(1) prerna 3.4.5.

A Norwegian Sojourn

A trip to Norway sparks questions on equality and inclusiveness.

PRERNA DHOOP

The curtains rolled up, and the Nordics greeted us with a huge round of applause. My apprehensions of facing a sparse crowd were at once shattered. I was left befuddled! Did the hoi polloi of a Christian state just welcome a play on "Queer Love"? That was my first interaction with the Norwegian audience.

As a theatre artist, I was acting in a play centred on the life of homosexuals in the Indian society and the attitude of their compatriots towards them. The first scene depicted a teenaged Raghu being mercilessly flogged by his family members. The family sought to ward off the evil spirit that they believed had entered Raghu's body. Their suspicion was not ill-founded. After all, Raghu displayed feminine characteristics, emotions and cravings, a thorough contrast to the physical attributes that he possessed. He no longer wanted to be identified as a male.

Raghu's parents deliberated deeply: Had the Creator erred while designing Raghu, or did some sorcerer practise black magic on their only son? What they did not realise was that their common Creator, when designing Raghu had not been selective while gifting him a heart that beat and a soul that felt. The audience sighed in utter dismay! The story continued with the viewers getting deeply engrossed in Raghu's life. What mesmerised me was the reaction of the Norwegian audience, who stayed glued to their seats till the end of the play, anticipating in vain, hoping to see Raghu live a life of his choice!

Norway as a tourist attraction was appealing indeed; however, more admirable were the people of Norway

The Indian team of theatre artists received accolades from the crowd and lucrative offers to perform again in the future. A robust gentleman blooming in a heavily embroidered suit approached me and remarked, "The play was extremely evocative. I am able to empathise with Raghu, but unlike him I was very lucky. Now I stand before you happy and prosperous, hoping that you would accept the invitation of having dinner at my home tomorrow." I gladly accepted Ali Ahmadi's invitation, impressed by the simplicity with which he invited me.

The day's work was over and it was time for one to rest. When in bed, a flurry of thoughts gushed into my mind. I intended to find out every detail about this "land of the midnight sun" during my sojourn, and the search began the following day.

I woke up early with the sun, although the latter had gone to bed late! I got dressed, packed my rucksack, and remembered to take warm clothing in case the erratic Norwegian weather turned cold in spring. Abelu, my guide-cum-mentor soon arrived with the day's agenda in hand. We traversed varied picturesque landscapes, like the spectacular fjords, lofty mountains, quaint islands, radiant sand beaches, scenic lakes, and thick woods. I was charmed and captivated by the aura and beauty of the Norwegian countryside.

Norway as a tourist attraction was appealing indeed; however, more admirable were the people of Norway. The much awaited evening finally arrived! Ali was extremely delighted to see me. I at once noticed that he had displayed the bouquet of freshly picked wildflowers that I had sent him earlier that day. Ali expressed his sincere gratitude for my gesture. I silently thanked Abelu for having guided me on Norwegian customs. I was not the lone guest that evening; there were also Ali's three friends—Alicia, Joachim, and Taiga.

We sat in the comfortable living room on wooden furniture, sipping freshly brewed coffee. The discussion focused on Norway, the country's high rate of industrial development, its massive reserves of natural resources, and, most importantly, the prosperity of the Norwegian population. I contemplated that maybe Norway was simply god-gifted. There could not have been a more convenient way of sympathising with my own country!

Taiga was the evening's entertainer. He sang a folksong in Sami, about two lost lovers who eventually met in the end. The song depicted Ali and Taiga's own story! A Pakistani immigrant, working in the fishing industry, meets a Sami native who is a member of the Storting, the Norwegian national assembly, and both gradually form a relationship that is ridiculed by most societies today. However, Norway, a Christian state, grant equal recognition and rights to both homosexual and heterosexual couples. The Norwegians, I understood, were an outstanding example of a people who truly believed and practised the tenets of equality and inclusiveness.

I silently questioned whether such a love story could have blossomed in our society as well. This was the first time I felt sad for Raghu. He was compelled to marry a girl and have children. Poor Raghu committed suicide on realising that there was no place for him in a nation that promised equality.

My sojourn to Norway has been memorable indeed! Now, when I sit back and ruminate over the ideals upon which the Indian and Norwegian societies have emerged, I realise that both share very similar ideas of equality. On the one hand, Jante Law states, "Don't think you're special or better than others." On the other hand, Indian philosophy believes in "non-duality," that is, the Oneness of all beings. The question is, do we?

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How does relationship-based governance accommodate new entrants? Evidence from the cycle-rickshaw rental market

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Article contents

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Abstract

Relationship-based contract enforcement is commonly thought to limit market expansion. In contrast, this paper illustrates how relationship-based contract governance accommodates new entrants into market exchange using a case study of the cycle-rickshaw rental market in a city in central India. Migrants face a higher penalty for default that introduces a gap between the *ex ante* risk for out-of-network agents and the *ex post* risk. As a result, cycle-rickshaw owners are more likely to rent to migrants and migrants are more likely to participate in rental contracts. With primary data on multidimensional measures of migrant status, we confirm that migrant status is a significant predictor of rental contract

participation, even controlling for other variables that moderate the rickshaw driver's ability to own a cycle-rickshaw. Our findings thus introduce a new perspective into current understandings of relationship-based contract governance.

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Abstract

Religion is an indispensable part of human existence. Freedom of religion is considered as the third most important civil liberty after the right to life and personal liberty and the freedom of speech and expression. The Indian Constitution guarantees freedom of religion and acknowledges the individual's autonomy in his or her relationship with God. However, the Supreme Court of India, through the creation and continued use of the essentiality test, has tried to reform religion by restricting the scope of this freedom. The judiciary has taken over the role of clergy in determining what essential and non-essential religious practices are. Moreover, the Court has applied the test in an inconsistent manner, repeatedly changing the method of determining essentiality, seriously undermining religious liberty. This Article examines these judgments to demonstrate the adverse impact of the essentiality test on religious freedom.

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Holy Cow, Privacy, and Unholy Laws

FAIZAN MUSTAFA, VIVEK MUKHERJEE

The impact of the privacy judgment on the constitutionality of the so-called beef statutes is examined through the critique of earlier judgments of the apex court, demonstrating how unscientific and unauthentic information became the basis of these judgments and how a selective approach was adopted in applying directive principles and fundamental duties over fundamental rights. With privacy as a fundamental right, it is no more an issue of just the butcher's right to trade, but a question of an individual's choice of food.

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The Indian Constitution, being a living document, was written in a social context that has seen tremendous change alongside a rapidly developing India. Mindful of this social progress, the Supreme Court has finally explicitly recognised privacy as a fundamental right in *K Puttaswamy v Union of India* (2017a). The judgment will have some bearing on the laws enacted by 20 Indian states in furtherance of the policy laid down in Article 48 of the Constitution, that is, to prohibit the slaughter of cows, calves and other milch and draught cattle.

Justice D Y Chandrachud in discussing the evolution of the privacy doctrine in India does mention *Hinsa Virodhak Sangh v Mirzapur Moti Kuresh Jamat and Ors* (2008: para 22), where the Supreme Court had specifically held that what one eats is one's personal affair and it is a part of privacy under Article 21. He also mentions "food habits" in his description of informational privacy and its nature of personality (*K Puttaswamy v Union of India* 2017b: para 170). Justice J Chelameswar has also made the following observation in his concurring judgment:

> I do not think that anybody would like to be told by the State as to what they should eat or how they should dress or whom they should be associated with either in their personal, social or political life. (*K Puttaswamy v Union of India* 2017c: para 40)

What will be the impact of this landmark decision on beef ban statutes? The Supreme Court, in hearing an appeal against the decision of the Bombay High Court (upholding the beef ban, but observing that mere possession is not a crime), has observed that the right to privacy judgment may affect the beef ban in Maharashtra (*Indian Express* 2017). But, then, beef ban and the privacy debate in this appeal should not be limited to merely decriminalising the so-called conscious possession of beef. It should ideally entail the bigger question of the constitutional validity of beef ban legislations not only against the right of beef traders, but from the perspective of an individual's choice of food.

The 'Rights' Debate

The first major case on beef law was *Mohd Hanif Quareshi and Ors v State of Bihar* (1958), where the Court upheld the ban on the slaughter of "useful cattle," but permitted trade and slaughter of old and unproductive cattle. This position was reiterated in a series of other cases (*Hashmatullah v State of Madhya Pradesh & Ors* 1996; *State of West Bengal v Ashutosh Lahiri* 1995). Unfortunately, this reasonable classification between "useful" and "unproductive" cattle was overturned by the apex court itself in *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat and Ors* (2005) (henceforth, Mirzapur judgment). The Court borrowed an observation from *Kesavananda Bharati v State of Kerala* (1973)—or rather reinvented its rationale—in this judgment: "The interest of a citizen or section of a community, howsoever important, is secondary to the interest of the

country or community as a whole" (*State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat and Ors* 2005).

First, the observation from the Kesavananda Bharati judgment was completely out of context.[1] Second, the observation goes against the constitutional ethos. Our constitutional ethos is reflected in the articles that lay down fundamental duties to promote harmony amongst all citizens (Article 51A[e]),[2] to promote scientific temper and humanism (Article 51A[h]), and for the protection of the economic interest of weaker sections (Article 46). "Cow protection" (often leading to cow vigilantism) cannot be in the interest of the country if it threatens the lives of citizens. Depriving (in fact, criminalising) Muslims, Dalits and the economically weaker sections of a cheap source of rich protein goes against our constitutional ethos; killing of people in the name of cow protection, more so.

In a serious blow to the opponents of individualism, Justice Chandrachud in the privacy judgment held that guarantee of constitutional rights does not depend upon the exercise being favourably regarded by a majority of the population. He said that the test of popular acceptance does not furnish a basis to disregard the right to liberty. He admitted that diverse and insular minorities face a grave danger of discrimination for no other reason but their views and opinions (*K Puttaswamy v Union of India* 2017b: para 126). The fundamental question is whether the legislations providing for the beef ban would stand the test of the right to privacy of individuals to eat what they choose in the confines of their houses.

Privacy is now a fundamental right. In the case of any conflict between the directive principles of state policy and fundamental rights, an effort must be made for a harmonious construction. However, if such harmonious construction is not possible, rights shall trump over mere goals (Seervai 1993; Baxi 1967). The directive principles in any case are mere goals to be achieved by the state. Yet some goals, such as the uniform civil code and ban on cow slaughter alone, are dearer to rightist forces than others simply because these help polarisation (Mahaprashasta 2012).

According to D N Jha, the cow has tended to become a political instrument in the hands of rulers over time (Mahaprashasta 2012). Is it not strange that even a partial ban by the Supreme Court on the sale (not consumption) of liquor within 500 metres of national highways under another directive principle (Article 47) was resisted by a number of state governments? Many other directive principles are similarly lying dormant. No one speaks of Articles 39(b) and 39(c) which provide for reducing income inequalities and ensuring that distribution of national resources subserves the common good.

The Mirzapur judgment, in fact, went too far in giving primacy to directive principles without bothering about the right to privacy and individual autonomy and, thus, went against harmonious construction. Today, one can have some solace as the privacy judgment is a nine-judge-bench decision, whereas the Mirzapur judgment was a seven-judge-bench decision. There is an urgent need for reconsidering the flawed Mirzapur judgment, though some of its basic premises already stand sub silentio overruled by the privacy judgment.

Constitutionality of Beef Ban

Many states in India have enacted laws prohibiting slaughter and trade of cows, buffaloes, and bulls. Eleven states (the cow belt) in India have a complete ban on slaughter of all cattle (male or female). Nine states have slaughter permission for aged bullocks and bulls that have been certified as being "fit for slaughter." Striking down the newly enforced Maharashtra beef ban provision, the Bombay High Court in 2016 held that: "consumption of food which is not injurious to health is a part of an individual's autonomy or his right to be let alone. Hence, it is an infringement of his right to privacy" (*Shaikh Zahid Mukhtar and Ors v State of Maharashtra and Ors* 2017: para 176).

The court, however, upheld the constitutional validity of Section 5C (incriminating possession of flesh of any cow, bull or bullock slaughtered in contravention of the provisions of the act), but limited its scope by saying that the possession should be "conscious" possession and not otherwise. The use of the term "conscious" here leads to an ambiguity in law. It has been argued elsewhere that the use of the term "possession" in itself presumes mens rea, that is, intent to possess (Mustafa 1992).

Another facet that expanded the scope of the right to privacy in the privacy judgment is the observation made by Justice Chandrachud:

> Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in part III. (*K Puttaswamy v Union of India* 2017b: para c)

This might lead us to deduce that life and personal liberty, from which the right to privacy primarily emerges, has to be now read with Articles 19(1)(g) and 25 of the Constitution. Article 21 is no more the sole repository of liberty. Fundamental rights are not a series of isolated points but a rational continuum of the legal concept of liberty. Effectively, one's right to eat food of one's choice hardly has any meaning unless the food is reasonably available for one to purchase. Freedom to trade in beef shall be a natural corollary to the new and expanded definition of the right to privacy.

The right to privacy and freedom of religion are also to be read together. Statutes banning beef have been challenged so far by butchers as violating their right to trade and courts have upheld these as "reasonable restrictions." With the privacy judgment, a new ground of challenge is possible. Abrahamic religions and tribal groups do not prohibit consumption of beef. India being a secular nation cannot dictate to non-Hindus what to eat and what not to eat. Such statutes are similar to the blasphemy law of Pakistan that imposes a duty on non-Muslims to respect Islamic beliefs. Opposing such an imposition of a majoritarian view, M K Gandhi once said:

> In India no law can be made to ban cow-slaughter. I do not doubt that Hindus are forbidden the slaughter of cows. I have been long pledged to serve the cow but how can my religion also be the religion of the rest of the Indians? It will mean coercion against those Indians who are not Hindus. (1999: Vol 96)

Contrast this statement by Gandhi with what is happening today in Bharatiya Janata Party (BJP)-ruled states. In March 2017, Gujarat amended the state's animal protection law to extend the maximum punishment for cow slaughter from seven years to a life term and the fine from ₹1 lakh to ₹5 lakh. The punishment cannot be anything less than seven years. This makes it the most stringent cow protection law in India. Similar stringent laws can be found in Haryana (rigorous imprisonment up to 10 years or fine up to ₹1 lakh), Jharkhand and Uttarakhand (10 years imprisonment and fine of ₹10,000). These heavy punishments violate the classical arrangement of punishments based on a distinction between "minor" and "major" crimes. The court must examine whether providing major penalties for minor crimes arbitrarily, without any rational basis, violates the right to equality (Article 14).[3] The Supreme Court also had reiterated in a number of cases that: "[N]o sentence should ever appear to be vindictive [since] an excessive sentence defeats its own object and tends to further undermine respect for the law" (*Dulla and Ors v The State* 1958).

A counterargument that might arise in testing the slaughter prohibition laws against the right to privacy of individuals in their religious/community context is: Would the right to privacy (now read with Article 25) of a Hindu individual be violated if a cow is slaughtered in their vicinity? No, generally slaughter does not take place in residential areas, and takes place only in the government-run slaughter houses. The Uttar Pradesh government has closed all government-run slaughter houses that are not in compliance with guidelines laid down by the apex court. Moreover, in order to further address this issue, we need to ask whether cow protection is an "essential" part of the Hindu religion.

D N Jha (2004) in his authoritative work on this subject, *The Myth of the Holy Cow*, demonstrates otherwise. He shows authentic evidence throughout the book where Hindus have historically consumed beef across epochs. He highlights the inconsistencies in the dietary practices of Indian society and its polymorphic nature. He also shows how the "holy" status given to the cow was a medieval development. He shows how prescriptive Hindu texts enumerate cow killing as a minor sin (*upapataka*) and not a major offence (*mahapataka*). Ironically, BJP-ruled states in harshly punishing cow slaughter are violating these very sacred texts.

Prohibition and Restriction

Now that the right to privacy has a firm normative grounding in the Constitution, the question is whether the slaughter prohibition, which is allegedly infringing the right to nutritious food,[4] can be curbed through reasonable restrictions. The state needs to prove compelling state interest and show that the food is injurious to the person consuming it. It then has to pass the test of reasonableness and proportionality.

Two judgments are important in this context. One is the Mirzapur judgment and the other is the Hinsa Virodhak Sangh judgment. The interesting point in the Mirzapur case is that the Court rejected the argument that a complete ban on the slaughter of animals of cow progeny does affect the fundamental right to practise any profession, occupation, trade or business on the grounds that this ban is not in the nature of prohibition, rather it is a mere "restriction" for a few days. For small butchers or daily wagers working in such retail meat shops, it is not a question of the right to trade, but the issue of denial of their livelihood for nine days. Justice M Katju, who decided the Hinsa Virodhak Sangh case, has himself admitted that probably his judgment was not "necessarily correct" (Katju 2015).

No further light is shed on this absurd distinction between "prohibition" and "restriction" in the judgment. The Mirzapur case justified the complete ban by saying that the impugned enactment is in the interest of the general public, a reasonable restriction to freedoms protected under Article 19. This is defended using the justification of protection of agriculture in a dominantly agrarian society, conveniently overlooking the fact that all farmers are not into animal husbandry. Articles 48A and 51A(g) pointing to protection of environment are also invoked. Both are flawed arguments. Farmers across religions would agree that cattle become a liability to maintain after they grow old, leading to spread of dangerous diseases and demanding a lot of resources to maintain, and end up eating more fodder and grass than is sustainable for the environment. Plummeting cattle population may lead to a serious fodder crisis (Ramdas 2015).

Strangely, the apex court relied on a study commissioned by the state government without making any efforts to verify the authenticity of tall claims made in it. The report, for instance, stated:

> It is estimated that a bull or bullock at every stage of life supplies 3,500 kg of dung and 2,000 litres of urine and whereas this quantity of dung can supply 5,000 cubic feet of biogas, 80 MT of organic fertiliser, the urine can supply 2,000 litres of pesticides and the use of these products in farming increases the yield very substantially. The value of the above contribution can be placed at ₹ 20,000 per year to the owner. (*State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat and Ors* 2005)

It seems these observations were not based on any scientific, empirical research, but the Court accepted them on face value just because the state of Gujarat included them in its affidavits and the opposite party did not contest the findings. Another source relied on by the Court was the report of the National Commission on Cattle (Department of Animal Husbandry, Dairying and Fisheries 2002), where the value of dung was compared to the Kohinoor diamond! While the Prime Minister has been advocating the use of LPG as cooking fuel instead of dung cakes—which pollute the environment and are a health hazard for women in rural areas—the Supreme Court strangely believed a report that says the value of dung can be compared to the Kohinoor? No authentic record is available to substantiate such an absurd observation. In any case, the controversial report was prepared by Justice Guman Mal Lodha, who had been president of the Jan Sangh (Rajasthan) during 1969–71 and was elected to the Lok Sabha three times on a BJP ticket.

On 23 May the most audacious move in this regard was made with the notification published on the Prevention of Cruelty to Animals (Regulation of Livestock Markets)

Rules, 2017. The notification is aimed at devitalising the Constitution of its federal character by imposing a virtual ban on the sale of cattle for the purposes of slaughter (Parthasarathy 2017). The centre has not only violated the federal structure followed in India (where agriculture and the preservation, protection and improvement of stock are state subjects), it has also transgressed on the fundamental rights of its citizens. No government has the right to compel an owner to not sell his cattle for any purpose. The government's request to vacate the stay on these rules by the Madras High Court was rejected by the Supreme Court. The BJP government in Rajasthan under pressure from farmers has agreed to have a fresh look at this issue. The Narendra Modi government is also considering the withdrawal of the controversial cattle rules (*Outlook* 2017).

Another mistake committed by the Court in the Mirzapur case was the reliance on Article 51A(g), which lays down a fundamental duty "to have compassion for all living creatures." It was held that cow slaughter goes against this constitutional value. But, then, cow and her progeny are not the only living creatures that deserve compassion. What about compassion towards the people who lost their livelihood (which is a fundamental right) due to stricter cattle protection laws (*Hindustan Times* 2015). Moreover, the Prevention of Cruelty to Animals Act, 1960 (under which the recent cattle rules were issued) itself excludes killing of animals for the purposes of food from the definition of "cruelty."[5] Finally, the current model of cattle protection does not really ensure "compassion" towards cattle. This point was highlighted by the Supreme Court itself in the Quareshi case, where the Court had observed that: "preservation of useful cattle by establishment of *gosadan* is not a practical proposition, as they are like concentration camps where cattle are left to die a slow death." This was evident in the recent incident where 200 cows died out of starvation in Chhattisgarh in a cow shelter (*gosadan*) run by a BJP leader (Mishra 2017).

The rule of law demands respect of individual preferences and beliefs. The Supreme Court in the Puttaswamy judgment has clearly held that dignity is the core that unites fundamental rights because fundamental rights try to achieve for each individual the dignity of existence. Justice A M Sapre has rightly held that unity and integrity of nation cannot survive unless dignity of every individual citizen is guaranteed through privacy (*K Puttaswamy v Union of India* 2017d). The three concepts of liberty, equality and fraternity are to be read together. Right to privacy recognises the autonomy of individuals, as privacy is intrinsic to freedom and liberty.

The first facet of individual autonomy is the freedom to eat. Let it not be diluted.

NOTES

1 The Kesavananda Bharati case was decided in the context of the right to property earlier protected under Part III of the Constitution.

2 Interestingly, the proposition of harmony among all citizens was used in the Hinsa Virodhak Sangh case to justify cow protection laws.

3 The doctrine of non-arbitrariness under Article 14 was laid down in *E P Royappa v State of Tamil Nadu* (1974). The doctrine was recently reiterated by Justice R Nariman in *Shayara Bano v Union of India* (2017).

4 It is clear from the provisions of the Food Safety and Standards Act, 2006 and the regulations framed thereunder that bovine flesh has been accepted as a nutritious food.

5 Section 11(3)(e) of the Prevention of Cruelty to Animals Act, 1960.

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— (2017c): SCC Online, SC, 996 (Chelameswar, J, concurring).

— (2017d): SCC Online, SC, 996 (Sapre, J, concurring).

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INDIA'S ATTEMPT TO SAVE THE HIMALAYAN ECOSYSTEM: A CLIMATE CHANGE LAW APPROACH

- *Niharika Salar*

According to a highly acclaimed report released last year, at least one third of the humongous ice fields in Asia's Himalayan eco system are on a meltdown due to climate change. In 2008, the Government of India released the National Action Plan on Climate Change (NAPCC) in furtherance of it's desperate measure to address climate change. In 2010, the much awaited National Mission for sustaining the Himalayan Eco-system was launched under the NPACC. The mission particularly aimed to address some important concerns like Himalayan glaciers, biodiversity and wild life conservation amongst others. Yet, In June 2013, the infamous flash floods hit Uttarakhand (a north Indian State covered majorly by the Himalayan range) which saw immense damage with respect to human lives and infrastructure. Due to a lack of comprehensive legislation categorically dealing with climate change In India, litigators resort to other several laws which address aspects of climate change like causes and effects. But the question of the hour is whether there has been a positive response by the Himalayan glaciers or it too late to act? The following essay will attempt to chalk out India's efforts to curb climate change impacts on the Himalayan ecosystem and understand the lengthy path which lies ahead.

PART I: INTRODUCING THE PROBLEM

Introduction

For many Indians, Diwali is one of the most auspicious festivals of the year, dedicated to the celebration of return of Lord Ram from exile (according to Hindu mythology). Unlike many festivals which are decided according to the Gregorian calendar, the Hindu calendar marks the dates of Diwali each year, which in turn follows the lunar cycle.[1] By Diwali, a major portion of India commences to feel the upcoming winter chills due to which Diwali for a long period of time has been a winter festival till a candid conversation with my father revealed that he could only recall his childhood Diwali days to be during a comfortable weather and never this cold. The lunar cycle was the same, but what brought about the gradual changes was the changes climate has been undergoing due to various factors.

This essay will appreciate and map out India's efforts in its attempt to restore the glory of the Himalayan ecosystem. After setting out a brief context and background in Part I,

[1] On the Hindu calendar, Diwali falls under the dark Moon Tithi during the Hindu month of Kartik, which falls between October and November according to the English calendar

Part II will chalk out the legal measures taken and attempt to track the progress of the same. Part III of the essay will then present the long road which lies ahead of India to restore the Himalayan range coupled with author's concluding thoughts.

Today, 'climate change' are the dreaded words which major countries are struggling to appreciate, including India. Not only has climate change posed a massive threat to significant "environmental, economic, social and political"[2] developments, it has also forced us to reconsider how we have been addressing global commons politics with the divide between the North and the South staring at us in the faces all over again.[3] (as explained below)

With respect to India's role, a "thriving economy and steadily growing emissions"[4] have made India a key player and also difficult to ignore in international climate change negotiations. On a domestic front, India's efforts to appreciate (much later curb) climate change achieved some momentum during Prime Minister Singh's regime by way of a "National Action Plan, eight national missions covering adaptation and mitigation, and 32 state action plans."[5] This plan also addressed climate change in the Himalayas[6], the progress of which is under a question mark as factors like coordination and enforcement issues at State level, and most importantly, lack of acknowledgment of the reality of climate change in itself by individuals in power[7] dampen such efforts.

[2] G. C.S. Negi et al., *Impact of climate change on the western Himalayan mountain ecosystems: An overview*, 53 TROPICAL ECOLOGY 345–356 (2012)

[3] Kari Anne Isaksen & Kristian Stokke, *Changing climate discourse and politics in India. Climate change as challenge and opportunity for diplomacy and development*, 57 GEOFORUM 110–119 (2014), "*Global climate change and international mitigation efforts are seen as representing a global injustice: It is the West's problem and responsibility, and it is therefore unfair that developing countries should suffer from, and solve, a problem they have not contributed to. A former government official (interview 11.10.12) argues that the pressure upon India and China to restrain emissions is unfair since it is asking these countries to make sacrifices to solve a problem caused by others*"

[4] Sonali P. Chitre, *India's Role in an International Legal Solution to the Global Climate Change Problem*, SSRN ELECTRONIC JOURNAL (2012); *See* Arindam Basu, *Climate change litigation in India: Seeking a new approach through the application of common law principles*, 1 ENVIRONMENT LAW & PRACTICE REVIEW

[5] Navroz Dubash & Lavanya Rajamani, *Rethinking India's approach* as a part of POLICY CHALLENGES- 2019-2024: THE BIG POLICY QUESTIONS FOR THE NEW GOVERNMENT AND POSSIBLE PATHWAYS , Centre for Policy Research (2019)

[6] The National Action Plan on Climate Change, National Mission for Sustaining the Himalayan Ecosystem available at <http://www.nicra-icar.in/nicrarevised/images/Mission%20Documents/National-Action-Plan-on-Climate-Change.pdf> (last accessed on March 27, 2020 ay 17:20 hours)

[7] See text of fn. 92

India for the longest period of time held the notion that the East cannot be held responsible for what the West does[8] , something similar of which is also incorporated in the 'polluter pays principle'[9] version followed within India. Due to this reason, the developing v. developed countries dramatic approach to climate change and law still haunts India.[10] Neverthless, Stokke & Isaksen[11] argue that a shift from, what they would like to term, "third world discourse" to a "win-win discourse" which is essentially a realization that climate change directly impacts economic development is taking place. Therefore, there is an "alignment between the Indian and the international climate politics" [12] and India is finally moving on to focusing on climate change's potential damages to internal economy and development.[13]

The ecological threat to Hindu Kush Himalaya Region

There is no doubt that the Hindu Kush Himalaya region is an important asset for India. Apart from being a valuable source of fresh water[14], the Himalayas also hold profound cultural and religious significance, which invites tourism at a large scale every year.[15] But one cannot forget that "mountains are early indicators of climate change"[16] due to which it comes as no surprise that the Himalayan region is gradually at a risk of being the front runners of bearing the heat from climate change, something which humans[17] and economic

[8] Jagadish Thaker & Anthony Leiserowitz, *Shifting discourses of climate change in India*, 123 CLIMATIC CHANGE 107–119 (2014), See Antto Vihma, *India and the global climate governance: Between principles and pragmatism*, 20 JOURNAL OF ENVIRONMENT AND DEVELOPMENT 69–94 (2011)

[9] *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212 *"The polluter pays principle demands that the financial costs of preventing or remedying the damage caused by pollution should lie in the undertakings which cause the pollution or produce the goods that cause the pollution."; See* Mizan Khan, *Polluter-Pays-Principle: The Cardinal Instrument for Addressing Climate Change*, 4 LAWS 645 (2015) *"application of PPP in India is regarded somewhat different in the sense that the Government has assumed a system of direct liability, and pays compensation to victims, but later collects from polluters through an action of subrogation."*

[10] Thaker & Leiserowitz fn. 8

[11] Isaksen & Stokke fn. 3

[12] *Ibid* at 111

[13] Fisher, *India and climate change: energy, equity and development*, *in* Feeling the Heat (123-148) <https://link.springer.com/chapter/10.1057/9780230374973_7 > (last accessed on April 10, 2020 at 12:30 hours)

[14] See Annexure 1; *See* PHILIPPUS WESTER ET AL., THE HINDU KUSH HIMALAYA ASSESSMENT : MOUNTAINS, CLIMATE CHANGE, SUSTAINABILITY & PEOPLE (2019)

[15] Shalini Singh, *Secular Pilgrimages and sacred tourism in the Indian Himalayas*, 64 GEO JOURNAL (2005) 215-223

[16] S.P Singh et. al. 2 *Rapid warming in the Himalayas: Ecosystem responses and development options,* CLIMATE & DEVELOPMENT (2010) 1-13

[17] < https://www.carbonbrief.org/analysis-why-scientists-think-100-of-global-warming-is-due-to-humans > (last accessed on March 30, 2020 at 14:20 hours) *"In its 2013 fifth assessment report, the IPCC stated in its summary for policymakers that it is "extremely likely that more than half of the observed increase in global average surface temperature" from 1951 to 2010 was caused by human activity. By "extremely likely", it meant that there was between a 95% and 100% probability that more than half of modern warming was due to humans."*

development[18] are arguably responsible for. Gangotri[19] has lost dangerous volumes of water[20] extending the arms of impact to drinking and harvesting water. [21] Similarly, apple harvesting in the State of Himachal Pradesh is affected negatively.[22] A country like India which is heavily dependent on agriculture for economy development is bound to be alerted.[23]

The much acclaimed and comprehensive *Hindu Kush Himalaya Assessment report, 2019* [24] released some disturbingly alarming observations. With inputs and peer reviewing from over 200 experts, researchers and policymakers for over a period of five years, the most worrisome finding remains that even if carbon emission are drastically reduced with immediate effect, by 2100, 36% of the Hindu Kush Himalaya glaciers will melt anyway.[25] Similar concerns was also a subject of controversy in the Intergovernmental Panel on Climate Change's Fourth Assessment Report (IPCC)[26], which predicted that "glacial melts in the Himalaya region alone with increase flooding, trigger avalanches and land- slides, and cause extinction of species and ecosystems."[27] Despite previous errors by the IPCC,[28] such findings are hard to ignore. Additionally "The Indian Network for Climate Change Assessment

[18] SURENDER P SINGH ET AL., CLIMATE CHANGE IN THE HINDU KUSH-HIMALAYAS: THE STATE OF CURRENT KNOWLEDGE (International Centre for Integrated Mountain Development) (2011) (the authors claims that undergoing dramatic change in the region is triggered largely by the economic growth of India and China)

[19] Gangotri is a source of the perennial and holy river Ganga which in turn is formed by the Himalayan glacier

[20] Emily Wax, *A Sacred River Endangered by Global Warming*, Washington Post, June 17, 2007, available at <https://www.washingtonpost.com/wp-dyn/content/article/2007/06/16/AR2007061600461.html> (last accessed on April 04, 2020 at 12:50 hours) ; *See* Deepa Badrinarayana, *The Emerging Constitutional Challenge of Climate Change: India in Perspective*, 19 FORDHAM ENVIRONMENTAL LAW REVIEW 1–38 (2009)

[21] Namrata Patodia Rastogi, *Winds of change: India's emerging climate strategy*, 46 THE INTERNATIONAL SPECTATOR 127–141 (2011)

[22] INCCA: INDIAN NETWORK FOR CLIMATE CHANGE ASSESSMENT, CLIMATE CHANGE AND INDIA: A 4X4 ASSESSMENT , A SECTORAL AND REGIONAL ANALYSIS FOR 2030S (2010) available at < http://www.indiaenvironmentportal.org.in/files/fin-rpt-incca.pdf> (last accessed on March 15, 2020 at 15:30 hours) (*"The increase in maximum temperature reduced the total chilling hours in the region... Data on cumulative chill units of coldest months showed a decline of more than 9.1 units per year in the last 23 years."*) at 82

[23] Jyoti K. Parikh & Kirit Parikh, *Climate Change: India's Perceptions, Positions, Policies and Possibilities*, 6 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2002), available at <https://www.indiawaterportal.org/sites/indiawaterportal.org/files/1934784.pdf> (last accessed on April 10, 2020 at 15:25 hours)

[24] HINDU KUSH HIMALAYA REPORT, 2019 n. 14

[25] *Ibid* at 230

[26] < https://www.ipcc.ch/> (last accessed on March 30, 2020 at 23:10 hours)

[27] CLIMATE CHANGE 2007 IMPACTS, ADAPTABILITY AND VULNERABILITY, IPCC, WORKING GROUP II CONTRIBUTION TO THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE FOURTH ASSESSMENT REPORT, SUMMARY FOR POLICY MAKERS (2007), available at <https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf> (last accessed on March 29, 2020 at 10:45 hours)

[28] The IPCC earlier claimed in 2007 that the Himalayan glacier could met by 2035 which was later reported as an error

(INCCA) [29] was created by the Government of India in 2010 as a network of various acclaimed scientific institutions partly to formalize the teams that worked on the first National Communication and partly as a domestic counterpart to the IPCC. It published an assessment of four sectors[30] in four "hotspots"—"the Himalayas, Western Ghats, coastal areas, and the Northeast"[31] and pointed out the declining state of the Himalayan range.

A glimpse of the severity of climate change impact on the Himalayan range was bestowed upon the Indian Himalayan state of Uttarakhand in 2013 in a horrific event which was second in damages only after the 2004 Tsunami in the 21st century.[32] On a June 2013 evening, the residents of Kedarnath in Uttarakhand woke up to devastating floods and landslides majorly caused by a multi-day cloudburst. The month of June typically attracts more tourists due to pleasant weather due to which the 3-day flooding caused death of over 5,700 people in official accounts and many missing. Apart from blaming movement of southwest monsoon winds,[33] uncontrolled tourism,[34] scholars have agreed that the major reason behind the disaster was climate change.[35] The then Chief Minister of Uttarakhand, Vijay Bahuguna was quoted on June 19, 2020 stating that he would call this natural disaster the "Himalayan tsunami."[36] Interestingly, this wasn't the first time the state was experiencing such a disaster[37] and it was the much needed wake up call for India to take action as soon as possible or be prepared to face the worst.

[29] Subodh Sharma & Rita Chauhan, *Climate change research initiative: Indian network for climate change assessment* 101 (3) CURRENT SCIENCE 308–11 (2011); Ramachandran, INDIA IN THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2012)

[30] INCCA: INDIAN NETWORK FOR CLIMATE CHANGE ASSESSMENT, CLIMATE CHANGE AND INDIA: A 4X4 ASSESSMENT , A SECTORAL AND REGIONAL ANALYSIS FOR 2030S (2010) fn.22

[31] Navroz K. Dubash et al., *India and Climate Change: Evolving Ideas and Increasing Policy Engagement*, 43 ANNUAL REVIEW OF ENVIRONMENT AND RESOURCES 395–424 (2018)

[32] Maharaj K. Pandit, *The Himalayas must be protected*, 501 NATURE 283 (2013)

[33] Amit Kumar, *Demystifying a Himalayan tragedy: study of 2013 Uttarakhand disaster*, 1 JOURNAL OF INDIAN RESEARCH 106–116 (2013)

[34] Nayanika Mathur," *It's a conspiracy theory and climate change " Of beastly encounters and cervine disappearances in Himalayan India*, 5 HAU: JOURNAL OF ETHNOGRAPHIC THEORY 87–111 (2015)

[35] *Ibid* ; *See* M Balasubramanian & P J Dilip Kumar, *Climate Change , Uttarakhand , and the World Bank ' s Message*, 49 ECONOMIC AND POLITICAL WEEKLY 65–68 (2014)

[36] *'Himalayan Tsunami' strikes, thousands still stranded in Badrinath and Kedarnath* <https://www.thenational.ae/world/asia/himalayan-tsunami-strikes-thousands-still-stranded-in-badrinath-and-kedarnath-1.646696> (last accessed on March 29, 2020 at 18:45 hours)

[37] See Ravindra K. Pande, *Flash flood disasters in Uttarakhand*, 19 DISASTER PREVENTION AND MANAGEMENT 565–570 (2010)

PART II: HOW HAS THE RESPONSE BEEN?

National Action Plan

The proposal to appoint an expert committee to study the impact of climate change on India was introduced during the Union Budget 2007-08 speech[38] following which the then Prime Minister of India, Mr Manmohan Singh established a high level advisory Council on climate change comprising of senior ministers and non-governmental experts. The main purpose of the Council was to frame a domestic strategy to deal with climate change which was a clear sign that climate change was gradually developing towards an issue for domestic policy-making as well. The Council followed up on its mandate by launching the National Action Plan on Climate Change (NAPCC) in 2008[39] , "establishing climate adaptation and mitigation missions in strategic fields such as solar energy, energy efficiency, sustainable habitat, water, Himalayan ecosystems, sustainable agriculture[40] and strategic climate change knowledge."[41] The National Mission for Sustaining the Himalayan Ecosystem (NMSHE), one of the eight missions under the National Action Plan was approved only in February 2014 by the Union Cabinet.[42]

But more than 11 years later, tracking the progress of the plan seems a tricky task as steps taken appear bleak, majorly because of lack of access to documents available. Authorities and officials are often found sceptical and unwilling to divulge information[43] and "the budget heads and schemes through which the plan is being implemented have changed enough number of times" to lose uniformity. Evidently, the National Plan was a rushed

[38] Speech of P. Chidambaram, Minister of Finance on February 28, 2007 available at <https://www.indiabudget.gov.in/budget_archive/ub2007-08/bs/speecha.htm> (last accessed on April 09, 2020 at 16:40 hours)

[39] NATIONAL ACTION PLAN ON CLIMATE CHANGE (NAPCC) 2008 Available at < http://www.nicra-icar.in/nicrarevised/images/Mission%20Documents/National-Action-Plan-on-Climate-Change.pdf> (last accessed on March 27, 2020 at 14:20 hours)

[40] *See* Rastogi n.21

[41] Government of India, 2008. PM's Speech on Release of Climate Change Action Plan. Available at < https://archivepmo.nic.in/drmanmohansingh/speech-details.php?nodeid=667> (last accessed on April 03, 2020 at 15:40 hours)

[42] Press release available at < https://pib.gov.in/newsite/PrintRelease.aspx?relid=104351> (last accessed on April 11, 2020 at 15:30 hours)

[43] Union Ministry of Environment, Forest and Climate Change released a publication on climate actions in India titled "India – Spearheading Climate Solutions". This publication "India – Spearheading Climate Solutions" mentions the key actions India has taken under various sectors towards combating and adapting to climate change. Despite extensive searching, the publication wasn't found.

decision and it appeared so due to then government's intention to be relevant in the international climate negotiations. Therefore, the document merely provided broad objectives and did not address particular strategy in detail. This becomes a problem as many readers of this document were new to the idea and still thought climate change was a ghost idea. It is also important to note that the concerned ministers took another six years to "approve the missions." By then, alignment between new schemes and the national plan lost track due to the election of a new government. Due to this, the intention behind the commencement of the plan appears to be getting bleak amidst the new government's fresh yet questionable plans.[44] In 2018, The Committee on Estimates submitted its report on the performance of the National Action Plan on Climate Change which interestingly had no mention regarding NMHSE.[45]

But on a more positive end, since the inception of the Himalayan mission which operates under the Department of Science and Technology (DST) "the creation of networks of specialised knowledge and information centres"[46] has been a step forward. As of 2014, India had established centres and an observational network to monitor the health of the Himalayan ecosystem.[47]

Litigation

Indian Courts have faced their fair share of criticism. Badrinarayana[48] notes that due to various factors including access to Court before actual violation occurs (given that a major population in a country like India is still unaware of their rights), Court's authority to determine whether an injury has occurred without placing reliance on statuary enactments and procedural flexibilities enshrined in the Indian Constitution pulls the Indian judiciary to be ahead of many other Court system in the world.[49] M C Mehta[50] has been an active flag bearer for leading Indian litigation revolving around related concerns. Procedural flexibilities

[44] *India's National Action Plan on Climate Change needs desperate repair* < https://www.downtoearth.org.in/news/climate-change/india-s-national-action-plan-on-climate-change-needs-desperate-repair-61884> (last accessed on April 09, 2020 at 10:20 hours)

[45] Available at <https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/Estimates%20Committee%20Report%20Summary_v1.pdf> (last accessed on March 29, 2020 at 15:40 hours)

[46] *Ibid*

[47] *India's Progress in Combating Climate Change* Briefing Paper for UNFCCC COP 20 Lima, PERU December, 2014 accessible at <http://harenvironment.gov.in/sites/default/files/Indian_Progress_Combating_Climate_Change.pdf> (last accessed on April 13, 2020 at 10:20 hours)

[48] Badrinarayana, fn.20 at 24 & 25

[49] *See* Basu fn. 4

[50] In *MC Mehta v Union of India* ,1987 SCR (1) 819, *"there is a 30-year history of court orders compelling Indian governments to take air pollution mitigation measures to protect constitutional rights, including a right to a clean and healthy environment."*

vested in Indian judiciary like public interest litigation, as explained above, has allowed him to do so. On a parallel end, climate change litigation is catching up as well.[51]

The National Green Tribunal was called in session to hear a petition in *Court (on its own motion) v State of Himachal Pradesh*,[52] regarding blackening of snow cover in the Himalayan range due to considerable increase in unburnt hydrocarbon and carbon soot. The National Green Tribunal made a series of orders directing the State government to take action to redress the environmental degradation of Rohtang Pass—caused by inadequately regulated tourism-related development and activities. The Tribunal noted Black Carbon has been a "major causative factor for rapid melting of glaciers in the north-western Himalaya" and a significant contributor to global warming.[53] After appropriate discussion and further hearings, the Tribunal in February 2014 ordered the State government to take various actions to reduce vehicular pollution, such as regulating the number of vehicles and emission standards. Later in May, 2016, the Tribunal directed the government to submit a "detailed compliance report relating to the various environmental orders of the Tribunal."[54]

While the order has been in place, the darker side of the picture has started to surface. After Tribunal restrictions, many local wage workers lost their source of livelihood and are allegedly still waiting for the execution of the rehabilitation plan. [55] Their main concern is that blocking tourist activities[56] is actively discouraging tourism, which was their bread and butter. Business Standard reported that the State of Himachal Pradesh was planning to appeal in the Supreme Court against the NGT order[57], however no such records were found on the Supreme Court website.

[51] See *Pandey v India*, National Green Tribunal of India, Original Application No 187 of 2017, Petition filed 25 March 2017: A nine year old girl sued the Indian government for not taking appropriate action towards curbing climate change and carbon emissions

[52] *Court on its own motion v. State of Himachal Pradesh, through Additional chief Secretary (Forests) and Others*, MANU/GT/0009/2014 (Court on its own motion)

[53] See ¶ 20, *Court on its own motion*, MANU/GT/0009/014

[54] *Court on its own motion*, MANU/GT/0009/014

[55] *4K Manali families hit by NGT ban await rehabilitation* <https://www.tribuneindia.com/news/archive/himachal/4k-manali-families-hit-by-ngt-ban-await-rehabilitation-653028> (last accessed on April 13, 2020 at 18:40 hours)

[56] *NGT revokes ban on paragliding gets its wings back in Manali* <https://timesofindia.indiatimes.com/city/shimla/NGT-revokes-ban-on-paragliding-gets-its-wings-back-in-Manali/articleshow/52528682.cms> (last accessed on April 13, 2020 at 15:30 hours) Although paragliding was resumed 11 months after the authorities fulfilled the strict parameters imposed by NGT, other tourist activities still remain banned

[57] *Himachal to move SC against green tribunal ban at Rohtang pass* < https://www.business-standard.com/article/news-ians/himachal-to-move-sc-against-green-tribunal-ban-at-rohtang-pass-116031601113_1.html> (last accessed on March 23, 2020 at 17:35 hours)

In *Lalit Miglani v. State of Uttarakhand and Ors*,[58] constitutional rights were vested in the Himalayan glaciers. This was not the first time an Indian Court has vested constitutional rights in non-human animals.[59] Earlier too, cetaceans were declared as 'non-human persons' in order to protect them from economic development.[60] The Court was called in session in response to a PIL filed by advocate Lalit Miglani amongst others. After referring to a number of academic opinions and conventions which emphasized the importance of sustainable development and argued that rights vested not just in human beings,[61] Justice Singh and Justice Sharma recognised Himalayan glaciers, lakes and forests as "legal persons" [62] in order to preserve and conserve them.[63]

The Court acknowledged the impact of human activity on biodiversity destruction and displacement of animals.[64] The Court also took note of the fact that recently a New Zealand Court had also faced similar facts.[65] Interestingly, the approaches in the New Zealand judgement and Indian judgement converge on the lines of sacredness of the natural elements in question. While the Te Awa Tupua River holds ancestral and cultural value for the local Maori tribe, Whanganui for over 150 years now,[66] Ganga and Yamuna are important places of worship according to Hindu mythology.[67] Court also discussed the *parens patriae* principle wherein the Court can assume the role of "parent of the country" to look after

[58] *Lalit Miglani v. State of Uttarakhand and Ors.* , MANU/UC/0067/2017 (Lalit Miglani)
[59] See *Animal Welfare Board of India v A. Nagaraja*, (2014) 5 SCC 547 (India) (The case was in relation to an age old South Indian traditional practice of Jallikatu wherein a bull is released into a crowd of people and multiple human participants attempt to grab the large hump on the bull's back with both arms and hang on to it while the bull attempts to escape. The Supreme Court referring to the pain inflicted on bulls purely for the pleasure of humans opined in ¶ 72 that *"[...] in our view, "life" means something more than mere survival or existence or instrumental value for human beings, but to lead a life with some intrinsic worth, honour and dignity. [...] The right to dignity and fair treatment is, therefore, not confined to human beings alone, but to animals as well."*)
[60] Circular F. No. 20-1/2010-CZA(M)/2840, *Policy on establishment of dolphinarium – Regarding*, Ministry of Environment and Forests - Central Zoo Authority (May 17, 2013) available at <http://cza.nic.in/ban%20on%20dolphanariums.pdf> (last accessed on April 12, 2020 at 13:50 hours)
[61] But See *Naruto v. Slater*, No. 16-15469 (9th Cir. 2018) where a US Court did not hold rights in animals when Naruto, a macaque took a popular self-portrait by randomly clicking on the camera faced towards him.
[62] See Oliver A. Houck, *Noah's Second Voyage: The Rights of Nature As Law*, 31 TULANE ENVIRONMENTAL LAW JOURNAL 1–50 (2017)
[63] See ¶ 65, *Lalit Miglani*, MANU/UC/0067/2017
[64] See ¶ 37, *Lalit Miglani*, MANU/UC/0067/2017 *"It is the human beings who have encroached upon the forest land of wild animals. The habitat of wild animal is shrinking resulting in wild animals coming contact with the human beings"*
[65] See ¶ 39, *Lalit Miglani*, MANU/UC/0067/2017 *"The New Zealand Parliament has enacted 'Te Urewera Act 2014' whereby the 'Urewera National Park' has been given the legal entity under Section 11 of the Act. The purpose of the Act is to preserve, as far as possible, Te Urewera in its natural state, the indigenous ecological systems, biodiversity and its historical cultural heritage"*
[66] < https://www.nationalgeographic.com/culture/2019/04/maori-river-in-new-zealand-is-a-legal-person/> (last accessed on April 14, 2020 at 14:45 hours)
[67] See ¶ 13, 17 *Lalit Miglani*, MANU/UC/0067/2017

somebody who is not capable to do so.[68] Based on this principle, Court acknowledged it's moral duty to protect the environment and ecology.[69]

This judgement follows a pathway which a handful of countries have followed[70] in order to protect natural elements under what scholars have described as *environmental personhood.*[71] This principle revolves around the legal approach that if an environmental entity is granted "legal personality", it cannot be owned and has the right to appear in Court.[72]

The freshness of this particular judgement creates ambiguity in understanding the extent of protection. According to the judgement, a few officials in power were appointed as the human faces to protect the glacier.[73] In such a case scenario, questions regarding extent of responsibility of such parents spring up. Will they be liable for any litigation on behalf of Himalayas individually or will it by NAMAMI Gange Project[74] collectively?

These were the concerns when the State appealed to the Supreme Court of India within few months.[75] The Apex Court has stayed the ruling for now. The state government attacked spiritual ecology[76] and contended that the religious faith in a natural body is not sufficient to recognise rights within them. The State government also appeared concerned regarding jurisdictional issues and as to how to decide when the state would be responsible to protect the glaciers, as the holy (and one of the world's dirtiest) rivers flow in other Indian states as well. Another contention centred on "Act of God". In cases of natural disasters, would

[68] See ¶ 44, citing *Snapp & Son, Inc v. Puerto Rico ex rel Barez*, 458 U.S 592 (1982) in *Lalit Miglani*, MANU/UC/0067/2017

[69] See ¶ 57, *Lalit Miglani*, MANU/UC/0067/2017 "*"The Chief Secretary, State of Uttarakhand, Director NAMAMI Gange Project, Mr. Praveen Kumar, Director (NMCG), Mr. Ishwar Singh, Legal Advisor, NAMAMI Gange Project, Advocate General, State of Uttarakhand, Dr. Balram K. Gupta, Director (Academics), Chandigarh Judicial Academy and Mr. M.C. Mehta, Senior Advocate, Hon. Supreme Court, are hereby declared the persons in loco parentis as the human face to protect, conserve and preserve all the Glaciers including Gangotri & Yamunotri, ... and waterfalls in the State of Uttarakhand. These Officers are bound to uphold the status of these bodies and also to promote their health and well-being"*

[70] In 2008, after a national referendum, Ecuador changed its constitution to reflect rights for nature. It was the first country ever to do so; its move was followed by Bolivia in 2010. In July 2019, Bangladesh became the first country to grant all of its rivers the same status as that of human beings

[71] 10 GWENDOLYN J. GORDON, ENVIRONMENTAL PERSONHOOD (2017)

[72] < https://www.npr.org/2019/08/03/740604142/should-rivers-have-same-legal-rights-as-humans-a-growing-number-of-voices-say-ye> (last accessed on April 09, 2020 at 09:50 hours)

[73] See ¶ 65, *Lalit Miglani*, MANU/UC/0067/2017

[74] 'Namami Gange Programme', is an Integrated Conservation Mission, approved as 'Flagship Programme' by the Union Government in June 2014 to accomplish the twin objectives of effective abatement of pollution, conservation and rejuvenation of National River Ganga. < https://nmcg.nic.in/NamamiGanga.aspx> (last accessed on March 30, 2020 on 17:35 hours)

[75] Special Leave Petition (Civil) Diary No(s). 34250/2017 *Union of India vs Lalit Miglani*, order dated 27 November, 2017

[76] Kelly D. Alley, *River goddesses, personhood and rights of nature: Implications for spiritual ecology*, 10 RELIGIONS 1–17 (2019)

affected parties be liable to sue the appointed protectors, the viz. the concerned person in the case at hand?[77] There is still a lot of confusion around the construction of legal personality and execution of the same, which appears to be the main concern of the protectors. But I believe this judgement has given way to the much required debate on Himalayan protection.

[77] The copy of the original pleading is difficult to obtain because the case is still sub-judice, therefore references is made to newspaper articles < https://www.hindustantimes.com/india-news/sc-puts-on-hold-uttarakhand-high-court-order-declaring-ganga-a-living-entity/story-IYqkaehoLhAyWfjAP8GYOO.html> (last accessed on April 04, 2020 at 15:20 hours)

PART III: LOOKING AHEAD

One of the major catalysts towards Himalayan glacier melting is the soot emitted from sources in India and China. Scholars[78] argue the proportional relationship between black carbon and melting glaciers which is further explained by Nanda[79] as follows:

> "*When black carbon falls on snow it also darkens it: white snow reflects 80% of the sun's rays but with the presence of black carbon, darker snow absorbs the sunlight instead, which melts the ice. Reduction in surface glacial ice, especially in the Antarctic and the Himalayas, has been found to contribute to rising sea levels and overall global warming*"[80]

On black carbon front, existing studies show that India has not yet taken a call as to an appropriate response.[81] But given the establishment of a specialised Court called "National Green Tribunal" in 2010 (the judgement of which we just saw) which is designed specifically for environmental law hearings, adds more power to procedural flexibilities designed under the Indian Constitution for Court system.[82] Nanda[83] argues that given the current stance of India's approach to international climate change and the judicial intention behind India's public interest litigation, the Indian judiciary's interpretation of the Indian Constitution appears to favour environmental conditions over development concerns. Therefore, there is room for law addressing black carbon in India's legal framework. Indian Courts did recognise the impact of black carbon[84] thereby including climate change litigation within the possible ambit.

[78] V. Ramanathan and G. Carmichael, *Global and Regional Climate Changes due to Black Carbon* NATURE-GEOSCIENCE (2007) "*Next to Carbon Dioxide, black carbon (BC) in soot, is most likely the strongest anthropogenic source for global and regional climate changes. Increased absorption of solar radiation by BC is shown to be just as important as CO2 in the early melting and retreat of the arctic sea ice and the Himalayan glaciers. During transport, BC is mixed with other aerosols to form Atmospheric Brown Clouds (ABCs). Global dimming due to ABCs can help explain the decrease in South Asian and Sahelian rainfall. Large reductions in BC emissions can significantly reduce the retreat of sea ice and glaciers.*"

[79] Anjali Nanda, *India's Environmental Trump Card: How Reducing Black Carbon through Common but Differentiated Responsibilities Can Curb Climate Change*, 39 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 39, 523–552 (2011)

[80] *Ibid* at 526

[81] *Ibid* at 548

[82] *See* text on fn. 49

[83] Nanda fn. 79

[84] See ¶ 2,3, *Court on its own motion*, MANU/GT/0009/014 "*Based on another study conducted by the Indian Institute of Technology, Kanpur, Black Carbon, mostly produced by burning of agricultural waste and vehicles,*

The 2019 Assessment Report by the International Centre for Integrated Mountain Development (ICIMD)[85] has some important suggestions worth pondering upon. Given the geographical nature of the Himalayas, trans-border international cooperation treaties have the potential to go a long way.[86] Another possible approach from the perspective of the resident can be green radicalism as put forth by Dryzek[87], which "enables individuals and communities to create alternative political economies based on self-sufficiency."[88] Additionally, The IPCC Panel is due to consider the Working Group III contribution to the IPCC Sixth Assessment Report at a plenary session on 12 to 16 July 2021[89] and it would be interesting to see the approach taken towards the Himalayan range.

Concluding thoughts

The current government's opinions towards climate change looks dubious and there are fair reasons to believe so. I believe there is enough research available to start panicking, but there are mixed opinions about it as well.[90] While it was pleasantly surprising to again find mention of climate change in Union Budget 2020-21, especially after the previous 4 budgets completely ignoring it under the same government, the Finance Minister of India did appear baffled regarding allocation of funds. She also seemed to completely ignore the estimates that climate change impacts could cause a reduction of 2.5 to 4.5 % of GDP, and did not give any indication of revising its emission reduction targets.[91]

Similarly there is also a stark contrast in the narrative adopted by the current Indian Prime Minister Modi. During an address to students in 2014, he was found stating that it is

is being seen as the major causative factor for rapid melting of glacier in the Himalayan region.... The study suggests that 40% of the glacial retreat could be attributed to Black Carbon impact and hence Black Carbon emission reduction can lead to near term impact on warming and thus reduce glacier melting."

[85] HINDU KUSH HIMALAYA REPORT, 2019 fn. 14

[86] One example can be the Kailash Sacred Landscape Conservation and development Initiative which is a regional cooperation treaty between India, Nepal & China. The primary purpose of the treaty is to establish mechanism for cross border cooperation to protect connected ecosystems

[87] J. S. Dryzek, *The Politics of the Earth. Environmental Discourses*, 2 OXFORD UNIVERSITY PRESS (2005)

[88] A similar example can be seen in the popular practice of wrapping oneself around a targeted tree or "tree hugging", a concept pioneered by the 1970s Chipko movement to physically block deforestation.

[89] < https://www.ipcc.ch/2019/09/26/working-group-iii-lam2-ar6/> (last accessed on April 13, 2020 at 18:24 hours)

[90] Just after the 600 pages Hindu Kush Himalaya report came out in January 2009, M Rajeevan, Ministry of Earth Sciences Secretary was quoted saying "*there is very little observational data to ascertain how the climate change is impacting the Himalayan range.*" On the other hand, Akhilesh Gupta, Department of Science & Technology in 2018 was quoted saying "*We have produced a large volume of scientific research in the last seven years and the next step is to consolidate all this research. We have planned a Strategic Knowledge report so that we can convert this research into policy*"

[91] Nirmala Sitharaman, Finance Minister , Government of India presenting the Union Budget 2020-21 on February 1, 2020 available at < https://www.indiabudget.gov.in/> (last accessed on April 13, 2020 at 11:20 hours)

not the climate but our tolerance and habits which has changed.[92] Amidst growing concerns over Modi government's various anti climate regulations including government's recent efforts to cut down Aarey forests in Mumbai[93], Modi was found calling out for strict action to curb carbon emissions at the 74th Session of the United Nations General Assembly (UNGA) in New York in September 2019. Yet, the Indian government appears to be continuing with its plans of construction of over 292 dams throughout the Indian Himalaya as part of Hydropower policy 2008[94] under the pretext of utilization of unexplored potential of hilly Himalayan states especially in the north-eastern India. [95]

The holy waters of Ganga have been visibly clean after ages now, due to the lockdown period.[96] And while it is no surprise that this may be temporary and as soon as human activity begins with full force, the water will start pollution again, stronger implementation of laws will be the key to bring in permanent changes. In my opinion, the measures taken by the government towards the Himalayan ecosystem is worth appreciating with due credits to a few policy makers and environmentalists who are trying their best to make aware the people in power. However, the same has constantly met with conflicting interests as we saw in the litigation section, due to which the real challenge remains to keep all the stakeholders interest in mind. Though it is impossible to keep everyone happy at this juncture where the reality of climate change is getting clearer day by day ironically and time is of the essence, the government needs to take a quick call as to who would be a priority, the current or the upcoming generation.

[92] The Prime Minister Narendra Modi interacting with students on the occasion of Teacher's Day <https://www.youtube.com/watch?v=_h-XZeQnLVU> at 48:25 (last accessed on March 29, 2020 at 15:35 hours)

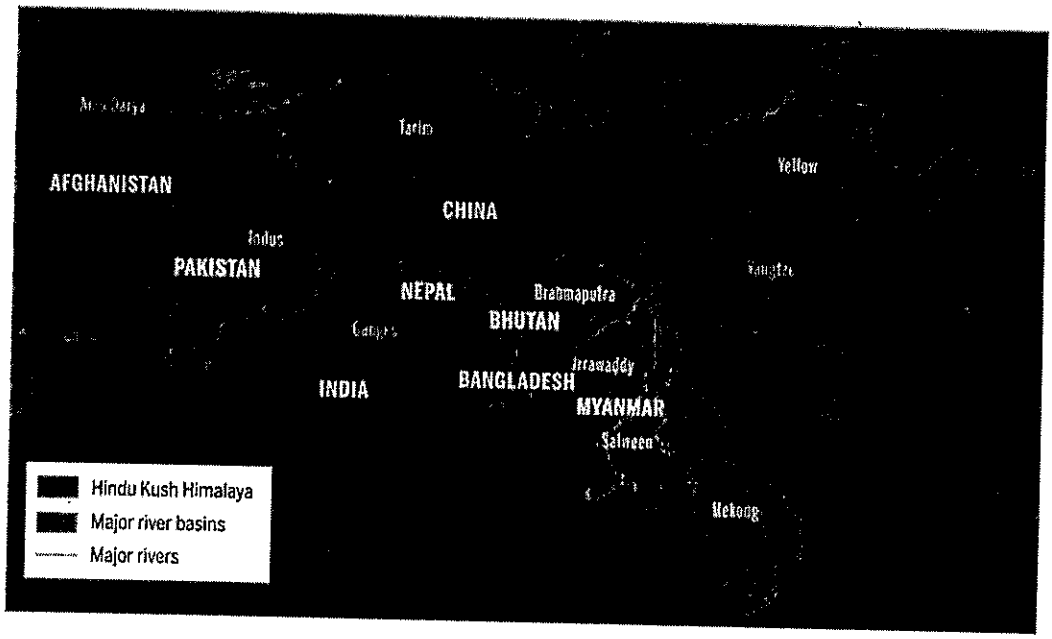
[93] BMC's Tree Authority approves cutting of 2,700 tress in Mumbai's Aarey colony < https://timesofindia.indiatimes.com/city/mumbai/bmcs-tree-authority-approves-cutting-of-2700-trees-in-mumbais-aarey-colony/articleshow/70892036.cms> (last accessed on April 09, 2020 at 16:50 hours)

[94] Available at <http://www.ielrc.org/content/e0820.pdf> (last accessed on April 10, 2020 at 17:30 hours)

[95] R. Edward Grumbine & Maharaj K. Pandit, *Threats from India's Himalaya dams*, 339 SCIENCE 36–37 (2013)

[96] *Ganga river water becomes fit for drinking in Haridwar, Rishikesh during India's lockdown* <https://timesofindia.indiatimes.com/travel/destinations/ganga-river-water-becomes-fit-for-drinking-in-haridwar-rishikesh-during-indias-lockdown/as75079848.cms?utm_source=facebook.com&utm_medium=referral&utm_campaign=TOI&fbclid=IwAR0TFQWvhinnJqlzkQD9dD7FQ8cyXJk7C1eofRe8kqw6KNzOkVC_9MVt1L4> (last accessed on April 13, 2020 at 23:03 hours)

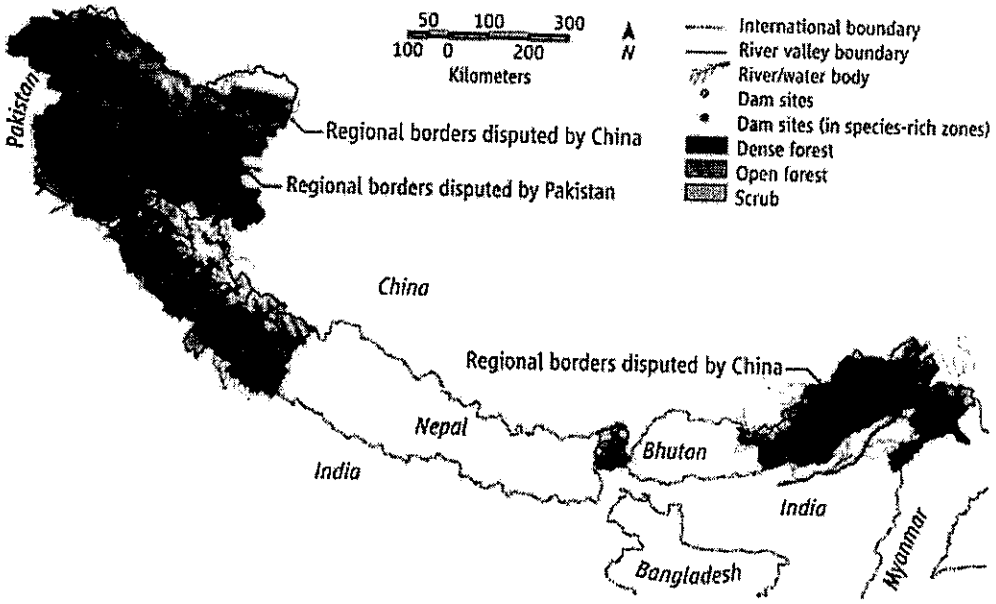
ANNEXURE 1: THE HINDU KUSH HIMALAYA REGION



The Hindu Kush Himalayan region and 10 major river basins

Picture sourced from *The Hindu Kush Himalaya Assessment Report, 2019*

ANNEXURE 2: PROPOSED DAM SITES OVER INDIAN HIMALAYAN RANGE



Distribution of proposed dams in the Himalayan states of India

Picture sourced from *https://www.circleofblue.org/wp-content/uploads/2013/06/CPI-grumbling-india-hydro-paper-2013-Grumbine-36-7-01.pdf*

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BRING OUR KIDS HOME AND HOW*

Abstract:

The issues of transnational-spousal child removal are many especially in the present world where people migrate across regions with much ease. Problems arise when children are caught in this migration. Problems become severe when one parent takes the child along without the permission of the other parent.

Thousands of children across the globe are abducted from his or her habitual residence by their own parents. Most of such removals are in defiance of custody orders by the courts.

India even in 2017 is not a signatory to The Hague Convention on Civil Aspects of International Child Abduction. The question of India's accession to the Convention first came up in 2007, but reached no logical end.

Indian Courts have analyzed each situation on a case to case basis. The position of law which is followed today is that any decision which is taken should be in accordance with the welfare and best interest of the child, comity of courts, priority principle and intimate connection test.

Now the big question is how would Indian Courts secure the prompt return of its children from foreign jurisdictions? How will Indian Courts ensure non- removal of Indian children to foreign jurisdictions in violation of local court orders? Which law would apply and how would it extend to a foreign country?

Keywords: transnational-spousal child removal, welfare and best interest of the child, comity of courts, priority principle and intimate connection test, The Hague Convention, parental child abduction.

* **Dr. Aruna B Venkat , Associate Professor, Nalsar University of Law, Hyderabad.**

Introduction:

'Imagine your spouse and 3-year-old child leave for a "vacation" to India and days before their scheduled return to the United States, you receive a call, saying they are not coming back home. Your spouse then files for divorce in India and you petition the U.S. court for sole child custody. Over the next few years, you find yourself embroiled in bitter cross-border litigation, drained of all your life savings, making no progress. You seek assistance from U.S. and Indian governments, but there is little they can offer, because they have not created a legal path for return of abducted children.'

-- BOKH

'One day two years ago, my wife left for India taking our two-year-old son. I'm now fighting a long court battle for custody in India.

- A US-based Indian father to The Telegraph

These are the experiences of many parents whose children are removed to other jurisdictions by the other parent.[1]

The issues of transnational-spousal child removal are many especially in the present world where people migrate across regions with much ease. Problems arise when children are caught in this migration. Problems become severe when one parent takes the child along without the permission of the other parent.

Thousands of children across the globe are abducted from his or her habitual residence by their own parents. Most of such removals are in defiance of custody orders by the courts. When parents split, they split across countries. These lead to conflict litigations in different nations. An aggrieved parent armed with a foreign decree requiring return of the child finds no relief in the Indian legal system. In the absence of a domestic law on "inter-parental child abduction" in India, NRI children become silent victims of their parents' marital dispute when they are forcibly brought back by one of the parents.

No domestic law on Parental Child Abduction

But the question is why there is no domestic law on Parental Child Abduction?

Ninety-four states are party to the Hague Convention on Civil Aspects of International Child Abduction, which desires "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access".[2]

[1] It is reported that each year more than 1,000 American children are reported abducted by their parents from the United States to other countries. Between 2010-14, 6,000 cases were reported. Less than 40% of the abducted children are returned. India is the No. 1 non-Hague Abduction Convention signatory destination of IPCA from the United States and No. 3 overall. (U.S. Department of State, 2015)

[2] The Hague Convention on Civil Aspects of International Child Abduction, 1980

"Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and if necessary of dissolving the marriage contract."

Lord Westbury

Lord Westbury's dictum in *Shaw v Gould*[1] still holds true.

Introduction

Marriage is a holy union. It joins two individuals for life. This is the basic belief across religions. Divorce being a thorny issue, the courts have a duty to make every possible effort to save the institution of marriage and must insist on performance of matrimonial obligations with prudence. Divorce under any personal law is devastating for all the interested parties of that union.

The essence of marriage is understood as "... a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring". *Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing.* It is indicative of a disruption of the essence of marriage. And if disruption continues for a long period, it would indicate breakdown of marriage.[2]

Marriage gives rise to conjugal relations, obligations and rights for both the spouses. Married state requires the discharge of common obligations imposed by the institution of marriage on them. Therefore, what the law seeks to enforce is the recognition and discharge of marital obligations of the married state. Withdrawal from this state of things called 'the home' is violation of matrimonial duties and obligations. It is believed in India that the conjugal right is not merely creature of the statue. Such a right is inherent in the very institution of marriage.[3]

Public policy, ethics, values & morals of a society are paramount in all jurisdictions. Therefore, marital relations are considered as the very foundation of a sound family system and hence safeguarded and protected. Severance of marital ties are allowed only in the manner and

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1(1868) L.R. 3 H.L. 55, 82

[2] Law Commission-71st Report on the Hindu Marriage Act, 1955-- "Irretrievable Breakdown of Marriage as a Ground of Divorce. Para 6.5.

[3] *Bipin Chander Jaisinghbhai Shah v Prabhawati*, AIR 1957 SC 176.

for the cause specified by law. Divorce is discouraged, and if at all permitted, is only for grave reasons.

The Apex Court observed that *desertion* is not the withdrawal from a place but from a state of things, which is 'the home'.[4] For desertion as a ground under section 13(1) (ib) of Hindu Marriage Act, 1955, two essential conditions relating to deserting spouse must be present, namely, the factum of separation, and the intention to bring cohabitation permanently to an end (*animus deserendi*). Two essential elements must be present so far as the deserted spouse is concerned: the absence of consent, and absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention to desert. All these four grounds have to be proved by the complainant.[5]

Lord Ried observed in *Gollins v Gollins* that "In matrimonial affairs we are not dealing with objective standards; it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman."[6]

Justice Chandrachud in *N.G. Dastane v S. Dastane*[7] observed that "The court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures."[8]

Therefore, where matters relate to delicate human relationship like matrimony, one has to see the probabilities of the case and not apply the test of proof beyond the shadow of doubt to matrimonial relationships between husband and wife.

Lord MacDermott, referring to the description of Sir William Scott said 'in *Preston Jones v. Preston Jones* that the jurisdiction in divorce involves the status of the parties and the public interest requires that *the marriage bond shall not be set aside lightly or without strict enquiry.* The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be "satisfied" in respect of a ground for dissolution, with something less than proof beyond reasonable doubt."[9]

The observations made by Lord MacDermott are still very relevant to the very institution of marriage in India, therefore, may be not 'proof beyond reasonable doubt' but definitely a strict inquiry in matter of dissolution of marriage is an absolute must. Therefore, a

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[4] Id.
[5] See *Mulla Hindu Law*, 21st ed, Butterworths.India.
[6] [1963] UKHL 5
[7] AIR 1975 SC 1534
[8] Refer, (1975) 3 SCR 967
[9] *Preston Jones v. Preston Jones* [1951] A.C. 391, 417.

duty is imposed on the court in the first instance, to make every effort possible to bring about reconciliation between the parties. In matrimonial matters, the approach of the court is required to be more constructive and Humane, since a matrimonial relationship and the welfare of the off springs is at stake.[10] Mulla says the court must not lose sight of the fact that dissolution of marriage is a matter of grave import and the last expedient of the law.[11]

Foreign Element

But all these observations and rules are thrown to the winds, the moment a foreign element in present in a fact scenario. Foreign element means an element or issue in a case which necessitates consideration of a law or a legal norm other than the law of the land or domestic law. Whenever the Courts are faced with a claim that contains a foreign element that is when Private International Law has a function to perform. This branch of law is also called Conflict of Laws. Private International Law is that part of Indian law which comes into operation whenever the court is faced with a claim that has a foreign element. Courts of the forum apply Private International Law to resolve conflicts. It is all pervading.

'It starts up unexpectedly in any court and in the midst of any process. It may be sprung like a mine in a plain common law action, in an administrative proceeding in equity, or in a divorce case, or a bankruptcy case, in a shipping case or a matter of criminal procedure. ... The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be untied only by Private International Law.'[12]

Therefore, Courts identify the appropriate applicable law for conflict resolution process. This is done by answering these questions. 1) Does the Court have Jurisdiction? 2) Classification or Characterization of the cause of action which means to allocate the issue to its correct legal category. 3) Identification of *Lex Causae* or the law that governs the cause of action. 4) Recognition and Enforcement of Foreign Judgements and Decrees.

The function of Private International Law is complete when it has chosen the appropriate system of law. Its rules do not furnish a direct solution of the dispute, and this law resembles the inquiry office at a railway station where a passenger may learn the platform at which his train starts.[13]

When a judge at the forum is seized of a case with a foreign element, he applies or enforces the chosen law which is the law of the forum but he must take in to consideration the foreign law which is an important fact in the case. Then the Judge attempts to create and

[10] S 23(2), (3) of HMA also see *supra 4 at* pg 1017.
[11] *supra* pg 829
[12] Frederic Harrison, *Jurisprudence and the Conflict of Laws*, pp 101-102.
[13] Cheshire and North's *Private International Law*, Butterworths 13th Ed, pg 8.

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CONFLICT OF LAWS IN MATRIMONY *

Abstract

Marriage gives rise to conjugal relations, obligations and rights for both the spouses. Therefore, what the law seeks to enforce is the recognition and discharge of marital obligations of the married state. Withdrawal from this state of things called 'the home' is violation of matrimonial duties and obligations. It is believed in India that the conjugal right is not merely creature of the statue. Such a right is inherent in the very institution of marriage.

Whenever the Courts are faced with a claim that contains a foreign element that is when Private International Law has a function to perform. This branch of law is also called Conflict of Laws. The function of Private International Law is complete when it has chosen the appropriate system of law. Courts resolve conflicts by the principles of comity or courtesy. The courts also use the principle of reciprocity to resolve conflict of laws. In cases where the wives of NRI are abandoned or deserted by their husbands then in that case which law will apply. Will courts apply law of the forum or foreign law?

There is no specific legislation with regard to NRI marriages. There is an urgent need for legislative intervention. Government must legislate because justice to all is a far more satisfactory way of dispensing justice than justice from case to case. Courts framed its own minimum rules of guidance for securing the certainty for NRI wives. Court also observed that it need not await legislative initiative, it can 'accomplish the modest job within the framework of the present statutory provisions if they are rationally interpreted and extended to achieve the purpose'. Court said 'a beginning has to be made as best as one can, the lacunae and the errors being left to be filled in and corrected by future judgments'.

Key words: Conflict of Laws, Domicile, foreign law, foreign judgement, law of the forum, marital obligations, Non-Resident Indians, Private International Law

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"Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and if necessary of dissolving the marriage contract."

Lord Westbury

Lord Westbury's dictum in *Shaw v Gould*[1] still holds true.

Introduction

Marriage is a holy union. It joins two individuals for life. This is the basic belief across religions. Divorce being a thorny issue, the courts have a duty to make every possible effort to save the institution of marriage and must insist on performance of matrimonial obligations with prudence. Divorce under any personal law is devastating for all the interested parties of that union.

The essence of marriage is understood as "... a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring ". *Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing.* It is indicative of a disruption of the essence of marriage. And if disruption continues for a long period, it would indicate breakdown of marriage.[2]

Marriage gives rise to conjugal relations, obligations and rights for both the spouses. Married state requires the discharge of common obligations imposed by the institution of marriage on them. Therefore, what the law seeks to enforce is the recognition and discharge of marital obligations of the married state. Withdrawal from this state of things called 'the home' is violation of matrimonial duties and obligations. It is believed in India that the conjugal right is not merely creature of the statue. Such a right is inherent in the very institution of marriage.[3]

Public policy, ethics, values & morals of a society are paramount in all jurisdictions. Therefore, marital relations are considered as the very foundation of a sound family system and hence safeguarded and protected. Severance of marital ties are allowed only in the manner and

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1(1868) L.R. 3 H.L. 55, 82

[2] Law Commission-71st Report on the Hindu Marriage Act, 1955-- "Irretrievable Breakdown of Marriage as a Ground of Divorce. Para 6.5.

[3] *Bipin Chander Jaisinghbhai Shah v Prabhawati*, AIR 1957 SC 176.

for the cause specified by law. Divorce is discouraged, and if at all permitted, is only for grave reasons.

The Apex Court observed that *desertion* is not the withdrawal from a place but from a state of things, which is 'the home'.[4] For desertion as a ground under section 13(1) (ib) of Hindu Marriage Act, 1955, two essential conditions relating to deserting spouse must be present, namely, the factum of separation, and the intention to bring cohabitation permanently to an end (*animus deserendi*). Two essential elements must be present so far as the deserted spouse is concerned: the absence of consent, and absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention to desert. All these four grounds have to be proved by the complainant.[5]

Lord Ried observed in *Gollins v Gollins* that "In matrimonial affairs we are not dealing with objective standards; it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman."[6]

Justice Chandrachud in *N.G. Dastane v S. Dastane*[7] observed that "The court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures."[8]

Therefore, where matters relate to delicate human relationship like matrimony, one has to see the probabilities of the case and not apply the test of proof beyond the shadow of doubt to matrimonial relationships between husband and wife.

Lord MacDermott, referring to the description of Sir William Scott said 'in *Preston Jones v. Preston Jones* that the jurisdiction in divorce involves the status of the parties and the public interest requires that *the marriage bond shall not be set aside lightly or without strict enquiry.* The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be "satisfied" in respect of a ground for dissolution, with something less than proof beyond reasonable doubt."[9]

The observations made by Lord MacDermott are still very relevant to the very institution of marriage in India, therefore, may be not 'proof beyond reasonable doubt' but definitely a strict inquiry in matter of dissolution of marriage is an absolute must. Therefore, a

[4] Id.
[5] See *Mulla Hindu Law*, 21st ed, Butterworths.India.
[6] [1963] UKHL 5
[7] AIR 1975 SC 1534
[8] Refer, (1975) 3 SCR 967
[9] *Preston Jones v. Preston Jones* [1951] A.C. 391, 417.

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enforce a right as nearly as possible similar to that which would have been created by the foreign court. But this method of conflict resolution does not do complete justice. Therefore, courts resolve conflicts by the principles of comity or courtesy. The courts also use the principle of reciprocity to resolve conflict of laws.

But unfortunately, all these methods don't seem to work in cases of NRI Marriages. In cases where the wives of NRI are abandoned or deserted by their husbands or where NRI husbands marry and leave behind their wives or in cases where NRI husband and his bride both being Indian domicile get married abroad and wife gets back to India due to ill-treatment and files for matrimonial relief in Indian Courts or husband files for relief in foreign courts, then in that case which law will apply. Will courts apply law of the forum or foreign law?

How will the courts resolve conflict of laws?

The issue of "NRI Marriages" has gained paramount importance over the years as the problem of Indian women trapped in fraudulent marriages with Non-Resident Indians (NRIs) and People of Indian Origin (PIOs) has assumed alarming dimension.

There is no specific legislation with regard to NRI marriages. There is an urgent need for legislative intervention. Government must legislate. Till this date Private International Law is a Judge made law. Chandrachud, C.J. has observed that Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.[14]

Matrimonial disputes are one of the most challenging and complex areas for legal intervention. The prevalence of marriages being celebrated under various personal laws in India adds to the complexity of these disputes. Issues become complex when a marriage steps beyond the borders of a country and its legal system. These marriages then enter a 'maze' of private international law that deals with the interplay and conflict of laws of different countries.

This has necessitated an urgent need to build safeguards to protect these women and make them aware of their legal rights. Law Commission in 1976 submitted its sixth-fifth report in which it prepared a draft bill on this subject.

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Appeal to Legislate

The Courts in India have time and again appealed to the Indian Legislature to legislate a law that seeks to avoid injustice to Indian wife whose NRI husband obtains an *ex parte* decree of divorce from foreign courts. The Apex Court has observed: " Our legislature ought to find a solution to such schizoid situations as the British Parliament has, to a large extent, done by

[14] Observed in *Mohd. Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945 at 945.

passing the "Recognition of Divorces and Legal Separations Act, 1971". Perhaps, the International Hague Convention of 1970 which contains a comprehensive scheme for relieving the confusion caused by differing systems of conflict of laws may serve as a model. But any such law shall have to provide for the non-recognition of foreign decrees procured by fraud bearing on jurisdictional facts as also for the non-recognition of decrees, the recognition of which would be contrary to our public policy. Until then the courts shall have to exercise a residual discretion to avoid flagrant injustice for, no rule of private international law could compel a wife to submit to a decree procured by the husband by trickery. Such decrees offend against our notions of substantial justice."[15]

Apex Court also observed: "The rules of Private International Law in this country are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act etc. In addition, some rules have also been evolved by judicial decisions. In matters of status or legal capacity of natural persons, matrimonial disputes, custody of children, adoption, testamentary and intestate succession etc. the problem in this country is complicated by the fact that there exist different personal laws and no uniform rule can be laid down for all citizens. ... This glaring fact of national life has been recognised both by the Hague Convention of 1968 on the Recognition of Divorce and Legal Separations as well as by the Judgments Convention of the European Community of the same year. Article 10 of the Hague Convention expressly provides that the contracting States may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with their public policy."[16]

Today, then ever in the past, there is a need for definite rules for recognition of foreign judgments in personal and family matters, and particularly in matrimonial disputes.

After having made repeated requests to legislature to come up with a suitable legislation with specific guidelines to regulate matrimonial disputes where foreign elements are present, Courts framed its own minimum rules of guidance for securing the certainty for NRI wives. Court also observed that it need not await legislative initiative, it can 'accomplish the modest job within the framework of the present statutory provisions if they are rationally interpreted and extended to achieve the purpose'. Court said 'a beginning has to be made as best as one can, the lacunae and the errors being left to be filled in and corrected by future judgments'. The Court set out the following guidelines:

[15] *Satya vs Teja Singh* AIR 1975 SC 105.
[16] *Y. Narsimha Rao v Y. Venkata Lakshmi*, 1991 (3) SC 33

"The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married.

The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties."[17]

Court also said that the parties do and ought to know their rights and obligations when they marry under a particular law. Court observed that with rise of marriages with NRIs the Union of India may consider enacting a law like the Foreign Judgments (Reciprocal Enforcement) Act, 1933 enacted by the British Parliament under Section (1) in pursuance of which the Government of United Kingdom issued Reciprocal Enforcement of Judgments (India) Order, 1958.

The Apex Court also gave three recommendations to safeguard interests of women:-

(1) No marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court;

(2) Provision may be made for adequate alimony to the wife in the property of the husband both in India and abroad.

(3) The decree granted by Indian courts may be made executable in foreign courts both on principle of comity and by entering into reciprocal agreements like Section 44-A of the Civil Procedure Code which makes a foreign decree executable as it would have been a decree passed by that court.[18]

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But unfortunately, the first Stage in Conflict of Laws being Jurisdiction, the issue and exercise of jurisdiction will always be based on the principles of Domicile and Residence which is the PIL rule of *Lex fori.* Hence, the above recommendations would not be very helpful.

It is importance for Nation State to entire into bilateral and multilateral agreements just as the European Nations did under the Brussels II framework Regulation of recognition of

[17] Id.
[18] *Neeraja Saroph v Jayant Saraph* 1994 SCC (6) 461.

foreign orders between EU countries. The impact of Brussels II is that if one is divorced in Europe, then there is a probability that the marriage will be recognized in one of the member states such as Britain. The problem would arise is when one gets divorced outside of the EU countries. Proving a valid divorce would be very difficult.

It is also difficult to issues judicial documents to a defendant when he is not in the same territory as the plaintiff. But service of proceedings is necessary for justice to be done.

India is a signatory to The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965. And India must sign The Hague Convention on the Recognition of Divorces and Legal Separations, 1970

Recognition of divorces and legal separations

The 1970 Convention regulates the recognition of divorces and legal separations. It is possible only if these divorces have been performed according to the correct legal process in the state where the divorce was obtained. Not all divorces need to be recognized under the convention.

Only those divorces and legal separations are recognized in all other Contracting States, which are obtained in a state where at the time of institution of the proceedings[19] the respondent had his/her habitual residence there, the petitioner had his habitual residence for at least a year or together with his/her spouse last habitually resided there or both were nationals of that state or if only petitioner was a national of that State, many other requirements have to be fulfilled as given in Article 2 of 1970 Convention.[20]

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[19] "Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations"

[20] Article 2 Such divorces and legal separations shall be recognized in all other Contracting States, subject to the remaining terms of this Convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation (hereinafter called "the State of origin") -(1) the respondent had his habitual residence there; or (2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled - *a)* such habitual residence had continued for not less than one year immediately prior to the institution of proceedings; *b)* the spouses last habitually resided there together; or (3) both spouses were nationals of that State; or (4) the petitioner was a national of that State and one of the following further conditions was fulfilled *a)* the petitioner had his habitual residence there; or *b)* he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or (5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled - *a)* the petitioner was present in that State at the date of institution of the proceedings and *b)* the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.

The UK is a signatory to the Hague Convention on the Recognition of Divorces and Legal Separations, 1970. It has adopted the convention as part of domestic law in 1971. UK has now replaced the 1971 Act with Family Law Act, 1986. Therefore British domestic law is equipped to validate foreign divorces. The Family Law Act, 1986 is broad enough to also provide for divorces which have been formalized as an order in proceedings by the court of the relevant country, and those informal divorces which have been made in the community as per the relevant custom. This is particularly common in the Hindu and Muslim religions.

The leading case is *Quazi v Quazi*[21] in which the couple was divorced in Pakistan as per a talaq divorce which involved the husband formally repeating before witnesses the word 'talaq' three times. The talaq was then given to the relevant authority and notice given to the wife. The issue decided by the Court of Appeal and eventually the House of Lords in 1979 was whether the talaq process was within the definition of 'quasi- judicial proceedings'. It was held that there was a valid divorce as the talaq was officially recognised by the law of Pakistan as leading to an effective divorce.

In the recent case of *NP v KRP*[22] there was a customary panchayat divorce in India which was argued by the ex wife to be invalid under English law on the basis that she had not known of or consented to the divorce in India. The divorce was not part of judicial proceedings, it was extra judicial and in order to be a valid divorce under panchayat system at least one of the parties must wish to divorce and the divorce must be endorsed by the community and family; there were no requirement for notice to be given to the other party to participate. Therefore, the British courts held the divorce valid as it was recognized in India.

Too much process, not enough service

The Hague Convection on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965 provides for Service of process, which is the method by

[21] [1979] 3 All ER 897 HL(E)
[22] [2013] EWHC 694 (Fam)

which a defendant is formally and officially notified that an action is pending against him and that he must respond.[23] While filing the initial pleading commences a lawsuit, from a defendant's perspective, service of process marks the beginning of his compulsory involvement.[24]

Service of process under the Convention is too costly, time consuming, and unreliable. The defining feature of Hague Service Convention, the Central Authority system, adds unwarranted expense and delay to the already expensive and protracted process of civil litigation. The Central Authority completely fails to effect service on a foreign party in a significant percentage of cases. The question is whether the Hague Service Convention actually permits litigants to sidestep the Central Authority and serve process simply, reliably, and directly—by mail. India opposes any direct service even by mail and requires service through Central Authority only. The Hague Service Convention provides one, universal mechanism to accomplish service of process within a party's territory. Each nation must establish a "Central Authority," which both receives and executes requests for service of process. Although it is easy to describe, but in practice the Central Authority system does not accomplish the stated goals of the Hague Service Convention, to simplify and expedite the service of documents abroad. Service of process under the Hague Service Convention often adds six months or more to an already delay-ridden judicial process. Even worse, however, is that nearly one in five service requests takes longer than a year to complete, and one in ten requests is never honoured at all. The Convention becomes inapplicable if address of person to be served is not known. In cases where the matter is not civil or commercial, the convention

[23] See *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444–45 (1946) ("[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.").

[24] See FED. R. CIV. P. 4(a)(1)(E) (requiring a summons of service to notify a defendant that a failure to appear will result in default judgment); TEX. R. CIV. P. 99(c) (requiring a citation to provide notice that if a defendant fails to file a written answer with the clerk, default judgment may result); see also Robert B. von Mehren, International Control of Civil Procedure: Who Benefits?, 57 LAW & CONTEMP. PROBS. 13, 14 (1994) ("As a general proposition, service is important in two respects. First, it may confer jurisdiction in some cases, and, second, it functions to give notice of the nature and venue of the case to the defendant.").

will not apply. The Hague Convention would become inapplicable where the document to be served is not a judicial or an extra-judicial document.

Indian Courts are now more receptive to foreign orders

But in *Anupama Sharma v. Union of India*[25], the summons issued by the New York Court was privately delivered to the Petitioner in the proceedings which were pending before the New York Court. The petitioner contended that the service of summons was contrary to Article 3 and 5 of the Hague Convention since the summons was served not by the U.S. Court to the Indian Government but privately delivered. The Petitioner also submitted that India had specifically opposed Article 10 of the said Convention, which permits service of summons or judicial documents by postal channels directly to the persons staying abroad. However, the Bombay High Court observed that it will not be possible for it to stay the service of summons while exercising its writ jurisdiction under Article 226 of the Constitution of India and the petitioner can take the said objection before the New York Court and if her contention is right, the New York Court may ask the respondent to serve the summons again, in terms of the provisions laid down under Article 3 and 5 of the Convention. The Service Convention is not very useful in getting the defendants to depose before the appropriate forum because of the procedural lapses.

In *Gunjan Salgia Nahar vs Akash Nahar,*[26] Court held that a petition for divorce filed in a foreign country if not seeking divorce on a ground recognized by the Hindu Marriage Act, 1955 would ex-facie be vexatious if the parties are Hindu. This court applied the conflict of law rule that was laid down by Apex Court in *Y. Narasimha Rao & Ors. Vs. Y. Venkata Lakshmi & Anr*[27], which said, judgment of a Foreign Court which is not founded on a law recognized in India concerning matrimonial issues is not recognized in India. The Delhi High

[25] W.P.(L) No.119 of 2014
[26] Delhi High Court Judgement dated 24 August, 2016,
[27] (1991) 3 SCC 451

Court observed that if a party initiates proceedings on being domiciled in a foreign country for annulment of the marriage and the parties are Hindus, their matrimonial bond would be governed by the Hindu Marriage Act, 1955. The Court abroad cannot annul the marriage as per the matrimonial laws of that country. The annulment has to be as per the matrimonial laws of the country of nativity of the parties. A petition seeking annulment of marriage or grounds other than the ones permissible under the Hindu Marriage Act, 1955 would be vexatious.

But of late we do find courts being more receptive to foreign court order and judgements.

In *Surya Vadanan v. State of T.N*[28], the court opined that there is no reason why the principle of comity of courts should be jettisoned, except for special and compelling reasons. It also said the principles for dealing with a foreign judgment are laid down in Section 13 of the Code of Civil Procedure[29]. Section 13 of the Code of Civil Procedure deals with Foreign Judgment.

In *P.K.Srikumar vs Harshitha Gopinathan*[30], the Court held that due respect has to be given to the orders of the Foreign Court, as the Foreign Court has the most intimate contact with the issue involving the custody of the minor child, who is a citizen of USA. Therefore, as per Section 13 of the Code of Civil Procedure, the order of the Foreign Court is to be construed as conclusive in matter of custody.

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[28](2015) 5 SCC 450

[29] Sec.13: When foreign judgment not conclusive - A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except -(a) where it has not been pronounced by a Court of competent jurisdiction;(b) where it has not been given on the merits of the case; (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable; (d) where the proceedings in which the judgment was obtained are opposed to natural justice; (e) where it has been obtained by fraud; (f) where it sustains a claim founded on a breach of any law in force in India".

[30] Madras High Court in its judgment dated 25 July, 2016

As mentioned earlier that justice to all is a far more satisfactory way of dispensing justice than justice from case to case. Therefore, to achieve justice for all, timely legislations are the essential requirement.

Recommendations

The Indian State must firstly, enact laws similar to Recognition of Divorce and Legal Separations Act,1971 of the British Parliament modelled on the Hague Convention on the Recognition of Divorce and Legal Separations, 1970. The 1970 Hague Recognition of Divorce Convention aims to facilitate the recognition in one Contracting State of divorces and legal separations obtained in another Contracting State and thus assure divorced and separated spouses that their new status shall receive the same recognition abroad as in the country where the divorce or separation is obtained. The Convention furthermore envisages combating "forum shopping" in the field of divorce. [31]

Secondly, consider enacting a law like the Foreign Judgments (Reciprocal Enforcement) Act, 1933 enacted by the British Parliament under Section (1) in pursuance of which the Government of United Kingdom issued Reciprocal Enforcement of Judgments (India) Order, 1958.

And thirdly, implement service via mail under the Hague Convention on the Service Aboard of Judicial and Extra- Judicial Documents in Civil or Commercial Matters, 1965 as the existing provision under CPC is inadequate. India acceded to The Hague Convention on 23rd November, 2006 and the Convention was entered into force in India on 1st August, 2007.

There is an urgency to educate women and raise their awareness levels of legal rights that they have and also impart knowledge of the laws they are governed by. Need to organize workshops for groups of women coming from similar backgrounds. These workshops must be power house of information and empowerment. These workshops must be multidisciplinary in nature.

[31] See Preamble and Article 1, Hague Convention on the Recognition of Divorce and Legal Separations, 1970

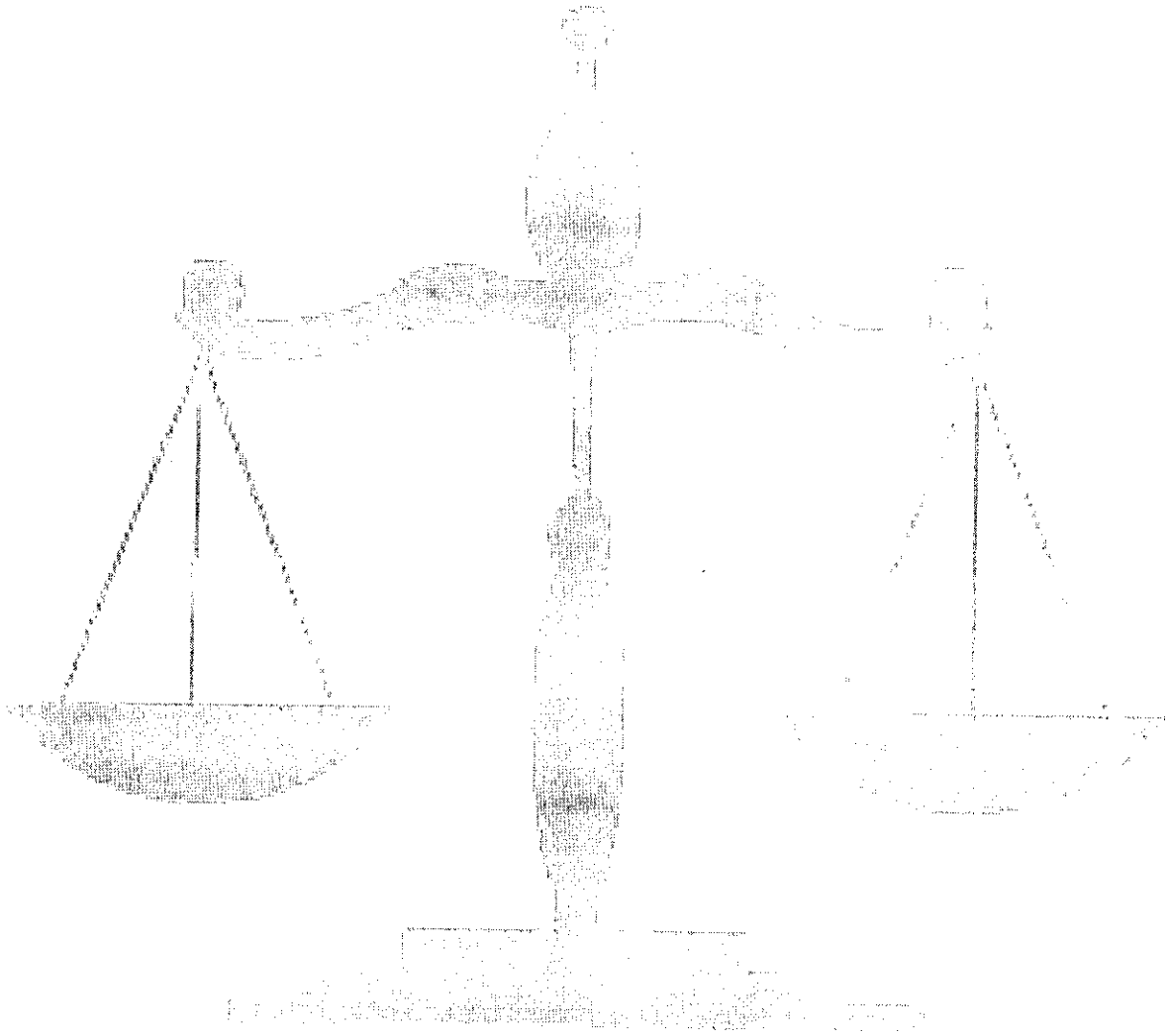
Amend the barbaric rule of "Dependence Domicile of a married Woman". Dependence status of the married woman requires the married woman to submit to foreign court's jurisdiction.

Indian Courts will have to sooner than later recognize and enforce the foreign decrees if an identity crisis has to be averted. The very ethos of Private International Law is to facilitate one's personal laws to be attached to the person no matter where he/ she travel or stay or marries. PIL also requires one to have the same statutes no matter where one is. If one is a legitimate son of his parents he should be so the world over. If the Nations States do not recognize and enforce decrees across borders then identity crises may pop up. In matrimonial disputes it may give rise to limping marriages.

To conclude, the 'Uniform Private International Law Rules' is an impossible dream. Therefore, what is possible and feasible is to have bilateral agreements between States especially on issues arising out of matrimony. India can have bilateral agreements with Islamic States on Sharia Law on issues of marriages, age of marriage, consent to marriage, and issues of age gap between couples to be married, amount of mehr, provision for maintenance of children and their mother on divorce.

Explore the possibility of criminalizing desertion by declaring the person proclaimed offender .

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ALIMONY: TILL DEATH DO US APART!

By

Dr. Aruna B. Venkat*

Abstract:

Alimony is the legally imposed monetary liability on one spouse by the other spouse for maintenance and support. Alimony could be temporarily awarded while divorce is pending—alimony pendent lite or permanently awarded after litigation. Presently, Alimony is left to the discretion of the judges.

It is time to make a new alimony law for the country which is gender neutral. The new alimony law must spell out situation based categories of ex-spousal maintenance or alimony.

In today's technology driven world, there is a possibility to acquire knowledge and get work and making oneself employable online by connecting globally. Therefore, two situations could be recommended to ease the alimony burden on the exes. Two situations where ex-spousal maintenance may be granted: First, Alimony granted as Rehabilitation Assistance and Second, Alimony granted as Settlement Support. It is proposed that marrying couples must enter into Prenuptial agreements/contracts. This will help the couple know their liabilities on the dissolution of marriage. It's high time that lifetime alimony ends. State must support the destitute and State must also promote self-reliance by providing opportunities.

Key Words:

Alimony, Ex-spousal maintenance, Rehabilitation Assistance, Settlement Support, Prenuptial agreements

Introduction

Alimony is the legally imposed monetary liability on one spouse by the other spouse for maintenance and support.[1] Alimony could also be temporary awarded while divorce is pending-alimony *pendent lite* or permanent alimony awarded after the litigation.

Divorce in India is wholly fault-based, and so a woman can get alimony from her ex-husband only if he was found to be at fault. Alimony is also awarded as damages to an injured party or is used to monetarily penalize the person responsible for causing the emotional pain during the marriage.

In a recent case, an Indian from Kerala had deserted his Pakistani-origin British wife and married again. The wife traced the husband to his home town in Malappuram district and made him pay alimony after a long and arduous legal

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[1] https://lawshelf.com/courseware/entry/historical-background-of-alimony

cedure. Pakistani-origin British wife said it was not for money alone, she wanted each him a lesson for playing with her life.[2]

Alimony is the quintessential of marriage. Alimony is considered a male only rden[3]. If you're facing a divorce, you'll have to face this reality. And if you earn bstantially well, you would be penalized for doing so. Penalization happens in two ys, one you must pay higher taxes and secondly, you are also made to pay higher imony if your marriage is on the rocks. 'Alimony turns out to be the cost of entering marriage, a marriage we thought would last a life time, but -- for reasons you didn't nticipate -- didn't'.[4]

Alimony has deep roots in Babylonian Code of Hammurabi. Under this ancient Babylonian Code, if a couple divorced, the man was obligated to return the dowry, grant his ex-wife custody of any children from the marriage, and give her an allowance to sustain her and the children until they were grown. If the couple did not have children, the man was obligated to return the dowry and pay his wife the equivalent of a bride price. If the wife had violated any number of traditions, the husband could be entitled to keep the dowry and children or even relegate his ex-wife to slavery.[5]

In the 19th Century, divorce laws were liberalized and divorce became possible in cases of marital misconduct. As a result, the requirement to pay alimony became linked to the concept of fault in divorce.[6]

In the present times, Alimony has moved beyond support to permitting the more dependent spouse to become financially independent or to have the same standard of living as during the marriage though this was not possible in most cases.

In India, once divorce proceedings commence, either party may seek interim or *pendente lite*[7] maintenance during the course of the litigation. On granting of divorce either party may ask for post-marital alimony[8]. It is not an absolute right, but may be granted, the amount and terms varying with the circumstances.

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[2] http://www.hindustantimes.com/india-news/pakistani-origin-uk-woman-tracks-deserter-indian-husband-to-kerala-gets-alimony/story-thoKeLugP36yTSjUMVNLkO.html

[3] https://www.huffingtonpost.com/kristen-houghton/is-alimony-still-necessar_b_1542291.html

[4] https://www.huffingtonpost.com/kristen-houghton/is-alimony-still-necessar_b_1542291.html

[5] King, L. W. "Hammurabi's Code of Laws". Exploring Ancient World Cultures, University of Evansville. Archived from the original on 9 May 2008. Retrieved 4 November 2014.

[6] "Report of the American Academy of Matrimonial Lawyers on Considerations when Determining Alimony, Spousal Support or Maintenance Approved by Board of Governors March 9, 2007"(Microsoft Word). American Academy of Matrimonial Lawyers.

[7] Hindu Marriage Act, 1955, Section 24. Maintenance *pendente lite* and expenses of proceedings.- Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay the petitioner the expenses of the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable.

[8] Hindu Marriage Act, 1955, Section 25. Permanent alimony and maintenance.-(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purposes by either the wife or the husband, as the case may be,

Unless the parties agree on the terms of their divorce in a binding written instrument such as prenuptial agreements or mutual divorce settlements, the court will make a determination based on the legal argument and the testimony submitted by both parties.

Alimony does still have its place in divorce proceedings and was created to aid ex-spouses, mostly women, who had no personal income or a very low income. But times have changed, many women are well educated and healthy, need minimum support. In this gender-neutral world even men are stay-at-home-husbands/dads. There is more possibility now that men need more support than women. Hence, there is always room for improvement and revision and many family court justices are helping to make some necessary changes by reinterpreting the basic laws regarding alimony as a "male only" burden.

Alimony in India

Alimony or spouse support is an obligation imposed by laws around the world. It is expected that both the spouses irrespective of gender must bear the maintenance support during and after marriage.

Alimony is based on the notion that marriage is a sacred union and hence indissoluble. Once the knot is tied, the duties and obligations of marriage are to be carried out for the rest of the life and beyond. The premise was the husband is bound to take up the responsibilities of maintaining his wife. But in modern society unsuccessful marriages do have a solution in the form of divorce. But alimony as a rule of matrimony remained. As present society treats men and women equal, the burden of alimony can now fall upon either side of the party depending upon the financial circumstances of the spouses. But in practice men are more liable to provide support to his ex- spouse.

In India divorce is governed by different laws for different communities. As in case of Hindus, Sikhs, Buddhists and Jains it is governed by the Hindu Marriage Act, 1955. Muslims are governed by the Dissolution of Muslim Marriage Act, 1939, for Christians is it the Indian Divorce Act, 1869 and Parsi can seek for divorce under the Parsi Marriage and Divorce Act, 1936. There is a Special Marriage Act, 1954 for inter community marriages and divorces

order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immoveable property of the respondent. (2) If the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just. (3) If the Court is satisfied that the party in whose favour an order has been made under this Section has re-married or, if such party is the wife, that she has not remained chaste or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.

The Court decides to grant maintenance only when an application is filed before it. It is entirely at the discretion of the Court to decide if at all any maintenance deserves to be awarded to the applicant/ petitioner, and if so, then the amount of maintenance to be granted. Whilst doing so, the Court takes into account various factors that would affect the quantum of maintenance.

The Indian Supreme Court has in its latest judgment[9] directed a husband to provide his wife Rs. 50 lakh amount and a flat worth Rs. 1 crore, even though it held that the acts of the wife in filing false complaints against the husband amounted to cruelty. The Court held that they were not oblivious to the requirements of the wife to have a decent house where she can live. Therefore, some permanent arrangement has to be made for her alimony and residence. Keeping in view the status of the parties, the court directed that the husband to pay to the wife a sum of Rs.50,00,000/- (Rupees Fifty Lakhs only) as one-time permanent alimony. The court also allowed the wife to continue to live in the house in which she was residing till the husband provides her a flat of similar size in a similar locality.

The Supreme Court[10] also ruled that 25% of the husband's salary could generally be awarded to the dependent estranged spouse and her children. The court reduced the alimony amount demanded by a divorced woman, holding that her ex-husband had to support his new family, including a child born of him.

The main object is to enable the estranged wife to live a life of dignity and in reasonable comfort. Not a lavish life but not leaving his ex-wife in financial misery and stringency. A balance has to be struck depending on the facts and circumstances of each case.[11] The quantum of maintenance would depend on various factors such as the ability of the respondent, needs of the wife, the social status, age, education, and other requirements. The Court would also have regard to the position and the status of the parties.[12]

Therefore, the court in a number of cases has held that no set formula can be laid down for fixing the amount of maintenance as the Court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance.[13] The Apex Court observed that it is the duty of the court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but at the same time she should not be left to live in discomfort. The Court has to act with pragmatic sensibility to such an issue so that the wife does not meet with any kind of man-made misfortune.[14] The Court also held the concept of sustenance does not mean to lead a life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the

[9]Raj Talreja v. Smt Kavita Talreja, SC judgement dated 24th April 2017.
[10]Rita Dey Chowdhury v Dr. Kalyan Dey Chowdhury, SC Judgement dated 22nd April 2017.
[11]Dr. KulbhushanKunwar v Smt. Raj Kumari AIR 1971 SC 234
[12]Chitra Sengupta v Dhruba Jyoti Sengupta AIR 1988 Cal 98
[13]Jasbir Kaur Sehgal v District Judge, Dehradun (1997) 7 SCC 7
[14]U. Sree v U. Srinivas (2013) 2 SCC 114

similar manner as she would have lived in the house of her husband. That is where the status and strata come into play.[15]

If the husband is unable to earn or is disabled, the court may ask the wife to pay the alimony. In an observation with far-reaching implications, the Supreme Court has said that a woman who deserted her husband and the matrimonial home and refused to return despite repeated requests was not entitled to maintenance. High Court denies monthly compensation to a woman making Rs 80,000 a month.

