year to complete post-graduation. The proposed policy has given ample stress on the area of research to encourage the young mind in this field.

FINANCIAL PLANNING AND BUDGET

Even the first national education policy of 1968 envisages a provision of six percent of GDP to be allocated for the education sector. The same allocation is maintained in the proposed policy. At present, we are spending around 3.1 percent of the total GDP in this sector. The policy will implement a regulatory regime which will have a clear separation of role, empowerment, and autonomy to institutions which focus on the smooth, timely, and appropriate flow of funds and the usage of the funds with probity. The policy also recognizes two types of funds; those being formula and discretionary funds, given to the state to implement priorities defined by the central government and to deal with localised specific context barriers to girls to get access to high-quality education. To ensure transparency, the funds or investment which are made available either to the private or public industry in this sector will come under the ambit of RTI (Right to Information). The details of the flow of funds can be accessed by the public at large.

One of the major contentions against the policy is about the commercialisation of education. This contention has been addressed in the policy by using a 'light but tight' regulatory approach that mandates full public disclosure of finances, procedures, course, and programme offerings, and educational outcomes; the substantial investment in public education; and mechanisms for governance of all institutions, public and private.

PROMOTING INDIAN CULTURE

The rich Indian heritage has been the guiding path of the policy since the beginning. The aim of education in ancient India was based on complete realisation and liberation of the self, in addition to the acquisition of knowledge as preparation for life in this world or life beyond schooling. It is the very cultural and natural wealth that truly makes India as 'Incredible India' as per India's tourism slogan. Culture awareness is not only important for the nation but also for an individual to develop a sense of identity, belonging, as well as an appreciation of other cultures and identities. To preserve and promote one's culture, it is very important to promote and preserve the culture's languages. This is the reason Indian languages are taken care of throughout the policy. Now, this has been a major contention and people have also alleged that this is because of the implementation of the ideology of Hindutva. Many developed countries have demonstrated time and again that studying one's culture, traditions, and languages is indeed a huge benefit to educational, social, and technological advancement. India is trying to achieve the same. Applying a political colour to this approach will fail the major objective of the policy. Concerning Hindutva, the Supreme Court in Ramesh Yeshwant Prabhoo case in the year 1995 has been very clear that it is a way of life and should not be equated with the Hindu fundamentalism. It represents a culture which in itself is very inclusive. If one goes to the text of Hindutva given by Veer Savarkar, he always

meant it as an inclusive term and nothing to do with religion. Anyone who lives between the Himalayas and the Indian Ocean, and considers this land as his fatherland and holy land is under the impression of Hindutva. Although, the policy in no means has used the word 'Hindutva' in the principles or visions of the policy. In my opinion, using Hindutva would also never make any difference because it was never meant to be an alienating term. It has been all-inclusive and for cultural preservation.

CONCLUSION

The Indian education system has revolutionized itself after 34 years. The policy has finally understood the problem with content education and has proposed a sound solution for the same. The increase in budget will ensure the proper allocation of funds, as done by many developed countries like the USA, Israel, and Germany. The ECCE will ensure more enrolments in the elementary level, and different forms of languages will ensure culture preservation. The vocational subjects will prove a holistic development and adaptive behaviour. No hard separation of streams will motivate students to explore other career paths. The Re-entry policy in the graduation system will be effective only if the administration can manage normal students and dropouts concerning the seats they have. As India is an evolving democracy with a strong presence of parliamentary democracy, the policy can be amended if required after the implementation. For achieving successful implementation, the policy proposed for the creation of Rashtriya Siksha Aayog (RSA), an apex advisory body at the central level, and Raj Siksha Aayog (RJSA) at the state level. I believe all the benefits that the policy claims to achieve i.e. affordable and quality education for all, are likely to be visible within a decade of the implementation.

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CENTENNIAL OF THE NINETEENTH AMENDMENT

*By Anuraag Asiwal**

"It is incredible to me that any woman should consider the fight for full equality won. It has only just begun." - American suffragist, Alice Paul, on the Nineteenth Constitutional Amendment, 1920.

The fight for complete equality for women at large, in common parlance, the feminist movement has seen waves that have been instrumental for women acquiring a plethora of rights: the right to work, the freedom of choice, the right to pursue an education, freedom from sex discrimination, sexual and bodily freedoms, etc. None, however, would be as important as the right to vote.

It could be argued that the use of the phrase 'all men are created equal' in the Declaration of Independence, 1776, was a misnomer. History testifies that this has not been the case. The 'men' alluded to must have fulfilled certain criteria to claim the 'unalienable rights granted by the Creator': They must be cisgender, heterosexual, male, white and land-owning. Anyone who fell outside the ambit of these criteria would not be endowed with the rights of life, liberty and pursuit of happiness.

The year 2020 marks the centennial of women being endowed with the right to vote in the United States of America; a right granted the Nineteenth Amendment of the US Constitution. The popular story about the Women's Suffrage Movement begins in 1848 at Seneca Falls, New York. Here, the first women's rights convention was held and the 'Declaration of Sentiments' was signed, condemning the tyranny that men exercised over women, voicing the grievances women had, and calling attention to the laws that governed them unfairly. The tale closes in 1920, with the passing of the Nineteenth Amendment.

The wildly popular 'suffragettes' have become synonymous with women's right to vote, and are often looked up to as the leaders of the movement. Susan B. Anthony, Elizabeth Cady Stanton, Alice Paul and Lucy Stone are adulated to this day. Many women, after exercising their right to vote, visit the final resting places of these women to honour them for their painstaking activities culminating in the right to vote.

In recent years, it has become clear that this propagated version of events is distorted by the Mandela effect. For starters, the term used for women demanding universal suffrage is suffragists and not suffragettes. This is the tip of the iceberg. The movement is often encored with great vigour as a story about middle-class white women fed up with the status quo, retaliating through protests, petitions and prayers demanding a right to vote, just like their male counterparts. The story, however, is much more convoluted and nuanced. Sadly, it has taken almost 100 years for the naked truth to come to light, but it is here nonetheless.

While reminiscing about the tumultuous late nineteenth and early twentieth century, the fight for ensuring universal suffrage was marked with contributions of women. All women. Not just middle-class and white women. The contribution of African-American, immigrant, and working-class women was indispensable. The significant contribution of disenfranchised women, such as Ida B. Wells, Sojourner Truth, Frances Ellen

Watkins Harper, Mary Church Terrell, Daisy Elizabeth Adams Lampkin, has been conveniently swept under the carpet.

The ugly history has come to light, owing to mainstream conversations about race and racial violence and discrimination. The dark side of demand for suffrage is racism, arising due to the right to vote being conferred onto black men by the Fifteenth Amendment to the US Constitution, 1870. Many suffragists, like Elizabeth Cady Stanton, warned white women that they would be 'degraded' if Black men were to place first in the race to get the right to vote.

Thus, it had become extremely evident that the right to vote meant two different things to white and black women: parity and empowerment. White women sought parity, while the recently liberated black men and women sought empowerment and a representative voice in the legislature that governs them. Owing to this, the suffrage movement was rooted in the abolition of slavery. This fact is often lost on people. Although black men were given the right to vote before the Nineteenth Amendment, it would be remiss to ignore racially motivated violence by the Ku Klux Klan in the South, and voter suppression against Black men motivated by white supremacy.

This brings forth another issue about the women's suffrage movement, the myth that all women could vote after the Nineteenth Amendment. Women in multiple states such as Wyoming, the first state to grant women unrestricted suffrage, California, Illinois, Oklahoma, South Dakota, Rhode Island, New York, etc., were already granted suffrage in many shapes and forms. Women had been voting for years before the Nineteenth Amendment. The erroneous statement overlooks a major falsity: Women were not guaranteed the right to vote after the amendment, rather, any law that reserved the extension of the ballot to men only became unconstitutional. There were still hurdles to overcome, namely the criteria of age, citizenship, place of residence and mental competence. These were clear attempts to keep women from voting. Apart from this, State laws were exercising the same.

However, no one was as disenfranchised as black women. The South continued to be a hotbed of racial violence and fear-mongering, leading to voter suppression in a region that longed dearly for the conventions and status quo of the antebellum South. Black women and men — who had received liberation decades ago — were still unable to make their vote count. While these were the more surreptitious manners of voter suppression, it would be lackadaisical to neglect the legislative voter suppression in states, including time-barred registration, literacy tests, taxes on the polls, and grandfather clauses, along with Jim Crow Laws of racial segregation. These show that there is more than one way to block access to ballots. Nevertheless, the suffragists persisted.

It took over a year for the Nineteenth Amendment to attain the thirty-six State majority requisite for ratification. The final state to do so was Tennessee, and thus, the disqualification based on sex about voting was held to be unconstitutional. This came into effect on the Eighteenth of August, 1920.

The suffragists were recounted during their time as 'bold' and 'unladylike', and disloyal to their country for expressing dissent during war-time. Women were regularly arrested for causing traffic jams and 'nuisance'. While

heralded as the foremothers of the modern feminist revolution now, during their day, they were 'not respectable'. They were slandered and maligned in male-owned media by men with voices and the ears of the people. Their efforts, spanning decades before fruition, were commendable.

The image of these women, in their long skirts and poster boards "SUFFRAGE FOR WOMEN", has been brandished into the eyeballs of the world at large and is one that shall continue to be a consistent reminder of what the country once was, how it changed, and how it is imperative that it never returns to the fascist, dystopian nightmare that it once was.

A hundred years, in comparison to mankind's existence, is not very long. The United States of America attained independence 244 years ago. The right and eligibility to vote had been enshrined in the US Constitution in Article 1. The states had the responsibility of conducting federal elections. The eligibility and requirements to vote have changed throughout the years through Constitutional Amendments to ensure equitable representation, ensuring that the governed had a voice in who governed them.

In this politically contentious period in the United States, incepted since the election of the incumbent 45th President, Donald J. Trump (R.), the country has never been more divided on partisan lines, with disagreements in the United States Congress and among the citizens represented. Trump won the Presidential ticket by votes in the electoral college, losing the popular vote, which his Democrat opponent, Hilary Clinton, had won.

Subsequently, with the removal of the Voting Rights Act, 1965, which prohibited racial discrimination during voting, after 2013, voter suppression through legitimate and legislative manner has increased rampantly. With inconsistent state laws, gerrymandering, ex-offender disenfranchisement and restrictive voting requirements such as early registration, photo-ID requirements and inaccessible polling places, typically in Black and brown neighbourhoods, not every vote made a difference, as it should have.

The foremothers and forefathers of the nation, who fought to ratify the Nineteenth and Fifteenth Amendment, did not wish to see commonplace voter suppression. They fought to abolish such practices so that their descendants could exercise their Constitutional right in federal elections to make their voices heard, which is the very thread of a Democratic Republic.

With the resurgence of mainstream interest in civil rights, with the Black Lives Matter movement and the eagerly awaited 2020 Presidential Election, the eyes of the world are on the United States. The agenda of the incumbent President to stop mail-in voting and disband the US Postal Service is a clear attempt at vote suppression. During this highly divided time, it has never been more important as members and allies of minority communities to do right by those oppressed by the current administration. It is essential to exercise the right to vote that was so heavily fought and dearly bought by abolitionists and suffragists, as Thomas Jefferson said, "We do not have the government by the majority. We have the government by the majority who participate."

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ENVIRONMENTAL IMPACT: ASSESSMENT OF THE DRAFT NOTIFICATION 2020

By Kshitij Vishwanath, Yash Sinha***

The environment, in itself, is an important aspect and a debated subject around the world. We have noticed the concerns of developed, developing and underdeveloped nations at the Paris accord. Every country requires holistic growth in every sector, but that should not come at the expense of environmental concerns. There has been a total turnaround in the global scenario due to the on-going phase of COVID-19. The political affiliations and balances have seen dramatic changes around the world. Various countries like Australia, the United States, some European countries, and some of the ASEAN countries are confronting China because of COVID-19 at various platforms. Even India is facing various issues regarding China including the on-going border dispute. The GDP of all the above countries, by and large, has faced negative growth due to the pandemic. Unemployment is rising and several reports also suggest that many companies settled in China are intending to shift to a different country which has the basic requisite infrastructure, simplified regulations, and most important of all, 'availability of license and environment clearance in a time-bound process'. India should take advantage of this opportunity and create an environment that welcomes all such investments, given that our GDP is not decent and negative growth is speculated for the future. This is a very suitable time to make changes in the Environmental policies to increase FDI (Foreign Direct Investment) and local investments. This could have been only done by making the existing policies more expedient and transparent as proposed in the EIA draft 2020. This draft seeks to bring some leniency in the clearance process and to reduce red-tapism. The idea is simply to make the process of giving clearance faster and ensure proper monitoring of the same.

There are certain changes proposed by the government in the policy, which has created space for contention as well as criticism. One of them is the introduction of the word "strategic". Under the topic, 'Categorization of projects and activities' point number seven mentions that "all projects related to national defence and security or involving other strategic considerations, as will be determined by the Central government shall require prior-EC from the ministry without any change in the category of the project". No information related to such projects will be brought into the public domain. Now, this is justifiable to the people if the matter is related to defence or national security. However, the addition of the point that the government can make any project "strategic" as per its own criteria and that would not fall under the ambit of RTI (Right to information) is contentious. The criticism is that this is diluting the policy rather than strengthening it and simultaneously reducing the transparency of the whole process. People are afraid that this would lead to an increase in crony capitalism. Even the government's decision of terming any project strategic is in question concerning the benefit the ministry might receive or it could be a possibility that this step becomes dependent on the benefit the ministry gets off the record rather than on actual merits. This could also become a new way for some companies or projects to evade responsibilities through public consultation by funding the government inappropriately to get the 'strategic' tag.

The government, however, with our understanding has tried to project a different perception. The perception they are trying to purport is that it is more in line with national interest that any of the future investments that are brought to India with probable impact on the country's development and economy, will get a direct environmental clearance or permission from the ministry without any delay. The idea is to keep such investments in India rather than losing the same due to the clearance process and RTIs because there are many countries which have the same infrastructure as we have and need such investments. Howsoever, even in our understanding, we believe that it is still something on which the government should provide proper clarification. There should be at least a proper definition of the term 'strategic' as mentioned by various critics of the policy. It should be also taken into consideration that this was just a draft notification and that the government has collected all the suggestions for the same. They may or may not bring about these changes when this policy is passed in the parliament, or they could even come up with a definition of the term 'strategic'.

Another criticism that the environmental policy faced is the application of its provisions on an ex post facto basis. This essentially means that the provisions of the policy can be applied in a retrospective sense, giving a chance to industries with incomplete or no environmental clearance to obtain the same, despite violating the earlier provisions.

The need for economic growth and investment through industries has pushed the government to allow for the relaxation of norms to induce industries to invest in India, sacrificing the standards of safety.

The ex post facto application story has two sides. While numerous environmentalists and conservationists have argued that this particular provision is and will be an excuse for industries to abandon their liabilities, leaving other stakeholders in the environment in a vulnerable position.

The government defends this stance by stating that it was providing these industries with a 'second chance' by allowing them to make amends. The defence to this would be that the government would re-enter these industries through the process of environment clearance and would only provide them with such documentation if they made changes, after payment of a fine.

However, simply paying a fine has more significance than just its pecuniary value, rather the symbolic value has a greater, more adverse effect. The bailout of these polluting industries by a simple payment of a fine represents a dangerous precedent by allowing industries to pay themselves out of trouble that they have caused, rather than being held liable for the same.

To conclude, we can say that the environmental policy is a diluted form of the erstwhile policies from 2006. The implication of this would be vast and from the face of the provisions, we can say that the policy was drafted merely to meet the needs for expansion of infrastructure.

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PERIOD LEAVE POLICY: THE DEBATE CONTINUES

*By Sharmila Adyanthaya**

In the first week of the August of 2020, an Indian food delivery and aggregating company introduced trans-inclusive period leaves for all of its menstruating employees. In a note to the staff, the CEO said the move of introducing ten days leave policy was to "foster a culture of trust, truth and acceptance".

The move reignited the debate around the policy of period leave. Many people remain divided on the issue. Across India, employees are entitled to a certain number of leaves, apart from days off and holiday leave, which is provided at the beginning of the year. The number of leaves is dependent on the industry, the employer, and especially on the state one works in, relying on the Factories Act and State's Shop and Establishment Act. Three types of leaves that are generally followed include sick or medical leave, casual leave, and privileged leave. Period leave is a paid or unpaid absence due to a menstruating employee's inability to go to work because of painful menstruation.