The verdict involving a Delhi based couple, where the wife wanted divorce, on account of physical abuse by her husband. She was supporting four children on a monthly income of rupees nine thousand went to the court to get a divorce and alimony. Instead, this woman has been ordered to pay her husband a monthly alimony of rupees five hundred, on account of the medical certificates that he presented in front of the court proving that he needed medical treatment and that he was without any livelihood. He convinced the court that he needed financial help more than his wife. It's an order that has taken many by surprise.[16]

Therefore, the Court decides the amount of alimony/maintenance which is to be paid by the respective spouse after examining various parameters.

Conditions for the Alimony Award

Courts will look at the conditions, means, needs and other circumstances of each spouse. Court will take into consideration the length of time the spouses cohabited, the functions performed by each spouse during the relationship; and in case there are any existing agreements between them.

If in case the couple have a child who is under school-age, and the mother or the father needs to be a stay-at-home parent, court while awarding alimony will take that into consideration until that parent is able to begin working outside the home. Because the support of a child should be the responsibility of both parents. The division of support between the partners is based on their earning capacity.

Alimony should be an equal opportunity responsibility. Gone are the days when a healthy woman, capable of working, was supported for life. The Mumbai family court pulled up a highly qualified healthy woman *for sitting idle and* for seeking maintenance from her estranged husband.[17]

Alimony was awarded to help and protect a former spouse who was incapable of taking care of herself/himself financially.

[15] Bhuwan Mohan Singh v Meena AIR 2014 SC 2875
[16] https://www.lexology.com/library/detail.aspx?g=b8686482-7e59-4082-a684-6957ccff4453
[17] http://www.dnaindia.com/mumbai/report-don-t-misuse-law-to-claim-alimony-court-tells-woman-2091027

In case of a contested divorce, often spouses fail to come to any understanding regarding alimony. In such situations, the court takes up the task of making decisions on the amount of alimony to be paid. Sometimes in compelling situations the court might even hand over the burden of paying for the maintenance to a public body. Alimony can be taken either as a one-time lump sum amount or a fixed payment, which could be monthly, quarterly and the like, depending on the requirement of the spouse. Age of the spouse is also taken into consideration while awarding alimony. Normally a young recipient of alimony gets it for a short period of time if the court thinks that he or she will soon be able to become financially sound through prospective career excellence. The amount and duration of alimony generally depends upon how long the marriage existed. Marriages that lasted more than 10 years are entitled to be granted a lifelong alimony.

Fault in marital breakdown can significantly affect alimony, increasing, reducing, or even nullifying it.

In states like Massachusetts and Louisiana, the salaries of new spouses may be used in determining the alimony paid to the previous partners.

But when the ex-spouse remarries, the alimony stands invalid and the husband has to pay for the children if any or when the ex-spouse dies.

Suggestions

In today's globalizing world when layoffs are a common phenomenon and mostly getting hired after the age of 50 is next to impossible, to put the burden to support entirely on one spouse is very unfair.

The wife/husband must be required to make some changes in their life and work. They may be required to make attempt to find full-time employment in a better-paid field. The courts must take the services of experts called "vocational evaluators" to evaluate the job prospects for a spouse who hasn't been fully employed for a while and estimate how much income they could earn.[18] No one should be allowed to sit idle, if they can't find a job, they must be ordered to contribute to community services.

It's time to make a separate Alimony Law in India. Time to discard the notion perpetuated by the ecclesiastical courts that the marriage continued, and so the courts could only award a divorce *a mensa et thora* meaning "from table and bed" or "from bed and board". This divorce was more like a separation granted by a court whereby a husband and wife are not legally obligated to live together, but their marriage has not been dissolved as it is a sacrament and hence in dissolvable.[19]

[18] *http://www.nolo.com/legal-encyclopedia/alimony-what-you-need-know-30081.html*
[19] Laurence C. Nolan, Lynn D. Wardle (2005). *Fundamental principles of family law - Google Books.* Wm. S. Hein Publishing. pp. 703–04. *Retrieved 2009-12-06.*

The husband has an eternal duty to support his wife even today.

The term alimony comes from the Latin word *alimōnia* meaning "nourishment, sustenance", and was a rule of sustenance to assure the wife's lodging, food, clothing, and other necessities after divorce.[20]

Alimony is also known as maintenance or spousal support or spousal maintenance. Alimony is a legal obligation on a person to provide financial support to their spouse before or after marital separation or divorce. The obligation arises from the family law of each country. But it's high time this term gets its real intent.

Alimony meant nourishment and sustenance for an ex-wife and hence alimony must be known as Ex-spousal support or Ex- spousal maintenance. The modern-day divorce ends the marital relationship in every which way.

Alimony as spousal support is misleading.

In today's technology driven world, there is a possibility to acquire knowledge and get work and making oneself employable online by connecting globally. Therefore, two situations could be recommended to ease the alimony burden on the exes. Two situation where ex-spousal maintenance may be granted: First, Alimony granted as Rehabilitation Assistance and Second, Alimony granted as Settlement Support.

Under *Rehabilitative Assistance Alimony*- the aim would be not to have 'Burdensome Exes Around'! Therefore, in situations where the ex-spouse is uneducated, has no skill sets to support oneself immediately after divorce, or has no coparcenary property. In other words, is a person who cannot have an existence of her/his own and has no place to go or stay. In such circumstances the ex-spouse will have to be rehabilitated. He/ she will need to be helped and supported so that this category of Exes does not live in penury. In this situation, ex-spousal maintenance becomes a means to avert man-made -misfortune for the ex-spouse. On termination of marital ties, the other partner should not be left feeling unwanted and thrown away from his/her strata and society to which they once belonged. Therefore, in situations such as these, *alimony becomes a necessity.* Such financial burden must be borne by the divorcing partner to rehabilitate the other. Alimony in this category must be a onetime lump sum amount paid to the ex- spouse. If required the ex-spouse must be allowed to cohabit in the same premises till alternate arrangements are made for their stay.

Under Rehabilitative Assistance Alimony, the state must also be an equal partner in responsibility sharing. It must also be the duty of the state to protect a person's life and give him/her a dignified existence. In India, the State of Telangana has launched a Aasara pension scheme on June 2017 for single women. This scheme provides financial assistance for women who are helpless, needy and poor.

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[20]*The Honorable David A. Hardy. "Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose". Nevada Law Journal (Winter 2009) 9 Nev. L.J. 325.*

Similar schemes must be launched by the states in India and provide a life of dignity to the needy and destitute persons and these schemes must be gender-neutral.

Around the world many countries have living assistance programs run by the state to help and support and provide skill training to the needy women to become self- sufficient.

Under Settlement Support Alimony, those ex-spouses who are educated, have skill set or have the qualifications to acquire them, have a potential to earn a living but have chosen to be stay-at -home-wife/husband. Such category of ex-spouses may be granted a onetime settlement amount as alimony. Under this category of ex-spouses, the alimony may be limited on the bases of faulty theory, education levels, length of marriage, contribution to home and bringing up children if any, contribution to husband's career etc. This category must be more on the compensatory notion, as compensation to the services provided as a wife/husband and mother/father to the children. This form of support compensates an individual for her or his contributions to the relationship as well as for any losses that individual has suffered. Settlement Support Alimony may also uphold a contract between the parties which governs support payments such as divorce agreement.

So, it is possible that these recommendations may reduce the burden of the divorcing spouse and at the same time bring in clarity to the ex-spouse seeking alimony.

It is high time the marrying couples enter into Prenuptial agreements/contracts. A prenuptial agreement is a contract entered into by two people prior to marriage. The content of a prenuptial agreement can vary widely, but this agreement may provision for the division of property should the couple divorce and any rights to alimony during or after the dissolution of marriage. This will help the couple know their liabilities on dissolution of marriage.

Most importantly there must be an end date. Judges must order an end date to any alimony award. Judges must eliminate lifetime alimony.

The government must allocate funds for destitute men or women at least for 5 years, where his/her partner can't provide financial support.

Best practices of the world judicial systems on alimony must be adopted by Indian legal system. Explicit guidelines must be given to judges on the amount and/or duration of alimony as done in some states in America.

Alimony must be awarded only in cases of marriage of ten years or longer and the payments should be limited to three years unless there are special, extenuating circumstances as done in State of Texas and Mississippi.

Conclusion:

Historically, alimony arose as a result of the indissoluble nature of marriage— because divorce was rare, husband and wife remained married after their physical separation and the husband's obligation to support his wife continued. When divorce became more common, many societies continued to recognize the need for the wife to be supported, at least for some time, when the marriage was being terminated.

More often it is the female partner who is entitled to the alimony. But there are times when the male partner is found to be harassed and the court passes the judgment that the wife would compensate his losses. The court decides the actual amount to be paid as alimony. The amount is calculated to keep in view many parameters like the income of the partners, societal status, the standard of living, the number of children, the number of years spent together and the emotional attachment. There isn't any fixed formula to calculate the amount of alimony but generally, it is the 1/3 or the 1/5 part of the salary of the paying spouse.

With the growing view that men and women should be treated equally, the courts now may order either the husband or wife to pay alimony, although in practice it is more often the husband. But alimony has often proved burdensome to those required to make large payments for a considerable time period. Unless a solution is found to divorce, the right to receive alimony will remains an essential component of the proceedings. But then what is the solution to divorce? Because if there is divorce, where will be Alimony. The only solution then is 'Never Marry' because the Courts even today will only pronounce divorce *a mensa et thora.*

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CORPORAL PUNISHMENT

As Child Abuse

By

Dr. Aruna B. Venkat*

Abstract:

Corporal punishment is a term used for the widespread practice of inflicting physical or mental pain by caretakers and guardians including parents and teachers, upon children with the objective of reforming their behaviour. Corporal punishment to a child amounts to child abuse and militates against the freedom and dignity of the children.

Customarily in India, the obligation of ensuring safety and care of the child vests with the family and the community. The Indian Penal Code enacted in 1860 recognized the powers which parents and teachers exercise and Sec. 88 and 89 allowed corporal punishment being caused to children without penal consequences. But the later developments have exhorted the need for revisiting the law on corporal punishment, firstly because of the advent of the Fundamental Rights at the national level and the concept of Child Rights at the international level, As far as Fundamental Right is concerned, Article 21 of the Constitution of India protects the right to life and dignity includes the right to education for children up to 14 years of age. Corporal punishment interferes with a child's right to education because of fear of corporal punishment makes children more likely to avoid school or to drop out altogether. Hence, corporal punishment is voilative of the right to life with dignity.

Next in importance is the legislation at the international level. The Convention on the Rights of the Child recognizes a child's right to physical integrity and dignity thus directly or indirectly dealing with the issue of corporal punishment. The UN Committee on the Rights of the Child issued its General Comment No. 8 focused on the responsibilities and obligations of the States in this sphere and delineated the various legislative measures that need to be undertaken. A strict definition of corporal punishment is that it is the "infliction of physical pain with the objective of reforming a child's behaviour. However, the contemporary understanding of the term includes humiliation, verbal abuse and acts that are a cause of embarrassment to the child so much so that the distinction between child abuse and corporal punishment has always been hard to make.

This article has the object of analysing the basic features of corporal punishment and tracing the modern trends of drawing a difference between the conventional system of corporal punishment and the new trend of abuse of the child justifying the need for legislation on Corporal Punishment to prevent abuse of the child..

Key Terms:

1. Corporal Punishment 2. Child Abuse 3. Right to Education 4. Child Abuse

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Child Abuse

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Introduction

"My son at school was slapped by his teacher several times for various reasons, but we never made a complaint against the teacher. Sometimes we too feel that he needs this kind of treatment to keep him in right path"[1]

"Any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light."[2]

Article 21 of the Constitution of India which protects the right to life and dignity which includes the right to education for children up to 14 years of age. Corporal punishment amounts too abuse and militates against the freedom and dignity of child. It also interferes with a child's right to education because fear of corporal punishment makes children more likely to avoid school or to drop out altogether. Hence, corporal punishment is violative of the right to life with dignity.[3]

The Gujarat High Court in its judgement has clearly stated that "corporal punishment to child in present days... is not recognised by law". The provisions of Sections 88 and 89 of IPC are generally invoked to explain the power teachers exercise when inflicting corporal punishment. These two provisions in the chapter on 'General Exceptions' cover harms that may be caused without penal consequence. Section 88 exempts an act from being treated as an offence when the harm was caused "to any person for whose benefit it is done in good faith". Section 89 exempts acts "done in good faith for the benefit of a person under 12 years of age ... by or by consent, either express or implied of the guardian or other person having lawful charge of that person." But not any more.

India is a State Party to the Convention on the Rights of the Child. The standard of 'the best interests of the child' is now a part of domestic law. In 2006, the Committee on the Rights of the Child explained this obligation further when it reiterated, in General Comment No. 8, "the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment". Corporal punishment can be best understood as the use of physical force to cause a child pain but not injury with the aim of altering the child's behavior.[4]

Definition of Corporal Punishment

Corporal punishment is a term used for the widespread practice of perpetration of physical or mental pain by caretakers and guardians including parents and teachers, upon children with the objective of reforming their behaviour. Customarily in India, the obligation of ensuring safety and caring for the child vests

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[1]P Laxma Reddy, *Despite Denials, Corporal Punishment Continues*, The New Indian Express, (January 27, 2014), available at http://www.newindianexpress.com/states/andhra_pradesh/Despite-Denials-Corporal-Punishment-Continues/2014/01/27/article2022097.ece.

[2]The Committee on the Rights of the Child defines corporal punishment in the General Comment No. 8 of the Child Rights Convention.

[3]*Mrbrahmanand Mishra vs. Ministry of Human Resource,* CIC/CC/A/2014/002226SA,*22 July 2016.*

[4] See, Straus, Murray A. 'Corporal Punishment and Primary Prevention Of Physical Abuse'. *Child Abuse & Neglect* 24.9 (2000): 1109-1114. Web.

with the family and the community. Effective eradication of corporal punishment is extremely challenging in the Indian context, wherein it has been traditionally seen as an effective way of reforming and disciplining children.

In India two out of three children have been physically hit as a disciplinarian measure.[5] Corporal punishment in schools was only recently banned in India in 2010.[6] There is no legal equivalent for corporal punishment in homes. Corporal punishment within the four walls of the home continues to be unabated and even encouraged.[7] The nation's 'future' is routinely subject to hitting, spanking and other forms of force. Not only are such acts not seen as problematic, but they are also legitimized to the extent that they are considered necessary. At the same time psychologists and child rights' advocates across the world are clamoring for ending corporal punishment.[8] The natural question which arises is should India follow suit?

Corporal punishment has been used in varied environments including homes, schools and other institutional set ups. It needs to be taken into account that parents' actions including inflicting corporal punishment do not occur in a vacuum but occur in an environment which is heavily influenced by social and cultural factors.[9] Their actions are judged by other parents, neighbors, teachers and relatives. Such factors might lead to legitimizing and encouraging corporal punishment.[10] The social and cultural belief that corporal punishment is not wrong and in fact, is necessary for the discipline of children is, thus, one of the reasons why parents resort to child abuse.

Corporal punishment is often seen as the only way of dealing with errant or deviant behavior when parents lack other coping mechanisms.[11] Most parents have not been exposed to the idea of there being alternatives to deal with disciplinary breaches and this in turn pushed them to use corporal punishment.[12] Corporal punishment is perceived as momentarily relieving tension because of dispersing it through the use of force.[13]

Corporal punishment is usually administered to ensure immediate change in behavior. This effect of corporal punishment has been confirmed by scientific research. While the idea behind using corporal punishment is to deter specific behavior and there has been significant research showing that corporal punishment

[5]"All You Want to Know About Corporal Punishment | UNICEF." *All You Want to Know About Corporal Punishment | UNICEF.* N.p., n.d. Web. 21 Apr. 2015.
[6] See, "Indian Government Bans Corporal Punishment in Schools." *NDTV.com.* N.p., n.d. Web. 21 Apr. 2015.
[7] See, EndCorporalPunishment.org,. 'Global Progress'. N.p., 2015. Web. 22 Apr. 2015.
[8]Lindahl, Mary W. "The Global Movement to End Corporal Punishment of Children." *PsycCRITIQUES* 55.51 (2010): Web.
[9]"Corporal Punishment." *American Psychological Association.* Web. 21 Apr. 2015.
[10]Hurst, Daniel. 'Corporal Punishment Can Be 'Very Effective', Curriculum Review Chief Says'. *the Guardian.* N.p., 2014. Web. 22 Apr. 2015.
[11]Is Corporal Punishment An Effective Means Of Discipline?' http://www.apa.org,..N.p., 2015. Web. 22 Apr. 2015.
[12]*Ending Legalised Violence against Children: Global Report 2007.* London, England: Global Initiative to End All Corporal Punishment of Children, 2007. Web.
[13]Is Corporal Punishment An Effective Means Of Discipline?' http://www.apa.org,..N.p., 2015. Web. 22 Apr. 2015.

...ctive in immediate change in behavior, till today no psychological study has ...ble to show that it is effective in long term alteration of behavior.[14] While the ...y effect of corporal punishment is only a change in behavior for compliance ...the expected behavior, the secondary effects are the long term effects which ...nt not be discernible.[15]Behavior thought to be undesirable can be suppressed ...ugh corporal punishment but desirable behavior can never be taught using ...poral punishment.[16]

... There has been no linkage which has ever been shown in this regard and this ...extremely problematic because this is the most often cited reason for indulging in ...rporal punishment. Apart from this lack of effectiveness argument there are ...ultiple other arguments against corporal punishment based on the harms caused ...y it.[17]

... In a study of around sixty six cases of severe child physical abuse it was ...nd that more than two thirds of them were escalated cases of corporal ...nishment.[18] While child abuse might or might not escalate into greater physical ...use, it is always problematic because of the psychological impact it has on ...ldren.

...ffects of Corporal Punishment

Child abuse is problematic also because it creates fear of future hitting in case of a repeat of the behavior and that in turn causes an anxiety cycle.[19] Certain studies have shown that children who are spanked or slapped grow up to have anxiety disorder and even substance abuse.[20]Corporal punishment plays havoc with the self-esteem of children and also promotes negative expectations about themselves.[21] Further, by involving the use of force corporal punishment removes space for dialogue and reflection and thus reduces the ability of children to reflect on behavior and understand the relationship between action and effect.[22] This goes on to be with them during their adult lives which in turn makes it extremely difficult for adults who were hit as children to have effective dialogues in the face of conflict.[23] Further, corporal punishment always stimulates anger and rejection in the children.[24]

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[14] Thompson Gershoff, Elizabeth. *Corporal Punishment By Parents And Associated Child Behaviors And Experiences: A Meta-Analytic And Theoretical Review*. 1st ed. 2015. Web. 25 Mar. 2015.
[15]American Psychological Association,. 'The Case Against Spanking'. N.p., 2015. Web. 22 Apr. 2015.
[16] Ibid.
[17] See,Kaplan, Yehiel S. "Corporal Punishment of Children in Israel: A New Trend in Secular and Religious Law." *The International Journal of Children's Rights* 14.4 (2006): 363-421. Web.
[18]Vockell, Edward L. *JSTOR. Pros and Cons of Corporal Punishment*. Web. 21 Apr. 2015.
[19]American Psychological Association,. 'The Case Against Spanking'. 2015. Web. 22 Apr. 2015.
[20]The Huffington Post,. 'What Science Says About Using Physical Force To Punish A Child'. N.p., 2015. Web. 22 Apr. 2015.
[21]Lindahl, Mary W. "The Global Movement to End Corporal Punishment of Children." *PsycCRITIQUES* 55.51 (2010): Web.
[22]Is Corporal Punishment An Effective Means Of Discipline?' http://www.apa.org,..., 2015. Web. 22 Apr. 2015.
[23]The Huffington Post,. 'What Science Says About Using Physical Force To Punish A Child'., 2015. Web. 22 Apr. 2015.
[24] Ibid.

Corporal punishment has been considered violent socialization of children.[25] This means that violence is used as a means to instill socialization patterns in children. This is problematic because this comes with a plethora of psychological and social problems. Another study has shown that children who are spanked as children will grow up to approve of spanking children and also approve of violence on their partner. When older children are hit studies show that this leads to increased aggression on children around them.[26] 'Legitimate' physical violence can be seen as having long term psychological maladaptation in adulthood as well as an increased risk of aggression.[27] Wife assault, depression, suicidal thoughts are found to be higher in those who are hit as children. Further, corporal punishment has also been associated with impaired cognitive development.[28] Spanking has been found to lead to a reduced amount of grey matter which in turn reduces the IQ at the stage where the brain is in developing stage.[29] `Corporal punishment has also been associated with impaired emotional development.

Distinguishing normative corporal punishment from child abuse is an extremely deep, broad based and effective research issue.

Child abuse itself did not gain recognition till the 1960s when Henry Kempe published groundbreaking research on the battered child syndrome.[30] This dealt with the amount of battering inflicted by parents on children.[31] Gradually every state in the United States came up with reporting laws. Despite this, courts continued to recognize the rights of parents to discipline their children in ways which could include use of physical force on children. However, in certain cases courts used the *parens patriae* power to intervene and restrict the rights of parent to inflict force on children. Initially courts went with a two-pronged test. The first prong was looking at whether the punishment was necessary. The second prong dealt with whether the punishment was reasonable or excessive.

The depravity of corporal punishment is often disguised as a rational way of protecting the child.[32] Thus, the proposition of viewing corporal punishment as a violation of rights of child is novel to the Indian society.[33] This is a major causative factor for non-reporting of physical abuse by children as it is seen as a normative

[25]Lindahl, Mary W. "The Global Movement to End Corporal Punishment of Children." *PsycCRITIQUES* 55.51 (2010): Web.
[26]'Is Corporal Punishment An Effective Means Of Discipline?' http://www.apa.org,.., 2015. Web. 22 Apr. 2015.
[27]"Corporal Punishment." *American Psychological Association*. n.d. Web. 21 Apr. 2015.
[28]*Ending Legalised Violence against Children: Global Report 2007*. London, England: Global Initiative to End All Corporal Punishment of Children, 2007. Web.
[29]Sarah Kovac,. 'Effects Of Spanking On Kids' Brains - CNN.Com'. *CNN*.., 2015. Web. 22 Apr. 2015.
[30]Kempe, C.Henry et al. 'The Battered-Child Syndrome'. *Child Abuse & Neglect* 9.2 (1985): 143-154. Web.
[31]Kempe and Child Abuse,. 'Kempe'. 2015. Web. 9 Apr. 2015.
[32] Guidelines for Eliminating Corporal Punishment in Schools, National Commission for Protection of Child Rights (NCPCR), p.5, available at http://www.ncpcr.gov.in/view_file.php?fid=108
[33]*Corporal punishment is illegal but thrives in Indian classrooms*, RT, (July 19, 2010), available at http://rt.com/news/india-corporal-punishment-school/

for discipline.[34] According to the study conducted in 2007 by the Ministry of and Child Development, sixty five percent of children going to school are ted to corporal punishment.[35] Further, sixty two percent of the reported oral punishment was in government schools.[36]

A strict definition of corporal punishment is that it is the "infliction of physical with the objective of reforming a child's behaviour or punishing him.[37] However, contemporary understanding of the term includes humiliation, verbal abuse and that are a cause of embarrassment to the child.[38]

Understanding of Corporal Punishment

Various human rights conventions and mechanisms like the Convention on Rights of the Child recognize a child's right to physical integrity and dignity thus or indirectly dealing with the issue of corporal punishment.[39] However, in light widespread scale of the problem, the UN Committee on the Rights of the Child its General Comment No. 8 on the specific issue of corporal punishment.[40] It ed on the responsibilities and obligations of the States in this sphere and also eated the various legislative measures that need to be undertaken.[41] It also e a very broad definition to corporal punishment by including all types of physical mental violence. Therefore, legally, corporal punishment is seen as a violation of child's right to physical integrity and dignity under various conventions and human ghts instruments.[42]

There is no legal definition of corporal punishment under the Indian law. However, indicative definitions have been given by various Acts. For example, often scholars rely on the Right to Education Act, 2009 to provide for a definition of corporal punishment. Sections 16 and 17 of the Right to Education Act also ban physical and mental corporal punishment in schools.[43] It is also arguable that protection against corporal punishment forms an integral part of a child's right to life under Article 21 of the Indian constitution.[44]

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[34] *All you want to know about Corporal Punishment*, UNICEF India, available at http://unicef.in/Story/197/All-You-Want-to-Know-About-Corporal-Punishment

[35] Study on Child Abuse India 2007, Ministry of Women and Child Development (Government of India) available at http://wcd.nic.in/childabuse.pdf.

[36] *Ibid.*

[37] Protection of Children against Corporal Punishment in Schools and Institutions, 2008, National Commission for the Protection of Child Rights, p.3, available at http://harprathmik.gov.in/pdf/rte/corporal%20punishment%20ncpcr.pdf.

[38] *Ibid.*

[39] Article 28(2), Convention on the Rights of the Child, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

[40] United Nations Committee on the Rights of the Child, 42nd Session, General Comment No.8.

[41] *Ibid.*

[42] Australian Human Rights Commission, Why are violence, harassment and bullying human rights issues?, available at https://bullying.humanrights.gov.au/.

[43] Right of Children to Free and Compulsory Education Act, 2009.

[44] Article 21, Constitution of India.

In fact, in the *Parents Forum for Meaningful Education and another vs. Union of India and Another*, the Delhi High Court banished all forms of child abuse and held that child abuse is to be treated as a violation of the right to life under Article 21 of the Indian Constitution.[45] Further, article 39(e) of the Indian constitution specifically states that the State shall ensure that children are not abused.[46] However, despite the strong legal argument that can be made to prove the illegality of corporal punishment in India, it continues to be practiced in many schools in India.

Corporal Punishment can be - Physical corporal punishment which includes any action that leads to infliction of physical pain. According to the NCPCR report, the most common examples of physical corporal punishment is caning, slapping, kneeling down, forcing children to stand in the scorching heat for long hours and boxing of ears.[47] It is the most easily identifiable type of corporal punishment.

This is one of the most common types of corporal punishment in schools. Often, teachers employ harsh methods like making degrading and humiliating remarks against students.[48] These actions that tend to have a psychological effect on the child are also included in the broad definition of corporal punishment.[49] Children are extremely impressionable and subjection to mental harassment often leads to long term effects like depression, low self-esteem etc.[50]

Discrimination is harbouring any kind of prejudicial views or behaviour meted out to any child due to his religion, gender, caste, economic background - delay in payment of fees or for being from a reserved category.[51] Discrimination based on socio-economic and religious identities is also fairly common in village schools and small towns.[52] Classifying discrimination as corporal punishment raises many interesting questions. For instance, it is a common practice in various schools to divide students in different classes on the basis of their past academic records.

Distinction between child abuse and corporal punishment

However, the distinction between child abuse and corporal punishment has always been hard to make. Courts have usually been refraining from calling it child abuse when force used was bona fide and was without cruelty or mercilessness and was within the bounds of moderation and the parent is acting with parental affection.

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[45] AIR 2001 Delhi 212.

[46] Article 39(e), Constitution of India.

[47] *Corporal punishment 'widespread' in Indian schools,* BBC News, (October 25, 2010), available at http://www.bbc.com/news/world-south-asia-11617206.

[48] Madabhushi Sridhar, Corporal Punishment: Violation of Child Rights in Schools, Legal Services India, available at http://www.legalservicesindia.com/articles/punish.htm.

[49] *Smacking children reduces emotional intelligence and worsens behaviour,* The Telegraph, (July 28, 2011), available at http://www.telegraph.co.uk/news/health/news/8666011/Smacking-children-reduces-emotional-intelligence-and-worsens-behaviour.html.

[50] Dr. Kerby T. Alvy, Corporal Punishment and Verbal Aggression, available at http://www.ciccparenting.org/newsletters/corporalpunishment.htm

[51] *supra* note 6, at 11.

[52] Chetan Chauhan, *Discrimination in schools amounts to corporal punishment,* The Hindustan Times, (January 29, 2013), available at http://www.hindustantimes.com/newdelhi/discrimination-in-schools-amounts-to-corporal-punishment-nac/article1-1003447.aspx.

In certain cases, such as *State v. Hick*[53]s, a mother hit her son in a way that ...ises on his shoulder.[54] The trial court held that any use of force which harms ...ld is child abuse.[55] The court of appeals later reversed the decision stating that ...cal harm was a vague concept which had not been defined anywhere and was ...to varied subjective interpretations.[56] The law was thus vague and desperately ...d clarity.

An early definition of child abuse in the 1960s was one which defined it as a ...ical condition having a diagnosable physical injury which was caused by a ...liberate physical assault. By the 1970s the definition was watered down to include ...y "physical or mental injury, sexual abuse, negligent treatment or maltreatment of ...child under the age of eighteen".[57]

It was important to term certain acts abusive even where they did not result in ...physical injury. An example of such an act is one where a father throws a heavy ...ookshelf at his son but misses. While it does not cause a physical injury this act ...ould in usual circumstances generate intense amount of momentary as well as ...erpetual fear of the father. It was keeping this in mind that the child abuse definition ...as expanded to being more than mere physical injury.[58]

What came to plague the definition next was the dispute between force and violence. Force was seen as an act which while violent all right was considered to be normal when viewed through societal and cultural glasses. An example of this was, and at times continues to be, the use of violent measures to alter behavior in children. However, drawing the line between what is acceptable and what is not is extremely difficult. Also, the question which also remains is who decides what acceptable is in the sense that there is always a certain amount of dissonance in any given society or culture when it comes to making an attempt to discern an issue such as this. There are some options which include leaving the decision open to social workers, judges or police but that option would be one which provides an intense amount of discretion and would also probably cripple any legislative approach. At the organizational level, the American Pediatric Association has taken a stand against corporal punishment.[59]

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[53] 515 S.W.2d 518 (1974)
[54] 'State v Hicks | Leagle.Com'. N.p., 2015. Web. 22 Apr. 2015.
[55] Ibid.
[56] Ibid.
[57] US National Centre on Child Abuse and Neglect used this definition in Public Law 93-237; 42 USC 5106g
[58] Martin, Harold P. 'Child Abuse And Child Development'. *Child Abuse & Neglect* 3.2 (1979): 415-421. Web.
[59] APA,. 'Policy Statement On Corporal Punishment'. N.p., 2015. Web. 22 Apr. 2015.

International Position on Corporal Punishment

Certain jurisdictions have brought in huge publicity programs to educate parents about the harms of spanking.[60]

UNESCO has issued a policy directive recommending that corporal punishment be banned in homes as well as schools for being violative of human rights as well as harmful in long term ways. Article 19 of the Convention on Rights of Children views corporal punishment as an act of abuse against children. Countries which have signed this Article have agreed to outlaw corporal punishment in toto.

In 1979 Sweden was the first country to outlaw corporal punishment at home by amending the Swedish Parenthood and Guardianship Code to state that *"A child may not be subjected to corporal punishment or other injurious or humiliating treatment."* This was the first time that law sought to enter the domain of family life vis-à-vis hitting of children by parents. This particular amendment was seen as being revolutionary in a country where till recently the maxim *"spare the rod spoil the child"* was seen as being extremely true through the eyes of religious codes as well as legal tenets. In fact Swedish law had initially expressly given parents the right to hit children and this particular use of violence was seen as an exception to criminal law. The exception was done away with in the 1950s. By the 1960s, increasing number of child abuse cases began cropping up which led to a detailed and intricate discussion on the various facets of child abuse. The societal view at that time towards corporal punishment was favourable and accepting and thus completely hostile to the idea of banning it. However, by 1979 Sweden did go on to officially banning corporal punishment in homes. The legislation was often criticized as being one without teeth because enforceability continued to be a key issue when it came to penetrating within the four walls of the home. However, public opinions changed once the law came into being with survey results changing drastically over a decade to show a significantly decreased percentage of the population accepting corporal punishment at home. This goes on to show that Sweden was one country where legislation was used to mould public opinion even in a sphere which can erstwhile be thought of as being entirely unique to the family.

As of 2015, corporal punishment in homes is banned in forty six countries across the world. In some European countries the ban on corporal punishment has been challenged on the grounds of the right to respect for family life and religious freedom. However countries like Sweden have refuted such challenges by giving prime importance to the child's rights.

It however, continues to remain legal where it has not been specifically legalized. Some countries have tried to strike a middle path by letting corporal punishment be legal as long as it is reasonable.[61] Some countries in their criminal legislations provide exceptions for the use of force such as in the case of boxing or for the use of force by teachers on students or by parents on children.[62]

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[60] See, Straus, Murray A. 'Corporal Punishment And Primary Prevention Of Physical Abuse'. *Child Abuse & Neglect* 24.9 (2000): 1109-1114. Web.
[61] Australia, for example.
[62] Californian Law for example.

In the United States all states allow the use of force on children. Canada is unique in the sense that it clearly fleshes out the extent to which corporal punishment is allowed. All the provinces and territories of Canada allow the use of "minor corrective force," while further mandating that the force can only be "of a transient and trifling nature." Canada also sets age y the open hand can be used for hitting children.

Another important point which complicates the issue and has to be taken into consideration is that corporal punishment is used where there are acts which are defiant on the part of the child. If these acts are being continuously repeated and there is a strong show of defiance it somewhere shows that the parenting style, whether authoritarian or permissive is not extremely effective.

Parents can use other disciplinary techniques instead of corporal punishment. One way of going about this is providing a set framework of rules for the child and enforcing those rules. In case of violation of these rules the best suited way is to go about explaining why the behavior was inappropriate.[63] Other ways include withdrawing privileges such as number of television hours or reducing the curfew time. Answering with a firm refusal is another option which can be implemented. One important way of leading to a reduction in corporal punishment is to have parent education programs which explain the pitfalls of such behavior and openly start to condemn such behavior. Some jurisdictions are actually training parents in conflict resolution techniques, and as effective as this is it not always necessary. Many parents who use child abuse do so consciously based on its beliefs about its appropriateness and effectiveness as a disciplinary tactic. When the desire is to be a good parent, alternative information will be extremely effective in providing parents with alternative ways of disciplining and in turn reducing corporal punishment.[64] Implementing alternative techniques will thus fuel their desire to be a good parent while simultaneously preventing corporal punishment.[65] While providing mere information might not work in an environment where corporal punishment has been completely legitimized, it is nevertheless step in the right direction. The social and cultural factors are somewhere being responded to by dissemination of information.

Short and Long term effects

Corporal Punishment has many short and long term effects on the physical and mental well-being of the child. In most cases, it has been observed that incident of mild physical abuse is always followed by more serious incidents of physical assault.[66] Corporal punishment does not only have the short term effect of physical injury or mental trauma but eventually leads to long term effects like development of violent tendencies in the child's adult life.[67] For example, those who have been subjected to corporal punishment in their childhood are more likely to do the same to their own children. In fact, it has been observed that students subjected to corporal

[63]Vockell, Edward L. *JSTOR. Pros and Cons of Corporal Punishment.* Web. 21 Apr. 2015.
[64]Lindahl, Mary W. "The Global Movement to End Corporal Punishment of Children." *PsycCRITIQUES* 55.51 (2010): Web.
[65]Ibid.
[66]*supra* note 6, at 4.
[67]*Ibid.*

punishment often exhibit aggressive behaviour towards their peers and family and reduces their emotional intelligence.[68]

Studies have shown that children who were physically abused are at a higher risk of suffering from depression, hitting their spouse or children, becoming alcoholics.[69] Thus, a severe punitive environment leads to behavioural problems in children. Further, acts of humiliation, degrading treatment and discrimination in school adversely affect the emotional health of the child.[70] It even leads to high dropout rates, inattentive behaviour, school phobia, anxiety, suicidal tendencies.[71]

A recent news article reported an incident of corporal punishment in school in Visakhapatnam. Five students were made to stand in the sweltering heat for being late to class and eventually landed in the hospital.[72] The parents as well as the children were reluctant on complaining against the school as they were afraid of straining their relationship with them.[73] Interestingly, corporal punishment is more widespread in private schools than government schools. Further, private schools often threaten or enter into a compromise with the child's family to prevent the incident from being publicised.[74]

One of the strongest factors that encourage widespread use of corporal punishment is the pervasive societal opinion that corporal punishment is an essential part of any efforts to discipline children. In fact, according to various surveys, it has been deduced that most children are unaware that physical abuse in school is a crime.[75] In fact, most teachers also fail to see the fine line between discipline and abuse. Delay in submission of homework or untidy uniform is often all it takes to deprive a child of his mid-day meals or to make him stand in the scorching heat for long hours. Such action is justified in the name of discipline. Awareness drives must be conducted to ensure that teachers are taught the difference between discipline and punishment. Discipline should be based on mutual tolerance and respect for others around you and this positive concept needs to be differentiated from an

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[68] Kathleen Raven, *Physical punishment tied to aggression, hyperactivity,* Reuters (New York), (January 17, 2014), available at http://www.reuters.com/article/2014/01/17/us-physical-punishment-idUSBREA0G16C20140117.

[69] Dr. Jennifer Shu, Can Spanking cause mental illness, CNN, (July 2, 2012) available at http://edition.cnn.com/2012/07/02/health/shu-spanking-mental-illness/

[70] Jenifer Goodwin, *Mental Abuse of Kids Leaves Lifelong Scars*, US News and World Report, (July 30, 2012), available at http://health.usnews.com/health-news/news/articles/2012/07/30/mental-abuse-of-kids-leaves-lifelong-scars.

[71] Ifrah Mufti, *CBSE warns schools about corporal punishment*, Indian Express, (June 29, 2014), available at http://indianexpress.com/article/cities/chandigarh/cbse-warns-schools-about-corporal-punishment/.

[72] PS Dileep, Children, *Parents Reluctant to Complain Against Corporal Punishment*, The New Indian Express, (January 27, 2014), available at http://www.newindianexpress.com/states/andhra_pradesh/Children-Parents-Reluctant-to-Complain-Against-Corporal-Punishment/2014/01/27/article2022098.ece1

[73] *Ibid.*

[74] P Laxma Reddy, *Despite Denials, Corporal Punishment Continues*, The New Indian Express, (January 27, 2014), available at http://www.newindianexpress.com/states/andhra_pradesh/Despite-Denials-Corporal-Punishment-Continues/2014/01/27/article2022097.ece.

[75] The Center for Parenting Education, *A Case Against Corporal Punishment*, available at http://centerforparentingeducation.org/library-of-articles/discipline-topics/case-corporal-punishment/

rently negative solution of punishment via physical or mental abuse.[76] This inction can also be seen in the context of the difference between respect and instead of getting a child to behave appropriately due to fear of being punished, ools should ensure such conforming behaviour arises out of respect for others.[77]

Another major cause of corporal punishment in schools is that often the dministration as well as the infrastructure is unequipped to handle the number of udents enrolled. This leads to underpaid teachers, stressful atmosphere and adequacy or shortage of basic resources. It has been observed that this taxing vironment creates tensions that result in teachers offloading the stress of their es on students often leading to cases of corporal punishment.[78] All the above entioned factors lead to poor classroom management which is a major cause of the gry and inappropriate responses of teachers to students.

While a few religions have openly raised their voice against corporal nishment, some believe that it is divinely mandated.[79] In fact, many argue that use corporal punishment is protected under their right to freedom of religion.[80] Some various verses in the Old Testament to support their view that corporal unishment is mandated under their religion. This section believes that "wounds leanse evil".[81] Many religious schools support the use of corporal punishment by lying on specific interpretations of the religious texts. However, the interpretations of such texts have been questioned on a large scale and there is a growing support in favour of non-violence in child rearing. Further, even from a legal point of view, the right to freedom of religion does not override the right of children against physical and mental abuse. As stated by the Committee on the Rights of the Child, freedom of religious belief cannot be exercised in contradiction with others right to physical integrity or dignity.[82]

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[76] Global Initiative to End All Corporal Punishment of Children, Report on Corporal Punishment of children in India, p.4, available at http://www.endcorporalpunishment.org/pages/pdfs/states-reports/India.pdf.

[77] Jessica Samakow, *What Science Says About Using Physical Force To Punish A Child*, The Huffington Post, (September 18, 2014), available at http://www.huffingtonpost.com/2014/09/18/adrian-peterson-corporal-punishment-science_n_5831962.html?ir=India.

[78] Kanchan Srivastava, *Education takes a beating*, DNA, (September 12, 2014), available at http://www.dnaindia.com/mumbai/report-education-takes-a-beating-2018024.

[79] Rita Swan, Religious Attitudes on Corporal Punishment, available at http://childrenshealthcare.org/?page_id=146.

[80] LearmoreZuze, Corporal punishment banning: a religious and cultural perspective, New Zimbabwe, (February 7, 2015), available at http://www.newzimbabwe.com/columns-20410-Corporal+punishment+Religion+and+culture/columns.aspx.

[81] *Ibid.*

[82] The Committee on the Rights of the Child, The Convention on the Rights of the Child and its Treaty Body — the Committee on the Rights of the Child, available at http://www.endcorporalpunishment.org/pages/hrlaw/crc_session.html.

Multidisciplinary Approach Essential

A multidisciplinary approach is essential for effective eradication of corporal punishment. This part of the project discusses the various steps or strategies that can be adopted by the State to ensure that corporal punishment is wiped from Indian schools.

Corporal punishment should be prohibited not only in schools but also in alternative care settings like foster care institutions, crèches, day centres, religious schools, institutions housing children in conflict with the law.[83] Further, it is necessary that a professional counsellor is appointed for each school.[84] The schools should also ensure that this counsellor is approachable and the taboo against seeking professional help is done away with. Schools should also ensure that anonymity is maintained in case of any complaints made to the counsellor. Drop boxes for complaints can be put in place to ensure that it is easier for children to make complaints without any fear of getting caught for the same. A Child Rights Cell needs to be set up in every school to make it easy for students to file a complaint against any kind of abuse suffered at school.

One of the biggest hurdles in the path of eradicating corporal punishment is the widespread belief in the society that it is the most effective ways of discipline children. Awareness drives need to be conducted to inform people of the dangers and the ineffectiveness of corporal punishment.[85] Often, parents justify the use of corporal punishment on the grounds that even children know that they deserve a beating if they do something wrong, however, that's only because they have experienced it since the very beginning.[86]Such awareness drives should also focus on making children aware of their right against all forms of corporal punishment including physical or mental abuse.

The high prevalence of corporal punishment across schools has normalised such behaviour, thus making it very important to set out a protocol specifying how a teacher should participate in a positive engagement with students.[87] For instance, it would be really helpful to distinguish the kind of issues for which the school should necessarily involve the parents and the ones where teachers can intervene on their own. For example, coming late to school, not submitting assignments can be dealt with by the school however, problems like belligerent behaviour like bullying or stealing etc. should involve the an expert counsellor or parents. Examples of how such positive engagement can be implemented by the school are giving positive attention i.e., identify good behaviour, explain clearly what is expected of the child,

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[83] *supra* note 33.

[84] Cathy Groenendijka, What shall we do about: Preventing Child abuse and neglect?, South Sudan Medical Journal, available at http://www.southsudanmedicaljournal.com/archive/august-2010/what-shall-we-do-about-preventing-child-abuse-and-neglect.html.

[85] *supra* note 6, at 8.

[86] Clif Flynn, Normative Support for Corporal Punishment: Attitudes, Correlates, and Implications, available at http://www.academia.edu/5148128/Normative_Support_for_Corporal_Punishment_Attitudes_Correlates_and_Implications.

[87] *Thou shalt not hit or harass a kid,* IBN Live, (March 6, 2012), available at http://ibnlive.in.com/news/thou-shalt-not-hit-or-harass-a-kid/236467-60-121.html.

ignore minor mistakes of the child, reward them for good behaviour.[88] Preventive strategies should be employed with the underlying objective of helping children instead of punishing them. Many experts also believe that the students so affected should be involved in the process of making such protocol and guidelines.[89]

Training programs for teachers is an integral component of any approach that seeks to eradicate corporal punishment. It is important to inculcate the value of being facilitator instead of an instructor amongst all teachers. They need to be trained to learn how to communicate with children in a positive, understanding and non-hostile manner.[90] Examples of positive engagement include inculcating the meaning of empathy in children, assisting them in coping with exam stress or emotions and anger.

It is important that both the press and the television media are engaged in bringing this problem to the forefront through extensive coverage. Clearly, the strong legal backing in the form of Article 21, Universal Human Rights Declaration etc. has not been enough to eradicate this problem and it is very important to build a strong public opinion in support for the same. Thus, the media can play an integral and an active role in dealing with this problem. The connection between infliction of corporal punishment and dropout rates can be highlighted by journalists.[91]

As revealed by various reports, corporal punishment continues to be practiced in all parts of the country. Thus, it is essential that the government takes an active role in establishing an effective strategy to eradicate this problem. As stated before, legally speaking, corporal punishment in India is banned in all forms in India. However, evidently there are various shortcomings in the implementation of the legal provisions prohibiting corporal punishment. It is crucial that the government comes up with a multidisciplinary approach to deal with this problem.

Further, in the Indian context, it also becomes essential to recognize and identify the thin line between discipline and punishment. It is highly possible that the understanding of corporal punishment in a collectivist society like India differs from that of an individualistic society like the United States. Thus, exceptions such as the one provided in Section 89 may be integral to avoid trivial situations falling under the garb of the crime of infliction of corporal punishment. However, there is certainly a need to narrow down the scope of this Section and ensure that those inflicting child abuse are able to escape under the protection of such a defence.

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[88]Shantha Sinha, End corporal punishment in India once and for all!, available at http://www.eenet.org.uk/resources/eenet_newsletter/eer1/page14.php.
[89]*Ibid.*
[90]Pinki Malik, Right to Education Act and Corporal Punishment in India, 33(3) International Indexed & Referred Research Journal 3, June 2012.
[91]S. Viswanathan, Corporal punishment: governments and media must act resolutely, The Hindu, (July 5, 2010), available at http://www.thehindu.com/opinion/Readers-Editor/corporal-punishment-governments-and-media-must-act-resolutely/article499971.ece

Conclusion

One can end on an optimistic note and take note of the active action taken by various bodies like the Central Board of Secondary Education to eradicate corporal punishment. It has issued repeated warnings to all its affiliated schools to ensure that no kind of abuse is meted out to students under the guise of reformative tactics or discipline. It has even threatened to disaffiliate the institute from the board in case any such incident is reported. Even the Ministry of Human Rights and Development has repeatedly issued directions to all State governments to ensure that corporal punishment is eradicated from all schools. Thus, one can hope that the government takes cognizance of the seriousness of this issue and takes the necessary steps to eliminate corporal punishment in all schools of India. Therefore, while corporal punishment needs to be clearly shunned as practice at home, law, in all fairness might not have the teeth to counter it, at least in a place in India. While a legal ban should be the eventual solution the current steps need to be of awareness, education and training. That in itself will go a long way to start letting parents know of its harms which will eventually lead to a reduction in its usage which is the most dire need of the hour from a child rights standpoint.

(13)



Carbon Markets at the Crossroad: Case of CoreCarbonX in India

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"Carbon, the currency of a new world order" (Paul Kelly, The Australian, 21 March 2007)

Abstract

Sustainability has become the sine qua non of businesses in the modern competitive environment. To remain relevant, firms have started becoming responsible in terms of environmental sustainability and thereby resorting to engagement of *'external agencies'* to look after their carbon footprints and

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CYBER CRIMES AND THE CYBER LAW IN INDIA: AN OVERVIEW

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I.INTRODUCTION

Cybercrimes are offences which are generally committed with a criminal intention to harm either the individual reputation or the reputation of any organisation or it may even cause physical or mental abuse to the victim directly or indirectly. In India 'Cyber Crime' is not defined officially in Information Technology Act 2000 (IT Act) or in any other legislation and thus it can be said that it is just a "combination of crime and computer"[1] Anyone who has an Email-id or Face book account or who is a member of a social networking website or even one who is doing on-line transaction to carry on day today business can become a victim of cybercrime. Cybercrimes not only affects the privacy of an individual but it is also harmful or threat to the security and integrity of the state or organisation. The cybercrimes in India, though on rise, mostly go either unreported because of lack of knowledge about the cyber law.

II.CYBER-CRIME: THE DEFINITION

Cyber-crimes are the crimes committed with the use of computers or relating to computers, especially through the internet. Cyber space crimes may be committed against persons, property, government and society at large. Thus, the Cyber Crimes is a term that refers to all criminal activities done by using the computers or computer networks or by using other devices like mobile phones, tablets[2] etc. It also covers the traditional crimes in which computers networking are used to enable the forbidden activity. Cyber Crimes can be categorised in three ways[3]:

1. ***The computer as a target*** – attacking the computers of others.

2. ***The computer as a weapon***- Using a computer to commit "traditional crime" that we see in the physical world.

3. ***The computer as an accessory***- Using a computer as a "fancy filing cabinet" to store illegal or stolen information.

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[1] Lionel Faleiro, "IT Act 2000 – Penalties, Offences With Case Studies", http://niiconsulting.com/checkmate/author/lionelfaleiro/

[2] Kanika Chhabra and Gunjan Chhabra, A Study on Emerging Issue on Cyber Law, Advances in Computer Science and Information Technology (ACSIT), Volume 1, Number 3; November, 2014, Krishi Sanskriti Publications pp. 112-116, http://www.krishisanskriti.org/acsit.html

[3] R. M. Johri , Principal Director (information Systems)Cyber Security – Indian Perspective, Office of CAG of India, seefor further detailswww.intosaiitaudit.org

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III.SIGNIFICANT CYBER OFFENSES IN INDIA

List of offenses given below is not exhaustive and would include many other offenses that would be committed through a computer or against a computer in the future.

Unauthorized Access (Hacking): it is an unauthorized control/access in to the computer system or network[4]by which destroys the complete data. Hackers write or use ready-made computer programs to attack the target computer to destruct or otherwise to steal the credit card information, bank account information and other confidential information.

Cyber Stalking: Repeated acts of expressed or implied harassment or physical threat towards the victim by using internet services. Even they use very filthy and obscene language to invite the interested persons. If the stalker is able to access the telephone of the victim, repeated calls will be made to the victim to threaten, harass, or intimidate them. Stalkers, generally, have desire to control the victims life. Majority of the stalkers are the dejected lovers or ex-lovers, who then want to harass the victim because they failed to satisfy their secret desires. Most of the stalkers are men and victim female[5].

Web Jacking – The term refers to forceful taking of control of a web site by cracking the password[6].

Cyber Squatting: More than one person claiming for the same Domain Name either by claiming that they had registered the name first on by right of using it before the other or using something similar to that previously[7]

Denial of service Attack: This is an attack in which the criminal floods the bandwidth of the victim's network or fills his e-mail box with spam mail depriving him of the services he is entitled to access or provide. This kind of attack is designed to bring the network to crash by flooding it with useless traffic[8].

Child Pornography: Depicting children engaged in sexually explicit act, creating text or digital images or advertising or promoting such material depicting children in obscene or indecent manner etc[9]

Cyber Pornography: This would include pornographic websites; pornographic magazines produced using computer and the Internet (to down load and transmit pornographic pictures, photos, writings etc.)[10]

Virus attacks: Viruses are the programs that will have the competency to infect other programs and make copies of it and spread into other programmes, which will multiply like viruses but spread from computer to computer are called as worms.

Trojan Attack: A Trojan, the program is aptly called an unauthorized program which functions from inside what seems to be an authorized program, thereby concealing what it is actually doing[11].

Software Piracy: Software piracy refers to the illegal copying of genuine programs or the counterfeiting and distribution of products intended to pass for the original. These kinds of crimes also include copyright infringement, trademarks violations, theft of computer source code, patent violations etc.

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[4] It is a kind of access without the permission of either of the rightful or person in charge of the computer, computer system or computer network (section 66 of IT Act 2000).
[5]See http://www.nandedpolice.in/cyber.php, (Accessed on 13-12-2017)
[6]See http://technohacks.in/cyber-protection-threats/cyber-threat/web-jacking/, (Accessed on 13-12-2017)
[7] See https://en.wikipedia.org/wiki/Cybersquatting
[8]See https://en.wikipedia.org/wiki/Denial-of-service_attack, (Accessed on 12-12-2017)
[9] Child Pornography has been exclusively dealt with under Section 67B.
[10] See http://www.cidap.gov.in/documents/cyber%20Crime.pdf, (Accessed on 12-12-2017)
[11]Ibid.

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DRONE TECHNOLOGY-EMERGING LEGAL ISSUES IN INDIA

*Dr. Shaik Nazim Ahmed Shafi**

INTRODUCTION

Humans are the most curious and smartest living organisms on the planet and hence innovative innovations are taking place. This is how the history has taught the humans of cave bashing a rock on the ground to make the first sharp-edged tool, to the development of electricity and internet which are revolutionary in scientific and technological developments. Thus human curiosity never fails to seek out new advancement and technologies like the Cloud Computing,[1] Face-Book, Apple iPod, Virtual Keyboard, Flower Sound,[2] the Oculus Rift, Apple iPhone, the Invisible Skyscraper, Google Glass, Plus Pool,[3] Birth Control Patch, Hybrid Vehicles, Sixth Sense,[4] Artificial Memories, Amazon Kindle, You Tube, Teleportation, Bionic Contact Lens, Tooth Sensor, Cameral Pill, Bio-artificial Lever Device, Billboard that produces clean water, Rewalk[5], The Artificial Pancreas, Retinal Implants and many more like that of the "Drones".

The initiation of the concept of Liberalization, Privatization and Globalization (LPG) has led the world to witness the much advanced technological developments[6] whereby the end result from the decades of research and development has had paved way for a wide range of technologies

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1. The practice of using a network of remote servers hosted on the Internet to store, manage, and process data, rather than a local server or a personal computer.
2. A gadget that consists of a doughnut-shaped magnet and coil at the base of a vase. It hooks up to a CD player, TV, or stereo and relays sounds through a flower's stem out through its petals (Japan).
3. Designed in New York to filter the very river that it floats in through the walls of the pool, making it possible for New Yorkers and its visitors to swim in clean river water
4. A wearable gestural interface that augment the physical world around us with digital information and lets us use natural hand gestures to interact with that information.
5. A revolutionary wearable robotic exoskeleton that provides powered hip and knee motion to enable individuals with spinal cord injury (SCI) to stand upright and walk.
6. Drones can be expected to become more sophisticated and available in more compact form, and also to become less expensive and therefore more accessible. They are likely to form part of the arsenals of an increasing number of States that may be able to deploy such force across international borders in relatively non-intrusive and sometimes non-attributable ways, on the battlefield and to pursue targets far removed from what would traditionally be seen as zones of armed conflict.

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which is now being used and which can augment or replace human physical and intellectual capabilities known as 'Unmanned Aerial Vehicles' or'Pilotless Aircraft' or 'Drones'. These drones are aircraft either controlled by 'pilots' from the ground or increasingly, autonomously following a pre-programmed mission.

This paper at first focuses the concept of drones; its use and functioning of drones. Later it continues with legal framework at the international and national level. This paper highlights the emerging legal issues emanating out of the drone technology and also tries to resolve the technology based mitigation measures. The author tries to brief up the present position regarding the drones in India and finally draws up with a conclusion.

Concept of Drones

The *Drones* are the subject matter of aviation law in particular and international air law in general. They can operate on surfaces or in the air without a person on board to control it; and that can vary in size, shape, form, speed, and a whole host of other attributes.[7] The different forms of drones are; large fixed-wing aircraft; small fixed-wing aircraft; micro-UAVs; Biomimetic UAVs and Blimps or balloons.[8] Hence, a drone can be a model aircraft someone purchases in a store, a mini helicopter used by some police forces, or a large plane-sized aircraft sent to a war zone.

In the industry, and across different regions, drones are also called Unmanned Air Vehicle (UAV); Unmanned Air System (UAS); Remote Piloted Aircraft System (RPAS); Model Aircraft (MA); Unmanned Aerial Vehicles (UAV); Pilotless Aircraft etc. Before UAVs became RPASs pilotless aircraft were known as an *Unmanned Aircraft System* (RPAS) is an aircraft and its associated elements which are operated with no pilot on board. PRAS was an overarching term for the entire system comprising an *Unmanned Aerial Vehicle* (UAV) which is applied to describe a self-piloted or remotely piloted aircraft that can carry cameras, sensors,

7. Greg McNeal. "A Primer on Domestic Drones: Legal, Policy, and Privacy Implications," *Forbes,* April 10, 2012.
8. Stanley, J. And Crump, C., *Protecting Privacy from Aerial Surveillance: Recommendations for government use of drone aircraft* - American Civil Liberties Union (ACLU), 2011, p 4.

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communications equipment or other payloads, as well those which support unmanned flights such as air traffic management and remote controllers of such aircraft. The following are the definitions associated with the various *drone* terminology:

i) *Unmanned Air Vehicle* (UAV) is a *"power driven aircraft, other than a model aircraft, that is designed without a human operator on board."*[9];

ii) *Unmanned Air System* (UAS) is *"an unmanned aircraft (UA) and all of the associated support equipment, control station, data links, telemetry, communications and navigation equipment, etc., necessary to operate the unmanned aircraft."*[10];

iii) *Remote Piloted Aircraft Systems* (RPAS) – a newly emerging definition coming from the International Civil Aviation Organization that intends to highlight the fact that the systems involved are not fully automatic but always have a pilot in command responsible for the flight.[11] RPAS describes a remotely piloted aircraft, its associated remote pilot station(s), the required command and control likns and any other components as specified in the design.[12]

iv) *Model Aircraft* is an aircraft; the total weight of which does not exceed 35 Kg (77.2 pounds) that is mechanically driven or launched into flight for recreational purposes and that is not designed to carry persons or other living creatures.[13]

v) *Pilotless aircraft;* [14] *as – "No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each Contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft".*

vi) The*Global Air Traffic Management Operational Concept* (Doc 9854) states *"An unmanned aerial vehicle is a pilotless aircraft, in the sense of Article 8 of the Convention on International Civil Aviation, which is flown without a pilot-in-command on-board and is either remotely and fully controlled from another place (ground, another aircraft, space) or programmed and fully autonomous."* This understanding of UAVs was endorsed by the 35th Session of ICAO Assembly.

9. *Canadian Aviation Regulations* (CARs), s. 102.01.
10. Federal Aviation Administration (FAA) Definition of "unmanned aircraft system" http://www.faa.gov/about/initiatives/uas/uas_faq?#On1 visited on 28-12-2014
11. Council of the European Union. *Towards a European Strategy for the development of civil applications of Remotely Piloted Aircraft Systems (RPAS),* Working Paper (13438/12), September 6, 2012.
12. UVS International Glossary of Terms http://www.uvs-international.org visited on 28-12-2014. CARs s. 101.01 http://laws-lois.justice.gc.ca/PDF/SOR-96-433.pdf
14. Article 8 of the Convention on International Civil Aviation signed at Chicago on 7th December, 1944 (The Chicago Convention, 1944).

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Use of Drones

The technology based drones can be used for commercial purposes,[15]or by the State for its good governance and public purposes,[16]or in wars[17] and in targeted killings[18]like that of the imminent threat from the so called terrorists at global level.

Functioning of Drones

15. Advertisements and deliveries; aerial photography; agricultural spraying; commercial and motion picture filmmaking; companies use to monitor their infrastructure such as pipelines, buildings etc.; farmers using to monitor livestock on vast spreads of land; journalism and photography; inspections and marketing materials to assist the selling process; journalism and photography; medical industry for blood delivery; organ transportation; photo-grammetry service; promotion and advertising; realtors, developers and builders in real estate and construction activity using drones for surveying land; recreational use; sample water from lakes, ponds and streams that people can't easily reach etc.[15]; used for sports (i.e. not only it is an entertainment to watch games from above, it also gives coaches a unique and valuable perspective of performance by players).
16. Aerial photography; archeology; atmospheric (including weather and atmospheric gas sampling); and oceanographic research; scientific research; cartography and mapping; commercial aerial surveillance (i.e., fire departments use to track and map wild fires); disaster aid and relief (i.e. searching for survivors in cases of flooding, wildfires, or nuclear fallout, used to help locate and save life in the midst of natural disasters); emergency and disaster monitoring; flight research; firefighting monitoring and management ; first aid kit delivery for providing food packets during disaster management; flight research; gather and deliver medical samples; geophysical research; guarding the border by defence personnel; historical monuments; sites topography etc.; imaging spectrometry; medical industry for blood delivery; mineral exploration monitoring wild life; museography ; national heritage sites in danger; oil, gas, mineral exploration; on-line archeology; organ transportation; photo-grammetry service; police using drones to fight crimes; police surveillance; putting out wildfire; remote sensing (i.e., geological surveying, agriculture, and archeology); sample water from lakes, ponds and streams that people can't easily reach etc. scientific research; sites topography; search, rescue and recovery; supplies and medicine to remote or otherwise unreachable areas in a disaster zone etc.; telecommunications relay platforms; tracking of illegal hunting of wild animals; tracking the environmental violations; used for sports (i.e. not only it is an entertainment to watch games from above, it also gives coaches a unique and valuable perspective of performance by players); used to inspect power lines, towers, tall structures like chimneys and roofs which reduce liability exposure; and weather and pollution reconnaissance. However, the subject drones, is one of the fastest-growing and, yet, controversial sectors of aerospace, but 'safety' is the principal concern.
17. Use of drones in warsto target persons located in another State is subject to and in compliance of rules of on the use of inter-State force.
18. According to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, a targeted killing is "the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator". This definition comprises all key legal elements: intention to kill; preplanning; identification of specific targets who are not detained; and, fundamentally, the "accordance with law" requirement (actual or purported); Philip Alston (footnote 14), p. 3, paragraph 1.

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Role of Information Technology in Civil Aviation: A Focus on Cyber Crimes and Emerging Legal Issues

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Introduction

The initiation of the concept of liberalization, privatization and globalization with highly advanced technology blended with information technology has completely transformed the economic behaviour of the world. Civil aviation is one of the most widespread and extensively interconnected international infrastructures in the world connecting everyone, every time and in every place. 'Airports' and 'Airlines' are the economic engines for the growth and development of a nation.[1] Civil aviation is a glamorous industry but sensitive and yet its abuse has become a threat to the general security of passengers, crew members and aviation industry as a whole due to the misuse of information technology. Today every airport, airline and the air traffic control systems are based on intelligent transport system i.e. the information and communication technology (ICT). Aviation has become the backbone of our global economy bringing people to business, tourists to vacation destinations and products to markets.

"Aviation" is the business of freedom. In 2016, 3.8 billion passengers safely took to the air and some 54.9 million tonnes of goods were delivered as air cargo.[2] Focusing the "financial performance"aviation's vital role in the world has not always resulted in appropriate rewards to airline investors. In recent years, however, airline efforts to restructure and reengineer their businesses have resulted in a historic strengthening of the bottom line. The industry earned a return on invested capital of 9.9% in 2016[3], which exceeded its cost of capital (estimated at 6.6%). Regarding the "safety", flying safely is the number one priority and the industry competes fiercely for every passenger, but there is no competition when it comes to ensuring safety.[4]Pointing out at the "aviation security", the aviation industry continues to be an iconic target for terrorist and other security-related attacks.

The purpose of this paperis to divulge how information technology is the key element in the economic development of aviation industry as a whole and airports, airlines and air traffic control system in particular. This paper also tries to focus the impact of information technology paving way for cyber-crimes etc. and existence of any legal mechanism to curb the said issues focusing the International Conventions pertaining to civil aviation and cyber-security.

Role of Information Technology in Aviation Industry

Air travel has always been closely connected with the information and communication technologies (ICT), benefiting from the technological developments and, in the same time contributing to its evolution. The modern consumer is more familiar with IT technologies; he has access to information which made him more sophisticated and demanding, requiring specialized and interactive services. The evolution of ICT shaped and

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1. *Airports Privatisation in India: Law and Policy Issues* (1st ed., pp.102). (2013). Hyderabad, Andhra Pradesh: Asia Law House.
2. IATA Annual Review-2017
3. IATA Report-2016
4. IATA Report 2016: One major accident for every 2.56 million flights using jet aircraft in 2016.

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re-engineered the air travel industry globally.[5] The air travel linked with tourism industry is highly fragmented and diverse, linking a "worldwide supplier community"[6] with passengers/consumers being distributed globally. The evolution of ICTs demonstrated that centralizing data is a key element in the development of air travel and tourism as well as transforming distribution into an electronic marketplace.[7]

The pioneers of the technical developments in the air travel and tourism industry were the Computer Reservation Systems (CRS) in the 1970s and the Global Distribution Systems (GDS) in the 1980s, among the first multi-organizational and global information systems[8] followed by the Internet in 1990s a first step associated to the development of the "world wide web"[9] under the 20th century. However, the 21st century has witnessed an advanced technological development which has transformed the aviation industry. Digital technologies have been the driving factor for improving airlines' operational efficiency. Custom software application development has become a major contributor to a company's competitive advantage and garners exponential growth in business. It helps the industry to leverage its technology and services by extracting full potential. It also facilitates the implementation and development of global standards and delivers value to the airline business firms.

The advent of technology and social media is increasing the customers' expectation to build and increase their relationship with the organization. Understanding customers' preferences, IT innovation and modernization help the airlines re-engineer their business processes by addressing the industry challenges and opportunities and transform its practices to a customer-centric approach. This conventional approach increases the connectivity and enhances the customers' satisfaction and innovative software applications provide real-time value to the customers.

Market conditions and industry developments affect the growth of any business. The increase in traffic and competitive pressure has been adversely impacting the financial sustainability of the airline industry. The current global market conditions and industry developments coupled with evolving technological trends and customer preferences are introducing more challenges than ever before. IT automation has removed barriers and changed the landscape of aviation industry. It helps the industry in cutting costs, improving relationships with the customers and clients, and improving the financial performance in a sustainable way.

The aviation operations since decades are based on IT industry. The aviation industry widely uses a variety of applications through the digitalization of different procedures. A catalogue of solutions can be found helping airlines manage a variety of processes, such as electronic documentation, aircraft performance and flight planning optimization, crew management or fuel efficiency. Other new services have recently become available, such as solutions for live flight tracking.

Data analytics is not an exception and in the last few years a number of companies have started to incorporate functionalities based on data mining and machine learning. A second generation of data analytics applications will surely disrupt traditional operational procedures by fusing a variety of data sources, including not just airline or weather data but also airspace management data. Applications will be able to fuse and analyze a variety of datasets and leverage historical behavior of the system to predict and recommend operational solutions to airlines, airports and air navigation service providers.[10]

Taking the IT into consideration, presently, several companies are promising increased efficiencies in different contexts like the Navblue, an Airbus company, offering the N-software, able to produce best-in-class

5. Buhalis Dimitrios, Strategic use of information technologies in the tourism industry, p.3
6. Werthner H, Klein S, ICT and the changing landscape of global tourism distribution, Electronic Markets, Volume 9, Issue 4, 1999
7. Buhalis Dimitrios, Strategic use of information technologies in the tourism industry, p.6
8. Abel Usoro, ICT (Information and Communications Technologies) and Tourism: An Initial Exploratory Study of Developing Economies as Suppliers of Hospitality and Destination, p. 1
9. Mistilis N, Buhalis D, Challenges and potential of the Semantic Web for tourism, eRTR, vol 10, 2012, p. 51
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UNCONVENTIONAL SOLUTIONS FOR ENVIRONMENT PROTECTION

Prof. K. Vidyullatha Reddy *

1. Introduction

Environment degradation remained a matter of concern world over for few decades now. United Nations efforts to address the issue started more than four decades ago[1]. These efforts led to States accepting to certain binding principles[2] and entering into some enforceable treaties[3]. These had a huge impact domestically also for each State party. Domestic actions in many States included enacting legislations, developing policy guidelines, setting up enforcement agencies, creating opportunities for education, making provision for financial allocation etc. the above indicate the multidimensional approach necessary to combat environment degradation. The concern for environment degradation is not a luxury rather it is a necessity as it threatens the existence of the species and the quality of life on this planet. The number of legislations, technological and financial challenges, numerous non-governmental organizations it brought with this was phenomenal. The world was literally forced to have a new vision. At this juncture the role religion has and shall have on environment protection also was not out of place, this led to many studies in this direction.

There are scholars who have justified with their studies that religion can have

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1 United Nations Conference on Human Environment (UNCHE) held from 5-12 June, 1972. June 5th is declared as the World Environment Day to mark the conference dates. There were many factors which highlighted the degrading environment thus invoking the conscience of the international community to take note of it, which include a novel namely 'Silent Spring' and a report namely 'Limits to Growth'. Silent Spring' was published in 1962 by Rachel Carson which spoke about the harmful effects of the use of pesticides on the birds and killing of them leading to a silent spring season. 'Limits to Growth', a report prepared by an International team of researchers at Massachusetts Institute of Technology which predicted that we need to limit our growth for the earth resources to sustain our life style.

2 Principles such as Polluter pay, Precautionary principle, Common but differentiated responsibility have led to guide many actions across States. They influence every decision making including legislation, State policies, judicial decisions etc.

3 United Nations Convention on Biological Diversity, 1992; United Nations Framework Convention on Climate Change, 1992; Basel Convention on Trans boundary Movements of Hazardous Wastes and their Disposal, 1989; Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973; The Convention on Wetlands of International Importance, 1971 etc. are few examples of international agreements.

positive role on environment protection[4]. There are scholars who asserted that religion attitude towards environment was responsible for environment degradation[5]. There are also studies which held that the relationship between religion and environmental behaviour is a very weak link[6]. The author in this paper intends to study the interface of Hindu religion on environment protection in India.

2. Hindu Religion

Hindu religion is the religion of the majority in India. Hinduism is considered a way of life that has been practiced in India. There are many criticisms to this statement; however there is a justification for the saying. The geographical territory of India is vast and it is a combination of diverse languages, cultures and practices. It is believed that Sri Adi Shankaracharya who travelled across India had contributed immensely in unifying many different practices and ideologies under one domain i.e. Hindu religion. The people who profess or practice the religion are called Hindu's. Hindu's disagree with the fact that Hindu religion emerged like few other religions which earlier had believed in pagan deities. The reason for disagreement is that the religion believes in the existence of multiple deities. Religion believes in the existence of multiple rituals and practices associated with these deities. In view of this diversity, what is stated as religious rituals by one scholar may not be considered by the other Hindu scholars. This enhances the chances of the critics because what one Hindu religious scholar states may not be accepted in its entirety by the other Hindu scholars. In these situations it becomes difficult to state with certainty that this is Hinduism.

Hindu religion besides believing in multiple deities also believes that they are worshiped with different names in different parts of the State, for example: Lord Shiva is worshipped as Vishwanath in Benares, while he is worshipped as Eshwar in Rameshwaram, he is worshipped as Mallikarjun in Srisailam etc. In the State of Telangana alone village goddesses are known as Pochamma, Maisamma, Uppallamma, Maremma, Poleramma, Ankallama etc. It is even contradictory to call them as village goddesses or as one and the same. Every deity has a different ritual and different festivities etc. Understanding Hindu religion in its entirety is more than a life time job for any scholar. Ideally speaking it should be less tedious

4 Harold Olofson, "Cebuano and tagbanuawa: Two cases of indigenous management of natural resources in the Philippines and their relation to religion" *Philippine Quarterly of Culture and Society*, 1995, Vol. 23, pp. 20–34

5 Mark Stoll, "The Quest for Green Religion" Religion and American culture: *A Journal of Interpretation, 2012*, Vol. 22, pp. 265–274

6 Heather Hartwig Boyd, "Christianity and the environment in the American public", *Journal for the Scientific Study of Religion, 1999*, Vol. 38, pp. 36-44.

and more interesting for scholars who follow the religion.

Hindu religion besides having divergent rituals and practices has common beliefs; believing in the existence of multiple deities itself is a unifying factor. Believing that Vedas are the actual utterances of god and should be followed is a unifying factor; however the expositions on Vedas in the form of Smritis by learned scholars such as Manu and Yagnavalakya differed in their views on few aspects. Bhagavad Gita is considered a cream/summary of Vedas and it is believed to be uttered by the god himself (Lord Srikrishna), it is a sacred book for all Hindu's in India. However the religion as such is not bound by the sacred book it acts as a moral guide or an ethical code. There are many other Upanishads and other sacred literatures that guide people in different parts of India, for example Tiruppavai is considered fifth Veda by shrivaishnavities in South India. This is believed to be sung by goddess Goda/ Andal who is believed to be reincarnation of goddess laxmi[7]. Tamilnadu State Government seal/emblem carries the temple tower of srivilliputhur temple. Tiruppavai shows the path for seeking the blessings of Lord Sri Ranganadha (the other name for Lord Sri Krishna). The unifying factors of the religion keep the religious followers intact while allowing each one of them to follow divergent rituals and practices.

3. Hindu Religion and Environment

One of the major beliefs of the Hindu religion is that god is supreme and god created the whole universe. There are verses in Bhagavad Gita which state the same, as Gita is believed to be the actual utterance of god, the belief also is very strong[8]. Gita asserts that God is the creator of mobile and immobile things on this universe and every action in this Universe is dictated by the god. There is also a belief that god exits in all beings and everywhere.

Hindu's believe that god exits in trees, water, animals etc. and in human beings as

---

7 The birth place of Godess Andal/Goda (Godess Laxmi reincarnation) is believed to be Srivilliputhur. This place is in the State of Tamil Nadu. Dravidian Sri King Sri Krishna Deva Raya has written a book on goddess Andal/ Goda and tirrupavai which was titled "Amukta Malyada"; the book is a very popular book on the subject. Tirrupavai impact can be clearly seen in the region which was under this ruler.

8 *Bhagavad Gita* (chapter VII –4th and the 6th verse).
Bhoomiraapo'nalo vaayuh kham mano buddhireva cha;
Ahamkaara iteeyam me bhinnaa prakritirashtadhaa.
(Earth, water, fire, air, ether, mind, intellect and egoism-thus is my Nature divided eightfold).
Etadyoneeni bhootaani sarvaaneetyupadhaaraya;
Aham kritsnasya jagatah prabhavah pralayastathaa.
(Know that these two (My higher and lower Natures) are the womb of all beings. So, I am the source and dissolution of the whole universe).

well. India is a biologically rich nation and this belief helped in environment protection. For example, many people pray to tress and few trees are planted in temples especially for the purpose of prayer. There are particular species of tress/ plants which have greater religious significance[9] over others[10].

Hindus consider rivers as goddess[11]. There is a belief that when people were suffering with drought and lack of water king Bhagiratha made tapasya/prolonged prayer[12] and the god is pleased with his tapasya and asked him to seek a boon. He asked god to give ganga/water to the public, and then the river course followed[13]. Telangana State Government project on supplying drinking water to every household is named as Mission Bhagiratha this signifies the importance of the beliefs on its followers on the present day to day life. This also indicates the belief that Hindu's believe that rivers have divine origin.

Hindu's also consider rain as god. There is a belief that when people were suffering with drought the sages advised the villagers that young girls should perform puja to seek the blessings of rain god. This required them to know the ritual to perform the puja. It was believed that Goddess Laxmi reincarnated herself as Andal/Goda and she described the puja ritual. The god was pleased and gave the followers worldly benefits[14]. This indicates the fact that people believe that if god

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9 Ocimum tenuiflorum popularly known as tulasi/ thulasi plant has an important place in srivaishnava tradition of Hinduism.

10 Oraons (Fourth largest tribal group in India) orientation to nature is shaped by their religious beliefs. They believe in spiritual beings and their hierarchy, 1) Dharmes (Supreme) 2) ancestors 3) spirits ex. Chandi is their spirit of war, Baranda is their house hold spirit etc. In karam festival they dance around karam tree. Young boys cut branches from an unflowered tree and they are planted in village court yards. These branches are not allowed to fall down and there are stories which speak of punishment for people treating the karam branches with disrespect. They conduct marriage ceremony of the earth. Before the ceremony no one is allowed to gather new fruits or cut yield etc. Many of them converted to Christianity, however they celebrate the festivals in same way. Converts attitude towards nature reflects departure from traditional attitude (Source: Virginius XAXA, "Oraons: Religion, Customs and *Environment" India International Centre Quarterly*, 1992, Vol. 19, pp. 101 – 110)

11 Arti/Harati is a part of prayer wherein small flame of fire is given (shown) to god which is then given (Shown) to the people who visit the temple. Similar Arti is given to river ganga in Haridwar and few other places on specific time or on specific occasions.

12 Tapsya is prolonged worship disassociating the practitioner with the world. The worship is usually continued until the god/godess blesses the worshipper or the worshipper seeks the boon from the god/godess.

13 King Bhagiratha is considered to be the forefather of lord Rama, Rama is believed to be an incarnation of lord srimahavishnu. While many kings ruled the region (Ayodhya) it was Bhagiratha who is still remembered, In fact Bhagiratha left the kingdom and the regime for the sake of tapsya. This indicates the fact that people do not remember kings as much as those who relinquished their kingdom for a good cause.

14 The day when god was pleased and blessed the people with worldly pleasures (Such as jewellery, food grains etc.) is celebrated as Bhoghi, and the day when goddess united with the

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23 24

Article

Mandatory CSR and organizational compliance in India: The experience of Bharti Airtel: PANDEY and PATTNAIK

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DOI: 10.1002/joe.21810

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Citations (9) References (17)

Abstract

India is the first country to legislatively require certain organizations to implement corporate social responsibility (CSR) programs. Although some firms, such as the telecom Bharti Airtel, had previously embarked on various sustainability and social outreach initiatives, the legislative mandate has forced some other firms to invest in CSR for the first time. Meanwhile, reaction from business leaders, both inside and outside the country, regarding the effectiveness of the law has been mixed. A pioneer in employing CSR interventions among all stakeholders in every stage of the value chain, Bharti Airtel, a multinational operating in 20 countries, still faces challenges in ensuring the effectiveness of its CSR outreach from both a business and a social responsibility perspective. Questions that remain to be addressed include the need for monitoring of outcomes and the potential for greater industry-wide collaboration.

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... It has evolved to its present-day form following changes in its economic, social and regulatory framework. It is one of the few countries in the world to make CSR spending mandatory for corporations with the backing of a law

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25 26

Article

University startups and special legislations: Genesis and developments in the United States of America, Japan and India

July 2017 · International Journal of Law and Management 59(5):00-00
DOI: 10.1108/IJLMA-05-2016-0046

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Citations (4) References (45)

Abstract

Purpose The paper aims at exploring the role of legislations in university startups. Design/methodology/approach Systematic review of legislations in three countries namely US, Japan and India has been carried out to assimilate the role of special legislations in university startups Findings Findings of the study reveal the important role that legislations can play in bringing out more University Startups. Legislations not only protect the interest of the founder but also provide a cushion to explore further opportunities. Research limitations/implications The implications for the makers of the legislations and policies start with the understanding that conducive legislations can help the founders to take up the challenge of starting a commercial entity out of research output. Originality/value The study adds to the limited literature connecting university startups and legislations.

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Citations (4) References (45)

... Recientes estudios revelan que una de las fortalezas del modelo de comercialización estadounidense se encuentra en la política pública de apoyo a la comercialización de intangibles a través del fomento en la creación de startups (Pattnaik & Pandey, 2016). La política de fomento en la creación de

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Protecting Online Copyright Infringements: The Emerging Legal Issues and Challenges

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Abstract

Copyright infringement is the primary problem in intellectual property rights in the present digital era as with the emergence of new technology, newer concepts called computer databases, computer related programs, computer software, computer layout and other works on the internet, specifically the cyberspace has come to light. The copyright infringements take place online due to the ease of replication as there is no degradation of the original copy with successive copying. The copyright law is the most powerful tool today to address and tackle the Intellectual Property Right issues based communication and information. While it is universally accepted that the main aim of copyright law is the promotion of individual interest, it also incentivizes authors to allow them in creating new works by providing recognition and economic returns through the law. However with the enhanced technology, legal issues have emanated, distorting the very principle of copyright law and making it very critical to apply the copyright law to the digital or online information. Hence, in this paper the author intended to discuss the issues relating to copyrights in relation to computer programs, computer databases in the cyber space and the related issues vis-à-vis protecting the rights of the authors in general.

Key Words: Cyber Space, Computer Database and Copyright Issues

Introduction

Intellectual Property Rights (IPRs) include copyrights, trademarks, patents, etc., are more vulnerable in the present day of digital world, while violation of copyright is more vulnerable compared to other IPRs. To manipulate, distribute and reproduce any copy righted work in the digital world is very easy. "Digital content can be combined, altered, mixed, manipulated and perfect copies can be made for little cost, thus the digital technology undermining the distribution systems and increase unauthorized use of copyright works"[1]. Therefore, due to the innovation of technology, there will always be a change in the society which is dynamic in nature and thereby facilitate the internet technology to grow at a faster pace. Simultaneously, the said technology may be used for the exploitation in the form of infringement of copyright when there are no proper checks and balances. Any work that is copyrighted may be circulated by using some basic tools of technology on cyber space to disseminate or store or use a copyrighted work, namely, ***'Packet Switching'***, ***'Caching'***, ***Framing Technology***, ***Linking*** and ***Email***[2] which is nothing but a severe violation of copyrights.

[1] Burgess, J. (1993). Internet Creates a Computer Culture of Remote Intimacy, *The Washington Post*, A1, A8, quoted by Fareed Ahmad Rafiqi in his article " Copyright Protection in Digital Environment: Emerging Issues", available at *www.ijhssi.org Volume 2 Issue 4, April 2013, PP.06-15.*

[2] a)'Packet Switching' technology: In this technology information that is transmitted through Internet is broken into small units (as packets). Once the packets reach their final destination, the broken units reassemble and are thereby stored in the hard disk or RAM as per their sequential order and makes a temporary copy of the same and transfers 'copies' that it has received and same will be resulted in to the saving of the unauthorized copy.

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Protection of Copy Rights in Cyber Space: Legal Framework for India

The main object of copyright law is to promote and protect the individual author's interest by providing recognition and economic returns through the law so that they can be encouraged to create new innovative works. However with the emerging technology, the printing by copying has been increased more particularly in the cyber world with anonymity thereby fixing the liability on any one. Under Copyright Act 1957, any creative words, literary works etc., are protected from being copied without prior permission from the copyright holder .Information that flows through the internet entails numerous practical problems as it can be modified, distributed and passed on as the cyber world is not limited by geographical boundaries, hence the internet permits rampant copyright infringements online. Preventing the copyright violations in the cyber space is very difficult as the Information Technology Act 2000 (Act 2000) was designed and formulated in the pre-digital technology period; therefore it could be said that the I.T Act 2000 has not adequately tackled and curb the copy right violations in the cyber space. While technology is moving in an amazed pace, it is the need of the hour to come up with the new and innovative digital technology to restrain unauthorized use of any copy righted work in the cyberspace.

Further intruding into one's copyrighted work would certainly cause a huge economic loss as well as it is a grave violation of the copy right law. Therefore, to tackle this issue, the Technological Protection Measures (TPM) was introduced in the international level, to provide extensive safety to the proprietary works from digital piracy via cryptography and passwords. It adopts two measures; one is Access Control Technology (ACT) and the other is Copy Control Technology (CCT). However, there is a downside to this as well as it enables unauthorized users to frame technical solutions, which can counter TPM. As a response to the same, the World Intellectual Property Organization (WIPO) has formulated two crucial treaties; they are 1) WIPO Copyright Treaty (WCT), 2) WIPO Performances and Phonograms Treaty (WPPT)[3], which mandates its member countries to extend adequate legal protection for effective TPM, in its national copyright legislations.[4] Several countries, such as the US, Japan, Australia and Germany have adhered to this mandate. Therefore, to

b)'Caching': In this method mirroring will happen in the CPU of a computer and is a fast storage buffer that permits the computer to temporarily store data in the RAM or hard disk and in this process the Proxy Caching happens at server level.[2] It also maintains an unauthorized copy of the work.

c).Framing technology: In this technology a webpage or site is framed within another website or its URL or domain name and the content of the target site is appeared within this border and original site is not displayed[2]. Thus, committing any copyright infringement by reproducing or creating a derivative work of the original, the framing site owner does not redirect user to the linked site; rather, he creates a new page within his frame. This amounts to copyright of the original site owner.[2]

d) Linking: This is a method of reproducing a work. It allows the user to gain his/her desired information that is available online by connecting the user to pages within the website. A webpage in the cyberspace is linked without the permission of the owner. While Surface framing does not create much problem, the deep linking create an issue of copyright because it provides the user access to the inner pages of another website through the links on one site, without accessing the home page of the site linked.[2]As linking happens without the knowledge and permission of the copyright owner of the online information therefore results in to copyright infringement.

e) Email: It is the electronic version of mail system and does not dilute the quality of information leaving a copy at both the sender as well as the receivers place. For further information see http://shodhganga.inflibnet.ac.in/bitstream/10603/13638/8/08_chapter%201.pdf.

[3] "The purpose of the two treaties is to update and supplement the major existing WIPO treaties on copyright and related rights, namely the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention), primarily in order to respond to developments in technology and in the marketplace".

[4]Retrieved from, https://www.nalsar.ac.in/pdf/Journals/IJIPL_2013_Final.pdf

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bring it in consonance with the WIPO Internet Treaties- WCT and WPPT[5]the Indian Copyright Act1957 was amended in the year 2012

The Indian Copyright Act 1957 was initially enacted in 1957 and was later amended in 1994 and in 2012. The amended Act of 2012 is more conclusive and forward-looking in terms of tackling copyright challenges of digital technologies especially those in the cyberspace. By removing certain restrictive clauses and phrases, and by expanding the definitions of works like cinematograph films (motion pictures) and sound recordings (phonograms) to include such works in any medium within their purview, the Act has adapted itself to the digital era.[6] To protect copyrighted works in cyberspace, a technical measure like fair use provisions for works online has been introduced. Moreover Section 14 of the Indian Copyright Act of 1957 was amended to include 'hire' to bring it in compliance with Article 7 of WCT and Article 9 of the WPPT, which provide for 'commercial rental' rights for computer programs and cinematograph films. However, in Section 14(d) and (e) of the said Act 1957, the term 'hire' was replaced by 'commercial rental' to narrow down the scope of hire to only commercial rentals and not non-commercial ones. The definition of the term commercial rental was also introduced under Section 2(fa) of the Amended Act2012. Fair use provisions are now extended to digital works as well as per Section 52 the Copyright (Amendment) Act 2012 provides that the work which is not a computer programme for purposes of private or personal use, including research, criticism or review of any work.[7].Making of copies or adaptation of computer programme from a legal copy for non-commercial personal use is also fair use.[8]

Protection of Copyrights in Cyberspace in India: The Issues and Challenges

It is obvious to understand the relationship between the 'information technology' and 'enforcement of copyrights in the cyberspace'. Hence some of the issues and challenges pertaining to digital replication posing to traditional IPR systems and owners are as follows:

1. Public use Vs Private use: It is one of the most basic copyright infringement issues in cyberspace and more particularly in India. The Act of 1957 too like the other copyright laws makes a distinction between reproduction for public and private use. Reproducing copies of a copyrighted work when in public use can be done with prior permission of the copyright owner, whereas the law permits fair dealing in cases of private use or review, etc., this however has changed when it comes to the materials in the cyberspace. The distinction has eroded with the emergence of Internet as an individual or user can transfer any copyrighted work over the Internet to multiple users[9]. Hence, there is a rapid need to adopt and implement acceptable norms in international level for protection of copyrights in the net.

2. Reproduction and distribution rights: In the cyberspace, distribution gets with reproduction since no copy can be distributed without reproduction[10]. "When data is transmitted through the Internet using a technique known as 'packet switching' will be broken up into smaller units or 'packets' of information. Then the packets are sent through the network as separate or distinct units at different times, at that time each computer makes a

[5] Abhai Pandey,(January 1, 2013), Inside Views, Development in Indian IP Law: The Copyright (Amendment) Act, 2012, Intellectual Property Watch),: Retrieved from http://www.ip-watch.org/2013/01/22/development-inindian-ip-law-the-copyright-amendment-act-2012/

[6] Section 2(y) of the Indian Copyright Act, 1957

[7] Explanation to Section 52 (a) provides even the storing of any work in electronic form also.

[8] Section 52 (ad) Indian Copyright (amendment)Act, 2012

[9]Subhasis Sah and Sourav Keshri.(2008) "Challenges to Copy Right Work In Cyber Space", Journal of Intellectual Property Rights Vol.3, Pp 35-42

[10] Under Articles 7, 11 and 16 of the WIPO Performances and Phonograms Treaty, 1996 (WPPT), the Performers and Phonogram Producers are vested with "the exclusive right of authorizing the direct or indirect reproduction of their respective protected subjects in any manner or form".

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temporary copy of each packet and transmits"[11].Thus, when the packets of the data being transmitted through the RAM of a computer a copy of the transmitted data may be created or stored at either in the destination computer's RAM, on its hard disk, or in portions of both. Therefore, reproduction comes with its own issues in the cyberspace due to Internet transmission as reproduction happens at every stage of the transmission. In Indian reproduction has to be done in a material form which includes even 'storing of it in any medium by electronic means'[12], however, there is no conclusive proof as to whether reproductions in the cyberspace fall under the category of right of reproduction given by law or not.

3. Enforcing liability: While enforcing liability, it is crucial to know on whom does the liability fall i.e., the party who receives it or the Internet service provider or the one who transmits the work. Section 79 of the Information Technology Act of 2000 envisages that if the subscriber proves that the breach or offence was committed without the knowledge of a person or that a person had exercised with all due diligence to prevent the commission of such breach or offence then there is no liability under the said Act of 2000.[13] To fix liability on the Internet Service Provider (ISP) for the Infringement or abetment of infringement of copy right of the any one, the ISP should have the Knowledge about any copyright infringement otherwise there would not be any liability on ISP. As the Internet is a global affair a person will be held liable, only if any act on internet is treated as an offence under their respective domestic law and thus, it is very difficult to regulate the same, as the message would travel various countries before reaching its destination. Hence, the ISP may not have liability in the country of destination or country of origin, but may be held liable in some country in transit. Software developers are potentially liable for copyright infringement based on the secondary liability, based on theories of contributory or vicarious infringement.[14] A provider must either commit direct or an indirect infringement i.e. contributory or vicarious copyright infringement.[15]

3. Implementing domestic/State IPR Laws: The effective enforcement of any domestic law is very difficult because of the involvement of numerous territorial jurisdictions. Some States are empowered to compel Internet Service Providers (ISPs) to examine the material which is being transferred through the net for copyright clearance under their domestic laws; some States are not, which eventually delays the whole process. Therefore, harmonizations of laws among the States are essential to frame uniform guide lines for the protection of copy rights in the cyber space. Controlling and distilling information flowing in the cyberspace has its own practical issues. The possibility to intercept material that is obscene is already existing[16] which includes the power to block the sites. However, it is not full proof because when once an infringing site is blocked, thousand other new infringing sites would crop up. Censoring is also difficult when the cyber space is universal and accessible to anyone to upload the information without any territorial limits.

Conclusion

To conclude, it can be said that the so called highly advanced modern technology known as the Internet technology poses a serious threat to IPR led copyright issues and copy right violations in cyber space which has become a common phenomena in these days. To tackle the infringement of copy rights in the cyberspace,

[11] James T. C (1998), "The Internet As A Challenge For Intellectual Property Protection: An Indian Perspective": Retrieved from www.wipo.int/edocs/mdocs/mdocs/en/wipo_int_sin_98/wipo_int_sin_98_2.doc

[12] Section 52(1) (b) and Section 52(1) (c) of Copy Right (amended) Act, 2012 clarify that the transient or incidental storage of a work purely in technical process of electronic transmission or communication to the public is within the meaning of fair use.

[13] Section 79 of the Information Technology Act, 2000

[14] Secondary liability 'arises when one party is held legally responsible for the actions of another party.' And it can be vicarious or contributory liability.

[15]Sony Corp of America v Universal City Studios Inc(US 1984) 104 S Ct 774, 464 U S 417; A&M Records Inc v Napster, 239 F 3d 1004, 1020 (9th Cir2001); In re Aimster Copyright Litigation, 2003 Copr L Dec P 28,630,67 USP Q 2d 1233.

[16]Section 69 of the IT Act 2000

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the existing law is inadequate. Therefore, it is the duty of the State to come out with a concrete policy in combating the on-line copy right violations and based on that requisite amendments should be made to the existing law.

For the effective protection of copy rights of the owners on cyber space the possible suggestions are;

1. It is the need of the hour that, at the International level all the States must adhere for a policy framework in tackling the issues of IPR infringements at a global level.
2. Due to the shift in digital technology, libraries are to be upgraded, and modernized with technology by meeting and maintaining the international standards in protecting the rights of all the end-users.
3. Introduction of ECMS[17] in India will be a proper way in tackling the issues emanating from copyright violations of any nature.
4. Like in the US, the Copyright Alert System(it lasts only for four years) can be introduced to stop online copyright infringement in India.

[17] Electronic Copyright Management Systems would be proper to introduce in India to tackle the copyrights violations, which is a technology that enables owners of a copyrighted work to tract and prevent copying of their digital work, like the digital watermarking system.

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Equity Investment Behavior of Working Women

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Abstract

Women are always considered as a separate segment of customers for most of the products. As a result specialized and tailor made products are created to suit to their requirements. But, the case is different when it comes to financial products. Though women are almost equal in number when compared to men on this planet and proportion of working women is also increasing significantly, so far no specific efforts are been made by the financial institutions to see them as worthy equity investors. They not only become a new class of investors but can actually give wonderful shock absorption capacity to equity markets whenever there is crash of equity markets due to external pressures. As women have better proportion of disposable income when compared with women, if they are trained well and are shown enough opportunities to invest on equity oriented securities, they can be of great help in building nation's economy

Top

Keywords

Equity Investment, Working Women, Theory of Planned Behaviour, Multiple Regression.

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Development of MBA in court administration and management: The experience of NALSAR University of Law, India

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Abstract

Purpose

The purpose of this paper is to share the experience of Centre for Management Studies, NALSAR University of Law in developing the new MBA programme in Court Administration and Management.

Design/methodology/approach

This paper describes the urgent need of skilled managers for court management and administration in an Indian context. The identification of the gap in skilled manpower and the availability of a structured learning platform at a master's level is also discussed in the paper. In addition, the detailed process that the university adopted in developing the programme objectives, structure and curriculum is also explained.

Findings

Educational innovations are rare. This programme is one-of-its-kind in India. NALSAR University of Law introduced this programme after a rigorous screening and evaluation process. This paper highlights the importance of proper planning and execution in introducing innovative programmes. The paper also highlights the acceptance that the programme received from all stakeholders due to its

The importance of identifying relevant stakeholders, the process of

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developing a programme, curating and conducting the process for best outcomes, with an emphasis on the contribution that a university can make is discussed in detail.

Originality/value

MBA in Court Administration and Management offered by NALSAR University of Law is unique as similar programmes are not offered by any other university in India. Thus, this paper is a novel contribution in highlighting the development and launch of the programme in Asia.

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A Bus Ride in Kolkata

This illustrative bus journey shows the many ways in which public transport in Kolkata is exclusionary.

PRERNA DHOOP

I was heading home after attending a lecture on the "Capabilities Approach," which is a theoretical framework used to measure the quality of human life and to assess government programmes. It focuses on the basic question: What is an individual actually "able to do and to be" with the resources and services available? The Capabilities Approach does not begin with the presumption that a "fair distribution of resources among the population necessarily leads to a good life for one and all." Rather, it closely looks at the contingencies that hamper the conversion of resources and facilities into actual usage and real outcomes for the public.

It was an exceptionally hot summer evening. I stood at the bus stop pondering over the Capabilities Approach, waiting for an air-conditioned public bus. The Government of West Bengal under the Jawaharlal Nehru National Urban Renewal Mission (JNNURM) had introduced big, airy, state-of-the-art buses in the city a few years ago, having comfortable seats with more leg space, large glass windows and low footboards, in order to transform public transportation in Kolkata as well as provide comfortable and safe travel options for the urban commuter. Recently, the government has sought more funds under the Atal Mission for Rejuvenation and Urban Transformation (AMRUT) for further developing public transport and building sustainable infrastructure and modern facilities in the city.

The unavailability, inadequacy and, most importantly, the inaccessibility of public bus transport for many commuters shows us how the transformation of urban transportation in the city is still a distant dream

After a long wait, on seeing an air-conditioned Calcutta Transport Corporation (CTC) bus approach the bus stop, I sighed with relief. On noticing the rush, I immediately wore my backpack on my chest just to add an extra layer of protection as I got on the bus. I frantically waited for the next stop when a few passengers would disembark. And, when that happened, I courageously made my way to the middle of the bus. I looked around to find if any seats were reserved for women. To my utter dismay, there were none!

The driver was seated comfortably in his assigned seat that displayed the label "Pilot." His driving justified the description as he sped through the evening hour applying brakes that sent shock waves along the crowded bus. Although the driver successfully broke the monotony among the passengers, he also invited stern warnings from them. I remembered how my cousin had lost balance in a speeding bus, tripped over and broken her incisor. I tried very hard myself to maintain my inertia that evening.

As I was paying for my ticket, the conductor suspiciously looked at the passenger standing beside me. The man was shabbily dressed and smelt strongly of sweat and tobacco. He was avoiding the conductor who shouted at once, "Will your father pay for your travel or the chief minister? Don't travel in an air-conditioned bus if you can't afford it, get off the bus now. Comfortable travel is not for the poor!" The passenger's face turned red, he stared at the floor and didn't move at all. Somehow he gathered himself, picked up his jute bag with a broken zip and scuttled to the front end of the bus. He whispered something to the driver, who nodded, smiled wryly, and stopped the bus. The passenger had succumbed to the public insult.

The bus halted at the next stop when a few other passengers alighted. Two policemen in uniform boarded the bus followed by a group of chirpy, heavily dressed transgender persons. No sooner did the conductor notice the transgender group than he raised an alarm to stop the bus. Expressing his discomfort, he shouted, "Get off the bus, it is already very crowded, we can't accommodate you all." The senior most member in the group responded, "We aren't travelling for free, we will pay for our tickets, we won't get down." The conductor reacted strongly, "The bus is full already. This isn't for the likes of you, 'Double Decker.' Get down now, don't create nuisance." The transgender persons kept reasoning with the conductor and even took out money to buy the tickets, but he did not budge an inch. Shockingly, the two policemen joined the conductor in evicting them from the "public" bus.

A group of college students argued with the conductor that they were entitled to receive student concession when travelling in public transport. The latter reasoned that student concessions were not available in air-conditioned buses. Sulking on losing the argument with the conductor, the students pooled in, penny by penny, just enough money to pay for all their tickets. Further on, the policemen commanded the driver to stop the bus midway and alighted like princes from their royal carriage. Needless to say, the men in uniform regularly enjoyed free and convenient travel in public transport. Overall, most passengers looked relieved as the air conditioning in the bus dried their sweat and cooled them. Meanwhile, a middle-aged man seated beside a woman with a baby constantly gaped at her breasts while she fed her wailing baby. Despite eliciting cold looks from her, he remained as unmoved as a rock.

A handful of passengers got down at the next stop. I spotted a vacant seat and dashed towards it. But, before I could place

my tired self on it there stood between the seat and me a profusely sweating old woman. I at once held myself back. At that very moment, a middle-aged man appeared from nowhere like a flash of lightning, shoved the old woman and grabbed the vacant seat. The old woman looked at that man with hopeful eyes. Once he had plonked himself comfortably on the coveted seat and gathered the woman's intentions, he loudly remarked, "You should avail the seat reserved for senior citizens. As it is, you seem to advantage from being a woman as well as a senior citizen." He continued as if addressing a gathering, "Is this what we call women empowerment? Do we always keep standing and offer our seats to women? This is what I call the subordination of men!" The old lady was on the verge of a breakdown. Sensing a potential quarrel, she diverted her attention to the world outside the bus. I was left speechless and numb. The others in the bus restrained themselves from intervening in what they believed was "a private matter" on a public bus.

The evening's events were an eye-opener for me. Although the government has reformed public transportation in the city over the last decade, the unavailability, inadequacy and, most importantly, the inaccessibility of public bus transport for many commuters shows us how the transformation of urban transportation in the city is still a distant dream. As such, it is essential to remove such impediments and discrimination so deeply embedded in the access and enjoyment of public facilities.

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DYNAMICS OF CONTEMPORARY INDIAN AND MALAYSIAN FEDERALISM: AN OVERVIEW

NEHALUDDIN AHMAD, FAIZAN MUSTAFA, AND ABDUL MOHAIMIN AYUS

The conception of federalism developed with the American federal system, which is regarded as the mother of all federal systems. The concept of the federal state took a definite shape with the adoption of the Constitution of the United States of America in 1787. As such in the 20th century, federalism gained significant importance and many countries around the world have adopted a federal system of governance. The study of federalism constitutes the examination of political institutions, comparative politics, and socio-cultural pressure. This is why most federations exhibit these features with some variations due to economic, political, and social exigencies. This article discusses the socio-political developments in the direction of the normative experimental concept of federalism with special reference to India and Malaysia.

Today the study of federalism has in many respects reached a progressive level, yet a troubling absence of agreement regarding the exact meaning of this concept remains. In today's political scenario of several countries, federalism is a prominent and broadly implemented system of governance. Around 70 percent of countries worldwide have at least some element of federalism in their setup, and 40 percent of the world's population lives in these countries.[1]

In a federal state, the combination between central rule (i.e., a national government) and province rule is of highest importance. Here the vital issue is how much power the national government and the state, regions, or provinces should exercise. In a wider sense, federalism encompasses the linkage of individuals, groups, and polities in a restricted union (i.e., in a way that it provides for vigorous pursuit for the common end that, at the same time, upholds the reliability of all parties[2]).

Federalism can be seen as a way of forming a union or making sure that a union stays intact while preserving internal diversities. Democracy is a critical part in the smooth functioning of a federal model. Since a federation not only demands regional self-rule but also representation in the national government, it can ensure democracy and people's individual rights.[3]

Federalism is not only an institutional arrangement within a nation, but also a political philosophy in which a group of members are considered bound together, with a governing representative head. The term "federalism" may be understood as a union or alliance in which equal parts decide to create a common union with each part retaining its own identity and integrity. Essentially, in this arrangement, the conflicts are to be solved amicably under judiciary and constitutional provisions.

Constitutional supremacy therefore means that all governmental authority is rooted in and derives from the sovereign written document that is subject to independent and impartial judicial interpretation. There is, then, a powerful role to be played by the law courts and, in particular, supreme courts and constitutional courts in all federations. Consequently, the role of judges as impartial umpires and the significance of judicial review both as process and substance must be included in any assessment of constitutional change and development in comparative federalism and federation.[4]

The notion of federalism has been around for a long time. Difficulties have been faced by various political analysts about defining a federal state, and it is desirable to come to the deduction that most countries today have some kind of federal structure. For example, the United Kingdom has self-directed counties, but is still not considered a federal country. Consequently, defining federalism is very difficult. Nevertheless, there are a number of features that a state needs to acquire in order to call themselves a federal state.[5]

Historical Orientation of Federalism

The term "federal" is from the Latin word *foedus,* which means covenant, treaty, agreement, or league.[6] It exemplifies the ideas of promise, commitment, and undertaking, which consequently include the ideas of cooperation, reciprocity, and mutuality.[7]

Thanks to new developments in the world and global economy and new thoughts, this classical definition of federalism has experienced some alteration. Today, the political science literature on federalism appears to have reached a mature state of progress. Now a wealth of fruitful insights into the nature and functioning of federal systems of government have yielded sophisticated comparative analyses that are global in scope.[8]

We can trace back the meaning and significance of modern federalism to the late 18th century. The unexpected atmospheres surrounding the shift from coalition to federation in the United States between 1781 and 1789 formed and shaped the nature of the succeeding intellectual debate in a way that had far-reaching significance in understanding one of the most important historical novelties in modern government and politics. Established in 1789, the American federal model was based on a set of core principles that were consciously imitated by others and that helped to spark a lasting analytical discussion about what "federal" means. The American federal precedent corresponded simultaneously to both theory and practice in this sense. Numerous attempts made during the last few decades for establishing a consensus on the exact meaning of the concept have so far proved futile. It has been indicated that scholars of federalism find it impossible to agree on a shared description.[9]

The idea was initially explained for comparative politics and other political science literature by the British constitutional scholar K.C. Wheare in his pivotal 1946 study *Federal Government.* Wheare's book constitutes the bedrock of the modern literature on the idea and remains the most shared point of departure for scholars working in the field. Wheare based his federal principle explicitly upon the pioneering instance of what he called modern federalism seen in the United States of America: a compound polity in which two coequally supreme levels of government both acted directly on the citizens through their own law and under a written constitution. Wheare tried to give a precise and empirical working definition of federalism that could be used as a guiding framework or principle for comparing different types of federal political schemes. He consequently demarcated federalism as "a system of government in which authority is divided between national and regional governments so that each remained, within a sphere, coordinate and independent." The stress in his description of the idea was on the division of powers both constitutionally and in practice.[10]

Some important federal theorists disagreed and developed alternative approaches to the narrow legal-institutional concept of federalism defined by Wheare. Among these critics was W.S. Livingston, who redefined federalism sociologically as "a device by which the federal qualities of a society are articulated and protected."[11] William Riker defined federalism as a rational choice of political power.[12]

Carl Friedrich regarded federalism as a continuing and evolving political course, and Daniel Elazar initially endorsed a description of federalism as a pleasant-sounding "partnership" between national and regional governments.[13] The idea referred to as federalism is related to the need of an orderly plan of relationship amid diverse tiers of government in a nation. It is to be observed that federalism refers to the technique of sharing powers so that overall and provincial governments each, within a specific sphere, synchronize and work self-sufficiently. It is a principle of association and practice whose final test is how the federal system functions. Expounding on this, Friedrich clarifies that federalism appears to be the most appropriate word by which we can label the process of federalizing a political community; that is to say, the procedure by which a number of distinct political administrations enter into contracts for finding solutions, for adopting joint policies, and for making decisions on joint problems.[14]

Federalism is a political association in which the actions of government are separated between regional governments and a central government in such a way that each kind of government has some actions on which it styles concluding verdicts.[15]

The vital organizations of federalism are of course a government of the federation and a set of governments of the member areas, in which both kinds of governments rule over the identical territory and people. Each kind of government possesses authority for making some decisions independently of the other.[16]

When we consider the division of power, we observe that it is also important that there are guarantees that the division is not changed against the will of the states. Most federations have such a guarantee in a written constitution.[17] Many modifications on federalism function in the democratic world, in countries as detached and diverse as Australia, India, Malaysia, and the United States. Federalism is frequently demarcated in contrast to "unitary" arrangements, under which the constitutional system creates a single pole of governmental authority to which all others are subject. An often quoted example of the unitary state is France; others examples are New Zealand, Japan, Sweden, and the Netherlands. Though it may differ from the unitary approach, it is an over-simplification to view federalism simply as a decentralized system, more than it is purely a unified one.[18]

In the post-World War II period, federalism appeared as a significant tool of nation-state building after the downfall of European colonial empires. In this connection, many post-colonial multiethnic countries of Asia and Africa accepted federalism. Even if several of these federations were not successful in their beginning, the role of federalism in harmonizing the competing and perhaps contradictory demands for autonomy and unity in such countries as India, Malaysia, and Nigeria could not be distrusted. After the end of the Cold War, federalism once again arose to the spotlight because of two inconsistent developments. First, the breakdown of the socialist federations of the USSR, Yugoslavia, and Czechoslovakia refreshed misgivings about stability and the stability of multiethnic federations. Second, despite these difficulties, politicians reconstituted multiethnic countries through federalism after the collapse of dictatorial regimes and centralist nation-building projects. For instance, international powers imposed federalism to reconstitute Bosnia-Herzegovina after a bitter war and genocide that accompanied the disintegration of Yugoslavia. Federalism was adopted by Russia to maintain what was left of the Soviet Union. Recently, American-led international forces caused the reconstitution of Iraq as an ethnic federation following the U.S. invasion and occupation of the country in 2003.[19]

Centralized Federalism and India

The federal character of the Indian Constitution is one of its salient features; however, the term "federation" is not used anywhere in the constitution. The Indian Constitution provides for a structure of gov-

ernance that is essentially federal in nature. It contains all the usual features of a federation (i.e., two governments, division of powers, written constitution, supremacy of constitution, rigidity of constitution, independent judiciary, and bicameralism). However, the Indian Constitution also contains a large number of unitary or nonfederal features (i.e., a strong center, single constitution, single citizenship, flexibility of constitution, integrated judiciary, appointment of state governor by the center, all-India services, emergency provisions, and so on).

However, Article 1 describes India as a "union of states," which implies two things: (1) Indian federation is not the result of an agreement by the states; and (2) no state has the right to secede from the federation. Hence, the Indian Constitution has been described as "federal in form but unitary in spirit."

Historically, the origins and formation of India as a federation in 1950 are predicated upon several ambiguities. First, the term "federal" was conspicuous for its studied ambiguity in the constitutional debates of the Constituent Assembly that adopted the new constitution. The division of opinion among political elites about the implications of this word reflected a wide spectrum of ideas that ranged from positive views about unity, domestic stability, decentralized government, and the protection of minorities and British political influence to fears and anxieties about civil war, separatist movements, political disorder, and open rioting, anarchy, and general chaos. Second, the chronology of events that wrought the partition of India in August 1947, establishing the two independent Dominions of India and Pakistan, altered both the perceptions of and the pressures for federation. Third, the overwhelming dominance of the Congress Party representing the Hindu population of India predisposed political elites to emphasize a strong federal center at the expense of the constituent state units. Consequently the Indian Constitution was, in short, a product of the idealism and social content of the independence movement combined with "the assembly members' experience in government and of the exigencies of the times."[20]

Most conventional interpretations of the origins of federation in India take their departure point as either (1) 1858 when the Government of India Act made the governor-general responsible to the secretary of state who now acted on behalf of the British crown or (2) 1861 when the Indian Councils Act granted powers to pass legislation on local subjects to Madras and Bombay and subsequently to new provinces that were created. The underlying point is that "if one word could sum up the post-1858 administration of British India, it was 'decentralization.'"[21]

The milestones along the road to federation include: the India Councils Act (1892), the Government of India Act (1909), the Government of India Act (1919), the Simon Report (1930), and the Government of India Act (1935). One outstanding similarity between India and the federations of Malaysia, Canada, and Australia is that it, too, was created by a process of what Bidyut Chakrabarty has called the "unpackaging of empires," or the devolution of imperial power.[22]

This process ensured that after the British left, the unitary character of the imperial administrative legacy was simply taken over by the Indian National Congress so that the federal idea began its life in an independent India with the notion of a strong central authority. If we identify the main driving forces that led to the creation of the federation in 1950, the following motives loom large in the mainstream literature[23]:

1. The interaction of the British colonial pattern of centralization and the thinking of the Indian political leadership;
2. The British desire to bring together within a single constitutional system the parts of India under indirect rule (the princely states) and those under direct rule (the British provinces with representative institutions);
3. The British concern about communal rights and communal status between Hindus and Muslims meant that issues of states' rights were generally subordinated to the larger, more dangerous challenge of seeking to accommodate Muslim anxieties within a united India;
4. The experience of partition in 1947 demonstrated the inherent dangers of separatism to those constructing the constitution and predisposed them to favor centralization;
5. The goals of economic development and modernization seemed to require a strong central authority capable of directing the economy; and
6. The existence of a highly centralized, hegemonic mass party and the absence of a strong state and regional parties supported a centralized federal formula.[24]

The overriding conclusion to these turbulent events is that "although no one seemed to seriously question the notion that India should be a federal republic, a variety of factors combined to ensure that the form of federalism would be highly centralized."[25]

Clearly the significance of British imperial influence cannot be underestimated even if all of the elements present in the Government of India Act (1935) were not fully implemented immediately after its introduction because of opposition by the princely states and the leaders of different political parties. But it is also true that the federal constitution that emerged from the Constituent Assembly was not merely a British template. This would ignore the importance of indigenous Indian elites who "produced new modifications of established ideas about the construction of federal governments and their relations with the governments of their constituent units." Indeed, the assembly "produced a new kind of federalism to meet India's peculiar needs."[26]

The circumstances that surrounded the federal bargain during the period 1946-1949 makes it perfectly possible for Riker to claim, as he did, that his federal prerequisites—the expansion condition and the military condition—were both evident in the creation of the Indian federation. There is no doubt that an internal/external threat existed for both Muslims and Hindus before and after partition, but why this factor should necessarily yield a federal state remains unclear. Moreover, the notion that the incorporation of the princely states fulfills Riker's expansion condition is also questionable. His claim that they were forced into the new union, which expanded by conquest rather than federalism, sits uneasily with his overall thesis about willing partners making federal bargains.[27]

Federalism with cultural and ethnic pluralism has given the country's political system great flexibility and, therefore, the capacity to withstand stress through accommodation. However, continuation of the same requires not simply federalism, but cooperative and constructive federalism.

Within this basic framework of federalism, the Indian Constitution has given overriding powers to the central government. States must exercise their executive power in compliance with the laws made by the central government and must not impede on the executive power of the union. Governors are appointed by the central government to oversee the states. The center can even take over the executive

of the states on the issues of national security or a breakdown of the constitutional machinery of the state. Considering the overriding powers given to the central government, Indian federation has often been described as "quasi-federation," "semi-federation," "pragmatic federation," or a "federation with strong unitary features" that reflect the canon of centralized federalism. A strong center is necessary for strong states and vice versa; this is the essence of centralized federalism.

Indian federation should be seen in the context of its democratic system of governance at the national, state, and local levels and the pluralities of its culture in terms of ethnic, linguistic, religious, and other diversities that cut through the states. India is the largest democratic country in the world, as well as the largest federal and pluralist country.

While democracy provides freedom to everybody, federation ensures that governance is distributed spatially, and a strong central government enables that the "unity amidst diversity" is maintained. It is through federation that the country mobilizes all its resources to maintain its harmony and integrity and marches ahead to progress.

The changing dynamics and the varied experiences that the Indian state has had post-independence—such as one-party rule, the rise of regional parties, the formation of coalition governments, and the active role of the judiciary—have shaped the trajectory of federalism by swinging the pendulum from centralized federalism to cooperative to confrontationist and vice versa.

Centralized Federalism and Malaysia

The modern federation of Malaysia, formerly Malaya, has origins that can be traced back at least to 1895 when the Federated Malay States (FMS)—Selangor, Perak, Pahang, and Negeri Sembilan—was formed by the British colonial administration.[28] This was not a federation in the accepted sense of the term, but the real significance of the Treaty of Federation for our purposes "lies in the idea of federation implicit in it: an idea which paved the way for the ultimate establishment of true federal government in Malaya."[29]

This left five other Malay states—Johore, Kedah, Perlis, Kelantan, and Terengganu—under British protection outside the FMS as the Unfederated Malay States (UMS) until the Japanese occupation of Malaya during 1942-1945.[30]

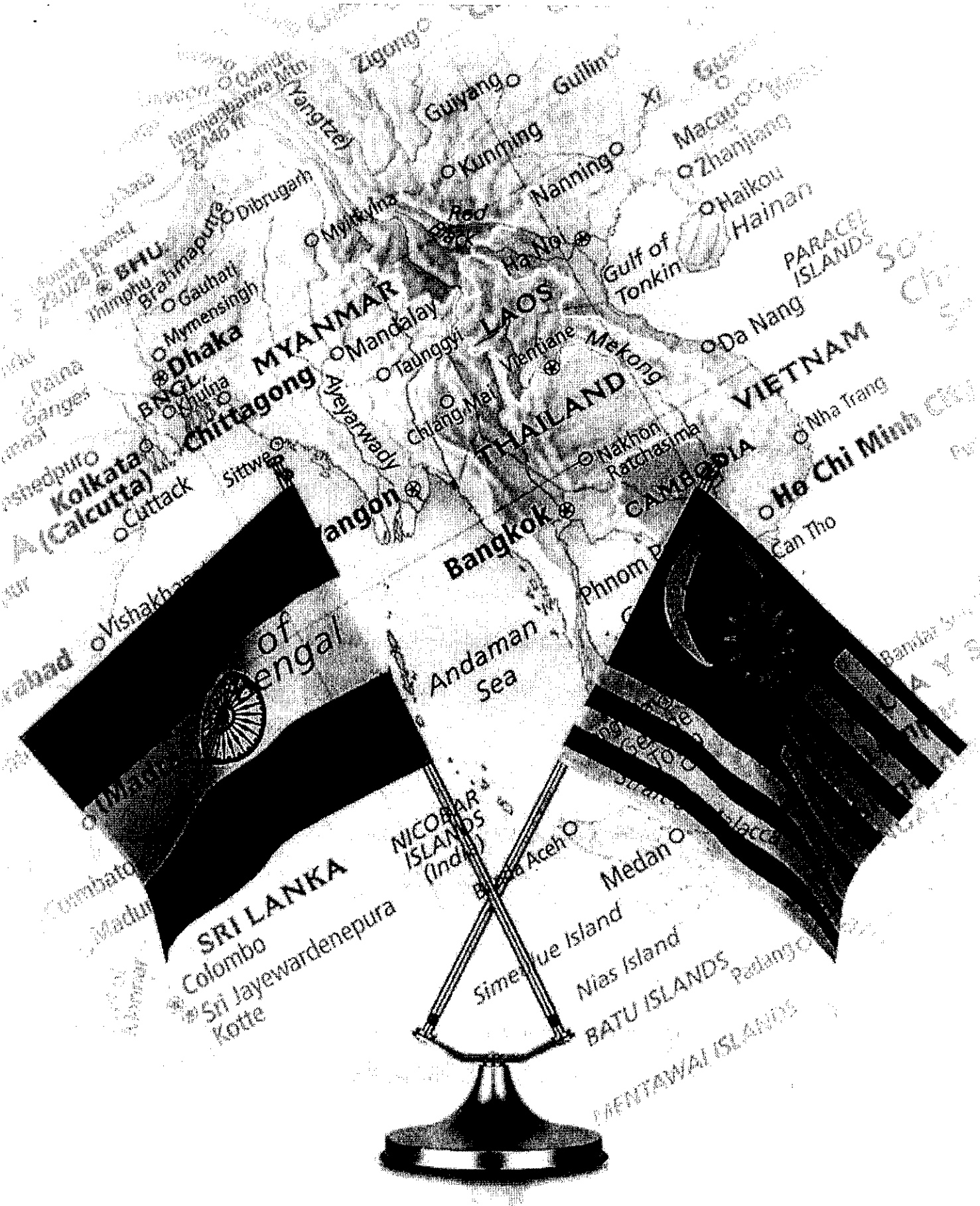
The British imposition of the Malayan Union in 1946 comprised the former FMS, UMS, and Straits Settlements states of Penang and Malacca and was the first time that all 11 Malay states were brought together under one administration. But the union lacked popular legitimacy and was fiercely opposed by the United Malays National Organisation (UMNO). The strength of the opposition eventually led to its abolition in 1948 and replacement with a new federal constitution.[31]

The Federation of Malaya was created with the same states and settlements, but this time it formally recognized the identity of the Malay states; strengthened the special status of the Malays vis-à-vis the Chinese, Indian, and other non-Malays; and introduced a highly restrictive citizenship law. In practical terms, the new federation had strong unitary features with a highly centralized federal government that was designed to foster a sense of national unity.[32] The constitution did not guarantee the autonomy of the constituent states nor did it address the issue of state's rights. Its principal purpose was to accommodate communal pressures that reflected the heterogeneity of the population and centered upon issues of citizenship, language, religion, Malay privileges, education, and the position of the local Malay rulers.[33] The entrenched position of the sultans, rather like the local princes in India, attracted strong individual allegiance in some states as a result of the long British colonial administration and ruled out a unitary state. Federation allowed the British to maintain and formally recognize the individuality of the constituent states and their rulers who retained traditionally associated powers (i.e., Malay customs, religion, and local land issues) while simultaneously accommodating the socio-political concerns of the Malays for special treatment in respect to ethnic diversity.[34]

With the creation of the new federation in 1948, one feature characteristic of Malaya is particularly interesting, namely, the notion of non-territorial federation. The chief identifying diversities of Malaya were not territorially grouped, thus the Chinese and Malay elements of the population in particular were present in almost equal proportions in some states with the Indian community standing, in a sense, as a balancing force. None of the three largest communities therefore could make territorial claims for autonomous homelands. According to Ramesh Dutta Dikshit, a federal form of government was adopted "not because of but in spite of 'racial' diversity, though the pattern of the real predominance of the two leading communities had created a politico-geographic situation that favored a federal rather than a unitary organization of the state." The communal distribution of the population meant that a federal rather than a unitary state structure would allow the Malay population in eastern Malay states to resist the economic threat of Chinese competition that had come to dominate the western states. In a nutshell, the interaction of communal, territorial, and economic diversities produced a unique set of circumstances that allowed federation to rescue the Malays from the threat of Chinese economic dominance.[35]

Watts described the Federation of Malaya as "a hybrid somewhere between unitary and federal government" and he noted three key factors that served to reinforce the progressive increase of central authority during its nine-year existence: (1) the communist threat promoted centralized administration, (2) the experience of elected representation and self-government converted the central institutions into an instrument of Malay nationalism, and (3) the political and governmental hegemony of UMNO under the leadership of Tunku Abdul Rahman ensured central influence in state politics. When independence for Malaya arrived in 1957, the opportunity had also arrived to overhaul the federal system. This overhaul was carried out in a way that effectively increased the legislative authority of the constituent states while simultaneously reducing substantially their executive responsibilities. The Independent Constitutional Commission (known as the Reid Commission after its chairman, Lord William Reid), on which no Malays were represented, was charged to establish a strong central government giving the constituent units a measure of autonomy, to safeguard the position of the Malay rulers, to create a constitutional head of state chosen from among the Malay rulers, to confirm a common nationality for the whole of the federation, and to safeguard the special position of the Malays and the legitimate interests of other communities. The Reid Commission Report that contained the draft federal constitution for an independent Malaya built upon the Federation of Malaya Agreement of 1948 and was clearly influenced by a combination of the Indian, British, and American constitutions.[36]

In the post-war march toward federation, Singapore had been deliberately omitted from successive schemes of an all-Malayan


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Mapping critical success factors in efficient court management: two case studies from India

Pinaki Nandan Pattnaik, Satyendra C. Pandey, Mahendra Kumar Shukla

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Abstract

Purpose

The purpose of this study is to identify and develop an understanding of various success factors in implementing an efficient court management system by the court managers employed at the trial courts and high courts in India. Court management implies using a professional approach using managerial tools and techniques in managing courts.

Design/methodology/approach

This study is based on a case study with two Indian states demonstrating efficiency in judicial operation with the adoption of court management techniques. Semi-structured interviews with the court registry, court managers, document studies, court visits, along with observation are the main data sources.

Findings

It was observed that managerial practices of job autonomy, regular feedback, clear job expectations and support from the supervisor/reporting officer act as critical success factors for court management efficiency.

Originality/value

This paper adds empirical insight from the Indian viewpoint on existing literature concerning management of courts.

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Follow the founder: case study of action learning experiment in an MBA program

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Abstract

Purpose

This paper describes the action learning experiment by the name Follow a Founder of a leading university in India. The purpose of the paper is to reflect on the key takeaways that can be drawn from such an action learning experiment.

Design/methodology/approach

This paper is based on a case study, authors' experience of leading and conceptualizing the program coupled with interviews of multiple stakeholders, which formed the sources of data.

Findings

The paper suggests the possibility of implementing such a program at other business schools and universities, provided there is a clear mapping of tasks and objectives and learners are given exposure to real time workplace scenarios.

Originality/value

The paper describes a one of its kind experiment at an Indian university when it comes to applying action learning in a taught program.

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The evolution of CSR efforts at Steel Authority of India Limited

Pinaki Nandan Pattnaik, Mahendra Kumar Shukla

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Abstract

What impact has India's 2013 law mandating corporate social responsibility (CSR) initiatives had on businesses and the communities in which they operate? A comparison of the CSR programs implemented by Steel Authority of India Limited (SAIL), a leading public-sector firm, before and after mandatory CSR indicates that the company has paid rigorous attention to social concerns in both periods. A statistical analysis of the company's expenditures on CSR efforts shows that the Companies Act 2013 amendment that requires spending 2% of company profits on CSR has not had an impact on SAIL. Since passage of the amended act, however, the scope of SAIL's CSR activities has become more focused and is now in sync with specific initiatives highlighted in the legislation.

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FEATURE ARTICLE

The evolution of CSR efforts at Steel Authority of India Limited

Pinaki Nandan Pattnaik | **Mahendra Kumar Shukla**

What impact has India's 2013 law mandating corporate social responsibility (CSR) initiatives had on businesses and the communities in which they operate? A comparison of the CSR programs implemented by Steel Authority of India Limited (SAIL), a leading public-sector firm, before and after mandatory CSR indicates that the company has paid rigorous attention to social concerns in both periods. A statistical analysis of the company's expenditures on CSR efforts shows that the Companies Act 2013 amendment that requires spending 2% of company profits on CSR has not had an impact on SAIL. Since passage of the amended act, however, the scope of SAIL's CSR activities has become more focused and is now in sync with specific initiatives highlighted in the legislation.

1 | INTRODUCTION

Headquartered in New Delhi, Steel Authority of India Limited (SAIL) is one of the largest state-run steel manufacturers in India. Generating close to 14 million metric tons of steel each year, it is the 24th largest steel producer in the world. Although the Indian government owns about 86% of SAIL's equity, even as a public sector undertaking (PSU) the company enjoys significant operational and financial autonomy. Because of the Maharatna status that SAIL received from the government, its executives are free to decide on investments up to 15% of the firm's net worth.

Active in the modernization and industrialization of India, SAIL has focused on research, development, innovation, sustainability, technology, and digitalization in its consultancy, environmental, logistics, and administrative work. Its expertise in the manufacture of steel is fundamental to the growth of the infrastructure of both its home country and that of the nations to which it exports. Employing about 110,000 people, the company produces hot rolled coils and sheets, cold rolled products, bars and rods, semifinished steel products, various railway products, and steel plates. In FY 2016–2017, it processed 15.7 metric tons of hot metal, about 14.5 metric tons of rough steel, and almost 14 metric tons of saleable steel.

Attention to a variety of social issues has been an integral part of SAIL's corporate social responsibility (CSR) efforts from its inception. Over the years, many of the company's CSR initiatives have focused on education, primarily at the secondary level. The company has helped fund approximately 750 schools at several locations and provided modern education to more than 130,000 students. In partnership with the Akshya Patra Foundation's school lunch program, SAIL has also helped provide students with midday meals. The company has also launched 21 special schools equipped with modern facilities for more than 3,500 students below the poverty line. At these schools, students are also given a midday meal and provided with a uniform and shoes, textbooks, stationery, a school bag, water bottles, and, in some cases, transportation, at no cost. Similarly, SAIL's CSR programs help educate an additional 500 children from tribes plagued by poverty and illiteracy at various locations throughout the country.

At SAIL's plant in Bokaro, the company's "Gyan Jyoti Yojana" program provides education and co-curricular development opportunities for the youth of the Birhor tribe, which is on the verge of extinction. They have also been provided with lodging, wholesome food, clothing, medical treatment, and sports and cultural enrichment opportunities. In the first edition of the program in 2001, 15 students participated, and

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completed grades 10 through 12 grades—the first in their community to do so. The success of the program generated substantial interest, and in 2013 another 15 youngsters participated in the program. Many of the program graduates have taken up sponsored vocational training in areas such as welding and carpentry, receiving a stipend along with room and board. This has been one of SAIL's the most successful CSR initiatives.

At these schools, students are also given a midday meal and provided with a uniform and shoes, textbooks, stationery, a school bag, water bottles, and, in some cases, transportation, at no cost.

With the Companies Act of 2013, India became the first country to legislatively require certain organizations to implement CSR. According to the act, companies with a net worth of INR 5 billion (US$83 million) or more, annual revenues of INR 10 billion (US$160 million) or more, or net profit of INR 50 million (US$830,000) are required to spend at least 2% from their net profits earned during the 3 preceding years on CSR efforts. Since passage of the act, SAIL has continued to participate in various CSR activities in areas mandated by the law.

2 | THE EVOLUTION OF CSR

The concept of CSR found relevance in the academic research of Bowen (1953). He defined CSR as business choices and actions that are undertaken for reasons outside the scope of a company's direct economic or technical interest. This laid the foundation for the conceptualization of CSR as the responsibility of decision-makers to take actions that not only served their own interests, but also protected and benefited the public.

Subsequent research by Carroll provided a conceptual model of CSR as a pyramid consisting of four layers of responsibility: economic, legal, ethical, and philanthropic (Carroll, 1979, 1991). At the bottom of the pyramid lay economic responsibility, the basic duty of the organization to conduct its various functions within the marketplace in supplying products or services to society for a profit. The legal responsibility of the organization was understood as its compliance with any laws governing its industry or operations. Since not all decisions are economic or legal, Carroll stated that the moral or ethical responsibility of a company was important as well, and required an organization to correlate its actions with the ethical norms and culture of its area of operation. The final layer of the pyramid, the organization's philanthropic responsibility, was the most critical with respect to the organization's position in society.

Over time, the business world's concept of CSR evolved to the point where it was defined as nothing less than "an obligation to improve community welfare through open business practices and contributions of corporate resources" (Kotler & Lee, 2005, p. 3). Now encompassing business ethics, stakeholder management, corporate citizenship, and sustainability practices, CSR has achieved "broad acceptance in the corporates and is interpreted by most to include motivations (responsibility), actions (responsiveness), and results (performance)" (Carroll, 2015, p. 91).

2.1 | CSR in India

The concept of being a responsible member of society has been a fundamental value in India's culture for centuries and is woven throughout the philosophies and religions of the region, as in Buddhism's dhammadana, a noble path that benefits all; the dasvandh of Sikhism, which calls for donating 10% of one's earnings toward the community's common resources; and Islam's zakaat, or almsgiving. Historically, these practices were the social obligation of all entities, including businesses, as a fulfillment of obligations set forth in scripture. The focus primarily was on ethics, acts of charity, and other discretionary initiatives for which there were no precise social requirements or standards.

This laid the foundation for the conceptualization of CSR as the responsibility of decision-makers to take actions that not only served their own interests, but also protected and benefited the public.

Although many Indian corporations have voluntarily engaged in CSR activities over the years, the new CSR provisions in the 2013 amendment to the Companies Act laid out a precise framework of procedures and methods to require organizations to participate in the process of societal and economic development through CSR. The government's mandate has resulted in an increase in the CSR spending nationwide. According to Indian Institute of Corporate Affairs, at least 6,000 Indian companies were required to undertake CSR projects in order to comply with the provisions of the Companies Act of 2013, with many companies doing so for the first time. The CSR rules broadened the ambit for compliance and obligations norms to include holding and subsidiary companies, as well as foreign companies whose branches or offices were in India.

The CSR rules that were outlined in the act went into effect on April 1, 2014. Under the act, CSR initiatives included but were not restricted to:

- projects or programs relating to activities specified in Schedule VII (see **Exhibit 1**) and
- projects or programs related to those mentioned in Schedule VII that are undertaken at the recommendation of the company's CSR committee.

According to the Act, any CSR activities are to be conducted in a company's local area of operation. The Act also defined the CSR responsibilities of foreign companies with branches or otherwise operating in India.

Each company bound by the Act is required to form a CSR committee to prepare the organization's CSR policy. This document must describe the programs that the company plans to undertake during the year. The goal is to integrate business models and concepts with social and environmental priorities in order to create shared value for the company and its stakeholders.

The Act also provided for a ceiling on company expenditures on CSR personnel, administration, and overhead: 5% of the total CSR allocation for the fiscal year. Any surplus arising from a CSR project cannot be considered part of business income. All CSR Board financial statements and reports issued by the company's CSR Board are to be made available on its company website.

3 | CSR AT SAIL BEFORE THE MANDATE

CSR was identified as an important element in the memorandum of understanding drawn up between India's major PSUs and the Ministry of Steel following FY 2007–2008.

EXHIBIT 1 Schedule VII

Brief on CSR Activities as Prescribed Under Schedule VII of the Companies Act, 2013:

Schedule VII mandates expenditure for the following:

1. Eradicating hunger, poverty, and malnutrition, promoting preventive health care and sanitation, and making available safe drinking water;
2. Promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly, and the differently abled and livelihood enhancement projects;
3. Promoting gender equality, empowering women, setting up homes and hostels for women and orphans, setting up old age homes, daycare centers, and other such facilities for senior citizens, and measures for reducing inequalities;
4. Ensuring environmental sustainability and ecological balance, protecting flora and fauna, animal welfare, agroforestry, conservation of natural resources, and maintaining quality of soil, air, and water;
5. Protection of national heritage, art, and culture, including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional art and handicrafts;
6. Measures for the benefit of armed forces veterans, war widows, and their dependents;
7. Training to promote rural sports, nationally recognized sports, para-Olympic sports, and Olympic sports;
8. Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socioeconomic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, and other classes, minorities, and women;
9. Contributions or funds provided to technology incubators located within academic institutions approved by the Central Government;
10. Rural development projects;
11. Slum area development.

The above CSR activities shall be undertaken by the Company, as per its stated CSR policy, in unison with new or ongoing projects, excluding activities undertaken in the discharge of its normal course of business. The following do not constitute CSR activities:

1. Activities conducted in the normal course of business;
2. Activities conducted outside the territory of the India or abroad;
3. Activities conducted for the welfare of employees and their families; and
4. Direct or indirect political party contributions of any amount.

CSR activities concentrating on natural and environmental consideration, training and education, medical services, social improvement, family welfare, and other measures were in progress at the PSUs at that time, and all profitable steel industry PSUs had already voluntarily reserved no less than 2% of their distributable surplus for CSR programs. A total budget of INR 2.9 billion ($43.6 million) had been allocated for CSR activities by the Steel Ministry PSUs during 2008–2009. The expenditure on CSR during 2008–2009 stood at about INR 2.29 billion ($34.4 million).

The CSR rules broadened the ambit for compliance and obligations norms to include holding and subsidiary companies. as well as foreign companies whose branches or offices were in India.

Since its founding in 1973, SAIL has engaged in various activities to promote the socioeconomic development of the areas where its plants and other units operate. The company's goals have been to:

- contribute to the environment from which it draws its resources;
- minimize social and economic imbalances by providing education, health care services, and job opportunities;
- safeguard the core values of Indian society; and
- advance scientific inquiry and innovation for the greater good.

These tenets underlie SAIL's philosophy to this day.

As part of its CSR efforts in 2008–2009, SAIL constructed 38 community centers, 25 school buildings, 164 additional classrooms, 623 toilets, and 12 sports facilities in various parts of India. It also conducted 2,195 health camps, provided 10 mobile medicare units, engaged 584 sanitation workers to attend to public washrooms and sewerage lines, distributed 355 solar lights, planted about 300,000 lakh trees to support local farmers, and provided 868 training sessions on income generation.

For its CSR activities in 2008–2009, SAIL received the SCOPE Meritorious Award for CSR and Responsiveness from the President of India, the Federation of Indian Chambers of Commerce and Industries' Social and Environmental Action and Globalization Award, and the Brilliant Peacock Award for CSR from the Golden Peacock Awards Secretariat. The company also received the SCOPE Meritorious Award for Environmental Excellence and Sustainable Development for 2009–2010.

In FY 2010–2011, India's Steel Ministry provided for a total budget of INR 1.99 billion ($29.9 million) for carrying out CSR activities by the PSUs. The expenditure on CSR during the period 2010–2011 stood at around INR 870 million ($13 million). During this period, SAIL's CSR efforts included the development of 104 holistic "model villages" that included medical and health services, schools, community centers, sports facilities, sanitation, roads, opportunities for agriculture, self-help organizations, and Internet connectivity. In addition, SAIL adopted 79 other villages across eight states to develop them as model villages. The company also built 54 primary health centers, 12 reproductive and child health centers, 17 hospitals, and 7 additional medical facilities to provide specialized healthcare to almost 30.6 million people. The company also opened more than 146 schools in local steel-producing townships to serve about 70,000 children and provided ongoing assistance to more than 286 schools. In this endeavor, SAIL achieved a female-to-male student ratio of 1:1 for all levels of education. SAIL also expanded local access to water by installing more than 5,100 sources of water, including ponds, wells, and reservoirs.

For it CSR activities in 2010–2011, SAIL received the SCOPE Meritorious Award for Corporate Governance and the 2011 Golden Peacock Environment Management Award from the Institute of Directors. It also earned the Most Innovative Energy-Saving Product Award from the Confederation of Indian Industries for its curtain flame ignition system.

In FY 2012–2013, the Steel Ministry earmarked a total budget of INR 2.4 billion ($36 million) for PSUs to carry out CSR activities. Their expenditure on CSR during that period amounted to about INR 2.18 billion ($32.8 million).

The company also built 54 primary health centers, 12 reproductive and child health centers, 17 hospitals, and 7 additional medical facilities to provide specialized healthcare to almost 30.6 million people.

In 2012–2013, SAIL's total solid waste utilization was 91%. Use of basic furnace and basic oxygen furnace slag was 96% and 70%, respectively. In addition, the company-built seven health centers to provide free medical care and medications to needy families. During 2012–2013, more than 87,000 people received health care at these centers. SAIL also opened more than 137 schools serving about 57,000 children in local steel towns, and provided assistance to more than 346 schools.

Among the awards that SAIL received for its CSR initiatives in 2012–2013 were the Greentech Foundation's

Environment Excellence (Silver) Award in 2012 and the Skoch Group's Financial Inclusion Award for 2013.

4 | CSR AT SAIL AFTER THE MANDATE

FY 2014–2015 was the first year under the new CSR policy stemming from the implementation of the Companies Act of 2013 and Companies (CSR Policy) Rules of 2014. In accordance with the new legal provisions, SAIL established a board-level CSR committee chaired by an independent director and including a finance director, a technical director, and a personnel director. A CSR policy, endorsed by the new Board, was developed for the company and displayed on its website.

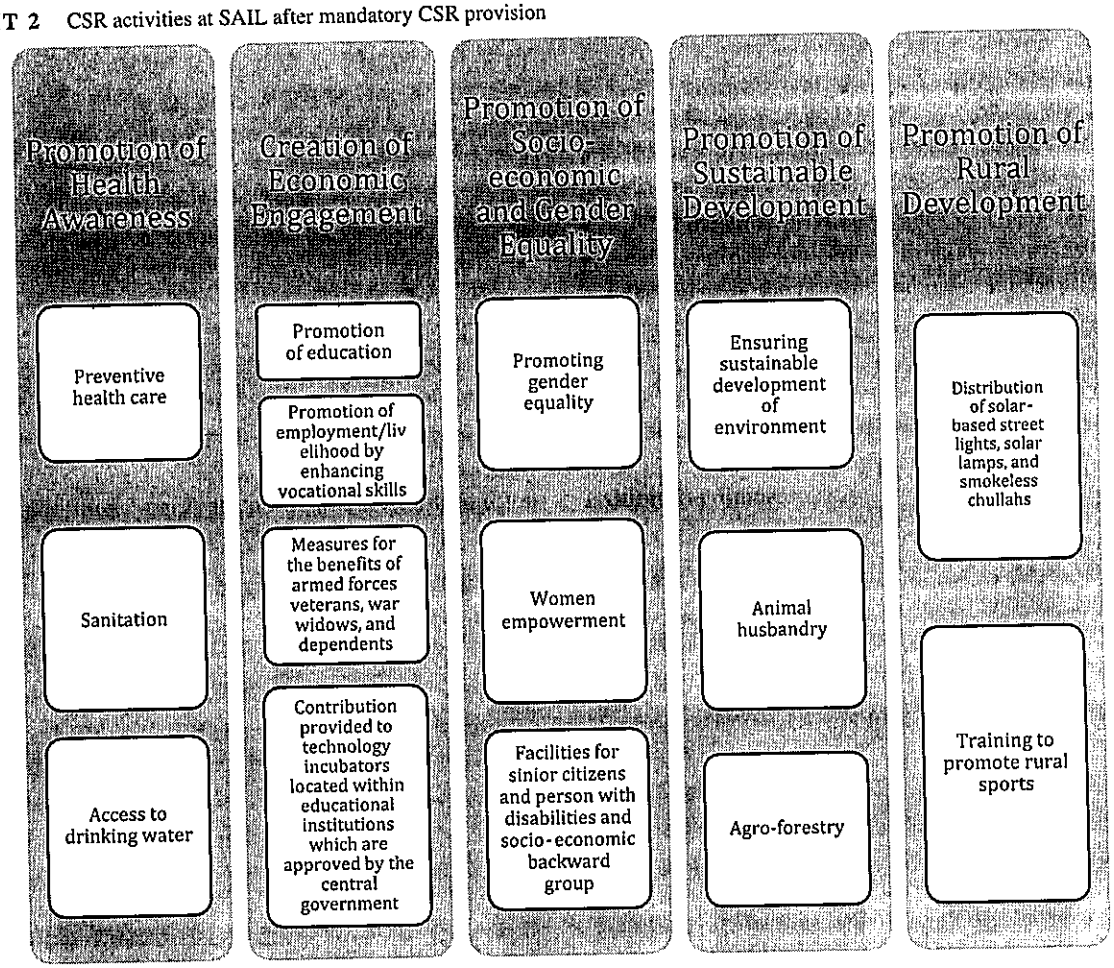
As mandated by law, companies were to spend 2% of the average net profit of the preceding 3 years on CSR activities. At SAIL, the average net profit of the previous 3 fiscal years (FYs 2011–2012, 2012–2013, and 2013–2014) was INR 38.72 billion ($582 million). The 2% of the average of the last three years' net profit was INR 780 million (US$11.7 million) and was allocated to CSR activities. Spending on most of the company's CSR programs was handled with budgeted funds for the fiscal year 2014–2015.

Seeking to operate in a socially, environmentally, and economically responsible manner so as to acquire social license in the areas it served, SAIL designed its CSR policy to:

- create value for all stakeholders that is linked to SAIL core strategies and businesses while encouraging sustainable development,
- enhance the quality of life of the people in surrounding communities,
- assist the underprivileged, and
- carry out developmental initiatives in a way that meets the needs of the present without compromising those of the future.

In accordance with the provisions of Schedule VII of the Companies Act of 2013 and Companies (CSR Policy) Rules of 2014, SAIL's CSR projects during FY 2014–2015 (see **Exhibit 2**) promoted:

EXHIBIT 2 CSR activities at SAIL after mandatory CSR provision



- health awareness
- economic engagement
- socioeconomic and gender equality
- sustainable development
- rural development

In response to pressing challenges, SAIL operated several CSR endeavors in "mission mode," which was designed to have an immediate impact on the financial development of the areas being helped. These mission projects typically concentrated on training, sanitation, environmental preservation, and water protection in accord with Schedule VII of the Companies Act of 2013. For example, as part of the Swachha Vidyalaya "Clean India, Clean Schools" campaign targeting sanitation in remote areas, SAIL built and repaired more than 1,000 toilet facilities in schools located near its plants and other operations in various cities.

SAIL continued to help provide both basic and specialized healthcare to millions of people through its well-established health centers and hospitals. With a long history of fostering improvements in education in its surrounding communities, SAIL has continued to upgrade infrastructure and provide financial aid for 129 schools serving about 60,000 students and to offer guidance on skill building and curriculum development to another 629 schools with 95,000 students. As SAIL had done before the law mandating CSR programs, it provided meals and assistance—from tuition to school supplies—to students at several schools near its steel plants that served families below the poverty line. Since the law went into effect in 2013, SAIL has granted scholarships to 1,670 college and postgraduate students seeking to pursue careers in a variety of fields.

To lessen the gap between provincial and urban zones, SAIL has designated 79 towns in eight states as "model steel towns." To increase the use of renewable energy, SAIL installed solar-based streetlights in these towns. In addition, smokeless stoves have been distributed, more than 20,000 trees have been planted, and ambulances, bicycles, solar lanterns, and transistor radios have been distributed in rural areas. SAIL also established an Integrated Development Centre at the rural Digha village in the Saranda Forest, which includes facilities such as a bank, rural government and telecom offices, a mother-and-child care center, and a meeting room for locals to use.

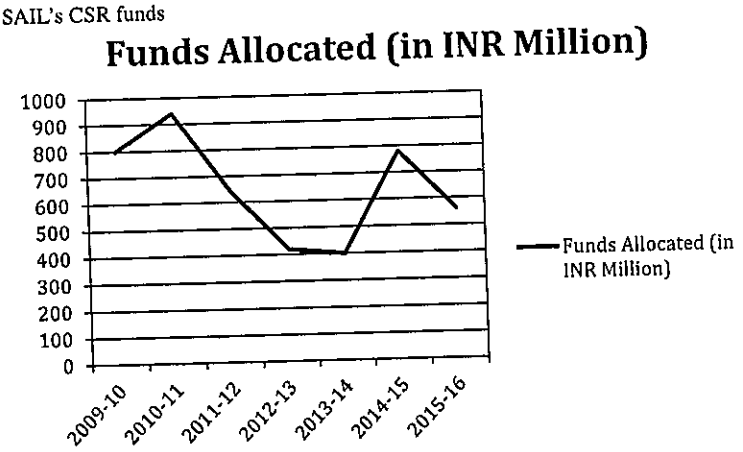
Professional training geared to help participates generate income has been given to 3,000 young people. In addition, 7,000 women in outlying areas have been trained in a variety of disciplines, including nursing, physiotherapy, driving, computer usage, repair work, welding, agribusiness, raising livestock, cooking, screen printing, weaving, and sewing, leading to new jobs and other economic opportunities. On a lighter note, more than 20,000 rural youngsters have participated in several sporting, cultural, and recreational events organized by SAIL.

At the Asia Business Responsibility Summit held on January 8, 2014, in Mumbai, SAIL received the Best CSR and Sustainability Award for 2013. Bestowed by the Asian Centre for Corporate Governance and Sustainability, the award recognizes progress made by organizations in the area of corporate governance, sustainability, CSR, and leadership.

4.1 | Bottom-line impact

Interestingly, a review of SAIL's expenditures (FY 2009–2010 to FY 2015–2016) shows that the amount of funds that the company allocates for CSR fell from 2011 to 2013. After the inception of mandatory CSR in 2013, the allocation of funds on CSR increased to INR 780 million in 2014 as compared to 400 million INR in the previous year. The fund allocation decreased to INR 560 million in FY 2015–2016 (see **Exhibit 3** and **Exhibit 4**). A regression analysis was conducted to determine whether the changes (increase or

EXHIBIT 3 Allocation of SAIL's CSR funds



Note: Amounts are in Indian rupees (INR). 1INR = 0.015 US$.

EXHIBIT 4 SAIL's year-to-year allocation of CSR funds

Year	Funds allocated (INR million)	Funds utilized (INR million)
2009–2010	800	789.6
2010–2011	940	689.5
2011–2012	640	612.5
2012–2013	420	327.2
2013–2014	400	620
2014–2015	780	350
2015–2016	560	760

Note: Amounts are in Indian rupees (INR). 1 INR = 0.015 US$.

decrease) in the allocation of funds for CSR were significant when comparing spending before and after mandated CSR.

The regression equation used was: $y = \alpha + \beta D + u_i$. In this equation, y stands for allocated CSR funds by SAIL and D (dummy variable) equals 0 for the premandatory era and 1 for the postmandatory era. **Exhibit 5** gives the results of the regression analysis. The slope coefficient of D, $p < .05$ is not significant. This suggests that there is no significant change (neither in increase nor decrease) in the allocation of CSR funds by SAIL in the postmandatory era. Therefore, the 2% CSR spending mandate seems to have had no or, at most, limited impact on SAIL's spending on CSR efforts.

Driven by business leaders' own intentions and choice, these programs were not necessarily guided by organizational objectives. Even then, they focused on local areas of operation and were in tune with activities commonly undertaken by other organizations in each company's sector.

5 | SHOULD CSR BE MANDATED?

Initially embraced by some organizations as a voluntary manifestation of corporate philanthropy, social responsibility became legally mandated in India in 2013 with an amendment to the Companies Act. The objective of the amendment was to ensure CSR allocation and utilization, which previously had been voluntary. Before the 2013 law was passed, some firms, such as SAIL, already engaged in charitable activities. Driven by business leaders' own intentions and choice, these programs were not necessarily guided by organizational objectives. Even then, they focused on local areas of operation and were in tune with activities commonly undertaken by other organizations in each company's sector.

The reason behind mandating the allocation of funds on CSR was to ensure that at least a set amount of corporate funds would be spent on issues of societal concern. However, the requirement to set aside a specific percentage of net profit to be allotted for CSR activities does not seem to have significantly affected the CSR programming at SAIL. It is too early to conclude whether the full impact of mandatory CSR will be positive, neutral or negative. It is important, however, for continued research on the theme of CSR—not only in India, but also globally.

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EXHIBIT 5 Dummy variable regression analysis outputs

	Coefficients	Standard error	t Stat	p	Lower 95%	Upper 95%	Lower 95.0%	Upper 95.0%
Intercept	700	105.4514	6.638128	.001169	428.9285	971.0715	428.9285	971.0715
D	−120	161.0797	−0.74497	.489802	−534.069	294.0685	−534.069	294.0685

(Lambert Academic Publishing, 2010) and *Managing IPR in University Spinoffs* (Paramount Publishers, 2016). He can be reached at pattnaikp@nalsar.ac.in.

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Original Article

Managing Customer Relations in a Modern Business Environment: Towards an Ecosystem-Based Sustainable CRM Model

Mahendra Kumar Shukla & Pinaki Nandan Pattnaik

Pages 17-33 | Published online: 22 Nov 2018

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Abstract

The adoption of Customer Relationship Management (CRM) has witnessed tremendous growth across sectors, geographies, and management cultures in the last several decades. The perception of CRM as an IT-based tool has undergone a paradigm shift and is now treated as a strategic indulgence by modern-day businesses where IT is an indispensable enabler. CRM has garnered the interest of both academicians and practitioners over the years. In this article, the authors establish the value of sustainability in CRM and make an attempt at proposing a conceptual framework for modern businesses through its integration with various social networking sites that produces volumes of real-time data. The article also explores the importance of Customer Experience Management (CEM). The authors

through a survey of the literature explaining the need for managing experiences and engagement around existing CRM processes. In addition to exploring the intricate relationship between CRM and CEM, the authors also provide an interactive ecosystem-based framework for the creation of a sustainable CRM framework.

Keywords: CKM CRM customer experience management social CRM sustainable CRM

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Teaching Baxi and learning from him: the symbiotic relationship between learning and teaching

Amita Dhanda

Jindal Global Law Review **9**, 257–265 (2018)

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Abstract

Reflective teaching devises methodology for transacting the learning process. The creation of this methodology is largely an unspoken enterprise in India. This piece breaks that silence in tribute to Upendra Baxi, one of the most charismatic law teachers in the country. The purpose of sharing Baxi's methodology of learning and teaching is to show how non-hierarchical learning happens and why such learning is *sine qua non* to mentoring students and nurturing scholarship. Good teaching practices can be replicated only if they are documented and disseminated. Such documentation can enable the institutionalisation of robust learning methods. Institutional incorporation will bring home the symbiotic relationship between learning and teaching, as well as teaching and research. This piece on Baxian teaching practices, and the lessons they impart, is an effort in that direction.

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Notes

1. His insistence on his students calling him Upen being one such method.

2. Teaching does allow scholars a space where they can test their ideas. However, most scholars do not see it that way and hence are often trying to escape their teaching duties. Baxi was always a passionate teacher and used his teaching to explore the interconnections between various areas of law. He has narrated in many a conversation as to how he changed the subject that he was teaching and tried his

hand at teaching nearly every area of law, including taxation.

3. When I was dismayed by reports of families abusing their members with mental disorder, he asked me whether I was comfortable with handing over the power to the State and if not what was my third solution?

4. 'You cannot analyze cases in the style of legal commentaries' and 'all data does not have to be presented in prose'. These two comments taught me to present, especially the innumerable cases on the defence of insanity, in analytical tables. From spellings to grammar, he did not miss a thing.

5. I especially cherish the appreciative comments and one where commenting on the elegance of style, he asked 'have you written it?'

6. UPENDRA BAXI, LAW AND POVERTY: CRITICAL ESSAYS (1988).

7. UPENDRA BAXI, THE CRISIS OF THE INDIAN LEGAL SYSTEM (1982).

8. *Id;* Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUDIES 107 (1985).

9. As I understand it, a jurisprudence of disadvantage would not have allowed the causes of people who could represent themselves to be brought before the courts by others relying upon the relaxation of the rule of *locus standi*.

10. Upendra Baxi, *Introduction, in* I.P. Massey, Administrative Law (2005).

11. Upendra Baxi, *The Travails of Stare Decisis in India, in* LEGAL CHANGE: ESSAYS IN HONOUR OF JULIUS STONE (A.R. BLACKSHIELD ED., 1983).

12. Catherine Mackinnon, *Mainstreaming Feminism in Legal Education,* 53 J. LEGAL EDUC. 199, 212 (2003).

13. This desire to shock is much more in evidence in the young Baxi who was angry and impatient for change. Possibly for these self-same qualities, I have more of the young Baxi in my readings.

14. I am using the first-person plural primarily to record two distinct initiatives. Firstly, I recall the very many conversations between Archana Parashar and me when many years back we had inaugurated a conversation on gendering legal education at the Trivandrum Law School with Prof Jayakumar and his colleagues. Secondly, I record the conversations that

happened under the auspices of GALA (Gender and Law Association) which was again an initiative attempted by Indian legal academics and practitioners in collaboration with scholars from the American University, Washington.

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CONFERENCE PAPER

Religious Education in India: Debates and Experiences

Manisha Sethi
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ABSTRACT
Religious education has remained largely absent from school and university curricula in India though its significance has been underlined by a plethora of government committees on education. Its absence can be traced to the imperatives of rule, both in the colonial period, and in post Independent India, and the need to balance competing claims and pressures. This paper shows how, on the one hand, the policy of religious neutrality – and later avowed secularism – and on the other, a desire for inculcation of moral, "spiritual" and "Indian" values tended to favour a natural religion approach. This idea of natural religion though comes to be inflected with a majoritarian bias.

KEYWORDS
Macaulay, religious neutrality, missionaries, spiritual values, natural religion

Introduction

In this paper, I attempt to chart out a tentative history of religious education in India focusing broadly on debates and policies on religious instruction in schools. There are two reasons for this: firstly, I realise that a large number of panellists and participants at this conference were engaged with either teaching, or studying religious education (henceforth RE) in schools, whether its curricula or pedagogy; and secondly, how the universities understood or incorporated – or even expelled – RE in India could not be disentangled from the policies affecting RE in schools. Indeed, it is difficult to distinguish the two, and difficult to understand the experience of RE in Indian universities without the broader background. This broader background consists of many questions about the

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nature, content and purpose of education. These were questions being framed and thrashed out first in the context of colonial rule, and then in terms of the vision of a newly independent postcolonial state. Central to this was the distinctive trajectory that secularism took in India. The experience of Partition and the bloody communal violence that accompanied it, also informed it. RE is expressly absent from Indian school and university curricula. Why was this so?

Religious Education in the Colonial Period

The early years of colonial rule in India – especially till 1830s – were marked by the dominance of Orientalists, with a decided interest in Eastern religions and their sacred texts. The British established their own *madrasa* Aliyah in Calcutta in 1792 (which has recently been converted into a university) and a Sanskrit College in Benaras in 1780. These were two of the three educational institutions endowed out of Indian revenues (Lelyveld, 1984, p. 86; Chatterjee, 2011, p. 26). The encouragement to Sanskrit and Arabic was premised partly on the principle that the sacred books of Hindus and Muslims were the sources of law by which the British would govern the subjects.

However in 1835, the notorious Minute of Macaulay – Lord Thomas Babington Macaulay, son of a missionary, and Law member of Governor General's Council – reflected the increasing impatience with the East India Company's policy of Orientalism. In advocating a choking of patronage to the study of Oriental languages and literatures of "Hindus and Mohammadens", Macaulay conjoined both the Utilitarian critique led by James Mills that these studies served no purpose, and the Anglicist demand for a more vigorous Christian policy in the colony. Macaulay's grounds for putting an end to this were manifold: the uselessness of learning these languages which did not prepare the pupils for a career, or even a bare sustenance; the drag on Company funds in publishing Arabic and Sanskrit books (which he called "waste paper" reflecting his prejudice against Eastern learning); the near completion of the project of codification of law which would render unnecessary the aid of *pandits* (Brahmin scholars) and *maulvis* (learned doctors or teachers of Islamic law) to interpret the Hindu sacred texts *Shastras* and *Hedayas*; and of course the falsity of these religions.

The following paragraph from the Minute brings to us in essence what appeared to Macaulay to be innately wrong with the encouragement of "Hindu and Muslim languages":

> It is said that the Sanscrit and the Arabic are the languages in which the sacred books of a hundred millions of people are written, and that they are on that account entitled to peculiar encouragement. Assuredly it is the duty of the British Government in India to be not only tolerant but neutral on all religious questions. But to encourage the study of a literature, admitted to be of small intrinsic value, only because that literature inculcated the most serious errors on the most important subjects, is a course hardly reconcilable with reason, with morality, or even with that very neutrality which ought, as we all agree, to be sacredly preserved. It is confined that a language is barren of useful knowledge. We are

> to teach it because it is fruitful of monstrous superstitions. We are to teach false history, false astronomy, false medicine, because we find them in company with a false religion. (Macaulay, 1835)

The emphasis on English literature, Western philosophy and sciences and its validation as the most valuable knowledge perforce placed Christian mission-run schools in an advantageous position. However, the English were at the same time wary of identifying their government too closely with Christianity. Thus, we see that Macaulay advised abstention from encouraging "those who are engaged in the work of converting the natives to Christianity" (Macaulay, 1835). Following him, the Despatch of 1854 authored by Wood, provided the Company's blue print of education of natives, and established the grant in aid system. It underlined that "good and secular education" would be the criteria for providing aid to schools and not instruction in Bible. The policy of religious neutrality was laid out in the following terms: the masters of government schools were not precluded from giving instruction out of school hours in the facts and doctrines of the Christian religion to any pupils who might apply for such instruction; and in the aided schools, the government would abstain from religious instruction conveyed in the schools, and the inspectors were to take no notice whatsoever of the religious doctrines which may be taught in schools (Wood's Despatch, 1854, par. 54).

Though Macaulay insisted that Sanskrit and Arabic could not claim British support either as "the languages of law" or as "the languages of religion", the consequence of this was not simply an efflorescence of missionary educational initiatives. In many regions such as the Punjab, support for what has been called vernacular Orientalism continued. Elsewhere, as in Madras, the grant support for mission schools and institutions was uneven. In fact, a complaint about the government's parsimony in this regard elicited a 50-page long letter from the Director of Public Instruction recounting the natives' fears about the proselytisation in mission school and the importance of state neutrality in matters of religion. Col. Macdonald also cited a meeting of over 6–7 thousand Hindus and Muslims in Madras in April 1859 who had appealed to the government to stop aid to mission schools and sought protection from religious instruction. The Missions on the other hand interpreted the 1854 Despatch to have provided for "the establishment of local boards of education and board schools financed from local property rates..., purely secular teaching, and grants-in-aid to voluntary societies whether they be Christian, Moslem or Hindu" (Whitehead, 2004, p. 126).

The debates reached a head by the time the Indian Education Commission was instituted in 1882 to review the progress in the field of education since Wood's Despatch of 1854. The question of religious instruction was an issue that exercised many witnesses who deposed before the Commission. A proposal was placed before the Commission that arrangements for religious instruction be permitted provided that a) parents may be enabled to withdraw children from it if they so wished; b) that the inspector and other departmental officer not interfere or examine such subjects; and c) that if there be sufficient numbers of dissenters, separate classes should be established for them. The majority in the Commission rejected this proposal because "religious feeling was so inflammable, and sectarianism so prevalent in India, that it

was **not safe** to depart from the earlier policy" despite the admission of the value of RE on all sides (Indian Education Commission, 1883, p. 129; emphasis added).

But two innovations from earlier policy were made. In the field of primary education, the Commission felt a real threat of retardation of the spread of education because parents loathed to send their wards to schools where religious instruction was compulsory. Such an exigency necessitated a departure from the policy of absolute abstention from interfering in a school's programme of religious instruction. Thus, a recommendation was made that: "it shall be open to parents to withdraw their children from attendance of such instruction without forfeiting any of the benefits of the institution" (Indian Education Commission, 1883, p. 512).

The second innovation was the recommendation to introduce moral education at the college level. But ever mindful of the difficulties of producing a curriculum which might be acceptable to all sides, the Commission urged for the preparation of a "moral textbook based upon the fundamental principles of natural religion" (Indian Education Commission, 1883, p. 307). This, as we shall see, was to become the model later too. Three caveats were added: that there should be no complaints about interference in religious beliefs; the candidates should not be called upon to declare religious beliefs; and no answer be objected on the grounds of it expressing any peculiarity of religious belief (Indian Education Commission, 1883, p. 308).

In a way, both of these departures could be seen as responses to two divergent demands, which played out in the Commission. The first was possibly a concession to the demands for a conscience clause by Indian witnesses, namely, Kashinath Telang, who wrote a detailed dissent note explicating the same. The missionaries and those disposed towards the expansion of missionary education stressed that the government policy of neutrality (or of not encouraging mission schools alone) had been decidedly "injurious from a moral and religious point of view" (Indian Education Commission, 1883, p. 610). The recommendation on moral training in colleges had resulted from the pressure of this lobby. Telang, though unsuccessful in his bid for something akin to Section 7 of the British Education Act of 1870, insisted that there was no way of satisfying the demand for religious instruction. The only tow models, he argued, were either the teaching of common principles under the name of Natural Religion, or instruction in the principles of all creeds, but the practical difficulties in pursuing either of these paths offered secular education as the only "remote haven of refuge for the educationists" (Indian Education Commission, 1883, p. 610). Telang's dissent suggests that the Indian national opinion – or at least a part of it – was on the side of complete severing of any religious training or teaching from secular education.

The dilemma that RE presented to policy makers was this: recognition of the value of religious instruction as a force of morality and virtue; the demands of missions to be given preferential treatment, native fears about widespread proselytisation, the governmental expediency of maintaining communal peace, alongside the aim of massification of primary education. The compromise that resulted from these opposing pulls and pushes was the expulsion of RE from government prescribed curricula, and a sort of laissez-faire to private initiatives of various hues as long as they maintained a certain standard of secular education.

Towards Independence

As the Government of India Act 1919, and then of 1935 paved the way for greater autonomy formation of provincial governments led by Indians, especially the Congress. With the introduction of diarchy which transferred the education departments to Indian ministers, a more nationalist vision of education was put forth. In 1937, Gandhi convened a committee of educationists headed by the then principal of Jamia Millia Islamia, Dr. Zakir Hussain, to prepare a future primary education scheme. Called the Wardha Scheme, it advocated a free, compulsory and universal education for all children. A progressive document, it was adopted by the Congress in its session in 1938 as a resolution on National Education, and its provincial governments began to implement it (with little success though) (Oesterheld, 2007, p. 4).

RE remained an unresolved issue in the Wardha scheme. Of all the national leaders, Gandhi's politics has been spoken of as having a spiritual basis. In 1928, writing in *Young India*, he had said:

> A curriculum of religious instruction should include a study of the tenets of faiths other than one's own. For this purpose the students should be trained to cultivate the habit of understanding and appreciating the doctrines of various great religions of the world in a spirit of reverence and broad-minded tolerance. This if properly done would help to give them a spiritual assurance and a better appreciation of their own religion. There is one rule, however, which should always be kept in mind while studying all great religions, and that is that one should study them only through the writings of known votaries of the respective religions. (Gandhi, 1928)

Nonetheless, the Wardha scheme made no provision for RE. In fact, Gandhi justified the exclusion "because we are afraid that religions, as they are taught and practised today, lead to conflict rather than unity" (in: Oesterheld, 2007, p. 7). At a later stage too, in 1947, he rebuffed the idea that RE could be a state concern, emphasising that it must remain the sole concern of religious associations. He did however underline that fundamental ethics being common to all religions, its teaching was "undoubtedly a function of the State" (Sethi, 2010, p. 10).

Meanwhile two parallel processes were at play. The first was the appointment by the government Central Advisory Board of Education (CABE) of a committee to examine the Wardha scheme in 1938, and a separate committee in 1946 devoted exclusively to study the possibility of RE. While no consensus emerged in the first committee, the second CABE committee of 1946, in its Interim Report, recommended "as in Britain, an agreed syllabus, expert teachers, the use of prime hours of instruction and the provision for a conscience clause" (Chatterjee, 2011, p. 197). Its final report, however, deemed RE to be the responsibility of the homes and the religious community to which the pupil belonged – a result, which a disappointed Sargent contemptuously called "a small mouse" (Sargent Report, 1948, pp. 12, 226). The second process focussed on what was happening in the provinces. Many of the ministers in charge of provincial educational ministries, though avowed Congressmen, were cultural

conservatives, or positively majoritarian, subscribing to a Hindi/Hindu/Hindustan model. This deemed India to be a land of Hindus, who spoke a chaste and heavily Sanskritised Hindi shorn of all Persian influences. An illustration of this hegemonic model was the *Vidya Mandir* scheme [quite literally translated as Temples of learning] introduced by the Central Provinces, which was seen widely as a crusade to efface Islamic culture and religious heritage (Oesterheld, 2007, p. 10).

Legislative Debates

The question of RE came up once again when the Constitution was being drafted (29 Aug 1947 – 26 Nov 1949). Article 28(1) of the Constitution, expressly forbids the provision of religious instruction in any educational institution wholly maintained out of state funds. At the same time, however, different articles, namely, 28(2), 29 and 30(1), allow the setting up and functioning of schools and institutions of higher education by religious minorities, and even the receipt of grant in aid from the government, as long as these do not discriminate on the basis of religion in admissions. It is interesting to trace the route through which the drafters arrived at these articles.

Article 28 was originally clause 16 of the Report of the Advisory Committee on Fundamental Rights, which was placed before the Constituent Assembly in August 1947. It read:

> No person attending any school maintained or receiving aid out of public funds shall be compelled to take part in any religious instruction that may be given in the school or to attend religious workshop held in the school or in premises attached thereto.

Clearly, in its original form, it did not envision expelling religion from schools, whether aided or government, only that no one would be compelled to participate in such instructions. There were two sorts of objections to this. The first amendment moved by Purnima Banerjee rued that there were a large number of educational institutions run on religious lines (*maktabs* and *pathshalas*, corresponding to Islamic and Hindu institutions respectively) who impart to students "fanaticism and religious bigotry", which could only be allayed a governmental control of the curriculum. A state which hoped to stay united (remember the background of Partition) – no matter how secular – required that its children must learn to appreciate the religion of another. Only a syllabus of such a type may be the bulwark against exclusivism (Constituent Assembly Debates (CAD), 5.67). She therefore proposed the addition of this paragraph as explanation, "[a]ll religious education given in educational institutions receiving Statewide will be in the nature of the elementary philosophy of comparative religions calculated to broaden the pupils' mind rather than such as will foster sectarian exclusiveness" (CAD, 5.46.66). Renuka Ray, on the other hand, sought to bring unequivocal exclusion of RE with her amendment, "[n]o denominational religious instruction shall be provided in schools maintained by the State. No person attending any school or educational institution recognised or aided by the State shall be compelled to attend any such

religious instruction" (CAD, 5.46.70). Ray's proposal received a greater reception and approval from the members whilst Purnima Banerjee's proposal was deemed controversial.

What would be the contours of such a comparative religion – questions raised by members Mahboob Ali Baig Sahib Bahadur – and what would it mean for rights being promised to the minorities to run their educational institutions, and further, what would be the implications of the proposed "unification of all religions" for the constitutional rights of minorities were all questions that were raised (CAD, 5.46.77-80). Another member, K. M. Munshi, also warned that disputes over the precise content and nature of elementary philosophy of comparative religions would lead to litigation, with the courts expected to pronounce whether the syllabus was of comparative kind, or belonged to one specific religion; and further, if such a syllabus would broaden or narrow the outlook of students. Therefore, Munshi cautioned that the adoption of comparative religions as a dictum could never become justiciable, but would only lead to considerable confusion and legal *imbroglio* (CAD, 5.46.83,86-87).

The second amendment, though more popular, was referred to a subcommittee which would report to the drafting committee. When the article suitably amended finally appeared for discussion in the Constituent Assembly, there were several amendments of different shades. On the one hand were those like Shiban Lal Saksena who resented the exclusion of religion on account of protection afforded to minorities. While minorities should not be compelled to have religious instruction against their wishes, the District education boards should not be barred from teaching the children of the majority community Gita and Ramayana, he felt. On the other hand were members like K. T. Shah who thought the provisions against teaching of religion to be too loosely worded and sought them to be made more stringent. B. R. Ambedkar's response to these was threefold: First that the monies generated from general taxation could not be used to provide any particular RE; the second factor militating against the provision of RE was the preponderance of religions and sects in India, and finally, he reminded the house that "unfortunately the religions which prevail in this country are not merely non-social; so far as their mutual relations are concerned, they are anti-social". Thus, he concluded that in "laying down in article 22(1) that in State institutions there shall be no religious instruction, we have in my judgment travelled the path of complete safety" (CAD, 7.68.159-163). [I am not going here into the discussions about aided schools run by religious communities covered under 28(2) now]. In the course of the discussion, Ambedkar distinguished between religious instruction and study of religions, and stressed that it was only the former, which was prohibited.

Nonetheless, the issue of RE refused to disappear. Immediately after the CAD took place, a committee to look into university education was appointed. Headed by S. Radhakrishnan, Spalding Professor of Eastern Religions and Ethics at the University of Oxford, it devoted considerable time on discussing RE. The Radhakrishnan Commission set out the agenda of RE in the following poetic terms:

> We teach religious dogmas not to provoke doubts of questions but to give comfort to the human spirit. To introduce these studies in a University is to make a sharp

> break with the critical methods of inquiry followed in other disciplines of the curriculum. To prescribe dogmatic religions in a community of many different faiths is to revive the religious controversies of the past. To turn the students over to theologians of different denominations for instruction in the conflicting systems of salvation is to undermine that fellowship of learning which defines a college or a university. (p. 256)

And yet, to "exclude spiritual training" would be being "untrue to our whole historical development" and to negate "the beauty and mystery of the universe, the meaning of life and death, the aspirations of the inner soul, that sad feeling of the wistful minded that beyond the world of positive knowledge there is a realm of forces unseen which we can feel but never know completely (Radhakrishnan Commission, 1963, pp. 260–261). It thus recommended that:

> (1) all educational institutions start work with a few minutes for silent meditation;
> (2) in the first year of the Degree course lives of the great religious leaders like Gautama the Buddha, Confucius, Zoroaster, Socrates, Jesus, Somkara, Ramanuja, Madhava, Mohammad, Kabir, Nanak, Gandhi, be taught;
> (3) in the second year some selections of a universalist, character from the Scriptures of the world be studied;
> (4) in the third year, the central problems of the philosophy of religion be considered. (Radhakrishnan Commission, 1963, p. 265)

The issue of religious instruction in schools was first dealt with in detail in the *Report of the Committee on Religious and Moral Instruction* (also known as the Sri Prakasa Committee) submitted to the Ministry of Education as early as in 1960. It advocated an "objective, comparative and sympathetic study of all the important religions of India" (extracted in Biswas and Agrawal, 1986, p. 612). The imperative of the Sri Prakasa Committee in making such a recommendation – as indeed of the other Committees and their recommendations such as the Kothari Commission in 1966 – was the task of "nation-building" and the forging of a "national consciousness". The task of RE could not be left to the home and community alone, the Sri Prakasa Committee argued, as this would result in limited understanding of one's own faith, ignorance of other faiths and blind prejudice towards others. *Report of the Kothari Commission* (1966), mulling over the nature of education that a secular state in a multi-religious democracy may impart, distinguished between "religious education" and "education about religions". It lamented that:

> ...owing to the ban placed on religious instruction in schools and the weakening of the home influences which, in the past, often provided such instruction, children are now growing up without any clear idea of their own religion and with no chance of learning about others". It thus recommended that a "period or two a week should be allotted to education in moral and spiritual values in an organized attempt to develop the character of the pupils and inculcate in them a respect for religions other than their own". (cited in Ayyar, 2017, pp. 299–300)

None of these recommendations were followed. The *81st Report on Value Based Education* (also called the SB Chavan Committee) submitted its report to the Parliament in 1999. "Values" was the locus of the SB Chavan Committee report. Value education was of supremely civic importance, as it would foster national integration and make students aware that the basic concept behind every religion is common. It would repel the overwhelming influence of western culture. But what precisely would these values be: they were indigenous and national values but seen deriving from "ultimate reality supreme power or self-consciousness to which man orients himself" (The 81st Report on Value Based Education, 1999). Ancient *gurukuls* (traditional Hindu educational institutions) were invoked as models of a value based educational system.

The Idea of Religion

Perhaps because the multiplicity of religions and creeds in the country, and the pragmatic need to keep peace, most policymakers gravitated towards the idea of a universal or natural religion. If committees instituted by colonial government identified ethics and morals derived from the common core of religions as the subject worthy of study (though never enforced), we see Purnima Banerjee's proposal not very different. The Radhakrishnan Commission spoke of an "Indian" outlook on religions, which in their view was not inconsistent with Constitutional principles. It held that religion is neither creed, nor emotion nor a ceremony, but a realisation which can be apprehended not by beliefs but "by their fruits". And if religion was a matter of realisation, then its vehicles were to be training, discipline and *sadhna* (spiritual practices).

This received its most cogent form in a judicial pronouncement in 2002. In 2000, the right-wing BJP (Bharatiya Janata Party or Indian Peoples' Party) government had proposed a New Curriculum Framework (NCF) which sought to give prominent place to RE. Again, the terminology was not new – students were to be made aware that the essence of all religions was common. It also proposed a new "spiritual quotient" and placed a premium on the learning of Sanskrit. A group of civil society activists approached the Supreme Court expressing the apprehension that the NCF would pave the way for "saffronisation of education" (a term commonly used by secular and left academics and activists to denote exclusivist communalisation), and that it fundamentally militated against the settled principle inhering in Article 28 (Shah, 2002). The Supreme Court dismissed the petition holding that NCF did not violate the principle of secularism (Shah, 2002; all citations below from it).

What interests me most here is also the definition of religion that emerges from this judgment. Justice Shah approvingly quoted a judgment ([1960] 9 SCC 548), to demonstrate a distinction between religion and *dharma*, "143. Our dharma is said to be 'Sanatana' i.e. one which has eternal values; one which is neither time-bound nor space-bound. It is because of this that Rig Veda has referred to the existence 'Sanatan Dharmani'. 'It is crystal clear', he concluded, 'that the word' 'religion' has different shades and colours. Important shade is dharma (duty). That is to say, duty towards the society and the soul". Here again we find the belief that there is an Indian sense of religion, which is compatible with secularism.

His brother judge, J. Dharmadhikari, insists on distinguishing religious instruction from RE. It is the former, which is prohibited in a secular state – the latter that should introduce pupils to religious philosophies without indoctrinating them, or curbing their independent thinking is to be encouraged. It is an experiment which needs caution and vigil. Though he leaves it to the educationists to frame such a curriculum, its contours are not entirely absent in his judgment. RE would be the "teaching of philosophies of religions with more emphasis on study of *essential* moral and spiritual thoughts contained in various religions" and would have no place for the "teaching of rituals, observances, customs and traditions and other *non-essential* observances or modes of worship" (emphasis added). The identification of morality, philosophy and nebulous spirituality as essential cores of religion and observances as non-essential or peripheral; or the primacy of doctrine over practice, has been a dominant mode of judicial thinking on religion, and we see it being repeated here.

The imprint of Phenomenology of Religions in his fervent hope that RE be premised on Religious Pluralism is obvious. In this conception of religious pluralism, world religions are viewed as embodying "different perceptions and conceptions of and correspondingly different responses to, the Real or Ultimate". Nonetheless as for J. Shah, for him too, the English word "religion" is inadequate in fully conveying "the Indian concept of religion", which is *dharma*. He writes: "Hindus believe in Vedas. The word 'Dharma' has a very wide meaning." Note how quickly the Indian concept of religion elides into a Hindu, Vedic one, and how *sanatan dharma* comes to stand in for natural religion: "Dharma or righteousness is elemental and fundamental in all nations, periods and times. For example truth, love, compassion are human virtues. This is what Hindu call Sanatan Dharma meaning religion which is immutable, constant, living permanent and ever in existence".

Conclusion

Thus, the model of RE in post Independent India remained this: the official banishment of RE from the curriculum; lack of any discussion among educationists on what might constitute a proper RE curriculum, and deriving from it a moral frame tending towards Natural Religion; and finally, despite the exclusion of RE, the cementing and naturalisation of a majoritarian idea of religion, culture and Indian-ness.

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THE CONTRIBUTION OF THE WTO IN ACHIEVING SUSTAINABLE TRADE DEVELOPMENT

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Introduction

The advent of globalization, has led the trade to become a global trade and every economy in the world is involved in the international trade either to a fuller extent or to a minimal extent. Participation in the global trade and commerce is the most important for any country's economic development which can enhance the productivity of natural and human resources by generating employment and wealth. It is only obvious that economic development of any country would depend on the policies of international trade and commerce, which include taking advantages of the emerging opportunities for international trade and commerce practices that are conducive to protect and preserve the environment, while minimizing potential adverse impacts on the ecosystem.

Thus, the international policies and regulations on trade and commerce should strive for the social progress and environmental protection which will in turn contribute to a sustainable development. Towards this end, the World Trade Organization (WTO) has been making great strides in ensuring rational use of world natural resources to achieve sustainable development, while aiming at increasing the production of goods and services by reducing tariffs and other trade barriers. Certainly, WTO has been in the forefront in initiating policies for sustainable growth, while encouraging international trade and commerce. This paper will therefore focus on various initiations and steps taken by the WTO to achieve a sustainable development blended with green economy.

International Trade and the WTO

International trade or global trade means a trans-boundary trade which involves imports and exports from one country to another and of services that cut across international borders or between the countries. However technically it has been defined that "international trade is the exchange of capital, goods and services across international borders or territories[1]." In simple terms it is the exchange of goods and services among the nations of the world.

1 Federico Ortino, "Treaty Interpretation and the WTO Appellate Body Report in US-Gambling: A Critique," Journal of International Economic Law9(1) (2006).

The World Trade Organization (WTO) was established in 1995, following the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade (GATT). WTO has a crucial role to play in the international trade, global economics, political and legal issues arising in the International business because of the globalization[2].It has emerged as the most powerful institution by replacing the General Agreement on Tariffs and Trade (GATT) which was created in the year 1948 for the reducing trade related barriers between the countries and encouraging the global trade. It has been striving since than to provide a global platform for its member countries in order to help them in services like exports, imports and facilitating trade and commerce in a peaceful manner.

The role of WTO in international trade is as stipulated in the agreement establishing it, clearly provides for the followings[3]:

i. Facilitating the implementation, administration and operation and furthering the objectives of the agreement establishing it and other Multilateral Trade Agreements and providing the framework for the implementation, administration and operation of the Plurality Trade Agreements.

ii. Providing the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to the Agreement setting it up and for the results of such negotiations as may be decided by the Ministerial Conference.

iii. Administering the understanding of rules and procedures governing the settlement of disputes or the dispute Settlement Understanding which as laid down under is Annex 2 to the agreement setting it up.

iv. Administering the Trade Policy Review Mechanism (Annex 3) of the agreement setting it up.

v. Cooperating as appropriate with the International Monetary Fund and the International Bank for Reconstruction and Development with a view to achieving greater coherence in global economic policy making.

Therefore it can be said that WTO plays an important role in promoting and protecting international trade and at the same with its regulations and negotiations, it is also encouraging the green trade economy, so as to achieve sustainable development.

WTO and Sustainable Development:

The World Trade Organization (WTO) is the only international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their respective parliaments[4]. These

2 PadmavathiBhamiditi, 'Role of WTO in International Business',https,://www.linkedin.com,visited on 26/11/2018

3 Article III of the Agreement establishing WTO

4 https://www.wto.org/english/thewto_e/thewto_e.htm, (Visited on 26/11/2018).

agreements, negotiated mainly intended to facilitate the free trade flow among the member States. Towards the end of the Uruguay Round, attention was drawn to trade-related environmental issues and the role of the newly emerging WTO in the field of trade and environment. In the Preamble to the Marrakesh Agreement Establishing the WTO, reference was made about the importance of working towards sustainable development[5].

The WTO indeed is responsible for the supervision of the implementation of the General Agreement on Tariffs and Trade (GATT), which explicitly states that trade and commerce should always be conducted "*in accordance with the objective of sustainable development.*" As the agreement recognizes, trade is a means of achieving sustainable development; it is not an end in itself. It is a framework for reconciling key international goals, and it applies to national actions as well. Therefore, sustainable development is not a buzzword or another way of talking about environmental protection, rather it could be said that the WTO and its member states should have sustainable development as the main objective[6]. As sustainable development is another important goal for the WTO, the WTO has been striving for policies which would support for the sustainable development and a green economy. It also provides for rules for the achievement of a crucial balance such as protection of the environment as well as promotion of free trade

Historically, international trade and sustainable development have been interdependent as visualized by the Earth Summit in Rio de Janeiro in the year 1992. International consensuses have actually been arrived in recognizing the importance of international climate as conducive for economic cooperation. It is very much clearly mentioned in Chapter 2 of Agenda 21 that member States agreed without any reservations, at the time that trade policy should not operate at cross-purposes with international efforts to curtail environmental degradation or promote development[7]. Again, when the World Summit on Sustainable Development was held in Johannesburg in the year 2002, the link between trade, finance and sustainable development has was discussed and evaluated, which also noted the need to support the conclusion of the Doha Round of negotiations[8]

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5 Harnessing trade for sustainable development and a green economy, https://www.wto.org/english/res_e/publications_e/brochure_rio_20_e.pdf, (Visited on 24/11/2018)

6 John Dembach, (1991) "WTO and Sustainable Development", http://fpif.org/wto_and_sustainable_development/, (Visited on 24/11/2018)

7 International Institute of Sustainable Development Reporting services, http://enb.iisd.org/process/trade_invest-intro.htm, (visited on 26/11/2018)

8 ***The Doha Mandate on International Trade and Environment***: "WTO along with its members, at the Doha Conference, reaffirmed their commitment towards environmental protection and agreedto solve the bilateral or multilateral trade related issues which are linked to the environmental protection by negotiations In addition to launching new negotiations, the Doha Ministerial Committee on Trade and Development at the Doha Ministerial Declaration negotiated and debated on the environmental and developmentalaspects . Paragraph 31 of the Doha Ministerial Declaration launched negotiations, "with a view to enhancingthe mutual supportiveness of trade and environment" and "without prejudging their outcome", on the issues of the reduction or, as appropriate, the elimination of tariff and non-tariff barriers to environmental goods and services (summarized on page 33). Paragraph 31(i) mandates Members to negotiate on the relationship between WTO rules and specific trade obligations set out in multilateral environment agreements (MEAs). Negotiations are limited in scope to the applicabilityof such existing WTO rules as among parties to the MEA in question. Moreover, the negotiationsare not to prejudice the WTO rights of any Member that is not a party to the MEA in question (the discussions held on this issue are summarized on page 39). Negotiations were also mandated in paragraph 31(ii) on procedures for information exchange between MEAs and the relevant WTO committees, and on the criteria for the granting of observer status in WTO bodies (summarized on page 44)within the World Trade Organization (WTO), and the implementation of the Monterrey Consensus on financing for development, to promote "open, equitable, rules-based, predictable and nondiscriminatory multilateral trading and financial systems that benefit all countries in the pursuit of sustainable development." retrieved on 26/05/2018 from http://enb.iisd.org/process/trade_invest-intro.htm.

It is pertinent to note that liberalized trade policies will lead to economic growth, so the policies need to address the environmental concern as well. Thus, trade and environmental policies should always be framed in such a way that they should complement to each other and not compete. The WTO's role is to see that liberalize trade polices do not act as an obstacle in protecting and preserving the environment and that same time the environmental protection policies also do not stand in the way of trade liberalization for developing country exports. In this regard it is also pertinent to take note of the key WTO instrument governing environmental regulations and standards is the Agreement on Technical Barriers to Trade (TBT Agreement). The TBT Agreement aims to balance concerns related to the trade impact of environmental and other requirements against the wider public policy goals these requirements serve. The Agreement sets out rules to ensure that such measures are non-discriminatory and do not create unnecessary obstacles to International trade[9].

To protect the environment, possible measures to reduce pollution must be adopted, like reducing emissions, minimization of wastage, recycling methods forestry management, and natural habitat protection etc. In this direction, the WTO insists each member state to use new technology which reduces carbon and other gases such as sulpher dioxide, nitrogen oxides and other greenhouse gases which are responsible for the spoiling of the environment. Apart from this Imposition of environmental taxes so as to reduce the adverse effect on the environment and other harmful activities which are detrimental to the environment must also be considered. One must also bear in mind that the Paris Agreement on climate change, 2016 also provided for the decarburization and advocated for the strengthening of the climate with low carbon emission,[10] to achieve development and sustainable environment. There is another method, that is, imposition of Environmental Taxes. They are taxes levied directly on polluters, thus the environmental taxes have far-reaching implications which will have indirect impact on trade, mostly in developing countries. However, the extent to which imposition of environmental taxes affect on international trade depends, among other things, on production costs and on the prevailing market structure. In this regard, this can be explained in the following words[11]:

> *"Several WTO disciplines may come into play if a green tax, trading scheme or related adjustments affect international trade. These may include key disciplines of the GATT and WTO agreements relating to nondiscrimination (i.e. GATT Article I on most-favoured nation treatment and Article III on national treatment), elimination of quantitative restrictions (GATT Article XI) and disciplines on technical barriers to trade".*

As environmental requirement depends on the desired environmental outcome, the level of governmental involvement and the availability of technological solutions to address specific problem is extremely important. So, in the recent past, new types of initiatives that are often voluntary have also emerged in response to consumer concerns, such as food miles programmes and carbon footprint labeling schemes. Environmental requirements may affect international trade, especially if they are used to shield domestic producers from international competition, or when

9 Harnessing trade for sustainable development and a green economy, https://www.wto.org/english/res_e/publications_e/brochure_rio_20_e.pdf , (visited on 24/11/2018)

10 By implementing the policies which advocated for the elimination of fossil fuel and subsides on them to underscore the effect on both environment and trade, see The Paris Agreement, www.unep.org.

11 See note 9 above

they are discriminatory. As countries continue efforts to "green" their economies, environmental requirements increasingly will become significant determinants of access to foreign markets.

The design and implementation of the measures for the green trade must be transparent and should have concern for the environment. Thus, by adhering to the Trade for Sustainable Development Principles, companies and institutions are expected to embrace, support and enact — within their sphere of influence - a set of core values to support trade for the sustainable development. Suggestions made by the International Trade Centre, which is an agency of the United Nations and the World Trade Organization, must be seriously taken in to consideration. These principles include[12]:

i. *Sustainability Principle*: Support and promote sustainable trade practices, with regards to social, environmental, economic and management, quality and ethics issues at stake in the production, processing and trading of goods and services.
ii. *Transparency Principle*: Contribute to efficiency in global supply chains by clear demonstration of openness to sharing good practices, to foster transparency, trust and inclusiveness at all levels of global supply chains.
iii. *Harmonization Principle*: Build on existing resources and methodologies with a collaborative approach avoiding duplication that may provoke proliferation of standards, multiplication of audits or assessment methodologies.
iv. *Sustainable development goals (SDGs) Principle*: Act in alignment to the United Nations Sustainable Development Goals, otherwise known as the Global Goals, addressing the root causes of poverty and the universal need for development that works for all people.

The Way Forward

In the process of globalisation, the international trade and commerce can have both positive and negative effects on sustainable development, particularly in the developing countries. There is a need to support the developing countries to integrate themselves into and derive benefits from the global trade. At the same time, attention also must be given to the green trade and sustainable development. Although WTO has been working with all its effort to ensure the rational use of world natural resources to achieve sustainable development through its polices with reduced tariffs and other trade barriers, making trade and environment mutually supported by macroeconomic policies conducive to environment and development calls for supportive international climate for the sustainable development[13]. Integration of trade development strategies and strategies for sustainable development should include the need to have climate-friendly strategies so as to protect and preserve the environment.[14]It is absolutely true to say that the development, is indeed, intended to improve the quality of human life and generate opportunity by fostering peace and security, social development and economic development. However, this is difficult to achieve or occur

12 www.intracen.org/itc/market-info-tools/voluntary-standards/t4sd-principles-and-signatories/, (visited on 24/11/2018)
13 See https://sustainabledevelopment.un.org/topics/trade
14 Trade, Environment, Climate Change and Sustainable Development, http://unctad.org/en/Pages/DITC/Trade-and-Environment.aspx

without international consensus[15]. Therefore, WTO, with the support of other international organizations, like the United Nations, should integrate trade agreements, polices for the protection of environment and welfare schemes which would move the international trading system toward sustainable development.

15 John Dombach, (1991) "WTO and Sustainable Development", http://fplf.org/wto_and_sustainable_development/

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Role of Information Technology in Civil Aviation: A Focus on Cyber Crimes and Emerging Legal Issues

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Introduction

The initiation of the concept of liberalization, privatization and globalization with highly advanced technology blended with information technology has completely transformed the economic behaviour of the world. Civil aviation is one of the most widespread and extensively interconnected international infrastructures in the world connecting everyone, every time and in every place. 'Airports' and 'Airlines' are the economic engines for the growth and development of a nation.[1] Civil aviation is a glamorous industry but sensitive and yet its abuse has become a threat to the general security of passengers, crew members and aviation industry as a whole due to the misuse of information technology. Today every airport, airline and the air traffic control systems are based on intelligent transport system i.e. the information and communication technology (ICT). Aviation has become the backbone of our global economy bringing people to business, tourists to vacation destinations and products to markets.

"Aviation" is the business of freedom. In 2016, 3.8 billion passengers safely took to the air and some 54.9 million tonnes of goods were delivered as air cargo.[2] Focusing the "financial performance"aviation's vital role in the world has not always resulted in appropriate rewards to airline investors. In recent years, however, airline efforts to restructure and reengineer their businesses have resulted in a historic strengthening of the bottom line. The industry earned a return on invested capital of 9.9% in 2016[3], which exceeded its cost of capital (estimated at 6.6%). Regarding the "safety", flying safely is the number one priority and the industry competes fiercely for every passenger, but there is no competition when it comes to ensuring safety.[4]Pointing out at the "aviation security", the aviation industry continues to be an iconic target for terrorist and other security-related attacks.

The purpose of this paperis to divulge how information technology is the key element in the economic development of aviation industry as a whole and airports, airlines and air traffic control system in particular. This paper also tries to focus the impact of information technology paving way for cyber-crimes etc. and existence of any legal mechanism to curb the said issues focusing the International Conventions pertaining to civil aviation and cyber-security.

Role of Information Technology in Aviation Industry

Air travel has always been closely connected with the information and communication technologies (ICT), benefiting from the technological developments and, in the same time contributing to its evolution. The modern consumer is more familiar with IT technologies; he has access to information which made him more sophisticated and demanding, requiring specialized and interactive services. The evolution of ICT shaped and

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1. *Airports Privatisation in India: Law and Policy Issues* (1st ed., pp.102). (2013). Hyderabad, Andhra Pradesh: Asia Law House.
2. IATA Annual Review-2017
3. IATA Report-2016
4. IATA Report 2016: One major accident for every 2.56 million flights using jet aircraft in 2016.

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re-engineered the air travel industry globally.[5] The air travel linked with tourism industry is highly fragmented and diverse, linking a "worldwide supplier community"[6] with passengers/consumers being distributed globally. The evolution of ICTs demonstrated that centralizing data is a key element in the development of air travel and tourism as well as transforming distribution into an electronic marketplace.[7]

The pioneers of the technical developments in the air travel and tourism industry were the Computer Reservation Systems (CRS) in the 1970s and the Global Distribution Systems (GDS) in the 1980s, among the first multi-organizational and global information systems[8] followed by the Internet in 1990s a first step associated to the development of the "world wide web"[9] under the 20th century. However, the 21st century has witnessed an advanced technological development which has transformed the aviation industry. Digital technologies have been the driving factor for improving airlines' operational efficiency. Custom software application development has become a major contributor to a company's competitive advantage and garners exponential growth in business. It helps the industry to leverage its technology and services by extracting full potential. It also facilitates the implementation and development of global standards and delivers value to the airline business firms.

The advent of technology and social media is increasing the customers' expectation to build and increase their relationship with the organization. Understanding customers' preferences, IT innovation and modernization help the airlines re-engineer their business processes by addressing the industry challenges and opportunities and transform its practices to a customer-centric approach. This conventional approach increases the connectivity and enhances the customers' satisfaction and innovative software applications provide real-time value to the customers.

Market conditions and industry developments affect the growth of any business. The increase in traffic and competitive pressure has been adversely impacting the financial sustainability of the airline industry. The current global market conditions and industry developments coupled with evolving technological trends and customer preferences are introducing more challenges than ever before. IT automation has removed barriers and changed the landscape of aviation industry. It helps the industry in cutting costs, improving relationships with the customers and clients, and improving the financial performance in a sustainable way.

The aviation operations since decades are based on IT industry. The aviation industry widely uses a variety of applications through the digitalization of different procedures. A catalogue of solutions can be found helping airlines manage a variety of processes, such as electronic documentation, aircraft performance and flight planning optimization, crew management or fuel efficiency. Other new services have recently become available, such as solutions for live flight tracking.

Data analytics is not an exception and in the last few years a number of companies have started to incorporate functionalities based on data mining and machine learning. A second generation of data analytics applications will surely disrupt traditional operational procedures by fusing a variety of data sources, including not just airline or weather data but also airspace management data. Applications will be able to fuse and analyze a variety of datasets and leverage historical behavior of the system to predict and recommend operational solutions to airlines, airports and air navigation service providers.[10]

Taking the IT into consideration, presently, several companies are promising increased efficiencies in different contexts like the Navblue, an Airbus company, offering the N-software, able to produce best-in-class

5. Buhalis Dimitrios, Strategic use of information technologies in the tourism industry, p.3
6. Werthner H, Klein S, ICT and the changing landscape of global tourism distribution, Electronic Markets, Volume 9, Issue 4, 1999
7. Buhalis Dimitrios, Strategic use of information technologies in the tourism industry, p.6
8. Abel Usoro, ICT (Information and Communications Technologies) and Tourism: An Initial Exploratory Study of Developing Economies as Suppliers of Hospitality and Destination, p. 1
9. Mistilis N, Buhalis D, Challenges and potential of the Semantic Web for tourism, eRTR, vol 10, 2012, p. 51
10. Perez, D. (2017, March 16). How the Information Technology is disrupting aviation data analytic? Retrieved from http:// http://datascience.aero/information-technology-industry/

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aero data targeting airspace re-design; Sky-breath, offered by Open Airlines, promises to exceed 2% on fuel savings thanks to big data analysis; Honeywell software helps airline flight operations managers to quickly understand fuel consumption trends, identify savings opportunities, monitor progress of savings initiatives and demonstrate results; PACE offers a more effective fuel management through improvement of daily operations, strategic planning and operational efficiency; and UTC offers enabling improvements in operational efficiency by integrating flight planning, avionics data, flight performance tracking and weather data with real-time updates and notifications.

Focusing on terms of aviation safety, Flight Data Services offers a full analysis service to aircraft operators to gain valuable safety insights through detailed reporting, statistics and visualization directly to safety departments. In addition, Flight Scanner, offered by Safety Line, offers to automatically identify the factors associated with hazardous situations based on all flight data. Last but not least, Innaxis coordinates the Safe-Clouds.eu research project which develops new data analytic techniques for a variety of airline and air traffic control operational contexts.

As the technology sector moves forward faster than other industries can keep up, the future seems at once both exciting and worrying i.e. issues such as cyber security becomes more and more challenging at a faster and faster rate. The year 2017 has revolutionized various technologies in the aviation and airport industry like that of Blockchain technology, Game of Drones, Augmented Reality, Chatbots, Airline New Distribution Capability and Indoor Positioning Systems (Beacons Technology).[11]

a) **Information Technology in Airports:** The establishment of the Airport Council International[12] (ACI) World Airport Information Technology Standing Committee (AITSC) has had paved way for the development of industrial policy guidelines and positions on issues affecting Information Technology (IT), Airport Automation, Telecommunications infrastructure and related passenger and cargo services at airports, in order to support operational and business processes in and around airports. The AITSC monitors developments in procedures, technologies and policy related to or that will impact Airport IT as well as discusses and examines functions of an airport that could benefit from automation. Also, the Standing Committee actively works to convey information to the airport community on all airport IT related issues, from practical and physical applications to new policy and guidelines. However, the AITSC deals with current issues like the common use self-service devices for passengers, electronic kiosks and other means of information distribution; machine readable travel documents (MRTD); passenger and baggage security (in the context of airport automation); information exchange and interconnection of various non ACI entities.

Airport Council International (ACI) believes that it is important to have a strong position on biometrics with the increase need in securing personal identification. 'The Application of Biometrics at Airports' provides general recommendations on the development and implementation of biometrically enabled programmes for border control, passenger facilitation and staff access control.[13]

b) **Information Technology in Airlines:** In a hyper-competitive environment, with tight margins and increasing regulatory and environmental pressures, airlines have for many years looked to technology to deliver greater operational efficiency. Now digital has ushered in opportunities for creating and delivering differentiated customer experiences that can build loyalty. And in a market place where it's harder than ever to stand out, that's absolutely critical.

Airlines have reached a defining moment.[14] The industry knows that digital will transform their industry.[15]The five key trends that together made Technology Vision and drawing out the most

11. https://www.internationalairportreview.com/article/26374/technology-revolutionise-aviation-2017/
12. Retrieved from http://www.aci.aero/About-ACI/Overview/Standing-Committees/Airports-Information-Technology
13. Annex 17: Security-Safeguarding International Civil Aviation Against Acts of Unlawful Interference, International Civil Aviation Organization (ICAO).
14. For example: For example, Virgin America is a front-runner that has learned to think like the disruptive tech businesses that surround it in Silicon Valley. Virgin has experimented with everything from in-flight social

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relevant implications and manifestations for the global airline industry are; (i) Adoption of automation; (ii) Liquid workforce – flexibility for today's digital demands i.e. sophisticated augmented reality (AR) technologies;[16] (iii) Platform economy – an innovation from the outside, in i.e. airlines will create interface on their proprietary platforms via Application Programming Interface (APIs), extending connections to other participants in the travel economy; (iv) Predictable disruption – digital ecosystems drive the next wave of change i.e. they need to develop greater predictive analytics capabilities that can harness developments outside their industry and map the potential impacts; (v) Digital trust – strengthening customer relationships through ethics and security. But, while this means airlines have little trouble in gathering customer data, they are also somewhat restricted in how they can use it beyond its immediate purpose.

Hence, trends in technology impact all industries, and travel and aviation is no exception. To stay competitive, airlines must use the newest technology to offer customers a better travel experience.[17] Some of the emerging technologies in the airline industry are; connectivity; passenger empowerment; biometrics, sensors and tracking technology, virtual reality, improving security, and cloud solutions.

c) **Information Technology in Air Traffic Control System:** The present air traffic control (ATC) systemhas evolved over several decades from the onethat was first put in place in the 1930's. The operationalcharacteristics and organization of theoriginalsystem were determined largely by thetechnologiesthen available—radio for navigation and air/ground communication, and telephoneand teletype networks for distribution ofinformationamong ATC ground facilities. Newtechnologies—such as Surveillance radar,Air Traffic Control Radar Beacon System(ATCRBS) transponders, microwave relays, andelectronic data processing—were added as demandincreased and the State-of-the-Art progressed after World War II, but they did notchange the essential characteristics of the earliergeneration of air traffic control—a ground based,labour-intensive, and increasingly centralizedsystem.[18]

Advanced data-processing and communication technologies have been introduced to meet the growing demand for ATC services[19] and to provide the controller with the information needed to make the decisions required for the safe and efficient movement of aircraft. However, these technologies were applied largely to improve the acquisition, integration, and display of formation, or to speed its dissemination among ATC facilities. Recently, the automated transmission of certain types of information to pilots has also been introduced, e.g., weather and terminal area briefings. However, the making of ATC decisions and transmission of ATC messages have remained essentially a human function.

The requirements for the ATC system will be affected as and when the air transportation network grows and evolves in response to economic conditions, market forces and changing government regulations. In addition, new technological developments will make possible new functions and modes of operation that would have been impossible with older equipment and resources. The character of the ATC is depended upon the latest technology being used by the air traffic controllers. At times it becomes a budgetary constraint on governments how much to be paid to the service providers.

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networks to rethinking how to buy tickets. It went as far as collaborating with its frequent flyers to secure two gates at Dallas Love Field. 30000 people signed a Change.org petition to allocate these gates to the airline. In return, the airline offered pre-IPO stock optionsto frequent flyers. The collaboration may have been virtual, but the rewards have been very real: revenues of almost US$ 1.5 billion in 2014 and a US$ 306 million initial public offering (IPO)

15. Turbulence ahead: Plotting a course through digital disruption-Technology Vision for Airlines 2016.
16. Ibid
17. Philip Te Hau, http://www.digitalistmag.com/customer-experience/2017/08/14/emerging-technology-in-airline-industry-05226935
18. Chapter 5. Technology and the Future Evolution of the ATC System. (n.d.) In *Air Traffic Control* (pp.67- 77). Retrieved December 14, 2017, from http://www.princeton.edu/~ota/disk3/1982/8202/820207.PDF.
19. These technologies have also found use in the cockpit where RNAV and other systems have provided capabilities that have indirectly affected the ATC system.

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In order to accomplish the goals of safety, efficiency, and cost-effective operation, the present ATC system offers various services to the aviation community like the separation assurance[20]; navigation aids[21]; weather and flight information[22]; traffic management[23]; and landing.[24]These services together comprise an integratedprogram, no part of which can be fully effectivewithout the others. Flight plans must take into account weather and traffic, for instance, traffic must be routed to destinations so that it arrives on time and can be handled at the airportwith a minimum of delay.

Similarly, clearanceshave to be modified so that traffic can be routedaround severe weather or away from bottle-necks that develop in the system. In a practicalsense, the aircrew and ground controllers cooperateas a team using various human and electronic resources to maintain safety and to movetraffic expeditiously. While the ultimate responsibilityfor safety of flight rests with the pilot, heremainsdependent in many ways on data or decisions from the ground. However, the major equipment components that support these ATC facilities are surveillance radar, airborne transponders, navigation aids, computers and communication links.

Cyber Crimes and Aviation Security: The Emerging Legal Issues

Aviation security is mainly classified into two; (i) Airport Security which includes customers, airport property, air traffic controller, cargo and airport operating systems; (ii) Airline Security which includes; passenger, crew, cargo, aircraft, flight management systems, and airline operating systems. The aviation security is important in a manner that the global economic value of aviation industryis estimated to more than 2.2 trillion dollars. However, the said industry is not free from global threats like from hackers and terrorists. The present day innovative advanced information and communication technology has misled the aviation industry a new growing type of threat from cyber space. As the industry relies more on information and communication technology (ICT), it is prone for security breach from hackers and terrorists.

The aviation sector is not immune to the cyber security risks that have been critical issues for all other industries.[25]It isn't just navigation systems that have been subject to cyber-attacks. An attack on the internet in 2006 forced the US Federal Aviation Administration (FAA) to shut downsome of its air traffic control systems in Alaska. In July 2013, an attack led to theshutdown of the passport control systems at the departure terminals at Istanbulairport, causing many flights to be delayed. Finally, an attack that possiblyinvolved malicious hacking and phishing targeted 75 airports in the USA in 2013.These are just a few examples among many more but they justify the needs toprevent such threats that could lead to dramatic consequences.

Today, the ITC has removed the gap between the people (hackers and terrorists) and the devices by which security threat in aviation sector has emerged. One of the major explanations for this new type of threat in this sector is the greater use of computer-based systems: sophisticated air navigation systems, on-board aircraft control and communication systems, airport ground systems including flight information and security screening, day-to-day management systems etc. In the same time, cyber threats have been developed

20. Tracking aircraft in flight, primarily with surveillance radars on the ground and airborne transponders, in order to ensure that adequate separation is maintained and to detect and resolve conflicts as they arise
21. Maintaining a system of defined airways and aids to navigation and establishing procedures for their use.
22. Informing users of the conditions that may be expected along the intended route so they may plan a safe and efficient flight.
23. Processing and comparing the flight plans, distributing flight plans to allow controllers to keep track of intended routes and anticipate potential conflicts, and ensuring the smooth and efficient flow of traffic in order to minimize costly congestion and delays.
24. Service operating airport control towers; instrument landing systems, and other aids that facilitate the movement of air traffic in the vicinity of airports and runways, particularly during peak periods or bad weather that might affect safety or capacity.
25. Duchamp H., Bayram, I., & Korhani, R. (2016, June 30). Cyber-Security, a new challenge for the aviation and automotive industries. Retrieved December 15, 2017, from http://blogs.harvard.edu/cybersecurity/files/2017/01/Cybersecurity-aviation-strategic-report.pdf

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regardless of the industries but in relation with technologies: computer viruses, malicious attacks, etc. Like any other industry, it is possible to consider two types of cyber security breaches i.e. (i) opportunistic – here the goal is to exploit mistakes made by internal users like employees using the IT systems with the purpose of causing inconvenience and nuisance to any entity involved in the aviation ecosystem; and (ii) calculated and premeditatedi.e. it concerns any malicious attacks to disrupt operations or threaten lives. This category is critical as terrorists are fully aware of the potential of technologies and cyber-attacks.

a) **Categories of Cyber Crimes in Aviation Industry:** "Airport security"refers to the techniques and methods used in protecting passengers, staff and aircraft which use the airports from accidental/malicious harm, crime and other threats. Airport threats could be cyber-attack, sabotage, improvised explosives devices (IED), border security, traffic of unauthorized materials and other security threats. However, "airport security" can be breached through cyber-attacks in the following ways[26]:

i. GPS Spoofing and Jamming: Spoofing is an attempt to deceive a GPS receiver by broadcasting counterfeit GPS signals, structured to resemble a set of normal GPS signals, or by rebroadcasting genuine signals captured elsewhere or at a different time.[27] Jamming is applied to knock out the navigation system entirely. Jammers can disrupt civil aviation systems and emergency service communications.
ii. Air Traffic Control (ATC) Hacking: Hackers could gain access to communication between aircraft and ATC centers and send false information to mislead pilots or overwhelm controllers with fake aircraft signals.
iii. Security Threat to Airport Operating Systems: Airport infrastructure supports many different operations that are critical for the efficiency and effectiveness of the air transport system making cyber-security system implementation essential to protect and control those operations. There have been incidents when cyber criminals, hackers have found opportunity to attack airport systems.[28]
iv. Security Threat to Airport Security System: Several potential targets for cyber-attacks within the realm of internal airport operations like; access control and perimeter intrusion systems, radar systems, ground radar, network-enabled baggage systems, supervisory control and data acquisition (SCADA). Airports typically rely on SCADA-type industrial control systems for utilities, baggage systems, and business processes such as facility management. Due to their limited or lack of internet access, SCADA-type systems may appear to be more secure, but they too are vulnerable to cyber threats.

"Airline Security" refers to the techniques and methods used in protecting passengers, staff and aircrafts which use the airports from accidental/malicious harm, crime and other threats. Airline security threats could be by Hijacking, Cargo security, Aircraft Communications Addressing and Report System (ACARS) hacking, sabotage, cyber-attack,etc. However, "airline security" can be breached through cyber-attacks due to the following factors:

i. ACARS Hacking: ACARS hacking happens when hackers take over air traffic control transmissions and give pilots bogus orders. They could create a bogus flight plan update, create bogus weather, create fake message from plane to ground.
ii. Security threat On-board the Aircraft: Security threat on-board aircraft by cyber criminals is a new concern today. With modern days handheld smart digital devices being allowed on-board aircraft, Wi-Fi being made available to passengers, cyber security has become talk of the moment. In May 2015, Chris Roberts, a

26. Sinha, S. K. (2016, November 29). Security Aspects in Aviation Sector. Retrieved December 14, 2017, from https://in.linkedin.com/in/sanjeev-sinha-pmi-pba-5a7b392
27. In 2009, a truck driver managed to accidentally mess with the navigation systems of New Jersey's Newark airport as he drove past on a neighbouring highway.
28. For example – Incident noted in ICAO 12th Air Navigation Conference - Three software engineers were accused of disrupting operations at a new terminal at an airport in June 2011. They worked for a sub-contractor and when they didn't get a pay rise they sabotaged the program code. Check-in services failed 3 days later, and 50 flights were delayed, causing knock-on delays elsewhere.

prominent hacker, told the FBI that he had managed to make an aircraft "climb" and move "sideways" after infiltrating its in-flight entertainment system.

iii. Flight Management System Hacking (FMSH): FMSH too have been a target of cyber-attack. This, and attack on other airline systems have risen recently. An incident as recent as June 21, 2015 when LOT Polish Airlines was forced to cancel 10 flights scheduled to depart from Warsaw's Chopin airport after hackers attacked its ground computer systems. The attack left the company unable to create flight plans for outbound flights, grounding around 1400 passengers.

iv. Remote Hijacking: It is an app that manipulates the Aircraft ACARS, which can give access to the plane's flight management system (FMS). One can communicate with ACARS through hacking the airline's systems or using a special radio.

v. Distributed-denial-of-Service (DDoS): DDoS attacks have grown in popularity to carry out a range of malware injection activities. Within such attacks, hackers utilize botnets of compromised networks to flood air traffic control and other critical systems with traffic, which results in a crash of the platform. Attackers may also ask for a ransom amount from the authorities to prevent disruption of flight management and control systems.

vi. Through Public Interfaces-Smart Phones: Through a Samsung Galaxy and a specially crafted app called Plane Sploit an airplane's computer can be hacked remotely. Another example could be a new theory with Malaysia Airlines flight MH370 vanishing that a framework of malicious codes, triggered by a mobile phone, would have been able to override the aircraft's security software.

vii. Mobile Applications: Most of the airline companies now provide Mobileapplication for airline services. This could be an opportunity for hackers for acyber -attack.

viii. Through Public Interfaces – Websites: Another public interface that could be vulnerable to cyber-attack is websites of airline companies. In a very recent incident (March 2015) it was reported British Airways' air-miles accounts, the coding site GitHub and the work chat service Slack have all been hit in the latest wave of cyber-attacks. User reported their account had been used by someone else to book a hotel room in Spain that their list of transactions showed "ex-gratia" deductions that had wiped out their entire credit, etc.

ix. Electronic Data Exchange Issues: The paper checks and balances that exist within the clerical world are not possible with EDI. While rare, the possibility that data will be intercepted and stolen or altered in transit does exist. Messages also may be deliberately or mistakenly duplicated. This can result in overcharges, wasted resources, and damaged relations between trading partners.

x. GDS/CRS Hacking: There have been incidents in past where hackers have gained access to airlines computer reservation systems. In one of the past incidents, O' BRIEN from Boston, US, without authorization, accessed the computer reservation system at a travel agency by entering through the company's website, and intentionally sending commands cancelling ticketed airline reservations for approximately 60 passengers, thereby causing damage and a loss in excess of $96,000 to the travel agency. The unauthorized intrusion resulted in approximately 60 passengers being stranded at airports during the Christmas holiday season.

xi. Hacking via on-board Wi-Fi systems: The US Government Accountability Office (GAO) report said that modern aircraft that have the ability to access the internet through on-board Wi-Fi systems face the very real threat of being hacked. "A virus or malware planted in websites visited by passengers could provide an opportunity for a malicious attacker to access the IP-connected on-board information system through their infected machines," according to the report.

b) **Legal Mechanism in curbing Cyber Crimes**

i. International Civil Aviation Organization (ICAO): The Chicago Convention 1944 (also known as the Convention on International Civil Aviation), established the ICAO, a specialized agency of the United Nations charged with coordinating and regulating international air travel. The civil aviation at global level is governed by the Convention 1944 along with various international conventions starting from the Warsaw Convention 1944 till the Cape Town Convention, 2001 which were ratified by member States. Annex 17 to

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the Convention on International Civil Aviation speaks of the "security" i.e. safeguarding international civil aviation against acts of unlawful interference but unfortunately the threat posed by cyber-security was left unaddressed until recent times. Recently, the Universal Security Audit Programme commenced the auditing of access controls and related security lapses in ICT systems. This was the first step forward in identifying the potential risks in cyber security.

ii. International Air Transport Association (IATA):IATA has also provided guidelines for cargo security and cyber-security. For cyber-security IATA has put in place a three pillar strategy to address the cyber-security threat. They are; work to understand, define and assess the threats and risk of cyber-attack, and advocacy for appropriate regulation and mechanisms for increased cooperation throughout the industry and with and between Government agencies.

iii. Computer Emergency Response Teams (CERT):CERT is expert group that handle computer security incidents. It focuses on security breach and denial-of-service incidents, providing alerts and awareness campaign and engages in research aimed at improving security systems. The goal of Air CERT is to provide a capability to discern trends and patterns of intruder activity spanning multiple administrative domains.

c) **Cyber-security and Emerging LegalIssues:** Aviation industry provides the safest and the fastest transport system in the globe. Airports are increasingly data driven and rely upon accurate and timely information for efficient operations. However, increased reliance on data and increased integration also increases the risk of malicious cyber-attack that disrupts airport operations. In preserving the efficiency, security and resilience, the stakeholders should seriously consider the cyber threats. To strengthen the cyber-security, propositions made by experts and agencies globally must be adhered. Some of the challenges pertaining to cyber-security are; introduction of strong systematic tests against cyber-threats; critical systems should be tested by external and independent companies that have a real expertise in cyber security; provide high security for critical communication systems; setting up a real cyber-security culture in the critical entities of this sector; assessment and awareness of vulnerabilities; deep understanding of the threats and the risks involved are to be sorted out at a war footing; implement stronger internal policies and plans within the sector; setting up of legal framework by governments in terms of cyber-security; and finally the ICAO, ACI and the IATA must take stringent steps in resolving the cyber breach in aviation sector.

Conclusion

In the present days of globalization, where every State is competing towards economic development through the tools of civil aviation, yet global aviation industry remains a target for adversaries seeking to make a statement or cause substantial loss to person and property. Like many emerging threats, cyber-attacks still loom in the periphery, and are seen more as a stylized fiction than an actual possibility. The development of a stringent cyber-security framework is the need of the hour. The only way to tackle this new and emerging threat is to find a global solution. Every State has to come forward in tracing and tracking the cyber criminals at the root level instead at the fruit level i.e. after occurrence. Cybercrime should not become a "new cold war" nor should result in complete social chaos. If these cyber-security threats are not curbed, one has to re-think over the retaining of airports in opting one among the Conventional Airports or E-Airports or the Intelligent Airports.