It is a fact that period leave policy and the debate around it applies to formal workplaces. The majority of women in India work in the unorganized sector. This makes the debate a privileged conversation in the eyes of many. Nonetheless, it is important. A Mumbai-based private company, Culture Machine, was one of the first companies to offer paid menstrual leave. It adopted the First day of Period ("**FoP**") leave in 2017, where it allowed its menstruating employees to take the first day of their periods off, and the trend was followed by many companies subsequently.

Firstly, let us absorb the medical and scientific reasons cited for the implementation of period leave policy. Headaches, cramps, and nausea caused by periods not only interfere with everyday activities but are much more debilitating in the case of many women who experience a condition of extreme menstrual pain and dysmenorrhea. Women experiencing ovarian cysts, menorrhagia, endometriosis, fibroids, etc. endure much more intense pain than others. The problem is common and widespread with variations reported across the country. Effective treatments are extremely limited. Detractors of the policy question: Why can't women just pop a few painkillers and get back to work?

One needs to understand that symptoms can only be minimised to some extent using painkillers; hormone treatments such as contraceptive pills, which may cause side effects; and surgery, being the last resort. Even these are not a complete cure. Taking a leave due to these reasons is considered to be humiliating by many, thus women continue to suffer in silence. The stigma attached to the subject results in women paying little or no attention to their health. Hence, the introduction of the friendly period policy comes as a respite from unnecessary shame, normalising menstruation at the workplace.

Many believe this move is more regressive than progressive. Arguments include that the policy will further deepen the gender gap in the workforce, it will further widen the age-old hiring bias, and spark issues of lesser pay and slow promotion of women at work. There exists a fear that the policy might hinder the progress made

on the principle of equal pay for equal work, and some consider the policy to be hypocritical in light of the fight regarding the same.

There have been cases of successful implementation and positive feedback for period policies from certain companies across India. The fear of backlash in the form of discrimination against women is not baseless, however, is their solution currently misguided? A similar reaction was observed when the Prevention of Sexual Harassment at Work Place (Prevention Prohibition and Redressal) Act, 2013 and Maternity Benefit Act, 2017 were implemented. Later, the object of these Acts was accepted to be an undeniable right. Paid period leaves take cognisance of an important aspect of women's healthcare rights.

History has witnessed changes which initially seemed impossible becoming mainstream in work culture. While people who want to maintain the status quo will argue that period leave policies will lead to decrease in productivity and losses, history has witnessed that workers are always keener on working in an environment that respects their rights and the limitations of their body, and that have a requirement of time off. The question which one needs to ask is whether the period leave will break the world as we know it, or bring more female perspective into the work culture, and modify it to meet the needs of more than half a workforce.

Instead of a blanket policy for strictly period-based leave, an overall leave policy for men and women to take time off for a host of reasons, including chronic medical conditions or in the case of women, clinically diagnosed extreme period pain, is advocated. Women in our country rarely recognise that their period pain might be a health issue and consider it something that they need to 'put up with' or 'deal with'. It says a lot about the conditioning women in society undergo, that as the closer they come to powerful positions at the workplace, the more they have to relinquish their comfort to meet the standards of decency and professionalism set by men. If women need to hide their pain at the workplace just to fit in and to not be treated as outcasts, then one is only sculling the boat of patriarchy ahead.

Article 42 of the Constitution of India speaks about just and humane conditions of work. The lack of basic private and hygienic spaces at the workplace for menstruating employees add to the impediment menstruating people face. On the note of men being discriminated against, Article 15(3) of the Constitution, a reasonable restriction to article 15(1), states that the State shall not be prevented from making special provisions for women and children to bring about equality despite the history of social discrimination that they have been subjected to.

Period leave is branded as sexist. Detractors argue that it calls for speculations about whether women will fake pain to take days off. Women who do not work at establishments with Period Leave Policy end up utilizing their sick leaves. One must consider that women across India are not entitled to a similar number of sick leaves; they are not uniform. A woman who suffers from dysmenorrhoea in City A and has availed her seven days sick leave is at a disadvantageous situation, compared to a woman in City B who also suffers from dysmenorrhoea, but has ten days of sick leaves.

It may not be common knowledge, but the government of Bihar has been offering two days of period leave to women employees since 1992 under a 'Special Cause Leave'. Ninong Ering, a Congress MP and Lok Sabha member from Arunachal Pradesh, had moved a private member's bill, 'The Menstruation Benefit Act 2017'. This Bill aimed to provide women working in public and private sectors two days of paid menstrual leave every month. It catered to menstruating employees across sectors, roles and class. The Bill, however, subsequently lapsed. Others were of the view that alternatives such as more sensitized HR policy, lowering the taxes on sanitary pads, and providing accessibility to these pads to those who cannot afford them should be looked into, in lieu of the Bill implementing period leave.

As the debate continues, from giving codenames to period to openly talking about period leave, one realises that society has come a long way and yet has a long way to go.

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DIFFERENTLY ABLED WOMEN – A STRUGGLE TO LIVE INDEPENDENTLY

*By Tushar Ranjan**

INTRODUCTION

"Equality is the public recognition, effectively expressed in institutions and manners, of the principle that an equal degree of attention is due to the needs of all human beings."

-Simone Weil

Women with disabilities can have plural identity markers because they are marginalized in Indian society based on their disability and other 'socio-cultural identities' that divide them into various categories. That is to say that women with disabilities can be invisible or side-lined in the human rights debate, and because of this reason are unable to enjoy the rights available to them. One of the rights available to people with disabilities is the right to live independently. It ensures that they are able to make their own life decisions and are included in the society.

A cumulative analysis and understanding of the available literature points to the fact that the right to live independently is one of the most fundamental rights for the disabled. From this right, stem various other rights, which include the right to legal capacity and right against domestic violence. Differently-abled women are one of the most vulnerable groups in the society and face grave injustice. The right to live independently for women with disabilities is what the researcher intends to find in Indian disability laws through this research. It is not refuted that laws in India are in place specifically for people with disabilities but the question to which answers are being sought is whether there is any special legislative protection implemented for the improvement of the life of these women? It is particularly pointed out that implementation of the right to live independently in India is flawed and has left many concerns unaddressed. Therefore, the gap that the researcher seeks to address is the need for the right to live independently specially for women since their vulnerable conditions are overlooked.

INTERSECTION BETWEEN GENDER AND DISABILITY

There is a process rooted deep in our cultures whereby people with disabilities are perceived separate from their gender, that is to say they are seen as neither men nor women, but only disabled. This failure to recognize their gender leads to men being the prototypic members of the community which ultimately results in standards being set ignoring the needs of the women. Women are considered to be a vulnerable class of society and perceived to be a burden on the families. Disability is always viewed by people of society with unwanted sympathy. A person with a disability is seen as an individual who is suffering from an unfortunate disease and no other aspect of that human being is appreciated. Scholars are of the opinion that disability does not override gender, rather gender determines how disability is perceived, reacted to and experienced. Women with disabilities face both the oppression of being disabled in an environment designed for the abled and the oppression of being a female in a male dominated society. This means that women often bear unique form of inferiority, both of presumed weakness attached to disability, and being the member of "the weaker sex". To take an example of such instances in India, the Ministry of Women and Child Development still does not include women with disabilities in their data collection process and there is not a single Ministry which provides gender segregated data when reporting on beneficiaries with disabilities.

RIGHT TO LIVE INDEPENDENTLY AND BE INCLUDED IN THE COMMUNITY

Human rights are based on the basic principle of universality and that every human being is born with equal dignity and rights. The right to live independently is one such right which becomes the core of the human rights principles which promotes enabling and inclusive environment for everybody, including people with disabilities. Article 19 of the UN Convention for Rights of People with Disabilities ("CRPD") (of which India is a signatory) reiterates this right in order to prevent abandonment and segregation and to enable development of personalities and capabilities of persons with disabilities. Article 3 of CRPD forms the basis for this principle namely, "full and effective participation and inclusion in society". While the CRPD does not include a specific definition of

'independent living', the common understanding of independent living is having choice and control as reflected in Article 19 and is one of the key principles of the CRPD. Article 19(a) requires that disabled people have the opportunity to make decisions about where and with whom they live, on an equal basis with others. Article 3(a) of the CRPD requires "respect for inherent dignity, individual autonomy, including the freedom to make own choices, and independence of persons". There are essentially two elements of Article 19, the first being personal choice and control of the people with disabilities to make decisions regarding their own life, and the second is the link to inclusion in the community and access to services and support.

It states that "States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take viable measures to encourage full happiness by people with handicaps of this privilege and their full consideration and cooperation in the network, including by guaranteeing that:

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(b) Persons with disabilities have access to a range of in-home, residential, and other community support services, including personal assistance, necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

(c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs."

This article makes it clear that the right to live independently and the opportunity to be included in the community is a human right which is offered to all people with disability.

Decisions relating to the lives of the people with disabilities who reside with their family are usually made by the family members. They are not given the freedom to make their own choices or make important life decisions. Without adequate support systems for the disabled, not only does the burden on the family increase, but it also violates the rights of the person with disabilities.

IMPORTANCE OF IMPLEMENTATION OF INTERNATIONAL CONVENTIONS IN INDIA

The Indian Parliament has exclusive powers to enact a statute or legislation for the implementation of treaties as provided under Article 253 of the Indian Constitution. Article 253 empowers the Parliament to make any law, for the whole, or any part of the territory of India, for implementing "any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Conferment of this power on the Parliament is evidently in line with the power bestowed upon it by Entries 13 and 14 of List I under the Seventh Schedule. The Directive Principle of State Policy ("DPSP") laid under Article 51(c) directs the government to strive to achieve objectives of international treaties which it ratifies in good faith. It provides that "the State shall endeavour to…(c) foster respect for international law and treaty obligations".

In the case of ***Jolly George Vergese v. Bank of Cochin***, Krishna Iyer J. observed that "*the positive commitment of State Parties ignites legislative action at home but does not automatically make the covenant an enforceable part of the corpus juris of India.*" The Delhi High Court also observed that in India, treaties do not have the force of law and consequently obligations arising therefrom will not be enforceable in municipal courts unless backed by legislation. It is also noteworthy to mention that Shah J. in the case of ***Maganbhai Ishwarbhai Patel v. Union of India*** observed that *"making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of others or modifies the laws of the state. If the rights of citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty".* Therefore, it can be clearly said that India is a State where international law and treaties do not become internal or municipal law in the sense of "Incorporation" or "Blackstonian" doctrine.

NEED FOR SPECIFIC PROTECTION FOR WOMEN

Currently, the Rights of People with Disabilities Act, 2016 ("The Act") is in force which replaced the Rights of People with Disabilities Act 1995 ("The erstwhile Act"). The preamble of the Act refers to Article 3 of CRPD which elaborates upon the general principles for the complete realization of rights of people with disabilities to equality and non-discrimination. In the Act, as opposed to the erstwhile Act, the legislature has made a few provisions for the protection of women and children with disabilities particularly, as they are considered to be a vulnerable group.

The right to live independently is one of the most important and fundamental rights, the realization of which is important for further realization of other rights available to the people with disabilities. As per the CRPD Report submitted by the Government of India to the National Committee for People with Disabilities "*Support services for 'living independently' are almost non-existent in the country. There are hardly any initiatives towards in-home, residential and other community support services. There are now a few services (run by the private sector) that have been initiated for elderly people in certain cities but these do not cater to the more specific needs of people with disabilities. Moreover, the costs are exorbitant and are usually beyond reach for many disabled people. There are a few non-governmental organizations (NGOs) which run Community Based Rehabilitation (CBR) programs but their reach is very limited and their approach is also sometimes medical based (barring some exceptions).*"

It can, therefore, be said that there exists a need for more targeted protection of women with disabilities and the most important aspect of it is the securing the right to live independently and to be included in the community.

CONCLUSION

It can be seen that no particular provision or enactment is present in the existing laws to ensure that the right to live independently is extended to the women with disabilities. Protection to women with disabilities has to be provided and for this purpose, specific provisions are to be included in the existing laws. Right to live independently, as earlier discussed, is fundamental for growth and freedom of persons with disabilities. It ensures that they have the right to make their personal life decisions and take control over their lives and ensure that they are included in the community. This implies that the usual practice of ignoring the presence of women with disabilities must be kept in check.

After the analysis of the above discussion, some suggestions are placed for consideration for effective implementation of the right to live independently, specifically focusing on the women with disabilities in India. These suggestions include:

- There should be an explicit right to live independently and to be included in the society mentioned in the Act for its effective realization.
- The Act must give power to the state governments to formulate their own rules and procedures for the composition of disability specific support service centres, which can be easily accessed by women with disabilities. Such support service centres must include members like NGOs, medical consultants and doctors, female nurses, and persons with special knowledge and sensitization towards people with disabilities.
- Steps must be taken for collection of accurate data, regarding the number (quantitative data) of women and also the conditions and requirements (qualitative data) of women with disabilities in each district, including the women who are enrolled in special institutions.
- Any issue which relates to women with disabilities must be dealt with promptly and therefore it is suggested that guidelines are issued which state that matters in the courts which are relating to the rights of the women with disabilities must be expedited or disposed of under summary procedure.

- Committees must be established with delegated powers to monitor the current situation and ensure that the support services are provided and essential standards are maintained.

Only when the right to live independently is ensured that women with disabilities will be able to realize all the other rights that are provided to them since it is one of the basic general principles which lets women take control and lead their life without feeling like a burden.

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THE COLOSSAL EPIDEMIC: VIOLENCE INSIDE, VIRUS OUTSIDE

*By Muskan Kukreja**

"Long-Term Domestic Violence – Being abused in this manner is like being kidnapped and tortured for ransom but you will never have enough to pay off the kidnappers." – Rebecca J. Burns

INTRODUCTION

In the ever-progressing time of today, women want to be treated equally and respectfully. In a male-dominated society, women want to be regarded as individuals with feelings, aspirations, and dreams. Unfortunately, some women fall prey to beatings, torture, and violence by their counterparts.

Domestic violence does not happen in a vacuum, i.e. it is unlike other crimes. It happens at your 'abode' which is a sacred place, a safe place; where you can spend your time peacefully, work, and relax.

Amid the unfortunate condition of COVID-19, cases of domestic violence hiked up. Domestic violence does not only lead to physical injuries but more than that, i.e. emotional and mental suffering of the children in the family as well. World Health Organization's report shows that, globally, 35.6% of women have ever experienced either non-partner sexual violence, or physical or sexual violence by an intimate partner, or both. This article will cover the intricacies of domestic violence and the increasing cases amid COVID-19. Moreover, it will also cover the nexus between domestic violence and psychological theories.

The WHO estimates that thirty-eight percent of murdered women are killed by their intimate partners, which may be an underestimate. It has been also reported that forty-two percent of the women who were either sexually or physically abused, were injured by their partners. Amid the lockdown, due to COVID-19, there has been a surge in the domestic and sexual violence cases globally. India's National Commission for Women (NCW) reported that 587 domestic violence complaints were registered between March 23 and April 16, which was a significant surge from the 396 complaints that were observed between February 27 and March 22. Moreover, six complaints were received on the newly launched WhatsApp number.

Feminist economist, Ashwini Deshpande analyzed NCW data for March and April in 2019 and 2020. She calculated the average complaints per day and observed the hike in cases related to domestic violence, and also a smaller rise in cases related to the attempt to rape or sexual assault.

WORK AND ABUSE

In India, it is evident that alcohol consumption and unemployment increase the violence on women. In the current situation, women, who were the sole breadwinner of their families, also stay at home in the horrid condition. As their husbands are not getting alcohol to drink, women are being hit and sexually abused. Earlier, women could run into the narrow lanes and shout, but in the recent heart-breaking case of Chennai, a forty-five-year-old got accustomed to the beating by her husband, which only decreased when she went out to earn money. However, during the COVID-19 pandemic, a lot of people lost their jobs and had to stay at home which

was supposed to be a safe place, but women were getting beaten. Domestic violence has not only been confined to India. Moreover, when a message service was established for hearing-impaired women, 170 complaints were daily received, which is gruesome and horrifying.

STEPS THAT WERE TAKEN BY BRAVE WOMEN

In Spain, women facing gender prejudice is regarded as an imperative social issue. Initially, on its helpline 016, eighteen percent more calls were received during the lockdown than the usual times. Also, in France, there were many silent requests seeking help. Email contact hiked by 286% over the same period and the new psychological support messaging service via WhatsApp received 168 inquiries within its first nine days.