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Linguistic Landscaping of "Ghoti" and "Bangal" in West Bengal: A Case of Bilingualism
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Appropriating to the Schoolscape: A Study of Reference of Linguistic Landscape in Dyad Text Construction

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ABSTRACT

Linguistic landscaping (LL) is an intentional activity undertaken by actors in a specific sociocultural and political context for multitudes of purposes such as planning (Itagi & Singh 2002). This proposition implies that in multilingual contexts, LL can take the form of a top-down intervention towards manipulating languages in a space and bottom-up individual's idiosyncratic use of languages towards particular positions and function(s). Schools are vulnerable to both and hence schoolscape offer glimpses of both the forms: the signs and notices placed in the school and pertaining to the school represent the top-down ideologies and language policy in action while the individual actors' language(s) use and multimodal representations in the school space contribute towards their idiosyncratic purposes. In the second case, purposes could include language learning/language awareness/creative multilingual and multimodal expression and affirming/resisting/remaking identities. Hence any investigations of the schoolscape if restricted to a study of visible and long-term written signs in a specific sociolinguistic and cultural context restricts three other aspects: a) construes the etic view of LL without considering the existence of an intentionality of an emic response; b) strictures the presence of other non-represented languages in the school space; c) misrepresents and masks the deep multilingualism in the school and; d) annihilates the learners' efforts and struggles to appropriate ones language capability to ones needs (even if it means to the schoolscape). I believe that investigating the

fourth aspect would make visible the other three as well. Therefore this study examines how learners use the LL as they appropriate their language capabilities to create a text to one language in their school space namely English. 18 pairs of class 8 learners in a government-run Zillah Parishad High School co-constructed a text in English. Their multilingual talk, 'scribblings' based on specific LL and the text that evolved out of the first two formed the data. In this paper we will examine the first two forms of the data. The findings will have implications for teacher education especially in raising teacher awareness to deep multilingualism, learner agency and language ideologies behind language planning and management.

1. INTRODUCTION AND OVERVIEW

Schools are an integral part of the civil society's endeavor to reproduce social and political ideologies and hence are in the center of all linguistic landscaping (LL) activities initiated by actors in the public and the private spaces. Children consciously notice, interpret and construct meaning out of the multilingual and multimodal signage of the 'public' and 'private' spaces in the LL and schoolscape. The materials (languages and other modes) on the signs, posters, and general announcement boards outside the schools, foyers and corridors that are visible to practically anyone and are produced by people with power, represent the *dynamic* 'public' top-down linguistic landscaping while the 'indoors-classroom' signs, graffiti, posters, tables, symbols produced by learners and teachers in the classroom represent, according to Brown (2005) the *manipulated cum activist* 'private' bottom-up linguistic landscaping. Clearly, location, purpose and third-party access and engagement with the sign forms layers of demarcating boundaries between the public and the private in a schoolscape. In the context of this study, the 'public' is understood as the artifacts on 'display' in generally 'accessible and visible' space while the 'private' refers to the space where specific signs from the LL are accessed and drawn upon to create the artifacts that in turn translocate to the public space. Correspondingly, two questions have kindled interest: 1)

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Does the translocation of signages from LL have a pedagogic potency for language learning in the school space? 2) What impact does it have on the agents of the event?

Current research on applicability of LL for language pedagogy investigates how and whether LL can be used for language learning. How can LL be tapped pedagogically for language learning, especially SLA? Would engagement in a critical discourse around languages in the LL impact agency, identity, critical understanding of language ideologies? These explorations are supported by two principles of research in LL. Principle 1, concurs that human agency constantly manipulates the LL either to adhere or resist or adapt or promote the identities as manifested in the LL or to counter/appropriate it or to transform it (Shohamy & Waksman 2009); and Principle 2, claims that for pedagogy, LL heightens critical awareness of language ideologies (Dagenaus, Moore, Sabatier, Lamarre & Armand 2008). This paper aims to contribute to both the strands through its explorations around the pedagogic applicability of LL for language learning. Studies that have engaged with the relevance of LL for pedagogy have been top-down i.e. initiated, orchestrated and sustained by the researchers, thereby portraying an etic view. Practically little research exists on how learners engage with the LL on their own i.e. without teachers' intentional use of LL. This paper aims to contribute to this line of investigation by exploring how signs from the LL of the public space are drawn upon by dyads in their private space of a collaborative task completion in order to create a text.

Three sources of data are examined in this paper: 1) task-specific dyad conversation around 'scribblings' in their rough work; 2) scribblings and graffiti that dyads did to replicate the signs of the LL in the course of their conversations; and 3) discussions with the dyads on their 'scribblings.' In particular, those signs, meanings and explanations used by the dyads and those LL signs that directly are made use of in the writing process have been identified. Specifically the emic views of the dyads are analyzed to understand better the possibilities of employing LL in language learning and to transform pedagogy to be inclusive of learners needs and to their multilanguage

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capabilities. Based on the analysis, the study presents three aspects in which the signs from linguistic landscape (LL) of the 'public' space are drawn upon *naturally* in a 'private' collaborative dialogue over a collaborative writing task in English in an ESL classroom.

In the rest of the paper we discuss some key concepts that guide this school-based linguistic landscaping study: first, a discussion of how the monolingual mindset operates in the *shared* LL; secondly, the notion of public and private spaces; thirdly, a review of studies that have investigated the schoolscape for its pedagogic value; fourthly, the description of the educational context and the schoolscape of the focal school; and finally an overview of the research methods and then the study.

2. Linguistic Landscaping in the School "Space": The Public and the Private Spaces

Linguistic landscaping (in its present participle form) has been argued as an intentional activity undertaken by actors in a specific sociocultural context for specific purposes (Itagi & Singh 2002). Both, the linguistic landscape and the act of linguistic landscaping are part of manipulating the public and the private space. Investigations of LL have a preference for representations of constitutionally and policy-backed literate languages displayed in these spaces. Therefore any investigation of the LL essentially is an acknowledgement of the LL as the 'physical form' of the political ideologies' as visible through language policy and planning or as a sociolinguistic relationship between policy and communities or as a tool that shapes and is constantly shaped by the sociolinguistic scenario of a specific context (Shohamy & Waksman 2009). This preference to study signs vis-à-vis the represented languages we argue has several representational and conceptual issues in a multilingual context. Representationally, 1) it masks the oral plurilingualism of minority languages and preliterate languages and therefore showcases a pseudo linguistic ecological reality of a certain spatial zone and; 2) misrepresents the languaging realities of the landscape given its predisposition to study written signs.

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English as Affirmative Action … But Affirming What? A Study of Interactions in the Affirmative Space

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ABSTRACT

Affirmative Actions (AA) in education are presumed to be interventions that enable access to educational spaces and by extension to quality learning opportunities. The assumption is that these programs would build capabilities that affirm their identities while providing equal opportunities to socio-economic growth and thus, again by extension enable agency. But is that what they do? We begin by placing agency as the terminal goal of AA. We then situate our study within a 'Third space' framework to examine the interactional space in an AA – A space of asymmetrical power and advantage inhabited by the implementer of the AA and a participant in an AA intervention. Therefore the question we ask in this study is: how are structures of dominance produced? Based on the analysis of the interactions we find several power-inflected controls that impact the actors of AA. This paper reports three sets of language use patterns and three modes of establishing dominance, all of which work in tandem to annihilate any possibility of nurturing the capability to act and voice oneself. Based on our study we propose that if AA has to materialize into affirming agency then the possibility of *contestation and mediation* needs to be built into the AA program. How and what changes need to be brought in to humanize each of the stakeholders is the billion dollar question.

Keywords: Language as affirmative action, English, agency in academic space, dehumanize

Introduction

Affirmative Action (AA) is perpetually framed in reparative language as any effort to remedy socially inherent inequalities through concrete measures. Most often AA is framed along one of the two rationales: one, right the wrongs done by dominant groups to specific cultural, ethnic or linguistic groups/communities; two, elevate visibility of otherwise underrepresented groups whose capabilities were never seen as contributing to the society. In

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any case, AA is rationalized either as a mode of repentance or a means for social justice or most often both. Whether AA takes off from the 'backward looking' logic of making up for wrong done in the past or from the 'forward-looking' position of nurturing and cherishing diversity in and for an equitable society, we believe that AA be perceived as a possibility for nurturing agency through its specific policies, programs, procedures and products. This aspiration for agency becomes all the more relevant if the AA is to be conceptualized in education since educational and learning opportunities are recognized as significant factors for a possible positive snow-balling 'multiplier effect' (UN global report on Education, 2016)

With the ideal that any AA should nurture and enable agency we began conceptualizing this narrative case study. The coveted outcomes for the recipient of our AA were two-fold: one to symbolically and operationally have some degree of control over ones' own behavior and over those whose actions in the world affect oneself (Duranti, 2004); and two, attain the capability to mediate and act (Ahearn, 2001). Both the goals we believe are significant given that any learning involves the crucial decision of whether to embark on a painful never-ending process of learning-unlearning-relearning cycles. Nonetheless, we were also aware that for the sense of agency to develop, a pedagogic space with the following two mutually inclusive aspects is pivotal: one, the 'individual' willingness to invest in their learning processes and the availability of the social-cognitive support systems that will feed the 'willingness'. AA should ideally provide a space for both and language in the process IS crucial. Language is both a tool for exhibiting agency and a strategy for attaining agency. English capability was presumed to be *the* object for realizing agency in the study. Thus was born our AA intervention that aimed to improve the recipient's English language capability as the means to nurture agency. What ensues in the following pages is the analytical narration of the language events in the AA intervention between two stakeholders: the implementer and the participant. We situate our study in the theoretical framework of 'Third space' to study the nature of the interactions between the two stakeholders.

In the ensuing sections of the paper we present an *etic*[1] version of the events in the AA intervention. In the first part of the paper, we present the

[1]. This paper does not engage in the *lived realities* of any of the three stake holders: Mx. C the commissioner of the AA; Mx P the participant and Mx I the implementer

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CLINICAL LEGAL EDUCATION IN INDIA: ISSUES AND CHALLENGES

K. Vidyullatha Reddy[♣]

Abstract

Legal education is fundamental to the very foundation of the judicial system of the nation. Professional competence and social responsibility are the two wings to be a successful law professional. Therefore, clinical legal education is mandated in undergraduate law courses to ensure proper practical training to budding lawyers. However, the Bar Council of India mandates the curricula and methodology for conducting these courses. A quality clinical legal education demands hefty financial and trained human resources which may not be easily affordable by many students. The citizens' rights are adversely affected if untrained lawyers are engaged to plead case in the court of law. This demands legal education institutions to equip themselves to provide practical training. This paper substantiates the role of functional legal aid clinics as facilitators of clinical legal education in addition to the traditionally conceived role of providing access to justice alone. This paper outlines the essential components of clinical legal education and the requisite time, methodology, teaching methods and techniques to conduct the same. This paper also explores the challenges and tries to suggest solutions for the long plaguing problem relating to clinical legal education in India.

Keywords: Skills, Mock Structures, Practice, Feedback, Live Cases, Methodology, Legal Aid Clinic, Legal Aid Committee.

Introduction

Advocacy is one of the oldest professions practiced extensively world over even today. Professions as opposed to occupations are governed by ethics and code of conduct as the skill required to practice them are generally high; however the outcome of professional activity is not always dependant on the skill of the professional.[1] This demands greater discipline and accountability among the people who choose professions over occupations. The Bar Council of India (BCI) is the professional council that governs the discipline and accountability aspects of advocates in India. The Advocates Act 1961 prescribes the functions of the Bar Council of India

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1 *Indian Medical Association v. V.P. Shantha* (1995) 6 SCC 651.

(BCI) which include regulating the standards of legal education.[2] The power of the Bar Council of India to regulate legal education is limited to the extent of regulating law degree course which entitles the graduates to enrol as advocate on the roll of the State Bar Council; that is an undergraduate law course only. The postgraduate degree course and research degree course in law are governed by the University Grants Commission (UGC).[3] The UGC governs all aspects of higher education in India including undergraduate law degree courses. The legal education committee of the Bar Council of India undertakes the responsibility of regulating legal education in India on behalf of the council.[4] The 184th Report of the Law Commission of India on Legal Education and Professional Training submitted on December 2002, recommended amendments to be made to the Advocates Act 1961 and the University Grants Commission Act 1956 to co-joint responsibility of BCI and UGC towards the regulation of legal education.UGC members are co-opted to the legal education committee of the Bar Council to ensure coordination between both the legal education regulators. The report deals with challenges faced by legal education in India. It refers to goals of legal education; institutional structure; curriculum / syllabi; evaluation / examination; the difficulty in finding good teachers; technology and connectivity; class room; teaching tools and infrastructure; students; career opportunities and placements; Bar examination / apprenticeship; governance; accreditation and quality arrangement; and financing. Observations made by the National Law School has also been considered in the report. Devising an effective procedure to study various aspects of legal education; teaching methods; training through clinical legal aid and ADR

2 Section 7 of the Advocates Act, 1961: Functions of Bar Council of India-(1) the functions of the Bar Council of India shall be: (h) to promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education and the State Bar Councils.

3 Professional councils are responsible for recognition of courses, promotion of professional institutions and providing grants to undergraduate programs and various awards. The statutory professional councils are: Bar Council of India (BCI):- The Bar Council of India is empowered to make rules to discharge its functions under the Advocates Act 1961. An important rule-making power is with reference to laying down guidelines for the standards of professional conduct and etiquette to be observed by advocates. The Bar Council of India Rules may prescribe for a class or category of person entitled to be enrolled as advocate. The Bar Council of India can also specify the conditions subject to which an advocate must have the right to practice and the circumstances under which a person must be deemed to practice as an advocate in a court, available at https://www.ugc.ac.in/page/professional-councils.aspx#BCI, (visited on March 15, 2018).

4 http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/committees/, (visited on March 15, 2018).The Legal Education Committee consists of five members of the Bar Council of India and five co-opted members to represent the judiciary, the Law Ministry, the University Grants Commission, and academia. This committee makes recommendations to the Bar Council of India on all matters pertaining to legal education in the country.

procedures and establishing special centers for updating and improving the quality of teaching; apprenticeship or training etc.[5]

The Advocates Act 1961 required the candidates who have completed law degree to undergo mandatory apprenticeship with a senior lawyer for a year to be eligible to practice as advocate. This was intended to ensure proper training to the advocates; however, this was amended in the year 1973 which has removed the requirement of mandatory internship. The reasons specified by the amending statute are: firstly, the law course was made three years from the then existing two years and secondly, the law is a second degree course hence it requires prolonged academic persuasion. There is no requirement of mandatory apprenticeship with senior lawyer today, however, almost all aspiring lawyers prefer to join the chambers of senior lawyers to learn professional skills and real life court room practice under the able guidance of experienced senior advocates, rather than practicing on their own directly. This implies the need felt by them in spite of prolonged academic persuasion; however, this differs from pre enrolment apprenticeship as this is post enrolment apprenticeship and the candidate joins the senior lawyers' office at his/her own will and not by compulsion.

The Judges, Bar Council of India and the Law Commission of India at various junctures expressed their concerns regarding lack of proper training of advocates. This led to the constitution of a committee headed by Justice A.M. Ahmadi in the year 1994. The committee recommended that the law graduates should undergo one-year mandatory apprenticeship with a senior lawyer and clear a qualifying bar examination to be eligible as an advocate. The Bar Council of India (Training) Rules, 1995 were notified to implement the recommendations of the committee. These Rules were challenged before the Supreme Court of India in the case of *V. Sudeer v. Bar Council of India*.[6] The Supreme Court held that the Bar Council of India lacked the legislative competence to frame the rules making pre enrolment training mandatory. The Law Commission's Report on Legal Education and Professional Training, recommended adding Clinical Legal education as a compulsory academic exercise in legal education in India, to ensure an effective social outreaching training to prospective advocates. The 266th report of the Law Commission of India submitted in 2017 discussed over concern of the Supreme Court which in *Sanjay Kumar v. State of Bihar*[7] the court has observed that 'few "*arji*", "*farji*" half-baked lawyers under the label of "proxy counsel" abuse and misuse the court process'. The aforementioned report of the Law Commission of India on the Advocates Act 1961

5 The Law Commission of India 184th Report on *"The Legal Education and Professional Training and Proposals for Amendments to the Advocates Act, 1961 and the University Grants Commission Act, 1956"*, December, 2002, pp. 13-14, available at http://lawcommissionofindia.nic.in/reports/184threport-PartI.pdf, (visited on March 15, 2018).

6 1999(3) SCC 176.

7 (2014) 9 SCC 203.

(Regulation of Legal Profession) recommended an amendment into Section 7 of the Advocates Act to empower Bar Council of India to mandate pre-enrolment training and apprenticeship to prospective advocates. The Commission also examined questions relating to standard setting in legal education, skills and values, globalisation, accreditation, and ADR training. A similar line of reasoning is found in the National Knowledge Commission's Report 2009 which proposed suggestions regarding quality of education, rating systems, curriculum development, examination system, legal research, faculty talent, legal education finance, international dimensions and usage of information and communication technology.[8]

Clinical legal education refers to that component of legal education which strives to develop requisite practical skills required for a law graduate and also to develop a sense of responsibility towards the society. This is possible by exposing them to practice real life cases. However, people who have not completed law course are not eligible to be an advocate and hence are barred from representing the clients in the court of law. The Advocates Act, 1961 prescribes the qualifications required to be an advocate which includes completion of a law degree from a recognized university.[9] This bar thus challenges the law schools to devise ways to handle clinical courses in law which are required to be learnt by practice rather than by theoretical discussions or lectures within the four walls of classrooms.

Clinical Legal Education in India

The Bar Council of India Rules 2008[10] mandated all undergraduate law course students whether studying in unitary stream or under the integrated double degree stream to study four courses in clinical legal education. The Bar Council of India also prescribed the methodology for conducting these courses and their evaluation pattern. The mandated four courses are as follows:

- Drafting, Pleading and Conveyance;
- Professional Ethics and Professional Accounting system;
- Alternate Dispute Resolution; and
- Moot court exercise and Internship.

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8 http://lawcommissionofindia.nic.in/reports/Report266.pdf, (visited on March 21, 2018).

9 Section 24: Persons who may be admitted as advocates on a State roll-(1) Subject to the provisions of this Act, and the rules made there under, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfils the following conditions, namely:-(c) he has obtained a degree in law. Section 29: Advocates to be the only recognised class of persons entitled to practise law- Subject to the provisions of this Act and any rules made there under, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates.

10 Part IV of the Bar Council of India Rules (Rules on Legal Education) in schedule-II on academic standards and courses to be studied prescribed the mandatory clinical courses along with other courses, available at http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartItoIII.pdf, (visited on March 21, 2018).

The mandated four courses methodology and evaluation criteria suggested by the bar council is as follows:

Drafting, Pleading and Conveyance: It suggests that "the course will be taught through class instructions and simulation exercises, preferably with the assistance of practising lawyers/retired judges". Therefore, the Bar Council contemplates class teachings followed by simulation exercises preferably with the assistance of practising lawyers/retired judges which means that it is not compulsory but only desirable to have an instructor with practical exposure. The evaluation pattern suggests that students have to be tested on their exercises in this behalf (15 practical exercises in drafting and 15 exercises in conveyance for 90 marks and 10 marks for viva voice).

Professional Ethics and Professional accounting system: It suggests that this course will be taught in association with practising lawyers on the basis of the prescribed materials. It suggests some list of books for the same. The evaluation instructions suggest that student's assessment should be made through case-study, viva-voce, and periodical problem solution besides the written tests.

Alternate Dispute Resolution: It suggests that the course is required to be conducted by Senior Legal Practitioner through simulation and case studies. The course evaluation suggests that student's may be examined in practical exercises for significant part of their evaluation.

Moot Court Exercise and Internship: It splits the course into three components, i.e., (i) Moot Court (at least three moot courts); (ii) Observance of Trial in two cases (one civil and one criminal case and to record the proceedings); and (iii) Interviewing Techniques and Pre-trial Preparations and Internship Diary (observe two interviewing sessions of clients and observe the preparation of documents, court papers and record them in diary). The course evaluation suggests that student's performance shall be evaluated on three components with 30 marks for each component and 10 marks for viva-voce on all three components.

This is the framework provided by the Bar Council of India for conducting the mandated clinical legal courses and their evaluation pattern prevailing as on today in India.

Challenges to Clinical Legal Education

There are two major challenges that this framework puts forth to us. First, is the framework of an ideal clinic for legal education. Does it encompass the whole requirement of clinical legal education? Secondly, is it possible to be implemented in Law colleges in India? An ideal clinical education aims to equip the students with the necessary professional skills which include drafting, argumentative and presentation skills and to apply the acquired knowledge with sense of justice and wisdom. In legal education it can be stated as an education which helps the student to find solutions to

common legal problems. This means that the student should be able to handle a client from the time he approached him with a legal problem till it is decided finally. There can be two situations, one when there is a real problem; and second, when the hypothetical problems are given to the student to analyse it and suggest relevant legal principles attracting such problem. Students have wider opportunity to learn in a better way with real life cases rather than hypothetical problems in view of their accuracy, availability of documents, genuine concern of the client and greater need to find the solution. However, the main challenge faced by law schools is to find live cases for the study of their students since they are barred from appearing in the courts. Although, they may be allowed to observe the proceedings of the court with the permission of the concerning authority in charge of court administration, which is ordinarily not easy to avail at all times. Therefore, the functional legal aid clinics are proven as effective device to help the students to have access to live cases to some extent.

The expected student learning from the clinical legal education does not change whether it is live case or a hypothetical case; however, live cases afford better opportunity to learn than hypothetical cases. So when we were to judge what is the expected learning that should be part of clinical legal education so as to find solution to general legal problems, we find that it should include the ability of the student to analyse and execute the following:

1. ***Client Interviewing and Counselling***

Student should be able to factually investigate the client through probing and seek all relevant information of the case. It should also include the reason, purpose and end sought to be achieved by the client seeking legal recourse, what will he gain if he wins the case, what is the time within which he is seeking the remedy etc. This can be done by giving confidence to the client that this is done to help him in better and legitimate manner. The student requires to have patience to understand the case explained by the client and harmoniously convince him/her that how he will be helped in the matter.

2. ***Possible Remedy/Remedies to the Problem***

There could be one or more than one legal remedies available for the matter in hand or even a compromise could be arrived. The student must possess the knowledge of what remedy suits the clients concern. The pros and cons of each remedy, their costs, and other relevant factors must be analysed and the best suited remedy for the clients concern has to be persuaded.

3. ***Knowing Duties and Responsibilities towards the Client and the Court***

The student should understand the consequences of the failure to discharge his duties and also understand its implication for the clients. The

student should also understand the requirement of being a member of bar association, to have a certificate of practice to file a case, filing in court as advocate for his client, understanding disciplinary actions against erring advocates etc.

4. ***Jurisdiction***

The students should be able to find out the jurisdiction where they can file the case whether it is a court, tribunal, revenue officer or consumer forum etc., the different procedures, different remedies and the time taken in each of these also merit the consideration of the student when they decide on the jurisdiction.

5. ***Court process***

This includes learning the procedures of paying court fees, stamp duty, praying adjournments and engaging senior counsel, if required etc. Besides this the student should also understand the technicality of the process i.e., filing procedure, docket writing procedures, etc.

6. ***Drafting***

The student should be able draft the plaints, complaints, notices and writs etc., required to file the case. It may also include drafting conveyance deeds. Student must possess the knowledge regarding fundamental rules of pleading and conveyancing.

7. ***Responding/ Defence***

The student should be able to draft the defendant/respondents version and be able to assess the implications of the stand taken in defence. Student must possess the knowledge of fundamental rules and principles regarding written statement, set-off, counter claim, plea bargaining and compounding the case etc.

8. ***Preparing Witness***

The student should be able to prepare the witness psychologically and also help him with mannerism and etiquette etc., he should also explain the consequences of depositions made and answers given by the witness and also the punishment for giving wrong evidence etc.

9. ***Collecting Documents***

The student should be able to collect all relevant documents including decisions given by the High Courts and Supreme Court which may operate as precedents to strengthen the case on merit. Relevant documents should be collected and also screened for their reliability and utility for the client.

10. ***Examining Witness***

The student should possess the skills to examine witnesses in the court. He should have understanding to ask the questions in strategical manner, especially during 'examination in chief' and 'cross examination', so that the

relevant information may be extracted from the witnesses for the satisfaction of the court. This requires framing questions, analysing their consequences their relevance and utility to pursue clients cause etc. Presence of mind and cognitive techniques play important role during examination for which the student must undergo few exercises to develop their skill.

11. ***Defending the cause of the client/ advocacy***

The student should be able to present the cause of the client in a convincing manner. This requires proper articulation and eloquence in addition to mannerism and style. The student appearing for defence must have a deep and pervasive knowledge of the facts, law and principles relevant to the matter in defence. Contents of the complaint and allegations alleged therein must be read and understood both in literal as well as practical sense.

12. ***Seeking the Remedy***

The student should be able to pray to the court for grant of remedy sought for by the party, in a polite and professional manner. Student should also possess knowledge about other available remedies and their efficacy and the prayer must contain the remedy that best suits the clients cause and competence of the court.

13. ***Executing the Remedy/ Appeal***

The student should be able understand the process once he obtains a favourable order. It includes filing execution proceedings, claiming possessions with the help of authorities etc. In case of unfavourable order the student should be able to find the recourse such as appeal, review etc. and the procedure thereof.

When we say the above are essential components of clinical legal education it also requires us to examine what should be the methodology and structure of the clinical courses that is required to be designed to encompass these essential abilities.

To begin with one component, i.e., drafting, let us examine the methodology and the challenges in equipping the student with requisite drafting skills. If a teacher teaches essentials of drafting a notice in money recovery suit, the teacher can address 100 students in a class at once. Engaging a teacher/practicing advocate/judge for an hour per academic day may satisfactorily serve the purpose of teaching. If a teacher tries to make the student to draft it and correct it and then inform the students of their fault and then asks the student to re do it and then corrects it again and informs them they can learn better. Skills cannot be acquired through lecture method only. The other available teaching methods and modern techniques founding on ideology of practical training or problem based learning i.e., Socratic Method; Mock Trial; Case Study; Moot Court and Legal Aid Clinic. But, they demand time, money and trained human resources. The more you make

them to practice the result would definitely be better in terms of knowledge and skills both. If you make the student to draft notice ten times and each time you guide him and give feedback, then the opportunity to equip the skill will be far better. This may require at least 100 hours dedicated teaching/assignment time to train 100 students. So to put it shortly you need to engage the teacher/practicing advocate/judge for 100 hours to train 100 students on how to draft a notice. This means it is 100 times expensive and demands 100 times more time. This is the main challenge in clinical legal education; it consumes a lot of time of the trainer. The rigorousness and the efforts made by the teacher are invisible workload as it appears to be an exercise on drafting a notice which can be met in theoretical outfit through teaching within an hour. However, it has to be appreciated that theoretical learning does not provide legally designed outcome rather it leaves the student deficient in learning the requisite skill. In the same way all components require to be handled; for example, in examination of witness, let there be audio visual recording and student be given feedback each time for improvement. If it takes one hour to teach the essentials of examination of witness to 100 students; it takes 100 hours to train 100 students on cross examination practically and asking them to redo and learn, relearn through practice and feedback mode.

The second challenge is to implement such rigorousness in terms of time and human resource expenses in the law schools which in turn will increase the per student cost of legal education. One fair criticism on national law schools which I have come across from a judge is as follows: "what is so great about legal education in national law schools? You teach the same subjects like in other law colleges but with a slightly changed methodology". If methodology is important for national law schools and those of us who believe that they have enhanced the quality of legal education, then why should the changed methodology be limited to non-clinical courses only? If we cannot invest, then who else will invest? is the pertinent question before national law schools to be considered for deliberation and adequate answer thereof. The other concern is its relevance for the students who intend to take up soliciting and do not intend to take up advocacy.

The third challenge is that if there is no functional legal aid clinic creating an authentic mock as an alternative. Making legal aid clinics functional requires huge investment in terms of finances and human resources. When we compare clinical education with other professional courses, especially medical course, where it is very successful we realize that medical colleges invest heavily in running a teaching hospital and in turn the cost of medical education is also very high. That kind of investment for the resources are not incurred in legal education. When we invest in legal aid clinics they can run successfully. As of now that culture is not very much prevalent in legal education institutions in India. Even if we invest heavily in creating a functional legal aid clinic the other problem is the student's ability

to understand the local language; however, this problem cannot be a major hindrance as much as creating a functional legal aid clinic. The other challenges that a functional legal aid clinic might pose are: first, it might take away the business of the advocates; and secondly, gaining people's confidence in them.

People do not repose much confidence in legal aid clinics as they have not been very successful by and large so far. They do not distinguish between some form of community service and legal service. The National Legal Services Authority has notified the Legal Services Clinics Regulations in the year 2011, which also authorises the legal aid clinics to handle certain community service driven initiatives.[11] If people who approach legal aid clinic are not provided with the service which they view as legal aid their faith may further diminish and gaining their confidence may turn illusive. So this initiative helps to make the legal aid clinics functional to some extent. These regulations are notified by the National Legal Services Authority in exercise of its powers under the Legal Services Authorities Act 1987.[12]

The problem with the functioning of legal aid clinics under the Legal Services Authorities Act 1987 is that the objective of the Act is to ensure free legal aid to all sections of the society,[13] but the purpose of legal aid clinics of law colleges will be in addition to it to train the students. So, thus

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11 National Legal Services Authority (Legal Services Clinics) Regulations, 2011, Regulation 9: Legal services in the legal aid clinic-(1) Legal services rendered at the legal aid clinic shall be wide ranging in nature. (2) The legal aid clinic shall work like a single-window facility for helping the disadvantaged people to solve their legal problems whenever needed. (3) Besides legal advice, other services like preparing applications for job card under the Mahatma Gandhi National Rural Employment Guarantee (MGNREG) Scheme, identity card for different government purposes, liaison with the government offices and public authorities, helping the common people who come to the clinic for solving their problems with the government officials, authorities and other institutions also shall be part of the legal services in the legal services clinic: Provided that the legal services clinic shall provide assistance by giving initial advice on a problem, assistance in drafting representations and notices, filling up of forms for the various benefits available under different government schemes, public distribution system and other social security schemes: Provided further that, in appropriate cases, the legal services sought for by the applicants in the legal services clinic shall be referred to the legal services institutions for taking further action. These regulations are available at https://nalsa.gov.in/sites/default/files/document/NALSA%20LEGAL%20AID%20CLINICS%20REGULATIONS,%202011.pdf, (visited on March 18, 2018).

12 Section 29(1) The Central Authority may, by notification, make regulations not inconsistent with the provisions of this Act and the rules made there under, to provide for all matters for which provision is necessary or expedient for the purposes of giving effect to the provisions of this Act.(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-(a) the powers and functions of the Supreme Court Legal Services Committee under sub-section (1) of section 3A;(b) the terms of office and other conditions relating thereto, of the members and Secretary of the Supreme Court Legal Services Committee under sub-section (4) of section 3A.

13 An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok-Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.

far there have not been many efforts to make legal aid clinics functional to ensure proper clinical legal education. Constitution of India intends that states should provide free legal aid to ensure equal justice to citizens,[14] rather than concern for clinical legal education, though free legal aid is not spelt out anywhere so far. This created an impression among judges and legal educators that legal aid clinics are meant for ensuring access to justice, hence, the clinical legal education did not get the requisite impetus from the legal aid clinics. However, Bar Council of India mandates setting up of a legal aid clinic in every legal education institution.[15]

The challenges in running the legal aid clinics and the expenses involved in running it made the law colleges to resort to authentic mock structures created which include asking students to do mooting, internship with advocates, observance of court proceedings, taught courses on drafting with simulation exercises etc. in lieu of functional legal aid clinics.

Conclusion

Does functional legal aid clinic do away with the need for authentic mock structures? Does it help to provide all the students with live cases? Does it take away the business of the advocates? Are other prominent questions to be answered. The other problem associated with legal aid clinics is to see whether the law teachers supervising the legal aid clinics are eligible and possess relevant experience to practice as advocate; if not, then how far does the clinical legal education remain really practical and to ensure proper practical guidance are further challenges. The recommendations of the Law Commission of India to appoint adjunct teachers from lawyers and retired judges on part time basis may help to cope up the challenges of professionally trained teachers to run legal aid clinic in law schools. The additional time required for students to undertake clinical assignments need to be considered pragmatically and consequently, alternative time schedule is to be prepared for execution and implementation of the curricula so designed.

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14 Article 39A of the Constitution of India reads as follows: 39A Equal justice and free legal aid - The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

15 Part-IV of the Bar Council of India Rules (Rules on Legal Education) in schedule-III on Minimum infrastructural facilities required in a Centre of Legal Education for applying permission to run law courses with affiliation from an Indian University mandated at section11 reads as follows: 11. Legal Aid Centre: Each institution shall establish and run a Legal Aid Clinic under the supervision of a Senior Faculty Member who may administer the Clinic run by the Final year students of the Institution in cooperation with the Legal Aid Authorities with list of voluntary lawyers and other Non-Government Organizations engaged in this regard in the locality generally from which the student community of the Institution, hail from, available at http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartItoIII.pdf, (visited on March 18, 2018).

Therefore, real solution for a proper clinical legal education lies in (a) investing heavily in legal aid clinics in terms of finances and human resources to make them functional within the law university or college premises; (b) providing institutional support to the legal aid clinics with alternate mock structures and to allocate time and resources sufficiently to help in necessary skills development; (c) engagement of retired judges and practicing advocates as clinical course instructors or allow clinical teachers to practice actively; and (d) to provide sufficient time or rather whole of final year for the students to undertake clinical activities. Hence, we need to fine tune our clinical courses methodology and their evaluation pattern more than their content to make it more practical oriented.

While the above solutions suggested require structural changes and long term measures we need to look at the possible solutions which can be implemented in the existing national law schools model for authentically conducting the clinical courses. The solution lies in taking the following measures (i) appointing four clinical course teachers/trainers specifically for each of the course specified by the bar council and do not entrust them with any other assignment (ii) classes have to be split into small groups i.e. a class of sixty may be split into three or four groups. This provides more time and opportunity to discuss and train each member of the group effectively by the teacher/trainer for each clinical course (iii) there must be at least two practicing advocates/retired judges employed in each law school to help the trainers and the students in each group (iv) case documents must be archived with the help of judiciary or advocates to provide authentic details (v) law school faculty should be motivated to help the groups on theoretical aspects of the subject and provide guidance on the cases they picked if required (vi) trainer should give instructions followed by assignments and ask the student to practice and provide feedback regularly on components such as drafting, trial advocacy; case preparation etc. so that students get abundant chance to practice and develop the skills and (vii) allot class hours for the class groups and provide for sufficient time in the timetable as per the course requirement. These measures might certainly help in enhancing the quality of conducting clinical courses.

The above measures will certainly help in effectively conducting the three clinical courses i.e. (i) drafting, pleading and conveyance, (ii) Moot court exercise and Internship and (iii) Alternate Dispute Resolution. These may not be successful for the course on Professional Ethics and Professional Accounting system which is more in the nature of a taught course and may require to be reconsidered as a clinical course by the Bar Council of India.

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FORM – IV

Statement Ownership and other particulars about

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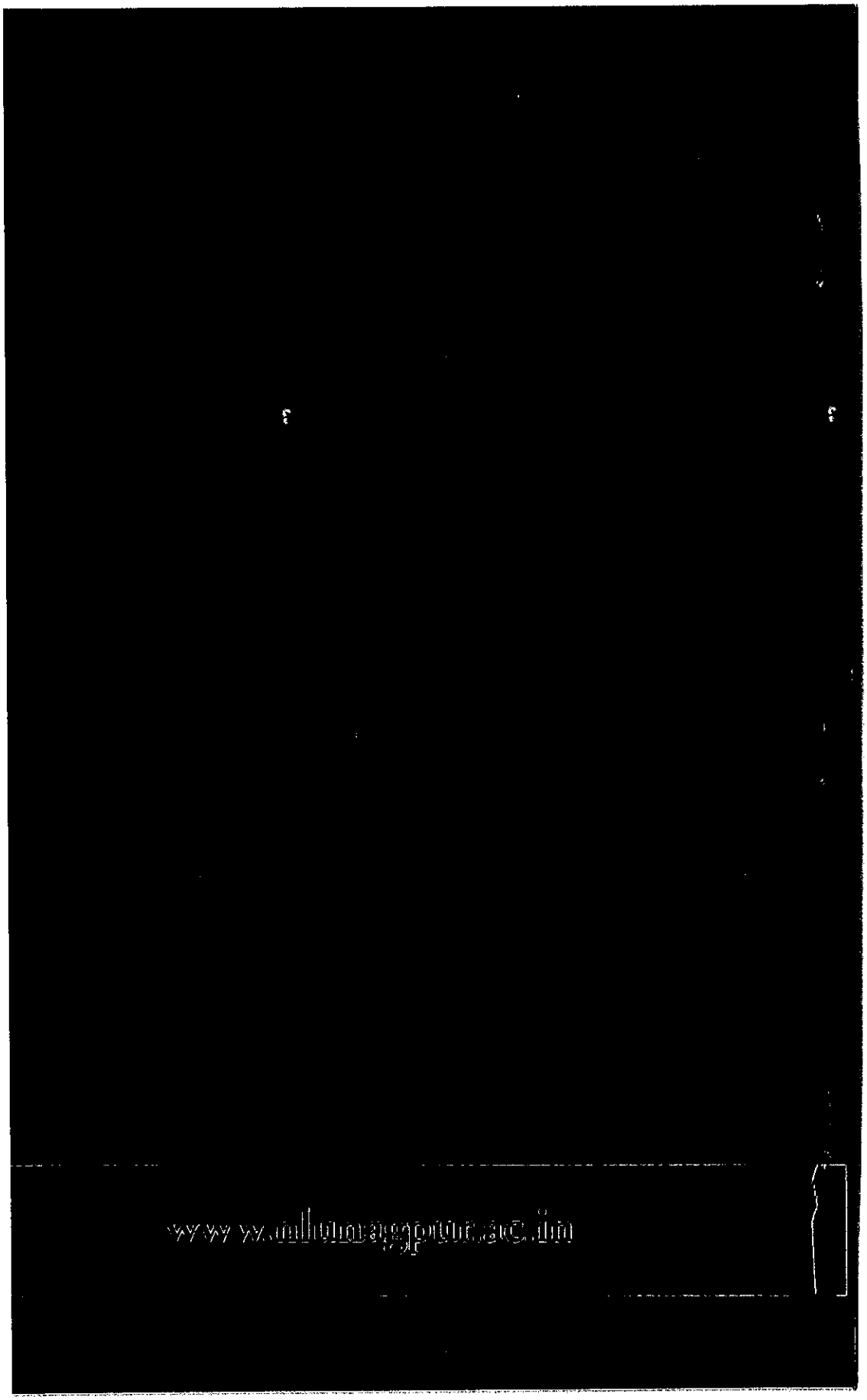
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I, Dr. Naval Kishor Manohar Sakarkar hereby declare that the particulars given above are true to the best of my knowledge and belief.

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IMPORTANCE OF EQUITY INVESTMENT CULTURE IN THE DEVELOPMENT OF AN ECONOMY

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ABSTRACT:

The sociologists commonly say that every person on this planet is same which is partially true. Quite often we come across people with brilliant intelligent quotient and innovations that are hailed from developing nations. Based on various developmental criteria, United Nations has officially divided the globe into developed and developing nations. When people with high intelligence and innovativeness are born in the so called developing nations, still what makes them not to be on par with developed nations?, why people with high IQ levels and innovativeness want to migrate to those nations instead of staying back in their own nations? The answer lies in the equity investment culture of a nation. This paper aims to study how the equity investment culture is dividing the globe into developed and developing economies and why equity culture is to be promoted in every nation for the purpose of developing their respective economies.

Key Words: Investment, Equity Investment Culture, Economic Development

INTRODUCTION:

EMERGENCE OF EQUITY CULTURE

Modern economies are heavily dependent on the corporate form of doing business. The scale of modern commercial activity, once it goes beyond the individual store and workshop, increasingly demands capital beyond the resources of most individual entrepreneurs. Although the capital needs could in some cases be met by partnership, the partnership form has proved rather inflexible and is used primarily by very small enterprises and by the professions. The use of companies to pool large sums of capital and therefore to raise capital for large new commercial ventures has been increasingly common since the Dutch and English East India companies were organized at the beginning of the seventeenth century. By the twentieth century corporations had become the dominant organizational vehicle for commercial ventures almost without exception throughout the world. Initially, these corporations have borrowed funds from others. But, they are having two main limitations:1. Borrowed funds have to be repaid within limited period and 2. Irrespective of the profitability, interest is to be paid on them. The corporations were looking for a permanent source of capital on which they are under no compulsion to pay annual interest. As a result, they started issuing new class of securities called equity shares (Kenneth W Dam, 2006).

Features of Equity Shares: Though Equity Share is a financial instrument, in every nation in which it is allowed to offer to general public, it is governed by Laws of the respective nations. There may be some differences in legal regulations; the following features are common across the globe.

1. Equity Shareholders are eligible to receive part of profit called dividend only after every other security holder received his due

2. Equity Shareholders may get dividend only when the company is in profits and the company feels so. In the case of loss, they will not get any dividend.

3. It is only equity shareholders who are eligible to elect the Board of Directors and cast their vote in all other occasions.

Why individuals invest on Equity Shares?

Generally, investors who are investing their funds for longer duration, look for capital appreciation. Companies which are growing in business size prefer not to distribute the dividends to shareholders. They rather, re-invest the profit in their business itself. As long as the company is able to generate better profits, the investor will be happy, as his capital is appreciated and hence the share value of the company in the market will also appreciate and in general, the return due to capital appreciation is higher than any other alternative.

The above argument is well substantiated by Thomas R.(2003) when he conducted research on comparing returns on equity shares, gold and bonds of USA, England and China and concluded that for any interval of 7 years, equity shares have outperformed all other assets.

Generally speaking, investors will not invest their entire funds on one single class of securities. They always create a portfolio of assets keeping in mind of their requirements, returns and safety. Mostly, certain amounts of funds are invested on Bank Deposits and other liquid assets by the investors. At times, the returns generated by these financial assets are lesser than inflation rate. Hence to match with inflation rate and to earn a positive return on their overall portfolio, investors are looking for an asset that is expected to generate a higher return than inflation and are investing on equity shares in attaining positive return on overall portfolio.

Some investors who have limited funds with them which are not sufficient to buy land or house are often investing their funds on equity shares as an alternative. Some class of investors who are having physical assets like land and/or house are also investing on equity shares as an alternative asset. In nation like India, Income tax exemption is offered to the investors who are investing on equity oriented securities. As a result, a good number of investors are investing on them (Basu.D, 2012).

Klinger (2009) has observed that some investors have made investment as their full time profession. He further noticed that a minimum of 60% of their investments are made on equity shares irrespective of stock market conditions. Some people who are habituated gamblers and punters on betting are also found as equity investors. But, they are found to be investing on equity shares only for a very less period of time. Hence, they are speculating more on the prices of the share than acting as long term investors.

Another interesting reason for equity investment by individuals is identified by Mathew S (2009). He found that some are investing on equity shares as they feel equity investment is fun and exciting. He stated that a majority of these sort of investors are influenced by the returns earned by their friends and other known persons. He further stated that these people are having similar mindset of those who buy lottery occasionally and these classes of investors are totally different from speculators and gamblers.

It is common that corporate may not pay dividend for a longer time due to growth of business and requirement of funds to propel the growth. But after some period of time, the corporate will have enough of reserves to pay regular dividends. The investors who are need of regular annual income tend to invest on equity shares of this type of corporate (Samuelson R, 2008)

Why equity culture is to be promoted?

It is an established fact that a nation cannot prosper if it does not develop industries. The most essential element of promoting any industry is to make the capital available. Most of the nations in the world are finding it difficult to arrange the necessary funds on their own to start industries as they are already in deficit budget. In some nations, the respective governments have promoted companies by issuing share to public and in other nations; the governments encouraged the private sector to do the same. This has led to economic development in their nations.

The nations, in which equity culture is existing for long have benefited with better industrialization which, in turn helped their economies to prosper. The following table is presented as an example of how industrialization helped various nations to have better Gross Domestic Product (GDP)

TABLE-1
Population and GDP Ranks of Select Nations

Rank	Country	Companies	Rank by population	GDP Rank
1	Unites States of America	132	3	1
2	China	73	1	2
3	Japan	68	10	4
	France	32	21	7
4	Germany	32	16	5
6	United Kingdom	26	22	9
7	Switzerland	15	95	31
8	South Korea	13	25	12
9	Netherlands	12	61	21

10	Canada	11	35	14
	Italy	9	23	10
11	Australia	9	52	17
	Brazil	8	5	8
	India	8	2	3
13	Spain	8	28	13
16	Russia	7	9	6
17	Taiwan	6	51	32

Source: http://en.wikipedia.org/wiki/List_of_countries_by_GDP_%28PPP%29

From the above table, one can notice that Switzerland, which is ranked 95 on the basis of population, is ranked 31 on the basis of GDP. The reason is clearly visible from the about table itself as one can notice that out of Fortune Global 500 companies, 15 are from this small nation. Another small nation Netherlands, which is ranked 61 on the bass of population, is ranked 21st largest economy again for the same reason. It has 12 Fortune 500 companies. Germany and France are ranked 16 and 21 respectively on the basis of population, but ranked 5 and 7 largest economies in the due to their 32 Fortune 500 companies each..

World's 1st and 2nd largest populated nations, China and India are ranked 2nd and 3rd world's largest economies respectively. In the case of China, it has 73 Fortune 500 companies. Hence its rank as world's 2nd largest economy is justifiable. But, in the case of India, though it is ranked as 3rd largest economy in the world, it can be attributed predominantly to its status as world's II largest populated nation. It has only 8 out of Fortune Global 500 companies.

On answering the question whether equity culture helps an economy to grow, one can cite the research findings of Kiron P (2008), who argued that it is the equity culture that made USA a better economy than Russia. He contended that on technology front, Russia is not an inferior nation in many areas. They were the first to send a human being into space and so many scientists have hailed from Russia. But, they could not start any business. In Russia, other than Government no private person was allowed to do business. This killed the entrepreneurial

aspirations of many. On the other hand, USA has been encouraging its citizens to be entrepreneurs. The equity culture of USA is helping those prospective entrepreneurs to find Venture Capitalists and Private Equity Funds to set up their ventures.

If equity culture is strong in a nation, then the domestic equity investors will work as a cushion when foreign investors withdrew their funds. There are strong evidences in support of this point. During the late 1990s, there was a capital flight from East Asian Nations, which were till that time called as Asian Tigers. The sudden withdrawal of funds by the foreign investors from these nations, send them into severe financial crisis (Osaka K, 2004). During the recent economic recession, most of the Foreign Institutional Investors (FIIs) have sold the shares of Indian companies, though most of the companies have continued to put up better profits, the FIIs were forced to sell the Indian company shares to book profit to offset the loses they incurred on other the investments made in other nations. This forced the Indian stock markets to lose their Market Capitalisation (which the product of number of shares issued by a company and its market price) by around 70%. As the size of domestic equity investors is negligible when compared with FIIs and hence they could not arrest the fall of the stock market (Suryanarana Y.M, 2012).

It is true that a company that invents a new technology would like to reap the benefits for a long time. If they sell their technology, they will be getting money only once but not for an eternal period. Hence, they would like to sell the technology in exchange of shares so that, they will be able to get eternal returns. There are so many such examples across the globe, where the companies that are low on technology, but having huge market potentiality like India, benefited in terms of technology transfer in exchange of equity shares (Brian C.L, 2009).

If the equity culture in a nation does not exist, then Government of that nation has to promote the business on its own. Often, the developing nations barrow funds from international agencies to promote the business. This proved as a costly affair in the long run in terms of negative balance of payments (Balance of payments is the difference between inflows and out flows of a nation). India solved this problem by allowing Foreign Direct Investment (FDI) in most of the sectors. As 100% FDI is not allowed in some sectors like civil aviation, insurance and others, some domestic companies ventured with them. If these companies would like to expand in future, it will be easier to them only if the equity culture is properly nurtured.

EQUITY INVESTMENT TRENDS

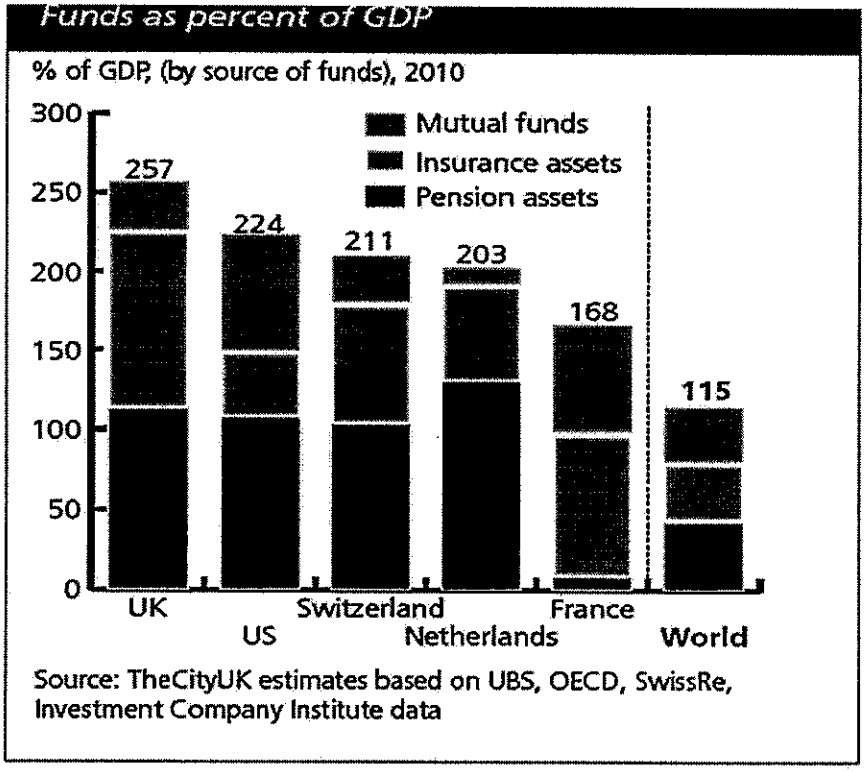
As there is no specific data available on how many persons in this world are investing directly on equity shares and how many persons are taking the help of Investment Companies. But from some sources like Securities and Exchange Board of India (SEBI), it is found that around 27% of global investors are directly investing on equity shares and the rest are investing through Investment Companies.

Equity Investment through Investment Companies

A large number of investors in this world are taking the help of various Mutual Fund, Insurance and Pension Fund which together known as Conventional Asset Management Companies while making investments on equity shares as they feel that their funds are better managed by the Fund Managers of the Investment Companies.

Graph-1

Proportion of Conventional Asset Management Companies to GDP

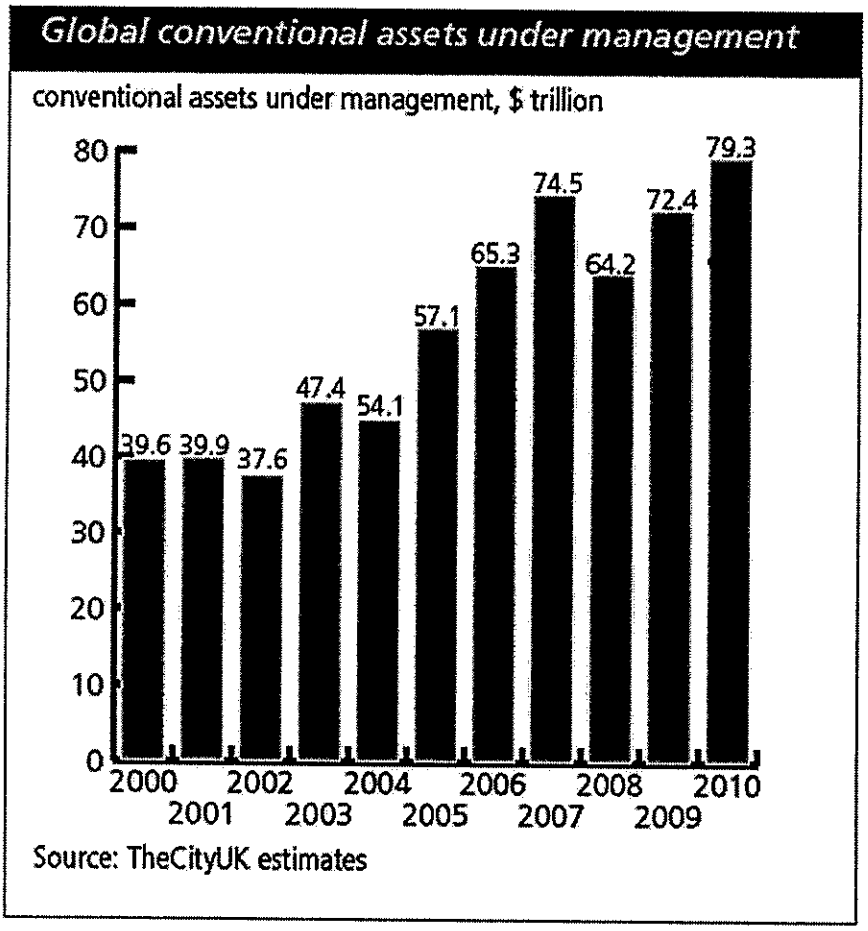


From the above graph, it is quite evident that the size of all conventional assets put together is 115% when compared with the size of world GDP. In that Mutual Fund size is around 45% of world GDP and Insurance and Pension Funds are around 35% each of world GDP. These figures are much higher for all developed nations except France, where the size of Mutual Fund

alone is more than 100% of GDP. In the case of France it is Insurance whose size is close to its GDP.

Graph-2

Size of Global Conventional Assets under Management

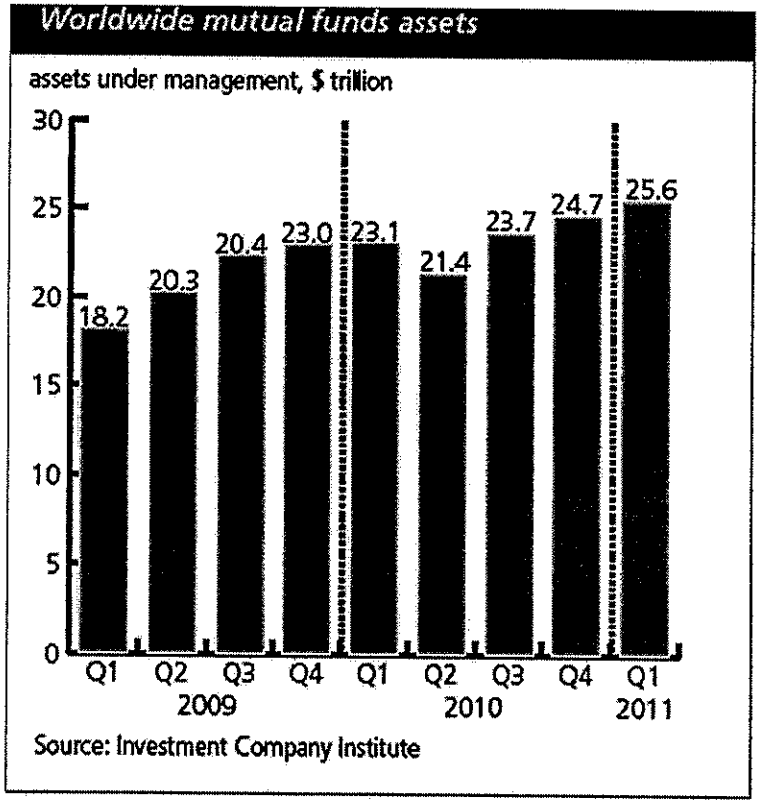


The above graph shows the raising importance of Conventional Assets Management in terms of their growing size. They have been raising continuously from 39.6 Trillion US Dollars in the year 2000 to 74.5 Trillion US Dollars in the year 2007. Due to global economic recession, there is a slump in its size in the year 2008 to 64.2 Trillion US Dollars, but this figure again rose

to 79.3 Trillion US Dollars by the end of year 2010 which was greater than the earlier peak figures of year 2007.

Graph-3

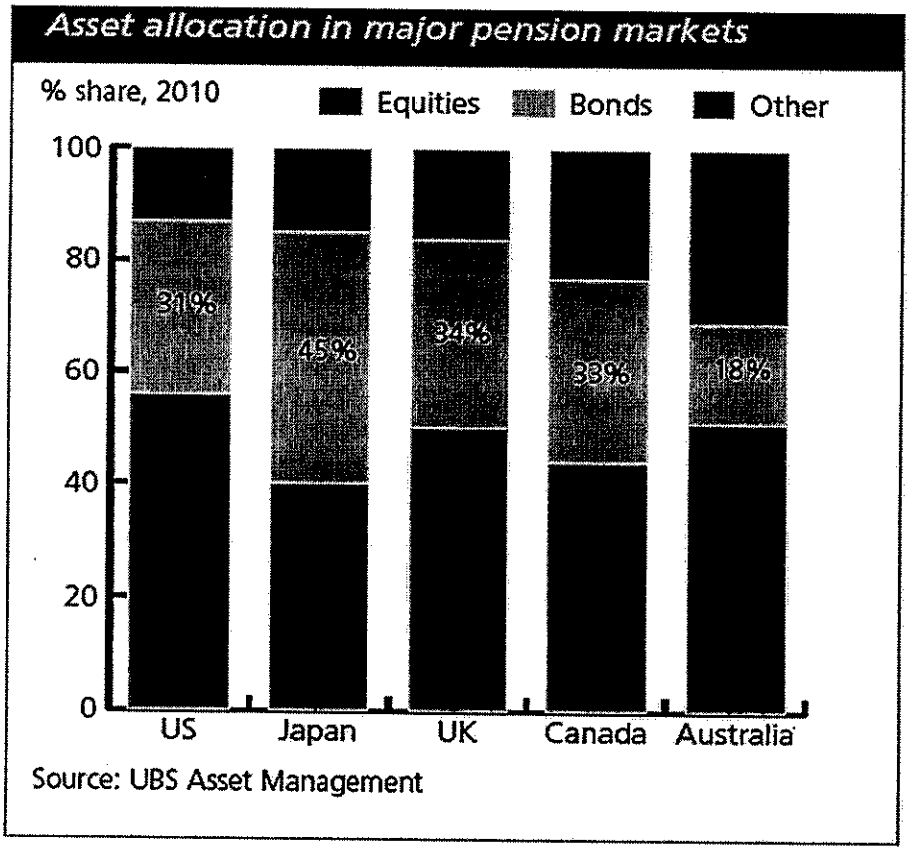
Worldwide Mutual Fund Assets under Management



Mutual Funds are collective investment schemes in which the Mutual Fund companies collect funds from investors and invest them on a range of portfolios which include equity shares and other securities. As per the statistics of Investment Company Institue, USA 80% of the funds are invested on equity shares by the Mutual Fund companies. From the above graph, one can notice the investments made on Mutual Funds in each quarter is continuously increasing from 18.2 Trillion US Dollars in the first quarter of 2009 to 25.6 Trillion US Dollars in the first quarter of 2011 except for the second quarter or 2010, in which, 21.4 Trillion US Dollars were invested.

Graph-4

Asset Structure of Pension Funds



Pension Funds which collect funds from investors during their days of earnings and invest them on various securities to provide pension to its investors during their retirement time are playing a vital role in economy as in most of the nations, it is functioned in the form a social security measure. It can be seen from the above graph that, in US, Uk and Australia the proportion of pension funds invested on equity is either 50% or above. Even in nations like Japan and Canada which are relatively conservative economies, the Pension Funds have invested 40% and 44% respectively on equity shares. One can further observe that except in Japan, in every other nation mentioned in the graph, the proportion of investment on equity shares is highest than Debt and other Securities. Even for Japan, the proportion of equity investment (40%) is slightly lesser than that of Debt (45%). The fact that these figure are for the year 2010, which is two

years after the severe global economic recession that took place in 2007 and 2008 shows the confidence of Pension Fund Managers on the potentiality of equity shares.

Insurance Companies is the last of the Conventional Asset Management Companies, which collect premiums from investors and apart from offering them insurance coverage, a large amount of their funds are invested on various Securities in the Market.

Unit Linked Insurance Plan (ULIP) is the most popular investment product offered by Insurance Companies across the globe. In an ULIP, the premium amount (after deducting Mortality and Administrative charges) is invested on different Securities. The ULIP investors can choose equity based, debt based or combination of Debt and Equity based schemes. The performance of these schemes will depend on the Capital Market (a market meant for Debt, Equity and other long term products).

Table-2

Asset Allocation of Global Insurance Companies (in%)

	Bonds		**Equities**	
Nation	2002	2012	2002	2012
Australia	41	30	41	53
Canada	53	51	13	26
Euro area	44	46	14	23
Belgium	52	53	14	14
France	59	52	14	18
Germany	15	10	14	20
India	48	44	28	33
Italy	58	58	23	32
Netherlands	23	37	21	33
Spain	52	58	14	14
Japan	32	52	21	24

Korea	14	46	14	24
Singapore	27	55	31	32
Sweden	52	49	33	46
Switzerland	53	43	14	28
United Kingdom	40	41	43	33
United States	62	56	16	24
Average	43	46	22	28

Source: Insurance Regulatory and Development Authority, India

Going by the above table, Only Insurance companies from United Kingdom have reduced their exposure on equity from 43% in the year 2002 to 33% in 2012. Rest all companies from the remaining nations that are listed above have witnessed a rise on equity exposure. As a result, the average exposure on equity rose from 22% in year 2002 to 28% in the year 2012. Another point that one can notice is barring Australia and Sweden, rest all nations' insurance companies have invested less than 40% on equity shares. Those two nations have invested 53% and 46% on equity shares in the year 2012.

CONCLUSION

It is evident form the above that either absence or low level of equity investment culture of a nation will kill the innovative thoughts of individuals and as a result some of the best ideas will die before they even take birth as individuals do not see any incentives for coming out with wonderful business ideas. Instead, if a nation can create and develop equity investment culture, then it automatically encourages individuals to bring out their new and innovative business ideas as they know that people are willing to back their ideas by making investments. After all, it is the private sector companies that have created both large scale employment as well as wealth creation compared with public sector.

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Preferences of Women Investors in an Emerging Market

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Abstract: *The proportion of working women is increasing in emerging markets since last decade or so. This socio economic change has created new class of investors called women investors. As a result a need arises for the business organizations which are offering a range of investment products to know what influences women to make an investment decision. To answer this question, a research survey is conducted in National Capital Region (NCR) in India among 1500 women investors. Questionnaires were used to get the data from the respondents and Multivariate Data Analysis Techniques are used to analyze the data. One of the most important implications of the results is that the investment industry should not treat investors as one homogeneous group; therefore, men and women as investors should be treated as separate market niches, each with its own needs and requiring targeted marketing strategies. Investment companies and financial service marketers should design investment programs to respond to the particular needs of women investors, men investors, investors with particular education and age levels, wealthy investors, and expatriate investors.*

Key words*: Behavioral Finance, Emerging Market, Investment Products, Risk tolerance, Gender Difference.*

1. Introduction

Individual investors expected to behave rationally as per modern economics. Unfortunately every investor is not behaving rationally (Barber and Odean, 2001). The fact that the collective behavior of individual investor is affecting the behavior of stock markets worldwide has paved the path for new domain of research called "behavioral finance". It has taken so many behavioral aspects of psychology such as belief, attitude, perception and deviation of human behavior from rational and justified behavior into the area of investment decisions. Differences in investment decision making between men and women is a classic example for such deviation from rational behavior. Psychological research demonstrates that in areas such as financial decision making, women have different outlook and preferences than men (Schumell, 1996).

Everywhere in the world the proportion of working women is on the increasing trend. It is combined with longevity and improved financial position is making them a good and separate segment of investors which no investment company can omit (Melia, 1996). In an emerging market like India, women employment participation grew up by more than 30% in the last decade. In certain professions like medical practitioners and in teaching profession they have almost equal proportion with men. The findings based on a survey1 of 2000 women (half of them working) revealed that income in working women households is 19 percent higher than non-working women

households. The average household expenditure of working women households was also 15 percent higher than non-working women households, reflecting the fact that part of the increase in disposable income also goes towards savings and investments. Women investors thus form a large and growing market. Of late there is rapid increase in the number of women professional investors. They even started occupying key positions in institutional investment organizations (Graham *et al.*, 2002; Krishnamoorthy, 2005). In addition, women investors account for more and more of the personal investing (Kover, 1999). Given, the much higher presence of women in both professional and personal investing, it is imperative to understand the role of gender in investment decision making process (IDM). This paper unfolds the factors affecting the investment decision making of women. It further finds out to what extent each of the factor causing the decision of women.

2. Review of Literature

In international literature, increasing attention has been given to psychological factors that lead to common investment practices in general, and gender differences in investment practices in particular. Existing research on the gender differences in investment decision making put forth two facts: (i) female investors appear to be more risk averse, and (ii) to have less confidence in their investment decisions, than male investors in equivalent circumstances. Here, we provide a highly summarized review of a few but probably some of the most relevant and important ones from the perspective of the present study.

2.1 Gender Differences in Investment Risk Aversion

There is considerable evidence that men and women have different attitudes toward risk. From survey responses of 5200 men and 6400 women, Barsky *et al.*, (1997) concluded that women are more risk-averse than men. Analyzing off-track betting slips for 2000 men and 2000 women, Bruce and Johnson (1994) concluded that men take larger risks than women although they found no evidence of differences in performance. Jianakoplos and Bernasek (1998) reported that roughly 60 percent of female respondents to the 1989 Survey of Consumer Finances, but only 40 percent of the men, were not willing to take any financial risks. Karabenick and Addy (1979), Sorrentino *et al.*, (1992), and Zinkhan and Karande (1991) observed that men have riskier preferences than women and tilt their portfolios toward higher betas and smaller stocks (Lewellen *et al.*, 1977). Flynn *et al.*, (1994), Finucane *et al.*, (2000), and Finucane and Slovic (1999) established that white men perceive a wide variety of risks as lower than do women and non white men. Bajtelsmit and Bernasek (1996), Bajtelsmit and VanDerhei (1997), Hinz *et al.*, (1997), as well as Sunden and Surette (1998) observed that men hold more of their retirement savings in risky assets. Jianakoplos and Bernasek (1998) reported the same for overall wealth. Papke (1998), however, in a sample of near retirement women and their spouses, found that women do not invest their pensions more conservatively than men. According to Barber and Odean (2000), individuals turn over their common stock investments about 70 percent annually. Further, men trade more than women and thereby reduce their returns more so than do women. The authors found that these differences were most pronounced between single men and single women. Mutual funds have similar turnover rates (Carhart, 1997). Olsen and Cox (2003) conducted a survey of professional men and women investment managers and found that when faced with social and technological hazards, the latter were more risk averse than the former. Graham *et al.* (2002) suggested that gender differences in information processing play a significant role in mediating investor perceptions of risk, thus influencing the well-documented gender differences in investment strategies. Felton *et al.* (2005) have presented evidence that such gender differences in investment strategies may be due to a specific subgroup of males (i.e., optimists) which result in different behavioral tendencies. Schubert *et al.* (1999) established that the comparative risk propensity of male and female investors were strongly dependent on the financial decision setting. They further observed that there were no gender differences in risk propensity when investors faced contextual decisions.

2.2 Gender Differences in Investment Confidence

While both men and women exhibit overconfidence, men are generally more overconfident than women. Gender differences in overconfidence are highly task dependent (Lundeberg *et al.*, 1994). Several studies have confirmed that differences in confidence are greatest for tasks perceived to be in the masculine domain (Deaux and Emswiller, 1974; Lenney, 1977; Beyer and Bowden, 1997). Men are inclined to feel more competent than women do in financial matters (Prince 1993). Barber and Odean (2001) also concluded that in areas related to finance, men exhibit more confidence than women. Women tend to be less confident in their ability to make the right financial decisions (Schumell, 1996) and view investing as scary (Bach, 2000).

Estes and Hosseini (1988) found that female investors have lower confidence in their investment decisions even when controlling for background and ability, and when the expected outcomes of the different investments were equivalent. Additionally, Lenney (1977) reported that gender differences in self-confidence depend on the lack of clear and unambiguous feedback. Since, feedback in the stock market is ambiguous, it is expected that men would be more confident than women about their ability to make common stock investments (Bach, 2000). Deaux and Farris (1977), Meeham and Overton (1986) and Beyer (1990) found that the self-serving attribution bias was greater for men than for women which resulted in the former being more overconfident than the latter. Lewellen, Lease, and Schlarbaum"s (1977) discovered that men spend more time and money on security analysis, rely less on their brokers, make more transactions, believe that returns are more highly predictable, and anticipate higher possible returns than do women. In all these ways, men behave more like overconfident investors than do women. Whereas prior research points to strong gender differences in the areas of investment risk-taking and investment confidence, little work has been undertaken which focuses on the underlying reasons for these differences. No previously published research in India, however, has examined the differences in the IDM process between female and male investors. The present study fills these research gaps.

3. Objectives and Scope

The major objectives of the study have been:

1. to determine the underlying dimensions in the selection of different investment avenues for women investors.
2. to study the factors affecting investment decision making (IDM) process women
3. to find out the extent to which each of the Investment Decision Factor, account for the variation in future investments for women investors.

A detailed and exhaustive questionnaire was prepared to carry on an in-depth exploratory and empirical level research. The questionnaire was prepared keeping in view the targeted class of investors in terms of desirable characteristics of good sampling research design. The data from the targeted sample has been collected during 2010-11. In terms of geographical location, the scope of the study has been restricted to National Capital Region (NCR) of India. National Capital Region is fast coming up as the centre for trading in financial markets in the north India (SEBI-NCAER, 2003). It has a good proportion of Investors (household investing in equity or bond or both) as compared to average number of total investors in India. The region ranks third in terms of volume of transactions in the stock markets in India (Gera, 2005). For the purpose of comparisons, a reasonably large number of avenues have been covered: equity shares, various mutual fund schemes, and „others" (government bonds, company debentures, bank-fixed deposits, gold/bullion, and real estate). The analyses of investor preferences have been conducted for 1500 respondents. It should be noticed that all the respondents were women.. The statistical analysis of the data provides answers to the broad/specific decision-making processes (psycho-economic-demographic) of women investors.

4. Research Design

The following research design has been adopted for carrying on the study of the investment decision making process of investors for the targeted segment of population.

The Investor Population and Sample

The well premeditated objectives of the empirical investigation required a reasonably large and representative sample of the targeted investor population. It is fairly well known from the available facets of the residents of National Capital Region of that only certain segments of the population are of direct interest from the view point of the „objectives of the present study". As such the focus for collection of data has been on the subjectively but relevant segments of the population. The „targeted relevant population segment" comprises of those respondent (women) investors who:

(i) possess reasonable level of income, are educated and well employed or engaged in economic activities such as professionals, entrepreneurs, etc.

(ii) are well aware of their social/economic needs and of the investment scenario; and

(iii) have availability of investible funds and are presently engaged in investment activity.

The subjectively decided sample size of 1500 investors/respondents has been taken from the targeted relevant population segment based on the combined judgment and random sampling covering different income, education, age and occupation groups. The sample demographics of respondent investors are shown in Table 1.

Table 1 : Demographic Profile of Respondents

		In Absolute Number	In percentage
Income (Rs. per month)	Less than Rs. 20,000	378	25.2
	Rs. 20,000-25,000	714	47.6
	Above Rs. 25,000	408	27.2
Education	Graduate	714	47.6
	Post-graduate	674	44.9
	Ph.D.	112	7.5
Age(years)	Less than 30	374	24.9
	30-45	587	39.1
	45-55	356	23.8
	Over 55	183	12.2
Occupation	Government service	506	33.7
	Other service	678	45.2
	Professional practice	138	9.2
	Own business	126	8.4
	Retired	52	3.5

Data Collection

As the focus of research has been in the identification of women investor"s broad/specific profile and determinants of perception on investment, the data has been collected from respondents on the income and investments of the households as a whole. In the present paper the term „household" implies the investor/respondents" family and the same has been taken as a sampling unit.

A total of 1838 questionnaires were personally administered, out of which 1526 could be obtained as complete for usage. At the screening stage, 26 questionnaires had to be rejected due to inconsistent or incongruous responses. Thus, the final sample size in the present study has been that of 1500 investor respondents, providing an 81.6 percent response rate which is considered to be reasonably satisfactory.

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Article

Organizational capabilities and knowledge management success: A quartet of case studies

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Abstract

Purpose The aim of this paper is to understand the role of organizational capabilities in knowledge management (KM) success pattern and how KM initiatives can be designed for organizational success. Design/methodology/approach The authors adopted a qualitative, descriptive case study research design to study the complex contextual issue of organizational capabilities and its role in KM success of information technology companies. Findings Findings of the study indicate that success of KM is not only bound by its processes but also by key infrastructure which can either promote or inhibit KM. To realize KM success, infrastructure capabilities have to be supported by knowledge process capabilities and vice versa. Research limitations/implications Future research can continue to examine organizational capabilities from the perspective of teams or business units in contrast to the organization. Originality/value This paper adds valuable empirical insights from Indian standpoint to the existing KM literature concerning preconditions of success and failure of KM initiatives in companies.

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... A knowledge management system not utilized properly would decrease staff performance, user satisfaction, quality of service, innovation, and many more (Elmorshidy, 2017). A lot of money and time is spent on building the knowledge management application, but not utilizing the application to its full benefit is going to cause the organization a major hardship (Oyefolahan & Dominic, 2013; Pandey, Dutta, & Nayak, 2018) . If employees continue this practice, it will

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Case Study

Branding Dilemma and Global Expansion: The Case of Caliber Technologies

Vivek Pani Gumparthi and Madhurima Deb***

This case study is about a branding dilemma faced by Caliber Technologies, a software company based out of Hyderabad, India. Caliber provided software solutions to companies in pharmaceutical, petrochemical and food & beverages industries, and the efficacy of its products suite was acknowledged by its clients. In the wake of a good financial performance during the Financial Year (FY) 2016-17, the Chief Executive Officer (CEO), Satya Sekhar Surabhi, received a rather rude shock when a client turned down a proposal by Caliber during one of its sales calls, stating that his company wanted to deal with products from well-established global players only. For Satya, a rejection that took place due to the limited visibility of the brand of Caliber Technologies was difficult to digest. Incidentally, Caliber had already established an international presence in the form of Caliber Infosolutions, a registered company in the United States of America (USA), but reality hit hard as it was still perceived to be a local Indian player in the market. This led to Team Caliber reinventing and branding itself as a global entity.

Key Words: *Brand Strategy, Business-to-Business (B2B) Marketing, Global Branding, International Marketing, Market Expansion*

INTRODUCTION

It was March 10, 2017, Satya Sekhar Surabhi (henceforth "Sekhar"), the founder and CEO, of Caliber Technologies Pvt. Ltd. was lost in deep thought. He had been immensely happy and proud of his company's Year to Date (YTD) performance for the Financial Year (FY) 2016-17 till he received a jolt from a prospective customer. He had just returned from a highly disappointing client call, the previous day. The client had turned down Caliber's proposal, stating that they wanted to deal with products built by well established global players only. Considering that Sekhar and his entire team knew that Caliber's product was exceptional with unique functional attributes and a perfect solution for the client, this rejection due to limited global visibility of

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brand Caliber was difficult to digest. While it was a matter of losing just one deal, Sekhar realized that the company had to focus on certain aspects that it had hitherto not paid enough attention to.

The year 2016 had been a phenomenal year for Caliber. The company had enjoyed a great run in Indian geography and continued its dream run in the overseas markets too. Caliber had just made inroads into China, by selling its products to a pharmaceutical major. The company had also sold multiple products to a large-cap pharmaceutical company in the US, which ensured some presence in that geography. Seeing multiple opportunities in the sales pipeline, the company had hired new talent extensively to support the growth and ensure quality deliveries.

ABOUT CALIBER TECHNOLOGIES PVT LTD

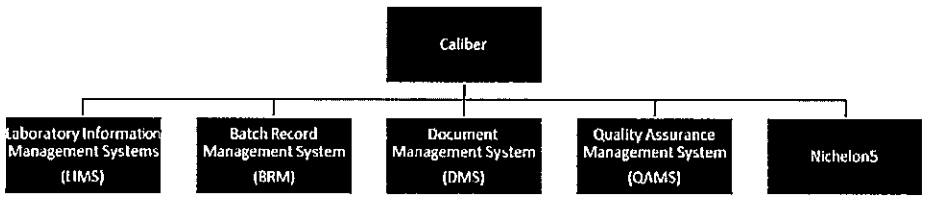
Caliber Technologies Pvt. Ltd was an enterprise IT solutions provider for companies that were operating in Pharmaceutical, Petrochemical and Food & Beverages sectors. Caliber was founded in 2001, in Hyderabad with three employees.

By the year 2016, Caliber had five products (refer to Exhibit 1) which catered to three very crucial industry needs, viz:

- Automation
- Compliance and
- Quality

Caliber used 100% web technologies since its inception and this was well received by the industry players. The IT solutions that Caliber provided to its clients, helped their laboratories go paperless and also helped the clients to comply with stringent regulations. The company's capabilities were in building products which catered to regulatory requirements like Good Laboratory Practices (GLP), Food and Drug Administration (FDA), and Good Automated Manufacturing Practices (GAMP).

Exhibit 1: Caliber's Product Portfolio



Source: Internal Company Records

CALIBER'S VALUE OFFERINGS

Caliber had started its journey in 2001, with only one value – offering – Caliber Laboratory Information Management System. By 2016, Caliber became synonymous

with Caliber LIMS owing to the supreme functionalities of the product. After establishing itself with LIMS, Caliber had built four other products – Batch Record Management System, Document Management System, Quality Assurance Management System and Nichelon 5, catering to the same industries. All these products aimed at the successful and smooth functioning of clients' processes by satisfying the afore mentioned three crucial industry needs. These products individually encompassed the areas of laboratory information management, document management, quality assurance management, people competency management, manufacturing process management etc., thereby supporting and enhancing the overall automation, compliance and quality goals of the clients. Caliber's products were not only instrumental in compliance and quality goals but in the long run also added to the improvement in the bottom lines of its clients.

LIMS

LIMS was an enterprise software solution, primarily aimed at pharmaceutical companies, which adhered to GMP and GLP guidelines. The product attributes facilitated a paperless automation, 100% compliance and complete integration with ERP, which was an industry first innovation.

BRM

BRM was an enterprise wide solution that organized, controlled and automated the batch records for regulated industries. Implementation of BRM in laboratories added to the savings of companies, which otherwise required a lot of paperwork and human intervention.

DMS

DMS was a software solution specifically developed for pharmaceutical industries, which faced serious documentation challenges that could actually threaten compliance requirements of pharmaceutical companies.

QAMS

QAMS was a software solution designed to help quality managers in dealing with challenges due to change management complexities and several implementation procedures like audits, Corrective Actions and Preventive Actions (CAPA) and training. The product allowed quality managers to set standards and formats to ensure compliance to quality standards.

NICHELON 5

Nichelon 5 was a product thoughtfully designed to manage the training requirements of GMP. Nichelon 5 covered five different activities of training management. They were – identifying, planning, executing, evaluating and tracking trainings.

Caliber's revenue came from product sales and Annual Maintenance Contracts (AMC). The average sales cycle of a product of Caliber was anywhere between 6 months to 12 months. Product selling here involved multiple rounds of discussions, demonstrations and testing. Keeping the challenging selling process in view, Sekhar placed emphasis on sales personnel training. Caliber not only aggressively acquired clients but was also successful in retaining them. In addition to retention, Caliber was, in fact, successful in cross – selling and up – selling to most of its clientele. This successful retention and further up-selling and cross – selling were possible because of the Key Account Management (KAM) procedures and policies that were formulated by Sekhar during the company's inception. Sekhar played a very crucial role in client relations and he felt that this was one of the best ways to acquire knowledge about the market and best practices.

Caliber's delivery managers would install the products in client's plants and ensure seamless integration with the client's systems across the enterprise. The delivery managers also played a crucial role in developing user interface of the products which was essential in smooth functioning of the products and also in increasing customer satisfaction.

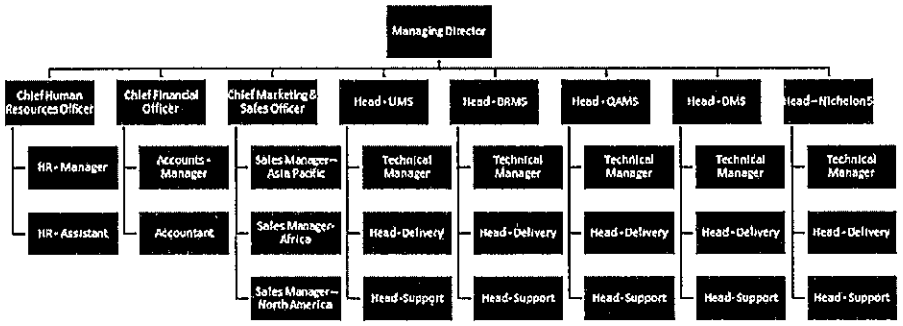
Caliber's products were not mere one time transactions. Along with the products came support services which helped clients in their day to day interactions with Caliber's products and processes. These support services were crucial because the products helped in maintaining global quality standards. The revenues for the support services came under AMCs. Clients judged companies like Caliber, not only on their products but on their service capabilities as well. Sekhar always felt that a good service capability was essential in building customer trust. Caliber offered both off – shore and on – site support services for efficient handling of customers' maintenance issues. Over a period of time, support services or AMCs significantly contributed to the revenues ensuring constant cash flow. It also helped Caliber in future up-selling and cross-selling of other products from its portfolio. Hence Sekhar's emphasis on customer support really helped the company in its growth journey.

In addition to the goodwill that the company had earned in Indian markets, Caliber was also known to be a good employer. Over the years, Caliber was successful in retaining good talent which helped in preventing any knowledge loss (refer to Exhibit 2). This can be substantiated by the fact that all the top management employees in Caliber have been in the company for more than ten years and each one playing a crucial role in building the company. Sekhar's trust in his employees and personal rapport with them were instrumental in retaining employees in an industry, which is prone to severe attrition.

CALIBER'S GLOBAL EXPANSION

After successfully establishing itself in Indian geography, Caliber wanted to increase its revenues and not to get stagnated with the same systems, practices, and clients.

Exhibit 2: Organization Structure of Caliber Technologies



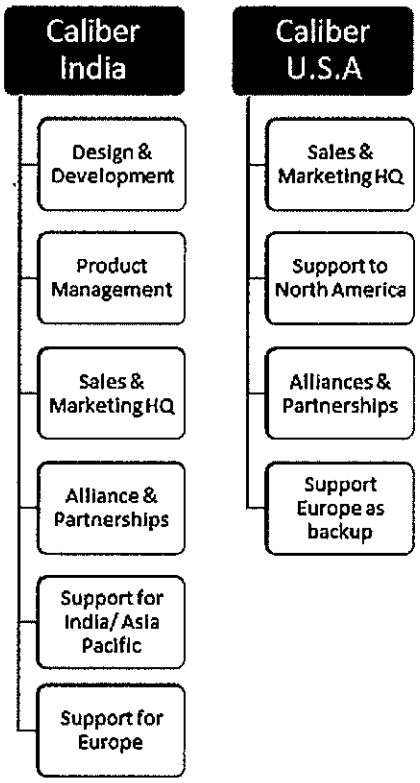
Source: Internal Company Records

Sekhar and team by then understood that all their clients (in India) had started getting most of their revenues from North American (NA) region, which definitely meant that Caliber had scope in the NA market. For successful establishment of products in the NA region, Sekhar wanted to replicate the Caliber Technologies model, which was then receiving accolades for its product and prompt after-sales support. Hence Sekhar wanted to setup another organization in the United States (US) which would have autonomy in decision making and subsequently ensure customer satisfaction. This move was also aimed at building capabilities and knowledge for their future market expansion aspirations.

Keeping the aspirations in view, Caliber started building products, centric to the needs of the companies that fell under GLP practices as per US FDA norms. By the year 2007, Sekhar was keen on making inroads into the US market (Sreekala and Sinha, 2007). In this regard Sekhar initiated conversations with investors in the US. During his discussions with various investors, Sekhar understood that investors were not willing to invest in an Indian product-based company as India was always known for services companies. After thorough deliberations with his key team members, Sekhar registered a company in the US, by the name Caliber Infosolutions, which marketed and sold the products that were developed by Caliber Technologies Pvt. Ltd. Sekhar made regular trips to the US and built a capable team to handle business opportunities in the US region (refer to Exhibit 3). Customer-facing employees from Caliber Technologies were transferred to Caliber Infosolutions for executing special projects. In addition to this, Sekhar hired local talent to ensure constant support services to the clientele in NA. The infrastructure setup in the US ensured a sense of trust in the customers, which helped Caliber in its personal selling endeavors.

In addition to this, Caliber felt that the companies in the US had a different approach to the product usage when compared to the companies in India. In this backdrop, the

Exhibit 3: Nature of Work Handled by Caliber India and Caliber USA



Source: Internal Company Records

product management team slightly changed the user interface of the products in the US and also the documentation required for the product usage. This process actually helped Caliber to understand customer needs from different perspectives and also helped them in building capabilities.

Caliber in its 16 years, found the years 2008-10 to be the most difficult phase in its journey. The global economic downturn had hit businesses badly and the company in the US could not make any reasonable progress during this period. On the other end, Caliber India made rapid strides on all fronts and was enjoying a tremendous position with three products and two product extensions (exclusively meant for the petroleum sector). LIMS was Caliber's flagship product and was instrumental in driving revenues for the company. It contributed a sizeable amount of sales volume but what worried Sekhar was that the company was relying heavily on one product. He wanted other products of Caliber also to be accepted well in the market. Keeping the heavy reliance on one product in view, Sekhar and his sales team made frequent trips to their existing

clients to promote products other than LIMS (refer to Exhibit 4). This constant and consistent personal promotional exercise started bearing fruits in the next couple of years and products other than LIMS were also increasing their contribution to the revenues Year-on-Year (YoY). This consistent increase in revenues by other products instilled confidence in the team.

Exhibit 4: Contribution of each Product to Caliber Technologies Revenues

	2014-15	2015-16	2016-17
LIMS	82%	78%	67.9%
QAMS	2.3%	3.5%	4%
BRMS	5.8%	4.8%	14.76%
DMS	2.9%	3.7%	3.34%
Nichelon 5	7%	10%	10%

Source: Internal Company Records

By the year 2014, Caliber Infosolutions had also started to gain ground in terms of revenues (refer to Exhibit 5). Caliber started investing even more in the US company by acquiring good talent capable of handling complex deals. In 2015, Caliber as a group had set a revenue target of USD 10 million by FY 2018 – 19, across all products and services. Accordingly, the team had started developing its capabilities. But the group realized that, for it to achieve a revenue target of USD 8 million, it had to look beyond India and the US. Keeping this in view, Caliber began nurturing Asia Pacific (APAC) and Europe, Middle East and Africa markets.

Exhibit 5: Revenue Growth of Caliber Technologies & Caliber Infosolutions

Financial Year (FY)	Caliber Technologies (India)	Caliber Infosolutions (USA)
	Revenue (YoY)	Revenue (YoY)
2014-15	42%	46%
2015-16	67%	–29%
2016-17	34%	170%
	Profits (YoY)	Profits (YoY)
2014-15	50%	71%
2015-16	122%	–117%
2016-17	20%	270%

Note: Actual revenue figures have not been divulged due to regulatory reasons. However, figures for Revenue and Profit YoY have been shared for the benefit of readers.

Source: Internal Company Records

THE DILEMMA

In the month of February 2016, Caliber had initiated talks with a pharmaceutical major in Europe. The company wanted this sale to be an entry point for its European business pursuits. The sales team at Caliber, developed a value proposition along with the product teams, to suit the requirements of the company. The company took the task as a special project and made several changes to exactly suit the requirements of the client. They left no stone unturned in developing the best-suited product as the deal would have major impact in the near future, in terms of up-selling and cross-selling.

The team had submitted their final proposal to the client by the end of December 2016. On March 9, 2017, Sekhar to his utter dismay realized that the client was not in a position to go ahead with Caliber, as the company was being perceived as a new Indian player with not much of experience in handling global standards. Sekhar was indeed rightfully disappointed, as the company always built products as per the global standards. Caliber's products, in fact, attracted plaudits from companies across the industries and this can be validated by the company's long-standing clientele list.

The outcome of the client call forced Sekhar to rethink on the strategy that they had been following till then. The company had all along focused on building good products and done pretty little for building Caliber as a global brand. The conversation with the client brought to the fore the stark reality that customer perception of the brand could outweigh product attributes. In spite of having a subsidiary in the US, and having installations in multiple countries, Caliber was still being perceived as a local Indian player. Sekhar felt that he had to do something about this customer perception, so that future global revenues were not affected by this perception, considering the revenue target that the company had set for itself. He realized that his next steps had to be towards bringing synchrony in processes and communication of the Indian and the US entities. He wanted both the companies to speak the same language to its clients and potential clients.

The global Quality Management Software (QMS) market was expected to cross USD 10 billion mark by the year 2025 (Research and Markets, 2017) and Sekhar did not want to lose out on this wonderful opportunity that the market was throwing up. For the company to leverage the opportunity, Sekhar felt that the company had to be positioned in such a way, which would ensure minimal bottlenecks in the growth journey of the company. Sekhar wanted brand Caliber to be perceived as a competent global brand, i.e., a brand which could redefine itself from time-to-time. However, Sekhar did not want to bring in a drastic change too, as the Caliber brand in India had a high recall value which the company had been enjoying all the while. With a firm resolve, to get better in all aspects, the whole team at Caliber committed to reinvent itself and make rapid strides in all its processes.

TEACHING NOTE

CASE SYNOPSIS

The case explains the importance of brand perception in a Business-to-Business (B2B) context. Caliber Technologies Pvt. Ltd. is a software solution provider company, headquartered in Hyderabad, India. Caliber provides software solutions to companies across pharmaceutical, petrochemical and food and beverages industries. Caliber was founded by Satya Sekhar Surabhi, who is also the protagonist of the case. After successfully establishing itself in Indian geography, Caliber made in-roads into the US geography and started a subsidiary by the name Caliber Infosolutions, based out of Pittsburgh. Caliber Infosolutions was entrusted with the task of business opportunities handling and client support. On the other hand, Caliber Technologies, the parent company handled end to end operations, including design, development, marketing, selling and support.

With a revenue target of USD[1] 8 million, Caliber started exploring business opportunities in EMEA and APAC regions. In one of its scouting exercises, Caliber found a prospective client in Europe. The client was a major pharmaceutical player capable of buying all the products from Caliber. However, at the end of the sales cycle, on March 9, 2017, Sekhar realized that the client that the client was not in a position to go ahead with Caliber, as Caliber was being perceived as a new Indian company and the client wanted to buy products only from players who had experience in handling global standards. Sekhar was disappointed with the outcome of the sales process and so was the entire team. Sekhar was rightfully disappointed as the company all along placed a lot of importance on the product attributes and placed a very little emphasis on brand Caliber.

Keeping in view the outcome of the sales discussion and the revenue target in mind, Sekhar wanted to do something about the customer perception of the brand. He wanted to position brand Caliber in such a way that companies across geographies perceive it as a global brand capable of handling products and services of global standards.

LEARNING OBJECTIVES

The case is about a company facing a branding dilemma. The dilemma is about establishing itself as a global brand so that it can cater to new geographies or restrict itself to a particular geography where it has a high ready recall. The specific teaching objectives include the following:

- To understand re-positioning of a brand that has a strong presence in a particular geography.

[1] USD = United States Dollar.

- To understand how to effectively handle business opportunities across geographies and accordingly meet revenue targets.
- To understand how to bring synchrony in brand communication and marketing communication across geographies.

POSITIONING IN COURSES

This case study can be taught as part of the following courses in postgraduate management programs:

1. Business-to-Business Marketing – B2B Marketing Strategies and Implementation module.
2. Business-to- Business Marketing – Personal Selling and Sales Management module.
3. International Marketing – Foreign Market Entry Strategies module.
4. International Marketing – Nature of International Marketing: Challenges and Opportunities module.

SUGGESTED PRE-READINGS

1. Anderson, J. C., & Narus, J. A. (1999). *Business market management: Understanding, creating, and delivering value.* Upper Saddle River, NJ: Pearson Prentice Hall.
2. Alashban, A. A., Hayes, L. A., Zinkhan, G. M., & Balazs, A. L. (2002). International brand-name standardization/adaptation: Antecedents and consequences. *Journal of International Marketing, 10*(3), 22-48.
3. Ellis, N. (2010). *Business to business marketing: Relationships, networks and strategies.* Oxford, UK: Oxford University Press (OUP).
4. Pitcher, A. E. (1985). The role of branding in international advertising. International *Journal of Advertising, 4*(3), 241-246.
5. Shaw, J., & Onkvisit, S. (2009). *International marketing: Strategy and theory.* London, UK: Routledge.
6. Schuiling, I., & Kapferer, J. N. (2004). Executive insights: real differences between local and international brands: strategic implications for international marketers. *Journal of International Marketing, 12*(4), 97-112.
7. Yin Wong, H., & Merrilees, B. (2007). Multiple roles for branding in international marketing. *International Marketing Review, 24*(4), 384-408.

SUGGESTED ASSIGNMENT QUESTIONS

1. What is the role of personal selling in B2B context? Explain the steps involved in selling a value-offering in the context of Caliber (or organizational markets) using any framework.

2. What is a Multi-National Company (MNC)? What are the significant advantages for a company becoming a multi-national company? What is the advantage that you see for Caliber in becoming an MNC?
3. Explain different foreign market entry strategies. Mention the strategy that Caliber has employed while setting up Caliber Infosolutions in the US.
4. What are the strengths, weaknesses, opportunities and threats of Caliber group based on the case?
5. What is the challenge that Caliber as a brand is facing in the context of the case? What could be the possible solutions? Mention the broad frameworks if necessary.
6. What can Caliber as a brand do to successfully make inroads into Europe?

ANALYSIS

Q1. What is the role of personal selling in B2B context? Explain the steps involved in selling a value-offering in the context of Caliber (or organizational markets) using any framework.

Expected answer to include the following points or more: The practice of selling has been around for a very long time and has gained prominence in the twentieth century and would continue to play a very crucial role in the twenty first century too (Hawes, Anne and Midmier, 2004; Powers, Koehler and Martin, 1998; Powers, Martin and Daniel, 1987).

Personal selling plays a crucial role in organizational markets (or B2B markets). Personal selling has a bigger role to play in B2B context because of higher order values, more complex product offerings and smaller number of buyers in B2B markets. In order to differentiate themselves, organizations generally prefer personal selling.

In addition to generating sales for the firms, personal selling can provide a feedback and an understanding of needs of consumers, which are extremely crucial for the selling firm's strategic planning. Personal selling as a concept also paves way for Key Account Management, which is yet again a crucial part of any company's growth process.

One of the most widely used paradigms in selling is the "seven steps of selling" proposed by Dubinsky (1981).

The seven steps of selling are: (1) Prospecting; (2) Pre-approach; (3) Approach; (4) Presentation; (5) Over-coming Objections; (6) Close; and (7) Follow-up.

Prospecting: Prospecting is the first step in the sales process. It is the process of identifying potential customers for the companies. One major and obvious reason for prospecting is to broaden the customer base of any company (Jolson and Wotruba, 1992), which in turn will help any company in growing. There are different methods of

prospecting like: referrals, networking, cold-calling, bird-dogging, etc. Prospecting happens to be the most essential step of selling process, as good prospects are easy to close. In addition to that, a rightly identified customer can help any company in terms of revenues.

For a company like Caliber, a sales person would have to identify leads by attending various events held by pharmaceutical companies (networking), actively searching and connecting with potential clients using various social media sites such as LinkedIn (bird-dogging).

Pre-approach: The pre-approach step entails all activities before the actual sales visit. This step involves researching about the potential client, understanding customers' needs, alerting the product design (if need be) and pertinent content that can be appropriate for sales closure. In other words, it can be understood that pre-approach is a preparatory stage for closure.

For a company like Caliber, this stage would primarily encompass designing a value proposition based on customer's background and needs. This stage would also have this process of checking if the client has already installed a quality management software or not. If the client has already installed a quality management software, then the salesperson is supposed to build a value-proposition accordingly.

Approach: Approach stage is the initial moments of any sale. It encompasses strategies and tactics employed by sales people when establishing initial rapport with the client. Many text books have mentioned about different approaches like, the introductory approach, consultative approach, product approach, assessment approach, consumer – benefit approach, referral approach etc.

In a setup such as Caliber, the approach stage would necessitate reaching out to the client remotely or in person. After reaching out in person, the salesperson is supposed to establish a ready – recall impression in the minds of the decision makers.

Presentation: Presentation is the main part of any sales call. Presentation involves demonstration of value proposition to the client. This stage gives a comprehensive understanding of product attributes, price, product attributes of competitors, etc. This can be a single presentation process or multiple presentations over a period of time (which varies from industry to industry). This step can be successful only after comprehensive understanding of the client and client's requirements.

For Caliber, this step would entail a PowerPoint presentation or demonstration of product attributes. This step may entail multiple stages of demonstration, as per customer requirements, which would actually make it a long sales cycle (as seen in the case).

Overcoming objections: Objections can be understood as questions or hesitancies about the company or product from client's end. These questions are obvious as the

products sold by B2B companies are high-value products. On many occasions the objections are taken into consideration, to better the functional attributes of value propositions. An increase in functional attributes can also give the selling company a chance to increase the pricing.

For Caliber, this step may involve, customer asking for product testimonials, rationale behind pricing, integration of a few more functional attributes etc.

Close: Close or closure generally entails successful completion of presentation(s) from the salesperson and culmination in a commitment to buy a product or service from the client. This step is the most critical part of the entire sales process.

For Caliber, this step would entail signing of a contract as per the agreed parameters.

Follow-up: Follow-up can be understood as the after sales service for a product. This step ensures to make the customer satisfied.

For Caliber, this step would be constant customer support and ensuring a great customer experience. This step can be a critical one because this would be a gateway for upselling and cross-selling.

Q2. What is a Multi-National Company (MNC)? What are the significant advantages for a company becoming a multi-national company? What is the advantage that you see for Caliber in becoming an MNC?

Expected answer to include the following points or more: As mentioned by Shaw and Onkvisit (2008), an MNC is not a concept which has single dimension, which means that there is no one parameter or criterion that can actually be used to identify or understand an MNC.

Shaw and Onkvisit (2008) in their study mentioned that the term MNC can be understood using the following criteria

- Definition by size
- Definition by structure
- Definition by performance
- Definition by behavior

Definition by size: The term MNC in this context means bigness. Bigness in terms of market value, sales, revenues, profits, assets and employee count.

Definition by structure: Definition by structure in this context includes the number of countries the firm operates in.

Definition by performance: Definition by performance is dependent on parameters such as earnings from foreign operations, sales and assets.

Definition by behavior: The definition by behavior depends on three parameters. They are: ethnocentricity, polycentricity and geocentricity.

- Ethnocentricity
- Polycentricity; and
- Geocentricity

Ethnocentricity: Ethnocentricity in this context can be defined as a strong slant for the home country. The usual practice is to use the home country as a base for the design and development of standardized products and exports in order to garner business.

Polycentricity: Polycentricity can be regarded as the opposite of ethnocentricity. Polycentricity refers to strong orientation towards host country. The logical assumption behind this orientation is that every market is unique, and consequences are difficult for outsiders to understand.

Geocentricity: Geocentricity is in between the two extremes of ethnocentricity and polycentricity. Geocentricity considers the whole world as addressable audience.

Advantages of Becoming an MNC:

- Survival and growth;
- Sales and profits; and
- Risk mitigation.

Survival and Growth: For companies to survive, they need to grow. For growing, companies have to expand to newer geographies, as one market or geography cannot accommodate the growth required for survival. For example, there are many countries which are small in size and cannot facilitate at all periods of time. Hence it is imperative for companies to expand in order to grow and survive.

Sales and Profits: By expanding into various geographies, number of units sold increase in number. In addition to this, economies of scale comes into play as a result of a bigger number of units which reduces the cost incurred.

Risk Mitigation: Most businesses are cyclical because of various factors such as recession and seasonal factors like climate. The direct consequence of these factors is impact on sales which is adequate to disturb the growth of a company. One way to mitigate risk is to consider foreign markets as a solution to fluctuating demand.

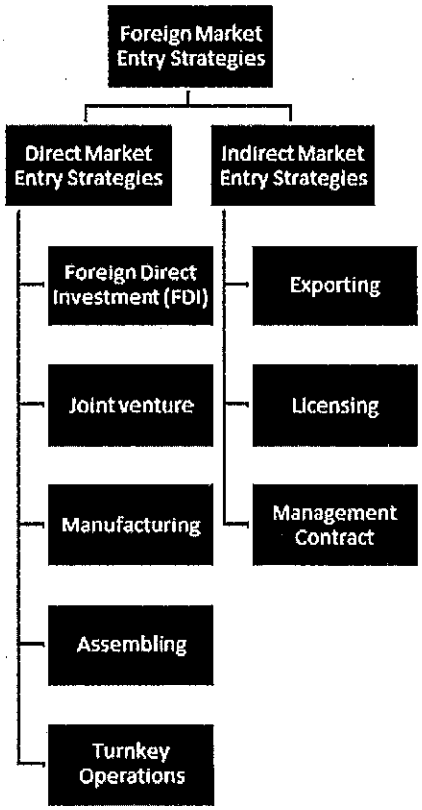
In the case of Caliber, expanding into other geographies would help in bettering revenues especially during a revenue target of USD 8 million that the company has set for itself by FY2017-18. Further to this, from the case it can be understood that, most of their clientele in India export their products to the US, which means that there is an opportunity in the US for the same products. Hence expanding into other geographies would be highly beneficial for Caliber and will bolster its growth in terms of revenue. In addition to the revenues, global expansion or becoming an MNC can be instrumental in building capabilities, which can be a significant factor in building products.

Q3. Explain different foreign market entry strategies. Mention the strategy that Caliber has employed while setting up Caliber Infosolutions in the US.

Expected answer to include the following points or more: Companies enter foreign markets because of various advantages as mentioned above. Foreign market entry strategies can be divided into two types:

- Direct market entry strategies and
- Indirect market entry strategies (Shaw and Onkvisit, 2008) (refer to TN Exhibit 1).

TN Exhibit 1: Different Foreign Market Entry Strategies



Source: Adapted by Authors' based on Shaw and Onkvisit (2008)

Companies enter foreign markets directly or indirectly based on the risk-reward ratio. To maximize profits, while tolerating a high degree of risk, a company may consider FDI. On the other hand, to minimize risk, some companies may consider indirect strategies such as exporting, licensing and management contract.

Foreign Direct Investment FDIs have been widely regarded as tools for diversifying investments. In addition to this, integration of global markets facilitates best practices in corporate governance, rules and regulations (Shaw and Onkvisit, 2008).

On the business front, FDIs help in building capabilities of companies which are essential for companies' growth and survival. In addition to that, it has been observed that developed countries have biggest inflows of FDI. For example, European Union, the United States of America (USA) and Japan (Shaw and Onkvisit, 2008).

Exporting: Exporting is a strategy where companies without any marketing or production facilities sell their goods (or export) from their home base. This strategy is regarded as an indirect strategy and risks are minimal as there are no heavy investments involved (Shaw and Onkvisit, 2008).

Licensing: Licensing is a reasonable compromise between exporting and FDI. Companies resort to licensing when they find exporting ineffective. Licensing can be understood as an agreement that permits a foreign company to use intellectual & industrial property (such as patents, trademarks and copyrights), technical know-how, architectural and engineering designs or a combination of any of these in a foreign market (Shaw and Onkvisit, 2008).

Management Contract: One significant way to generate revenue is to get into an agreement (or sign a management contract) with government or new owner in order to manage the business for the owner. Management contract can be used as a viable strategy for any foreign market entry with a minimum investment. Management contract as a strategy have been extensively used in hotel industry (Shaw and Onkvisit, 2008).

Joint Venture: Joint Venture (JV) can be understood as a partnership at a corporate level irrespective of geographies. Joint venture is generally formed for a specific purpose by two or more investors sharing ownership and control. Joint ventures can involve a certain degree of investments and is the only other way than licensing, that a firm can enter a foreign market (Shaw and Onkvisit, 2008).

Manufacturing: Manufacturing as a strategy is employed by companies involving all or some manufacturing in a foreign country. One major reason why companies use this strategy is to gain a better access to raw materials for its manufacturing operations, a process known as backward integration (Shaw and Onkvisit, 2008).

Assembly Operations: An assembly operation is slightly different from manufacturing. This strategy includes producing various parts or components in different countries and assembling them in a single plant. Assembling allows a company to gain an advantage in pricing as components become cheaper in this process (Shaw and Onkvisit, 2008).

Turnkey Operations: A turnkey is an agreement between the seller and buyer to supply a buyer with a facility which is fully equipped and ready for use. In this process, the buyer's personnel are also trained by the seller (Shaw and Onkvisit, 2008).

Acquisition: This strategy is employed by companies that wish to grow rapidly in a market. This is a direct strategy as it involves heavy investment. Acquisition is a process of buying a foreign company(Shaw and Onkvisit, 2008).

Strategic Alliances: Strategic alliance is an indirect strategy as it involves no much heavy-duty investments. A strategic alliance may be in the areas of production, distribution, marketing and R&D. Strategic alliance can be a result of mergers, acquisitions, JVs and licensing agreements (Shaw and Onkvisit, 2008).

In the context of the case, it can be understood that Caliber employed a direct foreign market entry strategy. The company founded Caliber Infosolutions as a subsidiary of Caliber Technologies Pvt. Ltd. In the USA. Caliber Infosolutions was established as a polycentric strategy. The company has autonomy in making decisions that are critical for business continuity. This strategy entails a lot of monetary investment which can impact the finances of the entire group. On the other hand, this strategy can be used as a device to build capabilities .

Q4. What are the strengths, weaknesses, opportunities and threats of Caliber group based on the case?

Expected answer to include the following points or more:

STRENGTHS

- Sectoral focus (e.g.: pharmaceutical, food & beverages and petroleum)
- Strong products (widely accepted in other countries)
- Mitigation of risk because of diversification in product portfolio.
- Presence in various geographies.
- Ability to up-sell and cross – sell
- Ability to provide constant product support.
- High employee retention (indicating strong loyalty for the employer)
- Good leadership.
- Strong presence in home country.

WEAKNESSES

- Heavy reliance on LIMS for revenues
- Less brand recall due to more focus on products.
- Heavy reliance on Caliber Technologies design and development team for product development.

OPPORTUNITIES

- Scope for up-selling and cross-selling to existing clients.
- A USD 10 billion market opportunity.

THREATS

- Well – established global players as competitors.
- Possibility of clients developing their own quality management software solutions as a backward integration strategy to reduce costs.

Q5. What is the challenge that Caliber as a brand is facing in the context of the case? What could be the possible solutions? Mention the broad frameworks if necessary.

Expected answer to include the following points or more: Caliber Technologies in its pursuit to achieve its revenue targets, started focusing on expanding their geographical reach. In pursuit of this, the company initiated sales discussions with a European pharmaceutical major. After several rounds of discussion, Caliber was turned down by the client stating that they would want to go ahead with established players following global standards. This disappointed Sekhar, the protagonist, who knew very well that their product was a globally supreme product and Caliber as a company, by then had multiple installations in various geographies. Hence it can be understood that Caliber as a brand was still being perceived as a new Indian company though it had global standards in all its processes.

Basis the context given in the case; Caliber could do two things:

- Change the way potential customers are thinking about the brand and
- Restrict its reach to India (APAC) and the US geographies.

First Option: For the customers or potential customers to change their perception Caliber could employ a repositioning strategy. Companies attempt repositioning strategies to change the way they are being perceived by their clients or potential clients. This can be achieved by unifying the brands across markets, that is, using a single brand across the geographies. In international markets, a firm's branding strategy plays a critical role in integrating its activities worldwide.

One serious caveat in the unification process is, as international markets evolve and become more integrated, a firm needs to focus on coherence of branding decisions across markets and the firm must decide on how to manage brands that span different geographic markets and product lines. A firm that wants to have an international brand (or unified brand) should examine its branding strategy and formulate the basic principles to guide the effective use of brands in the global marketplace. These principles would in turn act as guiding principles in ensuring synchrony in branding decisions at various levels.

Douglas, Craig and Nijssen (2001), developed an international brand structure which is based on three factors: firm-based characteristics, product-market characteristics and underlying market dynamics.

Firm-based characteristics include:

- Administrative heritage
- Expansion strategy
- Importance of corporate identity
- Product diversity

Market dynamics include:

- Political and economic integration
- Market infrastructure
- Consumer mobility

Product – market drivers include:

- Target market
- Cultural embeddedness
- Competitive market structure

Considering all the above factors, Caliber can develop a brand, common to all the geographies. However, Caliber should not change its name as Caliber enjoys a good brand recall in its home country. A logo change can be considered by the brand, to indicate that the company is reinventing itself to serve the needs of its clients and potential clients.

In addition to the above matrix, Caliber also needs to bring synchrony in its communication to the external world. The synchrony in communication can be brought in by the following strategies:

- By Product Feature
- By Benefit
- By Price/quality
- By Existing User
- By Experience and Reputation

When it comes to designing the communication programs for repositioning, Caliber can use 'By Experience and Reputation' positioning strategy. This is an apt strategy for communication purposes because, Caliber is an established brand in a geography, and over a period of time, it has gained a lot of experience in providing solutions to its clients. Testimonials of their clients and references of these clients across their communication channels can bring in a validation for the potential clients. Hence to

bring in synchrony in its marketing communication, Caliber can use 'By Experience and Reputation' strategy.

In addition to positioning and communication programs, as mentioned above the company can reinvent itself by changing the brand elements, such as logo, processes, vision statement, brand colors etc., which can communicate global standards and can be used by both the companies in the US and in India.

Second Option: The second solution as per the dilemma would be restricting Caliber's operations to the US and APAC regions. This solution can be considered if the company diversifies or focuses on value offering, which can eventually lead to up-selling and cross-selling. However, a disadvantage here is, this approach requires concentration in one market and the market can experience variable demand which eventually hampers the cash flow for the company. However Caliber can also consider diversification into other industries (other than enterprise solutions for Pharmaceutical, Petroleum and Food & Beverages) which mitigates risk.

Q6. What can Caliber as a brand do to successfully make inroads into Europe?

Expected answer to include the following points or more: Caliber as a brand has a strong presence in Indian geography and the US geography. In order to make inroads into Europe, Caliber can first establish itself as a global brand, which follow global standards and procedures in delivering value to the clients across geographies, as brand Caliber according to the case is still being perceived as a local Indian player. This global brand positioning can help Caliber in changing the brand perceptions. Caliber can follow two strategies to enter the European geography. They are:

- Indirect entry strategy; and
- Direct entry strategy.

Indirect Entry Strategy: As Caliber has multiple installations with multinational pharmaceutical majors, Caliber can try up-selling and cross-selling strategies with the plants of these Clients in Europe. This process can help Caliber in understanding European geography in detail and the process is comparatively easier as Caliber already has an established equation with these clients.

Keeping these installations as base or reference Caliber can try to pursue other European pharmaceutical companies. To this end, Caliber can organize various Below The Line (BTL) events, which can demonstrate Caliber's value offering to the potential clients.

In addition to the above mentioned process, Caliber can also join hands with other enterprise software solutions companies which are in the same domain. This brown field market entry strategy can be an expensive process but can obviate the process of establishing the brand Caliber.

Direct Entry Strategy: Caliber in the past had entered the US geography with no experience of handling any US clients. Keeping this in view, Caliber can apply the same strategy in Europe geography. To this end, Caliber can consider establishing an office in the same lines of its office in the US. To create brand awareness, Caliber can try various BTL activities, which can communicate the value proposition to the potential clients. In addition to various BTL activities, Caliber can consider aggressive direct contact exercises, with multiple potential clients, which can trigger selling processes. Though this process is a time taking one, Caliber can nurture the market and accordingly position its value-offerings to the clients. However, the idea of global brand positioning of brand Caliber would be compromised.

WHAT HAPPENED

Caliber after FY 2016-17, started focusing reinventing itself. The top management program started focusing more on building capabilities to acquire new clients and accordingly make its presence felt by all the industry players. In addition to this, Caliber also unveiled a new logo in May, 2018. This logo was used by both the companies of Caliber group. The group also designed consistent communication collaterals for reaching out to potential clients. This ensured that same language was spoken to all the clients across geographies.

To understand the company's perception and position in the market, Sekhar travelled to all his long-standing clients. Sekhar was told that there was a perceptible difference in the company's brand perception. Sekhar intends to continue with this positioning as it was well received by his clients.

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Review

Climate Change and Right to Development

Mukherjee and Mustafa

Special Issue S3: "Global Warming and Climate Change: Part 2"

HATASO, USA

Climate Change and Right to Development

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Abstract

The Right to Development is a relatively new right in human rights law. Although its roots may be traced to pre-world war era, Right to Development took concrete shape with the passing of the UN Declaration on the Right to Development in 1986. Some renowned academic institutions in India are making recent efforts to make the "Right to Development" a Fundamental Human Right. Climate change poses a direct threat to human rights of people, especially in tropically situated countries of the south (including India), which are coincidentally home to a large number of vulnerable/marginalized people who are considerably poor to concern themselves with issues such as climate change. Due to mounting pressure from least developed countries (LDCs) and small island developing countries (SIDSs), international community has lately shown greater interest in establishing a direct link between climate change and human rights. This interest may be a reaction to the recurrent failures in reaching a consensus in the climate change negotiations through mechanical Conference of Parties (COPs). Similar to a bottom-up approach that seems to have worked well for the Paris agreement, it was believed by experts that linking human rights to climate change would shake the conscience of the reluctant parties to act expeditiously. The importance of a human rights–based approach to climate change will be highlighted in the light of two recent developments in the climate change discourse: First, the recognition by scientists of several extreme disaster as climate change events directly violating the human rights of the vulnerable; second, the dilution of the differentiation created between developing and developed nations by the Common But Differentiated Responsibilities (CBDR) principle in the recent climate change agreements. This paper seeks to establish the efficacy of the human Right to Development (through tools such as Greenhouse Development Rights) in effectuating the third world approaches to the issue of climate change in the global south.

Keywords: Human right; Right to developments; Climate change; Paris agreement; North–South divide; Greenhouse Development Rights; Right-Based approach.

1. INTRODUCTION

> *"Poverty anywhere constitutes a danger to prosperity everywhere"* (Key Document – ILO Constitution, May 10, 1944).

Generally, one evil leads to another; then, there follows a series of unwanted chain of events. Climate change leads to hunger, poverty, conflict, loss of livelihood, forced displacement, etc. Climate change is caused due to unprecedented increase in green-house gases (GHG) leading to global warming that further is a cause of mega disasters causing outlandish loss to life and property leading to violation of basic human rights such as right to life, food, shelter, livelihood, and health. The chain can only be broken by reducing human-induced GHG emissions, particularly carbon dioxide (CO_2).

Climate change is not just an environmental concern. It has broad economic implications as well. Historically, the developed nations have been the major CO_2 emitters, leading to anthropogenic climate change. The developed nations developed at the cost of the environment. Developing countries are demanding their rightful development space. Developing countries have expressed their discomfort toward the greater

liability imposed on them under the common but differentiated responsibility principle of United Nations Framework Convention on Climate Change (UNFCCC).The term "applicable to all" was intensely debated at Durban, because it signals a political expectation that the climate regime must contain greater "symmetry" in the commitments in contrast to "differentiation" (Winkler and Rajamani, 2014).

If freedom is to be ensured to the large majority of the poor population of the world who reside in the developing "global south," economic development is a prerequisite. Economists such as Amartya Sen argue that economic development leads to better human rights conditions.[1] Human rights and economic development is so inextricably interrelated that the pursuit of one without the other would be incomplete and ineffective. Moreover, the study of the interrelationship between political and civil rights (usually associated with traditional western democracies) and socioeconomic rights make it clear that the realization of social and economic right is dependent not merely on socioeconomic development, but also on respect for political and civil liberties (Sen, 1999). Articles 55 and 56 of the UN Charter highlight the legal obligations accepted by state members to promote economic development, without which the citizens cannot realize their economic rights.

The integration of Right to Development argument in a climate stressed world has ethical as well as practical advantage. Ethically, it offers a vision similar to sustainable development goals (which has found broad consensus through the transformation of Millennium Development Goals (MDGs) to sustainable development goals) but with a much serious appeal to it, as it invokes a pressing obligation on the part of international community to ensure equity by allowing the developing nations to claim their equitable share of development. Practically, the Right to Development discourse will help the climate change project to work on something tangible, that is, rights involving individuals. It is expected that this will help the advocates of climate change action to gather more consensus. Unfortunately, gathering consensus on a wicked problem like climate change is an uphill task.

One of the biggest shortcomings of the problem of climate change has been its over-reliance on predictions of events that are yet to take place. Most of the climate change actions mandated in the climate change treaties are based on the principle of intergenerational equity, that is, directed toward protecting the interest of future generations. This takes our attention away from the urgency of the matter. Recent studies show that in the very youth of our millennium the violent face of climate change in the shape of extreme weather events are already occurring and thus the problem persists here and now (Stern, 2014). A meta-analysis of 59 studies that looked at climate change and extreme weather after the coming into force of Paris agreement concluded that climate change has aggravated extreme weather events. Moreover, 41 of the 59 studies demonstrated that climate change had made extreme weather events more intense and more long-lived. These included droughts in Syria to Storm Desmond, which battered the UK in 2015. "This is a real-world analysis of what is actually happening, rather than a projection of what might happen in the future," says Richard Black, director of the Energy and Climate Intelligence Unit.[2]

In addition, co-ordination among states with varied vested interests is a complex task. Especially, co-ordination in any act that affects the developmental goals of nations is even more complex (Sandler, 1997). This makes climate change a wicked problem—a problem that is extremely difficult to solve (Gardiner, 2017).

All the above facts call for urgent action to deal with climate change. As the global north is historically responsible for climate change, it has the moral and legal obligation (under the principle of Common But Differentiated Responsibilities (CBDR) in UNFCCC) to take concrete steps to deal with the impact of climate change. However, the recent developments in the evolution of the principle of CBDR shows that the global north is unhappy with the intelligible differentia created between the developed and developing nations (Winkler and Rajamani, 2014). In fact, the Paris agreement signed by most of the nations in the world today does not make any clear distinction between the developed and developing nations (different from the clear distinctions made in Kyoto protocol). It is argued that this dilution of the differentiated responsibility between developed and developing nations is a violation of the Right to Development enjoyed by developing nations. However, the urgency of the problem demands that the international community does not shy away from its responsibility toward developing and underdeveloped nations. It is suggested that the time is ripe for the international community to formulate development models that ensure sustainable development without violating human rights of the vulnerable. An assessment of such a development model for climate change, that is, Greenhouse Development Rights (GDRs), is intended to be done in this paper.

1 *See generally* Sen (1999).

2 The report is available at: https://eciu.net/assets/Reports/ECIU_Climate_Attribution-report-Dec-2017.pdf.

PART I

HUMAN RIGHTS TO DEVELOPMENT AND CLIMATE CHANGE

2. A RIGHT-BASED APPROACH TO CLIMATE CHANGE

It is evident from introduction that a major course correction is required to synchronize development (in development and underdeveloped countries) and climate change action on the same track. It is also clear that the blunt impact of climate change disasters is directly faced by poor citizens of the south, leading to human rights violations. Consensus building that may have worked for international law making in other branches of International Law (such as maritime law and humanitarian law) has simply fallen apart in the area of dealing with climate change. This may be because of a range of factors including lack of customary laws in the field because it is a rather recent challenge faced by humanity or disproportionate GHG emissions and vulnerabilities/preparedness of nations to adapt to climate change. This brings us to the issue of finding logical alternatives to the status quo that deals with climate change action. One such alternative is a Right-Based Approach to Climate Change.

A Right-Based Approach (RBA) to climate change action has many advantages. First, it ensures enhanced stakeholder participation. It provides for special attention to integrating the views of the poor and marginalized. It attempts to strike a balance between the winners and losers in the climate change discourse (Sinden, forthcoming).

Second, implementing RBA has the potential to overcome policy paralysis at both national and international levels. RBA seeks to harmoniously address both individual and community rights (which are often in conflict with each other). Community rights are of utmost importance in most of the climate change adaptation action. Often climate change mitigation is prioritized over adaptation action that is of more immediate need to the underprivileged in the global south (Pielke *et al.*, 2007). Adaptation projects mainly seeks to enhance good governance in southern nations by reducing poverty and meeting the sustainable development goals of developing countries at the same time.[3] This compromise leads to compromises at the level of human rights of the underprivileged. Of course, this is not to undermine the role played by mitigation action in dealing with climate change. Less expensive and cleaner energy technology that broadly falls under mitigation technology is a perfect example where mitigation has the potential to address Third World problems. Nevertheless, RBA seeks to address this issue by harmonizing mitigation and adaptation action with the rights of individuals and communities at its Center.

Third, RBA recognizes that development is more than freedom from poverty. This line of logic recognizes that the global south does not have the will to focus on rapid emission reduction; rather it prioritizes poverty alleviation over emission reduction. RBA seeks to establish a global burden-sharing regime.

Under the RBA, the right to fundamental human development is supported by two arguments:

First, there are political benefits of integrating human development in the larger rights discourse. In the greenhouse transition that we seek to achieve there is a high possibility of the global south seeking to protect the imperative of human development. The southern nations will prioritize human development over low-cost mitigation technologies. Thus, human development will be a nodal point as far as climate change negotiation from a southern perspective is concerned.

Second, the practical advantage of engaging with human development as an essential factor of negotiation of the global north with global south is that it ultimately pushes the southern nations toward prosperity, leading to "parity" instead of "differentiation" to which most northern nations oppose.

As both the political and practical arguments are deeply imbedded in ethical basis, RBA is essentially an appeal to morality. Its justification is however a practical one. Ultimately, in the present context where nations lack consensus on the issue of climate change, it is a necessity more than anything else.

3 Another adaptation-oriented example of the enhancement of good governance is in the area of land use and watershed management. Improvements in natural resource management can lower risks, reduce loss of human life, and thus facilitate adaptation to the heavy rains, floods, and severe storms that are associated with climate change, while simultaneously enabling populations to use their resources with minimal or no impact.

Chapter 2

Protection of Intellectual Property Rights in Cyber Space: An Indian Perspective

G. Mallikarjun[1]

Abstract

Computer and computer technology have assumed a major role in all aspects of life. Technology is helping every individual to such an extent that life without computers or computer technology seems to be very difficult. The dependency on the computer technology has been increased because every data and information has acquired electronic shape and is capable of moving through optical fibers, such as, voice files; MP3 files; e-mails; sending encrypted data and photographs, etc., which are capable of being transferred, distributed, circulated and stored in electronic form which serves time and is very easy. Though technology has made life easy, yet it has its own drawbacks like, increased dependency on technology would pose difficulty in protecting one's rights in the cyber space; copyright violation, unauthorized or unlicensed use of trademarks; trade names; service marks; images; music; sound; literary matter, etc. The increased frequency of intellectual property infringements is witnessed more in relation to online media in the recent times, as compared to offline. It could be due to easy availability of data in the cyber realm which can be easily accessed, copied and transferred without disclosing one's identity. This chapter focuses on critical legal issues relating to violations of intellectual property rights in the cyber space and their protection under the existing law.

Keywords: Intellectual property, Cyber space, Copyright, Trademark, Unauthorised use.

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Introduction

In the present day world, due to the shift towards technology and internet, the nature of crime too has changed. Cyber space has given rise to a new jurisprudence which is still in infancy. Now, the entire globe may be said to be a "cyber" village, constantly interacting and communicating through the cyber space, made possible by virtue of internet. This has led the entire legal community to re-think all the traditional questions, ranging from jurisdiction to the basic elements of crime. With the advantage of the cyber space, the software sector has also emerged as major business entity.[2] Another such new aspect of the law which has only recently come into limelight is the law of intellectual property rights. It began to draw immense public attention with the emergence of the TRIPS Agreement of the WTO (World Trade Organization). This leads the legal scholars to trace the history of the IPR, from the angle of classical philosophers and now they have reached a point where they have begun to study the intersection of IPR with new diametric of law like cyber law. Thus, the intersectional study of IPR regime and cyber space is still in its very nascent stages and not much of jurisprudence is available on it. This chapter is an attempt to contribute to this growing body of literature on the recent aspect of cyber space and IPR regime, which would one day assume greater significance.

The cyber criminals later began to target the e-commerce sector which has today become a very big medium of doing business. The traditional laws of IPR when applied to cyber space resulted in some difficulty and hence, some issues began to emerge. Legal scholars have advocated that these issues must be studied in light of technological and legal initiatives, and measures must be taken to protect the infringement of IPR rights in cyber space. The enforcement of IPR rights in cyber space is a very challenging area and this chapter is an attempt to look into the kinds of issues and challenges which have emerged in this area.[3]

IPR and Cyber Space: The Emerging Issues

Broadly, the area of cyber space in which the violation for IPR regime has been taking place and resulting in new issues and challenges may be categorized into two areas: the violation of copyright law in cyber space and the violation of trademark and domain names in cyber space. An attempt has been made to discuss each of them separately here.

Copyright Violation in Cyber Space

Over period of time, many commercial businesses have expanded themselves into online activities and hence, cyber space has become a place of increasing legal disputes.

2 Theresa Hitchens, "*Building Confidence in the Cyber sphere*", http://www.cissm.umd.edu/sites/default/files.pdf, (visited on March 23, 2019).

3 H. Brian Holland, "*The failure of Rule of law in Cyberspace?*", https://repository.jmls.edu/cgi/viewcontent.cgi?article=1027&context=jitpl, (visited on March 23, 2019).

Some of the issues which arise in the cyber space activities are:

(a) linking, b) framing, c) meta tag, and d) caching. Each of these issues has been discussed here one by one.[4]

(b) Linking: Linking is the practice of allowing a user to move from one website to another by simply clicking on a link. Linking may be 'inline linking' or 'hypertext linking'. Hypertext linking takes place when a user clicks on a hyperlink[5] which would be directed to another website. Inline linking happens when a website displays content directly from another website. This is commonly referred to as 'embedding'. It is not confined to just webpages; often, bloggers embed a YouTube video on their blogs to illustrate their point. In *Perfect 10 Inc. v Google Inc.*,[6] the Court of Appeal held that inline linking does not violate copyright law, because no copy has been created in this process.

(c) Framing: Framing is similar to inline linking. Framing refers to the practice of embedding material of one website into another website and covering it with frames. It gives an impression, as if the material is of the person who has embedded the material. The law should treat framing as similar to inline linking for purposes of IPR protection. So far, no case has come in which framing was found to be copyright violation. But there have been several cases, in which framing has been mentioned as source of trademark violation. But law is not clear on this issue.

(d) Meta tag misuse: Websites are written in HTML language. Basically, this language is composed of tags which are used to arrange text, images, etc. on a website. Meta tags are such tags which are invisible and exist in the code of the website to assist the search engines. Disputes arise when companies include on their own website, the Meta tags of other website.

(e) Caching: It is the process of storing of web pages either in user computer's local random access memory (RAM), or at the server level. The problematic issue arises when caching is done at server level, also referred as 'proxy caching'. This technique is used by search engines to speed up the searching process for the browsers and is also used for targeted advertising by the search engines. The question is whether this issue amounts to copyright violation of the user's search history or not, and the answer is still debatable.

(f) Downloading of copyright material: Once the content which violates copyright content has been uploaded on a website, the next thing is to download that

4 Tabrez Ahmad, "*Copyright infringement in Cyberspace*", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511187, (visited on March 23, 2019).

5 As of now, no court has ever held that linking amounts to copyright or trademark infringement and hence, one can do hypertext linking without any legal liability.

6 *Perfect 10, Inc. v. Google, Inc.*, 508 F.3d 1146 (2007).

content. But companies often find it difficult to bring action against thousands of users who downloaded the illegal content. Instead, they choose to bring the action against the intermediary which has hosted the content,[7] which is an unfortunate situation.

Protection of Copyright: The International Conventions

The World Intellectual Property Organization (WIPO) has two Conventions in relation to the protection of copyright in digital space. These are:[8]

(a) The WIPO Copyright Treaty 1996; and,

(b) The WIPO Performances and Phonograms Treaty 1996.

These two Conventions reveal the extent and scope of protection of copyright in the digital space. However, a framework in true sense is provided by the Electronic Copyright Management System (ECMS) to protect the third parties from circumventing the provisions laid in the WIPO conventions on protection of digital copyright.

The following are the two legal aspects of ECMS system:

(a) DMCA (Digital Millennium Copyright Act 1998):[9] This legislation prohibits any act which is meant to traffic any devices or technology which enable circumvention of technology to control access or which enable violation of the rights of the copyright owners.

(b) EUCD (European Union Copyright Directive):[10] The main focus of this legislation is to regulate and prohibit not the actual violation of the copyright, but the preparatory activities like producing devices, technology, etc. which enable violation of copyright by circumvention of technology.

Position under Indian Law

Indian law is still evolving on the aforementioned issues. The position of law is unclear, despite several settled cases. The chief legislation referred by the courts is the Indian Copyright Act 1957. However, on issue of hyperlink, the position is that the hyperlinking does not violate copyright as any website going online has created an implied license for everyone with internet connection to view that website.[11]

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7 In *A & M Records Inc v Napster Inc* 239 F. 3d. 1004 (9th Cir. 2001), it was held that the intermediary (Napster Inc.) was liable for hosting content which violates copyright.

8 Heike Wollgast, "*IP Infringements on the Internet- Some Legal Considerations*", WIPO MAGAZINE, https://www.wipo.int/wipo_magazine/en/2007/01/article_0005.html, (visited on March 23, 2019).

9 Digital Millennium Copyright Act 1998, https://www.copyright.gov/legislation/dmca.pdf, (visited on March 21, 2019).

10 Proposal for a Directive, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0593:FIN, (visited on March 22, 2019).

11 R.K. Chaubey, CYBER CRIME AND CYBER LAW, 1st ed. 2008, pp.712-714.

Trademark and Domain Name Issues in Cyber Space

The issue of domain name arises primarily due to the fact that domain names are registered on the basis of "*first come, first serve basis*" which leads many a times to "*abusive registration*", *i.e.*, registration done by a person who has no legitimate right or interest in the domain name. It is a well-noted fact that domain names are the rights of the original trademark owner.

(a) Cybersquatting

This technique involves the use of domain name by a person or entity who does not have has any legitimate right or interest in the domain name. Such persons register the domain name in their own name, with intent to sell those domain names to the legitimate owner, or third parties at a high profit. This practice has established the importance of domain names in the online sphere. To prove the existence of cybersquatting, the complainant must show the dishonest intention, lack of legitimate rights, and similarities in the trademark and in the domain name.[12]

(b) Reverse Domain name Hijacking

This is also referred to as reverse cybersquatting. In this practice, the trademark owner tries to secure a domain name by alleging fake claims against the rightful owner of the domain name. This leads to intimidation of the person having the rightful domain name and often, the trademark is transferred to the person who made the fake claim in order to avoid litigation expenses. This practice is resorted to by famous individuals and reputed corporations.[13]

International Conventions

An important international development worth mentioning here is the WIPO initiative on Domain name dispute resolution. WIPO took an initiative of consultations on domain name disputes and has initiated a settlement mechanism. Accordingly:[14]

(a) The registration authorities should procure correct and detailed data on owners of domain names and same should be made publicly accessible;

(b) In case of non-compliance with the above requirement, the registrar should cancel the domain name on a notice from the affected parties;

(c) The report recommended for a uniform dispute resolution for all Trademark-related disputes and there should be an online procedure to settle the disputes; and,

(d) The mechanism calls for trans-border enforcement of the domain names, to avoid deception, deceit, etc. in trade marks.

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12 What is Cybersquatting?, http://www.anti-abuse.org/what-is-cybersquatting/, (visited on March 21, 2019).

13 What is Reverse Domain Name Hijacking?, https://giga.law/blog/2016/10/19/what-is-reverse-domain-name-hijacking, (visited on March 21, 2019).

14 WIPO Internet Domain Name Process, https://www.wipo.int/amc/en/processes/process1/report/finalreport.html, (visited on March 21, 2019).

Indian Position

In India, the Trademarks Act 1999 can be invoked to protect the trademarks and the service marks respectively, and the protection available under the Act is stronger than internationally required and provided. The domain name infringement cases are generally decided under the trademark law as the Indian Information Technology Act does not deal with the domain name issues. In *Yahoo! Inc. v. Akash Arora*[15], the court for the first time protected a domain name in India in pursuance of a remedy involving the offence of passing off. A similar approach was adopted by the court in the case of *Rediff Communication Ltd v. Cybertooth.*[16] The Supreme Court of India, in *Satyam Infoway Ltd. v. Sifynet Solutions P. Ltd*,[17] categorically held that there is no legislation in India which explicitly refers to dispute resolution in connection with domain names as the operation of the Trade Marks Act 1999 has no extra territorial application and may not provide adequate protection to domain names. This does not mean that domain names are not to be protected legally to the extent possible under laws of passing off.[18] Further, it was also held that the internet domain names are subject to the same legal norms applicable to other types of intellectual property such as trademarks.[19]

Thus, the Trademarks Act 1999 can be invoked to protect the trademarks and the service marks respectively, the protection available under the Act is stronger than internationally required and provided. If the domain name, proposed to be registered, is in violation of another person's "*trademark rights*", it will violate Rule 2 of the Uniform Domain-Name Dispute-Resolution UDNDR Policy, adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN").

Software Patents and the Law

International Conventions

To determine whether patent can be granted or not to advance technological innovations is slightly controversial in nature. Clause (1) of Article 27 of the TRIPS Convention

15 I.A. No. 10115/1998 in suit No. 2469/1998.

16 AIR 2000 Bom. 27.

17 2004(28) PTC 566.

18 Passing off is a form of unfair trade practice in which one party seeks to profit from other party's reputation.

19 According to the court "*The use of the same or similar domain name may lead to a diversion of users which could result from such user mistakenly accessing one domain name instead of another. This may occur in e-commerce with its rapid progress and instant (and theoretically limitless) accessibility to users and potential customers and particularly so in areas of specific overlap. Ordinary consumers/ users seeking to locate the functions available less than one domain name may be confused if they accidentally arrived at a different but similar website which offers no such services. Such users could well conclude that the first domain name owner had misrepresented its goods and services through its promotional activities and the first domain owner would thereby lose their custom. It is apparent therefore that a domain name may have all the characteristics of a trade mark and could found an action for passing off.*"

provides that patent protection is available for all inventions and patent rights can be enjoyed on basis of fields of technology.[20] This clause doesn't define the exact meaning of the term "*invention*". Apart from this, computer software is mainly protected by Article 10 of the TRIPS Agreement. It mentions that the source code and object code can be protected as literary work under Berne Convention 1971.[21]

The dispute in relation to protection of software arises in reference to the protection of copyright or in protection of patent. The TRIPS Agreement discusses at length about the copyright protection granted to the object code and source code. It is difficult to protect computer software under copyright law because of basic difference between software and traditional literary work. The TRIPS Agreement provides copyright protection for object and source code but it doesn't provide protection for valuable behavior of the programme. Till now, we have been struggling to answer whether the patent protection can be granted to only software or technical applications or their physical manifestations.

Position in US

In the United States, the computer programs can be protected by both copyright and patent protection as Congress and Supreme Court blurred the distinction traditionally made in protection of computer related inventions. There are three implicit exceptions to the patent eligibility- the laws of nature, physical phenomena, and abstract ideas. In determining the patent eligibility of a method claim reciting the use of a computer as a limitation, the Federal Circuit looked into whether the computer plays a dominant role in determination of the nature of the invention or is it merely an insignificant part of the invention. In *Bancorp Services, L.L.C v. Sun Life Assurance Company of Canada* (US),[22] the Federal Circuit considered the patent eligibility of claims describing a method and system for "*determining the values required to manage a stable value protected life insurance scheme*". The court further ruled that the mere usage of the computer was not integral to determine the patentability under the abstract idea-expression test.

Copyright protects the form of expression and not the idea itself. However, the US Supreme Court in *Gotschalk v. Benson*[23] observed that, "*phenomenon of nature, though just discovered, mental processes and abstract intellectual concepts are not patentable as they are the basic tools of scientific and technological work*". To assess the patentability of the invention, one should look at the invention as a whole and not just at what was novel about it.

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20 WTO Module on Patents, https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules5_e.pdf, (visited on March 20, 2019).

21 Emmanuel Oke, "*Article 10 of the Berne Convention and the Three Step Test*", https://emmanueloke.com/2018/04/06/article-10-of-the-berne-convention-and-the-three-step-test-part-4/, (visited on March 21, 2019).

22 687 F.3d 1266 (Fed. Cir. 2012).

23 409 U.S. 63 (1972).

Position in India

In India, the Patents (Amendment) Act 2005 sought to introduce software patents. However, this amendment was rejected by the Parliament of India and hence, no changes in the statute were possible at that time. As the Patents act clearly says that computer software *per se* is not patentable, there are differences between pro-software and anti-software patent supporters. Inventive step is an important aspect of invention. To judge the inventive step, the following question is to be born in mind- "*Would a non-inventive mind have thought of the alleged invention?*" If the answer to the above question is "no", then the invention would be regarded as non-obvious. For the purpose of the determination of the inventive step, the prior art shall include the prior publication in the relevant field. These principles were laid in *Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries*,[24] and were followed in subsequent cases.

Computer Related Invention Guidelines

In India, in the absence of any guidelines on the issues of patents on computer related inventions (CRI), the patent offices in India were prohibited from issuing business method patents while computer programs could be patentable on the fulfillment of certain conditions and following tests should be followed. They are:[25]

(a) If the claims are in conjunction with novel hardware, the examiner should proceed to other steps to determine the patentability of the invention;

(b) If the contribution lies solely in the computer programme, the claim should be denied; and,

(c) If the contribution lies in both the computer programme as well as the hardware in question, the examiner should proceed to the other steps involved in assessing patentability.

Conclusion

The above points show that there is an urgent need to protect violation of the IPRs in cyber space. IPRs are valuable assets of a person and must be protected at all costs. United States has special legislations to protect the IPR violations in cyber space, for instance, the "*US Anti-cybersquatting Consumer Protection Act 1999*" which protects the interests of the owners of the both registered and unregistered trademarks against use of their marks within domain names. It also protects the names of the living persons to be used, in certain circumstances. The present-day legislations on cyber law in India don't have sufficient provisions for protection of IPRs. Therefore, there is an

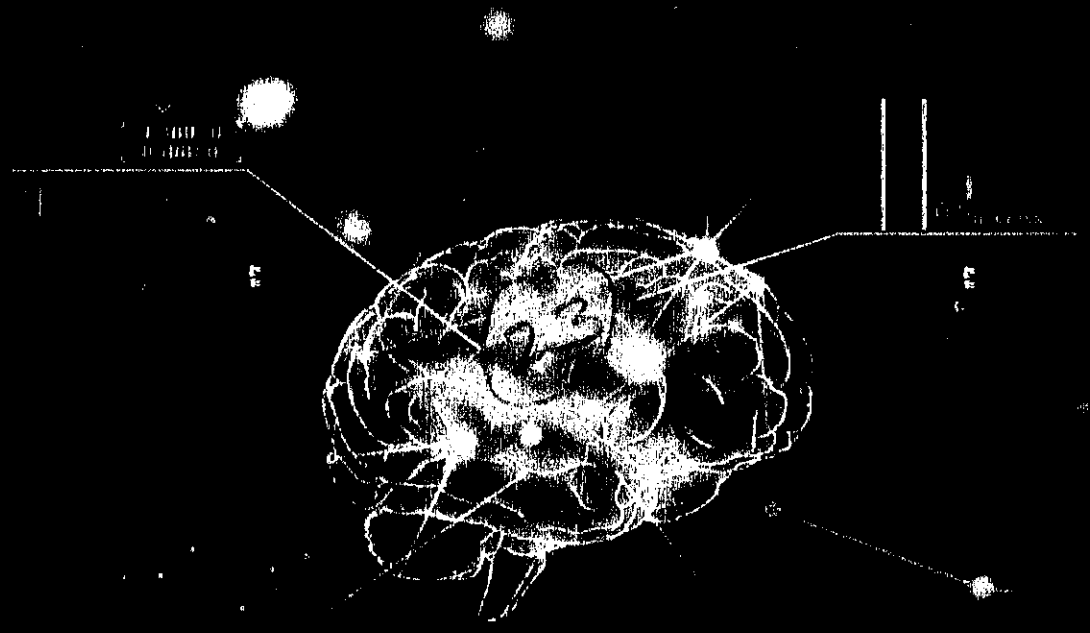
24 AIR 1982 SC 1444.

25 Devika Agarwal, "*Software Patents; Prohibited under Indian law but granted in spirit*", http://www.firstpost.com/tech/news-analysis/software-patents-prohibited-under-indian-law-but-granted-in-spirit-3702725.html, (visited on March 22, 2019).

immediate need of legislations on cyber law in India which will strengthen the IPRs protection.[26]

26 Karnika Seth, "*Strengthening the Intellectual Property regime in Digital India*", https://www.sethassociates.com/wp-content/uploads/strengthening-IP-in-Digital-India.pdf, (visited on March 21, 2019).

CHANGING DYNAMICS OF INTELLECTUAL PROPERTY RIGHTS



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Article

What Is Wrong with a Rights-based Approach to Morality?

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Rajesh Kapoor[1]

Abstract

There is a prominent streak of scholarship in moral and political philosophy which espouses the idea that morality is rights based. In this article, I argue that such an approach not only undermines but also operates against a range of other morally significant human relationships and attitudes such as community, solidarity, care, compassion and benevolence, which play an important role in our lives. The concept of rights is a product of historical circumstances, and it risks turning morality upside down if it encourages self-righteous claims. The notion of rights can be a constituent element of morality, but the entire moral phenomenon cannot be just rights based, and rights and duties need to remain balanced.

Keywords

Rights, morality, community, individualism, care, compassion

Introduction

The idea of rights has become so pervasive in the present age that some writers have termed it the age of rights.[1] Almost every human act and quest ranging from education to environment and sex to spiritualism is talked about, translated, measured and understood in the terminology of rights. People claim not only a right to life but to die also. Not only a right to development, but to do wrong also.[2] Not only a right to food but even a right to pornography.[3] The

[1] Norberto Bobbio, The Age of Rights (1996); Louis Henkin, The Age of Rights (1996).
[2] Jeremy Waldron, *A Right to Do Wrong*, *in* Theories of Rights 21-39 (C. L. Ten ed., 2006).
[3] Ronald Dworkin, *Is There a Right to Pornography*, *in* Theories of Rights 177-212 (C. L. Ten ed., 2006).

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discourse in moral and political philosophy has been shifting from basing rights in morality to rights-based moralities.[4] This approach is problematic because it undermines a range of other morally significant human relationships and attitudes such as community, solidarity, care, compassion and benevolence. To highlight this issue is the main object of the present enquiry.

This article is not concerned with what is a right—its normative content and its properties are not my concern here. Nor I am going to analyse any substantive theory of rights least to formulate it. My main motive in this article is to find out to what extent the whole social phenomenon can be hinged upon one single notion—the notion of rights? I would try to counter the proposition that morality is rights based, thereby allowing other morally significant human relationships and attitudes their due place. I would argue that even if the notion of rights is treated as indispensable, it risks violating the rights of other morally significant values by usurping their space and acquiring a position or place of pre-eminence which it does not deserve.

There are different types of rights—for example, moral rights, human rights and legal rights—so that, the foremost question which comes into mind is what type of rights the present critique is concerned with? Here I am going to deal not with any specific form of rights, but the notion of rights in general. In this amorphous form the idea of rights means claims against others. Second, there are different theories of rights. Which one of them would we deal with here? The present critique is predominantly focused on the idea of rights espoused in the liberal tradition. Although liberalism is not monolithic, I am concerned with that stream of liberal thought which projects the notion of rights as a peremptory norm and thereby puts excessive emphasis on the individual.[5]

Different Approaches Towards Rights

We can segregate the different approaches towards rights into three different groups. One approach discards the very idea of rights as it sees them as claims of an egoistic man or a male-centric aggressive way of ordering society. Marxist and some of the feminist theories fall into this group. In his oft-quoted criticism of the idea of rights Karl Marx observed that, 'none of the so called rights of man goes beyond egoistic man, … an individual withdrawn behind his private interests and whims and separated from the community'.[6] Similarly, discarding the notion of rights, some feminist scholars find it operating against the female nature, which is attuned to care and compassion. According to them, rights are in consonance with a male-centric psychology rested on the idea of individuality and separateness.[7]

[4] Ronald Dworkin, Taking Rights Seriously (1978); J. L. Mackie, *Can There Be a Rights Based Moral Theory? in* Theories of Rights (Jeremy Waldron ed., 1984).

[5] *Comments on Some Characteristics of the Liberal Political Tradition, in* International Human Rights in Context 512-16 (Henry J. Steiner et al. eds., 3rd ed. 1996).

[6] Darren O' Byrne, Human Rights an Introduction, 53 (2003).

[7] C. Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

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ABSTRACT

The Rajasthan High Court criminalized the Jain practice of ritual voluntary death variously termed sallekhana or santhara in 2015. The petition that sought its criminalization, and the court judgment were both framed in the language of religious reform and invoked judicial memory of sati. The Jain defenders of the practice, insisted on its difference from sati on the one hand, and suicide and euthanasia on the other, which too continued to remain beyond the pale of legality. However, in setting it up as an 'essential practice', which would afford it the protection of Article 25, they simultaneously drew upon Jainism's ethical teachings – mobilizing a range of ancient texts, providing a list of their religious figures and historical personalities who met 'death with equanimity' – and the moral and legal arguments utilized by euthanasia advocates, in particular the debates around the

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Right to Life. This paper thus examines the anxieties that have framed the debate on both sides, and asks what happens when piety and belief enter, or rather, are dragged into the courtroom: when one party seeks its denunciation and another its validation, or indifference even, from modern, rational law? The paper also examines if the High Court judgment is the result of the Christian/colonial legal legacy, which abhorred and outlawed suicide, as claimed by many commentators, by scrutinizing the colonial attitudes to sallekhana.

KEYWORDS: Macaulay euthanasia essential practice sallekhana santhara sati Article 21

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Recusal Refusals
Determining Bias and Impartiality

FAIZAN MUSTAFA

Judges recuse themselves from benches to retain people's trust in the judiciary. Lately, there have been controversial recusals: in one case by a few Supreme Court judges, and in another where a recusal was refused. The Chief Justice of India too had refused to recuse himself in a third case. Through an examination of various tests of determining bias and examples of other countries, a critical examination of the propriety of these refusals to recuse has been made.

In recent months, the Indian Supreme Court saw two extreme examples of judicial recusals. In the case of Gautam Navlakha, a human rights activist who had approached the Court for the quashing of criminal proceedings against him, as many as five judges on their own recused themselves (*Hindu* 2019). But, in another case where the correctness of the judgment authored by the judge was to be examined by the larger bench, Justice Arun Mishra refused to recuse himself despite requests by some of the parties and, on 23 October 2019, he passed a 56-page order giving reasons for his non-recusal (*Indore Development Authority v Manohar Lal and Ors* 2019). The Chief Justice of India (CJI) had similarly refused to recuse himself in *Assam Detention Centre v Union of India* (2019).

Since no reasons have been given for the recusal in the petition of Navlakha, we will discuss here the refusal orders by Justice Mishra and Chief Justice Ranjan Gogoi. Perception, indeed, has a central role in any judicial process and both the cases have raised serious questions about the impartiality of our highest court. Here, we would examine the origin and rationale of the recusal rule, how courts in other countries have dealt with such requests, why the recusal order of Justice Mishra is not consistent with global practice, why the CJI's order is contrary to even the test laid down by Indian judges, and what changes should be made in the recusal law.

Impartiality of judges is the first principle of fair judicial process. Though it is difficult to define impartiality in exact and precise terms, every judge must keep in mind what Learned Hand had said:

> What do I mean by impartiality? I mean you must not introduce yourself, your own preconceived notions about what is right. You must try, as far as you can, it is impossible for human beings to do so absolutely, but just so far as you can, not to interject your own personal interests, even your own preconceived assumption and beliefs. (Hand and Dillard 1953: 309–10)

The recusal of a judge is sought when there are doubts about their impartiality. In fact, it is the foremost duty of the judge to remove every sense of injustice and the possibility of appearance of bias not only from the minds of the parties, but even the public at large, or at least the well-informed observers of the judicial process.

Recusal: Origin and Development

A judge should ideally recuse themselves from a proceeding in which their impartiality "might reasonably be questioned" due to the possibility of their personal bias or prejudice concerning a party to the dispute, or personal knowledge of a disputed fact, or if they have been a lawyer or judge in the matter at some stage. To begin with, as was held in *Sir Nicholas Bacon's Case* (1563), a judge was expected to recuse themself if they had "direct pecuniary interest" in the matter before them. Sir Edward Coke laid down in *Dr Bonham's Case* (1610) that no one shall be a judge in their own cause. In the United States (US), in 1792 itself, recusal principles based on British common law were given statutory recognition. American law has been amended five times and new categories have been added to enlarge the categories necessitating recusal.

A leading British authority said in unequivocal terms that "for the law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice" (Blackstone 1992: 361). Justice Mishra has justified his refusal to recuse on these very grounds of his constitutional duty to sit and the oath he has taken to decide cases without fear or favour, affection or ill-will. Though, an argument in favour of recusal can also be made on the basis of this very oath.

Subsequently, the recusal law was further broadened and liberalised with "automatic disqualification" becoming the rule in cases of bias. It was termed as the "bright line rule" and covered clear-cut cases of bias. In the cases of appearance

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of bias, arguments are to be made demonstrating the reasons of possible bias by the concerned judge, and this was called the "rule of reason or per se rule."

Let us understand the concept of bias.. Bias means inclination, bent, prepossession, or a preconceived opinion, and does include a "predisposition" to decide the dispute in a particular way. Bias sways judgment as it is a particular influential power leading the mind to be inclined in a particular direction. In Justice Mishra's case, "predisposition" was the central argument as he had taken a definite position as to the meaning of "paid" under Section 24(2) of the Right to Fair Compensation in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR). Lord Esher in *Allinson v General Council of Medical Education Registration* (1894) observed that the question is not that the judge, in fact, was biased. In all likelihood, a fair judgment would be eventually pronounced by Justice Mishra, but the problem with such a judgment will be its legitimacy in the eyes of the public.

Non-recusal by Justice Mishra has shaken people's confidence in the impartiality of this bench as the thumb rule is that a judge should err on the side of caution and should remove any reasonable doubt about their impartiality. Lord Hewart famously observed in *R v Sussex Justices, ex parte McCarthy* (1924) that reasonable suspicion of bias was enough to exclude a judge. But, then, parties through recourse to recusal should not try to get a more favourable judge. Justice Mishra has rightly emphasised the possibility of bench hunting, and he is justified in saying that recusal requests are not to be used for such manipulations or avoiding a particular judge.

Genesis of Current Controversy

Under the LARR, 2013, if land was acquired five years prior to the commencement of the new act and if compensation had not been paid, the acquisition would lapse. A three-judge bench of Chief Justice R M Lodha, Justice Madan B Lokur, and Justice Kurian Joseph in *Pune Municipal Corporation and Others v Harakchand Misirimal Solanki* (2014) unanimously held that "paid" would mean compensation offered or rendered and deposited in court. According to Namita Wahi (*Live Law* 2018), this judgment was followed in more than 245 decisions of the Supreme Court and about 1,000 judgments of various courts of the country.

On 8 February 2018 in *Indore Development Authority v Shailendra* (2018), Justice Mishra, Justice Adarsh Kumar Goel, and Justice Mohan M Shantanagoudar, by a majority of 2: 1, held that the judgment in the Pune Municipal Corporation case as *per incuriam*[1] and gave as many as 11 reasons for the same. Interestingly, Justice Mishra also discussed the normal option of reference to the CJI in cases of conflict between two benches of equal strength, but eventually overruled the Pune Municipal Corporation case by going against the doctrine of *stare decisis*.[2] Justice Shantanagoudar preferred to write a dissenting judgment. Justice Mishra held that once compensation has been unconditionally offered and refused, it would satisfy the requirement of payment of compensation even if it was merely deposited in the government treasury. This new interpretation will only favour corporates and the government, and not the farmers whose land has been acquired, even though balance of equities in acquisition cases should always be in favour of people whose land had been acquired particularly in situations where compensation has not been paid for five long years. The law relating to judicial propriety is fairly settled and was reiterated by Justice R C Lahoti in *Central Board of Dawoodi Bohra Community v State of Maharashtra* (2005), where he had observed that "the law laid down by a larger Bench of this Court is binding on any subsequent bench of lesser or co-equal strength."

In view of the above, on 20 February 2018, Justice Lokur's bench, while hearing land acquisition matters from Punjab and Haryana, was surprised to know that a three-judge bench has declared a decision of an earlier three-judge bench judgment of which both Justice Lokur and Justice Joseph were part as *per incuriam*. Justice Lokur's bench, therefore, stayed the hearing in the high court and requested other benches of the apex court to wait till his bench hears the matter after Holi on referring the issue to the CJI for the constitution of a larger bench. On 22 February 2019, Justice Mishra himself referred the matter to the CJI for constituting a larger bench, and now, in his order, he has cited examples of referral judges sitting in the larger bench, though this certainly was not an ordinary referral but was made to prevent Justice Lokur from hearing this issue. In any case, Justice Mishra's 23 October order has not cited a single example that exactly matches the facts of this case. Moreover, why was Justice Shantanagoudar, who has dissented with Justice Mishra, not put on this bench by the CJI?

Perspective on Bias

Whose perspective of bias should really matter? On 2 May 2019, CJI Gogoi too had refused to recuse himself in the Assam Detention Centre case, though, being an Ahom from Assam, he and his family had a natural interest in the National Register of Citizens. Rejecting Harsh Mander's explicit request for a recusal, the CJI observed, "Do not even remotely think that we will recuse. We will not allow anyone to browbeat the institution. Recusal will be destructive for the institution." He went on to add that "the inability, difficulty or handicap of a judge to hear a particular matter is to be perceived by the judge himself and no one else" (Mustafa 2019). Justice Mishra has similarly talked of his own conscience, but then both, he as well as the CJI, ignored the sound principle laid down by Justice M N Venkatachaliah in *Ranjit Thakur v Union of India* (1987), where he had observed that

> as to the tests of likelihood of bias what is relevant is the reasonableness of apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however honestly, "am I biased;" but to look to the mind of party before him.

Ideally, Justice Mishra should have himself told the CJI that he does not want to be on this bench, or at least made this offer as soon as the hearing started in this case, as the mere likelihood of bias in India is considered sufficient to warrant a recusal (*Ashok Kumar Yadav v State of Haryana* 1985).

All human beings are entitled to consider themselves as fair and unbiased.

But, in the judicial process, judges do not have this privilege as it is not their assessment that matters; rather, it is for others to evaluate their fairness and impartiality. The guarantee of due process is violated if well-informed observers think that the concerned judge, being a fallible human being, in this particular matter, may not hold the balance nice, clear and true.

Justice Mishra asserted in this case that he will hear the case with an open mind, and like Justice N H Bhagwati, may change his opinion. Justice Bhagwati was on the bench in *State of Bombay v United Motors (India) Ltd* (1953) and also on the larger bench in *Bengal Immunity Co Ltd v State of Bihar* (1955) and changed his opinion. But, then, Justice Mishra did not take into account the fact that, at that time, the Supreme Court had just seven judges and, therefore, options before the CJI in constituting larger benches were extremely limited. Justice Mishra overlooked the fact that the possibilities of unconscious bias should also be removed from the judicial process. Is it not a fact that all of us see everything from our own eyes only?

In the US, doubts about impartiality are not examined from the perspective of the judge or the parties, but as per the mind of an "uninvolved reasonable observer." As opposed to the British test of "real possibility of bias," Australian judges follow the much broader test of "reasonable apprehension of bias." In Canada, the "likelihood of probability of bias" and not mere possibility is to be demonstrated, and the mere suspicion of bias does not warrant recusal. Britain, too, follows the test of "real possibility of bias" that is indeed examined from the perspective of not just the party seeking recusal, but what has been termed as the perspective of a "fair minded and informed observer." British law is, thus, an improvement on the American law as it goes one step forward with an additional qualification that this "uninvolved reasonable observer" should be "well-informed" as well.

Who is a well-informed observer? They will be one who would not be oversensitive, over-reactive, and over-suspicious of every judge's impartiality. They will not be an ordinary layperson either, but someone who has some understanding of the judicial system and is well-versed with the principles of fairness in the judicial system. The criticism of writers who advocated the recusal of Justice Mishra being mentioned in the order is in bad taste as these writers are people who are indeed well-informed observers of our judicial process. To say that due to their articles "the very independence of the judicial system is at stake, if in this kind of scenario, recusal is sought by powerful lobbies, and any recusal would be defeating the very oath of the office which a judge takes" is too strong a statement. Attributing motives to experts in their absence not only violates the natural justice principle that no one shall be condemned unheard, but will also have a "chilling effect" on the freedom of speech.

Judge's Opinion

In the cases of pecuniary interest, or involvement of the judge with the case as a lawyer, or their relationship with any of the parties or lawyers, there is generally an automatic recusal or what is called per se rule or off limits rule. Thus, cases of financial, relationship, and personal biases are fairly open-and-shut cases. Accordingly, Justice R V Raveendran in 2009 had recused himself from a case against Ambani brothers over Krishna–Godavari basin because his daughter had worked for the law firm that had advised one of the parties (*Economic Times* 2009). Justice Anil R Dave similarly recused himself in the National Judicial Appointments Commission case (*Supreme Court on Advocates on Record Association v Union of India* 2016) that was brought in to replace the collegium of which he was a member. But, invoking his oath, Justice Khehar refused to recuse himself in the same case.

But, when appearance of bias is alleged, the rule of reason is to be invoked and deeper questions are raised. Here, the first principle is that no person will be a judge in a cause where they have an interest in the outcome of the case. Thus, if a judge had some commitment to a cause, or expressed an opinion on the subject, or actively participated in the enactment of the law under challenge, they have to recuse themselves. Even the context of the case becomes crucial. In *Webb v R* (1994), Justice Deane explicitly laid down

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that appearance of bias will be satisfied if the judge has "published statements either in the course of, or outside, the proceedings." In the historic case of *R v Bow (Street Metropolitan Stipendiary Magistrate and Ors ex p Pinochet Ugarte* No 2) (2000), the House of Lords refused to give immunity from arrest, criminal charges, and extradition to former Chilean President Augusto Pinochet, who was arrested in London on 10 October 1998 for gross human rights violations during his presidency. Accordingly, he was extradited to Chile. Since, in this case, Amnesty International, a leading human rights organisation, was permitted to intervene, Pinochet, after losing the case, raised the issue about the bias of Lord Hoffman. It was argued that he should have recused himself as he headed a subsidiary of Amnesty International, namely International Charity Ltd, though no objections were raised during the hearing. But, Lord Browne-Wilkinson observed that if the conduct of the judge "may give rise to a suspicion that he is not impartial," he should be automatically disqualified from hearing the case. Here, even working for an organisation that espouses the same cause as the party before the judge was considered sufficient for automatic recusal. This was too broad an interpretation and Indian judges are not likely to follow this interpretation.

In the leading case of *Laird v Tatun* (1972), where the constitutionality of the military's surveillance of civilians was challenged, the issue of recusal of Justice Rehnquist, who had appeared as an expert witness at the Senate hearings, was raised after the Supreme Court had given a 5:4 judgment. Though it was argued that the case be reheard without Justice Rehnquist, he refused to recuse himself as his involvement was nothing beyond having some information about the case, and he was certainly not the lawyer, or advisor, or closely involved with the surveillance. Justice Rehnquist went on to say that "neither did he think his public statements and opinions on the law should lead him to recuse himself." But, unlike Justice Rehnquist, Justice Mishra has written an elaborate opinion.

In *Elk Grove Unified School District v Newdow* (2004), the recitation of the Pledge of Allegiance that included the expression "under God" in public schools was held as violative of the non-establishment of religion clause by the Court of Appeal for Ninth Circuit. Finally, the matter reached the US Supreme Court and Justice Scalia's recusal was sought on the grounds that he has expressed his opinion on the judgment at some religious event in 2003. Justice Scalia indeed recused himself. Justice Mishra has expressed a well-reasoned opinion not in some event, but in a judicial proceeding, and therefore his refusal to recuse is certainly problematic and undermines the promise of fair process and impartial justice.

Referral versus Appeal

Justice Mishra has rightly said that the constitution bench he is heading is not hearing the appeal against his judgment in the lower court. It is just hearing the reference from a smaller bench. He is certainly right on technicalities, but in reality, it is indeed his judgment that is under challenge before his bench. New Zealand's scholar judge Grant Hammond (2010: 52) rightly invites our attention to the overemphasis on formalities when he said that "the real sting of the criticism of the present apparent bias test is that it is too concerned with formality and appearance, and less concerned with actualities." In recusal, we do have a context-sensitive rule as well and, in the context of this case, recusal should have been automatic without any arguments.

In the US, only the concerned judge hears the recusal arguments. But, this is not consistent with the natural justice principle of "no one shall be a judge in their own case." In Britain, the Pinochet (No 2) case suggested that the panel of judges with Law Lord in Chair should hear recusal petitions. India already follows this rule and, in both the refusals discussed above, the decision was of the entire bench.

India should now bring in some statutory provision on recusals so that at least in cases like *Indore Development Authority v Manohar Lal and Ors* (2019), there should be an automatic recusal. In these kinds of references, the judge who had delivered the judgment should not be put on the larger bench.

NOTES

1 *Per incuriam* means a judgment in ignorance of statute or earlier judgments.

2 *Stare decisis* means to stand by earlier decisions.

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The Live Animal Export Trade

An Egregious Violation of the Public Trust?

Gary Lilienthal, Nehaluddin Ahmad, Faizan Mustafa

Keywords: Animal welfare (/list/articles/keyword/Animal%20welfare), Feedlotting practices (/list/articles/keyword/Feedlotting%20practices), Public interest (/list/articles/keyword/Public%20interest), Animal slaughter (/list/articles/keyword/Animal%20slaughter), International regulatory system (/list/articles/keyword/International%20regulatory%20system), Humane treatment of animals (/list/articles/keyword/Humane%20treatment%20of%20animals), Breach of the public trust (/list/articles/keyword/Breach%20of%20the%20public%20trust)

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The Australian Lot Feeders Association complains that animal welfare activists and airborne drones are probing their feedlotting practices. The object of this article will be to analyse critically the public interest in the export of live animals for purposes of destination market slaughter, with the industry's corporate interests. According to former Australian High Court Chief Justice French, public decisions must be made lawfully, rationally, fairly and intelligibly. The question arises as to whether decisions in the export supply chain of live animals comply with these criteria, and does the live animal export trade constitute a major breach of public trust? The prevailing public view, and therefore the public interest, may be inferred from the available facts, suggesting that the live animals export industry is only apparently in conformance with an international regulatory system. Authorities appear to have taken the side of corporate live animal export interests, and their apparent desires for production efficiencies, distorting the public rhetoric to manipulate the public interest, and reducing the quality of humane treatment of animals. On board many ships, animals have been severely ill-treated and tortured, enduring suffering through high temperatures, a lack of fresh or sufficient air causing death, and the further painful suffering of deadly diseases. Although apparently lawful, the trade does not appear rational, fair or intelligible, thus amounting to a large-scale breach of the public trust.

Keywords: Animal welfare; Feedlotting practices; Public interest; Animal slaughter; International regulatory system; Humane treatment of animals; Breach of the public trust.

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IPR and Cyber Space: The Emerging Issues

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Abstract: Computer and Computer Technology have taken a major role in all aspects of life. It is helping every individual to such an extent that life without computers and computer technology seems to be very difficult. The dependency on the computer technology has been increased because every data and information has acquired electronic shape and is capable of moving through the optic fibers. Though technology has made life easy, yet it has its own drawbacks like increased dependency on the technology would pose difficulty in protecting once rights in cyber space like copy rights violation, un-authorised or unlicensed use of trademarks, trade names, service marks, images, music or sound or literary matter etc.. The increased frequency of intellectual property infringements is witnessed more in relation to online media in the recent past rather than rather than offline. Therefore, this paper focuses on critical legal issues relating to violations of Intellectual Property Rights and its protection under the existing law.

Index Terms: IPR, cyber space, copy right, trade mark.

I. INTRODUCTION:

In the present day world, due to the shift towards technology and internet, the nature of crime too has changed. Cyber space has given rise to a new jurisprudence which is still in infancy. Now, the entire globe may be said to be a "cyber" village, constantly interacting and communicating through the cyber space, made possible by virtue of internet. This has focused on the entire legal community to re-think on all the traditional questions ranging from jurisdiction to the basic elements of crime. With the advantage of the cyber space, the software sector has also emerged as major business entity.[2] Another such new aspect of the law which has only recently come into lime light is the law of Intellectual Property rights which attracted immense public attention with the emergence of the TRIPS Agreement of the World Trade Organization ("WTO"). This leads the legal scholars to trace the history of the IPR, from angle of classical philosophers and now they have reached a point where they have begun to study the intersection of IPR with new diametric of law like cyber law. Thus, the intersectional study of IPR regime and cyber space is still in its very nascent stages and not much of jurisprudence is available on it. This paper is an attempt to contribute to this growing body of literature on the recent aspect of cyber space and IPR regime, which would one day assume greater significance.

The cyber criminals later began to target the e-commerce sector which has today become a very big medium of doing business. The traditional laws of IPR when applied to cyber space resulted in some difficulty and hence, some issues began to emerge. Legal scholars have advocated that these issues must be studied in light of technological and legal initiatives. Consequently, measures ought to be put in place in order to safeguard IPR regime in cyber-space from potential infringement. The enforcement of an IPR regime in cyber space is a very challenging area and this paper makes an attempt to look into the kinds of issues and challenges which have emerged in this area[3].

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[2]Theresa Hitchens and Nancy W. Gallagher, *Building Confidence in the Cybersphere: A Path to Multilateral Progress*, CISSM Working Paper 2 (2018).

[3] H. Brian Holland, *The Failure of the Rule of Law in Cyberspace?: Reorienting the Normative Debate on Borders and Territorial Sovereignty*, 24 J. Marshall J. Computer & Info. L. 1 (2005).

II. PROTECTION OF IPR IN CYBER SPACE:

Broadly, the area of cyber space in which the violation for IPR regime has been taking place and resulting in new issues and challenges which may be categorized into two areas: the violation of copyright law in cyber space and b) the violation of trademark and domain names in cyber space. An attempt has been made to discuss each of them separately here.

Copyright violation in cyber space: Over period of time, many of the commercial business have expanded themselves into the online activities and hence, cyber space has become a place of increasing legal disputes. Some of the issues which arise in the cyber space activities are:

a) linking, b) framing, c) meta tag, and d) caching. Each of these issues has been discussed here one by one[4].

a) Linking: Linking is the system enabling users to engage in inter-website movement by placing a click on a concerned link. Linking may be in line linking or hypertext linking. Hypertext linking takes place when a user clicks on a hyperlink[5] which would be directed to another website. Inline linking happens when a website displays content directly from another website. This is commonly referred as embedding. It is not confined to just web pages; often, bloggers embed a YouTube video on their blogs to illustrate their point. In its decision in Perfect 10 Inc v Google Inc[6], the court of appeal ruled in-line linking to be non-violative of copyright law, due to the absence of the creation of any copy in the process.

b) Framing: Framing is similar to inline linking. Framing is the method or practice of embedding material of one website into another website and covering it with frames. It gives an impression, as if the material is of the person who has embedded the material. In such cases, framing should be treated similarly to inline linking in the context of IPR. So far, no case has come in which framing was cited as a copyright violation. But there have been several cases, in which framing has been mentioned as source of trademark violation. But law is not clear on this issue.

c) Meta tag misuse: Websites are written in HTML language. Basically, this language is composed of tags which are used to arrange text, images, etc. in a website. Meta tags are such tags which are invisible and exist in the code of the website to assist the search engines. Disputes arise, when companies include in their own website, the Meta tags of other website.

d) Caching: It is the process of storing of web pages either in user computer's local RAM, or at the server level. The problematic issue arises when the caching is being done at server level, also referred as "proxy caching". This technique is being used by search engines to speed up the searching process for the browsers and is also used for targeted advertising by the search engines. Question is whether this issue amounts to copyright violation of the user's search history or not, is still debatable issue.

e) Downloading of copyright material: Once the content which violates copyright content has been uploaded on a website, the next thing is to download that content. But companies often find it difficult to bring action against thousands of users who downloaded the illegal content. Instead, they choose to bring the action against the intermediary which has hosted the content[7], which is unfortunate situation.

[4] Ahmad, Tabrez, *Copyright Infringement in Cyberspace and Network Security: A Threat to E-Commerce*, 9 IUP J. CL 17 (2010).
[5] As of now no court has ever held that linking amounts to copyright or trademark infringement and hence, one can do hypertext linking without any legal liability.
[6] Perfect 10, Inc. v. Google, Inc., 508 F.3d 1146 (2007).
[7] In A & M Records Inc v Napster Inc 239 F. 3d. 1004 (9th Cir. 2001), it was held the intermediary (Napster Inc) liable for hosting content which violates copyright.

Protection of Copyright: The International Conventions

The World Intellectual Property Organization ("WIPO") has two conventions in relation to the protection of copyrights in digital space. These are[8]:

a) The Copyrights Treaty, 1996 and

b) Performances and Phonograms treaty, 1996

These two conventions reveal the extent and scope of protection of copyrights in the digital space. However, a framework in true sense is provided by the Electronic Copyright Management System (ECMS) to protect the third parties from circumventing the provisions laid in the WIPO conventions on protection of digital copyrights.

The following are the two legal aspects of ECMS system:

a) DMCA (Digital Millennium Copyright Act, 1998)[9]: This legislation prohibits any act which is meant to traffic any devices or technology which enable circumvention of technology to control access or which enable violation of the rights of the copyright owners.

b) EUCD (European Union Copyright Directive)[10]: The main focus of this legislation is to regulate and prohibit not the actual violation of the copyrights, but the preparatory activities like producing devices, technology, etc. which enable violation of copyrights by circumvention of technology.

Position under Indian Law: Indian law is still evolving on the above issues. The position of law is unclear, despite several settled cases. The chief legislation referred by the courts is the Indian Copyright Act, 1957. However, on issue of hyperlink, the position is that the hyperlinking does not violate copyright as any website going online has created an implied license for everyone with internet connection to view that website[11].

III. TRADEMARK AND DOMAIN NAME ISSUES IN CYBER SPACE:

The issue of domain name arises primarily due to the fact that the registration of domain names in done on a "first come, first serve basis" which often results in *abusive registration* i.e. registration done by a person who lacks a legal interest or right in the concerned domain name. Furthermore, the fact that domain names are the rights of the original trademark owner is well recognized.

1. Cybersquatting: This technique involves the use of domain name by a person or entity lacking any legitimate claim in the concerned domain name. The registration of such domain names in done by individuals or entities under their own name calculated to make a high profit upon sale of the concerned domain name to the legitimate owner or interested parties. This practice has established the importance of domain names in the online sphere. To prove the existence of cybersquatting, the complainant must show the dishonest intention, lack of legitimate rights, and similarities in the trademark and in the domain name[12].

2. Reverse Domain Name Hijacking: Alternatively termed reverse cybersquatting, this practice involves the owner of a particular trademark attempting to secure ownership of the concerned domain name by leveling false allegations against the rightful owner of the domain name and claiming ownership of the same. This leads to intimidation of the person having the rightful domain name and often, the trademark is transferred to the person

[8] Heike Wollgast, *IP Infringements on the Internet – Some Legal Considerations*, WIPO Magazine (Jan. 2007), https://www.wipo.int/wipo_magazine/en/2007/01/article_0005.html.
[9] The Digital Millennium Copyright Act (1998).
[10] European Commission, *Proposal for a Directive of the European Parliament and of the Council on copyright in the digital single market*, EU (2016), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0593:FIN.
[11] R.K. CHAUBEY, AN INTRODUCTION TO CYBER CRIME AND CYBER LAW 712-714 (1st ed. 2008).
[12] Anonymous, *What is CyberSqautting?*, The Anti-Abuse Project, http://www.anti-abuse.org/what-is-cybersquatting/.

who made the fake claim in order to avoid litigation expenses. This practice is resorted to by famous individuals and reputed corporations.[13]

International Conventions:

An important international development worth mentioning here is the WIPO initiative on Domain name dispute resolution. WIPO took an initiative of consultations on domain name disputes and has initiated a settlement mechanism. Accordingly[14]:

a) The registration authorities should procure correct and detailed data on owners of domain names and same should be made publicly accessible

b) In case of non-compliance of the above data, the registrar should cancel the domain name on a notice from the affected parties

c) The report recommended for a uniform dispute resolution for all Trademark related disputes and there should be an online procedure to settle the disputes

d) The mechanism calls for trans-border enforcement of the domain names, to avoid deception, deceit, etc. in trade marks.

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Indian Position

The governing law in India is the Trademarks Act, 1999 which can be invoked to offer protection to trademarks as well as service marks. The security granted under the statute stands on strong footing as it goes beyond the requisite protection per international standards. Domain name infringement cases are generally decided under the trademark law as the Indian Information Technology Act does not concern itself with issues pertaining to domain names. In Yahoo! Inc v Akash Arora & Another[15], the court for the first time protected the domain name in India in pursuance of a remedy involving the offence of passing off.

The court pursued an approach akin to the *Yahoo decision* in Rediff Communication Ltd v Cyber tooth and Another[16]. The apex court of India, in Satyam Infoway Ltd. vs. Sifynet Solutions P. Ltd[17], categorically stated that there was absence of any statute which concerned itself, in clear terms, with problems arising out of issues related to domain names. As the Trade Marks Act, 1999 is limited to application to the borders of India alone; it may fall short in providing sufficient security to domain names. The implication of this is *not* that domain names do not come within the ambit of protection under laws of passing off.[18] Moreover, it was also ruled that the legal standards common to the IPR regime and applicable to Trademarks would extend to domain names on the internet as well.[19]

[13] Doug Isenberg, *What is Reverse Domain Name Hijacking?*, GigaLaw (19 Oct, 2016), https://giga.law/blog/2016/10/19/what-is-reverse-domain-name-hijacking.

[14] WIPO, *WIPO Internet Domain Name Process*, WIPO (30 Apr. 1999) https://www.wipo.int/amc/en/processes/process1/report/finalreport.html.

[15] Yahoo! Inc v Akash Arora & Another, I.A. No. 10115/1998 in suit No. 2469/1998 (India).

[16] Rediff Communication Ltd v Cyber tooth and Another, AIR 2000 Bom 27 (India).

[17] Satyam Infoway Ltd. vs. Sifynet Solutions P. Ltd, 2004(28) PTC 566 (India).

[18] Passing off is a form of unfair trade practices in which one party seeks to profit from other party's reputation.

[19] According to the court "the use of the same or similar domain name may lead to a diversion of users which could result from such user mistakenly accessing one domain name instead of another. This may occur in e-commerce with its rapid progress and instant (and theoretically limitless) accessibility to users and potential customers and particularly so in areas of specific overlap. Ordinary consumers/users seeking to locate the functions available less than one domain name may be confused if they accidentally arrived at a different but similar website which offers no such services. Such users could well conclude that the first domain name owner had misrepresented its goods and services through its promotional activities and the first domain owner would thereby lose their custom. It is apparent therefore that a domain name may have all the characteristics of a trade mark and could found an action for passing off."

If the domain name, upon the proposal for registration, violates the "trademark rights" of another individual, Rule 2 of the Uniform Domain-Name Dispute-Resolution UDNDR Policyas adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN") would be considered to be violated.

Software Patents and the Law

International Conventions:

To determine whether the patent can be granted or not to advance technological innovations is slightly controversial in nature. Clause (1) of Article 27 of the TRIPS Convention provides for protection to all inventions and for the enjoyment of rights associated with the patent on the basis of fields of technology.[20] This clause doesn't define the exact meaning of the term "invention". Furthermore, protection to computer software is offered principally by Article 10 of the TRIPS. It mentions that the source code and object code can be covered under 'literary work' under Berne Convention, 1971 and avail protection under the same.[21]

The issue in relation to the protection of software crops up in the background of protection of copyright or patent. The TRIPS Agreement largely deals with copyright protection granted to the object and source code. Difficulty arises in offering protection to computer software under copyright law on account of the fundamental distinction between software and traditional literary work. The TRIPS Agreement provides copyright protection for object and source code but does not contemplate protection for valuable behavior of the programme. Until now, we have been struggling to answer whether the patent protection can be granted to only software or technical applications or their physical manifestations.

Position in US:

In the US, protection of computer programs can be achieved by copyright and patent protection alike. The distinction generally made in protection of computer related inventions has been blurred by the Supreme Court and the Congress. Three implicit exceptions to the patent eligibility exist - the laws of nature, physical phenomena, and abstract ideas. In assessing the patent validity of a method claim wherein the use of a computer as a limitation is recited, the Federal Circuit delved into the aspect of a computer playing a dominant role in determination of the nature of the invention or whether it is merely an insignificant part of the invention. In Bancorp Services, L.L.C v Sun Life Assurance Company of Canada (US)[22] the Federal Circuit was called upon to ascertain the patent eligibility of claims which described a method and system *for "determining the values required to manage a stable value protected life insurance scheme"*. The court further ruled that the mere usage of the computer was not an integral part to determine the patentability under the abstract idea-expression test.

Copyright protection covers expression and its form to the exclusion of the idea. However, the US Supreme Court appeared to have challenged this established view in Gotschalk v Benson[23] wherein it observed that, 'phenomenon of nature, though just discovered, mental processes and abstract intellectual concepts are not patentable as they are the basic tools of scientific and technological work'. Therefore, in order to assess the patentability of the concerned invention, one must consider the invention as a whole and not merely at the aspect of novelty.

Position in India:

The Patents amendment Act, 2005 attempted to introduce software patents to India. However, this amendment was rejected by the Indian parliament and hence, no changes in the statute were possible at that time. As the Patent Amendment Act envisages computer software per se to be excluded from patentability, there are divergences between supporters of pro-software and anti-software patent. Inventive step forms the *sine qua non* of invention. To judge the inventive step, the following question is to be born in mind- *"Would a non-inventive*

[20] WTO, *WTO Module on Patents*, WTO, https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules5_e.pdf.
[21] Emmanuel Oke, *Article 10 of the Berne Convention and the three step test (Part-4)*, Emmanuel Oke (6 Apr. 2018), https://emmanueloke.com/2018/04/06/article-10-of-the-berne-convention-and-the-three-step-test-part-4/.
[22] 687 F.3d 1266 (Fed. Cir. 2012).
[23] Gotschalk v Benson, 409 U.S. 63 (1972).

mind have thought of the alleged invention? If the answer to the above question is ."no", then the invention would be regarded as non-obvious." For the purposes of determining the inventive step, prior art shall be deemed to cover prior publication in the concerned field. These principles were laid in Bishwanath Prasad Radhey Shyam v Hindustan Metal Industries[24], and were followed in subsequent cases.

Computer Related Invention Guidelines

In India, as there was a lack of guidelines regarding patents on computer related inventions (CRI), the patent offices were barred from issuing business method patents whereas on the other hand, patents to computer programs could be granted upon the fulfillment of certain conditions They are[25]:

- If the claim made is in combination with novel hardware, the examiner should proceed to the subsequent steps to ascertain patentability of the invention;
- If the contribution lies in the computer programme alone, the claim should be denied; and
- If the contribution lies in both the computer programme and the hardware in question, the examiner should proceed to the other steps involved in determining patentability.

Conclusion:

The above points show that there is an urgent need to protect violation of the IPR in cyber space. The IPR is a valuable asset of a person and must be protected at all costs. United States has special legislations to protect the IPR violations in cyber space, for instance, the "US Anti-cybersquatting Consumer Protection Act, 1999" which safeguards concerns of owners of registered and unregistered trademarks against usage of their marks within the purview domain names. Additionally, it protects the names of the living persons to be used, in certain circumstances. The present day legislations on cyber law in India don't have sufficient provisions for protection of IPR rights. So, there is an immediate need of legislations on cyber law in India which will strengthen the IPR rights protection[26].

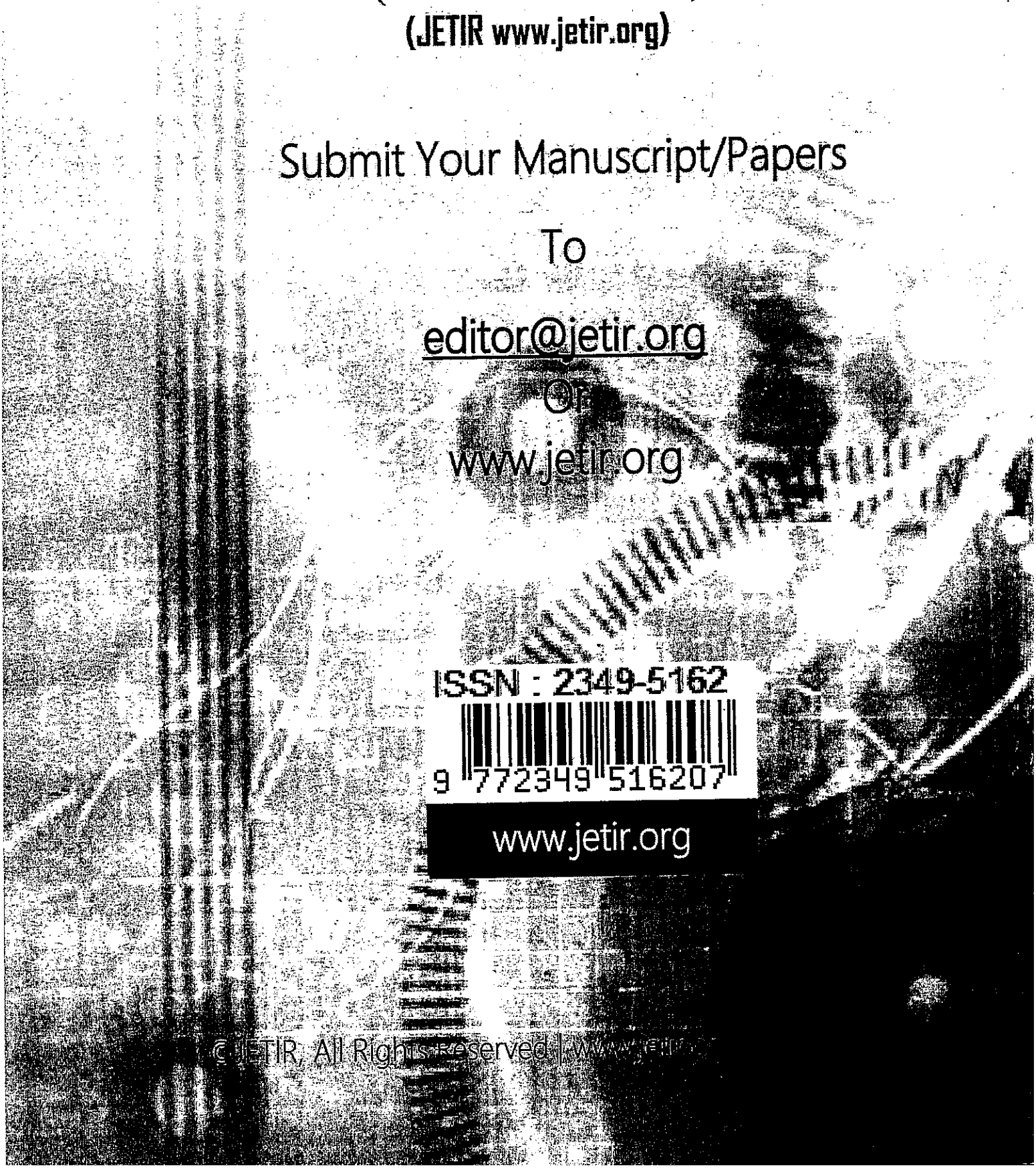
[24] Bishwanath Prasad Radhey Shyam v Hindustan Metal Industries, AIR 1982 SC 1444 (India).

[25] Devika Agarwal, *Software Patents; Prohibited under Indian law but granted in spirit*, Firstpost, (15 May 2017, 10:33), http://www.firstpost.com/tech/news-analysis/software-patents-prohibited-under-indian-law-but-granted-in-spirit-3702725.html.

[26] Karnika Seth, *Strengthening the Intellectual Property regime in Digital India*, Seth Associates, https://www.sethassociates.com/wp-content/uploads/strengthening-IP-in-Digital-India.pdf.

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IMPACT OF DIGITAL FORENSICS IN CYBERCRIME INVESTIGATION AND ADJUDICATION

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Introduction:

Digital forensics or Cyber forensics is a science that is used to collect digital evidence and provides the steps to authenticate the recovered electronic evidence. The involvement of forensic methods in the retrieving the data from the electronic gadgets are highly technical and sophisticated. The experts and trained persons are only able to use required standard technics for the collection, preserve, present and establish the integrity of the collected electronic data before the court. This made the investigating agencies to depend on the science of digital forensics. The novel problems which have emerged in the field of the commission of cybercrimes made the investigation agency to depend more on the science of digital forensics. Thus, unless an individual investigator is trained in the use of cyber forensics tools, it is almost impossible to ascertain the cause and trace the crime to its roots. It is a known fact that cybercrime is an illegal action that occurs while using the computer or anything related to it as an apparatus or as a target. Such crimes often have relevant evidence present in electronic forms which can, again, only be duly assessed and appreciated by an expert, who is called a cyber-forensics expert. Forensics, generally, refers to a scientific approach to establishing facts in a court of law and affixing it to the term cyber suggests a relation with cyberspace and hence such evidence or facts in the digital are being established with the help of science and technology is called cyber forensics.

Digital Forensics on Data Recovery in the Cyber Crime Investigation: Analysis

Types of Digital Forensics:

Digital Forensics is a science that helps the forensic investigator to inspect identify, acquire, analyze, and preserve the data in the digital form evidence present in the various types of electronic devices. It is a constantly evolving scientific field with many sub-disciplines. Some of this sub-discipline which provides best techniques and tools to solve complicated digital-related cases, they are:

A. **Computer Forensics**: it will help the examiner to get the data from system logs includes hidden, deleted, temporary and files which are password-protected, Sensitive documents and internet browsing history. It is also useful to retrieve data from USB pen drives.

B. **Mobile Device Forensics**: The data can be from call logs and text messages, viz., SMS and Email apart from viewing contract details and history of Incoming and outgoing call logs. It will also reveal location information through GPS or cell website logs. It also investigates communication stores like BBM, What's App, Web Chat, etc. The phone number and service provider information can be viewed.

C. **Network forensics**: It helps to analyze and monitor internet traffic from the packet level so as to retrieve quantitative data.

D. **Database forensics**: It related to the forensic study of database and related metadata. It helps to investigate the data available in the log files and in-RAM. Software tools can be used to retrieve, analyze and audit the data.

E. **Forensic data analysis (FDA)**: It is used to investigate financial frauds. It is useful to discover and examine the structured data to analyze the incidents of financial crime.

The main reason for using cyber forensics methods is to acquire data from the electronic gadgets that are present or may have been deleted or hidden and also to preserve the data to produce before the court of law as electronic evidence. Even in the event of a system failure (hardware or software related), the experts in the field of cyber forensics would able to recover the data to present the same in the court of law to prove the guilt of the cyber-criminal.[2] Thus, cyber forensics is a field that requires intensive and comprehensive hands-on training in

2. Jabbour, Kamal. "Cyber Vision and Cyber Force Development." *Strategic Studies Quarterly* 4, no. 1 (2010): 63-73.

deriving, preserving and authenticating the electronic data in a professional way. The growing number of cyber-crimes only confirms the need for the police to work in close association with cyber forensic experts.[3] The police officers need to understand the true nature of crime so they can adopt best-suited investigation strategies and for that, they need the assistance of cyber forensics experts. In absence of the same, the investigation is most likely to be botched up which means the evidence will either never be found or not handled properly, both resulting in a failure to convict the accused.

Cyber forensic investigators need to understand that their main focus should not only be on the collecting of the relevant evidence but also on the procedure that makes the collected evidence is admissible in a court of law.[4] Clear imagery of the sequence of events in the crime and its investigation needs to be laid down to support the admissibility of the evidence, that is to prove that they have not been tampered with, especially considering the strict scrutiny they go through. Another peculiar feature of these cybercrimes is that more often than not the concerned criminal is rather intelligent and in possession of a specific and sophisticated skillset. Hence, their understanding of things is far more than that of regular investigators working without technical aid.

The basic and prominent principle in digital forensics to acquire and analyze digital evidence is as follows[5]:

i. It should see that the evidence is acquired should not be altered.
ii. The analysis of the acquired evidence is conducted in an accountable and repeatable way by using digital forensic processes. For this, the hardware and software have been designed to ensure compliance with these requirements.

The different Forensic Toolkit (FTK) and their use can sub-discipline from the description of some the basic tools, and they are[6]:

a) **X-Ways Forensics**: X-Ways Forensics is an advanced work environment for computer forensic examiners. It is closely integrated with the WinHex hex and disk editor. It runs on all available versions of Windows efficiently and its key features are[7]:
   - Disk imaging and cloning
   - Ability to read file system structures inside various image files
   - Automatic detection of deleted or lost hard disk partition
   - Bulk hash calculation
   - Viewing and editing binary data structures using templates
   - Well maintained file header
   - Automated activity logging
   - Data authenticity
   - Complete case management
   - Memory and RAM analysis
   - Internal viewer for Windows registry file
   - Extracts metadata from various file types
b) **Encase**[8]: It is a multi-purpose forensic platform. It has the ability to gather data from various devices rapidly to unearth potential evidence.
c) **CAINE**[9] (Computer Aided Investigative Environment): It offers an environment to integrate existing software tools as software modules in a user-friendly manner.
d) **The Sleuth Kit**[10]**:** The Sleuth Kit is a Unix and Windows-based tool that helps in forensic analysis of computers. It comes with various tools which help in digital forensics. These tools help in analyzing disk images, performing an in-depth analysis of file systems, and various other things.

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3 *Ibid.*
4 Schroeder, Ralph. "Media Systems, Digital Media and Politics." In *Social Theory after the Internet: Media, Technology, and Globalization*, 28-59. London: UCL Press, 2018. doi:10.2307/j.ctt20krxdr.5, Accessed on December 8, 2019.
5 See http://cybersecurity.jhigh.co.uk/digitalForensics/toolsTechniques.html, Accessed on December 8, 2019.
6 See https://resources.infosecinstitute.com/computer-forensics-tools/, last visited on December 12, 2019.
7 Read more about it here: http://www.x-ways.net/forensics/, last Visited on December 11, 2019
8 Read more about EnCase: https://www.guidancesoftware.com/products/Pages/encase- forensic/overview.aspx last , Visited on December 11, 2019
9 Read More about it: http://www.caine-live.net/ , last Visited on December 11, 2019
10 Visit for more about it here: http://www.sleuthkit.org/ last Visited on December 11, 2019

e) **The Coroner's Toolkit:** The Coroner's Toolkit or TCT is also a good digital forensic analysis tool. It runs under several Unix-related operating systems. It can be used to aid the analysis of computer disasters and data recovery[11].

f) **Computer Online Forensic Evidence Extractor[12] (COFEE):** COFEE is a tool kit (with 150 different tools with a GUI based interface to command the tools) developed for computer forensic experts. This tool was developed by Microsoft to gather evidence from Windows systems for the law enforcement agency with free technical support. It can be installed on a USB pen drive or external hard disk. Just plug in the USB device in the target computer and it starts a live analysis.

g) **Plain sight[13]:** It is another useful digital forensics tool. It is a CD-based Knoppix which is a Linux distribution. Some of its uses include viewing Internet histories, data carving, checking USB device usage, memory dumps extracting password hashes, information gathering, examining Windows firewall configuration, seeing recent documents, and other useful tasks. For using this tool, you only need to boot from the CD and follow the instructions.

h) XRY:[14] It is the mobile forensics tool developed by Micro Systemation. It is used to analyze and recover crucial information from mobile devices. This tool comes with a hardware device and software. The hardware connects mobile phones to PC and software performs the analysis of the device and extracts data.

The latest version of the tool can recover data from all kinds of smartphones including Android, iPhone, and BlackBerry. It gathers deleted data like call records, images, SMS and text messages. However, with new techniques and forms developing for storing data, cyber forensics keeps getting more complex and there is a need for new tools to encounter new techniques AA

The purpose of a digital forensic examination is to recover data from computers, tab, and mobile seized as evidence in criminal investigations. Experts use a systematic approach to examine evidence that could be presented in court during proceedings. Knowledge in digital forensic and its handling enables the investigator to seize, collect technical material and restore the digital data without any damage to its integrity so as to make it admissible in the court of law.

As per the National Institute of Standards and Technology (NIST), the forensics investigation divided into four phases, they are as follows[15]:

1. ***Collection*** – search and seizing of digital evidence in Logical, conceptual and physical data formats for the physical memory locations of the device, and acquisition of data from data formats, while preserving the integrity of the data using advanced hashing and imaging algorithms.
2. ***Examination*** – applying techniques to identify and extract data from physical memory locations which both machine and human-readable formats.
3. ***Analysis*** – Use legally justifiable methods and techniques to derive useful information by evidence source imaging, carving and reconstructing the deleted evidence from the source.
4. ***Reporting*** – Describe actions used, explain how tools and procedures were selected, determine what other actions need to be performed, including forensic examination of additional data sources, securing identified vulnerabilities and improving existing security controls (i.e., presenting the information gathered and preparing case report).

It is pertinent to note that the Supreme Court of India in *State of Punjab v. Amritsar Beverages Ltd.*[16], noted that investigating officers face a lot of difficulty in investigating cyber-crimes which requires scientific expertise and knowledge of cyber forensics related techniques. Therefore, the investigator should follow step-by-step procedures during the collection of the digital evidence and also at the time of retrieval process with the help of cyber forensic experts in order to give testimony in court.

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11 For further information: http://www.porcupine.org/forensics/tct.html, last Visited on December 11, 2019

12 To know more about visit the official website: https://cofee.nw3c.org/

13 Read more about it here: http://www.plainsight.info/index.html, last Visited on December 11, 2019

14 Read more about it: http://www.msab.com/xry/what-is-xry, last Visited on December 11, 2019

15 Also read Bill Nelson, one of the contributing authors of the Guide to Computer Forensics and Investigations (third ed.) book, highlights the importance of the three A's of computer Forensics: Acquire, Authenticate and Analyze. (2008, pp. 32-33).

16 (2006) 7 SCC 607

Technical and Legal Challenges to Cyber forensics-The Evaluation:

Digital forensics is a technique to collect electronic evidence from the computer and other electronic equipment. But there are challenges to digital forensics are being faced while conducting investigations[17]. The challenges are technical challenges and legal challenges.

Technical challenges of cyber forensics:

a. ***The requirement of new and sophisticated tools***: There is a need to have new tools that are efficient enough to locate and recover sufficient data from the large data without any delay and lapse. Present forensics tools are being made for commercial purposes, thus profit-driven rather than science-based to fulfill real forensics needs that meet the needs of investigators and the expectations of the courts.[18]

b. ***Lack of standardizing procedure***: using ad-hoc methods for retrieving the digital evidence can hamper the credibility and the evidentiary value of recovered data. Therefore, the standardized procedure to be formulated.

c. ***Hiding the data technique in storage space***: Cybercriminals generally hide some useful data in the storage spaces and make them invisible to the usual system commands and programs by using Rootkit, which is a famous tool to hide data in storage space. Retrieving the data from the storage places will be a more complex and time-consuming process and sometimes data can be corrupted

d. ***Encryption and Steganography***: According to the oxford dictionary, the process of converting information or data into a code, especially to prevent unauthorized access. Thus, encryption is a method of scrambling information that must be decoded and read by someone who has the correct decoding key. Steganography is an encryption technique that can be used along with cryptography as an extra-secure method in which to protect data. Steganography techniques can be applied to images, a video file or an audio file[19]. Though these methods are the most effective anti-forensics techniques which will pose an obstacle to retrieve evidence, yet these are the most effective techniques to prevent data theft.

e. ***Issues relating to Cloud storage solutions:*** Cloud storage means spreading data in databases and computing systems across the existing servers. This expansion of potential locations for relevant data can create additional work for researchers in searching for data on cloud storage servers. Thus, Cloud storage systems can also pose particular challenges to investigators in computer forensics.[20]

Legal Challenges of cyber forensics:

a. ***Jurisdictional Challenges***: Cyber-crimes are not like conventional crimes, they are cross border crimes, the difficulty with cyber-crime to track and investigate because the perpetrator of the cybercrime need not present physically at the scene of the offence. The major problem in cybercrimes is identifying the jurisdiction. Art. 19 of the Convention[21] provides that states to come up with legislative and other measures that may be necessary to ensure that where its investigating authorities search a specific computer system or part of it and have grounds to believe that the data sought is stored in another computer system and such data is lawfully accessible from or available to the initial system, they shall be able to expeditiously extend the search or similar accessing to the other system situated outside the country. Thus, for all practical purposes, the internet does not recognize the territorial boundaries of States. Therefore, it makes cybercrimes very difficult to prosecute

17 *W.Chirath De Alwis,* An Introduction To Challenges In Digital Forensics, https://articles.forensicfocus.com/2017/06/29/, last Visited on December 11, 2019

18 Cyber CSI: the challenges of digital forensics theconversation.com/cyber-csi-the-challenges-of-digital.

19 https://www.techopedia.com/definition/4131/steganography, last Visited on December 11, 2019

20 Technical and Legal Challenges, https://forensicbit.com/challenges-of-modern-digital-forensics/

21 Council of Europe (CoE), "Explanatory Report to the Convention on Cybercrime" (ETS 185), 2001, http://www.coe.int, last Visited on December 11, 20191

b. ***Issues in maintaining the integrity of collected e-data***: Contrary to the real world crimes where tangible evidence in form of weapon of crime, fingerprints, etc. are easy to find and present in court but it is difficult in the virtual world to erase the information from the computer system that what is generally contemplated as digital evidence. This is done with the help of computer forensics. Finding digital evidence usually requires long, vigilant hours, dry work, and detailed technical knowledge – and requires a wide variety of procedures to be followed. However, digital evidence is also fragile, particularly susceptible to damage or tampering, intentional or otherwise. Ensuring the validity of the evidence requires clear evidence of the chain of custody and confirming its integrity at multiple levels, usually through an evaluation of its hash code.

c. ***Privacy issues***: There is a high risk of inappropriate access to personal and confidential information while retrieving data using forensics tools. It is right to say that 'the admissibility of electronic evidence in court depends upon the respect of legal constraints and guarantees, laid down in legislation pertaining to informational and communicational privacy'[22]. In the international scenario, the European Convention and the Charter of Fundamental Rights of the European Union emphatically asserts for the protection of individual privacy[23] govern the

Appreciation of Digital Evidence and the Indian Judiciary

To make the digital evidence admissible in the court of law it must be handled carefully to preserve the integrity of the physical device as well as the data it contains. Some digital evidence requires special collection, packaging, and transportation techniques. Data can be damaged or altered by electromagnetic fields such as those generated by static electricity, magnets, radio transmitters, and other devices. Communication devices such as mobile phones, smartphones, PDAs, and pagers should be secured and prevented from receiving or transmitting data once they are identified and collected as evidence[24].

Section 3 of the Indian Evidence Act, 1872 read with Section 79A of the IT (Amendment) Act, 2008 explains that evidence includes all documents that also covers electronic records which are stored or transmitted in electronic forms (Viz., computer evidence, digital audio, digital video, cell phones, and digital fax machines) produced for the inspection of the court and that such documents are called documentary evidence. As per the introduction of the Information Technology Act, 2000, the digital evidence collected through all means including through cyber forensics was considered as a document. Electronic documents, being secondary evidence, should be adduced through printed reproductions or transcripts and the authenticity of which be based on the certification by a competent signatory. Sections 65A and 65B have been added to the Information Technology Act, 2000 through the amendment in the year 2008. Section 65A lays down the contents of electronic records that may be proved with the provisions laid in Section 65B. Section 65B (Admissibility of electronic records) states that any information contained in electronic records which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be also deemed to be a document if the conditions mentioned in this section[25] are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without any further proof or production of the original.

In Anvar P.V.'s[26] case, the Supreme Court of India had observed that the Computer Output is not admissible without Compliance of S. 65B[27]. However, the Supreme Court of India, in a path-breaking dynamic judgment,

22 Maria Karyda and Lilian Mitrou, Internet Forensics: Legal and Technical Issues, http://www.icsd.aegean.gr/publication_files/conference/161099046.pdf, last Visited on December 11, 2019.

23 Article 8 of the European Convention and Article 7 of the Charter of Fundamental Rights in the European Union provides privacy of an individual.

24. David Mugisha, Role and Impact of Digital Forensics in Cyber Crime Investigations, https://www.researchgate.net/publication/331991596,last Visited on December 11, 2019

25 The conditions of Section 65B are: (i) Information was produced during the regular course of activities by the person having a lawful control over the use of computer; (ii) Information has been regularly fed into the computer in the ordinary course of said activities; (iii) Throughout the material part of said period, the computer was operating properly or the improper operation as not such as to affect the electronic record or the accuracy of its contents; (iv) Information contained in the electronic records reproduces or is derived from such information fed into the computer in the ordinary course of activities.

26 Anvar P.V. Versus, P.K. Basheer and Others, AIR 2015 SC 180.

27 Section 65B provides that for the purpose of evidence, a certificate identifying the electronic records containing

Shafhi Mohammad Vs. The State of Himachal Pradesh[28]has rationalized the law relating to the admissibility of the electronic evidence particularly in view of the provision of Sec. 65B of the Indian Evidence Act. The requirement of a certificate under Section 65(4) of the Evidence Act is not always mandatory when a party who is not in the possession of the device from which the document is produced. Therefore, printouts made by a mechanical process, approved by an authorized person, from a server or directly from the computer can be given as evidence if a witness can identify the certifying officer's signatures or can otherwise ascertain this based on his personal knowledge.

Conclusion

Digital forensics is going to play a vital role in the criminal justice system as the technology will continue to develop at a fast pace and at the same time the digital forensic discipline should also continue to develop with new tools to understand and analyze network intrusions to make sure that the cyber attacker should be convicted. For that, it must be forensically established that the data is authentic and reliable and not tampered with while submitting to the court of law. Therefore, law enforcement agencies need to be adequately trained to use the cyber forensics tools to be used in the investigation while acquiring, preserving and authenticate the electronic evidence. It is imperative for the government to ensure that digital forensic experts and cybercrime investigators with the minimum knowledge of the use of basic cyber forensics tools should work together with proper coordination and cooperation, which intern will improve the conviction rate.

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the statement and describing the manner in which it was produced by a computer and satisfying the conditions mentioned above and signed by an officer in charge of the operation or management of the related activities shall be the evidence of any matter stated in the certificate it shall be sufficient for the matter to be stated to the best of the knowledge and belief of the person stating.

28 *Shafhi Mohammad* v. *The State of Himachal Pradesh,* http://sci.gov.in//supremecourt/2017/6212/6212_2017_Judgement_03-Apr-2018.pdf

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Review

Race to the Bottom: Sino-US Trade War and Consequent Plastic Waste Mismanagement in the Global South

Singh and Mukherjee

Special Issue S4: "Global Trade Wars - A Case of Sino-US Trade War"
Guest Editor: Prof. Badar A. Iqbal

HATASO, USA

Race to the Bottom: Sino-US Trade War and Consequent Plastic Waste Mismanagement in the Global South

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Abstract

Globalization today can convincingly be said to have reached its pinnacle. However, with the world turning into a global space of homogeneity the stakes of survival have risen up too. The various forms of environmental degradation culminating into climate change have been accelerated due to globalization. This review discusses one such form of global environmental degradation that poses a serious threat to the health of citizens in the Global South. The phenomenon being talked about here is that of global waste dumping, a practice that has caught up roughly over the past four decades. The context that helps in illustrating the same is the United States–China trade war, narrowed down to the recent ban imposed by China and India on the import of plastic waste. As a reaction to excessive plastic waste dumping from Global South to Global North, 180 nations agreed in Geneva to add mixed plastic scrap to the Basel Convention. However, as will be shown in this review, the burden has only shifted to even poorer nations who willingly buy plastic waste from countries of Global North. The phenomenon of dumping plastic waste can be explained through the distinction between the developed and developing countries understood in the dualist taxonomy of Global North and Global South.

Keywords: Global South; Waste Dumping; Plastic Waste; Environmental Racism; Environmental (In)justice

1. CONTEXTUALIZING CHINA'S PLASTIC BAN AMID THE SINO–US TRADE WAR

Global waste dumping is a product of the top-down model that necessarily decides the locale of each economy in the global market. It involves the shipment of collected hazardous wastes from one country to the other. This practice has promoted a discriminatory classification over the years. It has been observed that the industrially developed countries occupy the share of being the biggest exporters, whereas those with lower industrial development are the biggest importers. The size of the plastic recycling industry (US$200 billion) makes it a powerful force that resists any changes in how the plastic waste economy is governed.

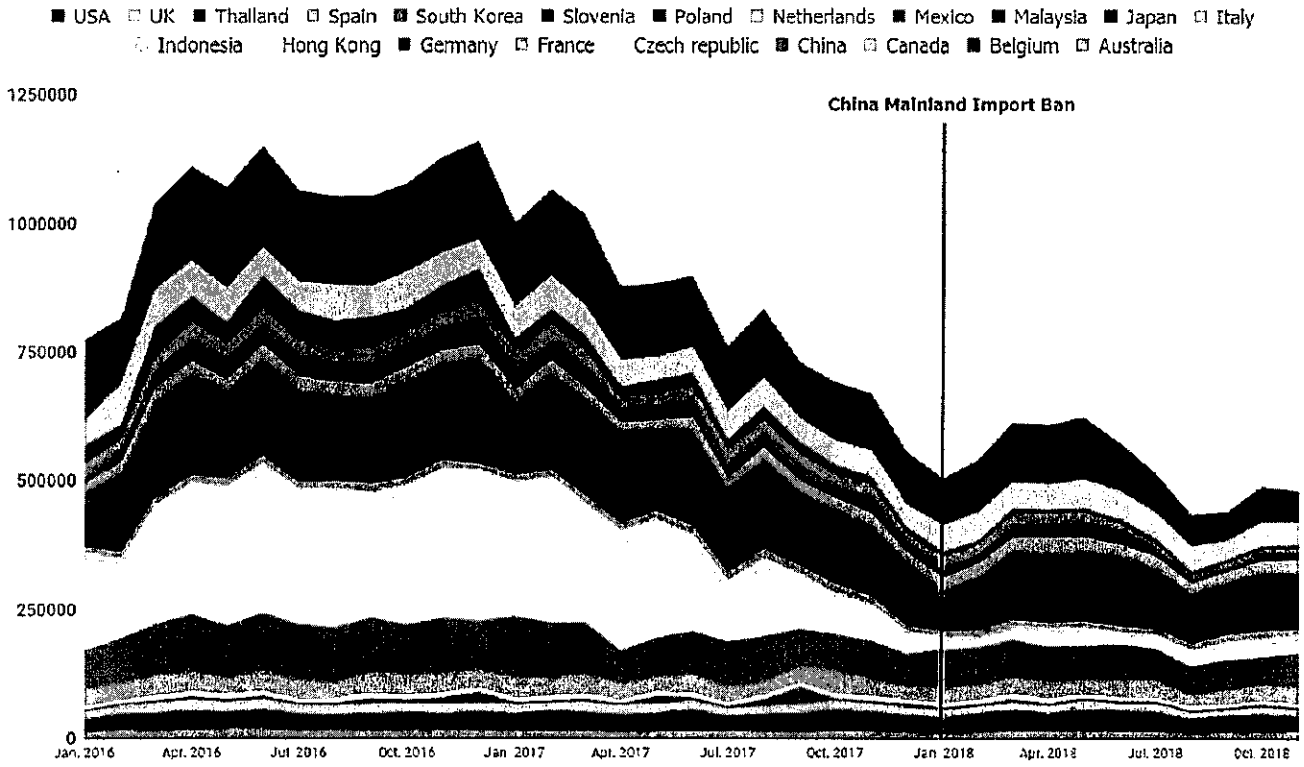
The South–North classification is better deemed than the erstwhile classification of poorer countries as Third World countries. The creation of this category emerged in the late 20th century from the decision of the then newly independent countries to neither side with the First World (Capitalist leaning) nor with the Second World (Communist leaning) countries. Arguably, the First World–Third World dichotomy is obsolete in a post-Cold War era. Moreover, such a categorization qualifies as inadequate in the era of rampant globalization. This is where the taxonomy of Global South and Global North become utile. The factors distinguishing a Global South country from those in North would be its erstwhile status as a colony, a current low gross national income or a lower lifestyle. Nonetheless, it is important to understand that the Global North neither denotes countries in the North alone, nor does it necessitate all the Northern countries to be rich. Similar anomalies are true for the Global South as well. The overlap between the First and Third Worlds has been explored by eminent scholars such as Baxi (2006).

2 Review

A United Nations Environment Programme (UNEP[1]) report released in 1997 indicated the generation of 400 million metric tons of hazardous waste in the year 1990. Around 90% of the total waste was produced by the countries that were members of the Organization for Economic Cooperation and Development (OECD) alone (see the graph below). The cost of waste treatment and disposal in these countries is much higher owing to stricter environmental norms. Therefore, it is conveniently decided to ship the waste piles to less-developed countries owing to cheap labor and lenient standards of environmental norms. The transboundary movement of waste not only shifts the onus of disposal on the importer, but also facilitates profits to the companies exporting the waste. The mechanism behind shifting of this onus is quite unlikely to be effective, considering the mandates of the UNEP's Guidelines for Framework Legislation for Integrated Waste Management. These guidelines cover the provisions' extended producer responsibility, product stewardship, drop-off systems, deposit scheme, material ban, and separation (UNEP Guidelines on Integrated Waste Management, 2016). It is also worth mentioning that Norway had unsuccessfully pushed for global agreement on plastic waste at the UNEP meeting in Nairobi in March. Earlier attempts such as the Clean Seas Pact has also failed to deliver much effect as it is nonbinding.

This renders the importer incapable due to its lack of means to process the disposal of waste and the increasing environmental and health-related risks that it poses. This is one of the gravest forms of environmental injustice currently taking place. Countries such as China, Malaysia, Vietnam, Thailand, and India have historically been at the receiving end of this injustice. Over the years, these countries under economic and developmental pressures have had to import hazardous waste piles that has extensively harmed public health, damaged crops, and caused severe environmental degradation (see the graph below).

Changes in plastic waste exports from top 21 exporting countries/ regions between January 2016 and November 2018 (in tons per month)



Source: Greenpeace report (2019)

[1] Based on a United Nations Environment Programme (UNEP) report in Greenpeace, Heavy Burden - A Case Study on Lead Waste Imports into India, Greenpeace International Toxics Campaign, March 1997, p 4.

1.1. Tracing the Conversion of Global South into a Global Dump Yard

The unequal economic transactions is reflected from the export–import imbalance of the Global North countries. Roberts and Parks in their book, *A Climate of Injustice* emphasize that waste is a major source of income from export in the countries of Global North. Not only does it generate income but also shifts the burden of environmental degradation on the Global South.

Since over the past year, the global waste trade is in utter turmoil with China putting a ban on plastic import at the beginning of 2018, which has worsened the US–China trade war. The ban prohibited the import of 24 types (Roche-Naude, 2019) of recyclable wastes that included recycled plastic. At the beginning of 2019, the ban was extended to include a total of 32 types of waste. This brought under ambit the post-consumption plastic items such as daily utility jars and containers. With these stringent steps it is estimated that by the year 2030 China would have displaced about 111 million (Lu, 2019) metric tonnes of plastic waste.

Post the ban, the export of plastic has witnessed a global reduction. For instance, the export of plastic by United Kingdom to China has declined by as much as 97% (Cole, 2019a). Meanwhile, as China is being lauded for its stringent action against plastic waste, the top exporters have already diverted and accommodated the banned plastic percentage to the import countries next in line. A Greenpeace report released in April this year clearly highlights a drastic upsurge in plastic import to countries such as Thailand, Malaysia, and Vietnam. Import in Thailand has increased by fifty times (Cole, 2019b), whereas that in Malaysia has become three times the original quantity. This unpleasant plastic waste diversion, most of which is occurring under the table through illegal means, has forced Malaysia to reject the stockpiles of plastic waste. In May, 2019, around 3000 metric tonnes of waste (Staff, 2019b) smuggled into the country was returned to exporters from the United States, United Kingdom, Australia, and Canada. A permanent ban was imposed by Malaysia back in 2018 with plans of a complete phase-out in another three years (Reintjes, 2018). Thailand too plans on implementing the ban by 2021, with Vietnam close to implementing it by 2025 (Staff, 2019a).

2. THE ROLE OF INTERNATIONAL LAWS IN CHECKING WASTE MISMANAGEMENT

The decision of a future ban and in cases such as those of China's the already imposed implementation of ban as a step to further the US–China trade war has led to a relatively more stringent check on the transboundary movement of waste. Again, to cite instances from the United Kingdom, its National Audit Office (NAO) indicated in its report of July, 2018 (National Audit Office, 2018) the impossibility of recycling the entirety of waste that it has been exporting. Under the existing regulations, the exporting body has to ascertain the quantity of waste that has been recycled. This is specified before the waste is sent across to the importer. The loophole in this process is that mere shipment of waste does not ensure its recycling. The ugly truth behind recycling plastic is that not more than 9% of it is actually recyclable (Lu, 2018). A meagre portion of the overall imported plastic waste is converted into usable goods, whereas a major chunk of it is either landfilled or incinerated. The waste that still remains finds its way into ocean waters through inland waterways or by being carried away by natural phenomena such as winds, storms, tides, and so on. It has been studied that about eight million metric tons (Lu, 2018) of plastic is dumped into the ocean water each year and importers from China, Thailand, Philippines, Vietnam, Indonesia, and India are at the apex of this dumping practice.

However, the onus of polluting the ocean or the environment at large should not be made to lie with these countries alone. The major role here is played by the rich exporting countries of which the United Kingdom is simply one among many such examples. The entire procedure of waste management and subsequent pollution resulting from it is finely arranged like a mesh, making it difficult for countries such as China to escape it. It is similar to the phenomenon Brecher and Costello explain through their "Lilliput Strategy"[2], wherein the Lilliputians despite being tiny had a strong network of ropes around Gulliver to keep him affix.