Mascarilla-19 (Mask-19), a campaign was launched in Spain's Canary Islands by the Institute for Equality, stressing that escaping abuse is a valid reason to leave your home. There are pharmacies all over where women can ask for mask-19, which is an indication that the women are being abused physically or mentally at their homes. The pharmacy staff will pen down the woman's contact number, address, name, and alert the emergency services immediately. This campaign is Kika Fumero's brainchild.

While speaking about her book, "No Visible Bruises: What We Don't Know About Domestic Abuse Can Kill Us," which is an international bestseller, Rachel Louise Snyder mentioned during her Harvard interview that the title stems from the fact that much domestic violence is "not visible to the naked eye". She offered an example from her book of a husband who threatened to put his pet rattlesnake in his wife's bed while she slept.

Jawaharlal Nehru, the first Prime Minister of India, said, "You can tell the condition of a nation by looking at the status of its women."

During COVID-19, two epidemics were faced together by the women. Working women were not only burdened with their office work but their housework too. Violence against women has become a central issue. Different countries and states are taking different measures to tackle the problem. For instance, Odisha Police in India came up with an initiative wherein they will contact women who called or filed a complaint earlier. The special drive 'Phone-Up-Program' has been launched across the state to deal with the problems of domestic violence in the coronavirus crisis period.

The most imperative question here is what drives men to beat or torture their wives so heinously, be it emotionally, physically, or sexually?

Earlier theories of domestic violence were considered 'private' and 'a family matter' wherein nobody had a say and fewer people were aware of it. Historical theories show that alcohol, poor impulse control, and mental illness lead to such barbarous behaviour. Whereas, current theories highlight that it is done for the establishment of power, and to show superiority through different forms of coercive and brutal behaviour.

The 'learned helplessness theory' observes that men battered because they had learned violence from their families as children, and likewise, women sought out abusive men because they saw their mothers being abused.

This is also called the "learned behaviour" theory of violence. Learned helplessness can be translated to the sense of hopelessness or resignation learned when a human or animal perceives no control over repeated bad events. Several studies found that batterers had been abused as children or they had witnessed their fathers beating their mothers. "Learned Behavior Theory" has observed that men lose control of themselves and act violently after alcohol consumption. Violence is certainly targeted for specific people at specific places as they cannot pour their anger on everyone they meet, like their friends, boss, or colleagues. As a result, they drain all their anger on their wife or sister, or some close family member with little physical and mental power.

Another theory to gain popularity was the 'cycle of violence'. This theory was based on the belief that men did not express their frustration and anger because they had been taught not to show their feelings; a man's tension built until he exploded and became violent. When the tension was released, the husband was apologetic and felt remorseful and the couple had their 'honeymoon period' like before. Concluding from all these theories, we observe that women have always suffered and fallen prey to their husband/boyfriend's anger or frustration despite being at no fault themselves. Women who are considered as "Devi" in Indian mythology are now being beaten by these beasts, which not only affects them physically but mentally too. Domestic violence does not only violate an individual's rights but is a social and public health concern too. It does not only involve violence by women's husbands but by their relatives and in-laws too. Earlier, it was done for something trivial like dowry.

Presently, in this tough time of COVID-19 when families are instructed to live indoors, domestic violence has penetrated deep into society. Women manage their work-life as well as the home maker's life and are being treated worse than a servant. Not only women, but the impact of this can be observed on children as well. Another aspect and dark side of domestic violence is sexual violence. Sexual violence is defined as any non-consensual sexual contact between the partners, refusal to use contraception, and cause unwanted pain. Women find this aspect most difficult to talk about as it can make them think that maybe it is their fault. Moreover, the person who is doing such an act is none other than the person they loved the most once. Men see it as their 'right' and women as their 'duty'.

What should be done to prevent domestic violence?

1. Educating the boy child - Solutions to almost all the problems pave its way through education i.e. the most crucial element of a happy and flourishing society. Lately, the girl child's education is being encouraged but has anyone ever talked about giving special EQ (emotional quotient) training to boys. They have rather been taught things like "boys don't cry, girls do", as a result of which they make girls cry when they attain maturity as a consequence of society's wrong beliefs. Moreover, a child miseducated is a child lost.

2. Know the signs - A woman should never ignore signs of domestic violence in the garb of love. At times, violence begins at an early stage of relationships but the emotion of love makes you ignore the signs.

3. Pen it down - Write down everything you had to go through, even the slightest of the details. Try to include details like time, date, location, and circumstances as they will help the police later in their investigation for getting a clear picture of the facts.

4. Know the number of a nearby shelter - You never know when the circumstances will be completely against you and you'll have to leave your safest place i.e. your home to seek help and seek asylum during tough times.

CONCLUSION

The global epidemic is now inside the houses. In this period of lockdown when men have nothing to do, they have started torturing their wives mentally and physically. We call it domestic violence. We call it private violence. Sometimes, we call it intimate terrorism. Despite the World Health Organization stating domestic violence as a "global epidemic", not much attention is being given to it. It is tough to prove what happens inside the four walls of a house and it can destroy a kid's future apart from the presence of a woman by making her undergo an ordeal. As long as women continue to show that they are vulnerable and scared, they will have to suffer more; so they should stay strong and come out to fight this.

A necessary step is needed for changing the whole mindset of society towards women and educating men. Men should be educated on how to treat women equally and help them grow too.

Lastly, if present domestic violence laws are combined with education, then indeed the future would be safe. Women should come out and speak against the violence because despite being domestic, violence is violence.

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PANOPTICON BY DATA: CLEARVIEW AI AND ZOOM

By Anushka Bhardwaj and Rashi Goel***

Michel Foucault's panopticon penitentiary has been an esteemed surveillance model in academic circles. It allows a monitor to observe every prisoner in a penitentiary from a central tower. Monitors did not always see an inmate but they could at any time, without being noticed by the inmate. The panoptic setup was based on Bentham's principle of power which reads as follows: "Power should be visible and unverifiable"[9]. This renders the inmate in a state of permanent consciousness and visibility hence assuring the automatic functioning of power.

Social media or any form of internet data mining is deemed analogous to a panopticon. The users are economically and politically alienated by stripping them off standard rights to participate in the decision-making process of how their data is utilized to supposedly benefit them. Similar to a panopticon in information society, one is seen without seeing and the observer sees everything without being seen[10]. It leads to concentration of power since the number of people who exercise the power is reduced and the number of those on whom it is exercised increases manifolds[11]. Furthermore, its strength is that a panopticon never intervenes and exercises clandestinely[12].

In such a setup, power is reduced to its absolute form. In an information society, users are trapped in an ingenious cruel cage[13] where the idea of foregoing technical means of communication and interaction threatens them with isolation and social disadvantages[14]. Surveillance of any kind infringes on the principles of right to privacy, and the right to be left alone, especially surveillance by private bodies.

CLEARVIEW AI

Clearview AI ("**Clearview**") is an American technology company that uses facial recognition to purportedly help investigate crimes. The company has a database of billions of pictures of people scraped from a multitude of websites like social media networks, online journalism, etc. It claims to provide law enforcement agencies an access to this database for investigation of criminal prosecution.

The primary contention with Clearview's arbitrary profiling of people is the blatant infringement of the latter's right to privacy, right to personal security, and the right to be left alone. The application ("**App**") collects data belonging to all individuals indiscriminately. Impressively egalitarian in its approach, what the company does not take into account is that these people whose data is being scraped for no discernible purpose, are innocent individuals. These people are unknowingly, without their permission, under the surveillance of a private organisation who has no authority over the subject matter. The data processing beyond being non-consensual is also unethical and illegal.

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[9] Michel Foucault, Discipline and Punish, 201 (2nd ed., 1995).
[10] Ibid. 203.
[11] Ibid. 206.
[12] Ibid. 206.
[13] Ibid. 205.
[14] Christian Fuchs, Digital Labour and Karl Marx, 255 (2014).

The app's claim that it only shares data with law enforcement systems is as spurious as its data sharing procedure is unaccountable. A leaked client list reveals that the clientele of the impugned company, apart from including law enforcement agencies such as the FBI and Interpol, includes non-law enforcement outfits as well. Several companies like Walmart, Macy's, Busy Buy, the NBA, and college security departments have access to the technology.

To gather clientele, Clearview is not only providing access to these organizations or actual executive agencies but to individuals within these organizations without being in unison with the management of these organizations.

The global outbreak of a novel Coronavirus, SARS COV-n2 causing COVID-19, has led to industries around the world transitioning to teleworking, or work from home ("**WFH**") modes. Naturally, such a transition requires robust online platforms to accommodate such a shift. A host of online audio-visual, multi-party streaming platforms provided for digital offices, boardrooms, classrooms, and courtrooms.

THE CASE OF ZOOM

Of them, Zoom Video Communications with their platform, Zoom, rose to mainstream prominence. Espousing the versatility of their platform, Zoom promises effective remote working, education, hosting virtual events, and telehealth over its platform. However, in light of the astronomic rise of Zoom, its history and its future cannot be ignored.

Following its tremendous rise to notoriety, eagle-eyed Zoom users noticed certain lacunae in the platform's functioning, pertinently its privacy policy. Zoom, as a platform, is equipped with privacy-unfriendly features. For instance, meeting hosts may monitor participants' devices using the 'attendee attention tracking' feature.

"Hosts can see an indicator in the participant panel of a meeting or webinar if an attendee does not have Zoom Desktop Client or Mobile App in focus for more than 30 seconds while someone is sharing a screen. In focus means the user has the Zoom meeting view open and active", reports Zoom's Help Centre. This feature has since been removed.

Zoom also permits paid subscribers the option to record meetings. This allows for non-participant individuals to access the contents of meetings, alongside all chat messages sent during the meeting. Most pertinently, Zoom's original privacy policy ("**Old policy**") does not inspire faith. Under the subheading titled "Does Zoom sell Personal Data?", the policy states, verbatim "Depends on what you mean by "sell."""

The old policy explicitly clarifies that yes, Zoom does collect identifiable personal data, regardless of if the user has a Zoom account; from either the user themselves, or any other host, participant or caller. Furthermore, the old policy states that personal data is collected by third-parties as well, and that logging in using a third-party application allows access to personal data.

In addition to the aforementioned breaches, the old policy permits passive collection of data without the explicit permission of the user. The old policy admits to allowing the data collected to be used for targeted

advertisements. Subsequent to the rather cheeky "Depends what you mean by sell", the old policy states that "Standard Advertising Tools" are used to improve user experiences, i.e. "serving advertisements on our behalf across the Internet, serving personalized ads on our website, and providing analytics services". Shockingly, the old policy admits that their data use may constitute sale in some legal sense of the word, and that the same is permissible as that is the historical mode of operation of advertisements.

The old policy is silent on the matter of data sent to Facebook, yet the iOS app sends data to Facebook regardless of whether the user has a Facebook account. Data items, such as when the user opens the app, details on the user's device, such as the model, the time zone and city they are connecting from, which phone carrier they are using, and a unique advertiser identifier created by the user's device which companies can use to target a user with advertisements are sent to Facebook.

Reacting to the bad press about the platform, Zoom made "improvements to Facebook login". In addition, in the following 2 days, Zoom deleted the code ("**Facebook SDK**") that allowed Facebook to access data.

Zoom meetings do not have end-to-end encryption, in spite of contrary claims in its security white paper. Instead, Zoom employs transport encryption, which allows Zoom to access all contents of the meeting. Zoom has been accused of leaking personal information, including their email address and photo(s), due to issues in Zoom's company directory setting. The directory adds all users with similar email domains to a common company directory under the assumption that each email corresponds to an employee in a common company. However, thousands of Zoom users registered with their personal emails have had their data leaked due to this. Zoom claims that the company directory lists users in the same organisation, either using the same account or the same email domain.

Since then, on March 29, 2020, Zoom has updated their privacy policy ("**New policy**"), stating that the user's privacy is extremely important. The new policy explicitly mentions that [Zoom] do[es] not sell your personal data, store meetings unless requested to, only stores user data required for Zoom to function, and that data is not used for advertisement purposes, apart from cookies collected on visiting Zoom's marketing websites. The new policy contains a table demonstrating the types of data collected, and for what purpose.

Furthermore, Zoom deflects the liability for the controversial 'Attention Tracker' feature on the hosts of meetings. Finally, the new policy definitively answers the same question of "Does Zoom sell Personal Data?" with "**We do not sell your data.**" However, it maintains the same caveat of its data use being considered as 'Sale' under the supposedly broad ambits of statutes such as the CCPA, and that the definition is contrariwise to traditional advertisement practices.

THE FUTURE OF DATA PROTECTION

In light of its privacy conundrums, Zoom is under scrutiny by the office of New York's Attorney General, Letitia James. The office inquired about Zoom's security measures by letter on March 30, 2020.

As a consequence of its prima facie questionable conduct, Clearview is under fire. Technology giants the likes of Facebook have initiated litigation against Clearview. Google; its subsidiaries YouTube, Twitter, and Facebook have issued cease and desist notices against Clearview to cease data scraping. To that, the CEO of Clearview, Hoan Ton-That has claimed that Clearview has a First Amendment[15] right to collect data in the public domain.

GDPR limits the processing of personal data relating to criminal convictions and offences to official authorities. At present, the USA lacks a federal privacy law. Regardless, the authorities are taking action against Clearview's conduct. To that end, New Jersey has barred its police department from using Clearview and the Office of Attorney General of New Jersey, Gurbir Grewal sent Clearview a cease-and-desist letter as well, particularly disturbed by the company's collection and sale of children's facial recognition data[16]. Citizens of Illinois have also filed a class action lawsuit against Clearview, outraged at the collection of their biometric data without their permission.

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[15] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." US Constitution (1st Amendment).

[16] Kashmir Hill, New Jersey Bars Police From Using Clearview Facial Recognition App, The New York Times, (last accessed Apr 2, 2020).

PREDATORY PRICING AND NEED FOR ITS REVAMPMENT

*By Jaivish Harjai**

INTRODUCTION

The Competition Act, 2002 (hereinafter "Act") was enacted in India's pursuit for globalisation and liberalisation of the economy. It was passed to provide healthy economic development in the Indian market with the aim to protect the competition and prevent abuse of monopolisation.

With the advent of Information Technology and Venture Capital, the traditional norms of the market have been disrupted, which has led several antitrust scholars to question whether the long-established antitrust principles are relevant or desirable in dealing with giant ICT-based firms.[17] These firms are prone to offering huge discounts as compared to traditional retail markets. Such below cost pricing coupled with an intent to eliminate competitiors is termed as predatory pricing. Scholars recommend that predatory pricing by a dominant firm should be treated as presumptively illegal, subject to a few 'business justifications' including 'meeting the competition'. Interestingly, this approach has been enshrined in Section 4 of the Act, although the Competition Commission of India (CCI) has repeatedly rejected a definition of dominance based only on market shares.

CCI has, from time to time, defended its stance by stating that pricing can be called predatory only when it is done by a dominant enterprise with an intention to eliminate competition. This makes the market prone to such significant players who may not be dominant but have deep pockets to influence the market and act independently of other competitors. In recent times, it has become impossible or at least very difficult for a firm to be absolutely dominant in the market.

Many companies are involved in predatory behaviour and are spending huge amounts of money on discounts, sops etc. to destroy the competition which could otherwise have been spent on innovation and improvement. These practices restrict new players to enter the market as it creates huge entry barriers and lead to the destruction of small enterprises as they cannot offer astronomical discounts to consumers continuously. These companies often escape the CCI's radar as they are not dominant in their relevant market. Therefore, to achieve the goal of Competition policy, which is to protect competition and consumers, a new policy to determine predatory pricing is needed as the big conglomerates are exploiting the lacunae in the present law.

PREDATORY PRICING

Predatory pricing is pricing goods below the cost with an intention to eliminate the competition and recoup the losses in the future. A firm's freedom to price its goods cannot be challenged and that freedom has been recognised as an essential element of doing business. As per the antitrust laws, unless justified, selling a product by a dominant enterprise below the cost of production would be predatory pricing. However, no 'strait-jacket' formula can be laid down, and each case would depend on its facts and circumstances.

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[17] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017).

Further, pricing cannot be predatory just because the firm is pricing its products at a lower level. An investment in temporarily lower prices may be required to enter a market, to make more customers familiar with the product, or to meet the demands of competition. Nonetheless, when the firm is backed by huge investments and has the power to absorb all the losses incurred in order to eliminate competition, the competition regulator should not allow the firm to evade the sanctions merely because it is not dominant in the relevant market.