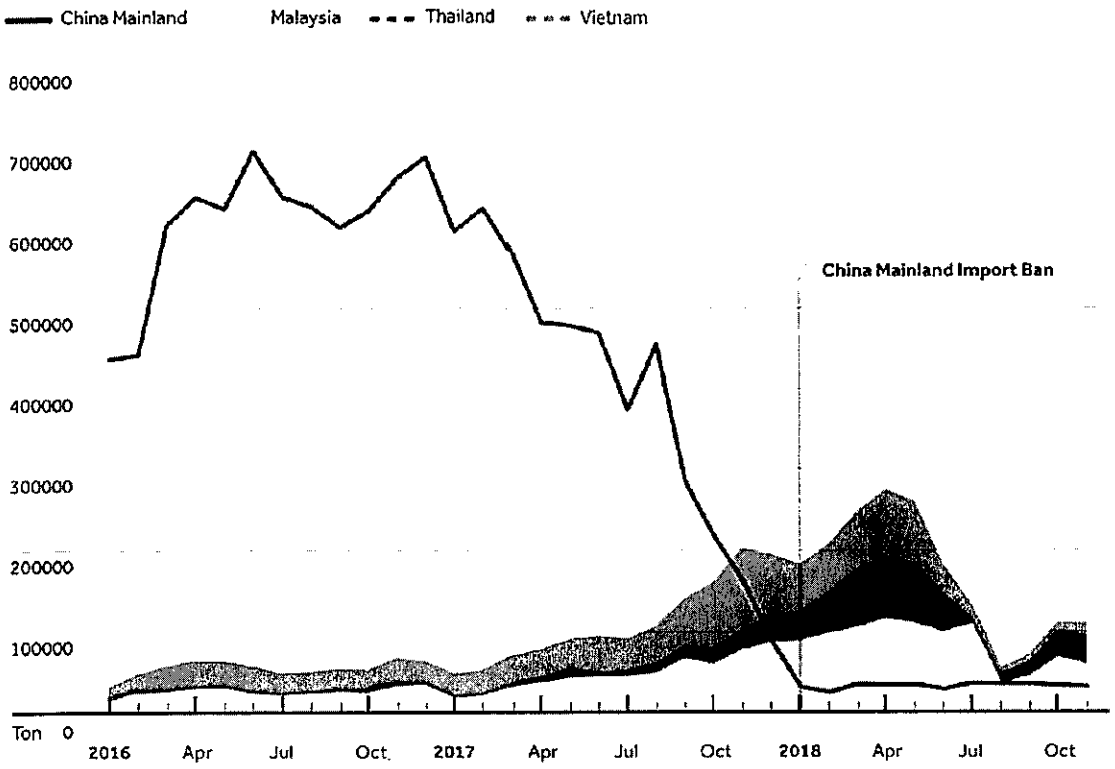
[2] In some ways, the Lilliput Strategy parallels the new strategies pursued by global corporations. Just as the corporate strategy creates worldwide production networks linking different companies, the Lilliput Strategy envisions strong local grassroots organizations that embed themselves in a network of mutual aid and strategic alliances with similar movements around the globe. And just as the corporate strategy seeks to create governance structures at local, regional, national, and transnational levels to support its interests, the Lilliput Strategy seeks to establish rules protecting the interests of those whom globalization threatens.

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The strategy includes threads that appeal directly to local concerns, identities, and economic issues; always backed by the promise of a relative upliftment. This has been the modus operandi of any dialogue that has ever existed between the countries of the North and the South. The dialogues vary in terms of friction that exists between the commitments made and commitments fulfilled. Such imperial and empire-oriented narratives of the history of the International Law has been well documented by scholars such as Koskenniemi (2011) and Anghie (2006).

Some exporting nations (such as the United Kingdom) have taken some salutary steps to regulate the practice of waste dumping, others (such as the United Systems) have hardly made any efforts to address the issue. In February, 2019, the Members of Parliament in the United Kingdom presented a motion before its parliament, which if passed would bind the U.K. exporters from dumping their plastic waste in countries with poor waste management systems (Laville, 2019). It is visibly, if not effectively, trying to mend its role in this irresponsible transboundary transaction of waste; whereas, a country such as the United States, which was the largest exporter of plastic waste to China (and the largest single country exporter of plastic waste), exceeded 500 metric tons (McVeigh, 2018) in the year 2014. Following China's ban the overall plastic waste export dropped by one-third of its previous year's export and that to China saw a steep drop by 92%. However, the export to countries such as Malaysia, Thailand, and Vietnam saw a huge rise. It increased by 273% in Malaysia (McVeigh, 2018), whereas the rise in Thailand was as high as 2000% (see the graph below).

Imports of plastic waste by China Mainland, Malaysia, Vietnam, and Thailand between January 2016 and November 2018 (in tons per month)



Source: Greenpeace report (2019)

Despite these frightening statistical data, there is very little that the International legal institutions are doing. The foremost trouble is the transboundary nature of the problem that can be dealt with mostly through International Laws and Conventions. Apart from the tiny steps of tokenism taken by the OECD members in the form of rules adopted at their respective domestic levels, there are very few International laws that are binding on transboundary waste movement. The two major conventions that have contributed to the check on waste movement are the Basel and the Bamako conventions.

2.1. Impact Assessment: Basel and Bamako Conventions

Basel Convention, which came into force in 1992, is a result of a series of negotiations inspired by global fear regarding waste mismanagement. Over the years the convention has mandated ethical rules to check waste mismanagement. The rules obligate members not to ship waste if the exporting party is equipped to manage the waste or if the importing party is ill-equipped for the same, or both. Members are required to minimize their transboundary movement of waste, especially those categorically hazardous. It is also obligated to take prior consent of the importing party, in the absence of which criminal charges would be imposed for illegal trafficking of waste. The United States, a major exporting country has not ratified the Basel Convention, which shows its lack of intention to address the issue of waste dumping.

Basel's contradictory clauses often act as a hindrance to its otherwise stringent obligations. For instance, the Basel Convention Conference of Parties (COP3; 1995) agreed on introducing an amendment to introduce ban. The prohibition would be binding on the states which are not a part of Annex VII (Basel Convention, 1989) but are involved as one of the parties in the waste transaction. Contradictorily, Article 11[3] was introduced in 1996 that has received much harsh criticism, bringing not a responsible name to the Basel Convention. The concerned article nullifies Articles 4 (strict liability; Basel Convention, 1989) and 5 (fault-based liability; Basel Convention, 1989) of the convention to allow bilateral, multilateral, or regional agreements between parties and nonparties as long as the hazardous waste is disposed off in an environmentally sound manner. Thus, the implementation has suffered highly on account of a missing mechanism that would have demanded accountability arising out of waste mismanagement. The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal was signed in December 1999 and could only attract 12 parties.

The contradictory overlaps in the convention obligations have been used to surpass the environmental standards during waste processing. In the past, Australia has successfully transgressed the ban laid down by the Basel Convention by invoking Article 11. Another example is the 2008 Bilateral Preferential Trade Agreement between China and Japan. Not only does this agreement misuse the provisions of Article 11 but also involves a host of members from across the categories of technical aid, environmental audit, and other corporate houses to create a tax-free zone (Barsalou et al., 2018). Recently, more than 180 nations agreed in Geneva to add mixed plastic scrap to the Basel Convention (1989). Although hailed by research centers of the West (Parker, 2019), this step will not solve the problem of the race to the bottom as the amended treaty does not ban parties from exporting plastic waste to poorer nations; it only requires them to obtain prior informed consent from the government of the importing states.

Besides the Basel Convention, there is another more stringent treaty of African countries to check waste imported to Africa. The Bamako Convention that came into effect in 1998 emerged as a reaction against the 1996 introduction of a near arbitrary Article 11. The definition clauses in Bamako convention are much more accurate and broader than those in the Basel Convention. Transcending the definition of "hazardous waste" stated by the Basel Convention, Bamako convention categorizes all the waste being generated from household (sewage, incineration of household goods, etc.) as hazardous. Unlike the Basel convention, it also includes radioactive wastes as hazardous waste. However, despite being fair and accurate toward the plight of the importers, the Bamako convention is but limited in its membership with a total of 29 signatories and 25 parties at present.

Beyond the two conventions there are hardly any effective laws operating at an international level that deal directly with irresponsible or illegal waste trade. Of course, there is the MARPOL convention of 1988 that addresses marine debris on a global scale, which apart from being outdated is limited in scope as it only covers vessel source marine pollution and not that originating from land. Moreover, MARPOL has failed to deliver as it could not be implemented in most of the developing countries (Karim, 2010). The concern of the global world regarding waste recycling and management has been so crude that most often these cases are

[3] **Article 11 conflicts with other liability and compensation agreements:** Whenever the provisions of the protocol and the provisions of a bilateral, multilateral, or regional agreement apply to liability and compensation for damage caused by an incident arising during the same portion of a transboundary movement, the protocol shall not apply provided the other agreement is in force for the party or parties concerned and had been opened for signature when the protocol was opened for signature, even if the agreement was amended later.

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transferred to the World Trade Organization (WTO), which does not even specialize in handling cases specific to waste trade in particular and environmental issues in general.

3. ENVIROMENTAL RACISM AND THE EFFICACY OF THE GLOBAL NORTH–SOUTH DIVIDE

So far, the review deals with highlighting the pitfalls of the global community in handling waste disposal and its recycling mechanisms. Further, it has also attempted to roughly enumerate the shortcomings amounting to such negligence. This part of the review leads the narrative of waste (mis)management into a more specific contextualization, a context that can only be justified as a bias of the global community. Ironically, the term "global" today does not so much pertain to the whole world as it does to a selective few powerful countries. Going back to the Greenpeace report of 2019 that highlights the top 21 exporters and importers, the parameter of development does not seem to be the only factor distinguishing the two from each other. The calculation of development is deeply ingrained in a discriminatory geographical identification. Beyond the fact that the top exporters are mostly the First-World countries whereas the top importers mostly the Third World , they can be better understood through their respective Northern or Southern locations. It is not simply a coincidence that exporters are predominantly countries of the Global North whereas the importers are mostly from the Global South.

International treaties, agreements, and laws have not worked effectively because they are mostly framed by the countries of the Global North and end up being ignorant toward the poorer countries of the Global South. This discrimination is environmental racism that has been thriving in the garb of environmental (in)justice over several years. Environmental racism is one of the most primary ways in which environmental injustice has been spreading its tentacles, as Bullard[4] in his article, "Environmental Justice: It's More Than Waste Facility Siting" explains (Bullard, 1996). Further, Park in her essay, "An Examination of International Environmental Racism Through the Lens of Transboundary Movement of Hazardous Wastes" examines the Not in My BackYard (NIMB) syndrome[5] as a tendency that the developed countries have been caught up with for long (Park, 1997).

The races are discriminated against while framing the environmental and trading policies. There is a conscious attempt to subjugate people belonging to categorically segregated inferior races, which leads to several negative consequences. Some of these trending attempts have been the setting up of hazardous factories in these countries, continued exclusion of races deemed inferior from positions of power in the decision-making committees, or officially dumping self-generated waste on their own land. These acts are performed through "impeccable" economic reasoning by economists and other scholars (Anghie, 2006).

An example worth citing here is that of the leaked memo of Lawrence Summers. Before getting to the content of the memo it is important to know who Summers is. Summers has served as the vice-president and chief economist of the World Bank. He also held the position of the U.S. Treasury Secretary, after which he was chosen as the president of Harvard University. His introduction prompts the image of an intellectually reasonable official. His reasoning was spilled through his leaked memos wherein he expressed,

> *"The measurements of the costs of health impairing pollution depends on the foregone earnings from increased morbidity and mortality. From this point of view a given amount of health impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages. I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that."* (Staff, 1992)

[4] "By not having a clear and stated definition of environmental justice and environmental racism, the authors appear to be equating the two concepts. The two concepts should not be used interchangeably. Environmental racism refers to any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color. Environmental racism is only one form of environmental discrimination. There are other forms of environmental discrimination."

[5] "Proponents of the racism theory argue that developed nations have policies that reflect their desire to dump wastes in the Third World in order to keep the First World beautiful. This leads to the notion that the developing world must internalize the externalities from which the rest of the world benefits.[61] As landfill space becomes more precious, developed nations experience the Not In My BackYard (NIMBY) syndrome just as U.S. communities have."

When people holding offices of such high responsibilities utter such inconsiderate statements in the name of reason, it does become difficult to trust international laws and policies that are framed in order to serve those already in power. Toxic colonialism (Pratt, 2010) is the only way to reason with the logic of dumping waste into the Global South, so as to not let go off the aesthetic beauty of one's own country. Environmental racism gives an unsaid permit to the Global North to take advantage of cheap labor, lack of public awareness, absence of social or political movements and most importantly economic poverty of the Global South. This continued, irresponsible attitude of the Global North has led to quite a few environmental mishaps in the Global South. One of those worth citing is the Khian Sea waste dumping incident wherein a cargo carrying around 15,000 tons of incinerated household waste from Philadelphia dumped some 4,000 tons of it in an island in Haiti, referring to it as a fertilizer. The remaining 10,000 tons was subsequently dumped into the sea. Another relevant incident here would be the 1988 toxic waste dumping by Italy in a Nigerian village, Koko. The waste stuffed inside tanks were unloaded in Koko as building material. Over the period, the containers (marked with an "R" symbolizing toxic industrial waste) started leaking, making the inhabitants sick. It was after a series of repeated denial by Italy of the waste being toxic in nature that it finally agreed with the waste really being toxic. The Bhopal Tragedy is the hallmark of environmental injustice and racism (Baxi, 2010). There are many other incidents that even today do not attract the attention of the biased media or are submerged even before the voices are documented. During the 1980s, quite a handful of similar instances were reported to be taking place in different parts of Africa. Guinea-Bissau was offered 600 million dollars to dispose off 15 million tons of waste over a period of five years. The deal was never locked due to government's intervention. However, what is worth wondering here is the fact that the sum that was being offered was nearly four times (Lipman, 1998) the gross national product of the country and yet it can never be equated with the damage it would have caused.

The irony here is that these rich, powerful exporting parties are oblivious of what the future has in store. Despite being the claimants of the best education and intellect in the world they fail to realize that polluting countries in the Global South will lead to a polluted Global North soon in time. Pollution, environment, and oceans cannot be contained by geographical borders. The filth that the Global North is drowning the Global South into, apparently with their consent, will swallow it too. This duplicitous web of preemptive measures is not the answer where consistently people from selective races and regions are targeted. It is a vicious circle wherein the countries of the Global South are consciously kept away from positions of power so as to continue minting money from their miseries. The narrative of sheer injustice is fractured and remoulded multiple times to manufacture opinion against the already discriminated. Evidently, on the Earth Day of 2018, the United States had the following to say in support of the environment,

> *"This year's Earth Day is focused on ending plastic pollution, but the problem isn't you or me. Asian countries and messy fishermen are destroying the world's oceans."* (Mastio, 2018)

4. CONCLUSION

The doom that we as humankind is approaching through such imperialist tendencies can be explained remarkably by Hardin's concept of the "Tragedy of Commons" (Hardin, 1968). The value assigned to money cannot compensate for lives that suffer. The suffering of lives transcends the evaluatively fluctuating denominator of money. It operates in the realm of ontology where unlike money, ontology is not a determinate[6] form of knowledge (Agamben, 2009). The current flux of situation can be understood as "banal" in the words of Hannah Arendt. In "The Human Condition" she understands banality as that stage where humans

[6] "Signatures (like statements with respect to language) are then that which marks things at the level of their pure existence. On haplos, 'pure being,' is the archi-signator that imprints its transcendental marks on existent entities. The Kantian principle according to which existence is not a real predicate, reveals here its true meaning: being is not 'the concept of something that could be added to the concept of a thing,' because in truth being is not a concept but a signature. Hence, ontology is not a determinate knowledge but the archeology of every knowledge, which explores the signatures that pertain to beings by virtue of the very fact of existing, thus predisposing them to the interpretation of specific knowledges.'

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are no longer content with the environment, evident factually from the launching of the first satellite in 1957. The history of development of the world is a banal narrative. From the Roman distinction between property and wealth to both overlapping in the current times, we have covered a banal journey. A journey in which with each successive accurate evaluation of metal carvings, the importance of nature has only diminished.

David Harvey (1993) analyses the current regime of environmental racism as indirectly analogous with the arbitrariness and authoritarianism of the German Green Movement of the 1930s. The nationalistic foregrounding of the German Green movement is not much different from the discriminatory steps being taken by the Global North leaders in their respective national interests. The perverted versions of nationalism are already underway. For instance, the ban imposed by China has only acted as a trigger event in severing its trade relations with the big export countries. The global onus of acting as a breeder of pollution was already being circulated through funded research studies. An OECD study featuring an "Environmental Policy Stringency Index" show that the index for the Global South countries to be nearly 39% lower than that for the Global North countries (EPSI, 2015). One of the examples of funded studies which depend on indexes such as the above to reach absurd conclusions is a study conducted by McKinsey Center for Business and Environment. It released a report titled, "Stemming the Tide" (Ocean Conservancy, 2015) in 2015, which concluded that Asian countries are the ones alone causing the environmental menace. Arguably, the OECD and McKinsey studies overlook the environmental injustices writ large in the phenomena discussed in this review. The ugly paradox of such a situation can be observed through a situation where toxic radioactive waste in Italy gets qualified as building material in Guinea-Bissau (Park, 1997).

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Greening The Indian Construction Sector: First Step to Effectuate India's Ambitious INDC

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Abstract:

The recent floods in India shall act as an eye opener for the law and policy makers who are responsible for formulating policies related to making urban buildings disaster resilient. Anthropogenic climate change has increased the frequency of such extreme events. No doubt, the Indian real estate industry is catching up fast with the international standards of green buildings. However, a serious re-look is inevitable in the light of recurrent criticism of national rating system (GRIHA as has been adopted by Ministry of New and Renewable Energy in 2007) considering the fact that more than twenty percent of the CO2 emission in India is caused by the Steel and Cement industry itself, which forms only a part of the overall construction industry. Greening the Indian construction sector should include a two-fold approach: reducing the carbon emission from this sector on one hand (mitigation) and making urban buildings disaster resilient on the other (adaptation). Moreover, it is quintessential for India to introduce stringent carbon emission standards for the construction industry, keeping in view the high ambitions set forth in the Indian Intended Nationally Determined Contributions (INDC's), which is projected to play a crucial role (as a bottom up approach has been adopted in Paris unlike preceding COP's) in the working and implementation of the Paris Agreement. This paper will make an effort to bridge the gap between the existing laws and regulations related to reducing carbon emissions and the recent international developments in this field. Good practices related to building and construction industry from the Conference of Parties (Lima- Paris Action Agenda Building Action Session which formed part of COP 21) in Paris needs to be juxtaposed against the existing building laws in India, which clearly is inadequate in terms of achieving the goals set forth in the Indian INDC's. Through this paper, reforms in the Indian laws and policies in the real estate industry will be proposed, to ensure the inclusion of international environmental standards in order to avoid crisis situations in the future.

Key Words: Real estate, climate change, construction sector, Paris agreement, GRIHA, Green rating

1. Introduction

"What will be done in this sector (building) is crucial for the future of developing countries"

-Ibrahim Thiaw from UNEP and co-founder of the Alliance on 3rd day (building day) of COP21 Paris.

While highlighting the importance of the building sector is mitigating climate change, Ibrahim Thiaw also added that this sector contributes 30 percent of the global CO2 emissions.

Climate Change is real. This is an established fact, not only in science but now also in global politics. The adoption of the Paris Agreement by almost 200 states

who are parties to the United Nations Framework Convention on Climate Change is evidence enough to highlight the gravity with which the international community has internalized the fact that anthropogenic climate change is not only real, but has devastating impacts on human life and property.

Real Estate has been and will be one of the biggest beneficiaries of the Indian success story.[42] On an average the share of Real Estate sector in the GDP of India amounts to 10 percent. Particularly, in 2013 real estate contributed to 6.3 percent which is expected to go as high as 13 percent by 2028.[43] Having said that, it is important to note that the growth of Real Estate is also a growing threat to the environment. Buildings may be responsible for forty percent of carbon emission in the cities of India. This raises greater concern for the government to ensure strict standards for buildings to ensure reduced emissions to meet the high ambition regarding carbon emission mentioned in the pledge (INDC) submitted to UNFCCC in COP21. However, the rhetoric in the building sector is far from the reality in terms of regulations and policies to ensure lesser emissions from buildings. This paper will highlight some of the key hurdles to achieving the goals mentioned in India's INDC with regards to the real estate sector. Particularly, a critical approach is taken to analyse the efficacy of the existing policies relating to green building ratings, building code etc. Suggestions will finally be made by doing a comparative study of policies and regulations adopted by other developing states like China. The suitability of good practices from the European story and other developed nations shall also be tested in Indian conditions.

2. Real Estate: A Climate Change Sensitive Sector

Climate change induced disasters are posing extreme threats to governance of urban areas. Sea level rise, which is projected to increase by eight to eighty-eight centimetres in the 21st century, will raise existential threats to the coastal cities in India. Since 1960's, natural disasters has increased to more than 3 times and economic losses has rose more than 9 times. The developing nations being placed on the tropical and sub-tropical zones make it more vulnerable to climate change induced disasters. Additionally, the economy and society in the developing nations are also highly dependent on climate. Due to shooting price of land in the concentrated cities of developing countries, where there is a rapid flow of rural population towards urban landscapes (partly due to climate vulnerability), commercial establishments are increasingly being built on reclaimed land from river and sea which are vulnerable to sea rise and climate change induced disasters.[44] The major threats to physical assets of the developing cities (therefore indirectly to the real estate sector) from anthropogenic climate change are rise in

[42] CEBR's World Economic League Table, CEBR, December 2013
[43] Assessing the economic impact of India's Real Estate sector, CREDAI, 2013
[44] Jorge Hardoy et al., Environmental Problems in an Urbanizing World, (London: Earthscan 2001), 207

sea level[45], tropical cyclone[46], flooding and landslides[47], water quality and shortage[48] etc.

Climate change has direct impacts on investment in real estate in that it decreases operational performance caused due to extreme weather conditions. Moreover, extreme weather conditions reduce life span of buildings.

Just to give a perspective, one meter rise in sea level had costed more than 7 percent of annual GDP.[49] Half of Peru's 12 percent decline in GDP in 1982 can be attributed to El-Nino related floods that year. Respective figures of 80 percent in Honduras, 49 percent in Nicragua (both for Hurricane Mitch), 6 percent in Mozambique can be attributed to climate change induced disasters. Data on economic losses associated with catastrophic events show that in constant 1999 US dollars, they have increased worldwide from an average of US$ 71.1 billion in the 1960s to an average of US$ 608.5 billion in the 1990s. Developing countries have seen higher loss due to climate change induced disasters than developed nations.[50] In fact, IPCC (in its 2nd assessment report) has averaged (tentative) economic loss at 2 to 9 percent of GDP which is caused due to vulnerability of cities to climate change disasters.

3. Tools (Regulatory & Voluntary Based) to Mitigate and Adapt to Climate Change Caused by Construction Sector

Broadly two approaches can be identified in reducing emissions from real estate sector. The first being compulsory Environment Impact Assessment/ Environment Clearance and the second is voluntary Green Rating of buildings to reduce emissions. Apart from EIA, the first approach also includes The National Building Code of India, 2005, if recommendations of planning commission are taken into consideration.[51]

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[45] This is the most fundamental challenge that urban settlements face from global warming. The threat will likely increase due to the ongoing influx of people and economic assets into coastal zones. At risk are entire sections of coastal cities and their infrastructure, beaches subject to erosion, river floors in estuarine zones subject to sedimentation, and wetlands and tidal flats subject to flooding. Furthermore, groundwater risks increased salinization, and coastal aquifers risk diminishing, affecting fresh water supplies and peri-urban agriculture.

[46] Increasingly frequent and intense tropical and extra-tropical cyclones will likely cause severe wind damage and storm surges which, compounded with a rise in sea level, are expected to become a severe problem for low-lying coastal regions and cities. Ports and other coastal infrastructure are especially at risk.

[47] Expected increases in the scale, intensity and frequency of rainfall in most developing countries will severely strain or overwhelm the storm drainage systems of many urban centers. This could lead to periodic flooding of low-lying areas as well as landslides and mud-slips on geologically unstable slopes, often subject to informal settlements. Cities built next to rivers and on reclaimed lands in riverbed planes will be prone to additional inundations.

[48] Urban flooding damages water treatment works and flood wells, pit latrines and septic tanks. Sewage treatment systems and solid waste disposal areas can also be affected, contaminating water supplies. Where overall rainfall decreases, droughts will likely compromise the replenishment of the water tables, the normal sources of water supply.

[49] Mimura N. and H. Harasawa, eds. 2001. Data-book of Sea-level Rise 2000. Tsukuba: Center for Global Environmental Research, NIES as quoted in IPCC Third Assessment Report, Vol. 2: 396.

[50] M. Sharma et al. 2000. "Reducing Vulnerability to Environmental Variability." Environment Strategy Background Paper. Washington, D.C.: The World Bank, 5.

[51] Planning Commission Twelfth Five Year Plan, Report of the Working Group on "Effectively Integrating Industrial Growth and Environment Sustainability".

The environment impact assessment as well as green rating of buildings mainly involves three dimensions:

a) Energy use
b) Raw material use
c) Water use

3.1. Energy use

According to a 2009 report (World Energy Outlook), two third of the energy produced in the world is consumed in the cities by nearly half of the population. This fact is equally true in the Indian context where there is rapid urbanization and an increasing movement from rural to urban setups. Moreover, with younger populations which prefer nuclear family setups, the demand for residential spaces would only increase.

In order to assess the energy, use of buildings, the geography and climate conditions play an important part. The Indian Bureau of Energy Efficiency which was created under the Energy Conservation Act has classified energy consumption of buildings according to climate zone and building use. Such classification is necessary to ensure fairness in assessing buildings for environmental clearances.

It would be safe to say that the Indian building sector is 'inefficient' in terms of energy efficiency. India scores poor in Energy Performance Index when compared to buildings in North America and Europe.[52]The residential sector itself consumes more than 37 percent of primary energy.[53]

The Environment Clearance (EC) system in India does not adequately address the energy saving agenda. Although the EIA process for construction sector has a section on energy consumption during different stages, it does not have clearly defined benchmarks and can therefore be deduced to be passive. The Energy Code for Building which is administered by the BEE is not in sync with the Environmental Clearance requirement prior to the commencement of the project. In fact, answering a few basic questions about source of energy supply, ventilation and energy saving appliances would suffice the requirements under the EC section on energy saving. The EIA process under EIA notification 2006 nowhere mentions anything related to the ECBC approaches. Nevertheless, energy professionals may sometimes choose to incorporate the ECBC approach in the EC process. But because of this piecemeal approach, where certainty and strictness is clearly lacking, hardly any instance of challenge of the EIA's by the concerned authority can be observed. At present data which is collected in the EC process (in Form 1 and 1A) is not suffice to come to a EPI figure. ECBC experts are hardly consulted in the EIA of a building. Additionally, the process of greening buildings has taken a scattered path, in the fact that National Habitat Mission under the National Climate Action Plan has also been given the onus to deal with increasing energy

Available at: http://planningcommission.gov.in/aboutus/committee/wrkgrp12/wg_es0203.pdf (accessed on 1st January, 2016)

[52] According to BEE, India's EPI for commercial buidings ranges from 200-400 kwh/sqm/year as compared to less than 150 kmh/sqm/year of buildings in North America and Europe.

[53] Primary electricity= electricity consumed directly + indirect energy use that was necessary to produce electricity. If only electricity consumption is taken, then the residential sector consumes 23 percent electricity growing at 8 percent per annum.

efficiency of buildings. The EIA process does not even take into consideration any energy deficit that may have been prevailing in the neighbourhood, assuming that in situ power generation will look to the issue. Moreover, the present EIA process for buildings does not provide for any indicators or post construction monitoring of buildings. These are some of the substantial handicap to the EC process.[54]

The good news is that ECBC has already been notified by eight states and it is expected that by the end of 12th five in 2017, ECBC will be made mandatory for all states. Rajasthan, Orissa, Punducherry, Andhra Pradesh and Uttarakhand have already taken a lead by notifying ECBC to make it mandatory.[55]India's pledge to the UNFCCC has also highlighted the intention make the code more stringent to promote construction of 'near zero' energy efficient buildings.[56]Even the Planning commission in its report "Effectively Integrating Industrial Growth and Environment Sustainability" has recommended that ECBC (for commercial buildings) shall be made mandatory in all tier I cities by 2015 and for all the country by 2018. This is just an extension of the mandate of the Energy Conservation Act, 2001 where central government has power to prescribe ECBC for commercial building (Section 14 p). However, the pace of progress on these lines has been too slow.[57]

With regards to Green Rating mechanisms (in contrast to mandatory EIA's), the greatest short-coming lies in the fact that it is 'voluntary' in nature. The efficiency and legitimacy of current rating has also been questioned. For example, LEED, or Leadership in Energy & Environmental Design, is a green building certification program that recognizes best-in-class building strategies and practices. To receive LEED certification, building projects satisfy prerequisites and earn points to achieve different levels of certification. India Ranks No. 3 on U.S. Green Building Council List of Top 10 Countries for LEED outside U.S. But, there has been growing evidence that several buildings in USA with LEED certification are underperforming compared to their promises, and there is gap between the design predictions and actual performance. A majority of the rated buildings could not maintain their expected energy consumption in its operational phase.[58]The National Research Council, Canada in a research concluded that 28 to 35 percent of the LEED building used more energy than that of the conventional buildings. In further study conducted in 2006 titled "Evaluating the energy performance of the first generation of LEED certified commercial building" concluded that there is variability from the predicted performance and the actual energy use in its operational phase.[59] A similar research titled "Comparison of commercial LEED

[54] Anumita Roychowdhury & Sakshi C. Dasgupta, Building: Earthscrapers- Environment Impact Assessment of Buildings, Centre for Science and Environment, New Delhi, 2011

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Available at: http://timesofindia.indiatimes.com/home/environment/India-to-implement-code-for-energy-saving-green-buildings-by-2017/articleshow/36254268.cms (accessed on 2nd January, 2016)

[56] India's INDC to UNFCCC available at:
http://www4.unfccc.int/submissions/INDC/Published%20Documents/India/1/INDIA%20INDC%20TO%20UNFCCC.pdf (accessed on 2nd January, 2016)

[57] *Supra* note 54

[58] Navar Mireya, some building not living up to green level, The New York Times, August 31, 2009.

[59] Diamond, Richard C et al, Evaluating the energy performance of the first generation of LEED certified commercial building, Vol.3, ACEEE 2006 Summer Study, 2006.

building and non-LEED buildings within 2002-04, Pacific North West Commercial Building Stock"[60] in 2008 came up with a finding that mean energy use per floor area for the twelve LEED building was only 10 percent lower than the 39 non-LEED buildings. The New Buildings Institute (under the direction of USGBC) has come to similar disparities in LEED certified buildings.[61] Among several reasons for these disparities, one reason is the heavy reliance of these rating systems on energy simulations and models to predict energy use in the proposed buildings, which are often inexact. It is not necessary that sustainable designs will translate into sustainable buildings.

The above mentioned problems call for post design monitoring, especially during the construction stage. In fact, the LEED program in US has made it compulsory on the green rated buildings to submit information for the first five years of operation. In case the building fails to provide such information, the label is withdrawn. The position of LEED India in this regards is unclear. Driven by the climate concern, energy sector is the immediate target of this initiative; Europe requires compulsory disclosure on energy performance certificates on sales, or lease. Building owners must obtain and disclose.[62]

As far as green rating system of buildings in India is concerned the Green Rating for Integrated Habitat Assessment (GRIHA)[63] is generally adhered to. This mechanism was designed by The Energy and Resource Institute (TERI) which is a research institute based in New Delhi. Apart from GRIHA there are mechanisms which are run by Indian Green Building Council like Leadership in Energy and Environmental Design (LEED) which is a US based rating system adopted in India since 2007. The advantages of green rating system includes boost in reputation of the construction company, it helps in mainstreaming green measures which make impact and has the potential to become a full-fledged standard.

In reality, green rating system has not taken widespread root in India yet. As of January 2016, only 675 projects have been registered under GRIHA. Even fewer numbers of buildings are actually rated. Nevertheless, there are more and more evidences to show that green rating system is being institutionalized by government through incorporation in regulatory obligations. The ministry of New and Renewable energy has come up with many incentives to promote GRIHA (which is officially the national green rating mechanism) rated projects.[64] Faith based pre-certification to green rated buildings is one of the incentives. Here a separate queue (fast-track process) for EC of project is offered by the government, only on the basis of a promise to get the project green rated. However, this promise is not legally binding, thus if a lower rating than was promised is achieved by the project proponent, it cannot be legally challenged. These loopholes among others point out to the need for higher levels of transparency and post construction

[60] Available at:
http://neea.org/docs/reports/baselinecharacteristicsofthe20022004nonresidentialsectoridahomontanaoregonandwashingtoneuireport82536194fb35.pdf

[61] Cathy Turner & Mark Frankel, Final Report on Energy Performance of LEED for New Construction Building, New Buildings Institute, 2008. Available at:
https://newbuildings.org/sites/default/files/Energy_Performance_of_LEED-NC_Buildings-Final_3-4-08b.pdf

[62] Green Building Rating: Overrated, CSE, 2012, New Delhi, at pg 4 Available at:
http://www.cseindia.org/userfiles/04%20Green%20Building.pdf (accessed on 2nd January, 2016)

[63] It is a 100-point system with a set of 34 criteria of which some are mandatory. Minimum qualifying score is 50 and rating given in 1-5 stars, 1 star for every 10 points over 50.

[64] *Supra* note 62

monitoring for the effective implementation of these incentives provided by the government. This is lacking at the present moment.

3.2. Water Use

Water faces similar issues in the EIA process as does energy. There is lack of any mandatory or clear guidelines in Form 1 and 1 A. That is not to say that there are absolutely no guidelines on per day per capita water consumption in buildings. Detailed study done by CSE reveals that actual water use in a building can deviate to substantial levels to higher or lower levels. The EIA rules in fact are close to the standard that is required to ensure that situations of water stress are avoided. However, what remains on paper are hardly taken seriously by project proponents and therefore remain just a formality.[65]

4. Hurdles In Achieving Low Carbon Emission From Building Sector

4.1. Loose Scrutiny Of Buildings in Township

Projects are classified as B1 which requires EIA and B2which do not require EIA. The EIA notification 2006 authorizes the ministry of environment, forest and climate change to issue guidelines for categorization of projects, but there is no such guideline from the ministry which expose ambiguity and make the avoidance of such regulations, easy.

4.2. Weak Mandate and Appraisal

The environmental clearance is based upon the information provided by the project proponent which are usually subject to manipulation by the project proponent. Although the committee can ask for a site visit, but in practice it is rare. There is no requirement to conduct EIA, rather it has become a formality to provide information as prescribed under the EIA rules.

Although, a decentralized mechanism in form of State Expert Appraisal Committee (SEAC) has been devised for evaluation of the project, but evaluation standards and norms have not been articulated properly, like water and energy consumption per capita.

Further, the EIA regulations adopts an area based criteria for exemption of EIA process, but in stipulated areas there may have been projects having potential of adverse environmental impacts.

4.3. Land Acquisition Without Prior Consent

Here we see a sharp contrast from the USA practice, as there is no need to EC for securing the land for the proposed project. However, there might be a chance of unsuitability of the land for the proposed project as it may be environmentally sensitive area under EIA.

4.4. Weak Monitoring System

It is expected that the project proponent would comply the prescribed target for water and energy consumption in its operational phase. But there is no formal

[65] Supra note 54

monitoring system which could ensure the prescribed compliance. The project proponents are mandated to submit bi-annual reports based on self-monitoring. There is growing body of evidence that there are gaps between the submitted reports and the existing ground level situations. Additionally, there is sharp variation from the stipulated condition on which EC was granted.

With the faster pace of construction sector the regional offices of the ministry of environment, forest and climate change are lacking manpower capacity which pose a challenge for enforcement. The regional offices have no power to punish the violators except issuing show cause notice. Barring a few cases, the MOEF & CC has failed to initiate punitive actions against the violators.

Due to lack of effective verification and monitoring mechanism, there are chances to bypass the conditions with on-site changes.

4.5. No Public Consultation

Public consultation and public hearing is not mandated for category B project, which include the building and thereby citizen's perspective are completely ignored. In climate sensitive areas, the opinion of the public regarding the viability of the project plays a very important role.

4.6. Post Facto Clearances

Post-facto clearances, although not provided in EIA, has become a common administrative practice, where environmental clearance for building projects are granted after the initiation of the building constructions stipulated with fine or bank guarantee to compensate for the expected environmental damage. This ad-hoc approach reflecting the backward polluters-pay principle is unacceptable in a climate sensitive nation like India. In order to achieve the ambitions mentioned in the INDC, it is quintessential to adopt a precautionary approach to EIA norms.

4.7. Misconceptions Regarding Rating

Some SEAC's awards rating like platinum gold with environment clearance. In fact, these ratings are awarded on the basis of information provided by project proponent and are not for the project construction or post construction performance. But the risk is that the project proponent may use such rating to convince others that the whole project is rated.

4.8. Want of Minimum Expertise

There is no stipulation regarding minimum number of members required for the functioning of the SEAC which might result in the ignorance of few fields for environmental clearance. The less number of members also undermines the effective and detailed appraisal of the project.

4.9. Want of Vivid Standards and Benchmarks

Although there are guidelines requiring minimizing the impacts on energy and water etc. but there is want of clear standards and benchmarks. In addition, there is fragmented sectoral appraisal of different green elements which is not a scientific approach.

4.10. No Formal Assessment of Benefits of EIA

Although various unofficial data reveal that EC result in the resource saving in the building sector, but no such effort was made by the concerned authority which is necessary to build public support and consensus.

5. Conclusions and Suggestions

The shift from market led rating system to a government backed rating system in India calls for holistic and integrated approach to rating of buildings. If gifts like FAR is continued with, then the accountability of developers shall be made stricter with stringent penalties. Disclosure of rating criteria and awareness of consumers also needs to be enhanced in order to facilitate the green rating system. A comprehensive legal framework in the lines of Seattle Building Energy Benchmarking and Reporting legislation with benchmarks like benchmarking, disclosure and reporting needs to be incorporated in the green rating mechanism in India.

Whether or not green rating of building makes economic sense is the most relevant question to ask from the side of the developers. If it does it will be an attractive business proposition, otherwise, the laxity in the part of developers and their tendency to bluff the rating system by showing sustainable designs without intentions to produce sustainable buildings would continue. Here, it is relevant to note that unlike USGBC which provides transparent data on payback time and incremental cost, the Indian counterpart IGBC is rather opaque on this matter.

A reassessment of the green rating system is inevitable. The goal of the green rating system shall be saving resources and reducing emission and not just increasing green footprint. More intention is not suffice to tag a building to be 'green'. Continuous monitoring is indispensable.

5.1. Suggestions

After going through several reports and literature on greening of Indian buildings, the authors hereby make the following suggestions in order to ensure that the real estate sector acts as a facilitator to achieving the ambitious goals mentioned in India's INDC (for which India shall be increasingly accountable under the current framework of the Paris Agreement) and not as a hurdle.

5.1.1. Master Plan for Cities

The EIA of the master plan of the city should have an integrated and holistic approach, taking the building as a next unit of assessment in granting environmental clearance. The master plan shall be taken as a reference point which will ensure the sensitivity of the building in particular areas (zone specific). This point has special relevance in the context of the Smart cities as has been proposed by the Indian Government.

5.1.2. Ensuring Public Participation

Public participation shall be mandatory. Citizen perspective has completely been ignored for category B projects which include buildings. Public participation and hearing should be mandated to ensure and assess local issues and needs.

5.1.3. Screening of Sites

Paragraph 2 of the EIA notification 2006[66] does not necessitate environmental clearance for securing land by the project proponents. The land should only be permitted to be acquired only after suitability of the land has already been fully established.

5.1.4. Standard Norms and Benchmarks

A standard and vivid benchmark for each and every green elements should be stipulated for building. There should be clear benchmark for water usage, energy consumption, water harvesting etc.

5.1.5. National E-Portal

There must be a national e-portal with a comprehensive details of different parameters, the list of different projects with stipulated condition so as to ensure public access and scrutiny. The authority should review the public comments on environmental aspects.

5.1.6. Mandatory EIA for Township Projects

The township projects have potential environmental impacts and it is irrational to exempt the same from EIA. Rather EIA should be made mandatory for township projects.

5.1.7. Strong and Effective Post-Construction Monitoring Mechanism

Surprisingly, the project proponents are mandated to submit bi-annual reports based on self-monitoring. There must be strong monitoring mechanism which could ensure post-construction performance and compliance of the prescribed conditions. The regional offices should be empowered to punish the violators. More stringent punishment should be prescribed for environmental violations.

5.1.8. Strengthen the Role of State Pollution Control Board

The SPCB are responsible for the prevention, control and abatement of the air and water pollution. The SPCB shall be empowered with proper authority to ensure the compliance of the post-construction performance.

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Case Study

Indraprastha Gas Limited: Formulating and Implementing a Go-to-Market Strategy

Amandeep Singh Narang, Vivek Pani Gumparthi** and Somnath Chakrabarti****

This case study is about a scale-up challenge faced by a widely-held company, Indraprastha Gas Ltd (IGL). IGL is a City Gas Distribution (CGD) company headquartered in New Delhi, India. The company provided clean fuels, CNG and PNG to the public at large. One fine day, the Managing Director (MD) of IGL, was asked by the Ministry of Petroleum and Natural Gas to onboard at least 300,000 domestic PNG connections by the end of the financial year (FY – 17). Other CGDs in the country were given similar targets. The MD of IGL was rightfully concerned about this arduous task, as the company since its inception could onboard 742,205 PNG connections. Though it was a huge task, IGL made multi-pronged efforts and over a period of one year could add a sizeable number, the most that any CGD could do in the country. The company was appreciated by the Ministry for working in line with its vision and was also lauded for being a guiding light for other CGD companies of the country.

Key Words: *Clean Energy Fuel, Domestic Cooking Fuel, Go-to-marketing Strategy, Market Penetration, Policy Implementation, Scaling-up*

It was a sunny afternoon of April, 2017 when Mr. E S Ranganathan, Managing Director of Indraprastha Gas Limited (IGL) was on his way back to office after finishing a meeting convened by the Ministry of Petroleum and Natural Gas (MoPNG), Government of India. The officials of the Ministry gave IGL a stiff target of adding 300,000 domestic Piped Natural Gas (PNG) connections by the end of Financial Year (FY) 2017-18. Mr. Ranganathan was in a deep thought, concerned about the ways to achieve the ambitious targets planned by the Ministry for increasing penetration of PNG connections in the country. IGL since its inception in the year 1998 could garner 742,205 domestic PNG connections until then. This meant that IGL had to add close to half of the existing PNG connections in a single year. While

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it was not just about getting more customers on board and its reputation being at stake, it was also about IGL being in line with the vision of the government to undertake expansion of PNG network across the country in a mission mode.

BACKGROUND

IGL was setup in 1998 City Gas Distribution (CGD) company, as a joint venture of Bharat Petroleum Corporation Limited (BPCL), Gas Authority of India Limited (GAIL) and the Government of the National Capital Territory (NCT) of Delhi. IGL was started to implement the Compressed Natural Gas (CNG) program as per the directions of Honorable Supreme Court of India (SCI). In 1999, IGL took over the Delhi City Gas Distribution Project (DCGDP) that was started by GAIL. DCGDP had earlier been started as a pilot project covering the areas of Bapa Nagar, Kaka Nagar, Pandara Park, Pandara Road, Sujan Singh Park and Sunder Nagar in Delhi, with around 1500 customers.

By the late 1990s, vehicular pollution levels in Delhi, the capital of India, had reached toxic levels, posing a serious threat to the health of the residents of the city. Keeping the health concerns in view, the Honorable Supreme Court of India issued a directive calling for all buses, taxis and three-wheelers in Delhi to be converted to CNG in response to the Writ Petition (Civil) No. 13029/1985, *M. C. Mehta versus Union of India* (India Environment Portal, 1998; Transport Department, Government of N. C. T. of Delhi, 2018). Since then, keeping in view the enormous business opportunity, IGL had started to significantly invest in setting up of the infrastructure and was successful in reducing and controlling the city's pollution levels (Kathuria, 2004). Over a period of time, IGL could position itself as a clean energy solution provider through innovative ways. After comprehensively establishing CNG ecosystem in Delhi, IGL expanded its reach by serving the nearby geographies of Delhi (NCT of Delhi) such as Noida, Ghaziabad, Greater Noida and Rewari.

Exhibit 1: Indraprastha Gas Ltd. (IGL)'s Performance

Sales Volume	Units	FY 2016-17	FY 2015-16
CNG	Million KGs	921	834
Industrial / Commercial PNG	Million SCM	174	160
Domestic Volumes PNG	Million SCM	94	86
Natural Gas	Million SCM	138	96
Sales Value			
CNG	(in crore)	3287	3079
PNG	(in crore)	919	973
Total	(in crore)	4206	4052

Note: (1) '₹' symbol: Indian Rupees (INR); (2) SCM: Standard Cubic Meter; (3) 1 crore = 10 million.

Source: IGL (2019)

In addition to the supply of its flagship value offering – CNG, IGL was also supplying PNG to the residents of Delhi. Though IGL had been spending a significant amount of money and effort on PNG, the company was receiving majority of its sales volume from CNG (refer Exhibit 1).

IGL's BUSINESS

CGD business was a highly regulated business and entering any new geographical area required authorization by Petroleum and Natural Gas Regulatory Board (PNGRB). IGL supplied natural gas to the residents of Delhi, through its two primary value propositions—CNG and PNG. Of the two value propositions, CNG was its flagship product which helped IGL in garnering a lot of brand visibility and recall. Natural gas was the cleanest burning fossil fuel and its sustainable fuel attributes made it more popular than other hydrocarbon fuels.

COMPRESSED NATURAL GAS BUSINESS

CNG was a gaseous fuel known for its green characteristics because of the absence of Sulphur and Lead. IGL started its CNG operations with 9 CNG stations catering to a meagre 1500 vehicles. Over a period of time IGL could successfully build its brand and could establish itself in the city of Delhi, with a steady increase in sales volume. By the end of FY 2017 (March 31, 2017), CNG was used by over 975,000 vehicles which included 578,000 private vehicles (refer Exhibit 2).

Exhibit 2: Number of CNG-run Vehicles Fuelled by IGL

	March 2014	March 2015	March 2016	March 2017
Buses	19,566	19,421	19,272	22,900
Auto / LGV/RTV	2,20,391	2,41,540	2,59,500	2,77,972
Cars/Taxi	5,14,801	5,56,156	5,89,801	7,09,900
Total	**7,54,758**	**8,17,117**	**8,68,573**	**10,10,772**

Source: IGL (2019)

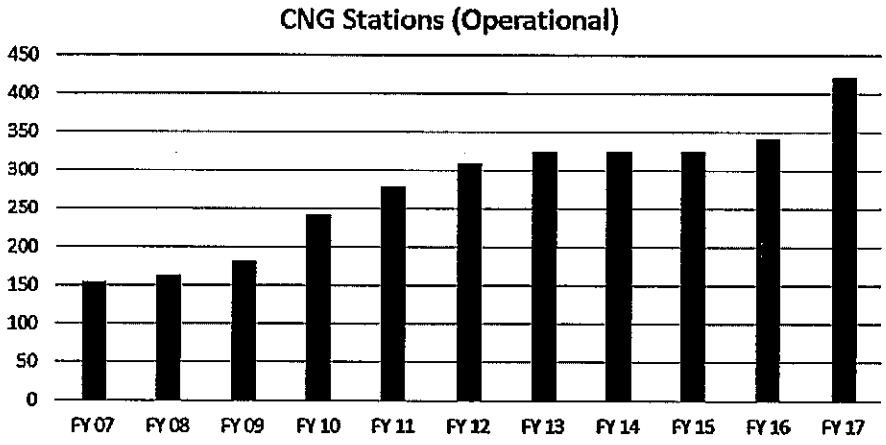
This steady growth was possible only because of the emphasis that IGL gave to augmenting CNG refueling infrastructure in line with the ever increasing demand of CNG across all vehicle segments. After 2009, IGL expanded its footprint beyond geographical boundaries of Delhi to adjoining cities of Noida, Ghaziabad and Greater Noida to provide CNG to the vehicles across the segments.

In addition to strengthening its capabilities, IGL was also successful in leveraging its equations with various stakeholders. During the year 2010, in view of Common Wealth Games 2010 held in New Delhi, IGL was successful in getting more plots of land for CNG stations and other infrastructure purposes. This support from the government provided a major boost for IGL in scaling up its infrastructural capabilities thereby providing better services to the consumers. In another instance, the marketing team of IGL had tactfully dealt a road-rationing policy (Odd-Even scheme) decision

of the government, by getting an exemption for all the CNG run vehicles, in NCT of Delhi, which helped the company in not losing revenues during that period.

As of March 31, 2017, the number of CNG stations grew to 421 (refer Exhibit 3), with an average CNG sale of 2.5 million kilograms per day. In addition to this, daily average gas sales grew by nearly 15% from 4 Million Metric Standard Cubic Meter per Day (MMSCMD) in FY 2015-16 to 4.59 MMSCMD in FY 2016-17.

Exhibit 3: Annual Growth Trend in Number of Compressed Natural Gas (CNG) Statons



Source: IGL (2019)

PIPED NATURAL GAS BUSINESS

PNG, another major value-offering of IGL was supplied to domestic, commercial and industrial customers. By the end of FY 2016-17, PNG was supplied to over 742,205 domestic PNG customers of Delhi NCT region (refer Exhibit 4). On the domestic front, PNG was used primarily for cooking applications, apart from powering domestic water heaters and gas generators. PNG was not only supplied to domestic households but also for other industrial and commercial users.

Exhibit 4: Number of PNG Users

	March 2014	March 2015	March 2016	March 2017
Domestic	459,467	560,752	636,618	742,205
Commercial/Industrial	1876	2292	2580	2870
Total	461,343	563,044	638,898	745,075

Source: IGL (2019)

In the commercial sector, IGL had positioned PNG as a new age fuel and was being supplied to hotels and restaurants of Delhi and National Capital Region (NCR) area.

Over a period of time, all the leading hotels, restaurants, commercial kitchens and hospitals of Delhi and NCR area used PNG fuel, owing to the several advantages.

Industrial segment was another major revenue contributor to PNG business. PNG in this segment was majorly used for power generation, to run Vapor Absorption Machines (VAM), boilers, furnaces, ovens, hot water generators, thermo-fluidic heaters etc. By the end of FY 2016-17, IGL had made deep inroads into this segment by supplying PNG to established private players like Honda, LG, Dabur, Moser Baer, U- Flex etc.

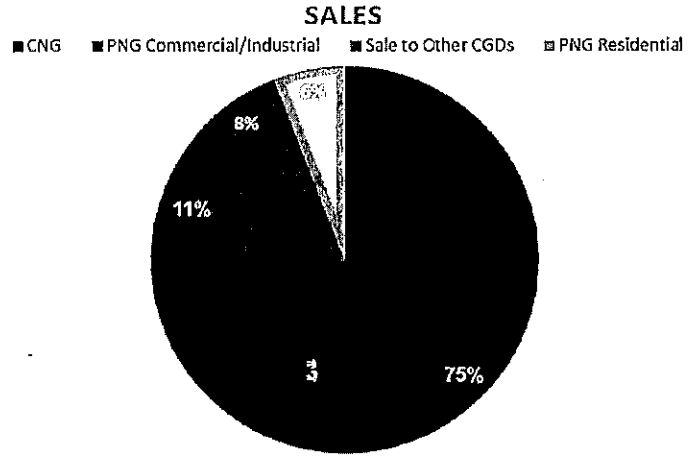
In addition to the green characteristics of the fuel, PNG was also acknowledged as a safe fuel, considering its physical characteristics. It was proven to be lighter than air and was found to disperse in case of a leak as opposed to the widespread kitchen application, LPG, which settled down. On the pricing front, PNG pricing was comparable to the alternate fuel of LPG (subsidized).

In addition to the characteristic advantages, PNG was supplied online unlike LPG which was stored in cylinders, requiring adequate space.

SALE TO OTHER CGDS

In addition to selling CNG and PNG to consumers, IGL also sold natural gas to other City Gas Distributors (CGDs) in Faridabad and Gurugram, which yielded regular flow of revenue for the company (refer Exhibit 5).

Exhibit 5: Sales Volume Mix of IGL as on March 31, 2017



Source: IGL (2019)

CHALLENGES FACED BY IGL IN SCALING – UP PNG

In the early May of 2017, the Managing Director of IGL called on his PNG team to formulate a strategy to achieve the ambitious target set by the ministry. During the

course of the meeting, he inferred that there were diverse opinions pertaining to the bottlenecks in scaling-up the number of PNG connections. As Chief Executive of the company, he felt that the team had to work in a structured manner to execute this formidable task and these diverse opinions could be a hindrance in achieving the targets. In order to bolster his team's efforts, he wanted to have some actionable insights from the ground. He felt that these insights would give him a cogent understanding of the market, people's belief systems, opportunities and barriers. So, the team decided that a leading market research agency should be commissioned to give an inside-out analysis for the domestic households not subscribing for PNG connections despite having network at their doorstep.

ABOUT THE SURVEY

The survey was administered by a reputed market research company based out of New Delhi. The vendor was entrusted with the responsibility of finding reasons for target audience not switching over to PNG connections in spite of having PNG network in their neighborhoods. The first step of the survey was a qualitative research module, which involved home immersion with couples and mini focus group discussions with four to six couples in each session. The objective of the qualitative module was to understand the barriers to adoption of PNG and motivations for staying put with LPG.

The second step was the quantitative module, conducted after a thorough understanding of consumers' thoughts about PNG fuel. The study was conducted more for validating the results of qualitative module. The total sample size of the study was 785 households. Three criteria were used for selection of their respondents. They were, households not having PNG connections currently, households having LPG connections and respondents who were aware of IGL providing PNG facility in their locality or society. For a respondent to be qualified for the sample, the respondent had to meet all the three criteria. The respondents were spread across all income group segments of Higher Income Groups (HIGs), Middle Income Groups (MIGs) and Low-Income Groups (LIGs). Within every income group, both house owners and tenants were chosen as respondents.

RESULTS OF THE SURVEY

At the outset, it was understood that Liquefied Petroleum Gas (LPG) was a serious competition to PNG. LPG was distributed by national players (Government of India undertakings), who boasted of having strong distribution networks. The market research team also understood that LPG was considered as an asset of inheritance that was passed on from one generation to another. Over a period of time, LPG connection was regarded as a bare necessity for any household. Though there had been many innovations, with the introduction of gadgets like induction stoves, microwave ovens, cooktops etc., no kitchen was considered complete without a LPG connection.

The survey threw up interesting insights into the psychological barriers among the public towards adopting PNG as the cooking fuel in their kitchens. The primary reasons for the inertia were grouped into five broad categories of safety, price, product-related, aesthetics and perceptual.

SAFETY

The survey brought out that the respondents were afraid of their safety with regard to a PNG installation primarily due to partial knowledge of the PNG concept highlighting that the respondents had no clue about the in-built safeguards in PNG pipelines going inside the houses. On the other hand, the study also revealed that respondents felt that LPG was safer when compared to PNG. It also highlighted that, since laying PNG network was an infrastructure intensive work, incidents of pipeline leak or breakage on the roads in the past added to the apprehensions in the respondent minds.

PRICE

It was observed that, initial investment of INR 6000 was the major bottleneck in adoption of PNG, by customers who were satisfied users of LPG. Further, their own past experiences and experiences of their acquaintances with regard to meter-based billing for other utilities had dampened their trust in the PNG billing system. The study also exhibited that though there was a marginal difference in terms of prices, the respondents felt that in the long run due to the heavy initial investment and enigma in PNG billing, there was a perception that PNG was more expensive in the respondent minds.

PRODUCT – RELATED

The survey revealed that people perceived that the time and energy in the process of acquiring a PNG connection was high and therefore they avoided the same, being satisfied with LPG. It showed that customers also had a perception that the flame strength of PNG was less when compared to LPG and therefore would lead to more cooking time resulting in higher costs.

AESTHETICS

The survey also threw up that respondents were concerned about the aesthetics of their kitchens due to visibility of PNG installation (as gas pipeline cannot be concealed due to safety guidelines) and seemed like an eye-sore in the kitchen. It was also observed that PNG connections would hamper the effective utilization of space within the kitchen.

PERCEPTUAL

The study revealed that the landlords were hesitant in getting PNG connections for their tenants as it required one-time financial outgo as a security deposit. Additionally, the tenants also exhibited resistance in acquiring a PNG connection, as it required

surrendering of existing LPG connection (the conventional form of fuel). Therefore, those in transferable jobs were reluctant in surrendering their LPG connections, as PNG was not available in all the cities. This point also revealed that people were unaware of the fact that all the Oil Marketing Companies (OMCs) offered the facility of keeping gas connections in safe custody on a temporary basis.

The key takeaway of the study was that 58% of the interviewed households which did not have PNG connections were mulling the option of switching to PNG in the near future.

DILEMMA

It was definitely an arduous task for the company given the kind of volumes that company had seen with PNG till then. The objective of the government was to cut down the use of subsidized LPG. When freed from subsidy, LPG could be used as a substitute for kerosene and forest wood for cooking purposes in rural and remote areas (PTI, 2015). As a part of this plan, IGL was given the target of increasing at least 300,000 domestic PNG connections for the financial year 2017-18.

The company had to do something extraordinary to achieve this feat of adding 300,000 PNG connections in a single year. Being one of the largest CGD companies in the country, and operating in the national capital, it was imperative for IGL to take up this directive seriously and draw up a strategy to achieve this ambitious target. Meeting the target would also augur well for the growth of the company and will continue to add to the sales volumes in the years to come.

On the other end, OMCs were improving their service quality levels for their LPG consumers by leveraging technology, to offer better customer experience. This could eventually be a deterrent for the loyal LPG customers to switch to PNG.

The results of the survey were tabled for a discussion between the management and the PNG team. The team felt that it had to work on all the action points (revealed by the survey) to achieve this formidable target set by the Government of India. The in-house specialists looking after various functions, were asked to diligently implement the strategies that were being formulated. The teams were given extra budgets for handling this special and crucial project. The team wanted to leave no stone unturned in achieving this target as IGL being the leader in CGD sector, wanted to show the way to all the other players.

TEACHING NOTE

CASE SYNOPSIS

Indraprastha Gas Limited (IGL) is a City Gas Distribution company headquartered in New Delhi, India. IGL is a clean energy solution provider and enjoys a great reputation among its addressable audience. On one fine day in April 2017, Mr. E. S. Ranganathan, the Managing Director of IGL is called for a meeting by the Ministry of Petroleum and

Natural Gas (MoPNG). During the course of the meeting, Mr. Ranganathan is asked to onboard at least 300,000 domestic PNG connections for FY 2017-18. IGL since its inception could garner 742,205 domestic PNG connections. This meant that the company had to onboard at least 50% of its existing domestic PNG connections.

The PNG division started working on various marketing strategies to achieve the targets set by the ministry. One of the first things that the team did was to understand the potential consumers of PNG. In this regard, they engaged a leading market research agency to understand the psychological barriers that consumers have for obtaining a PNG connection. The survey revealed interesting facts about perceptions of consumers with respect to PNG. Using the survey results as a base, the company wanted to devise a go-to market strategy for onboarding its consumers. PNG (domestic) accounted to 6% of the total revenue volumes of the company, while its flagship product CNG amounted to 74% of the total revenue volumes.

It was definitely an arduous task for IGL as a company, considering the stiff competition that it faced from Liquefied Petroleum Gas (LPG) providers. Though it was an uphill task for the company, it looked at this challenge as an opportunity to scale-up revenues of PNG, thereby contribute significantly to the topline of the company.

LEARNING OBJECTIVES

The case illustrates a challenge that IGL as a company faces. IGL is given an arduous task of adding 300,000 domestic PNG connections in one year (FY 2017-18). The specific teaching objectives include the following:

- To understand the addressable audience of a market that has been skimmed.
- To understand go-to market strategies of a utility company.
- To understand how to formulate strategies in markets that have high threat of substitutes.
- To consider the various business options available when confronted with a business challenge.
- To find a solution for a given problem and convert the problem into a business opportunity.

POSITION IN COURSES

This case is suitable for graduate and executive students for the following courses:

- Marketing Management – for understanding consumers.
- Strategic Management – for understanding product/market expansion strategies.
- Communication Strategies – for communicating the right message to the addressable audience.

- Integrated Marketing Communications – for understanding the significance of promotional activities.

SUGGESTED PRE-READINGS

1. Andzulis, J. M., Panagopoulos, N. G., & Rapp, A. (2012). A review of social media and implications for the sales process. *Journal of Personal Selling & Sales Management, 32*(3), 305-316.
2. Belch, G. E., & Belch, M. A. (2004). *Advertising and promotion: An integrated marketing communications perspective,* (6th ed.) New York: NY: McGraw-Hill.
3. Hochstein, B. W. (2016). *B2C sales interactions: Empowered consumers, sales influence tactics, and salespeople as knowledge brokers* (Doctoral dissertation, Florida State University, Tallahassee, FL). Retrieved from http://purl.flvc.org/fsu/fd/FSU_2016SP_Hochstein_fsu_0071E_13116
4. Percy, L. (2008). *Strategic integrated marketing communications*. New York, NY: Routledge.

SUGGESTED ASSIGNMENT QUESTIONS

1. Explain the product portfolio of IGL. What is the importance of each product in the company's portfolio?
2. Describe IGL's strengths, weaknesses, opportunities and threats.
3. Explain the importance of promotional activities for a company like IGL. What are the various promotional activities that IGL can undertake with respect to domestic PNG?
4. Analyze the PNG market that IGL is operating in.
5. Explain the challenge faced by IGL in the context of the case. Based on the information provided (with respect to psychological barriers among the public towards adopting PNG as a cooking fuel in their kitchens), what actions could IGL take for overcoming its challenges and achieving its target?

ANALYSIS

1. **Explain the product portfolio of IGL. What is the importance of each product in the company's portfolio?**

Expected answer to include the following points or more: IGL is a clean energy solution provider based out of New Delhi, India. IGL has four value offerings: (a) Compressed Natural Gas (CNG) for vehicles; (b) Piped Natural Gas (PNG) for residential use; (c) PNG for industrial and commercial purposes and; (d) sale of natural gas to other City Gas Distribution (CGD) companies.

Of the four value - offerings of IGL, CNG contributed to 74% of revenues, PNG (commercial/industrial purposes) amounted to 12%, sale of natural gas to CGDs 8% and PNG for domestic contributed to a meagre 6% (See Case Exhibit 5). However, it is noted that only two value-offerings were available for general public (vehicular CNG and domestic PNG).

COMPRESSED NATURAL GAS

Compressed Natural Gas (CNG) is a gaseous fuel and is a mixture of hydrocarbons mainly methane (IGL, 2019). CNG is the flagship product of IGL and was first supplied in 1999 by IGL to the people of Delhi. The benefits of using CNG as a fuel are (IGL, 2019):

- ***Green Fuel:*** Due to the absence of lead and sulphur, CNG is referred to as a green fuel. This green character of CNG facilitates reduction of harmful emissions, thus leading to reduction of pollution.
- ***Safety:*** With a high auto-ignition temperature and an arrow range of inflammability, CNG is one of the safest fuels.
- ***Low Operational Costs:*** CNG is economical to use when compared to usage in petrol and diesel vehicles.
- ***Increased Life of Lubricants:*** CNG as a fuel does not contaminate lubricants, thereby increasing the life of lubricants.

PIPED NATURAL GAS (DOMESTIC)

PNG as a fuel mainly consists of methane and small portions of other hydrocarbons. Because of low carbon to hydrogen ratio, PNG burns completely making it a clean fuel (IGL, 2019). IGL offered PNG to both domestic and commercial/industrial purposes. Domestic purposes meant household usages like gas stoves, geysers and other appliances. On the other hand, industrial or commercial purposes included supply to restaurants and other companies. The benefits of using PNG are (IGL, 2019):

- Uninterrupted Supply: PNG was supplied without any interruption to the households because of the infrastructure setup of IGL. The infrastructure setup of IGL also makes it very convenient for the consumers.
- Safety: PNG has low inflammability range, which means that the fuel does not catch fire easily. PNG being lighter than air, disperses easily in case of leakage.

PIPED NATURAL GAS (COMMERCIAL/INDUSTRIAL)

Re-gasified liquefied natural gas (R-LNG), also called R-LNG is supplied to industrial and commercial purposes. In industries, it is used to run hot water boilers, furnaces, ovens and generators. IGL also supplies PNG to hotels, restaurants and malls thereby reducing the usage space and air pollution.

SALE OF NATURAL GAS TO OTHER CGDS

In addition to business to consumer business (B2C), IGL sold natural gas to other business entities (other CGDs) that supplied natural gas to end consumers of Faridabad and Gurugram.

2. Describe IGL's strengths, weaknesses, opportunities and threats.

Expected answer to include the following points or more:

SWOT ANALYSIS

STRENGTHS

- Good infrastructure support to meet the growing needs of consumers of CNG and PNG.
- Strong organizational capabilities because of the joint focus of BPCL and GAIL, parent companies of IGL.
- Diversified risk in revenue flows, as the value offerings do not focus on one sector. That is, CNG is for transportation, PNG is for both residential and commercial purposes (with diversified applications) and sale of natural gas to other CGD companies.
- Innovative marketing plans.

WEAKNESSES

- High geographical concentration, that is majority of its business operations are in Delhi region.
- Heavy reliance on CNG for revenues (see Case Exhibit 5). That is, CNG occupies 74% of revenues for the company.

OPPORTUNITIES

- High brand recall because of strong presence of CNG.
- Rapid geographical expansion of the company may throw up opportunities for IGL to expand its customer base.
- An opportunity to utilize economies of scope. IGL has good presence with respect to CNG customer base. From the case, it can be understood that CNG was being used by close to a million vehicles in Delhi (it included 5,78,000 private vehicles). IGL has an opportunity to target these customers by devising innovative marketing schemes and can try to sell a PNG connection.
- IGL has positioned all its value – offerings as clean energy solutions, giving an opportunity to attract all the potential customers interested in clean energy solutions.

- Increase in price of conventional cooktops can throw up an opportunity for IGL, to facilitate a switch to PNG (Verma, 2017).

THREATS

- Strong presence of LPG. From the case, it can be understood that LPG has been the conventional source of energy for all the households. It can also be understood that LPG was considered as an inherited asset by the households as the connection was passed on from one generation to another, indicating that there is a high resistance to switch to PNG.
- Surge in induction cooktops owing to increase in working population, increase in their purchasing power, and better infrastructural benefits (Verma, 2017).

3. **Explain promotional mix. What are the various promotional activities that IGL can undertake with respect to domestic PNG?**

   Expected answer to include the following points or more: Promotional mix is a set of marketing activities that are intended to interact with target audience in order to achieve the institutional promotional objectives (Kotler and Keller, 2006). The different types of promotional activities that IGL as a company can consider are:

ADVERTISING

Advertising can be understood as a non-personal mode of communication run through mass-communication media such as newspapers, magazines, movie theatres, radio and television (Kotler and Keller, 2006). Advertising is generally measured by: advertising medium, advertising size, content of advertising, drafting of advertising, duration of the advertisement, technical output of advertising, and repetition of advertising (Nour and Almahirah, 2014).

IGL in the present context to promote its PNG, a relatively less-penetrated market can advertise using the following media: radio (specific channels of Delhi and NCR geography), local dailies (both local vernacular and English), out of home advertising (hoardings, danglers, bunters, etc.), short videos for movie theatres and local magazines (both local vernacular and English). These media should communicate that IGL as a brand also offers convenience of PNG, which will help in building top of mind recall of PNG as a value-offering. In addition to introducing PNG as a value-offering, IGL can also explicate the benefits of PNG which is a crucial aspect for consumers who seek utilitarian value.

Further, the advertisements should communicate a clear brand personality (Aaker's brand personality dimensions), which will help in building relationships with consumers (Aaker, 1999).

PERSONAL SELLING

Personal selling can be understood as a face-to-face interaction and verbal communication of company (or its representatives) with potential buyers (McCarthy and Perreault, 2004). In the context of this case, personal selling can be either door-to door campaigning or cold-calling in IGL's areas of operation. Further, sales persons can be deployed at various touch-points (like shopping malls, metro stations etc.) in the Delhi NCR geography. These sales representatives in addition to introducing the product to the potential buyers, can also distribute handouts which can help in building recall.

SALES PROMOTION

Sales promotion can be understood as any marketing or non-marketing activity which is leveraged to stimulate the demand for products (Obdyat, 2004). The sales promotion activities in the context of the case can be offering bundling value (by combining CNG and PNG), by giving discounts on PNG for the first few months of use for consumers and also by giving complimentary products (like utensils, lighters, key chains etc.).

PUBLICITY

Publicity can be broadly understood in two ways - publication of positive or negative news of the company (including its activities and products) using mass media or any publication or broadcasting of the same in an unpaid manner. Publicity includes all the activities carried out by an organization with an intention to strengthen its image in the community by involving in various activities such as supporting and participating positively in environmental, health public and social issues (Lovelock and Wirtz, 2004). In addition to that, IGL can also conduct safety drills and workshops to further the effectiveness.

INTERNET MARKETING

Internet marketing or social media promotions can be another effective tool for promoting products at a large scale. Through this media, IGL can promote various product attributes and schemes to consumers and potential consumers at large. The promotional posts can also communicate the company's various CSR initiatives and sales promotions.

4. Analyze the domestic PNG market that IGL is operating in

Expected answer to include the following points or more: Porter's (1989) Five Forces framework organizes many complex managerial economics issues into five categories or forces that affect the sustainability of businesses in a given industry.

The below description explains the scenario of PNG industry setting.

ENTRY

A low-entry barrier scenario in any industry heightens competition there by reducing the overall industry profits. As per the case, CGD business is a regulated business in India,

which requires authorization from PNGRB to set up infrastructure in a specific geography. In addition to that, setting up of PNG infrastructure entails a lot of investment expenditure, which reduces the risk of new entrants into the market. Hence, going by this it can be concluded that PNG industry setting has high entry barriers.

POWER OF INPUT SUPPLIERS

In the case of domestic PNG, for IGL it can be understood that the input gas price is fixed by the government every six months. This indicates that there is no bargaining power vested with IGL with respect to domestic PNG. Hence, the power of input supplier is high and industry profits is said to be low.

POWER OF BUYERS

The price of domestic PNG for consumers is non-negotiable indicating that the power of buyers is low. Hence, IGL is independent to fix the price for its domestic consumers.

INDUSTRY RIVALRY

From the case study, it can be understood, that IGL has no direct competition from any of the players with respect to PNG in its areas of operations, as of now. This zero competition from the industry with respect to PNG facilitates higher profits there by increasing the sustainability of IGL's PNG business.

SUBSTITUTES

Though there is no competition on the PNG front, IGL faces stiff competition from other factors such as domestic LPG, microwave ovens, induction cooktops etc. High switching resistance from LPG to PNG can be regarded as one of the major threats to PNG business of IGL. Hence, threat of substitutes for PNG is significantly high.

5. **Explain the challenge faced by IGL in the context of the case. Based on the information provided (with respect to psychological barriers among the public towards adopting PNG as a cooking fuel in their kitchens), what actions could IGL take for overcoming its challenges and achieving its target?**

Expected answer to include the following points or more: IGL is a CGD company with two major (B2C) value offerings – CNG and domestic PNG. CNG is a gaseous fuel used predominantly for vehicles. On the other hand, domestic PNG is primarily used for cooking in the kitchens.

Over a period of time, IGL became synonymous with CNG and became the major revenue contributor (74% of the total sales) for IGL. Domestic PNG contributed to only 6% of the total revenues, making it third highest contributor of sales volume, with 742, 205 domestic connections.

As per the case, the challenge that IGL faced was to scale-up the number of PNG connections by almost half of its existing connections in one year, in accordance with

the directive of the Ministry of Petroleum and Natural Gas (MoPNG). To get a comprehensive picture of the market, the team decided to hire a third party market research agency to get crucial actionable insights of the people's belief systems, opportunities and barriers.

From the survey, the following were inferred:

- Stiff competition from LPG
- Safety
- Price
- Product-related
- Aesthetics and
- Perceptual

STIFF COMPETITION FROM LPG

Over a period of time, LPG created a strong consumer base and became a formidable competition for other fuels to make an entry into the market. Hence it is essential for IGL to craft communication in such a way that PNG is well differentiated when compared to LPG (in terms of experiential benefits, symbolic benefits and functional benefits).

POSSIBLE SOLUTION

From the case, it can be understood that LPG was a widely accepted cooking fuel and was considered as an inheritance asset by people across the geographies. Keeping this strong resistance and sentiment in view, IGL can position PNG as a new-age fuel, which is efficient, environmental friendly and convenient. By positioning PNG as a new-age fuel, IGL is effectively differentiating PNG from the conventional LPG fuel. Furthering this thought process, IGL can effectively showcase the convenience of using PNG, by highlighting the space constraint that LPG cylinders pose. This positioning can be communicated to potential consumers of PNG across the geographies using various media. The communication should highlight the functional attributes (effectiveness, environmental friendliness, cost-effectiveness, convenience etc.) of PNG and how it is a smarter option when compared to LPG.

As IGL operates in an urban locality, it is imperative to target the working and educated class by highlighting the convenience that PNG offers. This highlighting of convenience can show that PNG is a smarter option when compared to conventional LPG fuel. In order to further this positioning, IGL can also implement various payment options like prepaid, postpaid, monthly billing and quarterly billing. IGL can also add to the convenience by opening up various payment methods like credit card, debit card, direct cash transfer, cash payment at designated offices etc. To this end, IGL can consider implanting a mobile application which will add to the convenience of the consumers. All these measures can successfully establish the positioning of convenience.

IGL can use newspapers, radio spots, social media platforms, TV commercials, BTL activities, ATL activities and direct selling in successfully reaching out to the potential consumers with the convenience positioning.

In addition to the stiff competition that PNG is facing from LPG, PNG also suffers from some perceptual issues. They are:

- Safety
- Price
- Product-related
- Aesthetics; and
- Perceptual

To counter all these perceptual issues, IGL in addition to communicating its value proposition to its potential customers, can also consider experiential marketing as an option. Keeping in view the limited geography that IGL caters to, IGL can open "Experience Centers" at various touch points across Delhi and NCR region. The location of each and every touch point should be based on the density of population or number of potential customers. These centers should enable reaching out to various types of potential customers at different times to promote the products of IGL, in this context PNG and its domestic applications.

The experience centers should have in-built models that replicate domestic households using PNG for various applications like cooking, water heating and power back-up. These centers should activate potential customers periodically and communicate the value proposition of PNG on various occasions as per a few pre-decided parameters at the central level. All the experience centers should report to the central team, so that the effectiveness of various communications or promotional exercises can be tracked without any spillovers.

In addition to handling experience zones, these centers can also handle billing, service support, grievance handling and also in administering ATL and BTL activities. The ATL and BTL activities can also be tailor-made for each micro geography based on certain parameters. The parameters can be the following:

- Gender domination
- Religion skew
- Language skew
- Predominant income group; and
- Presence of tourist spot etc.

SAFETY

According to survey conducted by the market research agency, the concept of PNG raised concerns of safety in the minds of potential consumers due to the partial understanding of PNG. The major concerns expressed by the respondents were:

- Respondents being incognizant of in-built safeguards in PNG pipelines going inside the houses.
- Perception that LPG was safer when compared to PNG.
- Incidents of pipeline leak or breakage on the roads added to the apprehensions of the consumers.

POSSIBLE SOLUTION

From the case it can be understood that PNG is a safe fuel and is lighter than air, which causes the gas to disperse in case of a leakage. IGL can exhibit this feature in a short video and publish it on various media like – social networking sites, TV commercials, workshops (BTL campaigns) etc. In this regard, workshops can be of great use as potential consumers can really experience the safety feature of PNG.

In addition to exhibiting the safety feature of PNG, IGL can also demonstrate the safety features of the pipeline network of PNG by running a door-to-door campaign or by showcasing the safety attributes in its experience centers. This exercise that provides hands-on experience of safety parameters will also help IGL in generating leads of potential consumers which can be pursued for sales - conversions.

PRICE

The following were the major concerns that the study exhibited:

- Heavy initial investment of INR 6000 posed a serious threat of switching to PNG.
- Consumers' past experiences with meter based billing dampening their trust in the PNG billing system.
- Perception that PNG was costlier when compared to LPG.

POSSIBLE SOLUTION

As it can be understood from the given case study that the initial investment posed a serious threat in facilitating a switch. Keeping this in view, IGL can possibly look at deferred payment option. That is, the initial investment can be added as a component to the regular consumption bills. With this option the burden of initial amount is obviated. IGL can leverage this and communicate this message across the media.

As mentioned above, IGL can launch a mobile application which can show live meter details (PNG billing system). This option can bring in transparency and can also be used as a platform for communication with the consumers, which will add to the customer experience component there by garnering the goodwill.

IGL through its communication can show that the cost incurred by PNG is of comparable standards to LPG. This can be well explained by furnishing relevant details in terms of cost that would be incurred by an average household. The details should be communicated across media so that the preconceived notion is extirpated.

PRODUCT-RELATED

The following were the major concerns of the potential consumers with respect to product-related concerns:

- Concern regarding the amount of time and energy in acquiring a PNG connection.
- Perception that the flame strength of PNG was less when compared to LPG creating a notion that it would lead to more cooking time and finally leading to more costs.

POSSIBLE SOLUTION

Keeping in view that IGL operates in a particular geography, IGL can demonstrate the effectiveness of PNG in its experience centers. The experience centers can administer effectiveness campaigns, where the centers can show that it takes the same amount of time for cooking any given dish as it takes for the conventional LPG fuel.

As mentioned above, the experience centers in addition to handling marketing activities can also handle the activation and billing activities of PNG connections. In fact, IGL can differentiate itself from all the other OMCs by expediting the PNG activation processes. IGL should formulate strict Turn Around Times (TATs) for installation of new PNG connections.

AESTHETICS

The study revealed that potential consumers were concerned about the eyesore that is caused by not concealing the pipelines and effective utilization of kitchen space is hampered because of the pipelines.

POSSIBLE SOLUTION

In addition to showcasing that most of the pipelines are outside the kitchen area in videos, brochures and articles, IGL can also replicate a kitchen in the experience centers, which can show effectively that the pipelines can be managed so that it doesn't turn out to be an eyesore.

PERCEPTUAL

The following were the preconceived notions with respect to perceptual aspects:

- Landlords being hesitant in getting PNG connections for their tenants as it required a big amount for the security deposit.
- Tenants exhibit resistance as acquiring PNG connection required surrendering of LPG connection. Therefore, those in transferable jobs were reluctant in surrendering LPG connection as PNG was not available in all the cities.

- Potential customers not being aware of the fact that they could surrender LPG connection on temporary basis.

POSSIBLE SOLUTION

Keeping in view the initial resistance from the owners, IGL can consider offering incremental discount for every additional PNG connection. For example, if an owner acquires a PNG connection for a first tenant, a 10% discount on acquiring PNG connection can be considered. The same owner can be given 15% or so for the second PNG connection. With respect to tenants too, IGL can consider offering initial discount of 10% (on the initial security deposit) on submission of temporary suspension of LPG voucher.

In addition to the above, to make people aware of the temporary surrendering of LPG option, IGL can consider communicating this to the potential customers using all the media options.

WHAT HAPPENED NEXT

After a series of brainstorming sessions, the PNG team took up the task of increasing the number of PNG connections. IGL kicked off its plan to break through the mental barrier of the consumers and establish the various advantages of the product PNG and elevate the awareness of PNG and encourage its usage in domestic, industrial and commercial sector through community outreach, social media engagement, advertising, and other promotions.

Starting with awareness measures and bursting myths around it, IGL ran an online campaign through social media platforms on PNG with animated contents, with a goal to help users learn about various advantages, safety initiatives, various modes of payments etc. of PNG.

Further to this IGL positioned PNG as a smart fuel. In this regard, IGL launched a short film on PNG in leading theaters targeting the urban and younger generation to switch to PNG. The digital advertisements were complemented by spots on radio regularly throughout the year, as part of a concerted effort to build product recognition.

Apart from this, various promotional schemes to encourage more number of conversions were also initiated. The company launched some of the first of its kind schemes like discount schemes and Diwali bumper prizes to attract potential customers. This call to action led to more number of conversions of PNG customers and help company achieve benchmark figures in terms of PNG connections in the industry.

In order to support the Government's priority to providing gas supply to domestic sector, IGL undertook door to door campaign by putting up kiosks at various public places and events like Durga Puja pandals, Dussehra, Diwali celebrations etc.to reach out at grass root level.

The multi-pronged efforts of IGL started to show results very soon. By the end of FY 18, IGL could add close to 1.52 lakhs of domestic PNG. The results of these campaigns continued and IGL could successfully have 1 million domestic PNG connections by the end of FY19.

In addition to the numbers, IGL also won accolades and special mention from the government for their sustained efforts in onboarding domestic PNG consumers. Though IGL could not meet the target of 300,000 PNG connections in a single fiscal, it has been able to scale-up the number of PNG registrations exponentially and the effect has been continuing in every subsequent fiscal.

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The Phenomenon of Brand Love: A Systematic Literature Review

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Abstract

Brand love is a phenomenon that is experienced by a group of satisfied consumers. The construct brand love is of great importance to academics and practitioners because a group of satisfied customers become loyal customers, thereby reduce several costs and also enhance several marketing activities. Since the research paper of it can be observed that there has been a surge in the number of research publications pertinent to brand love literature. Through this systematic literature review, we comprehensively review seventy six articles pertinent to brand love literature, published in various scientific journals there by presenting the key emergent themes, extensively used methodologies and analysis approaches, key variables observed, dominant theoretical underpinnings and a strategic conceptual

framework.

Keywords: Brand love Consumer - brand Relationships brand satisfaction

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Bignya Patnaik, Mahendra Kumar Shukla

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Abstract

Purpose

The purpose of this paper is to present a strategic change from the traditionally understood human resource management perspective. Through this paper, the authors attempt to present a diversity and equality based model of managing human resources for global companies for best outcomes through developing an environment of participation within the company.

Design/methodology/approach

This briefing is prepared by an independent writer who adds their own impartial comments and places the articles in context.

Findings

Through this paper, the authors show that DEMS has immense potential for modern day global organizations. However, it must be noted that adoption and adaptation are to be contextualized with the organization and matched with the overall goals. This paper provides a validation to the research by Ali & Konrad (2017) and empirically proves that migration from present practices to DEMS might take time, but organizations that have adopted DEMS practices have evolved into being participative in nature and have experienced sustainable competitive advantage, leading to superior organisational performance.

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Design Thinking and Startup Incubators: Towards a Co-Creation Model for Humanizing the New Product Development Process

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Institute of Rural Management Anand

Abstract

This study examines the application of design led co-creation practices in new product development by startups at incubators. In recent times, organizations, globally, big or small, established or emerging are adopting design thinking methodology to harness the creative and innovative capability of their employees. As a consequence, research as well as practice on design thinking and design centric business practices has gained speed with companies like IDEO and its co-founder, David Kelly championing the cause. Owing to various recorded success stories, in developed economies, design thinking has garnered attention from scholars and practitioners alike; however, research on its usage as a strategic co - creation tool in the new product development process in practice in startup in emerging economies is limited. This research attempts to identify the elements of design thinking based practiced by startups for new product development and assess its importance and outcomes in managing innovations. To achieve this, aim the authors examined the new product development process used by startups operating at T-Hub, India's largest incubator for startups headquartered at Hyderabad, India. This paper adopts an exploratory case study approach to identify key elements of design thinking that are practiced by the startups. The main findings show that design thinking is effectively a support process, representing greater integration for success of startups, at both back end and front-end of innovation. Our study provides

interesting implications for the startups, as well as, contributes to the debate of the impact of design thinking on innovation from an emerging economy perspective. Our study also contributes by capturing and presenting a conceptual design led co - creation model for startup incubators.

Start-ups that develop and market new and innovative products have received substantial attention from academics and researchers in recent times. But their success depends on assimilation into the modern business environment that is ripe with hyper-competition and in a competitive space, on the nature and speed of innovation which involves an "effective combination of internally generated and externally generated inventions."[1] Such assimilation of inventions needs to be captured and commercialized as new products as fast as possible in order to beat the competition to the market.[2] The focus on innovation is entrenched in the development of various industries leading to a significant increase in the standard of living of masses.[3] Besides creating competitive advantages, innovation provides the society to experience novel solutions to their existing problems, thus, contributing to the overall benefit of the society at large.[4]

Startup success depends on identification of existing market need(s), gaps in market offers, developing innovative and new products, marketing products to a profitable customer segment, acceptability by customers and accumulating & responding to feedback.[5] One of the commonly accepted methods of measuring the success of innovations by startups has been through measuring acceptance that new products receive from the end user or the customer.[6] Historically, the Process model of New Product Development (NPD) has been the cornerstone of developing new product for larger companies as well as startups. However, in recent times the focus on customer acceptance has increased drastically.

Startup Incubators nurture startups and help them get access to necessary resources, ancillary services and other linkages that are essential to set up their business.[7] They operate as a bridge that connects commerciable innovation to entrepreneurial success including assisting in the designing of new products or services as well as managing them. One of the means of such a synthesis of innovation and entrepreneurial spirit is design thinking.[8]

Design Thinking (DT) has garnered attention of both practitioners as well as researchers as it captures and promotes human centric innovations, which, is key to competitive advantage.[9] By being human centric, it is rapidly becoming a choice for companies that want to think and act differently by listening to customers, understanding them better and creating solutions

that they relate to. Central to viable innovation is in understanding the problems that end users have from their perspective rather than the perspective of the company.[10]

Available literature on the subject of Design Thinking and NPD is indicative of their importance in modern day businesses. However, the practice of Design Thinking in the process of NPD at the startup incubator level is unavailable. Similarly, research on the impact of employing Design Thinking in order to foster and manage the NPD process in startups is also insufficient. This paper presents a body of literature and practice on the linkage between Co-creation, design thinking and NPD. Through exploratory research, the author shall make an attempt to describe in-practice Design Thinking interventions for inculcating a mindset of innovation at start-up incubators.

The following section deals with the review of relevant literature and theories on co-creation, design thinking and innovation. The next section presents the methodology and analysis followed by theoretical and managerial implications. The final section highlights the limitations and the scope for further research.

Literature review and theoretical framework

Co-creation theory and theories on innovation

In a dynamic market, there is a continuous interchange of roles among producer, consumers, suppliers and distributors who constantly deliberate among themselves for the development of new products through the process of co-creation.[11] Such processes adopted for creation of value is critical for the success of large firms.[12] Co-creation enables higher consumption and better consumer experiences resulting in higher profits for the firms.[13] Through the process of co-creation led NPD, value proposition is operationalized embedded with a customer focused set of benefits. On the other hand, for firms, co-creation also drives innovation.[14,15,16]

Competitiveness is the key to the broadening horizon of choice for the customers. Competition results in more, better and novel solutions to problems that the society faces and seeks resolution to. Companies have, hence, adopted a range of strategies to exist during times of competition. Three generic strategies help companies sustain in the face of ever-increasing competition, namely; cost leadership, differentiation and focus.[17] Overall cost leadership aims at technological interventions to ensure incurring a lower cost as compared to the competition without intervening negatively on issues of quality, provision of service etc. Differentiation emphasized the importance of unique offerings from the competition so as to create a product or a service that is visibly different than others. The third, focus

strategy involved identifying and serving a particular group of customers, with specific needs, in the best possible manner so that the competition could not engage with them. Such interventions invariably require innovations.

The importance of innovation in modern day businesses is best expressed in the famous quote of Steve Jobs which reads *"Innovation distinguishes a leader and a follower."* Innovation is at the heart of competitiveness and impacts entrepreneurs and entrepreneurial growth. Innovation is frequently associated with new product or technology development; however, it is best understood as a process in continuum. In addition, innovation presents opportunities to businesses to overcome competitive challenges as well as to inculcate a culture of collaboration among employees that is enduring. Innovation acts as a key enabler in pivoting from the historically accepted methods of dealing with competition and moving towards novel approaches for efficiently and effectively managing the competitive dynamics.[18]

Theories of Innovation in business originate from the works of Schumpeter, wherein, he conceived innovation as the construction of new plant or machinery, introduction of new firms or even the onset of new leadership making innovation a discontinuous activity.[19] Innovation has been defined as "any thought, behavior or thing that is new as it is qualitatively different than other existing forms" and added the possibility of continuousness to innovation as a culture.[20] Innovation entails any new element brought to the buyer, even if it is not necessarily new to the organization.[21] Some of the authors conceptualize innovation as the newness that is implemented by organizations,[22] whereas, for some, it is a utility concept that caters to specific requirements on the end user.[23] Innovation demands new ideas, products or services that includes the concept of new use of existing products or services and even identifying new markets for existing products or services while emphasizing that innovation was a basic creative process within organizations.[24]

Innovation is widely accepted as the development and adoption of new ideas by organization.[25] The ability to discover new relationships, of seeing things from new perspectives and to form new combinations from existing concepts is innovation.[26] Researchers are also of the view that innovation is something that involves knowledge creation as well as its diffusion,[27] and that entails the conception of new association between products, market, technology and the organization.[28] The process of innovation provides added value and a degree of novelty to the organization, suppliers and customers, developing new procedures, solutions, products and services and new ways of marketing.[29]

A detailed and critical analysis of definitions of innovation reveals that it is comprised of newness of ideas, products or services. It is creative and structured problem solving, implementable by organizations, fundamental for sustenance of the organization and included creation as well as diffusion of knowledge. Innovation, hence, is to be considered as an outcome of organizational culture and environment that accommodates the drive for novelty while operating in an existing market or even in finding new markets for existing or new ideas, products or services.

Design thinking as a tool for NPD

Successful innovations, apart from being novel, must aim at maximizing customer satisfaction by catering to their unstated needs. These unspoken and unstated customers' needs have been denoted as "wicked problems" and a practice began taking shape wherein individuals or teams were referred to as designers engaged in a continuous process of defining the problem and crafting solutions that could be validated through experimentation and not analysis.[30] This formed the bedrock of the concept of Design Thinking and emphasized the importance of continuous learning and experimenting that led to better understanding of the problem and aided in identifying new opportunities.[31] Other researchers proposed that design is an evolving process that is intuitive as well as spontaneous.[32]

Design Thinking is increasingly being seen as an iterative problem solving technique in management parlance in conditions of uncertain and complex externalities. Such situations make decision making difficult and predictions challenging as data might be inadequate or not enough for a decision. Design thinking is also considered as a viable option for entrepreneurs who continually deal with complex, uncertain and risky decisions as they operate in the realm of novel solutions.[33,34] Justifying the relationship between innovation and Design Thinking as an approach, it was proposed that such approaches lead to an increase in innovation by being open, iterative and experimental in a dynamic business environment.[35] Design Thinking, provides a fresh lens to look at innovation by being a social process and not a technology intervention.[36] Others have also suggested that by having emotion, action and cognition at its foundational level, Design Thinking processes were adaptive of dealing with the unreliable data driven problem identification and solving process that entrepreneurs or startups usually faced.[37]

With the outcome being innovation, Design Thinking primarily has three distinct phases. Phase 1 of the process aims at developing a deeper understanding and appreciation of unstated, unsaid and unspecified customer needs through observation, focus group discussions and

interviews. Empathy towards the identified needs is critical to the process. This leads to defining the need appropriately. Phase 2 deals with creating ideas to cater to the defined needs innovatively and the final phase consists of prototyping and testing before the product or service is launched thus making is highly customer centric.[38]

The key to success of organization is in understanding and providing for customer needs rather than producing and selling what the organization is good at.[39] Several authors have also propounded theories that indicate similar outcomes justifying the value of being customer centric, oriented and focused.[40,41,42] For this to happen, organization, large corporations and startups alike have to re orient themselves to being open to continuous learning from customers about their needs and being empathetic towards those needs to be able to create lasting competitive advantages.[43]

Startups, by nature, deal with situations where identifying the problem and proposing an acceptable solution is very difficult. Though they have access to technology, many a times the solution is not accepted leading to failure. It is likely that by adopting Design Thinking practices or a human (customer) centric approach they may curb failure.

Design thinking, co-creation and start-up incubators

The relationship between innovation, design thinking and start-up incubators rests on imbibing co-creation as a mode of NPD. Design thinking helps translate ideas into realities by integrating a full spectrum of inputs that originates through interaction at incubators.[44] Broadly, startup incubators operate on either a closed innovation or on an open innovation model.[45] In the closed innovation model, startups move from the idea generation stage to the market on their own with assistance that is limited to availability inside the incubator itself. On the other hand, those incubators that have adopted the open innovation model accommodate external inputs to develop ideas or products in addition to all assistance and expertise available internally at the incubator.[46]

The open innovation model driven incubators display characteristics of design thinking and are best suited for integrating the external end users into the creation process. Through integration of design thinking, such incubators inculcate a culture of thinking that is inclusive and allows for co-creation of new products and services. Inclusivity ensures a participative ecosystem that brings together varied functional expertise as well as end user or consumers for inputs into the NPD process resulting in co-creation.[47] Through design thinking practices, attempts are made to move from a market push mandate to a strategy of identifying the market pull and making it a part of the NPD process.[48]

Such benefits, when embedded into the working culture at incubators signals a strong customer focus or centricity to all the startups that incubate at such startups. By listening to customers, startups have a lot to gain. The process of co-creation provides a cushion of comfort as new products have a higher likelihood of customer acceptance. Product development happens within a shorter span of time than the traditional NPD process. Research also shows that startups that followed a design thinking-based co-creation model for NPD, made an early entry to the market than those who did not.[49]

Research methodology

In order to address the research questions posed and to understand the design thinking process in the context of startups based at a large incubator, authors adopted a single case study approach for rich description and in-depth analysis of data and context-dependent factors.[50] Case study research utilizes in-depth insights of the empirical phenomena and their context. A case study approach provides flexibility, richness and holism, making it an optimal method for the phenomenon of interest, especially in cases where context is complex.[51]

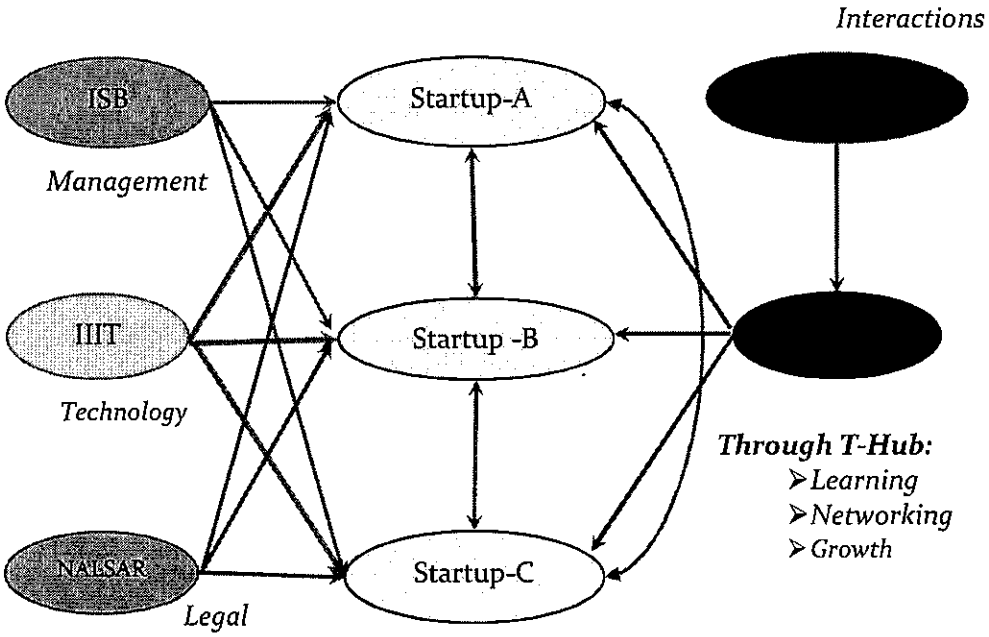
The authors questioned the top leadership of the incubator on their vision of incorporating design thinking model into their culture to understand the level of integration of design thinking into their operations. They are recognized for the large number of startups that they incubate and the number of startups that receive funding from investors. Several startups incubated at the said incubator have been able to commercialize their products with increasing rounds of investments. The choice of the specific incubator was based on the success that they have enjoyed in the startup ecosystem in India since their inception.

For the purpose of this study, multiple data sources were used to provide an understanding of the overall phenomenon of design thinking.[52] Sources of data for the case study included semi-structured interviews, review of internal documents, FGD with key informants, and the website of T-Hub for data triangulation. A total of 19 interviews were conducted that ranged from 30 minutes to 75 minutes. 14 out of 19 interviews were conducted with the startup founders, 5 interviews conducted with leadership team of the T-Hub including CEO and COO. Two rounds of FGDs were conducted with 9 participants in each. All the interviews were audio-recorded and transcribed. The received and validated a summary of their interviews for construct validity.[53] FGDs were also audio-recorded and transcribed. The data were analyzed using open coding process, and codes were subsumed into higher order categories.[54]

Analysis and results

T-hub is a unique experiment in the technology led startup ecosystem in India. Set in Hyderabad, it is the outcome of a public-private partnership of the state of Telangana in India, Industry and academic institutions. Each provides specific benefits to this experiment. The State of Telangana provided the initial push by bringing together the partners, financing the idea, allocating the physical space as well as providing top leadership support. The academic institutions offered support based on their expertise as well. The International Institute of Information Technology, a premier institute for research and education in the area of engineering provided testing labs and faculty support. The Indian School of Business, a globally acclaimed management institute provided strategic assistance, training and mentoring. The NALSAR University of Law, another premier institute in the legal sphere provided support with regards to understanding as well as being compliant with the law of the land. Figure 1 illustrates the collaborative relationship shared between all founding stakeholders.

Figure 1. Interactive and collaborative relationship among founding stakeholders of T – Hub.



The objective of T-hub was to provide a conducive open innovation ecosystem to technology-based startups with an aim of making Hyderabad

as the most favored entrepreneurial destination in India. Just like other incubators across the world, even T-hub provided physical support through infrastructure and services like shared professional services and mentoring to startups at a nominal charge to foster the ecosystem of entrepreneurial endeavors on an open innovation model. By virtue of being in the city of Hyderabad, T-hub also ensured access to venture funders to the startups. The vision of T-hub is best encapsulated by Mr. K Srinivas, the Chief Operating Officer of T-Hub, who said,

> *"If you take Silicon Valley, the University Avenue, the joke is that you just learn by osmosis. If you walk down the street, knowledge is just hitting you from everywhere. When you have such a large bunch of people, investors, mentors, start-ups from multiple areas, the neighborhood, you just learn by talking to other people."*

Similarly, Mr. Jaykrishnan, the Chief Executive Officer remarked that,

> *"T-hub is a learning organization that follows an iterative path to discovery."*

The initial remarks made by the top leadership of T-hub indicate inclination towards fundamentals of Design thinking. With backgrounds of education and work experience in and around the Silicon Valley, Design Thinking as a concept and its utility is not new to both the CEO as well as the COO. But the challenge was to integrate Design thinking as a practice. Upon inquiry, the CEO remarked,

> *"I have experienced Design Thinking in action in large organizations but its adaptability in startups shall be worth attempting."*

The Design Thinking model adopted by T-hub was the five phase model developed by Standard D-School. As can be seen in Figure 2, the model is holistic in nature and is commonly used by practitioners.

Figure 2. Design thinking model adopted by T-Hub (Adapted from Stanford Design School)

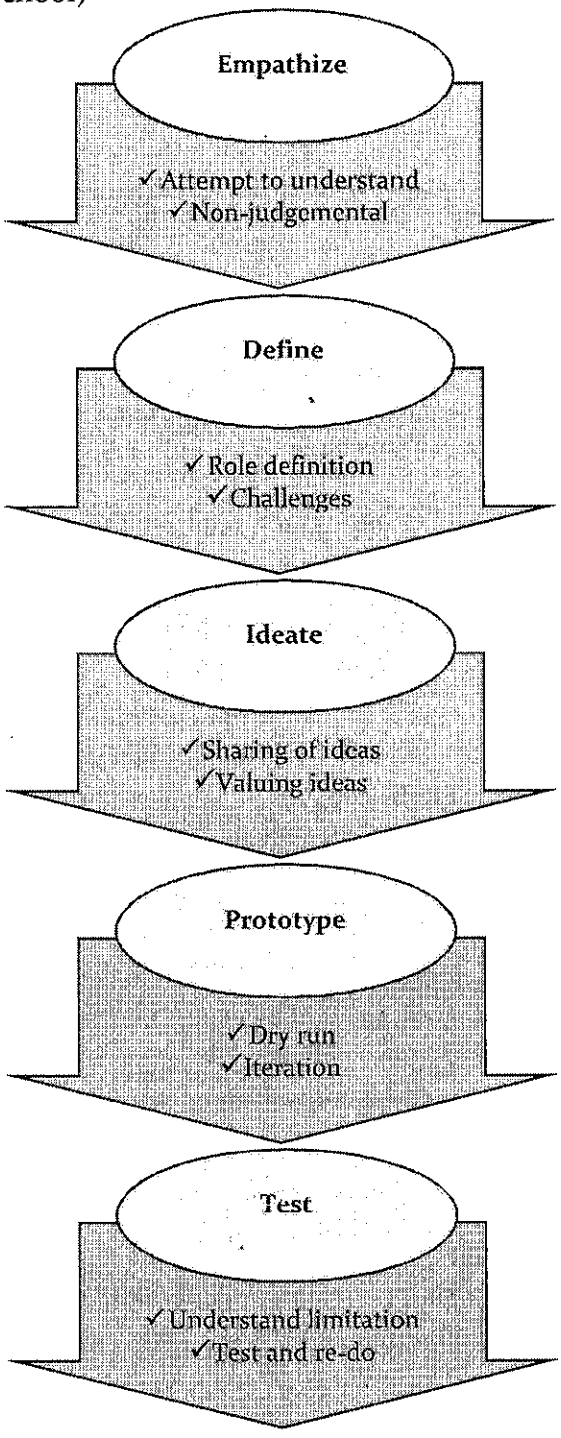
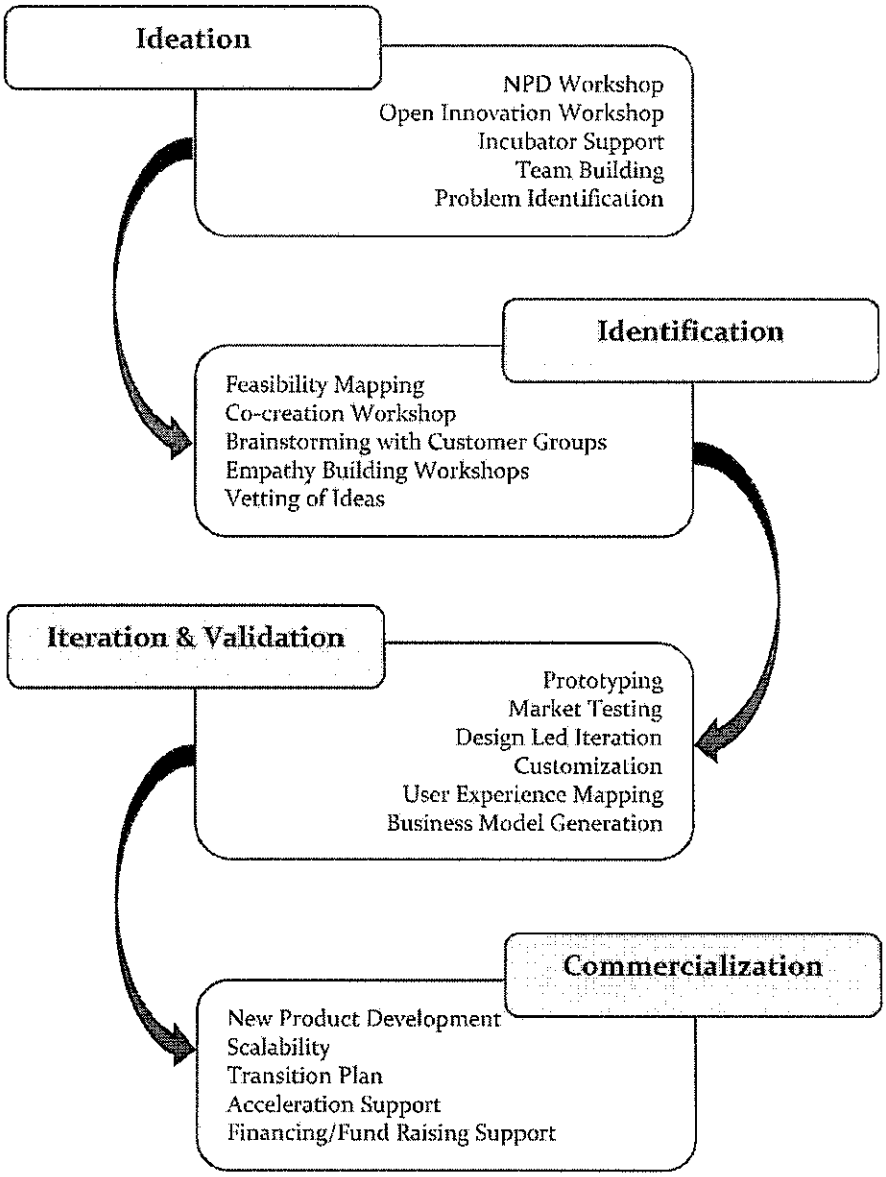


Figure 3. Design-Led Co-Creation Model



Interviews and FGDs with the top leadership at T-hub as well as startup founders revealed that, T-hub incorporated Design Thinking from the very beginning and several respondents stated that early adoption enabled adaptation of Design Thinking into the day – to – day functioning of T-hub. One of the startup founders stated that,

> *"I have been here for little more than a year now and have benefitted a lot from participating in Design Thinking interventions. Such a practice made me develop a better and relevant understanding of the end user's need. Both of us benefitted by product co-creation."*

Another respondent added,

> *"the customer's mind is murky and hence designing solutions of choice is very difficult, however, empathy created a bridge between my team and the end users. It was an amazing experience to develop products for the end user with the end user."*

Yet another founder noted,

> *"it was an eureka moment to me when one of my potential customers revealed that more than technology that goes into the product, it was the final product, the color of its packaging, its situation on the shelf that mattered most. Such revelation helped us understand the consumer and meet expectations."*

Almost all founders agreed that they formed small groups of end users and had employed anthropological or ethnographic tools to develop deeper understanding of customer needs to be able to define their problems better and make attempts towards crafting co-created solutions. Our analysis suggests that at T – hub, a robust co-creation model is practiced for best outcomes. In Figure 3, an attempt has been made to map the four stage co-creation model at T-hub. At T-hub, the co-creation starts at the Ideation stage wherein the incubator conducts several workshops on the process of NPD and open innovation to help startups understand the process of innovation and to include it in the NPD. T-hub also, through its support services, enables startups in team formation for cohesive team development. Finally, it helps registered startups identify customer or market problems and gaps. In the identification stage, T-hub helps startups in mapping idea feasibility. They also conduct co-creation workshops to connect startups with consumer groups. This practice helps startups in developing empathy

towards consumer problems and understand them better leading to a vetting of ideas through interaction with consumers as well as experts at T-hub. In the third stage, a thorough iteration and validation of ideas occur. In this stage, prototyping of the final product is done though the various stages of iterative design thinking model. This helps startups in cost saving while customizing through the user experience mapping process. In this stage, T-hub assists startups in market testing and business model generation as well. In the final stage, T-hub helps startups in commercializing the new product along with acceleration and fund raising support. Experts at T-hub also offer scalability and transition plans to startups incubated at its facilities.