POSITION IN EU AND US

In *Brooke Group*[18], the US Supreme Court opined that 'unsuccessful predation is in general a boon to consumers', and laid down a stringent two-pronged test for identifying predatory pricing. The first condition to be satisfied was that the alleged predator's prices were below 'an appropriate measure of costs'. The court did not specify what measure would be appropriate, but later most courts employed the *Areeda-Turner test*, which takes Average Variable Cost (AVC) as the appropriate measure of cost to determine predatory pricing. The second condition laid down by the Supreme Court was a serious probability of recouping the money invested in below-cost prices.

On the other hand, the EU has not set such a high bar to to establish predatory pricing. In *AKZO Chemie*[19], the European Court of Justice (CJEU) held that while a price below AVC must always be regarded as abusive, even pricing above AVC may be abusive if the defendant had 'a plan to eliminate a competitor'. In *Tetra Pak*[20], the CJEU again held that additional proof of recoupment is not required to establish and penalise predatory pricing.

This position was firmly restated in 2009 in the *Wanadoo* case[21], in which the CJEU declared that the probability of recoupment is not a precondition for determining predatory pricing. Thus, the price-cost test of EU allows for prices above AVC to be regarded as abusive if they are coupled with predatory intent and the risk of elimination of competitors.

PREDATORY PRICING IN INDIA

CCI defines predatory pricing as a conduct, "*where a dominant undertaking incurs losses or foregoes profits in the short term, to foreclose its competitors.*"[22] The essence of predatory pricing is pricing below one's cost with the intention to eliminate the competitors or reduce competition.[23]

Under the Indian competition regime, dominance *per se* is not bad but its abuse is bad.[24] Section 4 of the Act prohibits abuse of dominance and to determine predatory pricing, which is one the five abuses mentioned in Section 4, *first*, it must be established that the enterprise is 'dominant' in the relevant market in India.[25] Therefore, to determine abuse under the Act it is imperative to determine whether the enterprise is in a

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[18] *Brooke Group Ltd v. Brown & Williamson Tobacco Corp*., 509 US 209 (1993).
[19] Case C-62/86, *AK AKZO Chemie v Commission of the European Communities*, 1991 E.C.R. 286.
[20] Case C-333/94, *P. Tetra Pak International SA v Commission of the European Communities, 1996 E.C.R. I-05951.*
[21] Case C-202/07, *P. France Télécom SA v Commission of the European Communities, 2009 E.C.R. 214.*
[22] *MCX Stock Exchange Ltd v. National Stock Exchange of India Ltd., DotEx International Ltd. and Omnesys Technologies Pvt. Ltd*, 2011 Comp LR 0129 (CCI).
[23] *In Re: Johnson & Johnson Ltd.*, Tax LR 1659 (1987).
[24] *Jupiter Gaming Solutions Pvt. Ltd. v. Government of Goa & Ors*, 2012 Comp LR 56 (CCI).
[25] *Fast Track Call Cab Pvt. Ltd. and Meru Travel Solutions Pvt. Ltd v. ANI Technologies Pvt. Ltd.*, 2017 Comp LR 667 (CCI).

dominant position or not. Further, s 19(4) of the Act specifies certain factors to assess whether an enterprise can be held to be 'dominant', which includes market share, resources, enterprise's economic power, and share of competitors and entry barriers.

Moreover, in determining whether the conduct is predatory, the question of intent is relevant to the offence of monopolization[26] and a mere offer of a price lower than the cost could not automatically lead to an indictment of predatory pricing.[27] In the absence of a plausible motive to engage in predatory pricing, predator charge cannot be sustained.[28]

Therefore, for the prices to be predatory, they must not merely be aggressively low, but actually below the seller's cost. Commission prescribes a two-stage test resembling the Joskow-Klevorik test, which first assesses the market structure to determine whether a monopoly position attained by successful predation can be sustained, and then compare prices with costs.[29] The Commission generally looks at the 'average variable cost' as a proxy for marginal cost to assess whether a firm is selling below cost.[30]

Furthermore, in MCX-NSE case[31] CCI laid down a two-prong test for predatory pricing similar to the one in US Law. The two-prong test of recoupment and driving competitors out of the market, or having the intention to do so is necessary to determine predatory pricing in India. Interestingly, the Act does not prescribe for the test of recoupment to determine the predatory pricing. However, when dominance is established, this normally means that entry barriers are sufficiently high to presume the possibility to recoup.[32]

The problem with predatory pricing is that the consumers may benefit from the lower prices in the short term but in the longer term they will be worse off due to weakened competition resulting in higher prices, reduced quality and less choice.[33] Interestingly, the CJEU in Tetra Pak observed that: *"it must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated...The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors".*[34] This philosophy is also enshrined in Section 18 of the Act according to which the commission is duty-bound to eliminate such practices which lead to or may lead to elimination of competition. Therefore, the CCI should take cognisance when there is an apprehension of the elimination due to predatory pricing without waiting for a firm to become dominant in the relevant market.

In present times, it is very difficult for a firm to be absolutely dominant in a relevant market and the CCI's constant refusal to accept the concept of collective dominance has further lead to firms indulging in pricing below one's cost with intent to eliminate competition. The competition amongst competitors has shifted to

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[26] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985).
[27] *Re: Modern Food Industries (India) Ltd.*, 3 Comp LJ 154 (1996).
[28] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 US 574 (1986).
[29] A. Bhattacharjea, *Predatory Pricing in Platform Competition: Economic Theory and Indian Cases*, *in* MULTI-DIMENSIONAL APPROACHES TOWARDS NEW TECHNOLOGY 211, 216 (A. Bharadwaj et al. eds., 2018).
[30] Regulation 3, The Competition Commission of India (Determination of Cost of Production) Regulations (2009).
[31] MCX, supra note 7.
[32] EC Commission. "Tetra Pak II", EC Commission Decision, 72 O. J. L. 1 (1992).
[33] OECD, Policy Roundtables on Predatory Foreclosure, 14 DAF/COMP 231 (2005).
[34] Tetra, supra note 5.

"capital" and the firm which can absorb maximum losses and offer huge discounts survives in the market. This strategy might sound like it is in the consumer's interest but ultimately hampers competition in the long run.

CAPITAL AS A MEASURE OF DOMINANCE

Predatory pricing can drive undertakings out of the markets which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources are incapable of withstanding competition waged against them.[35] Vast amounts of capital, which could otherwise be utilised for innovation and development is being systematically burned to give discounts with a view to eliminate competition. It is often believed that 'firms operating in many markets can devastate their rivals through their potentially infinite capital resources'.

The Raghavan Committee (2000) clarified that the law cannot presume that possession of capital will always lead to harmful pricing practices. Access to greater capital resources should therefore not in itself be the basis for concluding that a firm's practices are 'unfair' *vis-a-vis* its competitors. Recently, the CCI in Bharti Airtel v. Reliance Industries Ltd (Reliance Jio Case) held that mere investments cannot be regarded as leverage of a dominant position. It also noted that if such investment is declared as anti-competitive, the same would deter entry and expansion and limit the growth of markets. Also, in Fast Track Call Cab v. ANI Technologies, the CCI observed that it was the penetrative pricing policy of OLA and Uber which helped them gain substantial market shares in such a short span, however, the CCI could not delve into the legitimacy of pricing due to statuory compulsion of non-intervention when the eneterprise is not dominant.

However, the commission should not ignore company's investments in giving up of profits which leads to elimination of small competitors and prevents firms from entering the relevant market as these practices create very large entry barriers. Therefore, it is high time that the CCI should start considering factors like the ability to acquire capital through venture funds, or deep pockets, or value of the parent company and its ability to absorb losses *vis-a-vis* its competitors while determining the dominance of company under the residuary clause of s 19(4) which gives the commission the power to take into account any other factor it deems fit.

A NEW AGE OF DEEP DISCOUNTING

Capital as a competitive weapon gives rise to concerns that the market may eventually tip in the favour of the player that may not necessarily have the most innovative product or service, but one that succeeds in obtaining more capital and enticing more users in its early days, using subsidies.

In the Reliance Jio case, the CCI noted that providing free services cannot by itself raise competition concerns unless the same is offered by a dominant enterprise and shown to be tainted with an anti-competitive objective of eliminating competition. As Jio was not dominant in the relevant market, it escaped liability and has been successful in eliminating the competitors in the Indian telecom industry. Before the advent of Jio, there were more than 5-6 major telecom players which have now been reduced to three. Jio, which initially offered its

[35] AKZO, supra note 4.

services at a 'zero' price, has acquired a substantial market share by eliminating other competitors. Moreover, Jio now charges its substantial subscriber base a fee in the name of IUC (Interconnect Usage Charge) for all the calls to competitors, thus encouraging its users to use Jio only which is harmful to the competition.

Since the definition of predatory pricing is linked to the action of dominant player and deep discounts are not considered anti-competitive *per se,* Reliance Jio escaped the liability of antitrust regulations, even after disrupting the market.

Deep discounts have created a new class of concerns about predatory pricing, with unprecedented negative profit margins on a sustained basis, being supported by equity capital infusions. In the short run, discounts are popular, but recoupment is inevitable and market power will adversely affect consumers in the future.[36]

Many online businesses have resorted to practices like cash-back offers, deep discounting and other sops designed to draw new users and establish the network effect. Sometimes, huge losses have been sustained for years on end. In a world where there have been huge technological advancements in recent times and there are no boundaries left for markets, there is an urgent need for a regulatory mechanism which monitors e-commerce sales as they take on retail business.

CONCLUSION

The scale of the discounting practices, and the sustained periods for which they are continued, has created new barriers to competition. It is difficult to rationalise these sustained losses as being an introductory offer by a new player. Rather, these practices appear to be a systematic competitive strategy. This is visible from the trend in the telecom sector in which Jio, because of its parent company, disrupted the pricing and forced competitors to merge or to leave the market and simultaneously earned substantial market shares, thereby successfully recouping those losses by charging extra from its subscriber base. Jio did not come under the radar of the antitrust regulations because it was not in a 'dominant position' to cause harm to the competition. However, the present situation shows that harm has already been done as consumers are left with fewer choices and increasing prices.

The CCI should reconsider its policy of determination of dominance by taking a holistic view of the market by including funding status, global developments, network expansion strategies and associated discounts. Moreover, Section 19(4) of the Act which specifies criteria to determine dominance also happens to include a residuary clause. According to Section 19(4)(m), the CCI can inquire into any other factor which is necessary for the determination of the dominant position. Therefore, the CCI should also take cognisance of factors like financial status and funding from venture capital while determining dominance.

The purpose of competition policy is to avoid situations where a few firms have market power, and new players are not able to enter. Society gains when firms obtain profits and valuation through innovation, not through the smart use of financial capital to kick off network effects. Online markets in India have many examples where

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[36] Smriti Parsheera, Ajay Shah, and Avirup Bose, *Competition Issues in India's Online Economy*, NIPFP Working Paper No. 194 (2017).

players with access to significant capital resources are resorting to deep discounting tactics to derive the long-term benefits of scale and network effects. In many cases like those of PayTM and Zomato, these practices have formed an essential part of their business model which have made cashbacks their sole way of attracting consumers.[37] Therefore, it is high time to formulate a new policy for e-commerce companies and increase the ambit of dominance under the act to punish predatory pricing and regulate these discounting practices.

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[37] Ibid.

VIRTUAL MEETINGS OF THE COMPANIES: MCA'S REACTION TO COVID 19

By Vinayak Nawal and Ayush Dwivedi***

INTRODUCTION

These difficult times where COVID-19 has forced us to be in lockdown has impaired the functioning of various companies. Various important matters about the company which require the physical presence of the shareholders in a meeting are improbable in the current scenario considering the fatal consequences and following social distancing norms to protect oneself from endangering his/her life. To prevent such a setback in the corporate sector, the key objective to accomplish is the smooth functioning of the companies. To facilitate companies, the Ministry of Corporate Affairs has issued Circular no. 14/2020 on April 8, 2020, allowing companies to convene their meetings via Video Conferencing (VC) or Other Audio-Visual Methods (OAVM). The decisions or resolutions can be taken through simple voting or electronic voting. Such relaxation is prescribed until June 30, 2020.

These circulars are considered a remarkable alternative to alleviate the current problem. It should be noted that The Companies Act, 2013, which provides provisions to govern the companies' structuring and its functioning, has no provisions regarding the virtual meeting of shareholders of the company. The MCA has requested the companies to hold meetings virtually and henceforth the resolutions and decisions of the company should be taken through electronic voting or postal ballot in pursuance of Section 110 of The Companies Act, 2013[38] and the Rule 20 of the Companies (Management and Administration) Rules, 2014,[39] as well as the provisions of the current circular. One of the major highlights of this circular is that such relaxations are provided for meetings of urgent nature, that is Extraordinary General Meeting (EGM), which creates a dilemma as to what constitutes as urgent. MCA has tried to give some insights as to what constitutes urgent; decisions on fundraising or restructuring of the company where approval of the shareholders is necessary are considered urgent. Further, MCA tried to address the issue which involves companies lacking the infrastructure to enable virtual meeting and electronic voting facility.

SUMMARY OF PROCEDURE UNDER THE CIRCULAR

The guidelines provided under categories A (companies which are required to provide e-voting facility) and B (companies which do not require to provide e-voting facility) have been outlined below:

1. The notification of the meeting must incorporate a statement saying that the EGM has been organized as per the Act and provisions of the General circular no 14/2020. In times where physical dispatch of financial statements of the company is not possible, emails must be sent to the respective shareholders. Before sending such emails, a public notice such as an advertisement must be published in a vernacular newspaper of that district where the company has been registered. It should contain the following information:
    i. Date and time of the General Meeting conducted through VC or OAVM.
    ii. Availability of the statement and notices on the company's website and other necessary information that is required to be in the notice of the shareholders.

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[38] The Companies Act, 2013, S.110

[39] The Companies (Management and Administration) Rules, S.20

2. The meeting can be conducted through Video Conferencing or other audio-visual means (OAVM).
3. While deciding the time for EGM, the company must take into consideration the time zone differences of all directors and shareholders.
4. For an EGM held through OAVM or VC, a recorded transcript must be kept in safe custody. In case of a public company, it must be published on the company's website.
5. If the number of shareholders present in the meeting is not more than fifty, the Chairman shall be appointed in pursuance of section 104 of The Companies Act, 2013, otherwise through an electronic voting facility.
6. According to section 105 of the Act, a proxy is allowed to be appointed on behalf of the member who cannot attend personally, but since there is no physical meeting, no proxies need to be appointed. However, as per section 112 and 113 of the Act, representatives will be allowed to poll when the members, due to some reasonable reason, are not able to attend the meeting.
7. The quorum shall be recognized and the attendance shall be counted for the purpose of quorum under section 103 of the Act.
8. All resolutions passed in consonance with this mechanism must be filed with the Registrar of Companies within sixty days of the meeting.

- The guidelines which are different for companies under category A and B are:

CATEGORY A	CATEGORY B
The facility allowing the members to attend the meeting by way of VC or OAVM must have the capacity for 1000 members on a first-come, first-served (FCFS) basis. However, large shareholders and auditors should not be limited on the first-come, first-served basis. Hence, exceptions must be made for large shareholders, promoters, Auditors, Directors, and key managerial personnel	The facility allowing the members to attend the meeting by way of VC or OAVM must have the capacity for 500 members, or members equal to the total number of members on a first-come, first-served (FCFS) basis. Exceptions must be made for large shareholders, promoters, Auditors, Directors, and key managerial personnel.
At least one auditor and an independent director or his authorized representative must attend the meeting.	There is no provision of this nature.
The facility of remote e-voting must be provided before the decided date of the meeting.	While sending the notice of the meeting, a designated email must be assigned to all members. This email address is required be used for taking a poll. The company has the responsibility to maintain the secrecy of the email and password.

The MCA in its circular no. 14/2020 had permitted the show of hands for voting. However, in its later circular, the MCA has set the responsibility on the Chairman to ensure that the e-voting facility is made available during the meeting.	For voting, the members must send the email to the designated email address at the time of sending the notice. The members are required to vote from their registered email address. If the members are less than fifty, then the Chairman can allow the drill of show of hands to seek votes.

CONCLUSION

The major highlight of the circular is that it only gives relaxation for virtual meetings which are unavoidable, that is Extraordinary General Meetings. The guidelines provided by the Ministry of Corporate Affairs give a very dicey impression since the insights provided for what constitutes urgent are not clearly answered. It has been deduced that meetings held by reasonable justification must be held. Every company deals with different issues that are unavoidable for their functioning and are important financial steps. Various instances can be carved out such as, if a company faces financial distress, a meeting held to increase funds could be seen as unavoidable. There are various issues that are given different precedence in different companies. Some key issues are the appointment/replacement of a chairman, structuring of a company, disclosure of dividends and auditor's report, etc. Each issue has different significance for different companies considering the company's goals and objectives. Thus, it is very important to clear the air of dilemma occurring due to this provision of the circular. The relaxations that are provided need to be looked at again in order to ease the situation in these COVID times.

After going through the various provisions outlaid under the circular, we examine that it is high time that the laws must be evolved to keep pace with the changing time, with provisions for a more permanent situation rather than temporary. Reliance upon technological advancements can be very useful to counter the COVID situation as well as restructuring the provisions of The Companies Act, 2013. Further, this concept of virtual meetings is not new to the Indian corporate sector. The Green Initiative brought in by the Ministry of Corporate Affairs which allowed paperless submissions, is of the similar pattern. It eventually benefits the company as well as its shareholders because of increased participation, minimization of the cost of setting up physical meetings, and enabling global connection. These benefits can only be availed if shareholders' interest in the company is very well-prioritized which needs activation of safety measures to protect them from cyber theft and making them aware of the technological advancements that have become quintessential for the smooth functioning of the board meetings. Further, Section 118 of The Companies Act, 2013[40] specifies that there must be a record of the minutes of the meetings and this can efficiently be achieved by introducing technological advancement in the corporate sector.

SUGGESTIONS

[40] The Companies Act, 2013, S.118

The government or the Ministry of Corporate Affairs should now examine the result of this brief arrangement and ought to consider promulgating permanent provisions of similar nature to the corporate sector. This must be done since this is inevitable. The headway in technology and its advantages of being cost-effective and efficient has driven the entire world on its way toward development.

The administration can form an umbrella setup where the Information Technology Act, 2000 as well as The Companies Act, 2013 can be brought in to achieve the primary objective of protecting the interests of the shareholders in pursuance to Section 43 and 66 of the IT Act, 2000 that penalizes hacking, data theft, damaging computer network, etc.[41] Furthermore, The Green Initiative in the corporate governance was applied after considering Sections 2,4,5 and 81 of the Information Technology Act, 2000 for the legal validity of the 'paperless compliances' under The Companies Act, 1956. Thus, it's a perfect example of both the acts being enforced in consonance. It is important to note that if the General Meeting of the company goes virtual, strict measures are very much required. This gives an opportunity to the lawmakers to formulate provisions under both The Companies Act and the I.T. Act that ensure the safety and effectiveness of the process.

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[41] The Information Technology Act, 2000, S.

APPLICATION OF ARTIFICIAL INTELLIGENCE FOR LAW ENFORCEMENT AND CHALLENGES AHEAD

*By Ranish Alia**

INTRODUCTION

The application of Artificial Intelligence (hereinafter, 'AI') can already be witnessed in various sectors like banking, healthcare, trade, etc. and it is steadily expanding into the field of law. The most recent application of AI in law is its use by legal-technology startup companies which use machine-learning to automate and restructure their work. Many firms have replaced attorneys with AI to provide alternate legal services.

AI, in simple terms, can be defined as "*a set of technologies that enable computers to perceive, learn, reason, and assist in decision-making to solve problems in ways that are similar to what people do*." Application of AI in law includes the ability of machines to compute or calculate to make laws that are more available, feasible, perceivable, and understandable to the public at large. It is pertinent to note that the application of AI in law has been continuously departing from knowledge-based representation approaches and is shifting towards machine learning-based approaches. This evolution has its origin in the 1600s, when *Gottfried Leibniz* proposed similar views.

The quintessential goal of the law is to preserve freedom and moral agency, which includes precluding and solving crimes so as to provide a jurisdiction with a secure and stable environment. For the attainment of such an objective, AI can be a vital actor for the enforcement of the law. One of the examples of AI and law enforcement can be facial recognition and image enhancement technology, both of which are widely used in many countries in order to identify criminals in public places and to assist in finding missing persons.

In order to better understand the impact of the application of AI in law enforcement, it is pertinent to conceptually divide it into three categories of users: 'those who make the law'; 'legal professionals' and 'those who are governed by these laws'.

2. *Administers of law*

Administers of law include the people who create and apply the law i.e. the government, policy makers, legislators, judges, and the police. AI can be used by government officials and policymakers for the formulation of policies or any substantive laws. These officials can use automated computer assessments or cognitive technologies to analyse the benefits of any policy, and to understand whether or not it should be implemented. AI can also be used by judges for risk analysis of escape or repeat of offense by the defendant/offender. Though the decision is not taken by the AI, it may influence the judges to an extent to form a bias. A predictive justice software was used in the Court of Appeals of Rennes and Douai of France in 2017.

One of the primary enforcers of the law is the police and currently, the police can use AI in a two-fold manner. The first being predictive policing, i.e., the use of machine-learning technology to detect patterns from past

crimes to try and detect future attempts of potential criminal activity. And secondly, facial recognition technology which allows the police to scan crowds to find an offender or a missing individual.

3. *Legal Professionals*

This category primarily includes attorneys, who use AI for performing multiple tasks like client counselling, contract drafting, and pursuing litigation. The use by legal practitioners can be fully or partially automated and can be done in three ways: (a) *Electronic discovery,* i.e., *predictive coding*; (b) *technology-assisted review* and; (c) prediction of the legal outcomes of litigation. Predictive coding is a document-review technique which discerns whether or not a discovery document is appropriate for their case.[42] Such technology-assisted review can also be used to review documents like contracts of mergers and due diligence. It can also inculcate in itself legal research facilities, assisted by an AI, for lawyers to form and make their case strong. Prediction by an automated system can help an advocate analyse a case and bring out a stronger case for their client. These technologies make the job of lawyers efficient, less tedious, and help in better law enforcement by assisting them in heavy tasks such as due diligence.

4. *Populace*

Populace is the people who are governed by the laws of a state. The populace of a country includes but is not limited to companies, individuals, and organisations. Companies and organisations use business-logic policy (also called 'domain logic') systems to comply with the law. AI is also used in the form of computable contracts, which are contracts expressed in electronic form and then translated to a computer-understandable form.

ENFORCEMENT ISSUES

Despite its widespread use, AI is not untainted and comes with its own set of flaws and limitations. Some of which include:

Biasness and fairness

One of the major concerns with the use of AI is the potential for biases within the system. Such biases may arise in two ways – by '*the AI itself*' and by '*humans swayed by an AI*'.

In order to allow machine-learning to make decisions for people, it is important to ensure that such decisions do not affect the freedom and liberty granted to people. This becomes pertinent in light of the fact that despite algorithmic decisions being governed by principles of law, machines may learn from previous data and subtly apply biases to a certain group of people.

Additionally, since AI is believed to be more meticulous, fair, and neutral, it may cause officials to repeat any mistakes which may have been made by the AI, in rendering their decisions. An example of such bias can be predictive analysis used by judges and police.

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[42] Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns,* 64 S.C.L. Rev. 633, 667-668 (2013).

The Black Box Problem

Transparency is a prerequisite of justice and legitimacy and a failure to understand an AI's decision-making process would result in the failure of the entire legal system. This is known as the Black box (hereinafter, 'BB') effect and it raises the question of transparency of an AI since the outcomes presented by the AI seem to be without any justifications or reasons. A number of reports have shown that facial recognition systems produce false-positive results in 20 to 34% of cases. Therefore, there has been a hesitation to use AI for governmental tasks.[43]

There are two kinds of BBs – the strong BBs and the weak BBs. Where the strong BBs make it impossible to analyse how an AI reached its decision, the decision-making process of a weak BB can be traced back by reverse engineering. With the rise of strong BBs, maintaining legitimacy and transparency in the legal systems may become completely impossible.

Legal Epistemological Issue

Legal Epistemology is a branch of philosophy of law which analyses the process of legal knowledge and legal thinking from cognitive, epistemological, ethical, methodological, and various other dominions. It seeks to understand how knowledge of law may be arranged.

Rule of law is dynamic in nature and a miniscule change in a situation can lead to a varied interpretation of the law. Therefore, it is important to have logical, intuitive, and rational thinking to interpret the law for its enforcement. The law enforcement process is deductive and is based on syllogistic conclusions.[44] Therefore, the contextualization of the principle of laws becomes pertinent for the enforcement of the law.[45] However, still being in the era of narrow AI, it is currently not possible to program the conceptualised intellectual procedure.

One of the major issues to be addressed before using AI to automate law enforcement systems is whether AI can inspect a situation in a holistic way, keeping in mind the general norms of society. This issue sits at the core of AI in law enforcement and needs to be addressed in order to make AI functional in society.

CONCLUDING REMARKS

The automation of computers has been of great significance and is more notable when it is attached to public administration and law enforcement. It cannot be denied that the introduction of such technologies in this field will increase their effectiveness.

Despite its effectiveness, AI has its limitations and it is not great with conceptualization, transferring knowledge of one activity to another, and handling open-ended tasks. The tasks that AI can currently handle are usually structured in nature and leave no place for subjectivity. Though AI can be considered one of the most neutral mechanisms for the enforcement of law, but the lack of emotional intelligence may lead to wrong inferences.

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[43] M. Kaminski, *Binary Governance: Lessons from the GDPR's approach to Algorithmic Accountability*, 92 S. Cal. L. Rev. 1529 (2019).
[44] Alexey I. Ovchinnikov, Alexey Yu. Mamychev, Tatiana S. Yatsenko, Artur Kravchenko & Yuri A. Kolesnikov, *Artificial Intelligence in Enforcement: Epistemological Analysis*, 13 J. Pol. & L. 75, 77 (2020).
[45] *Id.* at 79.

Therefore, it would not be wrong to infer that digitalization in law enforcement can be auxiliary in nature and cannot gain primary importance. Similarly, the administrative functions of AI cannot go par with the ethical, moral, and spiritual aspects.

Keeping in mind this discussion, it is important to be able to strike a balance between the potential of AI and the aspects of accountability, ethics, fairness, morality, and transparency while being able to overcome biases. If a balance is found, AI can enhance the functioning of the aforementioned bodies and can help in achieving the goal of the law.

Notably, we still are in the era of narrow intelligence and we still believe that AI will become far more developed and enhanced and we can hope that the future AIs would have this sense of subjectivity and conceptualization that is primarily needed in the law enforcement system.

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COVID-19: INDIA'S LICENSE FOR POLICE BRUTALITY?

*By Nilanjana Sarkar**

ABSTRACT

Our country is not alone in facing the brunt of police brutality and yet the horror isn't any easier for us. Police brutality is one of the oldest and most rampant evils prevalent in our society. Interestingly, with the advent of the COVID-19 crisis, this problem has multiplied and for all the wrong reasons. In light of the present circumstances, the police need to be reminded that their uniform is meant to "protect" us and not "punish" us. This article offers an insight into the history of police brutality in our country in the last decade along with describing the laws that address this problem, although not exclusively. The paper looks back at some infamous cases of police brutality during the pandemic and why there has been an increase in the same. Finally, the article is concluded with a few suggestions to help combat police brutality. All the blogs, websites and news articles that have been imperative to the study have been duly acknowledged.

INTRODUCTION

"Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars."

– Martin Luther King, Jr.

One of the earliest haunting memories of police brutality dates back to April 13, 1919, when the entire country was rattled by the cold-blooded butchering of innocent unarmed citizens by British troops at Jallianwala Bagh, Amritsar. A massacre that happened more than a century ago still manages to send shudders down one's spine. Although no more as lawless and uncivilized as they used to be, our police force still grapples with earning the reliance of their countrymen and rightly so.

In 2011, India's lionhearted tribal school teacher-turned-human rights activist Soni Sori was picked up by the Delhi Police from her abode at Chhattisgarh after she was accused of having connections with the Maoists. During her time at the prison, the Police didn't just torture, but also sexually assaulted her in some of the most despicable ways imaginable. Moving on, on December 15, 2019, the homely campus of Delhi's Jamia Millia Islamia University was viciously perpetrated and vanquished by paramilitary forces to put a stop to the student-led protests against the CAA and the NRC. Democracy cried as the Police wreaked havoc by sabotaging campus property and ambushing students with batons, tear gas, and rubber bullets. On February 23, 2020, in the midst of the North-eastern Delhi riots, five men, including the late 24-year-old Faizan of Kardam Puri, were seen being constantly nudged by the Police to sing "*Jana Gana Mana*" and "*Vande Mataram*" as they lay on the ground, fraught with injuries.

These were just a few examples of police brutality in the last decade. However, as many as 427 people breathed their last in police custody between 2016 and 2018, with 2017 accounting for 146 of these deaths. And these are just the cases that were reported. In India, it's no secret that major offences conveniently go unreported on a

daily basis. The statement by Martin Luther King Jr. remains oddly relevant to this day as he rightly pointed out that these are dark times that need no stirring. But the question of the hour is, what if these dark times were incited by none other than those who were meant to guide us out of the darkness? The police are here to protect us, or so we believe. But what happens if they do not just fail, but refuse to protect us? What are the ultimate legal implications of police brutality?

LAWS WITH REGARDS TO POLICE BRUTALITY IN INDIA

Police brutality is a glaring reality in our society today. Nevertheless, it's still a crime and needs to be condemned from the moment it happens. Just because the police have been entrusted with the power to maintain law and order in the State, doesn't mean that they are exempted from the repercussions of violating basic human rights of people.

Section 166 of the Indian Penal Code, 1860 prescribes the penalty for a public servant who deliberately contravenes the law and indulges in professional misconduct with an intention to cause injury to a person, or with the knowledge that such misconduct would most likely cause injury to a person. Such unprofessionalism can attract maximum imprisonment of one year, or fine, or both. When police brutality is used without excuse, it's a blatant abuse of power which makes the police officer answerable under this section before a court of law.

However, Section 166 can be invoked only with the sanction of the respective Government authority, as provided u/s 132 of the Code of Criminal Procedure, 1973 (CrPC). This is because the police have been inherently empowered to use absolute force wherever they feel necessary. Section 129(2) of CrPC allows the police to use physical force to disperse an unlawful assembly or punish them according to the law if the members of such assembly refuse to obey the commands for such dispersion. Sections 130 and 131 make the use of such force legal for the armed forces as well. However, according to Section 130(3), only so much force should be used as is absolutely necessary to disperse the assembly and arrest or detain the concerned offenders. Anything more than that would be in violation of human rights. The same spirit has been reinforced u/s 46 of CrPC as well.

As it turns out, judicial activism has played quite an important role in developing the law to deal with this dire version of human rights violation, where a handful of legal provisions were ultimately not enough. Although there had been cases of police brutality before, it was in the historic case of *Nilabati Behera vs. State of Orissa*[46] that the Supreme Court solidified the principle of ordering compensation for the violation of human rights owing to police brutality. The Court clearly stated that the principle of sovereign immunity would not apply in the case of unnecessary police violence. Further on, in the case of *Sube Singh v. State of Haryana*[47], the Supreme Court clarified that such compensation would be awarded only if the evidence was "clear and incontrovertible", and not dubious and disputable.

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[46] Smt. Nilabati Behera Alias Lalit Behera v State of Orissa and Ors., SCR (2) 581 (1993).
[47] Sube Singh v State of Haryana and Ors., 3 SCC 178 (2006).

However, as settled through precedents, in order to invoke procedural protection under CrPC, the police officer accused must show that the alleged criminal act was obligatory under the given circumstances for the performance of his duties as the police. Meanwhile, it is pertinent to note that the Supreme Court has never considered the violation of fundamental rights as a necessity for the performance of official duties.

POLICE BRUTALITY DURING THE PANDEMIC

It would be safe to say that till the end of last year nobody could have foreseen or even imagined the kind of predicament that has befallen us today. Although China did alert the World Health Organisation on December 31, 2019, about the increasing outreach of this unwonted pneumonia, it wasn't until the first COVID-19 case was reported back on January 30 this year in Kerala that we started to comprehend the gravity of the situation.

It was on March 25 this year that a substantially prolonged nation-wide lockdown was imposed by the Government of India. Except for essential services, all other forms of business would cease to operate for the time being. No matter how imperative it may have been to our survival, not every person, especially those of limited means, was prepared for what was to come. People would still leave their house and wander the streets, sometimes because they didn't have another choice and sometimes because they hadn't yet grasped the seriousness of the pandemic. This is where the police were expected to play a vital role. In the backdrop of looming death, the police had to do the needful. It was their duty to supervise the streets and see that the needs of the people were being met as adequately as possible and with minimum exposure.