Several founders also stated that they conducted such round to be able to create an iterative model of problem identification. T-hub facilitates the trainings on tools and techniques of interacting with the end users and analyzing the interactions and inputs provided by the end users. One other founder remarked that,

> *"I am thankful to T-hub for showing me the path to interact with the prospective customers. This process revealed to me classes of end users and I realized that my target audience was larger than I had previously thought."*

While responding to questions on documented interventions, the COO responded,

> *"one of the startups made several house visits to both customers as well as potential customers to observe them in their natural environment that helped them understand the unsaid and unmet yet important needs of customers towards which the technology could provide solution. Similarly, iterations on problem framing narrowed their understanding of the actual problem. Empathy aided the funneling down of broad base problems to fine-tuned ones."*

We can clearly see that it matches the first phase of the Design Thinking i.e. to empathize with customer needs leading to the second phase of the process i.e. of defining a problem through iteration.

Being empathetic helped startups in incorporating user centric direction to the ideation process. Such a practice, though not data driven, helped founders capture deep learning of user needs that could be translated into accepted solutions by users. One of the founders narrated,

"the ideation process earlier used to be one sided with team mates putting forward their thoughts as those of the customers but here at T-Hub by being user centric, they now focused on how technology can enable users. We became enablers rather than sellers. We also experience a higher degree of loyalty and trust among our customers."

Another founder said,

"Here at T-hub we learn the art of empathizing. By being empathetic to customer needs, the perspective of ideation has gone through a paradigm shift. Our biases are now reduced and we now see clearly that what we value and what our customers value are different and thus our offering have undergone a change. We, now appreciate problems better and more."

In general, most of the founders suggested that they have become more innovative.

From being empathetic towards user needs while defining the problem and ideating on possibilities to physically testing solutions through prototyping, founders expressed their wow moments. One of the founders mentioned,

"our prototype was inexpensive but we received invaluable inputs from users during a focus group discussion. We pivoted. We are happy that the process did not result in any significant financial loss. T-Hub is a place to do all such experimentations."

Another founder explained that during pilot testing with a prototype, users raised concerns about over indulgence with technology resulting in automating repetitive tasks thereby easing the actual use flipping an imminent failure story into a success story. Another founder remarked,

"we made at least 26 prototypes without making drastic technological changes and with least expense. We used cardboard for steel that ensured reuse as well. Such experimentation which we have done here at T-Hub was unimaginable without Design Thinking or thinking with the user in mind."

On a similar note, another founder stated that,

"more than money, we saved a lot of time and effort in testing our prototype and that helped us launch our product earlier than we had thought. What we learn at T-Hub is that real innovation is not technology

but takes place in our thought. My team is ready and willing to co-create, experiment and accept failures. This is real innovation"

Several of the startups that the authors interacted with, highlighted how they could pursue innovations because of the application of Design Thinking techniques. They also reflected upon their experiences of employing a phase wise engagement with the Design Thinking model starting with empathizing and moving through the iterative problem framing process to ideating possible user centric solutions leading to prototyping and finally testing their innovations with users leading to the expression of innovation successfully as well as profitably with regards to being able to raise capital from venture funders for scaling up.

Discussion and conclusions

Our research indicates several positive outcomes achieved by startups at T-hub due to the adoption of design led co-creation techniques. By being user centric in their approach towards framing or identifying problems, they added a rather humane element to the bare technology that was intended to drive innovations. Further, it was also found that through the iterative process of problem formulation, it was fine-tuned towards what startups could offer in terms of innovations that was acceptable to the users. The engagement of the team with users provided for a unified perspective that was geared towards finding an optimal solution rather than just a solution for the user.

One of the major reasons for the failure of startups was the sudden need to pivot from the existing solution. Through design led co-creation, founders maneuvered through such situations without losing money. Startups, that were bootstrapping, found Design Thinking to be of great value as without it they could have spent money in designing prototypes that may not be acceptable but cost a lot of money. One of the other important findings of this research is that startups have small teams and within those teams, individuals, at times, shy away from thinking together. Design thinking brought them together and enabled co-creating through directed thinking. Many founders found this invaluable.

Another major finding was that, founders built startups on assumptions. Innovation though assimilates creativity and creative interpretations, needs a direction to be successful. Through design led co-creation, founders stated that assumptive connotations of innovation concretized into acceptable solutions to validated problems. Design Thinking not only funneled an array of problems but at the same time allowed for an expansion of usage of technology towards varied solutions. This, at times, led to the discovery of

newer sets of end users resulting in larger market. The authors also found that several startups realized customer loyalty and trustworthiness at the end of the Design Thinking process due to the engagement of users from the beginning of the product development.

Based on several interviews and focus group discussions with startup founders and employees, the authors found that there was a significant relationship between Design Thinking and inculcating a culture of humane centric innovation within the startups. Such a relationship, according to our research yielded positive results and reduced failures as well.

Managerial implications

There are valuable practical implications of employing design led co-creation practices. Adopting such practices shall foster a culture of innovation. The same has been observed in our research on startups at T - hub. Startups and incubators should train their focus on humanizing the NPD process by being customer centric. However, the same could be tested and incorporated in larger organizations as well. Similarly, by adopting a design led co-creation process, start-ups, incubators as well as large organizations can experience better team coherence and performance. Through this process, engagement levels among team members can be enhanced. Such outcome can be modeled in any kind of organization dealing with customers. Effective team building can be achieved through such practices as well. The process of design led co-creation, as employed by startups studied at T-hub, resulted in customer loyalty and trust. Such outcomes can be derived by any organization through adopting design thinking and co-creation as ways of customer acquisition and retention.

As authors, we believe such interventions are replicable. However, they have to be contextualized and must have support from top leadership for yielding the best results. The paper contributes by exploring the adoption of design led co-creation practices by startups at T-Hub that are at the cusp of innovation. Also, the paper discusses nuances of the application of design thinking as well as co-creation practices and the outcome of reduction of failure in startups.

Limitations and directions for future research

This study has several limitations that can be addressed by the future research. First, the findings suggest that start-ups get benefited through training on design led co-creation model of new product development at T-Hub. Future research may consider the views of end users also to assess the effectiveness of the model proposed in this study. Second, the study is limited to the start-ups based on the T-Hub facility at Hyderabad, therefore,

generalizations of results may not be done for other start-ups and incubators. Finally, future research may empirically validate the effectiveness of the conceptualized co-creation model and examine the antecedents and consequences of design led co-creation environment in similar or different settings using quantitative methods.

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MSME IN ODISHA: OPPORTUNITIES AND CHALLENGES IN GENERAL AND POST-COVID SCENARIO

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Abstract

MSME all over the world has been the key to employment generation and prime mover in development of economy. This paper looks at the current scenario of micro, small and medium enterprises in the state of Odisha in India in general. It also looks at the challenges they face due to the pandemic Covid19 and thinks of possible ways to mitigate the problems in the short term so that the units survive and stand again.

Keywords: *MSME, SME, Odisha, India, Challenges*

Micro, Small and Medium Enterprises (MSME) play the important role the world over in contribution to GDP, employment, and livelihood generation. In developed countries, they are over 70% of the total enterprises. In emerging economies like India, Brazil, China etc., they are a formidable force in social development. A World Bank Group study suggests there are 365-445 million MSMEs in emerging markets: 25-30 million are formal SMEs; 55-70 million are formal micro enterprises; and 285-345 million are informal enterprises.

The volume of MSMEs in India has always been a matter of debate even though it creates large scale employment and also contributes significantly in exports and industrial production, primarily because of overlapping definitions of economic activities and different frames used for their data collection by different agencies. Based on census, Figures projected by Ministry of MSME for the year 2011-12 are 44.7 million units, employing 101 million people with gross output exceeding Rs. 18.3 trillion. Of the strong MSME sector, the registered MSME segment comprises of barely 4.3% of total units.

As per economic survey in the State of Odisha, altogether 3,91,697 MSMEs have been established in the state, at an investment of Rs 19,068 Crore and employment for 15,27,373 persons till March 2019. But there has been no count on informal and unorganised enterprises, which would be significantly more than the formal ones. We also are looking at the database of enterprises registered, but do not have the data on dormant and non-functional enterprises.

MSMEs need to be the engine of growth in Odisha as this will provide much needed employment to the youth and jobs will have economic multipliers in the cycle of income and expenses creating much required boost to the financial health of the State. Barring few large public and private enterprises, our industrial footprint primarily has been created through MSMEs, This is unlike the industrially advanced states like Gujarat, Maharashtra, Karnataka, Tamilnadu and NCR region. The efforts to rope in large industrial houses like POSCO, Vedanta,

Mittal etc. has run into rough weathers, primarily due to possible ambiguous identification and management of all stakeholders.

The state has bountiful resources, which are used as raw materials by scores of successful industries outside, whereas we have not been able to make the best out of them. The resources being critical to industrial growth, over-exploitation for short term gain might leave the state stare at unsustainability. In addition, our rich tradition of handloom and handicrafts has never been commercially exploited to reach what other states have achieved so far. The recent Start-up Odisha initiative by State Government has created a flurry of enthusiasm amongst prospective entrepreneurs and investors. It is to be seen how much of this interest gets translated to reality.

A basic comparison of India vis-à-vis Odisha exports on Handloom & Handicraft would speak of our performance. In the year 2017-18, the total export of handicrafts from the country was Rs.30337.60 Crores out of which our contribution was Rs.4.06 Crores (less than 0.014 per cent). Similarly, for the same year, handloom export from the country was Rs.2280.19 Crores and our contribution was Rs.1.68 Crore (less than 0.08 per cent).

Where does the gap exist? Why do we underperform despite our adequate knowledge, skills and abilities? During my tenure at industrial sector, subsequently advising Government on creating awareness for handicrafts exports and further consulting various industries as a part of National Productivity Council expert team, I have closely observed and studied various industries and discussed multifaceted spectrum on industrial growth with entrepreneurs and authorities, based on which I am expressing below my opinion on the opportunities and challenges this sector faces in the State.

Opportunities are pretty much external in nature, where the market forces, institutional policies and technological advancements shape the industry attractiveness. After Liberalisation, Privatisation and Globalisation (LPG) initiatives that started in India early 1990s, many licenses were disbanded offering a better platform to start a business. Almost 25 years later, we still struggle to provide a friendly approach for the entrepreneurs. India is ranked 77 among 190 economies in the ease of doing business, according to the latest World Bank annual ratings. The rank of India improved to 77 in 2018 from 100 in 2017. Ease of Doing Business in India averaged 124.82 from 2008 until 2018, reaching an all-time high of 139 in 2010 and a record low of 77 in 2018. Odisha has slipped three places as it has been ranked 14th position in 2017 in ease of doing business in Indian states from previous year. Even now, an entrepreneur needs to run from one agency to another multiple times to get the documentation and approvals in the State, leading to frustration.

The consumerism has made dramatic changes in socio-cultural attributes, leading to demand for new and existing products and services. Technical advancements and innovations around the globe is creating opportunities for start-ups like never before. The legal frameworks for regulation of industries are advocated to be investment friendly. Our GDP growth is seen to be one of the best in the world. Our productive workforce is seen as the youngest lot in the world, full of knowledge, energy and commitment. As the market cake is growing, any and every organisation entering into right kind of business can survive and thrive. This is particularly more applicable to MSMEs where the investment and per unit employment is low. While this is an

advantage for MSME promotors, the flip side is that they have limited resources and manpower to use for initial investment, approvals and regular compliances.

The institutional authorities play multiple roles for development of MSMEs. They have to act as mentors, regulators and facilitators to help and ease the burdensome activities the entrepreneurs have to go through in getting permissions and regular documentations. There has to be sensitisation of the officials in this regard, to play all three roles in balance. They assume the role of regulator as the dominant one, while underplaying the other two. Entrepreneurial encouragement cannot take place only through workshops and seminars in star hotels through high-teas and dinners. The officials need to go to the field to help the promoters sort out their impedances onsite, soiling their own hands along with the enterprise. Instead of stalling the work (which results in accumulation of interest on loans and breakage of learning curve) due to some possible non-compliance, they should encourage and assist in these matters so that the entrepreneur focuses more on developing the business. My personal experience in Gujarat State way back in 2004 was revealing, where various Government agencies came onsite to help us out in compliances while asking us not to stop work even for a day. In contrast, the same kind of work in Odisha in the same year was stopped by agencies for almost a month till all the compliances are made. This made me realise why Gujarat is such an industrially vibrant state. Making friendly policies are a great welcome move. It also must be complimented with change of mindset for people who are placed for mentoring and facilitation. The MSMEs need not be governed with stern iron-clad laws, rather they should be encouraged through development of competence.

Now comes the credit lineage to MSMEs. We have state finance corporation, IPICOL etc. in addition to SIDBI for funding. For a micro and small enterprise, collateral grows into an issue of concern as they cannot arrange the same with limited resource for investment. We do not attract so much angel investors or crowd funding as the states like Karnataka, Telangana, Maharashtra and Gujarat do. This needs to be addressed on priority as enterprise need capital investment at appropriate time for growth.

Then comes the linkage to market landscape. Despite rapid growth in demand and increase in production capabilities, unless there is a link between the two, there will always be the cream with the intermediaries, leaving the manufacturer or service provider with abysmal margins. There has to be collective movements by clusters of MSMEs in similar line of industries, to approach market in unified manner, instead of competing with each other. This will not only increase the contribution of their business, but also will bring a state of harmony where one can help the other on various supply chain issues.

While these are opportunities and challenges in external context, we need to see from an entrepreneur perspective through internal lenses. Every person is unique, has distinct set of abilities, complimented by specific and limited resources available to the person. This amounts to capability and competence, and an entrepreneur needs to capitalise on these to create a sustainable competitive advantage. Everyone cannot do every job and hence should not get distracted by any and every activities that are seen in the surroundings which are money-spinners. One has to work within one's own strengths and maps it with the opportunities available.

The enterprise also should not solely depend on assistances by the State to start working. One must understand that the official process takes time (which is inevitable in current scenario, with a hope that things improve radically if we intend to match with international development). When they come, they should be treated as a catalyst to growth, not sole vitamin for survival. One must also not aim to start with a bang, with optimal capacity and achieving economies of scale in an instant. One should start small and grow in steps. At every step, there should be scanning to exploit economies of scope in line with opportunities available so that their bouquet of offerings are multiple matching their internal capabilities. Frequent change of goals now and then would not be considered dynamism, rather would create confusion within all stakeholders.

Let us now look at a policy on national level, where we still define micro, small and medium enterprise based on level of capital investment. A recent change post covid19 outbreak has included annual turnover in the definition. This is completely in contrast with the policy followed by almost all countries in the world, where employment level is taken as the indicator. Adopting this in our policy would help us provide promotion and assistance to MSMEs more effectively resulting in better employment and economic growth.

I hereby conclude in saying that we have great potential and can match any top industrially advanced state in the country and can compete globally. To make this a reality, the approach needs to be both internal and external to the enterprise and I hope, with positive incremental steps, we will be able to convert our dreams into action.

In addition to the above, the pandemic Covid19 has severely affected the performances of MSME due to series of lockdown and with several bailout packages announced by Government, there might be survival and revival of enterprises. I further suggest the following policy level intervention to expedite the revival.

Before I go into those details, we must emphasize the facts to government that, time is not suitable now to focus more on start-up Odisha and Make-in-Odisha to keep promoting more number of new enterprises. It is very important to keep the existing units survive this phase first. It is not about statistical numbers of industries promoted, rather how many the government could facilitate survive, thrive and grow by providing intensive care kind of treatment.

As most of the production/operations are stopped, enterprises might face difficulty while resuming operations they would need initial upkeep/maintenance of plant/equipment and also would need support for raw materials / intermediary products. We saw recent fatalities in a plant in Visakhapatnam where resumption resulted in gas leak. Sudden burst in enterprising activities all over the world after the lockdown period might create shortage; hence the government may intervene to ensure enough availability for the enterprises. They also might think in the direction of offering a resumption allowance directly proportional to investment in plant and equipment for making the plants operational to the optimal capacity.

There might be some enterprises, who have changed their track to help out fight against covid-19 by producing Sanitizers, Masks, PPEs, Gloves etc. They should be given Tax and other reliefs through some incentive scheme. Incentive to support rental expenses, electricity and water charges may help overcome the idle expenses. Many industries depend of unskilled labour and most of them have returned to their native place. Getting inadequate manpower for labour intensive activities might impede operations resumption. Therefore, some sort of incentive for the

unskilled workforce to return back to work would help. Idle salary to regular and contractual employees is being paid as they are like family members of the entrepreneurs and have been instrumental so far for successful ventures. Some level of subsidization in this regard would ease pressure on the working capital. There is EMI deferment for loans, but one has to still pay interest, penal interest etc. The interest for the deferment period may be taken care of through reimbursement or some other suitable mechanism. Even though loans have become relatively easier now for units who have already availed in the past (using credit guarantee system by government to cover additional 20% loan) , there will still be apprehension by bankers to grant loan during resumption and expansion of operations. This capital arrangement to micro and small enterprises need to be facilitated by Government.

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FIRM SIZE & SUSTAINABLE PERFORMANCE

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Abstract

This paper looks at firm size and its history in terms of policy level requirements for control and facilitation. It further looks at literature in terms of relationship between firm size and performance. It then reviews literature on concepts of sustainability and any relationship with firm design parameter like size.

Keywords: *Size, Performance, Sustainability, Firm, Design*

There are various design parameters for firm which have a bearing on performance. This paper looks at various literature and probes further on possible relationship between firm size and sustainable performance.

Concept of Firm Size

The firm size concept dates back to the history of competition law where governments attempted to regulate competitive markets for goods and services to avoid cartels, monopolies and restrictive trade practices. These efforts were made to restrict the firm size so as to avoid a monopolistic foothold by any trader or cartel of traders to the detriment of consumers' interest (Mehta, 2011). In India, Chanakya's Arthashastra (400 BC) speaks about cartels existing in trade (Kumar, 2012).

The earliest example Lex Julia de Annona enacted by Romans around 50 BC where corn trade was protected through imposition of heavy fine to anyone who directly or deliberately stops supply ships with an intention of increase in price. In 301 AD even death penalty was imposed upon traders who intentionally created scarcity (Garnsey, 1967). Roman emperors brought further regulations through constitutional enactments for which evidences are available for 483 AD (Constitution of Zeno) and Florentine Municipal laws of 1322 and 1325. Wenceslas II of Bohemia formulated various legislations from 1283 to 1305 to prevent cartel within ore traders forcing price increase.

Henry III passed an Act in England in 1266 to regulate bread and ale price by avoiding cartels and large monopolistic enterprise taking advantage of food shortage (Ages, 1985). During the period of Black Death Edward III enacted Statute of Labourers in 1349 to restrict higher wages charged by workmen due to labour shortage in England (Webb & Webb, 1904).

Due to flourish of international trade, many changes were noticed in Europe around 15th century and in 1561 a system of Industrial Monopoly license was introduced which is similar to modern day patents which granted exclusive rights to certain licensed group to produce a particular set of items (Acemoglu et al). This was abused regularly to create shortage and enhance the price of commodities and the courts in England finally made all these grants void as this lead to price increase, quality decrease and made many workers idle. King James I started granting them again from 1623 by excluding patent rights and guilds from prohibition. From King Charles I to King Charles II it continued and used to raise revenue for governance and fighting war through granting rights. In 1684 it was decided in courts to grant exclusive rights to only large and powerful companies to trade overseas (Posner, 1975). However due to increasing coal prices as a result of cartels in Newcastle coal companies which resulted in product cost for many core industries, a new law was passed in 1710 to prevent monopoly restricting size of coal producers. Adam Smith in his famous book "The Wealth of Nations" in 1776 advocated for division of

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labour to increase productivity and provide just employment to people which led to the concept of effective small firms.

To avoid these unfair and monopolistic trade practices, many Governments around the world started enacting various competition policies. In France initial foundations of a competition law were laid in the Chapelier Law of 1791. Finland court passed a judgment in 1837 against the cartel of forest producers (Mehta & Evenett, 2006).

Canada was the first country to formulate and adopt a competition law in 1889. The first federal statute prepared by Senator John Sherman to limit cartels and monopolies was passed by Congress in USA in 1890 known as Sherman Antitrust Act. The purpose of this act was to protect the public from the failure of the market. It was revised through adopting The Clayton Antitrust Act in 1914 detailing provisions in terms of discrimination of price, services or facilities (Connor, 1997).

In India, articles 38 and 39 of the Constitution of India gave direction to the principles of State Policy to promote the welfare of people by securing and protecting as effectively as it may, a social order in which justice – social, economic and political to be prevailed so that ownership and control of material resources of the community to be so distributed as best to subserve the common good and that the operation of economic system does not result in the concentration of wealth and means of production to the common detriment (Brass, 1994). The Industrial Policy Resolutions of 1948 and 1956 emphasized growth, social justice and self-reliance and defined parameters of government's regulatory mechanisms. Public sector was taken to be the main driver of production with almost exclusive rights of development and growth in core areas while private sector was allowed limited licensed capacity. Even for other sectors there was no competitive market as there was neither easy entry nor easy exit for enterprises (Chakravarthy, 2006). Government determined the plant sizes, their location and prices in most of the important sectors and further intervened through allocation of scarce financial resources and high tariff walls, restriction of foreign investments and quantitative restrictions.

This licensing policy favoured big business houses in India as they were in a better position to raise capital and had managerial resources to run the industry. They could easily secure licenses based on their past achievements and could foreign collaborations to establish large plants. This led to concentration of economic power in the hands of few business houses and due to entry restrictions, the small and medium industries could not properly develop, survive and thrive in this highly regulated environment. This led to these few highly connected family run business groups getting into monopolistic industries and indulging in restrictive trade practices which were detrimental to the general consumer and economy (Fulda & Till, 1968).

Three studies were conducted to enquire into problems arising out of Government policies in terms of development of industries and economy and welfare of consumer (Majumdar, 2014). Hazari committee set up in 1951 concluded that the licensing system has resulted in disproportionate growth of some of the big business houses in India and submitted report in 1965. Mahalonobis committee set up in 1960 concluded in the report submitted in 1964 that the top 10 percent of the population cornered as much as 40% of the income and further noted that big business houses were emerging because of the planned economy model practiced by Government. The Monopolies Inquiry Commission (MIC) set up in 1964 under the chairmanship of Mr Das Gupta concluded that there was concentration of economic power in the form of product-wise and industry-wise concentration and few industrial houses were controlling a large number of companies and there existed in the country large scare restrictive and monopolistic trade practices. As a follow up the MIC drafted a bill which was enacted by Government in 1969 and The MRTP Act came into existence where the statute was enacted to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto. However it proved to be more of a licensing law as core sector monopoly was mostly with Government and entry barrier to industry was bigger due to introduction of this licensing mechanism preventing growth of small and medium scale (Panagaraiya, 2005)

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In 1991 India adopted reforms in terms of deregulation and liberalisation. In post 1991 LPG paradigm, a number of changes were introduced in policies related to licensing, foreign investment, technology imports, government monopolies and ownership price and purchase preference for the public sector, reservation for the small scale sector etc to make market driven by competitive forces so that there can be incentives for raising productivity, improving efficiency and reducing costs. The concept of firm size was no more treated with intolerance, so as for monopoly as market was made open to allow competition. This resulted in de-controlling, de-regulating, delicensing, de-canalising, and de-beaurocratising of industry and trade which resulted in various amendments of MRTP Act and after the wave of globalisation initiated by WTO in 1995 Raghavan committee reexamined MRTP Act in 1999 and proposed a new law. India therefore adopted Competition Act in parliament in 2002, and further adopted Competition Amendment Act in 2007 (Ramappa, 2009). National Development Council subsequently recommended National Competition Policy in 2007. Government of India has set up another committee on Competition Policy in 2011 (Dwivedi, 2017).

The above literature indicates to some extent that economies around the world have been making policies from early days to determine and regulate firm size. As my study is to understand the possible relationship of firm size with sustainable performance, I went further to understand how different countries define firm size for policy level intervention.

Firm Size Definition across the World

Different countries adopt different measures to determine size of a firm. Most countries use the number of employees as the indicator of firm size while some add net asset, some add annual turnover and some even take the level of capital investment in plant and machinery as the determinant of firm size. In India it was earlier capital investment based size definition, which has been updated recently by adding turnover while increasing the capital investment for Micro, Small, Medium and Large enterprises in both manufacturing and service sector.

The above shows a varying degree of definition on firm size and that brings out a question about "what determines firm size?" Here the definition of firm size does not follow any pattern of developed or emerging or underdeveloped economy and appear to be unrelated on this factor. The literatures and policy documents available from Planning Commission and Ministry of MSME does not give any clear reason on deciding to classify enterprise purely based on capital investment and recent addition of annual turnover.

However, from all the firm size determinants above, the employment emerges as the prime factor, and we will subsequently observe that, scholars also have been taking this into account for their studies where size is one of the variable.

Firm Size and Performance

Performance of a firm has always been a matter of interest for researchers and for centuries social scientists have been trying to estimate optimal parameters for firms to improve their performance. Several attempts have been made to study performance of firms based on strategy and size of the firm (Smith et al, 1989; Liu, 1995; Beaver, 2007; Glaister et al, 2007; Escriba-Esteve et al, 2008). However in most of the literature we find that not much attempt has been made to link sustainable performance with size. Researchers have focused more on technical efficiency, profit, total factor productivity, labour productivity etc. In the present scenario of depleting natural resources, it is important for firms to survive and thrive in the long run through contribution to shareholders, environment and stakeholders.

Some researchers have undertaken study to find effect of firm size on **rate of growth (Sales)** of firm. There has been mixed findings on this issue. There is no relationship between size of a firm and its rate of growth (Simon, 1964). Large firms were found to have a better growth rate than small and medium firms in a study conducted in Australia (Parker, 2000). Successful smaller firms exhibited lower productivity growth rates and subsequently lost their advantage during transition of Slovenia from closed

economy to being part of European Union (Polanec, 2004). Firm Size was found to have a moderating effect on firm performance which is positively associated with formal strategic planning in a study where 500 large firms were studied in Turkey (Glaister et al, 2007). In a study conducted in manufacturing firms in eight European countries, it was found that Large firms perform better than SME due to their approach in product & process innovation (Vaona and Pianta, 2008). Small firms with strategic orientation of top management team perform better sales growth and market share (Escriba-Esteve et al, 2008). Sales growth rate is negatively associated with firm size (Akcigit, 2009).

Another line of study has been to measure performance in terms of **technical efficiency** and productivity having some relationship with firm size. Bigger firms with more hierarchical level tend to be less efficient (Simon, 1964). Out of four Indian manufacturing industries studied, firm size is positively associated with high factor productivity in only one industry: machine tool manufacture. Other variables that contribute to difference in efficiency include (a) age of enterprise (b) vintage of capital stock (c) level of labour force experience (John, 1984). In industry wise study, higher total factor productivity (TFP) growth was observed for industries with larger firms having greater market share while lower TFP growth was observed for industries with smaller firm having greater market share (Acs et al, 1996). Small and medium firms tend to be less inefficient than the larger firms (Diaz and Sanchez, 2002). Larger firms are technically more efficient and productive in China (Cheng and Lo, 2004). Labour productivity and Total Factor productivity found positively associated with size of the firm in a study conducted in African firms (Biesebroeck, 2005). Productivity increases with size till a certain level then decreases due to diseconomy of scale (Halkos and Tzeremes, 2007). The innovation and productivity found positively associated with firm size in a study conducted in Spain (Castany et al, 2007). Positive relationship between firm size and labour productivity and Total Factor Productivity found in a study in Canada (Leung et al, 2008). Firms in the mid-level size categories appear to be less efficient than small and large size firms (Truett and Truett, 2009). Large and older firms found less productive in a study conducted in large Australian firms (Palangkaraya et al, 2009). Firm size has a positive and significant impact on the use of innovation and learning measures which has impact on performance (Jusoh, 2010). Regulations were found to have major effect on firm size and productivity in a study conducted in France (Garicano et al, 2011). Big firms are more productive, offer higher wages and pay more taxes than small ones. Economies dominated by small firms are often sluggish (The Economist, 2012, May 3).

Some similar studies have been conducted taking **profit** of the firm as measure of performance. Firm size has no effect on profit in manufacturing industries in USA (Amato and Wilder, 1985). Large and Extra Large enterprise make more profit if they are more market oriented (Liu, 1995). No significant growth in firm performance was observed on size as it was dependent on other factors (Orser et al, 2000). Size does not matter for performance while innovation is the key driver for profit (Skypala, 2005). Small and Large firms generate more profit than medium sized firms in financial services (Amato and Burson, 2007). Small firms with strategic orientation only survive in the long run (Beaver, 2007). In a study conducted on US apparel intermediary firms in small and medium size, it was found that Firm size has no effect on profit (Ha-Brookshire, 2009). Size and Financial performance are not consistently related and performance is dependent in financing (debt or equity) of size expansion (Muzir, 2011).

A very few studies also have been conducted checking sustainability efforts. Size is positively associated with environmental performance (Elsayad, 2006). Firm size has no effect on Corporate Social Responsibility activities (Blomback and Wigren, 2009). Organisation size, ownership and industry are strongly related with support mechanisms and reporting of sustainability (Gallo and Christensen, 2011).

In the studies on effect of firm size on sustainability efforts, the expenses incurred have been considered on CSR etc., except the article (Nayak, 2015) where the phenomena has been explained qualitatively.

In 16 of the above studies employment is taken as a measure firm size. Turnover is used for size determination in 3 of the studies. Capital investment and net asset is used for the purpose in one study each and a mix of these is used in 2 studies. The exact determinant of firm size is not specifically mentioned in 11 of the studies mentioned above.

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Third-Party Funding in International Arbitration: Ownership of the Claim, Consequences for Costs Orders, and Regulation

Sahana Ramesh*

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ABSTRACT

The increasing use of third-party funding in international arbitration has given rise to a myriad of challenges. Many of these remain unaddressed. Even though some jurisdictions have sought to regulate the sphere of third-party funding in international arbitration, it remains largely unregulated. The result is that a third-party funder is not held accountable. This article examines the issue of ownership of a funded international arbitration claim, and the consequences of that finding on an arbitral tribunal's ability to impose costs order on a funder. The objective is to ensure that a funder is playing a role in the arbitral process merely to facilitate access to justice, and nothing more. The examination in this article comprises a review of case law, primarily of English courts, in the context of litigation funding, and then determining whether it is possible to transpose the learnings therefrom to the arbitration context. A brief discussion on the applicability of the doctrine of *res judicata*, in the context of the issues raised in this article, is undertaken. Finally, the article also considers the best way to regulate the specific question of imposing costs on a third-party funder in international arbitration.

1. INTRODUCTION

The use of third-party funding in international arbitration has become a prominent feature in the relatively recent past. The practice has been known to the world of litigation, however, for several decades. Today, third-party funding in international arbitration raises far more questions than does third-party litigation funding; but even the acceptability of the practice of such funding of a litigation proceeding was fiercely contested before courts of law.

Third-party funding with respect to litigation has undergone a sea change over the years of its existence. From being completely prohibited in common law jurisdictions, it has now come to be generally accepted in several jurisdictions, subject to certain restrictions. Courts in various jurisdictions have approached the question of the restrictions on third-party funding in litigation with varying levels of strictness.

Traditionally, the primary objection to third-party funding of legal proceedings, developed first in the context of litigation, has been the common law doctrines prohibiting maintenance and champerty.[1] The doctrine of maintenance prohibits a party or entity that is not a party to the legal proceedings from financing the expenses of any of the parties to such proceedings.[2] Champerty is a form of maintenance that involves a third-party financing the costs of a litigation for profits.[3] Both maintenance and champerty were frowned upon in the common law world, with such prohibitions existing in jurisdictions from England, where it originated, to the United States of America.[4] Such funding arrangements were prohibited on public policy grounds—it would be ethically wrong for an entity that is not a party to the proceedings to fund

1 See generally, Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third-Party Funding in International Arbitration* (2nd edn, Kluwer Law International 2017).

2 ibid 43–74, 43; Willem H van Boom, 'Third-party Financing in International Investment Arbitration' (2011) Available at SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027114> accessed 8 October 2019.

3 Nieuwveld and Sahani (n 1) 43; Maya Steinitz, 'Whose Claim is this Anyway? Third Party Litigation Funding' (2011) 95 Minnesota Law Rev 1268, 1287.

4 See generally, Steinitz (n 3).

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such proceedings and then benefit from the same. Further, such arrangements were thought to be more likely to support frivolous litigation.[5]

However, as Lord Neuberger has observed, the attitude of courts with respect to third-party funding of litigation proceedings changed over time.[6] In England, third-party funding arrangements have not been regarded as violating public policy for over a century now.[7] The decision of the court in *Arkin v Bouchard Lines Ltd*,[8] which brought in to the spotlight the issue of third-party litigation funding, makes it clear that third-party funding arrangements are permissible. While such a rationale has prevailed in jurisdictions like England and the United States[9] for a while now, third-party litigation funding has only recently been permitted in jurisdictions like Hong Kong,[10] where such funding is now recognized in limited circumstances.[11] Further, in some jurisdictions, third-party litigation funding continues to be specifically prohibited in light of the common law doctrines of champerty and maintenance.[12]

Even though third-party funding in international arbitration is a relatively new practice, it has found acceptance more easily. In England, it is the court that has clarified that any limitations on third-party funding that may apply in the context of litigation cannot be extended to international arbitration.[13] In jurisdictions like Singapore[14] and Hong Kong,[15] the permissibility of third-party funding in international arbitration and proceedings arising therefrom have been specifically permitted recently by legislation. The fact that it is in its nascent stages means that several issues need to be addressed. Of these, there are some that have already been addressed in the context of litigation funding and can inform international arbitration policy and jurisprudence.

This article focuses on the issue of the ownership of an international arbitration claim that is funded by an independent third-party.[16] More specifically, it addresses the question of (i) whether the third-party funder of an international arbitration claim may be considered the owner of that claim, (ii) if this is answered in the affirmative, whether that would impact the ability of the tribunal to impose costs orders on the funder.

5 ibid 1288.

6 Lord Neuberger, President of The Supreme Court, *From Barretry, Maintenance and Champerty to Litigation Funding*, Harbour Litigation Funding First Annual Lecture (Gray's Inn, 8 May 2013).

7 *Ram Coondoo v Chunder Mookerjee* [1876] 2 AC 186 (PC).

8 *Arkin v Bouchard Lines Ltd.* [2005] EWCA Civ 655, [2005] 1 WLR 3055.

9 *Charge Injection Technologies, Inc v E.I. DuPont de Nemours & Company* C.A. No N07C-12-134-JRJ (Del 2016); *Bluebird Partners, L.P. v First Fidelity Bank, N.A.*, 709 2d 865, 870 (NY 2000); see generally, Steinitz (n 3).

10 *Winnie Lo v HKSAR* [2012] HKCFA 23.

11 See generally, Varun Mansinghka, 'Third-Party Funding in International Commercial Arbitration and its Impact on Independence of Arbitrators: An Indian Perspective' (2017) 13(1) Asian Int Arbitr J 97.

12 For example, Singapore: *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Another* [2007] 1 SLR(R) 989; Ireland: *Persona Digital Telephony Limited v The Minister of Public Enterprise* [2017] IESC 27.

13 *Giles v Thompson* [1994] 1 AC 142 (HL).

14 Civil Law Act and the Civil Law (Third-Party Funding) Regulations (2017).

15 Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.

16 For a brief discussion on this question, see generally, Vyapak Desai and Kshama Loya Modani, 'Third-Party Funding: Liability of Third-Party Funders to Pay Costs in Arbitration; Entitlement of Successful Claimants to Costs of Third-Party Funding' (2017) 87 Inter-Pacific Bar Assoc J 16.

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As a starting point, it is necessary to discern who a third-party funder is. One of the difficulties that arises in the context of third-party funding in international arbitration is the lack of coherence in the definition of the term 'third-party funder'. Most laws and institutional rules do not even define the term. Among those that do, there exists no uniformity of definition. As a result, the scope of the term varies significantly, depending on the instrument that is being referred to. On the one hand, the IBA Guidelines on Conflicts of Interest in International Arbitration, 2014 uses the notion of 'direct economic interest' as the relevant factor in determining a third-party funder.[17] The Explanation to this provision elaborates that a third-party funder would also include anyone who contributed funds or any other material support to one of the parties to the legal proceedings.[18] By using 'direct economic interest' as the qualifying criterion, this definition excludes funders who are philanthropically motivated. On the other hand, the definition used by the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration in its report (the '**Task Force Report**'), makes it clear that both categories (for-profit and philanthropic) are included.[19] For the purposes of this article, however, the term third-party funder shall refer to those independent funders who provide finances for litigation and/or arbitration proceedings on a commercial, for-profit basis.

Given the lack of jurisprudence on the specific question of ownership of the claim in the field of international arbitration, the article will use the decisions of courts to examine how the question has been dealt with in the context of third-party litigation funding. It then assesses whether parallels may be drawn between litigation and international arbitration, and how the principles laid down in respect of third-party litigation funding may be extrapolated in to the field of international arbitration. In assessing the ownership of the funded arbitration claim, it is also important to pay heed to the existing doctrines in international arbitration law that permit the extension of arbitration agreements to non-signatories. To this end, the article will also examine whether these doctrines are useful in bringing a third-party funder of an arbitration claim within the ambit of the arbitration agreement. Here, the author notes that a summary discussion on this question is reflected in the approach adopted by Vyapak Desai and Kshama Loya Modani.[20] However, the present article attempts to make a more rigorous analysis of the question and arrive at a definitive answer.

Apart from using the above analysis to determine whether an order of costs may be passed against the third-party funder of an arbitration claim, the article will also briefly deal with the issue of whether the doctrine of *res judicata* will operate against

17 IBA Guidelines on Conflicts of Interest in International Arbitration (2014) (IBA Guidelines), General Standard 6(b); also see, Practice Note 01/17, Singapore International Arbitration Centre, Administered Cases under the arbitration rules of the Singapore International Arbitration Centre, On Arbitrator Conduct in Cases Involving External Funding (31 March 2017) <http://www.siac.org.sg/images/stories/articles/rules/Third%20Party%20Funding%20Practice%20Note%2031%20March%202017.pdf> accessed 8 October 2019.

18 IBA Guidelines, Explanation to General Standard 6(b).

19 Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, William W Park, Stavros Brekoulakis and Catherine A Rogers (eds), the ICCA Reports No 4 (April 2018), pp 92–93 <www.arbitration-icca.org> accessed 8 October 2019 (Task Force Report).

20 Desai and Modani (n 16).

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the third-party funder and prevent such a funder from funding a claim based on the same issue against the same party in a new proceeding in the future. Finally, the article discusses in brief how the issue of ownership of the claim must be regulated. The article primarily uses common law jurisprudence, especially English law, to substantiate arguments, though examples are drawn from other legal systems, where necessary.

A preliminary issue that must be addressed before embarking on the central analysis of this article is that of the need for disclosure of the existence of third-party funding in international arbitration. This will be the focus of the next section of this article.

2. NEED FOR MANDATORY DISCLOSURE OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

To be able to examine whether a third-party funder must be considered the owner of the claim, it is first necessary to be able to determine the very existence of such third-party funding. As it currently stands, a third-party funder of an arbitration claim is not a party to the arbitration agreement, and hence, there is no obligation to disclose the existence of such funding to the arbitral tribunal or to the opposite party.[21] On a balanced consideration of the arguments for and against mandatory disclosure of the existence of third-party funding (discussed in the following paragraphs), it is the opinion of the author that compulsory disclosure of a third-party funding arrangement will offset several potential complications that could arise at a later stage of the arbitration, or even after the arbitration has been completed. This article, however, does not deal with the manner in which disclosure should be made.

2.1 Arguments against disclosure of third-party funding arrangements

Third-party funding, at its ethical best, is meant to facilitate access to justice for claimants who would otherwise be unable to access expensive dispute resolution mechanisms.[22] However, both, the funded parties as well as third-party funders have raised objections to mandatorily disclosing the existence of a funding arrangement in international arbitration. Some of these have been discussed below.

One of the early arguments against the disclosure of funding arrangements was founded on the belief that the source of financing for the concerned proceedings is irrelevant to the substance of the issue and the arguments made, and therefore, there was no need to treat third-party funding in a manner any different from a loan intended to finance a legal proceeding.[23]

From the perspective of the funded party, it has been argued that disclosure of the existence of third-party funding might expose the funded party to excessive costs

21 G J Shaw, 'Third-party Funding in Investment Arbitration: How Non-disclosure can Cause Harm for the Sake of Profit' (2017) 33 Arbitr Int 109–20.

22 Eric de Brabandere and Julia Lepeltak, 'Third Party Funding in International Investment Arbitration' (2012) 27(2) ICSID Rev Foreign Invest Law J 379, 385.

23 M. Maniruzzaman, 'Third-Party Funding in International Arbitration- A Menace or Panacea?' (*Kluwer Arbitration Blog*, 29 December 2012) <http://kluwerarbitrationblog.com/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/?doing_wp_cron=1503332583.8441140651702880859375> accessed 8 October 2019.

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orders.[24] The fear is that the disclosure of the existence of third-party funding would indicate more-than-adequate financial resources, and therefore prejudice the tribunal to order costs or security for costs against the funded party.[25] Further, it has been argued that funders themselves fear what they may be exposing themselves to in terms of tribunal enquiries, cross-examination, etc. if the existence of funding is disclosed.[26] In addition to the above, a fear has been expressed amongst those in favour of non-disclosure of funding arrangements that making such a disclosure will encourage frivolous opposition and unnecessary lengthening of proceedings by the opposite party.[27]

While discussing the arguments against mandatory disclosure of third-party funding in international arbitration, it might be pertinent to take note of present-day practice. Practice among several countries which have accepted the use of third-party funding in international arbitration varies, with only some laws requiring specifically that there must be mandatory disclosure.[28] In the context of practice of reputed arbitral institutions, the rules of Singapore International Arbitration Centre (**SIAC**) which though expressly addresses several issues relating to third-party funding do not make it mandatory to disclose the existence of funding.[29] Further, the guidelines on conflict of interest issued by the International Bar Association require mandatory disclosure of funding only if there is a previous relationship between the funder and an arbitrator.[30] But it must be remembered that these guidelines are only soft law, and are of persuasive value and are not binding. In addition, there are countries like the Netherlands, which have recognized the possibility of third-party funding of arbitration claims but have expressly not made any laws or rules in regard thereto.[31] By implication, this would mean that where there is no express requirement to disclose the existence of third-party funding, the funded party may choose not to reveal such funding.

From the perspective of the funder and the funded party, there are clearly some compelling arguments in favour of not requiring mandatory disclosure of funding arrangements. It is easy to see why the funder and funded party may consider disclosure to be detrimental to their interest.

The following paragraphs of this article will highlight the main advantages of disclosure of third-party funding arrangements, in making the case for making such disclosures mandatory.

24 Jennifer A Trusz, 'Full disclosure? Conflicts of interest arising from third-party funding in international commercial arbitration' (2013) 101 Geo L J 1649, 1675.

25 Rachel Denae Thrasher, 'The regulation of third party funding: gathering data for future analysis and reform' (2018) Law and Justice in the Americas Working Paper Series 9.

26 van Boom (n 2) 56.

27 Allisson Ross, 'The Dynamics of Third Party Funding III' (2012) Global Arbitr Rev.

28 Singapore: Legal Profession (Professional Conduct) Rules (2015), rule 49A(1); Hong Kong: Arbitration and Mediation Legislation (n 15), art 98U.

29 SIAC: SIAC Practice Note (n 17), Paras 5, 7 and 8; SIAC Investment Arbitration Rules, art 24(l).

30 IBA Guidelines (n 17); Shaw n (21).

31 Marc Krestin and Rebecca Mulder (Linklaters), 'Third-Party Funding in International Arbitration: To Regulate or Not To Regulate?' (*Kluwer Arbitration Blog*, 12 December 2017) <http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/> accessed 8 October 2019.

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2.2 Arguments supporting disclosure of third-party funding arrangements

Perhaps the most important aspect of dispute resolution, from the perspective of the disputing parties, is to ensure that in addition to obtaining an order or arbitral award that is just and fair, the prevailing party is also able to obtain any amounts that have been awarded. This might lead to the question of the ability of the losing party to meet its costs and make any payments due to the prevailing party, especially when an appeal or challenge of an arbitral award is preferred. In this context, an important argument in favour of making disclosure of funding arrangements mandatory is that it permits the parties to the proceedings, especially the non-funded party, and the tribunal, to make an appropriate assessment with respect to orders for security for costs.[32]

Second, the need to disclose the existence of third-party funding in international arbitration is heightened by the innate requirement of impartiality imposed by international arbitration. Impartiality of the arbitral tribunal, a cornerstone of international arbitration, refers to the absence of any bias—actual *or* apparent—on the part of the tribunal and its members.[33] Here, it must be noted that scholars and practitioners have generally raised concerns relating to impartiality of arbitral tribunals because of the repeated appointment of tribunal members by parties/their solicitors.[34] Where such concerns already exist, it is necessary to ensure that developments in the field of international arbitration, including third-party funding, do not cast a cloud on the legitimacy of the process itself. Today, solicitors of parties are often the link between the parties themselves and third-party funders.[35] Where third-party funders of international arbitration claims are concerned, there are possible conflicts of interest that may arise because of the relationships between the various parties concerned. However, of specific importance to the present context is the possible conflict of interest created for members of the arbitral tribunal because of the existence of a third-party funding arrangement.

It is extremely common that members of arbitral tribunals are senior members or practitioners who also work in the biggest arbitration law firms/practices. Since law firms are often responsible for introducing their clients—the party to the arbitration—to potential third-party funders, a professional link between solicitor firms and

32 *RMS Production Corporation v Saint Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (13 August 2014); *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd Sti v Turkmenistan*, ICSID Case No ARB/12/6, Procedural Order No 3 (12 June 2015), where disclosure of the funder's identity was ordered in relation to an indication that an application for security for costs will be made; Shaw (n 21) 116.

33 Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law International, OUP 2015) 229–304, 278.

34 Vanessa Giraud (D'Empaire Reyna, Abrogados), 'The Problem of Repeat Arbitrators in Investment Arbitration' (*Kluwer Arbitration Blog*, 1 September 2014) <http://arbitrationblog.kluwerarbitration.com/2014/09/01/the-problem-of-repeat-arbitrators-in-investment-arbitration/> accessed 8 October 2019.

35 Bentham IMF Unveils New Portfolio Model for Litigation Funding, Bentham IMF (16 November 2015), <https://www.benthamimf.com/docs/default-source/default-document-library/portfolioannouncement clean.pdf?sfvrsn=2> accessed 8 October 2019; see generally Victoria Shannon Sahani, 'Reshaping Third-Party Funding' (2017) 91 Tul L Rev 405 for insights in to the newly forming close relationship between third-party funders and law firms.

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third-party funders[36] is bound to develop, creating a possible spill-over effect when members of the tribunal are also practitioners who have previously had interactions with the third-party funder (on a separate occasion). This could lead to a perception of bias on the part of a tribunal member towards the funded party, when the fact of the existence of third-party funding and such relationship is discovered by the other (non-funded) party. It is, thus, essential that third-party funding of a claim be mandatorily disclosed, to permit arbitral tribunal members to make fair assessments of potential conflicts of interest and make declarations as required. After all, an award rendered by an arbitral tribunal may be challenged at the seat, or subject to proceedings opposing its recognition and enforcement. Even though both these kinds of proceedings depend on the *lex arbitri* and *lex fori* respectively, often, the award may often be set aside or not be enforced, as the case may be, on grounds of bias of the arbitral tribunal.[37] The ICCA-QMUL Task Force Report makes it clear that there is a general agreement among practitioners that it is only disclosure of funding arrangements that will enable the arbitral tribunal to assess and make disclosures of any possible conflicts of interest.[38] Here, it must be noted that the SIAC's Practice Note on Arbitrator Conduct in Cases Involving External Funding[39] requires such conflicts of interest to be made known to the tribunal.[40] However, the non-mandatory nature of the provision means that there is some ambiguity as to how this must be achieved. Of note in this context is the Canada–European Union Comprehensive Economic and Trade Agreement (**CETA**), arguably a comprehensively structured document that takes in to account several contemporary issues in trade and arbitration. The CETA makes disclosure of third-party funding of claims arising thereunder mandatory.[41] The formulation seen in the CETA may well pave the way for arbitral practice across the world.

If it is accepted that the foremost task of an arbitral tribunal is to ensure that an enforceable award is rendered, it is necessary to ensure that potential objections to the award are removed as early in the proceedings as possible. In the case of third-party funding of the claim, this would translate to mandatory disclosure of the existence of such funding as early as possible. It might be some consolation to funders and funded parties who fear detrimental consequences if disclosures are made, that the Task Force Report also notes that unless exceptional circumstances so demand, it is sufficient to require disclosure of only the existence and identity of the funder.[42]

36 M J Goldstein, 'Should the real parties in interest have to stand up? Thoughts about a disclosure regime for third-party funding in international arbitration' (2011) 8(4) Trans Dis Manag 7; Task Force Report n (19) 82.

37 English Arbitration Act 1996, s 68(2)(a); German Code of Civil Procedure (Zivilprozessordnung) 1887, s 1059(2)(d); Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1966) (ICSID Convention), art 55.

38 Task Force Report (n 19) 83.

39 SIAC Practice Note (n 17).

40 ibid, para 5.

41 The Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (CETA), art 8.26.

42 Task Force Report (n 19); also see, Queen Mary, University of London and White & Case, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015) <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbi

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In conclusion, the author reiterates that there is more to be gained than lost from mandatory disclosure of third-party funding arrangements. The extent of disclosure can address many of the concerns of funders and parties, but the disclosure of the very existence of funding will only help both parties and the tribunal.

3. OWNERSHIP OF AN INTERNATIONAL ARBITRATION CLAIM FUNDED BY A THIRD-PARTY

The objective of this article is to determine whether a third-party funder may also be considered an 'owner' of the claim. In the traditional sense, the term 'owner' can be rather easily defined–as the party whose right has allegedly been affected and who therefore brings a claim to set right the violation. However, with the dilution of the doctrines of maintenance and champerty, and especially in the context of this article, it is more difficult to define. The terms 'owner' and 'ownership' are used in this article in a broad sense, to indicate possession of the claim and the incidental rights that would accrue therefrom to such owner. A determination on the question of whether a third-party funder might also be considered the owner of the funded claim would lend itself to further determinations on various questions, including whether costs orders might be made by the tribunal against the funder.

It must first be clarified that the examination in this article will be limited only to cases where the funding for the claim is provided by an independent third-party. Therefore, this will exclude cases where one party to the claim chooses to assign the claim to a third-party.

The assignability of an arbitration agreement is itself recognized in some manner or the other in legislation like the English Arbitration Act, 1996 (the '**Act**'). In Section 82(2) of the Act, in defining who a party to an arbitration agreement, the provision includes '*any person claiming under or through a party to the agreement*'.[43] In *Phoenix Finance Ltd*,[44] it was stated that an assignee may be considered a party claiming under the agreement.[45] Therefore, subject to the general rules regarding assignment of arbitration agreements, when such assignment has been made, the assignee is considered a party to the claim. However, this is not the obvious outcome when the claim is funded by an independent third-party. This will be examined under this section of the article.

3.1 Using the approach of courts as a guide to practice in international arbitration

The question of the ownership of a claim is not a new one where a third-party litigation funder is involved.[46] The question that remains is the extent to which the rationale of court decisions in relation to third-party litigation funding may be extended and transposed to the context of third-party funding in international arbitration.

tration-survey-2015_0.pdf> accessed 8 October 2019, where 71% of those surveyed stated that full terms of a funding agreement must not be disclosed.

43 English Arbitration Act 1996, s 82(2).

44 [2002] EWHC 1028 (Ch).

45 ibid [83] (J Sir Andrew Morritt VC).

46 *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 (UKHL).

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Arbitration as a system of dispute resolution developed as an alternative to litigation. Yet, despite the several unique rules and principles that apply to arbitration, the mechanism is not entirely divorced from domestic regulation and the supervision of courts. Courts continue to play an important role, albeit exhibiting varying degrees of supervision, at various stages of the arbitration—from being able to review the jurisdiction of the arbitral tribunal[47] to being able to set aside the award[48] or refuse to recognize and enforce it.[49] Therefore, it is important that arbitrators keep in mind principles laid down by courts, subject to the principles that are unique to arbitration.

Further, litigation before courts has existed as a mechanism for dispute settlement for much longer than arbitration has, thereby giving courts the benefit of experience and expertise in handling commercial disputes. The same may be said of courts' experience in addressing issues arising from third-party litigation funding, including that of the ownership of the claim in such cases. Thus, arbitrators might benefit from the wisdom of courts in dealing with such issues. This does not mean that the approach adopted by courts must be extended in totality to apply in the context of arbitration—indeed, arbitrators must necessarily adapt courts' solutions to the needs of arbitration. Yet, the rationale adopted by courts may serve as a reasonable starting point for such an analysis.

It is for these reasons that the approach adopted by courts in the context of analysing the ownership of the claim that is funded by a third-party may serve as a guideline, an inspiration even, for arbitrators grappling with the issue in an arbitration context.

3.1.1. Circumstances in which a third-party litigation funder may be acknowledged to be the owner of a claim: principles recognized by courts

As a starting point, it is worth noting that in jurisdictions like England, the power of courts to make orders of costs against parties who are not named in the proceedings has been statutorily recognized.[50] Section 51(3) of the Senior Courts Act, 1981 states that *'The court shall have full power to determine by whom and to what extent the costs are to be paid'*.[51] This provision has sometimes been referred to by courts dealing with the question of whether to order a third-party litigation funder to bear costs.[52] Even though it might appear, *prima facie*, that the power bestowed by Section 51 of the Senior Courts Act, 1981 excuses the court from having to make a determination as to the ownership of the claim by the third-party funder, this is not the case in reality. Not only does there have to be a nexus between the claim at hand and the non-party that is to be the subject of an order for costs, but courts have also observed that this nexus must go beyond the mere fact of funding being provided by

47 For example, see, English Arbitration Act 1996, s 31.

48 For example, see, English Arbitration Act 1996, ss 67, 68.

49 For example, see, UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (New York Convention), art V.

50 Senior Courts Act 1981, s 51.

51 Senior Courts Act 1981, s 51(3).

52 See, *Progas Energy Limited, Progas Holding Limited, Sheffield Engineering Company Limited v The Islamic Republic of Pakistan* [2018] EWHC 209 (Comm) (QB), [2018] 1 Costs L.R. 137.

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a third-party.[53] The very nature of this determination means that it will turn on the facts of each case. Therefore, it is important to take note of the guidelines that courts have over the years prescribed in making this determination. Many of the guidelines and parameters laid down by the courts in the context of litigation funding are useful in the context of third-party funding in arbitration, as well. In the following paragraphs, this article will highlight some of the key principles that have been developed by the English courts in relation to passing orders against non-parties, including third-party litigation funders, which are also relevant from the stand point determining the question in respect of in international arbitration.

In the decision in *Hamilton,*[54] handed down nearly two decades ago, the court had made a clear distinction between 'pure funders' and commercial litigation funders. In making this distinction, the court clarified that the mere existence of a third-party funder does not automatically make such funder a possible subject of costs orders.[55] It was in later decisions that English courts delineated principles.

In *Dymocks,*[56] a case that originated in New Zealand and made its way up to the UK Privy Council, the court identified 'control' over the proceedings as an important factor relevant to the use of Section 51 of the Senior Courts Act:

> Where ... the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence ....[57]

From the above passage, it is evident that a third-party funder exercising a great degree of control over the funded proceedings stands the risk of being deemed the true party to the proceedings. It is important to note that this conclusion hinges on the belief that the funder is furthering his own interests, and not merely facilitating the funded party's access to justice.

In *Flatman v Germany,*[58] the English Court of Appeal cited with approval several cases[59] that had considered the question of when costs may be imposed on third-parties and laid down relevant principles. Of note is the case of *Thomson v Berkhamsted Collegiate School*[60] which built on the principles recognized in *Dymocks*[61] as well as several other cases. The principles laid down that are pertinent in the context of the present article include: (i) ordering of costs against third-parties

53 *Deutsche Bank AG v Sebastian Holdings Inc and Another* [2016] EWCA Civ 23 [21], [2016] 4 WLR 17.
54 *Hamilton v Al-Fayed No* 2 [2002] EWCA Civ 665, [2003] QB 1175.
55 ibid [40].
56 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and Others* [2004] UKPC 39, [2004] 1 WLR 2807.
57 ibid [25].
58 [2013] EWCA Civ 278, 2013 WL 618037.
59 Dymocks (n 56); *Thomson v Berkhamsted Collegiate School* [2009] EWHC 2374 (QB), [2009] 6 Costs L.R. 859.
60 Thomson (n 59).
61 Dymocks (n 56).

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only in exceptional circumstances,[62] (ii) allowing the trial judge to make a determination as to the conduct of the non-party, (iii) differentiating between litigation funders who might have a commercial interest in the proceedings, and those parties that assist with financing of the proceeding but for purely philanthropic purposes, (iv) the court exercising caution to ensure that litigation funding is not used as a means to unnecessarily prolong litigation.[63] These principles make two things clear: (i) That the role of a court at higher levels must be as minimal as possible, and (ii) the court will always be wary of imposing costs on a third-party funder—hence, the rather high threshold to be met.

Once the extent of participation of the third-party litigation funder has been established, courts must then determine the actual costs that such funder must pay. In addressing this important issue, English courts have once again emphasized on the need to strike the delicate balance between encouraging funders who genuinely facilitate access to justice for a party that would otherwise not have been able to bear the costs of the litigation, and those whose actions are driven by purely self-serving purposes.[64] Building on the rationale behind the *Arkin cap*,[65] the Court of Appeal, in the recent decision in *Excalibur Ventures*,[66] recognized that commercial litigation funders generally view the funding as an investment and thus, the funder must be liable to the '*imposition of a requirement to pay costs on an indemnity basis*'[67] because the '*derivative nature of a commercial funder's involvement should ordinarily lead to his being required to contribute to the costs on the basis upon which they have been assessed against those whom he chose to fund*'.[68] From the approach of the court in this case, it is clear that a third-party litigation funder may be made liable for costs up to a certain extent, keeping in mind the '*economic realities of who controls and benefits from litigation*'.[69]

From the above, it can be summarized that the fact of existence of third-party funding itself does not necessarily mean that the funder must be regarded as the owner of the claim or that he has undertaken the risk of having orders for costs being passed against him. Clearly, the extent of control that the third-party funder exercises over the proceedings, including his decision-making power, and the benefits that he seeks to obtain from the funding arrangement play a crucial role in determining whether he may be considered the 'true owner' of the claim that is funded. These are guidelines that are useful even in the context of international arbitration claims funded by independent third-parties.

3.1.2 Consent to arbitration—a hurdle to be crossed

The preceding paragraphs have discussed the extension of the ownership of the funded claim to the third-party funder in the context of litigation, and consequent orders of costs being made by the court against the funder. A previous section of this

62 Aiden Shipping (n 46); *Symphony Group Plc v Hodgson* [1994] QB 179.
63 Thomson (n 59) [18].
64 Arkin (n 8) [38]–[40].
65 Arkin (n 8).
66 *Excalibur Ventures v Keystone* [2016] EWCA Civ 1144, [2017] 1 WLR 2221.
67 ibid [28].
68 ibid [27].
69 Progas (n 52) [74].

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article has discussed the benefits of using decisions of the court as a starting point to the analysis in the specific context of international arbitration. However, the question still remains as to the practical feasibility of this approach—primarily because of the requirement of consent to arbitration. In the context of international arbitration, consent, which is the foundation stone of the process, is reflected in the form of the agreement to arbitrate.[70] Consent is important in determining the jurisdiction of the tribunal, and is also crucial in the context of extending the jurisdiction of the tribunal to those who are not signatories to the arbitration agreement. To deal with situations where, to effectively deliver justice, a party who is not a signatory to an arbitration agreement must be brought within the jurisdiction of the tribunal, several doctrines have been developed in the context of international arbitration. Two of these doctrines are discussed below, as they reflect varied practice of courts in common law and civil law jurisdictions, and their applicability to a third-party funder is examined.

1. The 'group of companies' doctrine has found acceptance in some jurisdictions,[71] but not in others.[72] As the name suggests, it indicates that the party that is sought to be brought within the purview of the arbitration agreement must be capable of being considered a part of the same 'group of companies' as one of the parties to the agreement. The doctrine enables affiliates, sister-companies, etc. belonging to a group of companies to be made party to an arbitration proceeding, even though they are themselves not a party to the arbitration agreement. However, this simpliciter association of the non-signatory with the party to the agreement is not sufficient; the non-signatory party should have also played a significant and controlling role in the negotiation and conclusion of the contract which contains the arbitration agreement.[73] In *Dow Chemicals,* an ICC arbitration[74] which recognized the application of the group of companies doctrine, and which was later reaffirmed by the Paris Court of Appeal,[75] there was an emphasis not only on the fact that Dow Chemicals, France appeared to have been at the centre of the organization of the contractual relationship and the parties' attitude towards the choice of company that would sign the contract but also Dow Chemicals, France's role in the termination of the contract.[76] In contrast, however, the group of companies doctrine has not been recognized by English courts, because the question of whether a non-signatory may be bound by the contract is to be decided in accordance with the law of the arbitration agreement and when that is English law, the doctrine does not

70 Blackaby and Partasides (n 33) 76.

71 *Dow Chemicals v Isover-Saint-Gobain* (CA Paris, 21 October 1983) cf ICC Case No 11405/2001.

72 *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), 2004 WL 229138.

73 *Dow Chemical France, The Dow Chemical Co and Ors v ISOVER Saint Gobain* (Interim Award) ICC Case No 4131 (23 September 1982).

74 ibid.

75 Dow Chemicals (n 71).

76 ibid.

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find a place therein.[77] The decision of the English court in *Peterson Farms*[78] overruled the conclusion of the tribunal in this respect.[79] The most important point to be noted in relation to the application of the group of companies doctrine is that its application is dependent solely on the role of the non-signatory in the formation and/or termination of the contract that contains the arbitration agreement. It is, then, clear that that this doctrine finds no application at all in relation to a third-party funder who is not in any way concerned with the formation or termination of the contract or the arbitration agreement. A third-party funder's participation in the entire matter arises only *after* the dispute has arisen, and any role that the third-party funder plays does not influence the contract in any manner.

2. Another doctrine that is of interest is one that was developed in the *Dallah*[80] cases. The decisions of the English and French courts in *Dallah*[81] display a complete divergence in the application of purportedly the same principles of law. In England, in its application of French law (as the appropriate applicable law), the English courts (the High Court, Court of Appeal and the Supreme Court) concluded that the tribunal had erred in considering that the Government of Pakistan was, indeed, a party to the arbitration agreement.[82] In stark contrast to this, however, when the matter was raised before French courts at the time of annulment proceedings, the French court, applying the test of 'subjective common intention' concluded that the Government of Pakistan could indeed be brought within the scope of the arbitration agreement, and thus under the jurisdiction of the arbitral tribunal. The rationale used by the tribunal, and the English and French courts is important to assess the applicability in relation to a third-party funder of an international arbitration claim. The tribunal came to its conclusion that it had jurisdiction over the Government of Pakistan on the basis that the Pakistani government was an 'alter ego' of the trust.[83] The French law, on the other hand, determines the question of jurisdiction of the tribunal as one of the subjective common intention of the parties determined with reference to good faith.[84] In the context of the third-party funder, it must be noted that like in the case of the 'group of companies' doctrine, both alter ego as well as common intention of the parties apply in relation to the

77 Peterson Farms (n 72); *Roussel-Uclaf v GD Searle and Co Limited and GD Searle and Co.* [1978] FSR 95, which recognized the group of companies doctrine in 1978, but was subsequently overturned in *City of London v Sancheti* [2008] EWCA Civ 1283, [2009] Bus. L.R. 996.

78 Peterson Farms (n 72).

79 ibid [52], [62].

80 England: *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2010] 3 WLR 1472; France: RG No 09/ 28533 Paris CA (17 February 2011).

81 ibid.

82 Dallah England (n 80) [66].

83 ICC Case No 9987, Partial Award on Jurisdiction (26 June 2001) [2010/2] International Journal of Arab Arbitration 337, 365–66 (Award) in Jan Kleinheisterkamp, 'Lord Mustill and the Courts of Tennis-*Dallah* v *Pakistan* in England, France and Utopia' (2012) 75(4) MLR 639, 642.

84 Kleinheisterkamp (n 83) 649.

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> formation of the contract and the arbitration agreement. The determination is not made at the stage of the dispute arising but in relation to the agreement itself. Once again, since the third-party funder generally does not feature at the stage of negotiation of the contract, or any time before the dispute actually arises, it is not possible to bring a third-party funder within the jurisdiction of the tribunal hearing the claim funded by such funder using any of the aforementioned doctrines.

It is, thus, clear that these (and other) existing doctrines that permit arbitral tribunals to exercise jurisdiction over non-signatory third-parties cannot be used in the context of third-party funding.[85] Yet, the desirability of giving the tribunal the power to make costs orders against the funder has been expressed.[86] However, since it is clear that it is not possible to give an arbitral tribunal such powers, an alternate solution is proposed in the next sub-section of this article. This would ensure that a third-party funder who meets the criteria identified in Section 3.1.1 can still be held responsible for costs orders passed in relation to the concerned arbitration proceedings.

3.2 Holding a third-party funder liable for costs orders in funded proceedings: an alternate approach

It has been shown above that a third-party funder cannot be brought within the ambit of an arbitration agreement that it has not itself signed, and consequently cannot be brought under the jurisdiction of the arbitral tribunal in relation to proceedings that it has funded. As a result, the tribunal itself may not pass any orders, including orders for costs, against a third-party funder, even if the tribunal has reason to believe that the funder's role in the proceedings goes beyond just providing the finances and access to justice. The fact that most arbitration legislation do not enable arbitrators to directly make an order of costs against a third-party funder,[87] *or* to have costs ordered by a tribunal against a party be paid by a third-party funder has been recognized as a hurdle that cannot be overcome by the will of the court alone.[88] It is essential that this unjust situation be remedied. A third-party funder in the context of litigation before courts runs the risk of liability for instances where its involvement in the proceedings is excessive. Similarly, a third-party funder in the context of international arbitration must be held liable for claims that it funds so as to ensure that its own interest in accessing justice are met. A third-party funder of an international arbitration claim must not be permitted to escape liability of the back of the strict requirement for consent to arbitration and jurisdiction of the arbitral tribunal.

In this context, it must be remembered that even though arbitration is a relatively distinct system of dispute resolution, courts still play a supervisory role.[89] In addition,

85 For a slightly different view, see, Desai and Modani (n 16).

86 Hong Kong Law Reform Commission's Final Consultation Paper (2015) in Task Force Report (n 19) 162.

87 For example, English Arbitration Act 1996, s 63(1), which permits the tribunal to allocate costs between the parties only; UNCITRAL Rules (2010), art 42; LCIA Rules (2014), art 28(4).

88 Progas (n 52) [79].

89 For example, English Arbitration Act 1996, ss 9(4), 24, 67, 68.

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the role of courts as a supporting system to arbitral tribunals has been noted (in the context of the English Arbitration Act 1996 when it came in to force, but equally applicable for several arbitration legislation around the world).[90] Generally, an arbitral tribunal takes the assistance of a court on procedural matters in light of the fact that the court has more power than a tribunal to compel action by a potentially hostile individual or party.[91] In keeping with the nature of courts' role in arbitration proceedings, several arbitration legislation provide for arbitral tribunals (and often, parties themselves) to seek the assistance of the court in several matters like taking of evidence, securing the attendance of witnesses.[92]

It must be noted that as far as third-party funding in international arbitration is concerned, courts have off late played a somewhat active role in identifying certain principles.[93] However, there have been no cases thus far where courts have addressed the issue of ordering costs against a third-party arbitration funder. While ordering of costs has generally always been within the jurisdiction of the arbitral tribunal and not courts, it is proposed that courts be given the power to pass orders for costs directly against a third-party funder of an international arbitration claim. This approach will serve twin purposes: (i) it will ensure that a third-party funder of an international arbitration claim does not escape liability in matters where the involvement of the funder goes well beyond merely providing the funded party with the finances to access justice, and (ii) it will allow international arbitration to maintain its autonomy as a method of dispute resolution while at the same time overcoming the hurdle posed by the consent requirement discussed previously in this article.

It must be remembered that permitting the court to pass an order for costs against a third-party funder of an international arbitration claim is not a way to use the power of the court to somehow bring the funder within the purview of the arbitration agreement. It is simply a suggestion to ensure that a funder with a personal interest does not merely reap the rewards of the system but also faces the consequences, in applicable cases.

Further, the use of courts to order costs against third-party funders of international arbitration claims must not be completely independent of arbitral tribunals. It is suggested that it must be the arbitral tribunal that makes such references and requests to the courts, after it has itself conducted an in-depth analysis of the extent of involvement of the third-party funder and whether the circumstances exist that require an order of costs to be made against such third-party funder. This will ensure that the arbitral tribunal is still vested with the ultimate power to decide on the issue at hand, and also not require courts to conduct detailed reviews in relation to the arbitration. Arbitral tribunals may, as discussed previously, find it useful to refer to and adapt to context the approach adopted by courts in relation to third-party litigation funding. When those factors are considered, and an appropriate determination has

90 Okezie Chukwumerije, 'Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996' (1 June 1999) Arbitr Int 15(2) 171–91.

91 For example, English Arbitration Act 1996, ss 42, 43, 44, 45; French Code of Civil Procedure, Book IV—Arbitration 1981; art 1468. Also cf Indian Arbitration Act 1996, ss 17, 9.

92 Indian Arbitration and Conciliation Act 1996, s 27; English Arbitration Act 1996, ss 43, 44.

93 *The RBS Rights Litigation* [2017] EWHC 1217 (Ch), [2017] 1 WLR 4635; *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), [2016] 2 CLC 419.

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been made by the arbitral tribunal, there is little that the court that has been approached needs to do, though it is foreseeable that the actual approach adopted by courts might vary according to jurisdiction.[94] The author of this article, however, advocates a minimalist approach by courts in respect of the question of whether orders for costs must be passed against the third-party funder. This approach will heed to the largest extent possible to the principle of autonomy of arbitration as a dispute resolution mechanism.

To be able to enforce the suggestion discussed above, it might be necessary for countries to amend their domestic laws giving courts the requisite powers to pass orders against a third-party (if this power does not already exist), as well as to permit tribunals to seek the assistance of the court in this respect. In this context, it must be noted that the Rules of the SIAC do make provision for the tribunal to pass an order of costs against a non-party, but this is subject to the agreement of the parties.[95] Further, in order to protect funders from the possibility of arbitral tribunals loosely interpreting the principles involved in establishing the role of the funder and the extent of liability, if any, domestic legislation must give courts the power to conduct in-depth analysis, in appropriate cases. However, as stated previously, it is the opinion of the author that courts must use this power only in exceptional circumstances, for example, where it can be shown *prima facie* that the arbitral tribunal has made an error in the application of principles.

4. RES JUDICATA EFFECT ON THE THIRD-PARTY FUNDER

This part of the article briefly discusses the effect that a finding in relation to the ownership of the claim by the third-party funder might have on the funder's future actions. Specifically, this section of the article will discuss whether a third-party funder of an international arbitration claim who has been found to be an owner of the claim might be precluded in the future from entering a funding arrangement with a party for a proceeding or claim against the same party against whom the initial claim was funded. That is, is there a *res judicata* effect of a finding of ownership of a funded claim on the funder?

The difficulties of not having a well-defined *res judicata* regime in the field of international arbitration have been widely acknowledged by scholars.[96] Even though suggestions have been put forward for the methods that arbitral tribunals may adopt to enforce the principle of *res judicata* as seen in litigation practice,[97] in principle, there is no need for a tribunal to adhere to the concept of *res judicata*. However, in the case of third-party funding of an international arbitration claim, and the involvement of courts, in the manner suggested earlier in this article, it is more reasonable to raise the question of applicability of the principle of *res judicata*.

94 For example, the approach adopted by courts in relation arbitrability of certain matters like fraud or bankruptcy differs a great deal between the United States of America and England.

95 SIAC Rules (2016), art 35(1).

96 Silja Schaffstein, *The Doctrine of Res Judicata before International Arbitral Tribunals* (OUP 2016) 2; B Sena Gunes, 'Res Judicata in International Arbitration: To What Extent does an Arbitral Award Prevent the Re-litigation of Issues' (2015) 12(6) Trans Dis Manag.

97 Schaffstein (n 96).

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The principle of *res judicata*, as we know it today, originated in the field of litigation.[98] The principle is now well entrenched and recognized in both civil law jurisdictions as well as common law ones.[99] The doctrine stipulates that once a matter has been decided by way of a judgment, order or award, it cannot be relitigated between the same parties.[100] Thus, it is clear that the doctrine of *res judicata* arises only when the two matters being considered relate to the same legal context.[101] So, then, can there be legitimate concerns of the applicability of the doctrine in relation to the participation of a third-party funder?

The answer must be in the negative. The present article has previously discussed the question of ownership of a funded arbitration claim by the third-party funder, and thus, having orders passed against such funder by the court at the request of the tribunal. However, it is important to note that in this case, the court is not passing judgment on any issue of law between the funder and the party against whom the funded proceedings have bene brought. It (and the arbitral tribunal, so to speak) is merely passing an order against the third-party funder based on facts. Thus, the doctrine of *res judicata* cannot apply to prevent the third-party funder from entering in to a funding agreement in a future proceeding, even if such proceeding relates to the same question of law and is against the same party as in the initial proceedings in which the court had passed orders against the funder.

5. FUTURE REGULATION OF THE ISSUE OF OWNERSHIP OF THE CLAIM AND ORDERING OF COSTS AGAINST THE THIRD-PARTY FUNDER

This section of this article discusses the various ways in which the central question of the article as to whether the third-party funder of an international arbitration claim can be considered an owner of the claim, and whether costs may be ordered against such funder, may be regulated. This section will explore three possible approaches: (i) Binding domestic legislation and institutional rules, (ii) Guidelines to arbitral tribunals, for the determination of ownership of the claim, and/or (iii) Employing an 'organic' approach.

i. Binding domestic legislation and institutional rules

Binding legislation and institutional rules on any matter have the advantage of assuring certainty to parties. Amending or introducing provisions in domestic arbitration laws and in the rules of arbitral institutions that clearly prescribe the circumstances under which the involvement of a third-party funder will be construed to be sufficient to render such funder an owner of the claim will ensure that funders know exactly what risks they are undertaking when they enter a funding agreement. Thus, the funding agreement can be drafted in a manner

98 Schaffstein (n 96) 6; Gunes n (96) 3.

99 Peter R Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (Oxford 2001) para 1.12 in Schaffstein (n 96) 11.

100 K R Handley, *Res Judicata* (4th edn, Lexis Nexis 2001) para 1.01 in Schaffstein (n 96) 11.

101 Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration' (1996) 8 African J Int Law 38, 40.

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so as to limit the participation of the funder, in accordance with the stipulations of the law (or institutional rules).

On the other hand, there are two primary disadvantages of adopting this approach. First, the field of third-party funding is itself rather new, and most jurisdictions do not have any laws regulating the same. It is only recently that some countries (discussed earlier) have explicitly permitted third-party funding in international arbitration. Similarly, only a few arbitral institutions have made amendments to their rules to include references to third-party funding.[102] Given this background, it would be rather impractical to suggest that legislatures and arbitral institutions must now leap directly from minimal rules relating to third-party funding to drafting rules on the very specific question of ownership of the funded claim. Such a task would require in-depth analysis of the factors that have been so far considered by courts in determining the question of ownership of claims in relation to litigation funding. Not only will this be a time-consuming process, but it might also not lead to the desired results and may only further complicate this field.

The second disadvantage of adopting this approach is that by choosing to draft binding legislation or institutional rules, countries and institutions run the risk of severely limiting the situations in which a third-party funder might be considered the owner of the funded claim. As far as third-party litigation funding is concerned, there do not exist domestic legislation which specifically enumerate the circumstances in which the funder might be considered the owner of the claim. In the context of third-party funding in international arbitration, if the suggestion of adapting from the practices of courts in relation to litigation funding is adopted, there is no good reason to advocate the drafting of binding rules. In fact, it is necessary to ensure that there is enough flexibility for arbitral tribunals to take in to consideration peculiar and changing circumstances.

ii. Guidelines to arbitral tribunals

As the word 'guidelines' suggests, they are not binding. Soft law in the form of guidelines is used widely in the field of international arbitration,[103] and serves as a means of providing the arbitral tribunal with guiding principles that reflect what might perhaps be best practices in the field. The advantage of using guidelines is that in recently developed fields like third-party funding, arbitral tribunals are provided with a set of guiding principles by arbitral institutions or organizations that are active in the field, but tribunals are not bound by these guidelines and therefore, have the liberty to develop case law according to the demands of the facts of each case.

In contrast, the use of guidelines also means that there is less certainty for a third-party funder who seeks to ensure that his/its actions will not one day

102 See, SIAC Investment Arbitration Rules (2017) cf SIAC Rules (2016) (for international commercial arbitration).

103 IBA Guidelines (n 17); IBA Rules on Taking of Evidence in International Commercial Arbitration (1999 and 2010 versions); see generally, Gabrielle Kaufmann-Kohler, 'Soft law in international arbitration: codification and normativity' 1(2) J Int Dis Settlement 283–99.

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make him/it to be made liable when that was not the intended result. This is because arbitral tribunals, which are already not bound by any doctrine of *stare decisis*, will not only have the flexibility to take in to consideration specific facts (which is a liberty that arbitral tribunals must have); but they are also under no obligation to adhere to the guidelines. Thus, it is possible that some tribunals might strictly apply the guidelines, some might ignore them altogether, while others might purport to apply the said guidelines but there may be differences in the manner in which the guidelines are interpreted. While these might be general objections to the use of guidelines, they are especially pertinent to the present context because of the very fact that the field (third-party funding) is still in its nascent stages. In a field that is still developing its jurisprudence and practices, the use of guidelines may end up perpetuating confusion.

Despite these objections, the significance of the advantages of using guidelines might outweigh the disadvantages. Thus, the use of guidelines might emerge as a healthy way to develop practice in the field and to specifically address the issue of ownership of the claim.

iii. The 'organic' approach

The third approach that could be adopted in addressing the issue of how ownership of an international arbitration claim funded must be determined is to allow arbitral tribunals themselves to organically develop the jurisprudence. This would mean that arbitral tribunals will have full liberty to decide the method to be adopted in determining the question of ownership of the claim—this would include the issue of whether a tribunal must refer to case law from courts to determine the criteria. It is easy to object to this approach because it clearly brings out the lack of certainty, for one, and also paves the way for much confusion even between tribunals as to the criteria that must be applied. This approach reminds one of the model adopted by the ICSID Convention in its treatment of the term 'investment'.[104] The ICSID Convention did not provide any definition or guideline for the interpretation of the term, and the various decisions of tribunals reflect the different approaches adopted, including the importance granted to the various criteria identified.[105] There is a similar risk of divergence in ideas and reasoning in the context of the criteria to be adopted where there is a third-party funder involved.

On the other hand, the 'organic' approach has the merit of permitting arbitral tribunals to draw on the jurisprudence of various countries and other tribunals, when required. This approach will allow tribunals a greater array of jurisprudence to choose from. This is, of course, also possible where only guidelines are prescribed.

104 ICSID Convention (n 37) art 25.

105 For example, *Fedax NV v The Republic of Venezuela* Case no ARB/96/3 (Decision on Objection to Jurisdiction, 11 July 1997); *Salini Ostruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* ICSID Case No ARB/00/4 (Decision on Jurisdiction 23 July 2001).

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5.1 Choosing the best approach

In considering the advantages and disadvantages of the three approaches outlined above, it is the opinion of the author that it is not possible to simply adopt a single approach. Instead, a hybrid between the 'guidelines approach' and the 'organic approach' may best serve the purpose of ensuring that there is discipling in the jurisprudence of arbitral tribunal while at the same time providing sufficient liberty to adapt to the specific facts of each case. An arbitral tribunal will be able to fall back on a set of guidelines prescribed by an arbitral institution while at the same time not being bound by such guidelines—this only enhances the power of the arbitral tribunal.

6. CONCLUSION

The fact that third-party funding in international arbitration is in its nascent stages must be looked at as an opportunity to develop it so as to enhance the efficiency and accessibility of international arbitration. This goal, however, is not limited to only opening up avenues but to also effectively regulating them. If third-party funding is to be considered a successful and attractive option, it is necessary to ensure that all the parties involved are protected from abuse. One of the steps that must be taken in respect of this is to ensure that third-party funders not only reap the rewards of their 'investment' but also bear the related risks. As has been elaborated earlier, the use of jurisprudence from litigation funding is an effective starting point. While it may be *desirable* to develop a way to bring third-party funders within the jurisdiction of the arbitral tribunal, this is not possible using existing theories. The alternative suggested in this article will ensure that the core principles of international arbitration are adhered to, while at the same time ensuring that every party (the term being loosely used, and not to refer only to the parties to the proceedings) involved gets what they deserve. This is crucial to ensure not only the continued appeal of international arbitration, but to also signal that change will be embrace while also ensuring that basic notions of fairness and justice are not ignored.

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Research Article

Linking Relational Benefits and Customer Loyalty: The Mediating Role of Customer Intimacy

Mahendra Kumar Shukla & Pinaki Nandan Pattnaik

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Abstract

This paper contributes to the debate on the dimensionality of relational benefits by establishing it as second-order reflective construct with three related but distinct dimensions, namely, confidence benefits, social benefits, and special treatment benefits in the B2C services context. This is one of the few empirical studies to investigate the role of intimacy in service relationships, and the first to illustrate its mediating effects on the benefits–loyalty relationship. While existing literature regards service benefits, trust, and commitment as key pillars, our study proposes

complementary contributions of intimacy to customer loyalty formation as an asset for managers to explore.

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Article

Ethical Dilemmas in the Lawyer–Client Relation: Concerns and Solutions

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Anirban Chakraborty[1]

Abstract

Lawyer–client relationship is the most important aspect of professional life of lawyers. When lawyers enter into professional relation with their clients they become bound by several ethical and professional duties. These duties are a mixture of status and contract emerging out of the nature of the relationship governing lawyer and client. Observing these duties is indispensable under the rules governing standards of professional conduct for lawyers. Lot has been written about these duties and the need to observe them, but the untraded area in the literature remains some of the challenges that arise in course of observing these duties due to some equally competing issues. The lawyers often face these challenges in their professional life, but little guidance is available to address them effectively. In this context, the aim of this article is to trace some of these competing issues and challenges and discuss the legal and regulatory framework that help to address them. The article begins by exploring the issues that arise at the very formation of the lawyer–client relationship. In the second part, the article examines the issue of lawyer's scope and authority to make decisions in legal transactions for their clients. Also it covers the issues involving extent of lawyer's authority to take decisions on behalf of mentally impaired or minor clients. Finally, the article looks into the issues that come up during the discharge of the lawyer–client relationship. The article concludes on the note that to ensure an effective and satisfactory lawyer–client relation it is an imperative that lawyers are sensitized with these issues and the principles they can look at for their resolution.

Introduction

On the morning of 8 May 2019, the entire legal fraternity of India wakes to learn in shock and mourn that one of its great son Professor N.R. Madhava Menon has set on his heavenly journey renouncing this world forever. It was an irreparable loss because rarely a great talent and persona like him is born. A person coming from a very humble background, reached to the zenith of the Indian legal fraternity with his sheer hard work, impeccable personal discipline and professional commitment. There is hardly any field in Indian legal profession where he has not left a mark by his scholarship and contribution. He has been a phenomenal law teacher, a serious academic scholar, a visionary administrator and reformist and

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a noteworthy leader in the field of continuing legal and judicial education. But of all the achievements he commands, he will always be especially remembered for his contribution in the reform of Indian Legal education. The highlight of his professional career came with his role in founding the National Law Schools at Bangalore and Kolkata which today has received global admiration. As a law teacher he has dedicated his life in improving the quality of the legal professionals in India. Till the day of his demise, he has worked tirelessly to develop programmes which would provide opportunity and training to law students and lawyers to improve their professional competence and quality. The author had a long association with Prof. Menon and appreciates Asian Journal of Legal Education's initiative to publish a special issue dedicated in the memory of this celebrated personality. Availing this opportunity and to pay personal tribute to this great law teacher this article contributes on a theme very dear to Prof. Menon, professional responsibility of lawyers. The article addresses some fundamental issues involved in the lawyer–client relationship.

A lawyer–client relationship may be established when a client approaches a lawyer for some legal advice or service and the lawyer accepts to provide the same. But when a lawyer enters into a relation with his client to provide his legal service, she becomes bound by several ethical and professional duties. These ethical duties are a mixture of status and contract emerging out of the nature of the relationship governing the lawyer and client. That is to say that some elements of this relationship are based on the contractual relation that the lawyer is entering with his client to provide his legal service. Others are based on his obligations emerging from the fiduciary relation that a lawyer has with his client and the same cannot be entirely waived by the lawyer or his client. Observing these duties is indispensable under the rules governing standards of professional conduct of lawyers. Lot has been written about these duties and the need to observe them, but the untraded area in the literature remains some of the challenges that arise in course of observing these duties due to some equally competing issues. The lawyers often face these challenges in their professional life, but little guidance is available to address them effectively. This article aims to trace the issues and challenges that arise in course of a lawyer–client relation by exploring the rules governing the standards of professional responsibility. It also discusses the guidelines for lawyers based on the existing legal and regulatory framework to resolve these challenges. The article however does not intend to indulge into the issues arising from the fiduciary nature of the lawyer–client relationship, for example, '*conflict of interest*' and '*confidentiality*'. It only aims to address the range of issues that emerges from the contractual nature of this relationship.

The article begins by exploring the issues that informs the very formation of the lawyer–client relationship. It then examines the issues emerging in connection to decision-making in a case and with special reference to mentally impaired or a minor client. Finally, it examines the issues in termination of lawyer–client relationships and the duties of lawyers towards clients at the end of the lawyer–client relationship. The article concludes by highlighting the importance of the knowledge of the rules that governs these issues to ensure an effective and satisfactory relation between the lawyer and clients.

Ethical Dilemmas of Lawyers During the Formation of The Lawyer–Client Relationship

Majority of lawyer–client relationships begin in a very straightforward manner. A client comes to a lawyer's office, explains about his legal issues or requirement, reaches an agreement and formally engages the lawyer to deal with his legal issues. There are no mandatory rules that are required to be completed with appointment of a lawyer. The existing Bar Council of India Rules governing 'Standards

of Professional Conduct and Etiquette' for advocates in India[1] (will be referred hereafter as BCI Rules) does not specify any requirement for forming a lawyer–client relationship. Rule 11 of the BCI Rules provides:

> An advocate is bound to accept any brief in the Courts or Tribunals or before any other authorities in or before which he proposes to practise at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief.

According to this rule an advocate will accept engagement from a client for payment of an agreed amount of fee consistent to the amount she charges for the nature of legal service to be provided. This is generally the manner by which a lawyer–client relation will be established. There is no other requirement to be fulfilled by the advocate. So an oral agreement concluded between a lawyer and client for providing legal service in lieu of an agreed fee can establish a lawyer–client relation.

However, this rule gives rise to a question that whether a lawyer is under a general professional obligation to accept every client who approaches him or a limited discretion is allowed to him to refuse a case. According to Rule 11 of BCI Rules in a special circumstance a lawyer has discretion to not take a case. But what amounts to a special circumstance is not defined in the rules. In circumstances where a lawyer in India can decline to accept a case is an issue that remains open to interpretation. In this regard the American Bar Association Model Rules of Professional Conduct (2004) can offer some guidelines. American Bar Association Model Rules of Professional Conduct (2004) has a comparable provision.[2] The said rule states that a lawyer can decline from accepting a case of client who has approached him for his legal service for a '*good cause*'.[3] Therefore, the term '*good cause*' used in American Rule of Professional Conduct can be considered as comparable to '*special circumstances*' under the BCI Rules. The term 'good cause' is explained as

> If the lawyer could not handle the matter competently...or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client–lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

Accordingly, the probable interpretation of '*special circumstances*' for a lawyer to decline a case under the BCI Rules can be regarded as grounds (a) where a lawyer cannot offer competent representation due to lack of his specialized skills or knowledge; (b) where acceptance of a case would be unreasonably burdensome for the lawyer and (c) where representation would result in an improper conflict of interest.

Refusal to Accept a Case that Requires Knowledge of an Area of Law in Which a Lawyer Has No Experience or Knowledge or Time

Rule 11 of BCI Rule states that a lawyer is bound to accept a case unless there is a special circumstance which justifies her recusal for accepting a case. The issue that rises is whether a lawyer's refusal of a case on the ground that he cannot offer competent representation due to lack of his specialized skills or

[1] Part VI, Chapter II of the Bar Council of India Rules framed under the Advocates Act, 1961.
[2] Rule 6.1 of the American Bar Association Model Rules of Professional Conduct (2004).
[3] Comment 2 to Rule 6.1 of the American Bar Association Model Rules of Professional Conduct (2004).

knowledge can be justified as special circumstance. It is a duty of a lawyer to provide competent representation to a client. According to various authorities a competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[4] A lawyer may not possess the required necessary special training or prior experience to handle legal problems of a particular type with which the lawyer is unfamiliar. To competently manage a case by a lawyer what is required is having strong grip over some fundamental skills, such as the analysis of precedent, the evaluation of evidence and legal drafting. The most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. According to the American Bar Association Model Rules Professional Conduct (2004) in Rule 1.1 a lawyer is permitted to refuse to take a case in an unfamiliar field if the lawyer lacks '*thoroughness and preparation* reasonably *necessary for the representation.*' Further to resolve this ethical dilemma of lawyers the BCI is negotiating a new code of ethics[5] suitable to contemporary era, states in its Rule 4 that '*An Advocate may decline a specialist brief if he/she considers himself not competent to accept the brief.*'

Refusal to Accept Case Because It will be Unreasonably Burdensome for Lawyer Due to His Lack of Time

Another important issue that looms large is whether a lawyer can refuse a case as he cannot offer competent representation because he lacks thoroughness and preparation as he cannot devote necessary time. The American Bar Association Model Rules Professional Conduct (2004) in Rule 1.1 allows such an excuse of lawyer. Similarly, Rule 8 of this new BCI code of ethics provides '*An Advocate shall accept only as many briefs as he/she is sure he/she can attend to, and shall refrain from accepting briefs in which he/she is likely not to be available owing to his/her preoccupation in other matters.*' Thus an inference of these rules state that an advocate may decline to accept a case on new field or an area he has no experience. It also allows an advocate to refuse brief due to heavy workload and paucity of time. These grounds may be justified as special circumstance to refuse a case.

But there is no such comparable provision in the existing BCI Rules therefore a lawyer requires accepting a case in a totally new field or a specialized domain of practice and to meet requirements of competent representation he has to engage along with another lawyer who has reputation of having established competence in the particular field of practice. The BCI current rules are obliterating whether a lawyer has competence to manage a particular type of case or lacks experience in specialized area of practice. It also ignores the fact that whether a lawyer can compensate her inexperience or lack of knowledge in particular field of law through study or affiliation with another lawyer. This is a cause for undue hardship for both lawyer and client and requires more clear interpretation like its American counterpart. A lawyer needs to be allowed to turn down a request for legal representation if she lacks time, expertise, or interest in the matter. Rule 11 of the BCI Rules must be read as an exception to lawyer's duty to not decline a case if an Advocate lacks expertise or time to attend a case as a justified refusal as '*special circumstance*'.

[4] The comments to Rule 1.1 of American Bar Association Model Rules of Professional Conduct (2004).

[5] *Bar Council of India Draft Code of Ethics*, http://www.barcouncilofindia.org/bci-seeking-viewssuggestions-on-the-draft-code-of-ethics/

Refusal of a Request for Legal Representation of Unpopular Clients or an Unpopular Cause by a Lawyer on Account of Conflict of Interest

As per rule 11 of BCI Rules an advocate is bound to accept a brief for any client who has approached him for legal assistance and is willing to pay him fees except when there are special circumstances that can justify such refusal to accept the case. The understanding is that a lawyer cannot pick and choose his clients. Furthermore, Rule 15 of the BCI Rules states

> It shall be the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence.

But contrary to this, lawyers often make decisions to engage or not to engage for any particular client and craft their practice domain based on their personal interest and aspirations. As a matter of general prudence lawyers do use their discretion to choose to accept or decline a case. One of the acceptable grounds of refusal to represent is where exists a conflict of interest. The BCI Rule 33 states '*An advocate who has, at any time, advised in connection with the institution of a suit, appeal or other matter or has drawn pleadings, or acted for a party, shall not act, appear or plead for the opposite party.*' The term is understood as a situation where representation does jeopardize a client's interest or violates client's right of undivided loyalty of his lawyer. Where a lawyer can identify and analyse that such circumstances exist which can lead to a conflict of interest the lawyer can withdraw from the case or refuse to represent.

But there is caveat to this in the rules of professional ethics and lawyers cannot pick and choose their clients. An ethical issue that arises in light of this caveat is whether a lawyer is free to adopt a professional decision to not represent an unpopular client or a cause which interferes her personal moral stand on ground of conflict of interest. In the recent past in India advocates have passed resolution to not represent Ajmal Kasav or Afjal Guru because her own personal biases may affect her ability to properly represent the case. But according to Lord Denning '*...No matter how great a rascal the man may be. No matter how undeserving or unpopular his cause. The barrister must defend him to the end provide isd only that he is paid a proper fee or in the case of a dock brief, a nominal fee.*'[6] The Supreme Court[7] has fortified the legal position about advocates' responsibility to not refuse cases because the case or the client in unpopular. In its judgement passed in 2011 dealing with the issue of Coimbatore Bar Association's resolution that no member of the Coimbatore Bar will defend the accused policemen in the criminal case against them, the apex court observed

> Professional ethics requires that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in passing such a resolution that none of its members will appear for a particular accused, whether on the ground that he is a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the Statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused for a crime. Such a resolution is, in fact, a disgrace to the legal community. We declare that all such resolutions of Bar Associations in India are null and void and the right minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is the duty of a lawyer to defend no matter what the consequences. and a lawyer who refuses to do so is not following the message of the Gita.

[6] R. v. Worsley, (1967) 3 W.L.R 1666.

[7] A.S. Mohammed Rafi v. State of Tamil Nadu, (2011) 1 S.C.C. 688.

This decision of the Apex Court of India creates an embargo on lawyer's decision to choose not to represent an unpopular client or an unpopular cause in account of personal moral stand.

Ethical Dilemmas in Relation to Lawyers' Authority to Make Decisions for Clients

It is generally considered that lawyers are agents of the client and the client is bound by the action of his lawyer. Commentaries on Professional Responsibility of lawyer–client control reflect that a tension exists between the client and lawyer about the control and decision-making powers relating to the case and its representation. Professor Nancy B. Rapoport mentions that

> In the world of 'who knows the most,' the client (and the party on the other side) will always know the most about the facts of the case; then comes her lawyer (and the lawyer on the other side);... Depending on the personalities and skill levels of a client and her lawyer, there can be tension between how the lawyer wants to present the case and how the client wants it presented.[8]

Although the rules governing professional responsibilities set out the division of authority between the client and the lawyer, there is no clear line of demarcation.

The lawyer–client relationship is one of the oldest examples of an agency relationship. The agency law for lawyers imposes the obligation of informed consent. The requirement is that a lawyer has an affirmative duty to consult her client and a duty to advise her client '*promptly any information which it is important that the client receive*'.[9] The modern rules of professional responsibility have increased emphasis on the importance of both and explanation of relevant information by creating a uniform '*informed consent*' standard.[10] A client's agreement constitutes informed consent if a lawyer has communicated adequate information and explanation about the reasonable course of action. However, lawyers are provided with a limited exception where she can take decisions and act even without an informed consent by the client. This limited authority is regarded as an appendage of the typical nature of the client–lawyer relationship and is considered to be in the interests of the client, to give the fullest beneficial effect to his appointment of the advocate.

According to Rule 1.2 of the American Bar Association Model Rules Professional Conduct (2004) '*...a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.* But Rule 1.2 allows a lawyer a limited '*implied authority*' and states that '*A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.*'

[8] Nancy B. Rapoport, *The Client Who Did Too Much*, 47 Akron L. Rev. 121–33 (2014).

[9] Baker v. Humphery. 101 U.S. 494 (1879).

[10] Rule 14 of the BCI Rules

> An advocate shall at the commencement of his engagement and during the continuance thereof, make all such full and frank disclosure to his client relating to his connection with the parties and any interest in or about the controversy as are likely to affect his client's judgement in either engaging him or continuing the engagement.

Similarly, English law recognizes the principle that by appointing an advocate to conduct her case the client gives an '*implied authority*' to adopt such actions that is necessary for conducting her case. According to Halsbury's Laws of England[11]

> ...at the trial of an action, counsel's authority extends when it is not expressly limited, to the action and all matters incidental to it and to the conduct of the trial, such as withdrawing the record, challenging a juror, calling or not calling witnesses, cross-examining or not cross-examining witnesses, consenting to a reference to arbitration, a compromise, or a verdict, undertaking to appear, or, on the hearing of a motion for a new trial, consenting to a reduction of damages.

However, the '*implied authority*' of counsel in English law is confined to matters falling within the subject matter of the suit. In the absence of express authority, the counsel cannot enter into a decision with reference to a collateral matter. Halsbury's Laws of England, 4th ed. Vol. 3, paras 1183 provides that

> A compromise by counsel will not bind the client, if counsel is not apprised of facts the knowledge of which is essential in reference to the question on which he has to exercise his discretion, for example that the terms accepted had already been rejected by the client. Where counsel enters into a compromise in intended pursuance of terms agreed upon between the clients, and, owing to a misunderstanding, the compromise fails to carry out the intentions of one side, the compromise does not bind the client, and the court will allow the consent to be withdrawn.

The BCI Rules don't refer to details regarding the authority and control of lawyer–client relationship. Supreme Court of India's decision in *Byram Pestonji Gariwala vs Union Bank of India*[12] case is a relevant legal authority on this issue. The court has held '*that client's consent is not needed for a matter which is within the ordinary authority of counsel.., his consent will be inferred, and he will not be heard to say that he did not understand what was going on.*' However, the court has also drawn certain limitations on this authority of lawyers and the limitation rule propounds that 'it *will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances.*'

Lawyer's Authority to Settle Client's Case

According to the rule laid down by Supreme Court in *Byram Pestonji case*[13]

> lawyers as agents have limited authority to settle clients cases because of the implied authority vested by his appointment as a counsel. But the court also states that 'it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demand'.

The English law on this issue is clear that lawyers don't have authority to settle a client's case without her proper consent.

[11] Lord Hailsham, *Halsbury's Laws of England,* 4(3). Butterworths, 1181 (1975).
[12] Byram Pestonji Gariwala vs Union Bank of India, (1992) 1 S.C.C. 31.
[13] *Id.*

Representing Client of Special Categories, that is, Minor, Mentally Unsound or Juvenile

Lawyers often represent clients who are minor, mentally disabled or juveniles. Sometimes they receive this case personally from these clients or their wards or otherwise they are called by the legal aid authorities[14] or courts to represent them. Such clients may have diminished capacity or intellectual impairment to provide appropriate instruction to the lawyer. *Who can give instruction to the lawyer on behalf of such clients?* And also *what decisions can lawyers take for such client?*

As per Indian law every civil suit or proceeding filed by or against a minor or mentally disabled person '*shall be in her name*' by a '*guardian*' or a '*next friend*' of such suitors.[15] Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian, provided that the interest of such person is not adverse to that of the minor.[16] Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian. Every application to the court on behalf of a minor or a mentally unsound person shall be made by his next friend or by his guardian for the suit.[17]

Plea of minority or mental unsoundness exonerates a person from criminal liability.[18] However a 'Juvenile' may require assistance of a lawyer to defend him in an enquiry before the Juvenile Justice Board.[19] However Section 46 of the *Juvenile Justice (Care and Protection) Act, 2000* states that

> Any competent authority before which a juvenile or the child is brought under any of the provisions of this Act, may, whenever it so thinks fit, require any parent or guardian having the actual charge of or control over the juvenile or the child to be present at any proceeding in respect of the juvenile or the child.

Under India law in any civil proceeding a guardian or next friend has the authority to instruct a lawyer on behalf of minor or a mentally unsound person as her authorized representative. There is no such express provision in the juvenile *justice law and* juvenile can give express instructions to her lawyer. However, if the lawyer deems fit, he can consult whenever any parent or guardian having the actual charge of or control over the juvenile.

However, it is important to note that both civil and criminal proceedings involving a 'minor', 'mentally disabled' or 'juvenile' is in their name. So the parent, guardian or next friend acts as her representative or authorized agent have implied authority by law to instruct in the legal proceeding on her behalf. So looked from a lawyer–client relationship perspective the 'minor', 'mentally disabled' or 'juvenile' is the client or 'principal' who appoints the lawyer, but the lawyer requires consulting or taking instruction from such parent, guardian or next friend. Rule 19 of BCI provides that '*An advocate shall not act on the instructions of any person other than his client or his authorized agent.*' It is interesting to consider whether the lawyer can totally ignore the interest and instructions of any of a 'minor', 'mentally disabled' or 'juvenile' client. Furthermore, it is also a contentious issue whether a lawyer has an implied authority

[14] See the National Legal Services Authority (Legal Services to the Mentally ILL Persons and Persons with Mental Disabilities) Scheme, 2010. Under the scheme lawyers are required to provide Legal aid to mentally ill persons under Section 91 of Mental Health Act, 1987. Similarly, under other schemes NALSA may appoint lawyers to provide legal representation to the children across the country.

[15] See Order XXXII Rule 1, 3 and 15 of the Code of Civil Procedure, 1908.

[16] See Order XXXII Rule 4 of the Code of Civil Procedure, 1908.

[17] See Order XXXII Rule 5 of the Code of Civil Procedure, 1908.

[18] See Section 83, 84 & 85 of Indian Penal Code, 1860.

[19] Sampurna Behrua v. Union of India, (2011) 15 S.C.C. 232.

to act in cases of reasonable and calculated actions for the protection of interest or welfare of such clients.

Rule 1.14 of the American Bar Association Model Rules Professional Conduct (2004) relates to lawyer's relationship with clients having diminished capacity. This rule encourages a lawyer to maintain a '*normal*' lawyer client relation with clients having diminished capacity. But rule also permits the lawyer to assume more paternalistic role to protect the clients from some harm. In such case the lawyer may ask the court to appoint a third party who would make some legal decision on behalf of the client. There is no similar comparable rule in either BCI Rules or BCI Draft Code of Ethics. But the rule also like Indian law emphasizes that when the lawyer is dealing with a client with diminished capacity is preferred that the client is represented through a GAL (*guardian ad litem* or guardian). Although in United States in recent past Scholars have attacked this on the grounds, for example, too paternalistic approach, best interest of child is neglected and the true voice of the child becomes redundant. But Prof. Frances G. Hill argues in the face of such criticism that GAL compared to attorney–client model has some affirmative strength.[20]

However, in India the Ministry of Women and Child Development, Government of India, in its advisory capacity has framed model guidelines for lawyer on handling complaints by children under the *Prevention of Children from Sexual Offences Act, 2012* keeping in view with the 'Best Interest' of the child. These guidelines can be used for guidance by lawyers in dealing with representation of a juvenile client. The guideline states that the lawyer shall represent the child in accordance with the child's welfare and best interests. Where a child by virtue of his/her age, maturity or disability, unable to express a view as a general rule, the lawyer shall act in terms of the child's instructions, conveying them to the Court by direct evidence if possible, call such witnesses as are required to carry out those instructions and examine and cross-examine and make submissions on behalf of the child.

Ethical Dilemmas During Discharge of The Lawyer–Client Relation

Generally, the relationship between a lawyer–client terminates with end of case or the work that the client has entrusted to lawyer (unless there is a retainership agreement). However, termination can also happen by way of dischargement of the lawyer by his client[21] or lawyer's withdrawal from case[22]. On termination of the lawyer–client relationship, lawyer has the duty to promptly return the client all the documents and files, certified copies of the order or judgement (if agreed),[23] along with the detailed statement of accounts relating to client's money received by the lawyer, receipts and if any remaining unused money of the client. However, BCI Ethics rules are not candidly specifying what documents are required to be returned to the client on termination. The Supreme Court however has observed all documents and files relating to the case available with the lawyer have to be returned to the client promptly on termination of lawyer–client relationship. It is understood that lawyer will deliver all documents and files received from his client. But one issue raised is that when a client has not paid the bill at the end of the representation, can the lawyer keep a client's documents until the client pays? The

[20] Frances Gall Hill, *Clinical Legal Education and the 'Best Interest' Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering Pedagogy*, 73 IND. L. J. 605 (1988).
[21] R.D. Saxena v. Balaram Prasad Sharma. (2000) 7 S.C.C. 264.
[22] Rule 12 of BCI Rules along with formal acceptance of the same by order of Court.
[23] *Supra* note 22.

law in this regard is settled and the Supreme Court's opinion in *R.D. Saxena v. Balaram Prasad Sharma*[24] is applicable. The Apex Court has held that

> if a client does not want to continue the engagement of a particular advocate it would be a professional requirement consistent with the dignity of the profession that he should return the brief to the client. It is time to hold that such obligation is not only a legal duty but a moral imperative.

The Apex Court has further elaborated on the termination of the lawyer–client relation that a lawyer must withdraw if a client desires to fire her. A client always has a right to change lawyers and need not give any reason. According to the court

> A litigant must have the freedom to change his advocate when he feels that the advocate engaged by him is not capable of espousing his cause efficiently or that his conduct is prejudicial to the interest involved in the lis, or for any other reason. For whatever reason, if a client does not want to continue the engagement of a particular advocate it would be a professional requirement consistent with the dignity of the profession that he should return the brief to the client.[25]

Finally, the lawyer's must remember that even with the termination of the lawyer–client relation, the lawyer's duty of confidentiality towards his client's case and communication is a continued and eternal obligation and is never terminated once a lawyer–client relationship is established.

Conclusion

An effective justice delivery system requires talented, dedicated and qualified legal professionals who serve the bar. As torch bearers of justice, it is a heavy burden from the day a legal practitioner earns the privilege to be called an officer of the court. Every legal practitioner must be cognizant of the responsibilities that come with being admitted to profession and with each appointment and level of office. With this objective in mind this article has attempted to expose lawyers to some of the most fundamental ethical issues and standards of professional conducts that occur frequently in course of dispensing their professional responsibilities and interaction with clients. The article likes to conclude that it is inadvertent that the members and entrants of this profession must be informed about these challenges and sensitized about the rules that aid their resolution. This awareness will help them to serve the clients better and shape their professional life in a more efficient manner.