However, in more than one instance, the police decided to take justice in their own hands. The already glaring problem of police brutality saw a perilous growth in light of the present circumstances. Numerous photos and videos surfaced where the police were seen *lathi*-charging at helpless people and vandalising vegetable vans for being out on the streets, not caring in the least about their reasons. Sometimes, this vandalism would assume enormous proportions. It was on March 26 that Sonu Shah, an essential service provider was shot by the local police. A pickup truck driver at Patna, Sonu Shah's only mistake was his financial infirmity which made him leave his house during the lockdown to sell potatoes. But that wasn't the only mistake. Instead of helping his situation, the police decided it would be funny if they asked him for a bribe in exchange for sparing him an arrest. When Shah refused to comply, he was shot in the leg in broad daylight.

Moving on, three Adivasi women were seen being physically abused by a policeman in Golaghat, a district in the east of Assam, on March 30. These women were stopped, beaten and humiliated by the policeman for being out during the lockdown, carrying vegetables on their bicycle. Another bone-chilling incident occurred on April 18 when Mohammed Rizwan in his late teens succumbed to the injuries inflicted on him by the police for leaving his house to buy biscuits.

Consequently, fruit sellers and vegetable vendors were not the only ones at the end of the baton. By the morning of June 23, the father-son duo Jayaram and Fenix succumbed to their injuries at the Kovilpatti Government Hospital, Tamil Nadu. They had suffered fatal injuries at the hands of the police for opening their

mobile shop during the permitted hours. As reportedly stated by Jayaram's daughter, the police had stripped the duo naked and crushed their bones and genitals by whacking them with batons.

Even journalists and migrant workers had to face the wrath of this injustice. Despite being classified as essential service providers, journalists in Hyderabad and Delhi would be stopped, interrogated and abused by the police for stepping out of their houses. On March 23, *Aaj Tak* journalist Navin Kumar was threatened, tortured, and manhandled by the police on his way to his office at the Noida Film City. The same day, another journalist in Hyderabad, Ravi Reddy, who worked for *The Hindu*, was reportedly attacked by the police on his way home at night.

These are times when nobody knows for sure how long they are going to have to stay put. Thus, nothing could be more natural than the tendency to go home and be with one's family until everything falls back in place. However, the migrant workers are some of the worst affected in this pandemic. Myriad videos have been surfacing to reveal the wretched condition of the migrant workers, where we can see how the workers are often stranded in the middle of nowhere with no public transportation to take them home. One such video displayed how a few migrant workers were driven away by the police for breaking the curfew in the city. These workers ended up going without food and money for three days.

REASONS FOR THE INCREASE IN POLICE BRUTALITY

One wouldn't be wrong to wonder why, after all, are the occurrences of police brutality increasing in the midst of a pandemic? What is it that makes the police so confident in their gruesome approach towards their own countrymen who they had vowed to protect? Let's look at the two most significant reasons why police brutality is getting more rampant by the day.

- **Role as "Punisher"** – According to a recent study on the status of policing in our country, instead of thinking of themselves as the protector of their countrymen, the police tend to take on the role of the "punisher". This perception was especially dominant amongst the police of Karnataka, Chhattisgarh, Nagaland, and Bihar, amongst others. These states were also found to be more prone towards seeking extra-judicial methods to tackle the accused. On the other hand, such a tendency was almost absent in police personnel in the States of Orissa, West Bengal, Punjab and Kerala. These states were found to believe that a legal trial should never be compromised for instant justice.

This speaks a good deal about why police brutality has seen a rise in recent months. What could give a stronger boost to this "punisher" personality of the police than a fatal pandemic? While some of them are investing their time and resources to help the financially deficient sections of the society get through these dark times, a large section of the police has taken it upon themselves to satiate their bloodthirsty tendencies by "punishing" whoever goes astray.

- **Public Approval** – The same report has revealed that the attitude of the police is further fuelled by the positive response from people. About 78% of the people who were surveyed were of the opinion that

police violence towards criminals is justified. Similarly, almost 85% of people supported the use of police violence to extract confessions from criminals. Interestingly, it was also revealed that the more educated a person was, the more likely he was to reinforce violence against criminals.

This is perhaps an even bigger reason behind the increasing tendency of police brutality during the pandemic. There is a not-so-little difference between being a graduate and being educated for real. A truly educated mind would understand how instant justice is a threat to justice at length. More often than not, it's a platter of injustice that's served to us under the shroud of instant justice. In light of the COVID-19 crisis, graduates with a roof over their head quite conveniently overlook the struggles of a less privileged person. The economic constraints of a person compel them to open their shops and continue with their labour despite all the risk. It's as much a threat to them as it is to the people around them. But more often than not, they lack a second choice. However, not everyone who goes out during the pandemic is trying to fill their stomach. Sometimes, it's parents who have run out of medical supplies, or just innocent young people who need a change of air. These people deserve to be helped, advised and understood, not beaten with batons.

CONCLUSION

Not only do we need a stricter implementation of our criminal laws, but also some well charted-out directions against the use of brutal force for the police to follow. Although Section 46 of the CrPC makes it illegal to use any additional force to arrest a person that what is absolutely necessary, ancillary provisions to deal with specific scenarios of police brutality should also be added. The laws should be such that the police stop considering themselves to be above the law and start viewing themselves as the "protector" and not the "punisher".

In *Ramlila Maidan Incident v. Home Secretary, Union of India (2012)*, the Supreme Court duly considered all the photographs and footage verifying the brutal treatment meted out to an individual by the police. The Court quite distinctly proclaimed that under no circumstances, procedures, or standing orders, are such actions justified. They pointed out the indisputable existence of a criminal element in such actions, which should render the perpetrator liable, irrespective of his rank.

It is high time for our justice system to recall the observations of the Supreme Court made in the aforementioned case and imbibe the spirit of such observations in the present day. The COVID crisis is here to stay, at least for another year. The lockdown may be implemented in intervals. This allows police brutality plenty of room to worsen. However, a sturdy legal framework and an even sturdier judiciary should help us combat this quandary like never before.

** Currently a second-year law student at the Department of Law, Burdwan University, I constantly endeavour to widen my horizons and gain as much insight of the legal arena as possible. I intend to explore the various facets of the legal framework of our country and expose the loopholes that are holding us back as a society.*

THE INFRUCTUOUS NATURE OF ANTI DEFECTION LAW

*By Piyush Kaushal Singh**

The recent fiasco in the Rajasthan State Assembly has established how defection in Indian politics has become an anathema among the masses but still professed rigorously by some rapacious or perhaps disenchanted politicians. However, the real problem is not with its mischievous invocations but an oblivious attitude by the ruling dispensation and judiciary. The pattern evolved to subvert the applicability of Anti Defection law is axiomatic. Therefore, it seems paramount to take actions but not in a form of punishment, instead of by mending and fixing the lacuna of existing laws.

Moreover, the problem is not with disenchanted politicians as they should have an option to seek an alternative in other parties. The real matter of concern is the temptation of illegal gratification by those acquisitive legislators, who are flocking to other parties for a mere pittance. No legislation in the world could change this practice except a collective deprecation by the common people. Besides, the denunciation should manifest in a substantial form and should not be confined in abstract philosophy.

The amendment to the Constitution of India to insert Tenth Schedule was to inculcate deterrence among politicians, who would defect from one party to another on inducement. The infamous incident of 1967, involving an MLA Gaya Lal, who switched his party affiliation thrice in the same day, led to this infamous phrase, "Ayya Ram Gaya Ram" which means, "switching allegiance".

Historical Background of Anti-defection Law

The need for robust legislation was felt in the 1960s when politicians switching allegiance had become the norm. It was ubiquitous in almost every party. The virulent practice had become so contagious that ministry was offered to any ambitious MLA and any number of minsters could be in a cabinet. Opposition party with an aspiration to come into power used to entice MLAs by offering them various ministries, leading to various Faustian bargaining between the politician and political party.

Therefore, to stop this sordid infirmity to the system, the then-government thought of enacting legislation to curb and regulate this practise to an extent. Thereafter, when this legislation was passed and brought into effect, initially there was a sense of deterrence among the politicians. However, legislation without varying interpretation and loopholes cannot be considered a dynamic law. Nevertheless, it also leads to variegated circumvention by different vested interest groups. By that time, political parties were already in search of some alternative method to save themselves from this robust legislation. Finally, with the advent of a new government, they found a new mechanism for defenestrating governments.

Contents of Anti-defection Law

The Anti-defection Law was passed in the year 1985 through the 52nd Amendment Act to the Constitution of India. It lays down the circumstances which will attract disqualification for a legislator. There are two grounds on which a legislator can be disqualified.

Firstly, if a member voluntarily gives up the membership of the party, he shall be disqualified. However, voluntarily giving up the membership is subjected to variegated interpretation. Voluntary giving up the membership is not the same as resigning from the party. The manifold judgments of the Hon'ble Supreme Court explicitly reiterate that "voluntarily giving up should not be construed in its literal sense. Therefore, though, a legislator has not resigned, the presiding officer/ speaker has been conferred with the power to make a reasonable inference as to what constitutes voluntary resignation through the conduct of the legislators". Hence, even without resigning, a legislator can be disqualified if by his conduct the Speaker/Chairman of the concerned House draws a reasonable inference that the member has voluntarily given up the membership of his party.[48]

Secondly, if a legislator votes in the house against the direction of his party and his action is not condoned by the said party, he can be disqualified. There are certain exemptions accorded to the legislators such as if they

[48] Ravi S. Naik vs. Union of India, 1994 AIR SC 1558.

merge with or into another party then, in that case, they will be exempted from disqualification, provided that at least two-thirds of its legislators are in favour of the merger. In such a scenario, neither the members who decide to merge nor the ones who stay with the original party will face disqualification.

Subversion of Anti-defection Law and the recourse lying ahead

Anti-defection law states that a legislator is said to have given up his membership if they voluntarily renounce it or disobeys the directives of the party leadership on a vote. This implies that a legislator defying (abstaining or voting against) the party whip on any issue can lose his membership of the House. The law applies to both Parliament and state assemblies.[49] As a consequence, in case any legislator abstains or cast his vote to other parties in a trust vote then he could be deemed to have resigned and the speaker could disqualify him, which means that he seizes to be a member of that party and once disqualified, he will be barred from contesting an election in the remaining period of the assembly.

The pattern developed by the political parties to evade this law was to make the legislator resign from their post and then after the trust vote, seeking by-election and subsequently, by honouring the commitment, respective political parties will give them the ministerial birth as promised.

Nevertheless, whenever a law has been ostensibly circumvented by some vested group, the judiciary has come to the rescue. Whereas, in this issue, the Hon'ble court has done nothing but juggle around at different positions.

There are manifold of instances, where the Hon'ble Court on the same circumstances has taken different positions. Initially they asked the speaker to decide on disqualification issue early in a time-bound fashion and later on they scorned the speaker on showing such expediency on deciding the matter. The only similarity in this entire fiasco was, at different time, with different state, with a different government, only one party had the benefit. At the end of the day, only the ruling dispensation was able to evade blame.

Notwithstanding the facts, the nexus of underscoring this anomaly is not to cast an indictment on one political party but to ensconce the reluctance the judiciary carries to attribute any malignity to the ruling dispensation. With extensive scrutiny, it will become evident as to how different government at times have resorted to this sinister move and how the Hon'ble Courts have acquiesced to the ruling incumbency.

Therefore, it leads us to the point that how new legislation is required to deal with this menace and stop nefarious legislators from shifting their allegiance from one party to another on the promise of gratification. Renegades needs to be punished, but not in the conventional way. In no time that law will be repealed on the pretext of the law having a draconian texture.

Hence, the very force or allurement that drives these legislators to shift their allegiance, must be abrogated. The first is a promise of ministerial birth, once this is out of their purview they will fall in line. So, the first stipulation for turncoats would be that if they defect from one to another they cannot become a minister in that term of assembly. Nevertheless, if they are forming their party then they can become minster, provided, they are not allying with other parties to overthrow the existing government.

Secondly, they could contest the by-election, if not disqualified. However, they should submit their entire financial transaction in the public domain for the time being to ascertain that no illegal gratification in the form of inducements has been received by the defecting legislator.

Lastly, the legislator should be allowed to vote against the wishes of their party, if the matters are policy-related and do not have any bearing to the party stability. Therefore, legislators across India should be conferred the power of working according to their conscience and shall only be obligated to vote according to their party, when their survival is in question or at the time of passage of the annual budget or no-confidence motions.

It should be borne in mind that all the above-mentioned points are not immune from Constitutional scrutiny and thus, if questioned, may manifest some dichotomy. Therefore, the future course of action cannot be determined on the premise of Constitutional rectitude but rather on expediency. There are times when various legislation was passed on the principle of pragmatism, such as preventive detention laws, land laws, etc.

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[49] Vibhor Relhan, The Anti-Defection Law Explained, PRS Legislative Research (Dec. 6, 2017) https://www.prsindia.org/theprsblog/anti-defection-law-explained.

Furthermore, the need of the hour is to deal with the arbitrary power vested in the hands of the presiding officers. The real reason for this chaos could be traced to them. Various expert committees have recommended that rather than the Presiding Officer, the decision to disqualify a member should be made by the President of India, in case of MPs, or the Governor of the State, in case of MLAs on the advice of the Election Commission.[50] This would be similar to the process followed for disqualification in case the person holds an office of profit i.e., the person holds an office under the central or state government which carries a remuneration, and has not been excluded in a list made by the legislature.[51] If they cannot shift the power to the aforesaid person then they should lay down a mechanism for the speaker to decide the matter in a time-bound fashion.

Moreover, when a legislator is found colluding with other political parties, a blanket ban should be imposed on him to not contest elections for consecutively five years irrespective whether an election is approaching ahead or has already commenced. The measures may seem rigid at the outset but are suitable to the present atmosphere. This is the only way of adding deterrence among the mischievous wicked politicians willing to sell their soul.

Consequently, the Courts have held that they will not intervene into the domain of speaker/ chairman while they are deciding the disqualification proceeding and only after the disqualification matter is decided can the aggrieved party can approach the Court.

Successful Execution in the Past

Many states like Karnataka, Madhya Pradesh, Goa etc., have borne the brunt of this new ploy. Whereas, in Maharashtra, a more audacious subterfuge was used, which was quite unprecedented and historic. These three states have seen a defection which was in no way surreptitious, rather, it was conspicuous and apprehended by every establishment that a horse-trading of this sort might happen to defenestrate the government to forge an unscrupulous alliance. This iniquitous conduct was only possible in our system due to this inept repugnant law. Time and again, committees have recommended making substantial reform in the law but, the government of that day could ill-afford those changes as it will vitiate their future sinister plan. Therefore, various government at times have unleashed this kind of abhorrent practices to our system and has left an indelible blemish to our democracy.

Paradoxical Judgement of Rajasthan High Court

The judgement of the Rajasthan High Court created a digression to a quiet punctilious system. It seems to be a classic case of judicial impropriety at the outset and a judicial overreach from the core. In the case of, Kihoto Hollohan Vs Zachilhu, it was held that "though the jurisdiction of courts under Articles 136, 226 and 227 is not completely taken away given the finality clause in Para 6 of the Tenth Schedule, the scope of judicial review does get limited and excluded in respect of an act committed by the Speaker within his jurisdiction. In other words, if the Speaker has acted in the exercise of and within the confines of his jurisdiction under the Tenth Schedule, Constitutional Courts will not interfere with it in the exercise of their powers of judicial review. It was made clear that judicial review is not available at a stage before the final decision of the Speaker in the form of any *quia timet* relief at an interlocutory stage".[52]

Moreover, the issue relating to the jurisdiction of a high court to pass interim orders before the final decision of the Speaker has already been settled by the Supreme Court in the case of, Speaker, Haryana Vidhan Sabha v. Kuldeep Bishnoi.[53] It was held that given the Constitutional scheme of the Tenth Schedule "normally judicial review could not cover any stage before the making of the decision by the Speaker or the Chairman of the House, nor was any quia timet action contemplated or permissible".[54] It was further stated that, "restraining the Speaker from taking any decision under Para 6 of Schedule X is, in our view, beyond the jurisdiction of the High

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[50] Anirudh Burman, The Anti-Defection Law – Intent and Impact Background, PRS Legislative Research (Nov. 23, 2009) https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/1370583077_Anti-Defection%20Law.pdf.

[51] Vibhor Relhan, The Anti-Defection Law Explained, PRS Legislative Research (Dec. 6, 2017) https://www.prsindia.org/theprsblog/anti-defection-law-explained.

[52] Kihoto Hollohan vs. Zachilhu, (1992) Supp 2 SCC 651 at para 110.

[53] Speaker, Haryana Vidhan Sabha vs. Kuldeep Bishnoi & Ors, (2015) 12 SCC 381.

[54] Ibid. at para 39.

Court, since the Constitution itself has vested the Speaker with the power to decide Para 6 and care has also been taken to indicate that such decision of the Speaker would be final. It is only thereafter that the High Court assumes jurisdiction to examine the Speaker's order.[55]

Therefore, the decision taken by the Rajasthan High Court is unprecedented and has disregarded the law laid down by the Supreme Court. The aforesaid judgement explicitly states that the Court does not have the power to entertain any plea before the making of the decision of speaker or chairman. The Rajasthan High Court has defied the precedent laid down by the Supreme Court and thus the only probable rationality in these circumstances ought to be to hold the judgement erroneous and rescind it. Though, this will not result in the reinstatement of past development and could be set aside for its infructuous nature. Nonetheless, the fact that this judgement was bad in law and sets a bad precedent is sufficient for repudiating it.

Conclusion

Defection has become a ubiquitous subject in the democratic corridor. It is believed these days that the ruling dispensation has a monopoly over state government and irrespective of the outcome of an election, ultimately, at the end of the day, the result is going to be in the favour of the ruling party. Defection is a facet of every political party and therefore shall not be seen as an exclusive prerogative of any one party. Moreover, the mechanism devised by the current ruling dispensation manifests the conspicuous lacunae in our existing structure. It should be borne in mind that every problem has a solution, provided it is addressed and acknowledged properly. The need of the hour for our political parties is that they should rise to an occasion and consider this imbroglio as a prodigious impediment in the nation's development. It has led to chaos and uncertainty which resulted in shambolic handling of the States' economy. The time has come when the Centre has to understand that they are sabotaging the States' development instead of unscrupulous transitory power.

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[55] Ibid. at para 44.

BOOK REVIEWS

IN THIS SECTION

MAVERICK UNCHANGED, UNREPENTANT BY RAM JETHMALANI

*Reviewed By Muskan Bansal**

Maverick Unchanged, Unrepentant is written by a former politician, highest rated criminal lawyer, and an international legal authority: Ram Jethmalani. The book ponders over various diseases that are inherent in government; ranging from Kashmir, China, Pakistan, fundamentalism to black money, corruption, governance, and the rise of terror.

The most admirable part of the entire work is the sheer collection of relevant facts on every subject discussed, which demands attention and applause. Especially, the complexities of the Kashmir issue, Bhopal tragedy, black money, state collusion, and national fraud served as the hallmark of this book. There's no doubt when it comes to reading his work and even the title says it all. He has expressed his arguments along with some of the quotes, one such being "If we did not know that he [Bin Laden] was in Abbottabad for years with his wives and kids, we are a failed state; if we did know, we are a rogue state." Or his view of democracy where he said, "Democracy is like a swimming pool. If you do not periodically change the water, it will almost certainly turn into a stinking cesspool."

This book makes an incredible attempt to teach the citizens of India regarding the truth about several things that have happened in the country. Like an eye-opener, it talks about the hidden truths and is backed by logic, making it a priceless gift given to India by Ram Jethmalani. If one wants to know about the India of today and a decade back, this is your go-to book.

Muskan Bansal is a Second Year Law Student in the BBA LLB course at Kirit P. Mehta School of Law, NMIMS.

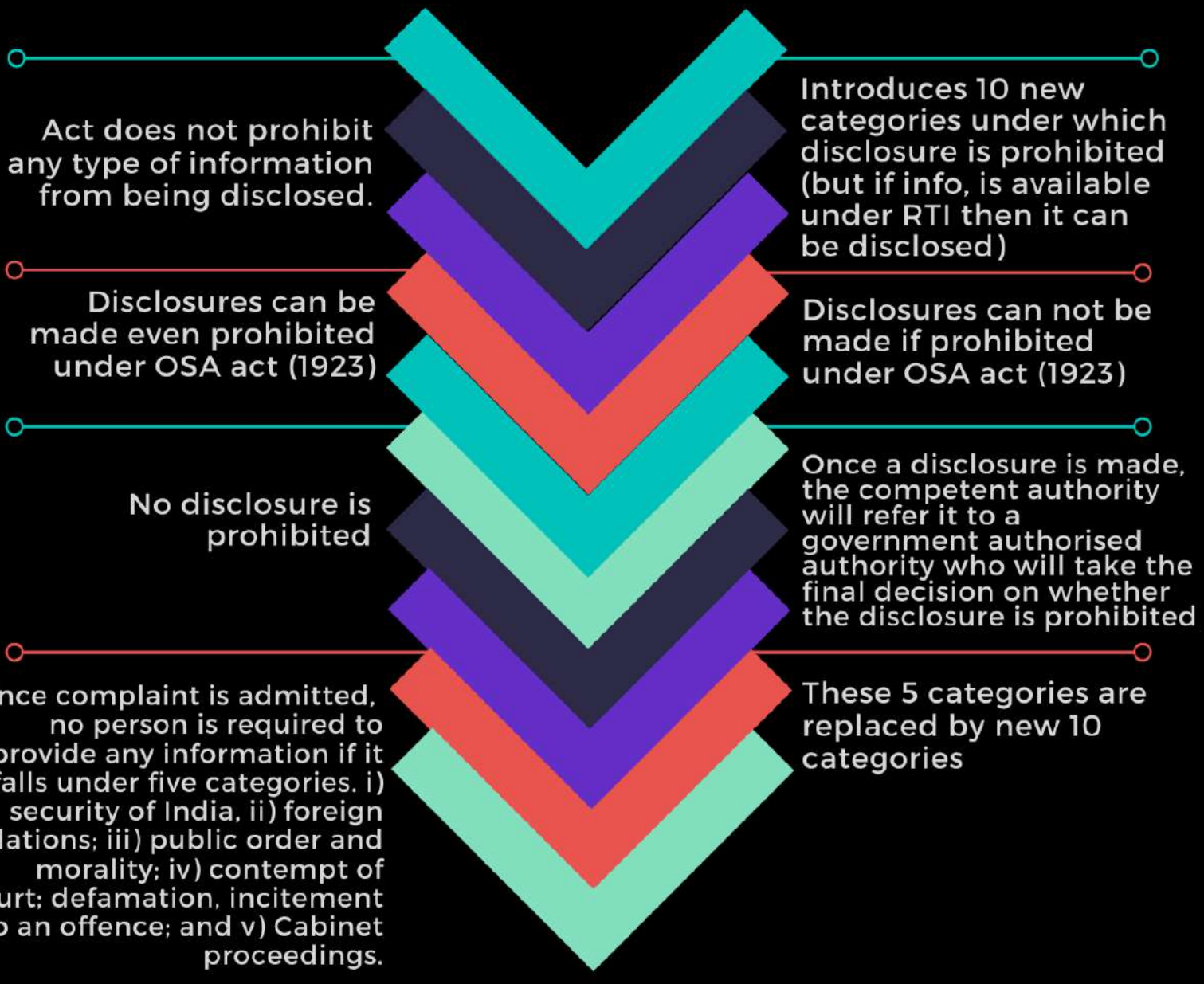
INFOGRAPHICS

IN THIS SECTION

WHISTLEBLOWERS PROTECTION ACT, 2014

VERSUS

WHISTLEBLOWERS PROTECTION (AMENDMENT) BILL, 2015



MENTAL HEALTH ACT, 2017

1. The new act defines "mental illness" as a substantial disorder of thinking, mood, perception, orientation, or memory that grossly impairs judgment or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs."

2. The act effectively decriminalized attempted suicide which was punishable under Section 309 of the Indian Penal Code.

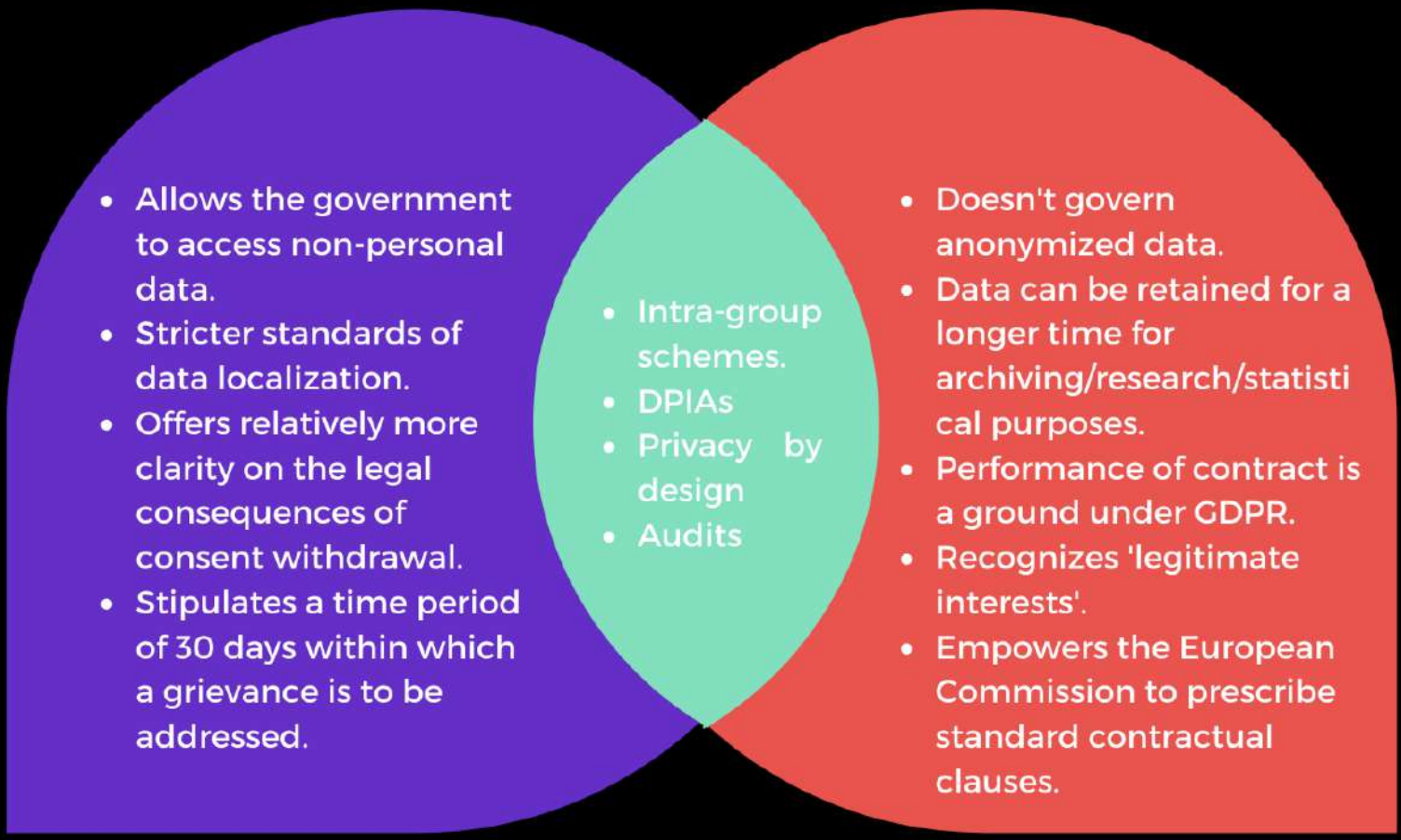
3. Another highlight of this Act is to protect the rights of a person with mental illness, and thereby facilitating his/her access to treatment and by an advance directive; how he/she wants to be treated for his/her illness.

4. Additionally, the Act asserts that no person or authority shall classify an individual as a person with mental illness unless in directly in relation with treatment of the illness.

PERSONAL DATA PROTECTION BILL, 2019

VERSUS

GENERAL DATA PROTECTION REGULATION



Personal Data Protection Bill, 2019

General Data Protection Regulation, 2018

PREVENTION OF MONEY LAUNDERING ACT (Amendments)

2005

- Includes amendments in section 2, 28, 30, 44, 45, 73 of the Prevention of Money-laundering Act, 2002.
- Omitted section 29 of the principal Act.
- Substituted the words "High Court" with "High Court or is qualified to be a Judge of the High Court".

2009

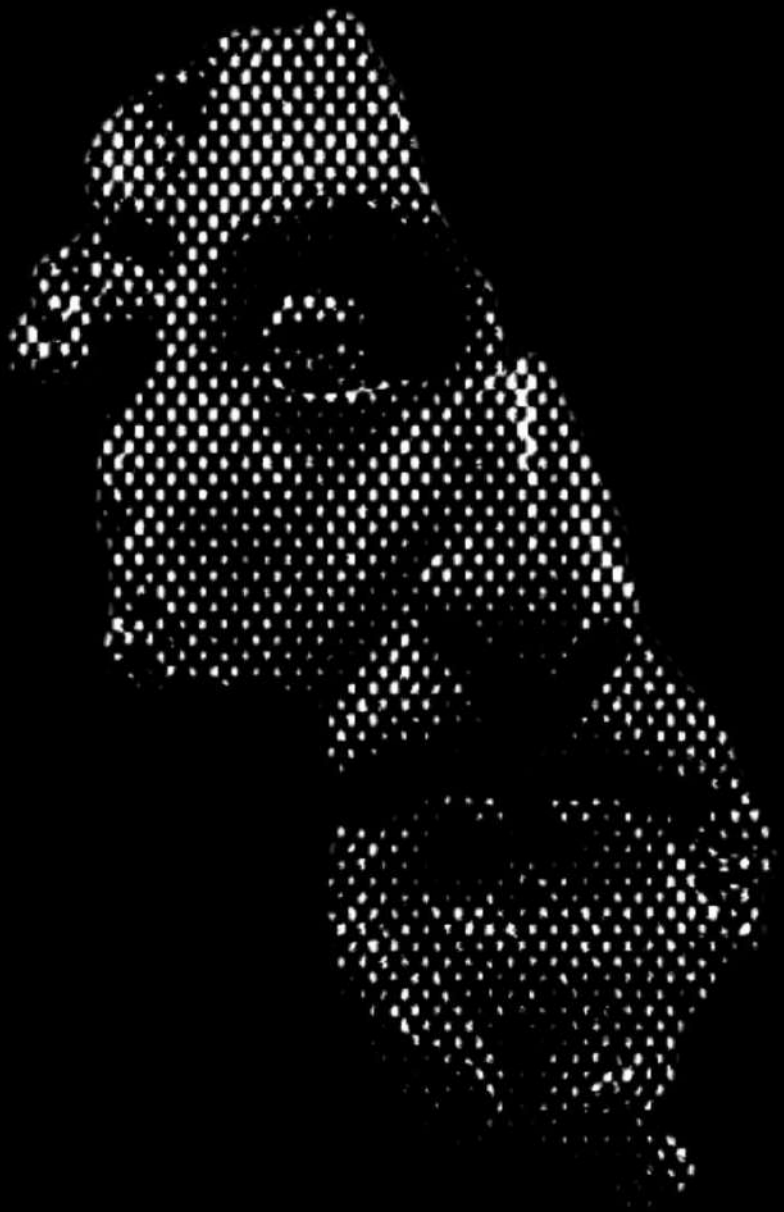
- Includes amendments in section 2, 5, 6 and 8 of the Prevention of Money-laundering Act, 2002.
- Substituted the words "ninety days" with "one hundred and fifty days" in section 5 of the principal Act.
- Substituted the words "one or more Adjudicating Authorities" with "an Adjudicating Authority" in section 6 of the principal Act.

2012

- Adds the concept of 'reporting entity'
- PMLA, 2002 levied a fine up to Rs.5 lakhs, but the amendment act has removed this upper limit.
- It has provided for provisional attachment and confiscation of property of any person involved in such activities.

2019

- The deletion of provisos in sub-sections (1) of Section 17 and Section 18, doing away with the pre-requisite of an FIR or charge sheet.
- Insertion of an explanation in Section 44.
- Scope of "proceeds of crime", under Section 2, has been expanded.
- Amendment to Section 3.



RECENT UPDATES

IN THIS SECTION

1. The Curious Case of NLAT

The National Law Aptitude Test ("NLAT") was an alternate entrance exam created by NLSIU to admit the 2020-25 batch of students during the COVID-19 pandemic. The contentions to NLAT are in light of the by-laws of the CLAT consortium stating that no institution of the consortium can hold an individual entrance exam while being part of the consortium.

NLSIU decided to make this decision in light of the possibility of a zero year, however the Petitioners, Rakesh Kumar Aggarwalla and Prof R Venkat Rao, former NLSIU Vice-Chancellor, represented by Senior Advocate Nidesh Gupta, believed that this was not an issue of grave concern. The case was heard before a Supreme Court bench comprising of Justices Ashok Bhushan, R Subash Reddy and M R Shah.

Mr Gupta submitted that it was not feasible to conduct as there lies scope for manipulating the exam system. The Petitioners argued that the availability 28,000 proctors to monitor was 'a joke' and raised other contentions such as the lack of disclosure to the CLAT consortium by NLSIU to and the material fact that the Executive Committee, headed by the Vice-Chancellor of NLSIU decided and signed the matter of postponing CLAT on September 28th 2020.

The Petitioners citied the ratio of the Supreme Court in Preeti Srivastava v. State of Madhya Pradesh, stating that if the same candidate is subjected to several tests he would be put to unnecessary inconvenience, contesting that the NLAT procedure was not fair, transparent and could be deemed exploitative.

However, the apprehensions of NLSIU does holds true, since the possibility of a zero year could possibly disrupt the institution's standing.

2. Caste and Privacy: Synonymous or Not?

Caste is often linked with identity; however this information is sensitive and holds importance beyond the mere identity of a person. The Madras High Court rejected a case where Mr Muthian sought information of candidates selected on their caste background under their respective reservations. The following is a list of the information sought by Mr Muthian.

1. Total number of vacancies called for the years 2006, 2007 and 2008;

2. Number of seats allocated to the Backward Community out of the total number of vacancies called for the years 2006, 2007 and 2008;

3. Number of seats allocated to the Most Backward Community out of the total number of vacancies called for the years 2006, 2007 and 2008;

4. Out of seats allocated to the Backward Community, the list of the selected candidates from the sub-castes of Muthuraja and Muthriyar;

5. Out of seats allocated to the Most Backward Community, the list of selected candidates from the sub-castes Ambalakarar; and

6. Out of seats allocated to the Most Backward Community, the list of selected candidates from Vanniya Kula Shatriar sub-castes (Vanniyar, Vanniya, Vanniya Gounder, Kandar, Padayachi Palli and Agni Kular Shathriar).

The verdict with respect to this took twelve years to get an Order of disclosure, with the caveat that if

the Tamil Nadu Public Service Commission takes the issue to the Supreme Court, then Mr Muthian would not be able to pursue his information.

This case is under the banner of the Right to Information Act, 2005. Tamil Nadu Public Service Commission cited Section 8(1)(d) of the said act which talks about commercial confidence, trade secrets and/ or intellectual property. In light of these incidents, the High Court of Madras Ordered the TNPSC to appraise the Court of the names and designations of all those involved in rejecting the RTI request, and who had subsequently failed to undertake their duties under the RTI Act.

3. SC Gives Telecoms Ten Years to Pay AGR Dues.

After a legal battle of twenty-one years, a three-judge bench of the Supreme Court has given the final verdict on the Adjusted Gross Revenue ("AGR") dues of the Telecom Companies ("Telecoms"). The Court had already calculated the AGR dues in October 2019 and now the Court has given a time-frame of ten years to the Telecoms to pay the same to the Department of Communications ("DoT").

The telecoms challenged the definition of AGR in the license agreements, i.e. dues from revenues of both telecom and non-telecom services. The Supreme Court, however, upheld the definition of DoT as per the license agreement and gave the final assessment of AGR dues to be 1.56 Lakh Crores.

The Court has however left the question of whether spectrums can be sold as part of IBC proceedings for the NCLT to decide. DoT argued that the spectrums cannot be sold. However telecoms believed that spectrum is an asset which was bought through auction and hence they have the right to sell the same if required.

The judgment has majorly impacted two telecom companies: Vodafone Idea and Bharti Airtel, which account for around half of the total AGR. Reliance Jio is the only telecom which has already paid its AGR dues. The Court has not made it clear whether Reliance Communications Spectrum and Bharti Airtel are supposed to pay the dues for Aircel or Videocon.

4. Daughters are Entitled to have Equal Coparcenary Rights Even if Born Prior to Hindu Succession Amendment Act (2005)

In Vineeta Sharama v. Rakesh Sharma, the Supreme Court rectified its mistake in Prakash v. Phulavati, where it had held that, "the rights under the amendment are applicable to living daughters of living coparceners as on 9-09-2005 irrespective of when such daughters are born". This precisely means that the daughters cannot ask for equal rights if the coparcener died before the 2005 amendment to the Hindu Succession Act, 1950.

In the present case the Court held that "[d]aughters have to be given equal rights equal share of coparcenary rights in share of property like the son". The Court held that the rights of the coparcener is by birth and that right cannot be taken away on the basis of whether the father is alive or not. The Court also mentioned that imposing such conditions on coparcener will be against the spirit of the 2005 amendment. The Court has also urged all lower Courts to decide upon all the pending matters related to this in the next six months. This was a very important judgment and there was a dire need for the same in Order to achieve the object of 2005 amendment, which was brought in Order to quash

patriarchal notions in the society and to ensure gender justice and equality.

5. Defence of Juvenility and Unsoundness of Mind Must be Raised During Trial

A three-judge bench of Supreme Court in Mohd. Anwar v. NCT of Delhi held that "a plea of unsoundness of mind as under section 84 of the Indian Penal [C]ode along with attempts to mitigate the punishment by raising the defense of juvenility must be raised during the trial as opposed to [during] a later stage".

This Order was passed against an appeal made against a judgment of Delhi High Court where the Court convicted the accused under Section 394 of the IPC read with Section 25 of the Arms Act, 1959 for voluntarily causing hurt in committing robbery. The accused had presented fresh claims in the Delhi High Court appeal citing juvenility and mental illness. The accused received mental illness treatment and was reportedly just fifteen years old when the crime was committed. Stating that, "[i]n Order to successfully claim [the] defence of mental unsoundness under Section 84 of the IPC, the accused must show by preponderance of probabilities that he/ she suffered from a serious-enough mental disease or infirmity which would affect the individual's ability to distinguish right from wrong". The Court dismissed this argument.

The Supreme Court upheld the conviction and noted that there were no reason for intervening with the challenged Order with the credible testimony of twelve witnesses of the prosecution and in the leniency shown in the sentencing of the accused.

6. Dalbir Singh vs NCT of Delhi

The above-named Appellant appealed the Order of the Delhi High Court rejecting the Appellant's claim for release of compensation under Section 357(3) of CrPC. The Respondents, members of the police force, were accused of having illegally detained and torturing the Appellant's son in connection with a theft case. The Appellant's son succumbed to injuries caused in lock-up. The Respondents were charged under Sections 342, 332, 306, 167, 218, 220, 302 read with Section 34 of IPC.

The Trial Court has awarded compensation of Rs One Lakh payable by Kunwar Pal, Rs Five Lakh each from SIs Hindveer Singh and Mahesh Mishra and Rs. Two Lakhs each from constables Pradeep, Pushpender and Haripal, under Section 357(3) CrPC.

The Respondents argued that that the judgment of the Trial Court, convicting the Respondents and further imposing sentence and award of compensation, are subject to challenge in the appeals, and the Appellant is not entitled to such compensation during the pendency of the appeals before the Delhi High Court.

In view of the pendency of criminal appeals before the High Court, wherein the respondents-accused have challenged their conviction and sentence imposed, the High Court did not interfere on merits of the matter. The High Court was of the opinion to not release such compensation in favour of the Appellant at this stage. The High Court in the judgement quoted that "[i]f we permit the release of such compensation to the appellant at this stage, it may lead to multiplicity of proceedings. Instead of Ordering release of compensation to the appellant at this stage, we deem it appropriate to request the

High Court for expeditious disposal of [the] Criminal Appeal."

7. Common Cause v. Union of India

The Applicant herein, M/s Orissa Minerals Development Company Limited sought condonation of delay in the payment under the Order passed by the Court. The Applicant had also requested for a direction to the State of Orissa to conduct joint verification of the undisposed stock and allow sale of the same to enable the Applicant company to realise the amount. The Applicant has sought permission to resume regular mining operations in view of payment of the entire amount demanded. The Applications were regarding the mining lease in favour of the company of the applicant in respect of Roida - Bhadrasahi Iron Ore and Bhadrasahi Iron and Manganese respectively.

The Court while disposing of petition had directed that the Applicant company to pay compensation on or before 31st December 2017. Since there was delay in payment, condonation of the same was sought and the further relief was prayed for. The State of Orissa in the reply to the applications has said that the compensation amount Ordered by the Court under Section 21(5) of the M.M.D.R. Act, 1957 had been paid by the Applicant along with interest with respect to all the mining leases held by the Applicant. The Court stated that since the interest is said to have been paid for the period of delay, we find it expedient to condone the delay. Further since the compensation amount along with interest has been paid as per the Order of the Court and the receipt of the same is acknowledged by the State of Orissa, the Court also consider it appropriate to grant the further relief sought in the applications.

The Court also took into account the submission of the Solicitor General that in similar circumstances, through the Order dated 29th January 2020, identical prayers made were allowed by the Court and the instant applications were ordered to be listed after a week so as to enable the learned counsel for the State of Orissa to ascertain whether the payment has in fact been made by the applicant company.

Accordingly, the following Order was passed wherein the delay in payment of the compensation along with interest is condoned; the Applicant be permitted to resume mining operations subject to all necessary clearances required in accordance with law being obtained; and the Competent Officers of the State of Orissa shall also conduct a joint verification of the undisposed stock and allow sale of the same by the Applicant on following due procedure.

8. English as the medium of language for Education

The Supreme Court refused to stay an Order of the Andhra Pradesh High Court against making English the medium of education for government schools between class I to VI from the 2020-21 Academic Year.

The Court stated that Section 29(2)(f) of the Right to Education Act, 2009 ("RTE"), under which the medium of instruction shall, be in the mother tongue of the child. Article 29 of the Constitution, which protects the interests of minority classes, entitles citizens to conserve their language and prohibits discrimination on the basis of language. Article 120, i.e. language to be used in Parliament provides for use of Hindi or English for transactions of Parliament but also gives the right to

Members of Parliament to speak in their native language. Part XVII of the Constitution deals with the official languages in Articles 343 to 351. Article 350A, i.e facilities for instruction in mother-tongue at primary stage, provides that it shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups. Article 351, i.e directive for development of the Hindi language provides that it shall be the duty of the Union to promote the spread of the Hindi language. The Eighth Schedule recognises the following twenty-two languages as official languages: Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Sindhi, Tamil, Telugu, Urdu, Bodo, Santhali, Maithili and Dogri.

9. Air pollution stated as cause of 9-year-old's death in landmark UK ruling

In a first of its kind ruling, air pollution was declared to be the cause of Ella Kissi-Debrah's death in 2013 by a coroner.

The initial investigation, which was conducted in 2014, had no mention of air pollution. The cause of death was deduced to be acute respiratory failure caused due to asthma. However, this verdict was questioned and a new inquest was ordered to look into the cause of death after lawyers for the family put forth evidence to the attorney general in 2018. Upon conclusion of the two-week enquiry, Prof Stephen Holgate said a biological cause of Ella's health further deteriorating in the cold weather months was due the seasonal worsening contamination of air during winters.

He said it was the snowballing impact of the contaminated air that Ella was breathing in that caused the acute asthma attack. Holgate remarked: "Ella was like a canary in a coalmine". His statement comes as a warning to the other Londoners regarding the toxic contaminants such as Nitrogen Oxide in the air that they breathe. Ella previously had numerous seizures and was taken to the hospital almost thirty times in the three years before her death.

Under laws of the EU, the annual average concentration level of nitrogen dioxide cannot exceed forty micrograms per cubic metre OF air (ug/m3). Britain has missed this target for a decade. The UN states that air pollution should be viewed as a matter of human rights. It is said to cause seven million untimely deaths a year, out of which 600,000 are children. About 40,000 deaths in Britain are linked to air pollution, according to a research conducted in 2016 by the "Royal College of Physicians" and "The Royal College of Paediatrics and Child Health". London has also introduced the world's largest, citywide low-emission zone, requiring diesel vehicles to meet certain standards or pay daily charges. A report conducted by King's College states, "Even with the measures in place, the capital is only expected to reach legal pollution limits by 2025". This report is likely to increase pressure on the government to deal with illegal levels of air pollution across the nation.

"The coroner's unambiguous finding is a legal first and will certainly send a signal to the UK government," commented Katie Nield, a lawyer at environmental law charity Client Earth, which provided assistance to Kissi-Debrah's legal team.

"This is a historic and a ground-breaking decision which shows the devastating impacts of air pollution and the urgent need to clean up the air we breathe," opined Larissa Lockwood, who leads the Global Action Plan's clean air campaign.

10. Amish Devgan vs Union of India

This was a petition filed by Amish Devgan, a journalist and managing editor-in-chief of News 18, under Article 32 of the Constitution to quash FIRs arising from the same cause of action in different states. The contention is against calling Khwaja Moinuddin Chishti, a revered saint of India, as a terrorist and a robber on live debate. It was contented that Petitioner did this deliberately to incite feeling of animosity and hatred against the Muslim Community.

Petitioner later apologized and claimed that the words were uttered inadvertently and by mistake where he confused Khilji with Khwaja Chishti. However, the words were repeated and reference to his certain acts was also made in the debate. The FIRs around the country allege offences under Sections 153A, 295A, and 505(2) of the Indian Penal Code, and Section 66-F of the Information Technology Act, 2000. Apart from the quashing of FIRs arising under the aforementioned sections, the court also questioned maintainability of this relief when there is already presence of relief under Section 482 of CrPC in the powers of High Court and whether there is a by-pass of procedure.

The defence of slight harm by Petitioner was refused by the court on grounds that it was meant for offence causing almost negligible harm. The Bench discussed extensively on hate speech citing precedents, and the jurisprudence of France and America in particular to analyse the alleged offence. The Bench distinguished between free speech and hate speech. The Bench also shed light on the need of criminalising hate speech to promote social harmony.

The Bench did not quash the FIR at this preliminary stage; rather transferred it all to the station where the first FIR was filed and gave interim relief against arrest to Petitioner only on condition that he co-operated with the arrest.

11. Arnab Manoranjan Goswami vs the State of Maharashtra & Ors.

The foundation of this case was more political in nature than legal, but this commentary will be focusing on, and restricted to the legal aspects of it. It all started back in the year 2018, when Arnab Goswami, the owner of ARG Outlier Media, and two other accused were booked by the Alibaug Police for abetment of suicide of Anvay Naik and his mother.

The deceased person wrote a suicide note and blamed the three accused for not making transactions of rupees 5.4 crores in total, which were due to Concorde Designs Pvt. Ltd. As per the allegations, ARG Outlier Media owed the person 83 lakh rupees. After an investigation, the police filed an "A" summary report, the magistrate accepted the same, and the case was closed.

The case was recently reopened for investigation and one fine day, the accused were arrested from their homes in the most unacceptable manner one could think of. As soon as the arrests took place, they were produced in front of the Chief Judicial Magistrate, Alibaug. She explicitly mentioned that, "There is no nexus between the deceased and the accused." Hence, she denied police custody and

ordered Judicial Custody of the accused. The counsel for the accused also questioned the process of re-investigation, which was not followed as per Section 173(8) of the C.R.P.C, where the consent of the magistrate is a must for re-investigation.

The bail application was moved and a writ petition was also filed in the Bombay High Court to quash the FIR against Arnab under section 482 of the C.R.P.C. The Bombay High Court ruled that the matter was pending before the sessions court. Hence, the High Court did not intervene and rejected the interim bail.

This Judgment was challenged in the Supreme Court and the Court made various observations under the same. A bench consisting of Justice D.Y. Chandrachud and Justice Indira Banerjee, after looking at the FIR, observed that, "Prima facie, on the application of the test which has been laid down by this court in a consistent line of authority… It cannot be said that the appellant was guilty of having abetted the suicide within the meaning of Section 306 of the IPC."

The Apex Court also came down heavy on the High Court for not giving the accused bail in the first instance. The bench said, "The High Court abdicated its constitutional duty and function as a protector of liberty. It is the duty of courts across the spectrum — the district judiciary, the high courts and the Supreme Court — to ensure that the criminal law does not become a weapon for the selective harassment of citizens".

The Supreme Court, after making all these observations, granted interim bail to all the three accused and even questioned the Maharashtra state government's intentions in this case. The court also held that this was a civil dispute related to commercial transactions and treating it as a criminal offence would infringe on the rights and liberty of citizens. The court even went to the extent of saying that deprivation of liberty even for a single day is one too many days.

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