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[24] *Id.*
[25] *Id.*

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Article

Secularism, Multiculturalism and Legal Pluralism: A Comparative Analysis Between the Indian and Western Constitutional Philosophy

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Abstract

India over thousands of years had become a 'melting pot' of religious, linguistic and cultural diversity, and thereby created a unique cultural fabric based on the principles of multiculturalism and pluralism.The ancient Indian philosophy was based on the ideals of vasudaivakutumbakam - the whole world is one family and sarvadharmasambhava- all religion leads to the same destination. These philosophical notions have attained legal status in the India. This article will focus on the background and constitutional perspective of secularism as implemented in India, the Supreme Court's interpretation of secularism and identification of certain religious practices as an essential and integral part of a religion and lastly the role of the State in regulating the freedom of religion.

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Introduction

The term 'India' has varied implication. In modern political context, it refers to the country which gained independence in 1947 with a defined political boundary. In historical context, it was either described as the land beyond the Hindukush mountains or the land where the river Sindhu (at present referred to as River Indus). In social context, it was called as Hindustan referring to the people living in the Indian subcontinent as Hindus. For centuries, people from different parts of the world had entered the Indian subcontinent as invaders, traders, refugees, religious propagators, etc., and had settled down, and thereby bringing their individual culture, language and religion with them. India for over thousands of years had become a 'melting pot' of religious, linguistic and cultural diversity, and thereby created a unique cultural fabric based on the principles of multiculturalism and pluralism. The ancient Indian philosophy was based on the ideals of *vasudaivakutumbakam*, the whole world is one family, and *sarvadharmasambhava*, all religion leads to the same destination. These philosophical notions have attained legal status in India.

This article will focus on the background and constitutional perspective of secularism as implemented in India, the Supreme Court's interpretation of secularism and identification of certain religious practices as an essential and integral part of a religion, and lastly, the role of the state in regulating the freedom of religion.

Understanding 'Secularism' in the Western Constitutional Philosophy

The simplistic meaning of the term secularism implies separation of religion and state. The concept of a secular state as part of political theory is relatively of recent origin. But the notion of secular state can be traced to the history of Christianity and its relationship with the state. The term implies that there should be 'clear separation of the spiritual and temporal powers' and the basis of authority and governance arise from civil and natural law, and not from any religious order or divine law. One of the earliest thinkers to conceptualize the doctrine of secular state was the renowned Catholic thinker Marsilius of Padua of the fourteenth century, who in his treatise *Defensorpacis* (1324) negated the supremacy of the church over the state as well as the concept of Christian state and argued that 'the state be based upon law inherent in nature, and that the church should not have jurisdiction over the state'.[3] Laying down the concept of secular state Marsilius argued that '[t]he rights of the citizens are independent of the faith they profess; and no man may be punished for his religion'. His progressive thoughts were not deemed acceptable in his time, but became the influencing force for the Protestant Reformation and modern constitutional state. During the Reformation movement, a new concept of church—the Corpus Christi—was advocated which promoted the idea of complete separation of the church from the state and all use of coercion in religious matters were condemned. But the implementation of the idea of secular state was made for the first time in Rhode Island as part of the 'lively experiment' under the leadership of Roger Williams wherein full political rights were given to all individuals regardless of their religious beliefs. This idea was implemented to promote the goal of 'for the good of whole' and consequently all religious matters were taken away from the jurisdiction of civil authorities. Subsequently, the writings of John Locke conceptualized the idea of separation of church and state into a political doctrine based on the natural rights theory wherein he advocated that since men are born equal with natural rights to life, liberty and property, the authority of the state is derived from the consent of the governed based on the terms of social contract. Execution of all laws is primarily for the purpose of public good. The writings of Locke were of great inspiration to the American founding fathers, which incorporated the same values in their Declaration of Independence. The United States is the first nation in modern history to become a secular state wherein all religion were equal before law and government does not have any jurisdiction over religious matters. No preferential treatment is made towards any particular religion and all religious groups are treated as private voluntary associations. The US Supreme Court in Watson v. Jones[4] held that '[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect'. The concept of secularism has become part of modern constitutional practice, but it was not until the twentieth century that the democratic states of Western Europe adopted the secular ethos in their state functioning and governance.

Secularism in the Indian Context of Multiculturalism and Pluralism

Secularism as an integral part of constitutional norms was evolved in the West. Post-Independence in 1947, India adopted a constitution based on liberal democratic values and principles, but made attempts to contextualize and integrate these principles within the broad milieu of multi-lingual, multi-cultural and multi-religious society. During the drafting of the Indian Constitution, the Constituent Assembly was facing several challenges, including the need to accommodate different interest groups within one legal framework. The three primary groups were the majority led by the Indian National Congress, separatist groups led by the Muslim League and the 584 independent princely states. It was necessary for the Drafting Committee to bring together these different groups into one nation-building process by ensuring that the fear of majoritarianism was diluted by recognizing and protecting the elements of plurality and diversity through state institutions. The Constituent Assembly after elaborate debates concluded that the state must equally protect all religions and accommodate the various religious and cultural diversities. Similarly, it was

recognized that there could not be one official state religion nor strict separation of state from religion. The Preamble to the Indian Constitution therefore recognizes India as a sovereign country with a socialist, secular, democratic and republican polity. The goal of secularism was introduced by a Constitutional amendment in 1976. Secularism has been recognized as a basic and integral part of the Constitution by the Indian Supreme Court in the S. R. Bommai[5] case and is deemed to be beyond the scope of any amendment. Even though the word secularism was not specifically included in the originally drafted Constitution, but the goals of secularism were comprehensively included in the Constitution as part of individual rights and freedoms. Article 14 prohibits the state from denying 'to any person equality before the law or the equal protection of the laws' and Articles 15 and 16 prohibit the state from making any discrimination, including employment with the state, against any citizen on the grounds of religion or sex. Articles 25 to 28 lay down the scope and extent of the right to freedom of religion in India. Article 25 secures to all persons, irrespective of their nationality, the right to freely profess, practise and propagate religion, but subject to public order, morality and health, and to other fundamental rights. Every religious denomination has been given the right to establish, maintain and manage institutions for religious and charitable purposes.[6] Similarly, the Constitution guarantees every individual that neither one would be compelled to pay any tax for religious purposes nor any religious instructions would be imparted in any government-aided educational institutions.[7]

Thus, the model of secularism in India is uniquely different from the Western ideas of secularism. S. Radhakrishnan, former president of India, in his book *Recovery of Faith* had described the concept of Indian secularism as follows:

> When India is said to be a Secular State, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt religion. It does not mean that secularism itself becomes a positive religion or that the State assumes divine prerogatives .... We hold that not one religion should be given preferential status...This view of religious impartiality, or comprehension and forbearance, has a prophetic role to play within the National and International life.[8]

Mahatma Gandhi too, emphasizing the importance of religious tolerance and respect towards diversity, had stated that 'I do not expect India of my dreams to develop one religion, i.e. to be wholly Hindu or wholly Christian or wholly Mussalman, but I want it to wholly tolerant, with its religions working side-by-side with one another'.[9] The concept of secularism based on *sarvadharmasambhava* implies not just non-interference by the state but also equal treatment of all religions and equal support to all religions so that they can come to an equal level.

Freedom of Religion Vis-à-Vis Secularism in the Indian Constitution

The Indian perspective of 'secularism' has been identified within the universal values of religious acceptance, tolerance and mutual respect. Secularism has become a part of national identity that propagates the idea that India is more than a territorial identity, but rather it is a humanistic ideal that encompasses all the people living within her territory irrespective of their religious, linguistic or cultural differences. The ideal of secularism is a reflection of the composite Indian culture, and it includes all religious and cultural groups who are having an equal right to practice their faith and right to be instructed through their mother tongue.

The legal concept of 'secular' state in India does not imply strict separation of state from religion, but implies protection of all religions equally, not upholding any particular religion as state religion and maintaining an attitude of neutrality and impartiality towards all religions. The actual application of this unique concept of secularism can be seen in examples of government providing Haj subsidy, facilitating the

organization of religious festivals like Kumbh Mela, organizing religious pilgrimage to Kailash Mansarovar Yatra, etc. The core essence of secularism has been incorporated within the constitutional moral principles of liberty of belief, faith and worship, and in the rights provided under the freedom of religion.

Supreme Court, in several of its decisions, has attempted to define and describe the concept of 'secularism' as applicable in India. In the early case of Sardar Taheruddin Syedna Saheb v. State of Bombay[10] describing the secular nature of the Indian Constitution Ayyangar J. observed that

> Articles 25 and 26 embody the principles of religious toleration that has been the characteristic feature of Indian civilization from the start of history. The instances and periods when this feature was absent being merely temporary aberrations. Besides, they serve to emphasize the secular nature of the Indian democracy which the founding fathers considered to be the very basis of the Constitution.

In the case of Kesavananda Bharati v. State of Kerala,[11] secularism was recognized as part of the basic structure of the Constitution. This was explained in Ahmedabad St. Xaviers College Society v. State of Gujarat[12] wherein it was stated that '[s]ecularism in the context of our Constitution means only an attitude of live and let live developing into the attitude of live and help live'. The modern Indian concept of secularism was further clarified in Ziyauddin Burhanuddin Bukhari v. Brijmohan Ram Das Mehra.[13]

In the leading case of S. R. Bommai v. Union of India,[14] the Supreme Court had observed that the term 'secularism' does not imply that the state should be hostile towards religions, but rather it should act with neutrality in its treatment towards all religions. In the words of Ahmadi J., secularism is based on the 'principles of accommodation and tolerance'. Every individual has the freedom to practice and profess his own religion, but he continues to be a secular citizen when he respects the rights of other individuals to practice their beliefs. In this context, the ideals of secularism would be violated if religion is used for political purposes and advocated by political parties for fulfilling their narrow political ends. Politics and religion should be set aside to ensure proper governance. It is the responsibility of the state to implement secularism through law or executive order. Similarly, it is the duty of court to ensure that no political party violates secular ideals.

In the subsequent case of Ismail Faruqui v. Union of India,[15] the Court attempted to provide an Indianized definition in contradistinction to the Western concept of secularism by referring to ancient Indian texts such as Yajur-Veda, Atharva-Veda and Rig-Veda and gave formal recognition to the concept of *sarvadharmasambhava*, largely based on the notions of tolerance. In the case of Manohar Joshi v. Natin Bhaurao Patil,[16] the Court held that the concepts such Hinduism and Hindutva were not necessarily anti-secular and emphasized on the notions of tolerance. It clarified that 'the words "Hinduism" or "Hindutva" are not necessarily to be understood and construed narrowly, confined only strict Hindu religious practices, unrelated to the culture and ethos of the people of India, depicting the way of life of the Indian people'.[17] In A. S. Narayana Deekshitulu v. State of A.P.,[18] Ramaswamy J. quoted from the ancient scriptures to explain the social and religious plurality existing in the Indian society:

> The word 'Dharma' or 'Hindu Dharma' denotes upholding, supporting, nourishing that which upholds, nourishes or supports the stability of the society, maintaining social order and general well-being and progress of mankind; whatever conduces to the fulfilment of these objects is Dharma. It is Hindu Dharma and ultimately 'Sarwa Dharma Sambhava'. Dharma is that which approved oneself or good consciousness or springs from due deliberation for one's own happiness and also for welfare of all beings free from fear, desire, disease, cherishing good feelings and sense of brotherhood, unity and friendship for integration of Bharat.

Thus, it can be concluded that the Indian judiciary has always recognized multiculturalism and legal pluralism as the fundamental basis for determination of the concept of secularism in India. The ancient

Indian philosophy of *sarvadharmasambhava* is the core basis of secularism which promotes the idea of religious tolerance and unity in diversity, and establishes a uniqueness to the Indian practices of secularism distinct from the Western political thought.

Essential Part of Religion Doctrine

The Indian Supreme Court has attempted to balance between the various competing rights—such as individual rights and autonomy, community-based religious beliefs and practices, rights of religious denominations to manage their religious affairs and the secular authority of the state to intervene on grounds of public order, health and morality—by developing the doctrine of essential part of religion within the contours of their power of judicial review.

The doctrine is based on the principle that the state may not intervene with the core beliefs upon which a religion is founded and shall not interfere with such religious practices which are deemed fundamental in the context of a religious belief. The primary factor which the judiciary would test in the identification of essential part of religion is to determine whether the nature of the religion will be adversely affected without compliance of that part or practice.

The judiciary in its role of protector and guarantor of fundamental rights in several of its decisions had applied this doctrine. In the landmark case of Sri Jagannath Ramanuj v. State of Orissa[19] (popularly referred to as the Shirur Mutt case), the Supreme Court had to look into the scope of state intervention and the right of religious denominations to manage their own affairs and administration. It was held that there could not be any unregulated and unrestricted right of entry in a public temple or other religious institution, for persons who are not connected with the spiritual functions thereof. It is a traditional custom universally observed not to allow access to any outsider to the particularly sacred parts of a temple as, for example, the place where the deity is located. There may be fixed hours of worship and rest for the idol when no disturbance by any member of the public may be allowed by the temple authorities. Government officials can make entry after providing due notice to the head of the institution and at such hours which would not interfere with the due observance of the rites and ceremonies in the institution.

Similarly, in Mohd. Hanif Quareshi v. State of Bihar,[20] a petition was filed challenging the legislations banning the slaughter of certain animals in the states of Bihar, Uttar Pradesh and Madhya Pradesh. The Court negated the argument as such legislations were in violation of the fundamental right of the Muslims to sacrifice the cow on Bakri Id and held that the sacrifice of cow on Bakri Id was not an essential practice of Islamic religion.

The Supreme Court attempted to balance the concept of secularism with individual freedom of religion in the case of Stanislaus v. State of M.P.,[21] and gave a limited interpretation to the right of religious conversion. In this case, a petition was filed challenging the validity of Madhya Pradesh Act which made it a penal offence to convert or attempt to convert by means of 'force, fraud or allurement'. The Court held that the right to propagate implies the right to spread the tenets of his religion, but does not extend to the right to convert, because each man has the freedom of 'conscience'. Similarly, freedom of conscience implies the freedom to choose and hold any faith of his choice, and not to be converted by means of force, fraud, inducement or allurement. Even if a religion promotes the idea of conversion and propagation and such acts can be interpreted as an integral part of their religious tenet, the state has the right and duty to intervene on the grounds of public order, morality or health if such conversion is not voluntary in nature. If every religion starts campaign for conversion, it will result into breach of public peace and then it will become an obligation of the government to intervene. Similarly, in Dr M. Ismail Faruqui v. Union of India,[22] it was held that mosque is not an essential part of the practice of the religion of Islam and *namaaz*[23] can be offered anywhere, even in open, by the followers of Islam. In Commissioner of Police v. Acharya Jagadiswarananda

Avadhuta,[24] it was held that the Tandava dance with display of swords was not an essential practice for the Ananda Margis. In the words of Supreme Court in the Shirur Mutt case,

> Some practices, though religious, may have sprung from merely superstitious beliefs and may, in that sense, be extraneous and unessential accretions to religion itself and unless such practices are found to constitute an essential and integral part of a religion, their claim for protection as essential practices may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are an essential and an integral part of the religion and no other.[25]

Thus, it is a part of judicial responsibility to ensure that the fundamental religious freedoms as provided in Articles 25 and 26 of the Constitution are properly in balance with the secular responsibilities of the state, and in fulfilment of that responsibility, the court can consider the doctrine, tenets and beliefs of a religion for the purpose of determining the essential or integral part of religion.

Gender Rights in Conflict with Community Religious Beliefs

In recent years, the growing recognition of gender rights has opened up the debate for recognition of gender issues in the larger contextual discussion of secularism. Across the spectrum of personal laws, it has been found that women in general suffer from inequality in terms of inheritance, divorce, etc. In addition, it was also seen that inequality based on gender prevails in access to different religious institutions. These gender-based inequalities which are prevailing amongst the different religious communities is contrary to the constitutional values of secularism and equality. The present challenge to freedom of religion vis-à-vis secularism is largely posed by the demand for gender-based equality which often gets throttled due to community-based pressure in the name of religious freedom and autonomy.

The right of Muslim women to receive maintenance after divorce was upheld by the judiciary in the infamous case of Md. Ahmed Khan v. Shah Bano Begum.[26] But the then government enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986, to define the scope of right of Muslim women to claim for maintenance. Even though the legislation gave a better protection to a divorced Muslim women, but it was much less than the judicial mandate. In 2017, in the landmark decision of Shayara Bano v. State of Uttar Pradesh,[27] the Supreme Court recognizing the unequal status of Muslim women in the context of instant divorce banned the practice of Triple Talaq. The decision of the Court was largely based on the application of the principle that all personal laws must be tested against touchstone of fundamental rights and the practice of Triple Talaq was contrary to the principles of equality and violative of constitutional morality. The Supreme Court being the upholder and protector of fundamental rights considered it necessary to intervene in the matrimonial practices of Muslim couples since the Triple Talaq was in violation of fundamental rights. The Court analysed the various religious texts and came to the conclusion that Triple Talaq was not part of essential religious practice and needs to be abolished as the act was derogatory to the dignity of women and violated the principles of gender equality. It was explicitly held that 'gender equality, gender equity and gender justice' are integral part of Article 14 of the Constitution and freedom of religion has to be balanced with individual rights. Even though a large section of the population had appreciated the judgement of the Court and the Central government placed a Bill before the Parliament to criminalize Triple Talaq, but many of the political parties have opposed imposition of punishment to the offending Muslim male.

Similarly, the recent judgement relating to the opening up of the Sabarimala temple to female devotees have given rise to law and order crisis in the state of Kerala. Recognizing the largely prevailing that Lord Ayyapaa was a celibate, women within the age group of 7–60 years have been prohibited from entering into the temple premises. By virtue of Rule 3(b) of the Kerala Hindu Places of Public Worship Rules (Authorization of Entry) Act, 1965 (Act), women of menstruating age were not allowed to enter the temple

by custom. Young Lawyer's Association challenged the provision on several grounds, including whether a biological function could be a ground of discrimination against women in the case of Indian Young Lawyers Association v. The State of Kerala.[28] The majority opinion held that the exclusionary practice of denying entry to women of menstruating age was per se in violation of Article 15(1) of the Constitution as it amounted to discrimination on the basis of sex, as the physiological feature of menstruation is exclusive to females alone. It violated the rights of Hindu women to enter Hindu temples which have been dedicated to the public. The public character of the temple gave birth to the right of all the devotees to enter it for the purpose of *darshan* or worship, and this universal right to entry is not a permissive right which is dependent upon the temple authorities. It was further held that the exclusion of women from the worship of Lord Ayappa was not an essential practice, hence such practice cannot be upheld in the name of religious freedom. Amongst the members of a religious community there should be intra-faith parity.

The Indian Constitution has always been deemed to be a living constitution and the rights and freedom of the citizens have to be determined based on the changing needs of the society. In this context, the transformative role of the Constitution needs to be imbibed with changing times. It was argued by Chandrachud J. that the discourse relating to 'essential religious practices' must be made within the peripheral limits of constitutional values such as dignity and freedom. The several arguments made against the entry of women into the temple was nothing but attempts to continue the subjugation of women through patriarchy norms. The arguments based on impurity of menstruating women leads to stigmatization of women as weak and lesser human beings, and are tradition processes to shackle women and deny them equality of status. 'Discrimination within religion both reinforces and is reinforced by, discrimination in broader social life.' The future course of action for constitutional courts is 'not to ask whether a practice is "essential" but to ask whether the impugned practice is socially exclusionary and derogatory to individual dignity'.

Thus, the concept of secularism will be deemed to be a sham if the rights of women are denied in the name of religious practices. The judiciary has interpreted the Indian Constitution as a tool for social transformation wherein every individual has the freedom and right to live a life of dignity and equality. It is necessary that the concept of secularism and freedom of religious practices include within its fold the equal rights of women within the personal laws and equality of treatment intra-faith. The state in its effort to maintain the secular ethos must overcome patriarchal norms and gender-based taboos.

Uniform Civil Code

At present, a growing demand is being made to create a uniform civil code (UCC) whereby all the multifarious religious norms can be combined and uniform religious code of practice can be established. The Constitution has mandated for the introduction of UCC under Article 44 in the Chapter on Directive Principles of State Policy. In the case of Sarla Mudgal v. Union of India,[29] the Supreme Court had also advocated for the inclusion of UCC as part of secularism doctrine. The present demand for implementation of UCC is being made from the perspective of achieving gender equality by incorporating the 'best traditions and harmonizing them with the modern times'.[30] But a realistic assessment of the Indian tradition would indicate that any form of uniformity among the various religious is difficulty to achieve, keeping in view the existing plurality in society. Amongst the Hindus, there are multiplicity of laws, customs and traditions which makes it very difficult to have one singular code of law which will be acceptable to all the Hindu community across the length and breadth of the country. Similarly, amongst the Muslim population, there are various differences in their applicable personal laws. The constitutional mandate of UCC can only be fulfilled if there is an effort made towards consensus building amongst the members of different communities so that in the name of uniformity, people are not coerced.[31] Attempts should be made to create

an environment of equality without compromising on the social, cultural, linguistic and religious plurality, until then UCC will remain a distant dream. The true application of secularism from the perspective of *sarvadharmasambhava* is to bring all members of different religious communities at an equal footing. Until a consensus on the norms and values of UCC is achieved, the Indian concept of multiculturalism, legal pluralism and secularism should be the guiding light so that every individual in every religion are equally treated with respect and dignity and the constitutional duty 'to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities' is properly implemented.[32]

Conclusion

In the case Mrs. Valsamma Paul v. Cochin University,[33] the Supreme Court aptly stated that

> [P]luralism is the keynote of Indian culture and religious tolerance is the bedrock of Indian secularism. It is based on the belief that all religions are equally good and efficacious G pathways to perfection or God-realization. It stands for a complex interpretive process in which there is a transcendence of religion and yet there is a unification of multiple religions. It is a bridge between religions in a multi-religious society to cross over the barriers of their diversity. Secularism is the basic feature of the Constitution as a guiding principle of state policy and action. Secularism in the positive sense is the cornerstone of an egalitarian and forward-looking society which our Constitution endeavours to establish. It is the only possible basis of a uniform and durable national identity in a multi-religious and socially disintegrated society. It is a fruitful means for conflict-resolution and harmonious and peaceful living. It provides a sense of security to the followers of all religions and ensures full civil liberties, constitutional rights and equal opportunities.[34]

It is the mandate of the Constitution that the secular character of the Indian nation must be protected and all attempts should be made to strike a balance between the rights of the individuals and the duty and commitment of the state to establish an egalitarian social order by upholding the principles of equality and non-discrimination. But it is equally to protect the dignity and worth of women and any social or religious practice which is being practiced or perpetuated in the name of religious practices and customs, then the freedom of religion should be deemed to be subservient to fundamental freedoms and human rights of women.

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Notes

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4. 80 U.S. 679 (1871).
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16. AIR 1996 SC 796.
17. *Id.*
18. AIR 1996 SC 1765.
19. AIR 1954 SC 400.
20. AIR 1958 SC 731.
21. AIR 1977 SC 908.
22. AIR 1995 SC 605.
23. The ritual form of prayer as prescribed by Islamic religion for its followers.
24. AIR 1984 SC 512.
25. AIR 1954 SC 400.
26. (1985) 2 SCC 556.
27. (2017) 9 SCC 1.
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29. (1995) 3 SCC 635.
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31. M.P. SINGH, *On Uniform Civil Code, Legal Pluralism and the Constitution of India*, Special Editorial Note, JILS, Vol. V (Monsoon).
32. Article 51A of the Indian Constitution.
33. AIR 1996 SC 1011.
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Jainism in Danger? Temple entry and the rhetoric of religion and reform in post-colonial India

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Article contents

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Abstract

A bitter debate broke out in the Digambar Jain community in the middle of the twentieth century following the passage of the Bombay Harijan Temple Entry Act in 1947, which continued until well after the promulgation of the Untouchability (Offences) Act 1955. These laws included Jains in the definition of 'Hindu', and thus threw open the doors of Jain temples to formerly Untouchable castes. In the eyes of its Jain opponents, this was a frontal and terrible assault on the integrity and sanctity of the Jain *dharma*. Those who called themselves reformists, on the other hand, insisted on the closeness between Jainism and Hinduism. Temple entry laws and the public debates over caste became occasions for the Jains not only to examine their distance—or closeness—to Hinduism, but also the relationship between their community and the state, which came to be imagined as predominantly Hindu. This article, by focusing on the Jains and this forgotten episode, hopes to illuminate the civilizational categories underlying state practices and the fraught relationship between nationalism and minorities.

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Footnotes

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References

1 The Jains are divided into two principal sects: Shvetambars (white clad) whose mendicants wear white robes, and Digambars (sky clad), whose male mendicants, insisting on the prerequisite of nudity to ascetic life, go naked.

2 I have used the term 'Harijan' out of deference to the title of the legislation and when referring to the debates within the Jain community that employed this term alone. Otherwise, 'formerly Untouchable groups' has been used. Similarly, Bombay has been preferred over Mumbai to correctly reflect the usage in the period covered here.

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6 Kaviraj, Sudipta, 'The Imaginary Institution of India', in Subaltern Studies VII: Writings on South Asian History and Society, (eds) Chatterjee, Partha and Pandey, Gyanendra (New Delhi: Oxford University Press, 1992), pp. 22–33 Google Scholar .

7 Agnes, *Law and Gender Inequality*, especially pp. 18–26.

8 Custom came to be legally defined as a rule that was followed by a particular family, tribe, caste, sect, or group, which from long practice had obtained the force of law. Cohn, 'Anthropological Notes on Disputes and Law in India', p. 618.

9 Kenneth W. Jones, 'Religious Identity and the Indian Census', in Barrier (ed.), *The Census in British India*, p. 79.

10 The Privy Council ruled in the widow's favour in *Sheo Singh Rai v. Dakho* and *Bhagvandas Tejmal v. Rajmal*, cited in *Parshotam v. Venichand*, *All India Reporter* 1921, pp. 148–150.

11 *Prem Sagar v. Ram Gopal*, *All India Reporter* 1929, pp. 814–815.

12 The courts held that the rules of inheritance and succession laid out in these texts were obsolete and 'relate to a condition of Jain society when the widow was considered as a more preferential heir than the son, and cannot have any binding force at the present time'. *Bhikubai Chunilal Ambaidas v. Manilal Bhagchand Raychand*, *All India Reporter* 1930, pp. 517–527.

13 Cohn, 'Anthropological Notes on Disputes and Law in India', pp. 620–622.

14 *Gettappa v. Erramma*, (1926) 51 MLJ 757.

15 *Hirachand Gangji v. Rowji Sojpal*, (1939) 41 BOMLR 760.

16 Derrett, D. M., Religion, Law and the State in India (London: Oxford University Press, 1968), pp. 438–440 Google Scholar .

17 Article 25, dealing with 'Freedom of conscience and free profession, practice and propagation of religion', also empowered the state to enact laws for 'providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus'. Its Explanation II defined Hindus thus: 'In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jains or Buddhist religion, and the reference to the Hindu religious institutions shall be construed accordingly.'

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20 *Jain Mitra* began publication in 1900. Premi, *'Parichay'*, pp. 152–153.

21 Mukhtar started as the editor of *Jain Gazette* (1914–18), edited *Jain Hiteshi* after Nathuram Premi's demise, and launched *Anekant* in 1929. It was published from Saharsawa in Saharanpur, western Uttar Pradesh, Mukhtar's home, before being moved to Delhi in the mid-1950s.

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27 Bakliwal, '*Bharatiya Jain Siddhanta Prakashini Sanstha Kashi ki Dwivarshik* Report', p. 3.

28 Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947* (New York: Cambridge University Press, 2014), p. 123.

29 *Mt. Jaiwanti v. Mt. Anandi Devi*, AIR 1938 All 62. J. Collister noted that the plaintiffs had submitted a copy of C. R. Jain's *The Jaina Law* but that the court had declined to consider it.

30 According to Sangave, the campaign bore fruit, as reflected in the 1931 and 1941 censuses, although the picture of overall decline remained. *Jaina Community: A Social Survey* (Bombay: Popular Book Depot, 1959), p. 2. In fact, to this day such campaigns are resurrected before every census. See also P. Flugel, 'Demographic Trends in Jaina Monasticism', in *Studies in Jaina History and Culture: Disputes and Dialogues*, (ed.) Peter Flugel (London and New York: Routledge, 2008; reprint), p. 313.

31 Dundas, *The Jains*, p. 5.

32 Mukhtar, , *'Jainiyon ka Atyachaar'*, *Anekant*, vol. 1, nos. 8–9, 1929, pp. 433–439 Google Scholar .

33 Subadhra Devi, *'Adhunik Jain Samaj ki Samajik Paristhiti'*, *Anekant*, vol. 1, nos. 8–9, 1929, pp. 463–470. *Jain Hiteshi* proposed a number of reforms, including the relaxation of caste and *gotra* barriers in marriage as well as the prohibition on polygamy and child marriage. *'Jain Jansankhya ke Rhas ka prashana'*, *Jain Hiteshi*, vol. 11, no. 3, 1914, pp. 139–142.

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37 *Moti Ram And Ors. v. Manday Lal* on 19 July 1912; 16 Ind Cas 356.

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48 P. Chatterjee, 'Secularism and Tolerance', in *Secularism and Its Critics*, (ed.) Rajeev Bhargava (New Delhi: Oxford University Press, 1998), pp. 351–353.

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50 Proceedings of the Central Legislative Assembly, January–June 1938, *Indian Annual Register*, Vol. 1 (1938), p. 87. One may add here that Marwaris can be both Jains and Vaishnav Hindus and that there is a remarkable similarity in their social worlds, even if they adhere to different faiths. Bajoria was also very active in opposing the reforms in Hindu law. See E. Newbigin, *The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community* (Cambridge: Cambridge University Press, 2013), p. 146.

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67 Diwakar, *Charitra Chakravarti*, pp. 284–285. All further references to Shantisagar's fast and political meetings are from Diwakar, *Charitra Chakravarti*, pp. 282–303, unless mentioned otherwise.

68 Makarand Mehta, 'The Dalit Temple Entry Movements in Maharashtra and Gujarat, 1930–1948', in *The Other Gujarat*, (ed.) Takashi Shinoda (Mumbai: Popular Prakashan, 2002), pp. 1–20.

69 'Inclusion of Jains among Hindus', *The Times of India*, 20 August 1949, p. 5. Diwakar's organization appears not to have been mass-based, but in the main a forum for writing letters and sending petitions to the government on issues and concerns considered important to the Jains.

70 Diwakar, *Charitra Chakravarti*, p. 288.

71 'Inclusion of Jains among Hindus', *The Times of India*, p. 5.

72 Diwakar, *Charitra Chakravarti*, p. 289.

73 'Harijan Entry Act and Jain Temples', *The Times of India*, 8 August 1949, p. 9.

74 'Harijans to be Admitted', *The Times of India*, 2 February 1954, p. 1.

75 'Jain temples in Gwalior Closed', *The Times of India*, 11 October 1954, p. 5.

76 See Rodney W. Jones, *Urban Politics in India: Area, Power, and Policy in a Penetrated System* (Berkeley: University of California Press, 1974), pp. 50–57 and p. 87. The first two chief ministers of Madhya Bharat following the victory of the Congress in the first general elections were Jains, namely, Mishrilal Gangwal and Takhtmal Jain.

77 'Entry into Jain Temples: Indore Harijans' Move', *The Times of India*, 12 July 1954, p. 9.

78 'No Entry for Harijans', *The Times of India*, 21 September 1955, p. 9.

79 'Jain Women Sit outside Temples', *The Times of India*, 26 September 1955, p. 3.

80 Diwakar, *Charitra Chakravarti*, p. 290.

81 'Harijan Temple Entry Challenged', *The Times of India*, 24 July 1951, p. 7.

82 Ibid.

83 Diwakar, *Charitra Chakravarti*, p. 297.

84 *Bhaichand Tarachand And Ors. v. State Of Bombay And Anr*, AIR 1952 Bom 233.

85 Ibid.

86 *State v. Puranchand*, AIR 1958 MP 352. The trial court did not record any explicit finding regarding caste Hindus accessing this temple.

87 Diwakar, *Charitra Chakravarti*, p. 292.

88 Prof Mahendra Kumar Nyaycharya, *Jain Mandir aur Harijan* (Delhi: Bharatvarshiya Digambar Jain Parishad, n.d.), p. 17.

89 This distinction is found in the writings of the medieval South Indian Digambar *acharya* Somadeva Suri, author of the authoritative *Shravakachara, Upasakadhyayana*. *Shravakachara* is the corpus of prescriptive literature for Jain householders.

90 Phoolchandra Shastri, *Varna, Jati aur Dharma* (Delhi: Bharatiya Jnanpeeth, 1989; 2nd edn). See also his series 'Shudra Mukti', *Gnanodaya*, no. 4, October 1949, pp. 267–270, and *Gnanodaya*, no. 5, November 1949, pp. 367–373.

91 Banshidhar, *'Jain Mandir aur Harijan'*, pp. 29–32.

92 'Editorial', *Gnanodaya*, no. 1, July 1949, p. 76. *Gnanodaya* regularly carried news of the pro-Act camp, reporting, for example, that pamphlets were circulated against the *hartal* called on the first anniversary of Acharya's fast.

93 An editorial in the magazine *Jain Sandesh* headlined *'ghar ki phoot'* (a house divided) latched onto this communication as evidence of the reformist desire to send those opposed to the Act to jail. See rebuttal and original letter in *Gnanodaya*, no. 3, September 1949, pp. 221–222.

94 Narendra, *Harijan Mandir Pravesh*, p. 34.

95 Ibid., pp. 33–37.

96 Ibid., p. 18.

97 'Entry of Harijans into Temples', *The Times of India*, 27 December 1950, p. 7, and 'Entry of Harijans into Jain Temples', *The Times of India*, 25 December 1950, p. 9.

98 Parmeshthi Das, *'Bharatiya Digambar Jain parishad ke manch par ghatit ghatnayein jinhe aaj bhi bhool nahi saka!'*, *Veer (Swarna jayanti visheshank)*, pp. 99–100.

99 'Open temples to Harijans', *The Times of India*, 5 April 1956, p. 5

100 V. D. Savarkar, *Hindutva* (Mumbai: Swatantryaveer Savarkar Rashtriya Smarak Publications Division, 1999; 7th edn), p. 28; for a discussion on the 'essentials of Hindutva', see pp. 64–72.

101 See P. K. Datta, '"Dying Hindus": Production of Hindu Communal Common Sense in Early Twentieth Century Bengal', *Economic and Political Weekly*, vol. 28, no. 25, June 1993, pp. 1305–1319.

102 See K. W. Jones, 'The Arya Samaj in British India, 1875–1947', in *Religion in Modern India*, (ed.) Robert D. Baird (New Delhi: Manohar, 1981); and also J. T. F. Jordens, *Swami Dayanand Saraswati: Essays on his Life and Ideas* (New Delhi: Oxford University Press, 1960).

103 V. D. Savarkar, *'Jain Hindu hi hain, lekin kis arth main?'*, *Gnanodaya*, no. 4, October 1949, pp. 290–300.

104 Pandit Sukhlal Sanghavi, *'Ek mahatvapoorna patra: Jain Hindu samaj ka ang hai'*, *Gnanodaya*, no. 4, October 1949, p. 302.

105 Banshidhar, *'Bhartiya sanskriti ke sambandh mai Hindu shabd ka vyapak artha'*, in *Banshidhar Abhinandnan Granth*, p. 33. This was of course a wholesale borrowing from Savarkar.

106 *Gnanodaya*, no. 5, November 1949, pp. 396–399.

107 *Gnanodaya*, no. 12, June 1950, p. 891.

108 Banshidhar, 'Jain Mandir aur Harijan', pp. 29–32.

109 Vidyarthi, *'Harijan mandir pravesh'*, pp. 20–21.

110 *Gnanodaya*, no. 5, November 1949, p. 397.

111 Vidyarthi, *'Harijan mandir pravesh'*, pp. 39–40.

112 Ibid., p. 18.

113 Fuller, *The Renewal of the Priesthood*, p. 162.

114 Varni, *'Porwar Sabha mai vidhva vivaha ka prastav'*, in *Meri Jeevan Gatha*, Vol. 1, pp. 261–266.

115 Werner Menski, 'Jaina Law as an Unofficial Legal System', in *Disputes and Dialogues: Studies in Jaina History and Culture*, (ed.) Peter Flugel (London: Routledge, 2006), p. 428; Cort, 'Jain Identity and Public Sphere in Nineteenth-Century India', p. 112.

116 For instance, the pandits endeavoured to provide a Shastric foundation to Harijan temple entry, and before that to Dasa worship rights. They also regularly published critiques of texts which they deemed to be false, authored by allegedly ignorant and self-interested *bhattaraks* and *munis*. Parmeshthi Das Jain, *'Jain Samaj ke beesvin sadi ke pramukh andolan'*, in *Nathuram Premi Abhinandan Granth* (Tikamgarh: Premi Abhinandan Granth Samiti, 1946), p. 586.

117 Wittrock has argued that modernity is characterized not by a conjunction of industrial and democratic revolutions, but by a set of 'promissory notes', which in turn shape the institutions we may deem modern. The singular feature of the modern age is the globalization of these promissory notes such that they

provide the 'general reference points' for projects that seek their realization, as well the point of departure for those who oppose 'emblematic modern institutions'. Wittrock warns, however, that just because those speaking for tradition express and formulate their opposition with reference to the idea of modernity does not imply an abandonment of their 'ontological and cosmological assumptions, much less their traditional institutions'. Björn Wittrock, 'Modernity: One, None, or Many? European Origins and Modernity as a Global Condition', *Daedalus*, vol. 129, no. 1, 'Multiple Modernities', Winter, 2000, pp. 31–60.

118 Dundas, *The Jains*, p. 251. Following Dundas, Cort has also argued for the centrality of reform in Jain tradition: see J. E. Cort, 'Defining Jainism: Reform in the Jain Tradition', in *Jain Doctrine and Practice: Academic Perspectives*, (ed.) Joseph T. O'Connell (Toronto: University of Toronto Press, Centre for South Asian Studies, 2000), pp. 165–191.

119 It was not just Shantisagar who was exercised by the temple entry laws—for many academics and commentators too, these laws posed a question mark over the nature and practice of Indian secularism. D. E. Smith, for example, has argued that the state's reformism has resulted in a weakened internal autonomy of religions. D. E. Smith, 'India as a Secular State', in *Secularism and Its Critics*, (ed.) Bhargava, pp. 177–233.

120 According to the traditionalists, Gandhi's actions were guided by politics rather than *dharma*. Gandhi's *ahimsa*, directed as it was towards other men, rather than all sentient beings (tiny and microbial as enjoined in Jainism) was limited, if not false. Quoted in Vidyarthi, '*Harijan mandir pravesh*', pp. 62–63.

121 Indralal Shastri cited in ibid., p. 72.

122 Manisha Sethi, 'Minority Claims and Majoritarian Anxieties: The Jain Question', *Economic and Political Weekly*, vol. 51, no. 49, 2016, pp. 55–63.

123 Letter dated 9 December 1947. Microfilm, Reel Number 59, K-138, Nehru Memorial Museum and Library.

124 Galanter, Marc, 'Hinduism, Secularism, and the Indian Judiciary', Philosophy East and West, vol. 21, no. 4, October 1971, p. 477 CrossRef Google Scholar .

125 A. Giddens, 'Living in a Post-Traditional Society', in *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order*, (eds) Ulrich Beck, Anthony Giddens and Scott Lash (Cambridge: Polity Press, 1994), pp. 56–109, especially p. 66. According to Giddens, tradition is merely repetition, even neurosis, given to 'formulaic versions of truth' which are fundamentally opposed to the 'rational enquiry' typical of societies that have been de-traditionalized. The reformist attack on their opponents seemed to approximate precisely such a critique even as they set themselves up as the true custodians of tradition.

126 Vidyarthi, *Harijan Mandir Pravesh*, pp. 5 and 17.

127 For a discussion on this point, see Subramanian, Narendra, Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India (California: Stanford University Press, 2014), p. 42 Google Scholar .

128 Sharafi has shown how Parsi legislators resisted the attempt to include Parsis within the Hindu Religious Endowments Act, fearing that as India moved towards independence, their rights as a minority would be imperilled under a majoritarian polity. Sharafi, *Law and Identity in Colonial South Asia*, pp. 95–96.

129 Agnes, *Law and Gender Inequality*, p. 25; Galanter, 'Hinduism, Secularism, and the Indian Judiciary', p. 471.

130 Menski, 'Jaina Law as an Unofficial Legal System', p. 431.

131 To be sure, the magazine *Gnanodaya*, in the issue that carried Savarkar's article, also issued warnings to its readers about the 'communal' designs of the Hindu Mahasabha, which, according to the editors, only served the interests of its Brahman leaders under the rhetoric of Hindu unity. '*Sampadakiya: Jain banaam Hindu*', *Gnanodaya*, no. 4, October 1949, pp. 307–311.

132 See Tanweer Fazal, 'Scheduled Castes, Reservations and Religion: Revisiting a Juridical Debate', *Contributions to Indian Sociology* (n.s.), vol. 51, no. 1, 2017, pp. 1–24.

133 In 1954, the government of Madhya Pradesh appointed the Niyogi Commission to investigate the role of foreign missionaries in the state. The Commission muddied the distinction between consent and force, and laid the framework for the way in which conversions have been viewed thereafter. In 1977, the

Supreme Court, in upholding the constitutionality of the anti-conversion laws of the states of Orissa and Madhya Pradesh, ruled that the right to propagate under Article 25 could not be understood as the right to convert: *Rev. Stainislaus v. State Of Madhya Pradesh & Ors* 1977, 1 SCC 677. The judgment paved the way for the enactment of a string of state laws restricting conversions. Jenkins, Laura Dudley, 'Legal Limits on Religious Conversions in India', Law and Contemporary Problems, vol. 71, no. 2, 2008, pp. 109–128 Google Scholar .

134 Neerja Gopal Jayal, 'Faith-based Citizenship: The Dangerous Path that India is Choosing', *The India Forum*, published online on 1 November 2019, available at https://www.theindiaforum.in/sites/default/files/pdf/2019/11/01/faith-based-citizenship.pdf, [accessed 20 October 2020].

135 Galanter, 'Temple-Entry and the Untouchability (Offences) Act, 1955', *Journal of the Indian Law Institute*, vol. 6, nos. 2–3, April–September 1964, pp. 185–195.

136 Ibid., p. 194. Emphasis in original.

137 *Pannalal v. Sitabai*, AIR 1953 Nag 70. The court was examining whether the Hindu Women's Rights to Property Act applied to Jains. On the judicial response to these questions, see Sethi, 'Minority Claims and Majoritarian Anxieties'.

138 *State Of Rajasthan And Ors. v. Vijay Shanti Educational Trust*, RLW 2003 (4) Raj 2568.

139 *Bal Patil v. the Union of India*, 2005 (6), SSC 690.

140 Turner, Victor, The Ritual Process: Structure and Anti-structure (New York: Cornell University Press, 1991; 7th edn), p. 95 Google Scholar . Liminality, according to Turner, is necessarily characterized by ambiguity and its fraught relationship with systems of classification.

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Research Paper

Diversity and Equality Management System and Perceived Organisational Performance: A Mediating Role of Organisational Citizenship Behaviour

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Abstract

A structured diversity and equality management system (DEMS) contributes to the smooth and peaceful functioning of organisations. The review of literature shows that the impact of DEMS on organisational performance and growth is found to be positive in Western countries. However, there appears to be a lack of research on the role of DEMS in Indian organisations, especially in the IT industry. This study makes an attempt to assess the impact of DEMS on perceived organisational performance and organisational citizenship behaviour (OCB) and empirically validate the mediating role of OCB in Indian IT firms. This study used descriptive research design, and the nature of research questions mandated the primary cross-sectional data collection method. The online questionnaire was e-mailed to human resource managers as well as executives of IT firms in India. Responses of 220 respondents were analysed to test the hypotheses of the research using CB-SEM. The results confirm a mediating role of OCB on the linkage between DEMS and perceived organisational performance. Findings suggest that organisations should promote OCB as it contributes significantly in establishing a positive, committed and conflict-free work environment.

Keywords

Diversity and equality management system, organisational citizenship behaviour, perceived organisational performance, diversity, equality

Introduction

Modern societies have become increasingly heterogeneous and diverse (Barak, 2016). The legal, social and economic changes in the structure of workforce and the organisation demand implementation of

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policies that address concerns of diversity, equality and inclusion (Shen et al., 2009). Implementation of such policies passes positive signals to stakeholders who value diversity and inclusion and bring social justice in consonance with law (Ali & Konrad, 2017). Even the International Labour Organisation in 2006 proposed 'diversity and equality' as one of the key characteristics of high-performing workplaces (Armstrong et al., 2010). Available research indicates that the mere presence of diversity without participation in decision-making does not add value to the organisation (Cox, 2001). Hence, organisations have been facilitating diversity and encouraging equality through involvement and assignment of responsibilities (Dickens, 1999; Kumra & Manfredi, 2012). Such practices, with proper implementation and management, may create a variety of creative ideas, perspectives and enriched problem-solving skills for better performance (Jackson et al., 2003; Thomas & Ely, 1996).

India, being the second most populous country and the largest democracy in the world (Thite, 2011), has to address a variety of diversity issues, related to gender, age, education, religion, caste, social class (e.g. Scheduled Castes, Scheduled Tribes and Other Backward classes), language, regional background, ethnicity, disability, sexual preference, values (Kirton & Greene, 2015), faith, opinion and food (Kundu, 2004; Venkata Ratnam & Chandra, 1996). To guarantee equal opportunity, the Constitution of India provides right to equality to all and forbids discrimination on grounds of religion, sex, caste or place of birth (Kundu, 2004). But researchers of diversity argue that these provisions are porous in nature and religious, cultural and economic inequalities (caste, gender, creed etc.) prevailing in the society make diversity management a complex human resource (HR) issue (Cooke & Saini, 2010) in India.

Managing diversity by providing equal opportunities can create a peaceful and productive society and, thus, it is important to understand that differences exist and these differences, if managed efficiently, can act as organisational assets (Bartz et al., 1990; Gagnon & Cornelius, 2002). To accommodate the differences among employees with the formal structure of the workplace, organisations have to intervene voluntarily by implementing diversity and equality management system (DEMS)–related policies and measures for maximising employee efficiency (Cooke & Saini, 2010).

DEMS can fully capitalise the opportunities offered by diversity, which goes beyond affirmative action (AA) and equal employment opportunities (EEO)–based programmes (Richard et al., 2013). Without adopting an effective DEMS, diverse workforce will not produce beneficial results as diversity without equality creates conflict (Joshi et al., 2011). An appropriate alignment between DEMS at various levels of management, having diverse set of employees, conveys a strong message to all stakeholders and motivates employees to utilise opportunities. DEMS also creates a hurdle-free pathway in establishing a positive climate for diversity wherein every employee gets opportunities to voice their ideas and suggestions for the overall growth of the organisation. The key objectives of DEMS include identifying critical issues, assigning responsibilities to everyone, communicating with those involved, providing equal treatment and finally evaluating the benefits gained from the decision taken (Gilbert et al., 1999).

In developed countries, organisations adopt and follow EEO or AA policies to provide fair treatment and equal provisions to all employees in the workplace. Contrary to this, in India, despite awareness of individual rights, there is a lack of strict and effective policies, which leads to conflict and disturbance in organisations. The available literature on DEMS indicates that there is empirical validation of the positive impact of DEMS on organisational performance in Western countries such as the United States, Canada, Australia and Ireland (Armstrong et al., 2010; Richard et al., 2013), which may not represent the situation of India (Peretz et al., 2015), where values related to religion, caste, culture and region are significantly diverse (Magoshi & Chang, 2009). The diverse societal structure (Budhwar, 2009; Sowell, 2002) and expanded economy (Budhwar & Varma, 2010) offers a strong argument to study DEMS in the Indian

context. Hence, this study makes an attempt to examine the role of DEMS in increasing the efficiency of employees and the organisation as a whole. Based on previous research (Kundu, 2004), societal categorisation (Shenoy, 2013) and efforts of Indian firms (Mercer, 2012), major dimensions such as gender, caste, religion and disability have been chosen for the present study.

The IT industry is significant to the Indian economy (Gupta et al., 2015) and contributes substantially in elevating various socio-economic parameters (NASSCOM, 2013) through empowerment of diverse human capital in terms of age, gender, educational background, disability etc., merit-based recruitment process and equal employment opportunity to socially and economically backward groups (Upadhya, 2007). Scholars have noted that merit-driven empowerment has resulted in social homogeneity among the workforce but overlooks such social mechanisms that bring about merit to begin with (D'Costa, 2003; Fuller & Narasimhan, 2006; Ilavarasan, 2007; Upadhya, 2007). The IT industry prioritises elimination of discrimination and encouragement of diversity by emphasising inclusivity through EEO policies (Donnelly, 2015; Patrick & Kumar, 2012). This provides a strong reason to study DEMS in the Indian IT sector (Cooke & Saini, 2010) in order to explore the reasons of its success, if any, and indicate directions for its implementation in other industries as well.

Konrad et al. (2016) have studied DEMS in the Canadian context and reports the positive impact of Canada's Employment Equity Act, 1986, on the creation of a smooth and healthy working condition for the career development of women, aboriginals, persons with disabilities and minorities. This article extends the work of Konrad et al. (2016) by investigating DEMS in an Indian context. Similarly, researchers (e.g. Ali & Konrad, 2017; Konrad et al., 2016) also advocate exploring relevant antecedents and consequences of DEMS. The review of literature indicates that the role of DEMS in Indian organisation and especially in the IT industry is unexplored. Likewise, there is limited or no research which studies the impact of DEMS on organisational citizenship behaviour (OCB) and examines the mediating role of OCB. This study, therefore, has the following objectives: (a) identifying the role of DEMS in IT firms, (b) proposing and empirically validating OCB and perceived organisational performance (POP) as the two outcomes of effective DEMS and (c) establishing the mediating role of OCB on the linkage of DEMS with POP.

Literature Review

Diversity and Equality Management System

DEMS is defined as a system of managing a diverse workforce by respecting their rights, providing equal opportunities at work and fair performance appraisal for the optimum use of resources by the organisation with an aim to achieve competitive edge by enlarging the talent pool (Cox, 1991; Cox & Blake, 1991; Yang & Konrad, 2011). It focuses not only on the hiring of a diverse set of talented people but also on motivating and retaining them through DEM-related staffing practices. DEMS tries to identify leadership skills in employees and provide opportunities to participate in key organisational decisions (Konrad et al., 2016) and lays the foundation for remediation of workplace inequality by motivating employers to assign responsibilities to all team members (Kalev et al., 2006).

Breaking the traditional notion of homogeneous teams, recent developments in diversity theories have emphasised the value of heterogeneous work groups. These modern approaches consider employees as strategic assets in organisations and focus on merging diversity values with the organisational mission and overall business strategy (Ely & Thomas, 2001). Mere integration of minorities is not the aim, rather

the intention is to provide opportunities to each and every employee to contribute their best (Metcalfe & Woodhams, 2008). Kochan et al. (2003) suggests that the negative effects of diversity on team's overall performance can be reduced by making employees a part of the decision-making process. Organisationally, DEMS has created a new identity by moving away from being associated with legal agreement and understood as AA and EEO to being a competitive resource for organisations. It focuses on both recruitment and enrichment of employees (Ali & Konrad, 2017).

Organisational Citizenship Behaviour

Organ (1997) stated OCB as 'individual behaviour that is discretionary, not directly or explicitly recognized by the formal reward system, and that in the aggregate promotes the effective functioning of the organization'. The human relations school forwards the argument that 'a happy worker is a productive worker'. Healthy relationship, trust and mutual commitment among employee and the organisation increase the probability of employees engaging in OCB (in-role or extra-role behaviour). Thus, favourable attitude expressed by the organisation motivates employees to reciprocate by contributing beyond their job requirement (Bourdage et al., 2012). This positive attitude and engagement of employees' influence job performance (Sundaray, 2011).

Perceived Organisational Performance

Kılınç and Ulusoy (2014, p. 26) define organisational performance as 'the total amount of quantitative and qualitative contribution of an individual, a group or an organization to a task which is used to find out what has been reached or achieved during the fulfilment of the target of that task'. Ford and Schellenberg (1982) define it in terms of goal attainment, organisation's ability to secure scarce resources and the behaviour of the participants of the organisation. These three perspectives together can contribute towards improving organisational performance. Organisations can enhance their performance by improving the quality and productivity, introducing creative ideas, encouraging innovation or even by minimising costs (Becker & Gerhart, 1996). While explaining the difference between organisational performance and organisational effectiveness, Richard et al. (2009, p. 720) state that 'organizational performance covers three specific areas of firm outcomes: financial performance, product market performance and shareholder return whereas organizational effectiveness captures both organizational performance and internal performance outcomes'.

Theoretical Framework

This study uses strategic human resource management (SHRM) theory, ability–motivation–opportunity (AMO) theory, and social exchange theory (SET) to interconnect DEMS, OCB and POP. The nomological network for this research has been provided in Table 1.

The AMO theory (Appelbaum et al., 2000) predicts individual performance by their ability to do the tasks they are assigned, their motivation for these tasks and the opportunity provided for the same. The AMO theory of performance supports the positive role of DEMS in improved organisational performance, which is a function of employee ability, motivation and opportunity. Similarly, the SHRM theory provides a strong foundation to the concept of DEMS believing that organisational strategy, which supports a diverse workforce, identifies their capabilities and provides them opportunities to grow can ultimately lead to enhanced organisation performance (Ali & Konrad, 2017).

Table 1. Nomological Model

Antecedents	Mediator	Outcomes
Diversity and equality management system (SHRM, SET and AMO)	Organisational citizenship behaviour (SHRM, SET and AMO)	Perceived organisational performance (AMO and SHRM)

Source: Author.

Note. AMO, ability–motivation–opportunity theory; SET, social exchange theory; SHRM, strategic human resource management theory.

The SET suggests that relationship partners evaluate the positive consequences (actual and anticipated rewards) as well as the negative consequences (actual and anticipated costs) of their relationships (Bagozzi, 1975). The actors involved in the exchange come into relationships when the benefits in being in the relationship exceed the costs in doing so (Blau, 1964). This theoretical lens provides a basis for employees to engage in OCB, which leads to a positive and incremental organisational performance.

Research Model and Hypotheses

The present study proposes OCB and POP as two outcomes of DEMS. Also, the model hypothesises OCB as a mediator between the effective DEMS (see Figure 1).

DEMS and Perceived Organisational Performance

Applying the AMO theory in the context of their study, Armstrong et al. (2010) argue that both team and organisational performance are dependent on a workforce that is highly competent, motivated and empowered with opportunities. Higher the effectiveness of management of diverse workforce (provision of training, development and involvement), the higher will be their contribution to the organisation

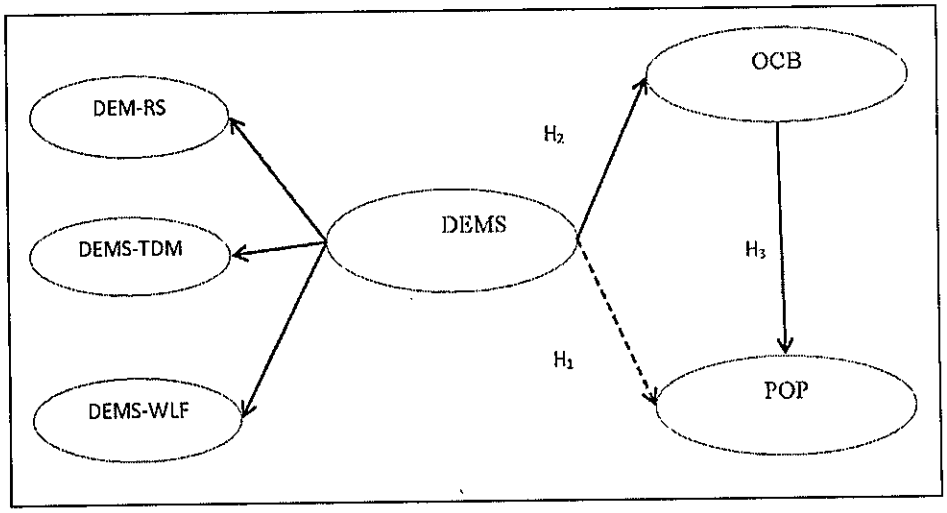


Figure 1. Mediation Model of OCB

Source: Author.

(Jayne & Dipboye, 2004). The concept of DEM is derived from SHRM theory and suggests that a capable and diverse workforce contributes significantly to firm performance. Through integrating DEM perspectives with SHRM theory, Ali and Konrad (2017) indicate that DEMS aligned with a diverse human capital base contributes in generating positive organisational performance.

An effective and structured DEMS aims to develop a mind-set within employees to value diversity and provide voice opportunities to the team members. It also focuses on enhancing the overall organisational performance by supporting the business strategy (Chow et al., 2008). Among the various objectives of DEM practices, researchers (Armstrong et al., 2010; Konrad et al., 2016; Mamman et al., 2012) have found that they create a positive diversity climate, develop an attitude of inclusiveness in decision-making, encourage innovation and creativity in organisation and have a positive impact on the organisation. Therefore, it can be hypothesised that

H_1: DEMS has a positive impact on perceived organisational performance.

DEMS and OCB

According to AMO theory, when a diverse set of employees receive fair treatment from the organisation they are working for, and get an opportunity to express their ideas, their level of job satisfaction and commitment towards the organisation increases. This satisfaction has a strong impact on job performance resulting in engagement in enhanced OCB (Schaufeli & Bakker, 2004). DEMS as a strategy aims to provide equal opportunities to the workforce for creating productive organisations. Referring to SET, Organ (1990) explains that employees might perform OCB as a response to fair treatment received from organisations that support equity and fairness, which in turn increases the chance of producing committed employees. In the same way, employees tend to support their organisation's diversity initiatives when they experience fair policies and procedures (Pfau & Kay, 2002). Perceived fairness or organisational justice strongly affects employee's attitudes and behaviours such as OCB (Noor et al., 2013). Hence, it is hypothesised that

H_2: DEMS has a positive impact on OCB.

OCB and Organisational Performance

Research indicates positive impact of OCB on the overall operating efficiency, customer satisfaction, quality of performance, team effectiveness (Podsakoff & MacKenzie, 1997) and task accomplishment through sharing of best practices amongst employees (Miao & Kim, 2009). Cropanzano and Mitchell (2005, p. 877), applying SET in the organisational context, conclude, 'individuals with a strong exchange orientation are more likely to return a good deed than those low in exchange orientation'. When employees consider themselves as a part of the organisation, they always work in a direction to make it healthy and conflict free (Witt, 1991). This kind of behaviour in employees helps in developing positive attitude, increasing the level of tolerance among fellow employees and enhancing team effectiveness. SHRM theory also supports the fact that committed and motivated employees empowered with fair HR practices can form a high-performance workforce (Takeuchi et al., 2009). Research shows that effective team functioning is considered as one of the most significant determining factors of organisational success that can be achieved through OCB (Coyle-Shapiro et al., 2004; Liden et al., 2008; Mahembe & Engelbrecht, 2014; Ross et al., 2008). Thus, it is hypothesised that

H_3: OCB has a positive impact on perceived organisational performance.

Mediating Role of OCB

Effective DEMS imparts OCB in the employees. OCB develops an organisation's ability to recruit, promote and retain the best and deserving people and also help in creating a positive environment in the organisation, leading to the enhancement of employee morale and sense of belongingness to a working group. This results in developing commitment, trust and loyalty among employees that may enhance organisational effectiveness and performance (Podsakoff & MacKenzie, 1997). Therefore, it is hypothesised that

H_4: OCB mediates the relationship between DEMS and perceived organisational performance.

Research Methodology

Sample and Data Collection Method

This study used a descriptive research design to address the identified research objectives. The nature of research mandated the primary cross-sectional data collection method. The IT industry was chosen to gather data as it is one of the biggest employers of diverse workforce in India. The list of more than 1,000 Indian IT firms included in the NASSCOM database served as a sampling frame for the study. These firms were approached to participate in this research, and 162 firms gave their consent for the participation. An online survey method was used to collect the data. The questionnaire was e-mailed to several HR managers as well as executives of IT firms. Out of which, 232 responses were received. However, 12 responses were dropped from the data set due to problem of missing values (more than 15 per cent) and suspicious response pattern. Therefore, the final sample size of this research study is 220. Respondent characteristics are provided in Table 2.

Table 2. Sample Characteristics

Particulars	Categories	*n*	%
Age group	25–35 years	86	39.1
	35–45 years	59	26.8
	45–55 years	36	16.4
	55 years and above	39	17.7
	Total	**220**	100.0
Gender	Male	128	58.2
	Female	92	41.8
	Total	**220**	100.0
Work experience	Less than 5 years	92	41.8
	5 to 10 years	77	35.0

(Table 2 Continued)

(Table 2 Continued)

Particulars	Categories	*n*	%
	More than 10 years	51	23.2
	Total	**220**	100.0
Organisational position	Manager	81	36.8
	Executive	139	63.2
	Total	**220**	100.0

Source: Author.

Measures

To measure the constructs, pre-existing multi-item measurement scales were adapted. Table 3 summarises the measurement items corresponding to each of the constructs used in this study. It also includes factor loadings of items, average variance extracted (AVE) and composite reliability of the constructs. The survey instrument used a five-point Likert scale of agreement (1 = strongly disagree, 5 = strongly agree) to measure the three constructs.

DEMS was operationalised as a second-order construct having three distinct dimensions: DEMS–recruitment and selection (RS), DEMS–training, development and monitoring (TDM) and DEMS–work–life flexibility (WLF). This study defines DEMS as a system of identifying, hiring, developing, managing and retaining a diverse set of workforces by providing them equal opportunities and flexibility to work, express and make decisions that may provide a competitive edge to the organisation. It was measured through a scale adapted from Konrad et al. (2016) and Armstrong et al. (2010). As the original scale of DEMS was developed in the European and US context, this study retained and adapted only those items which were found relevant in the Indian context and was validated by seven industry experts, including top management and senior HR managers. At the beginning of the questionnaire, the term 'diversity' was explained as one encompassing gender, caste, religion and disability. The final scale included 12 items to measure the constructs (see Table 3).

OCB was used as a mediating variable in this study. It is operationally defined as an employee's extra-role behaviour aimed at enhancing organisational effectiveness selflessly, without the expectation of getting recognised by the formal reward system of the organisation. For measuring OCB, scale items developed by Turnley et al. (2003) were adapted. The final measurement scale of OCB had three items (see Table 3).

For the purpose of this study, organisational performance is defined as the perception of employees towards the degree of productivity, growth and creativity achieved by the organisation with respect to its nearest competitor in the benchmarked years. The construct was measured using the six-item scale (see Table 3) adapted from Delaney and Huselid (1996).

Common Method Bias

As the responses were self-reported, tests for a common method bias were done using Harman's single factor test (Podsakoff & Organ, 1986) and the marker variable test (MacKenzie & Podsakoff, 2012). Herman's single test was conducted using principal component analysis by simultaneously loading all the items for the exploration of the factors. The analysis revealed five factors (more than one), with the

first factor accounting for 24.261 per cent (less than 50 per cent) of the total variance explained. The marker variable test was conducted by introducing theoretically unrelated variable (habit of taking ice-cream during lunch) into the research model. The marker variable failed to make a significant impact on OCB. Thus, both the tests confirm that there is no problem of common method bias.

Control Variables

In line with previous research (e.g. Newman et al., 2016), this study controlled the influence of demographic variables including gender (0 = male, 1 = female), work experience (<5 years = 1, 5–10 years = 2, and >10 years = 3), and employee's position in the organisation (manager = 1, executive = 2) on DEMS, OCB and POP. Organisation size and age were also included as control variables which may affect the core constructs of the study (Armstrong et al., 2010). Organisation size was measured as the total number of regular employees (Konrad et al., 2016). Age of the organisation was operationalised as the number of years of its establishment (Chakraborty & Chatterjee, 2020). Each of these control variables was treated in structural path analysis as a single latent variable.

Data Analysis and Results

Measurement Model

Data were analysed using SPSS and AMOS 22, and the reliability and validity of the scale items were checked using confirmatory factor analysis (CFA). Two competing models were used to operationalise DEMS. In the first model, DEMS was operationalised as the first-order construct, whereas the same was conceptualised as the second order in the second model. The goodness of fits and tests for reliability and validity of items of both the models are provided in Tables 3–7.

Measurement and structural models with cut-off values above 0.90 for CFI, TLI and IFI and below 0.08 for RMSEA (with a PCLOSE > 0.05) were considered to have an acceptable level of fit between the hypothesised model and the observed data (Anderson & Gerbing, 1988; Hair et al., 2012; Hu & Bentler, 1999; Marsh et al., 2005). The results of CFA indicate that both the measurement models (1 and 2) have adequate fits (fit indices first-order DEMS CFA: $\chi^2/DF = 3.328$, $P < 0.001$, CFI = 0.925, TLI = 0.912, IFI = 0.928, RMSEA = 0.067, PCLOSE > 0.10; fit indices second-order DEMS CFA: $\chi^2/DF = 3.190$, $P < 0.001$, CFI = 0.936, TLI = 0.928, IFI =0.941, RMSEA = 0.065, PCLOSE > 0.10).

Reliability and Validity of Measures

Construct reliability was assessed by examining the value of composite reliability. As indicated in Tables 3 and 5, composite reliability of all the constructs was above 0.70; thus, the constructs were reliable. Construct validity was examined by assessing three types of validity: convergent, discriminant and nomological.

Convergent validity was established through significant factor loading and AVE. Results showed that the scale items had significant ($P < 0.001$) and adequate factor loading (above 0.70) on their corresponding constructs (Anderson & Gerbing, 1988). Also, AVE of all the constructs was at the acceptable level (above 0.50). Therefore, constructs have convergent validity.

Discriminant validity of the constructs was determined by following the Fornell and Larcker (1981) criteria, which state that square root of AVE of a construct should be greater than its correlation with other constructs. As seen in Tables 4 and 6, all the constructs demonstrated discriminant validity.

Nomological validity was examined using the correlation estimates of the constructs provided in the correlation matrix (Hair et al., 2012). Tables 4 and 6 indicate positive and significant correlations among constructs as expected in the theoretical network. Thus, the constructs were having nomological validity as well.

Thus, both the models are fulfilling the reliability and validity criteria. However, the second-order model displayed better fit (see Table 7) as it had lower scores on χ^2/DF, RMSEA, AIC and BIC and greater scores on CFI, TLI and IFI (Hair et al., 2012). It means that DEMS is a second-order construct having three distinct and interrelated dimensions.

Table 3. Factor Loading and Validity Measures for Model 1 (DEMS as First-Order Construct)

Items (Seven-Point Likert Scale)	DEMS-RS	DEMS-TDM	DEMS-WLF	OCB	POP	AVE	CR
My company design recruiting materials aimed at attracting a diverse group	0.846					0.715	0.926
Utilise a diverse group of recruiters	0.924						
Utilise search firms or employment agencies specialising in finding a diverse set of qualified candidates	0.811						
Use a diverse team to interview candidates	0.817						
Utilise a structured interviewing process	0.824						
Track applicant diversity		0.821				0.703	0.904
Track the diversity of candidates invited for interviews		0.812					
Track the diversity of new hires		0.923					
Ensure that a diverse group of employees is receiving mentoring		0.791					
Flexible work scheduling			0.873			0.539	0.774
Work-at-home option			0.642				
Dependent care resource and referral service			0.666				
I generally help others who have been absent. (OCB1)				0.806		0.703	0.876
I generally help others who have heavy workloads. (OCB2)				0.884			
I go out of the way to help new employees. (OCB3)				0.823			

(Table 3 Continued)

(Table 3 Continued)

Items (Seven-Point Likert Scale)	DEMS-RS	DEMS-TDM	DEMS-WLF	OCB	POP	AVE	CR
How would you compare the organisational performance over the past three years to that of other organisations that do the same kind of work? What about quality of product, services or programmes? (POP1)					0.919	0.654	0.918
Development of new products, services or programmes (POP2)					0.926		
Ability to attract essential employees (POP3)					0.778		
Ability to retain essential employees (POP4)					0.782		
Satisfaction of customers or clients (POP5)					0.725		
Relations between management and other employees (POP6)					0.691		

Source: Author.

Table 4. Validity Measures for the Model with DEMS as First-Order Construct

	POP	DEMS-RS	DEMS-TDM	DEMS-WLF	OCB	MSV	MaxR(H)
POP	0.808					0.593	0.943
DEMS-RS	0.295***	0.845				0.489	0.935
DEMS-TDM	0.389***	0.699***	0.838			0.489	0.92
DEMS-WLF	0.729***	0.248***	0.318***	0.735		0.531	0.825
OCB	0.770***	0.404***	0.524***	0.700***	0.838	0.593	0.883

Source: Author.

Note. Sqrt of AVE on the diagonal; *** $P < 0.001$.

Table 5. Factor Loading and Validity Measures for Model 2 (DEMS) as Second-Order Construct)

Items	POP	OCB	DEMS	AVE	CR
POP1	0.912			0.652	0.917
POP2	0.949				
POP3	0.778				
POP4	0.76				
POP5	0.695				
POP6	0.718				
OCB1		0.795		0.703	0.876

(Table 5 Continued)

(Table 5 Continued)

Items	POP	OCB	DEMS	AVE	CR
OCB2		0.886			
OCB3		0.832			
DEMS-RS			0.477	0.534	0.764
DEMS-TDM			0.884		
DEMS-WLF			0.77		

Source: Author.

Table 6. Validity Measures for Model 2 (DEMS as Second-Order Construct)

	POP	OCB	DEMS	MSV	MaxR(H)
POP	0.808			0.583	0.950
OCB	0.764***	0.839		0.583	0.884
DEMS	0.494***	0.637***	0.730	0.405	0.841

Source: Author.

Note. Sqrt of AVE on the diagonal; *** $P < 0.001$.

Table 7. Fit Indices for Models 1 and 2

Model	First/ Second Order	χ^2/DF	CFI	TLI	IFI	RMSEA	AIC	BIC
Model 1	DEMS as first-order construct	3.328	0.925	0.912	0.928	0.067	729.471	964.219
Model 2	DEMS as second-order construct	3.190	0.936	0.928	0.941	0.065	705.181	931.834

Source: Author.

Structural Model

As discussed earlier, measurement model 2 (DEMS as a second-order construct) had better fit indices. Therefore, the validity of the same structural model was examined using CB-SEM with AMOS 22 and was found to have an adequate fit (χ^2/DF = 3.516, $P < 0.001$, CFI = 0.931, TLI = 0.919, IFI = 0.932, RMSEA = 0.069, PCLOSE > 0.10). Subsequently, regression paths of the structural model for the anticipated mediation effect were also explored.

The results of hypotheses testing of H_1, H_2, H_3 and H_4 are provided in Table 5. H_1 projected that DEMS had a positive impact on POP. Results of 'DEMS-POP' path analysis completely support this hypothesis ($\beta = 0.402$, $P < 0.001$). H_2 predicted that DEMS and OCB were positively related. Results of path analysis also support this hypothesis ($\beta = 0.510$, $P < 0.001$). H_3 predicted the positive impact of OCB on POP. Results of 'OCB-POP' path analysis support this hypothesis too ($\beta = 0.470$, $P < 0.001$). H_4 forecasted that OCB has a mediating effect on the positive relationship between DEMS and POP.

Mediation Analysis

This study applies Baron and Kenny (1986) criteria for testing the mediation effect of OCB. According to this test, a true mediation happens if the following three criteria are fulfilled. The first criterion mandates a significant relationship between independent and intervening variables (proposed mediator). Essentially, the structural path indicates a significant relationship between DEMS (independent) and OCB (intervening variable) ($\beta = 0.510$, $P < 0.001$). The second criterion mandates a significant relationship between intervening variable and dependent variables. Test results indicate that there is a significant relationship between OCB and POP ($\beta = 0.470$, $P < 0.001$). Finally, the third criterion mandates that, for a true mediation to occur, the relationship between independent and dependent variables (which was earlier significant in the absence of intervening variable) will either be partially insignificant (weakened in case of partial mediation) or no longer be significant after the introduction of an intervening variable (full mediation). In fact, as H_4 indicates, in the absence of the intervening variable (OCB), relationship between DEMS and POP is positive and significant ($\beta = 0.435$, $P < 0.001$). However, in the presence of the intervening variable (OCB), the relationship between DEMS and POP becomes insignificant ($\beta = 0.013$, $P < 0.756$). Therefore, OCB fully mediates the relationship between DEMS and POP.

The mediation results were also confirmed using the bootstrapping method (see Tables 8 and 9) as suggested by Preacher and Hayes (2008). This method requires assessment of the statistical significance of indirect effects. As seen in Table 5, 95 per cent confidence interval (CI) of the indirect effect for both the bias-corrected and the percentile does not include zero. This confirms a significant mediating role of OCB.

Table 8. Results of the Bootstrapping Test of Mediation

		Bootstrap 1,000 Times 95 Per cent CI			
		Bias-corrected		Percentile	
Mediating Variable	Indirect Effect	Lower	Upper	Lower	Upper
OCB	0.435***	0.318	0.652	0.321	0.655

Source: Author.

Note. *** $P < 0.001$.

Table 9. Results of Hypotheses Testing

Hypothesis	Direct Effect (xy)	Indirect Effect	Total	Result
DEMSPOP (H_1)	0.402***	---	0.402***	H_1 supported
DEMS OCB (H_2)	0.510***	---	0.510***	H_2 supported
OCB-POP (H_3)	0.470***	---	0.470***	H_3 supported
DEMSOCBPOP(H_4) (mediation result using bootstrapping)	0.013 (ns)	0.435***	0.448***	Full mediation, H_4 supported

(Table 9 Continued)

(Table 9 Continued)

Hypothesis	Direct Effect (xy)	Indirect Effect	Total	Result
Control Variables				
Organisation Size DEMS	0.12	--	--	--
Organisation Age DEMS	0.07	--	--	--
Gender DEMS	0.10	--	--	--
Work experience DEMS	0.13	--	--	--
Position DEMS	0.11	--	--	--
Organisation size OCB	0.14	--	--	--
Organisation age OCB	0.27*	--	--	--
Gender OCB	0.10	--	--	--
Work experience OCB	0.02	--	--	--
Position OCB	0.05	--	--	--
Organisation size POP	0.23*	--	--	--
Organisation age POP	0.12	--	--	--
Gender POP	0.03	--	--	--
Work experience POP	0.05	--	--	--
Position POP	0.08	--	--	--

Source: Author.

Note. ns, nonsignificant; *** $P < 0.001$; * $P < 0.05$.

Discussions and Implications

This research is a first to investigate the dimensionality of DEMS and a mediating role of OCB on the linkage between DEMS and POP. The findings suggest that DEMS is a second-order construct consisting of DEMS-RS, DEMS-TDM and DEMS-WLF. Thus, employees may see DEMS in its holistic frame rather than in individual dimensions. This research provides new insight with respect to DEMS in the IT industry in India. In the Indian IT industry, employees perceive DEMS-TDM as the most important dimension followed by effectiveness of policies related to work–life flexibility (DEMS-WLF).

The confirmation of positive and significant impact of DEMS on POP reinforces the findings of DEMS scholars (e.g. Armstrong et al., 2010; Konrad et al., 2016). It also indicates that organisations which recruit diverse workforce must adopt practices such as valuing diversity and providing training to the workforce on diversity, help them be conscious of workplace diversity and include minorities in the process of recruitment, all of which impact performance positively. Engaging a larger talent base helps to access a wider pool of knowledge, creativity and innovation and enhances the probability of setting and achieving high-performance goals (Cox, 2001).

Our findings suggest that DEMS and OCB are positively related. It extends the work of Shen et al. (2009), who have tested the impact of diversity management in different functions of human resources on OCB and argue that 'human resource diversity management practices help to include non-mainstream employees in the core groups and leadership teams, and encourage collaborative activities between

different groups, thereby increasing cohesiveness within the organization' (p. 248) and thus infuse OCB among employees.

Further, by establishing a positive and significant relationship between OCB and POP, this study lends credence to the research on OCB. While analysing the role of OCB, Podsakoff and MacKenzie (1994) recommended organisational effectiveness, efficiency and success as various consequences of OCB. In addition, this kind of behaviour helps employees to perform beyond their job requirement and, thus, contributes to task accomplishment and group performance (Randel & Jaussi, 2003). Organisations expect employees to engage more in habits that include helping colleagues in need, promoting a positive work environment, developing an attitude to tolerate inconveniences without complaining much and making an attempt to protect the resources of the organisation (Witt, 1991).

One of the core objectives of this article was to examine the mediating role of OCB on the linkage between DEMS and POP in the context of the Indian IT industry. Based on a review of the relevant literature, we proposed and tested a mediating model. The theoretical model stipulates mediating effects of OCB on the DEMS and POP relationship. In so doing, this study addresses the calls for research to identify and examine relevant mediators in the performance-building process of organisations by efficiently and effectively managing the DEM practices (e.g. Ali & Konrad, 2017; Armstrong et al., 2010).

Theoretical and Managerial Implications

The article attempts to deepen the knowledge about the DEMS. All prior research in the field of DEMS was conducted in Western countries such as the United States, Australia, Ireland and Canada. India, being a land of diversity, finds it challenging due to its prevailing inequalities. Hence, this article, for the first time, has made a significant effort of testing DEMS in the Indian context. This article also contributes to theory by demonstrating the validity of the mediating role of OCB on the relationship between DEMS and POP, a new model which has not been tested before. Findings support the argument provided by Konrad et al. (2016) that DEMS not only focuses on providing EEO but also aims at hiring, developing and retaining employees from diverse background.

The findings support the value of adopting DEM practices for enhancing organisational performance. HR practitioners can utilise this for creating a peaceful and competitive work environment. Adoption of DEMS practices related to staffing, training and development and providing WLF develops a sense of involvement and satisfaction among employees. Our findings support Organ's (1997) statement that fair treatment at workplace encourages employees to involve in OCB. HR managers should adopt effective leadership skills to enhance participation of employees in the process of goal achievement.

Adoption of DEMS also passes positive signal to stakeholders regarding the organisation's support towards diversity (Ali & Konrad, 2017); this attitude creates zeal within the employees to contribute beyond their job requirement. For the optimum utilisation of the available workforce, the organisation should mentor diverse employee groups to merge them with the existing talent base. DEMS can be used as a performance-enhancing tool because managing diversity fairly by providing equal opportunities will help the organisation motivate employees to engage more in OCB and produce their best, leading to improved organisational performance.

HR managers may utilise these findings to argue that adopting a sophisticated DEMS has positive economic, social and legal impacts on organisational performance. It could help them in the fruitful promotion of diversity at workplace and also in creating a talented and innovative workforce. The study considers DEMS as a path from tolerance to acceptance. Lastly, the results confirm a mediating role of

OCB between DEMS and organisational performance. Hence, organisations should also promote OCB as it also contributes in establishing a positive, committed and conflict-free work environment.

Limitations and Directions for Future Research

There are certain limitations to this study. This study explores the role of DEMS and OCB only in IT firms, and the sample size is also small. This limits the generalisation of the study. Moreover, for testing of hypotheses, only the employee perspectives have been taken into consideration. Results would have been more robust if dual perspectives (both employees and firms) have been used to check the impact of the constructs. There are other dimensions also which link diversity to strategic business goals and human resource planning; future researchers in this field can make the proposed model stronger by testing the impact of the constructs used in the conceptual model on other relevant constructs. Future research might also explore the DEMS in other areas or sectors of work, and a comparative study of different sectors or different countries can also be done.

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The Increasing Trends of Cyber Crimes Against Women: An Indian Perspective

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Abstract

In virtual world of internet, the sharing of information is very fast and easy. Internet has become the fastest mode of information sharing tool in the present global world. The number of users of internet in India has been increasing day by day, not only in the metropolitan cities but also in the rural areas. There are numerous advantages with the internet, but at the same time it has become a major mode of instrument to commit virtual crimes against women anonymously. The cyber-crimes pose a great threat to the individual integrity and privacy. Cyber-crime is a global phenomenon and women are more vulnerable and susceptible to the cyber-crimes. Cyber-crimes and privacy breaches in India have been increasing day by day, more particularly against the women with an intention to cause psychological harm to them. Like cyber defamation, cyber-stalking, sending threatening messages, morphing of photos, and e-mail spoofing against women etc. Some of these crimes are rampant in India. The lack of knowledge and consciousness about the use of internet and the social media, the women in India are facing a great vulnerable threat to their lives and to their privacy. In this article, the author explores the issues relating to online security vulnerabilities and the cause of cyber-crimes against women.

***Key words**: Cyber-crime, Cyber- Stalking, Morphing of photo, E -mail Spoofing, Cyber law, Information Technology Act 2000, and women empowerment*

Introduction:

The rampant usage of technology and increased trends to access to the internet has created the good opportunities for the development of commerce, research, education, entertainment and public discourses. It is true that technology is a boon to mankind but misusing of the same has witnessed increasing incidence of Cyber Crimes in India and there is no proper protection or safe guards to the victims of cyber-crime more particularly women who are more prone to the cybercrimes. Cybercrimes are not only affecting the privacy of the individuals but also poses a threat to the security and integrity of the state or organization. The cybercrimes in India, though on rise, mostly go either unreported or conviction is very poor. Cyber-crime and privacy breaches in India have been increasing day by day, more particularly against women with an intention to cause psychological harm to them. Like cyber defamation,[2] cyber-stalking, sending threatening messages, morphing of photos, and e-mail spoofing against women etc. Some of these crimes are rampant in India. Therefore, in this paper an attempt has been made to understand the nature of the cybercrimes and its impact over the women rights and the security and integrity of the women in India.

[2] Defamation: Sec 499 of IPC Provision and IT Act 2000

Cyber-Crime: The Definition:

Cyber-crimes are the crimes committed with the use of computers or relating to computers, especially through the internet. Crimes which involve use of information or usage of electronic means in furtherance of crime are covered under the ambit of cyber-crime[3]. Cyber space crimes may be committed against persons, property, Government and society at large. The United Nations Congress divided the cybercrime into two categories and defined thus[4]:

a) Cybercrime in a narrow sense that is computer crime in which any illegal behavior have been done by the means of electronic operations that targets the security of computer systems and the data processed.
b) Cybercrime in a broader sense which is computer-related crime any illegal behavior committed by means of an operating system or network, including such crimes as illegal possession or distributing or altering any information by means of a computer system or network.

Therefore, Cyber Crime is a term that refers to all criminal activities done by using the computers or computer networks or by using other devices like mobile phones, tablets[5] etc. It also covers the traditional crimes in which computers networking are used to enable the forbidden activity. Cyber Crime can be categorized in three ways[6]:

1. **The computer as a target** – attacking the computers of others.

2. **The computer as a weapon-** Using a computer to commit "traditional crime".

3. **The computer as an accessory-** Using a computer as a "fancy filing cabinet" to store illegal or stolen information.

Cyber offenses specifically committed against women:

In the present pandemic situation though normal crimes have reported to have been come down but Cybercrimes against women are increased may folds. It is very much evident in the words of K. Indraveni, Joint Director, Centre for Development of Advanced Computing. She rightly observed while speaking to media that there was a significant increase in cyber crimes against women during lockdown. For that she referred to the data collected by the National Commission for Women, which shows that 54 cybercrime

[3] According to The Cambridge English Dictionary
[4] At the tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders, in a workshop devoted to the issues of crimes related to cyber space cybercrime was divided into two categories.
[5] Kanika Chhabra and Gunjan Chhabra, A Study on Emerging Issue on Cyber Law, Advances in Computer Science and Information Technology (ACSIT), Volume 1, Number 3; November, 2014, Krishi Sanskriti Publications pp. 112-116, http://www.krishisanskriti.org/acsit.html, (Accessed on 23-10-2020)
[6] R. M. Johri , Principal Director (information Systems)Cyber Security – Indian Perspective, Office of CAG of India, see for further details *www.intosaiitaudit.org*

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Decriminalisation of Adultery, the Indian Experience and Experiment : How Much Shine in the Joseph Shine Verdict?

DECRIMINALISATION OF ADULTERY, THE INDIAN EXPERIENCE AND EXPERIMENT : HOW MUCH SHINE IN THE JOSEPH SHINE VERDICT?

by

Rajesh Kapoor[1]

In *Joseph Shine* v. *Union of India*[1] a five-Judge Constitution Bench of the Supreme Court unanimously held that the law criminalising adultery is unconstitutional, principally because it treats a wife unequally within the institution of marriage. Had the Court stopped there, it would have been possible to criminalise it, by making the impugned law gender neutral, but it went to the extent of saying that adultery "does not fit into the concept of crime".2 Accordingly, it gave advice to the legislature not to criminalise it in the future as well.[3] A provision which was once hailed by the judiciary,[4] as a reflection of an enlightened and humane outlook of the framers of the Code, has been decried now as a remnant of a patriarchal mentality.

It is remarkable here that the petitioner's grievance was that the provision discriminates against men as it punishes them only, and not the adulterous woman.[5] A woman is not liable even as an abettor.[6] Interestingly, the case took a complete turn as the Court held that a deeper probe reveals that the provision discriminates against a wife, as she is not considered an equal partner within the institution of marriage. It subjects her to a position of subordination while the Constitution considers her an equal and autonomous individual, hence, it must go. The judgment is widely welcomed for empowering women, though it ultimately benefits the adulterous man as it is he who cannot be punished now, unlike before.

All the five-Judges were unanimous in condemning the impugned law, nevertheless they gave four opinions. Every Judge had a lot to say,[7] especially against that aspect of the impugned provision which in their opinion treats a wife like property of a husband and violates the guarantee of equality. The Court also goes on to hold that the said law denudes a woman of her dignity, autonomy and privacy.[8] This article analyses how right the Court is in attributing all these characteristics to a provision whose constitutional validity had been upheld by the very same Court twice in the past.[9] The provisions which have fallen from grace are Section 497 of the Penal Code and Section 198(2) of the Criminal Procedure Code. It is pertinent to quote the impugned provision here:

> 497. *Adultery*.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

Thus, adultery means having sex with a woman who is the wife of someone else. If

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a married man has sexual intercourse with a woman who is single or a divorcee it does not amount to adultery as per the definition for the purposes of criminal law. Furthermore, according to Section 198(2), in case of some matrimonial offences, the Court can take cognizance of a matter only if approached by an aggrieved party and in case of adultery only a husband is considered an aggrieved party. Thus, it denies a wife the right to initiate legal proceedings if her husband has a sexual relationship with any other woman. A husband can put behind bars a man who destroys the sanctity of his matrimonial home but a wife suffering from the same agony has to be content with a civil law remedy only, namely, seeking divorce on the ground of adultery. There is of course differential treatment, but is this so discriminatory as to render it unconstitutional?

Past Attacks on the Impugned Provision

The abovementioned question was answered in the negative by a very distinguished two-Judge Bench of the Bombay High Court consisting of Chagla and Gajendragadkar, JJ. in *Yusuf Abdul Aziz* v. *State*[4] way back in 1951.

The petitioner before the Bombay High Court argued that the provision is violative of Article 14, which mandates that "the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India". The impugned provision violates Article 14 as it punishes only a man involved in adultery but takes no action against the woman, who participates in the crime willingly. This argument implies that as both are equally guilty, hence, both must be punished equally. Article 14 allows different people to be treated differently but the differential must be rational and must have a reasonable nexus sought to be achieved.

The Court referred to the history of the Penal Code and paid rich tribute to the enlightened mindset of the framers of the Code.[4] It is remarkable that Babington Macaulay when he prepared the draft of the Penal Code had not made adultery a criminal offence.[10] He had said that "*It seems* to me that no advantage is to be expected from providing a punishment for adultery."10 One of the reasons he gave for not criminalising adultery was as follows:

> *The condition of the women of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale already too much depressed the additional weight of the penal law. We have given the reasons which lead us to believe that any enactment on this subject would be nugatory. And we are inclined to think that if not nugatory it would be oppressive. It would strengthen hands already too strong. It would weaken a class already too weak. It will be time enough to guard the matrimonial contract by penal sanctions when that contract becomes just, reasonable and mutually beneficial.*[11]

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The Law Commission, however, did not agree with his proposition and made adultery a crime.[12] The Commission, however, agreed with Macaulay on the point that because of factors like the tender age at which women get married in this country quite often to a man much older in age, sharing the husband's attention with many wives they deserve a sympathetic treatment

at least at the hands of law.[13] In other words, the Commission acknowledged that the highly unfair social conditions were to be blamed for the infidelity of a wife not because she lacks agency.[4]

The Court in 1951 accepted the abovementioned justification and dismissed the objection of violation of the equality clause. It stated that "very good grounds were present why Section 497 was enacted in the form in which it finds a place in the Penal Code."4 I agree with the Court and am of the opinion that it was a progressive provision when it was passed, as the law-givers of all the societies hitherto had generally condemned an adulterous woman harshly and at times even more in comparison to an adulterous man, while under the Code she was completely exonerated from liability. In appeal, a five-Judge Bench of the Supreme Court did not find it fit to interfere with the judgment and dismissed the appeal.[14]

Three decades later, the issue of constitutional validity of Section 497 was once again before the Supreme Court in *Sowmithri Vishnu* v. *Union of India*.[15] In this case, the husband of the petitioner wife had filed a criminal complaint against another man for having sexual relationship with his wife and applied for divorce too. The petitioner wife filed a writ petition seeking quashing of the abovementioned criminal complaint filed by her husband as it caused harm to her reputation. She pleaded to quash the said criminal complaint on the ground that Section 497 is unconstitutional because it violates the equal protection clause since it does not punish a married man for having an illicit relationship with an unmarried woman or a divorcee or a widow but the same is not the case with a wife. It is a "flagrant instance of gender discrimination, legislative despotism and male chauvinism".[16] By imposing restrictions only on a married woman and not on a married man it sanctions "romantic paternalism".[16]

The Court discarded all the said arguments stating that they have only "a strong emotive appeal but no valid legal basis to rest upon".[17] The Court took a very pedantic approach and did not find the provision discriminatory and stated that "we cannot accept that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed".17 The Court held so because in its opinion according to the very definition given by the Code, adultery can be committed by a man only.[18] As according to the definition, a woman, whether married or unmarried, cannot commit adultery, so there is no discrimination.

This is difficult to accept. The question before the Court was—is there any rationality in excluding women from being liable or are they arbitrarily left out while defining the offence of adultery? It further stated that in order to pronounce the provision defining adultery as discriminatory, it would be required to redefine the

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offence. And if it embarks upon this task, there are many provisions under the Code which would need a change. To prove its point, the Court gave the example of Section 392, which defines robbery, the punishment for which is ten years.[17] The Court said that otherwise it can be argued that how breaking a home is different from breaking a matrimonial home? Hence, the punishment should be the same, but in the case of breaking a matrimonial home it is just half as compared to the one for breaking a home. This is a clear case of false analogy or informal fallacy. But even otherwise at the heart of robbery lies the use of force and fear which is not the case with adultery. Therefore, the reasoning is unsustainable.

The Court held that there is no discrimination in not making an infidel wife liable under the impugned law because, the law is right in believing that it is a man who is a seducer, not a woman.[18] This means she is merely a victim or falls into the trap of a man.[19] This amounts to treating a woman as not having agency and creating sexual stereotypes. But this reason was created by the Court for the first time in this particular case. As stated above, the framers of the Code had very different considerations in mind and we cannot blame them for the above reasoning.

Merely three years later in *V. Revathi* v. *Union of India*[20], the constitutional validity of Section 198(2), which debars a wife to prosecute her adulterous husband was challenged before the Supreme Court. The petitioner submitted that debarring a woman from prosecuting her adulterous husband amounts to discrimination. The Court outrightly rejected the argument. In the opinion of the Court, as the husband too cannot prosecute his wife for adultery, there is no discrimination. The limitation is imposed on both genders. According to the Court, the limitation is because there is a policy of law to not allow the spouses to attack each other with the weapon of criminal law. The law wants them either to make up or break up, rather than sending one of them to jail and causing a trauma to their children.[21]

The reasoning does not seem to be apt. If the intention of law is to not allow erring spouses to use the wrath of criminal law against each other, then, Section 494, which allows one to prosecute his or her spouse for bigamy, should have no place in the Penal Code. On the other hand, it provides even higher punishment than adultery. Therefore, the reasoning that spouses should not use criminal law against each other is incorrect.

Furthermore, under Section 497, a husband is allowed to prosecute the outsider man but a wife is not allowed to prosecute the outsider woman for defiling the sanctity of her matrimonial home. This means the sanctity of a matrimonial home can be violated only by a paramour of a wife, not of a husband, which is simply untenable. The justifications like marriage at tender age and getting only a fraction of her husband's attention, would apply only to a married woman. Therefore, a single woman should be liable to be prosecuted by an aggrieved wife for defiling the sanctity of her matrimonial home. However, the Court gave a very formalistic justification for excluding a wife for not being considered an aggrieved person and thus incapable of prosecuting the outsider woman. The Court said that the way law has defined the offence means a woman cannot commit adultery and this underinclusiveness is within the legislative competence which the Court did not find discriminatory.[22] In *Joseph Shine*[1] the Court rejected all the reasons given by the Court in previous judgments which have hitherto upheld the constitutional validity of the impugned provisions.

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Towards a convivial tool for narrative assessment: Adapting MAIN to Gondi (Dantewada, India), Halbi and Hindi for Gondi- and Halbi-Hindi speaking bilinguals

Uma Maheshwari Chimirala

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Abstract

This paper presents the adaptation of MAIN to Gondi (Dantewada), Halbi and Hindi for Gondi-Hindi and Halbi-Hindi bilinguals. The Gondi and Halbi communities and the context in which Gondi-Hindi and Halbi-Hindi bilingual children are growing up are described, and the adaptation process is outlined together with its theoretical underpinnings. Finally, results from a study of 54 Halbi-Hindi bilinguals from Grade 3 (Mean age = 8.5 years), Grade 5 (Mean age = 10.9 years) and Grade 7 (Mean age = 12.9 years) are presented. The results showed that, for the macrostructure of Grade 3 and Grade 5, L1 retelling was significantly better than L2 retelling, though this pattern was not found in Grade 7 where the performance was at the same level across languages for retelling. Narrative macrostructure was consistently higher in tellings than in the retellings regardless of languages and grades.

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Reinvigorating Bicameralism in India

Malavika Prasad and Gaurav Mukherjee*

Abstract

The Supreme Court of India in *Puttaswamy v Union of India I* articulated a bold new vision for the relationship between the individual and the State which recognised that autonomy is the fundamental premise of any protected freedom. However, its holding in *Puttaswamy v Union of India II* went against the grain of its previous decision by validating the constitutionality of the passage of the Aadhaar Act 2016 as a "money bill" by the Lok Sabha under Article 110 of the Constitution of India. The correctness of the underlying constitutional vision in *Puttaswamy II* has now been referred to a Constitution Bench of the Supreme Court in *Roger Mathew v South Indian Bank Ltd.* This article argues against the constitutional rectitude of *Puttaswamy II* in three veins. We do so by first examining the normative basis for the bicameral structure of government in India, which we argue seeks to balance its *demos*-constraining and *demos*-enabling functions. Second, we identify points of capacity-loss through an examination of parliamentary and political practice which denude the capacity of bicameralism to serve its intended ends. We conclude that the capacity of the upper house to be *demos*-enabling and *demos*-constraining can be restored if we reckon with the points of capacity-loss, and generally, with the practice of working the Constitution among political actors, in fora other than courts.

Keywords: Bicameralism; Separation of Powers; Constitutional Politics; Executive Accountability; Political Theory

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1. Introduction

The majority judgment of the Supreme Court of India in *Puttaswamy v Union of India*[1] recognised 'privacy as an independently enforceable right'.[2] Departing from the view of privacy as a bundle of rights, *Puttaswamy I* stands for two propositions: first, that privacy is essential for protecting personal liberty as it allows us to define ourselves and our relations to others;[3] and second, that privacy recognizes the individual autonomy[4] or the 'right of every person to make essential choices' on the course of their life.[5] Therefore, *Puttaswamy I* articulates a bold new vision for the relationship between the individual and the State that recognises that autonomy is the fundamental premise of any protected freedom.

In 2019, the Supreme Court in *Puttaswamy v Union of India*[6] was to answer the question of the validity of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016 in light of its judgment in *Puttaswamy* I,[7] and held that the Act had validly been passed as a "money bill" by the Lok Sabha under Article 110 of the Constitution of India. The inference arrived at by the Court in *Puttaswamy II* rested on a particular vision of the nature of bicameralism in the Indian Constitution, the scope of Article 110, as well as the ambit of the Lok Sabha Speaker's discretion in certifying bills as money bills. The correctness of this vision was the subject of discussion in a subsequent SC judgment on the constitutionality of tribunals under the Finance Act 2017 and has now been referred to a Constitution bench.[8]

In this article, we unpack whether the holding in *Puttaswamy II* on the money bill question is consonant with the holding in *Puttaswamy I* on the relationship between the individual and the State. Specifically, we argue that *Puttaswamy I's* view of the relationship between the individual and the State finds expression in the functional justifications for the bicameral structure of government we see in India. The normative basis of this structure we note, in Section 1, is the balance of *demos*-constraining and *demos*-enabling functions that the Indian bicameral structure was designed to serve. We then argue in Section 2 that while the structure of government was constitutionally designed to serve these *functions*, its *capacity* to do so

[1] *Puttaswamy v Union of India* (2017) 10 SCC 1.
[2] Columbia University of Global Freedom of Expression, 'Puttaswamy v India' <https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/> accessed 18 August 2019.
[3] *Puttaswamy I* (n 1) [140]-[141].
[4] *Puttaswamy I* (n 1) [141]-[142], [168]-[169].
[5] *Puttaswamy I* (n 1) [113].
[6] (2019) 1 SCC 1.
[7] *Puttaswamy I* (n 1)
[8] *Roger Mathew v South Indian Bank Ltd.* (Civil Appeal No. 8588 of 2019) [123].

has either been largely absent or denuded over time. We explore two reasons for the gap between functions and capacity: first, parliamentary and political practice towards constraining the *demos* in Parliament, and the points of capacity-loss; second, the political practice towards enabling the *demos,* outside of Parliament–in the realm of union-state relations– and the points of capacity-loss. We conclude that the capacity of the upper house to be *demos*-enabling and *demos*-constraining can be restored if we reckon with the points of capacity-loss, and generally, with the practice of working the Constitution among political actors, in fora other than courts.

2. Functional Justifications of the Indian Bicameral Structure

The idea of an upper house was the subject of great disagreement in the Constituent Assembly tasked with framing a Constitution for an independent India.[9] The framers were working to produce a democratic order, under conditions of limited sovereignty, despite deep internal divisions concerning the 'religious and national vision of the newly independent State, as well as a grave need for economic development'.[10] Bhatia, when discussing the range of disagreement in the Constituent Assembly regarding the institution of bicameralism, notes[11]

> *Several members criticized the proposal for a second chamber on the ground that it would 'clog in the wheel of progress', delaying legislative action and preventing speedy transformative decisions. Mohd Tahir argued that it was paradoxical for a body like the constituent assembly to insist on a bicameral legislature. If faith could be reposed only in decisions that had been approved by two separate legislative chambers, then what authority did a unicameral legislature have in insisting on the creation of a second legislative house? Others also expressed anxiety about the*

[9] For a flavour of these disagreements see Constituent Assembly of India Debates (Proceedings) Vol IV, 28 July 1947 <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C28071947.html> accessed 1 June 2019.

[10] Hanna Lerner, 'The Indian Founding: A Comparative Perspective' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2012) 58.

[11] Udit Bhatia, 'Precautions in a Democratic Experiment: The Nexus between Political Power and Competence' in Jon Elster, Roberto Gargarella, Vatsal Naresh and Bjørn Erik Rasch (eds), *Constituent Assemblies* (CUP 2018) 127 (footnotes omitted).

> *representation of vested interests through the second chamber. In particular, they urged that the second chamber would give disproportionate representation to the interests of the landed classes and block attempts at redistribution of wealth.*

Ultimately, our bicameral system was crafted by building on features of typical upper-houses—to be *"demos-constraining"*—while fulfilling the specific aims of our polity, which even at its founding was described as 'one of the richest countries in the world in terms of its linguistic, ethnic, and religious diversity'[12], of being "*demos-enabling*".

Typically, the principle behind bicameralism is that the decisions of the majority or the *demos* represented in the lower house ought to be tempered by the particular preferences of sub-national units represented in the upper house.[13] The more the "competences" of the upper house, the more it is capable of constraining the *demos* in the lower house.[14] The Indian upper house is competent to vote on and reject all bills originating in the lower house[15] except money bills,[16] and thus serves a *reactive* role. It also has a weak navette system[17] by which the upper house may delay legislation or force reconsideration by the lower house.[18] In case proposals for amendment cannot be resolved, disagreement between the houses is resolved through a joint sitting.[19] Finally, upper houses are meant to multiply the possible veto players who are able to block, or at least influence legislative outcomes, under conditions of staggered election cycles.[20] Thus, the upper house is designed to be a reactive, *demos*-constraining house, that acts as a "cooling chamber" for and a check on the majoritarian lower house.

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[12] Hanna Lerner, 'Constituent Assemblies and Political Continuity in Divided Societies' in Jon Elster, Roberto Gargarella, Vatsal Naresh and Bjørn Erik Rasch (eds), *Constituent Assemblies* (CUP 2018) 64.

[13] See Alfred Stepan, 'Federalism and Democracy: Beyond the US Model' (1999) 10(4) Journal of Democracy 19.

[14] ibid 22.

[15] Article 108 of Constitution of India 1950.

[16] Article 109 of Constitution of India 1950.

[17] However, the navette system is temporally limited, and inapplicable to money bills as evident from Article 109 of Constitution of India 1950.

[18] Vernon Hewitt and Shirin Rai, 'Parliament' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds), *The Oxford Companion to Politics in India* (OUP 2010).

[19] Article 109 of Constitution of India 1950. This, however, has not happened since 2002, when the provisions of the Prevention of Terrorism Bill were being debated in a joint session; Press Trust of India, 'POT Bill passed by joint session of Parliament' (*Rediff*, 26 March 2002) < https://www.rediff.com/news/2002/mar/26poto7.htm> accessed 18 August 2019.

[20] Daniel Diermeier and Roger Myerson, 'Bicameralism and Its Consequences for the Internal Organization of Legislatures' (1999) 89(5) American Economic Review 1182.

The Indian upper house's function, however, is not only to enable reflection, but also to guarantee representation.[21] In other words, India's upper house is designed to be uniquely *demos*-enabling, despite the *demos*-constraining features visible at first blush. This is evidenced in the upper house's *proactive* role, in exercise of its competence to initiate bills.[22] Within systems of democratic governance, there is usually a 'necessary correspondence between acts of governance and the equally weighted felt interests of citizens with respect to those acts'[23], where elections to the house by popular vote permit a majority of citizens to 'induce the government to do what they most want it to do and to avoid doing what they most want it not to do.'[24] Upper houses have the ability to bring into the legislative agenda interests outside the contemplation of the lower house's entrenched majority[25] when they are conferred the power to initiate legislation. This is done by using a mode of election and representation that is different from its lower house counterpart. It is for groups unable to influence the legislative agenda in the lower house—being disadvantaged by direct elections—that the upper house serves as a *proactive* forum for initiating legislation.

Typically, upper houses are designed to express a principle of representation which is different from the lower house of Parliament,[26] which is constituted through a direct election on a one-person, one-vote basis from single voter constituencies.[27] Upper houses by using election processes such as the proportional system, reflect the diversity of a particular state, while also possibly serving different electoral cycles (depending also upon the nature of election systems).[28]

In the same vein, the Indian upper house, unlike the lower house, is indirectly elected.[29] It comprises of representatives of States and Union territories[30] while also retaining an epistocratic element in democratic deliberation.[31] In keeping with the aim of representing the several states'

[21] Philipp Norton, 'Adding Value? The Role of Second Chambers' (2007) 15(1) Asia Pacific Law Review 3, 4. See Samuel Patterson and Anthony Mughan (eds), *Senates: Bicameralism in the Contemporary World* (Ohio State University Press 1999).
[22] See Article 107 of Constitution of India 1950.
[23] Michael Saward, *The Terms of Democracy* (Blackwell Publishers 1998) 51.
[24] Robert Dahl, *Democracy and its Critics* (YUP 1989) 95.
[25] Norton (n 21) 5.
[26] Jeremy Waldron, 'Bicameralism and the Separation of Powers' (2012) 65(1) Current Legal Problems 31, 41.
[27] ibid.
[28] Samuel Patterson and Anthony Mughan, 'Senates and The Theory of Bicameralism' in Samuel Patterson and Anthony Mughan (eds), *Senates: Bicameralism in the Contemporary World* (Ohio State University Press 1999) 1.
[29] Article 80(4) of Constitution of India, 1950.
[30] Article 80(2) Constitution of India 1950.
[31] Article 80(3) of Constitution of India 1950; see Bhatia (n 11).

particular interests,[32] the number of representatives a State sends to the upper house is proportionate to the population of the State.[33] Proportionality in this context is a *demos*-enabling feature[34] that comports with the necessity of holding together[35] the many diverse Indian States in the Union.[36]

But where is the place of the individual in this scheme? Both under the *demos*-enabling and the *demos*-constraining functions of the upper house in India, the individual citizen is thought to have the standing to challenge the passage of a bill without upper-house scrutiny.[37] The *demos*-

[32] States are also accorded different rights in relationship to the Union, by constitutional design depending on the unique cultural, ethnic and geopolitical contexts of various territorially concentrated groups. The thinking underlying this arrangement is that unlike purely geographical states, states built on linguistic (Punjab, Rajasthan, West Bengal, Bombay state, Madras state, Mysore state, Kerala and Madhya Pradesh) or ethnic bases (Nagaland, Manipur, Tripura, Meghalaya, Mizoram and Arunachal Pradesh) exhibit stronger intra-group ties and thus are better represented when their subjective contexts and interests are constitutionally accommodated. This is described as an "asymmetric" federal structure. See generally, Alfred Stepan, Juan Linz, Yogendra Yadav, *Crafting State Nations* (Johns Hopkins University Press, 2011) Chapters 4 and 5; Rekha Saxena, 'Is India a Case of Asymmetrical Federalism?' (2012) 47(2) Economic and Political Weekly 70; Louise Tillin; 'Asymmetric Federalism', in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2012); Nirvikar Singh and Govinda Rao, *Political Economy of Federalism in India* (Oxford India Paperbacks 2006) 65-72; Arun Thiruvengadam, *The Constitution of India A Contextual Analysis* (Bloomsbury 2017) 89-91. Some scholars depart from the framing of Indian federal structure as "asymmetrical" by arguing that the real "management of regional, linguistic or cultural diversity have been constitutionally symmetrical," since no "special protection for the rights of cultural minorities" in these States has been offered; Louise Tillin, 'United in Diversity? Asymmetry in Indian Federalism' (2007) 37 The Journal of Federalism 45.

[33] Article 80(4) Constitution of India 1950. Critics argue that this is only more *demos*-enabling when compared with the American system. One proposal is that each state be allowed a minimum representation regardless of their population size; Commission on Centre-State Relations, 'Report on Constitutional Governance and the Management of Centre-State Relations' (2010) Volume 2, 153.

[34] Stepan (n 13) 23-4.

[35] BR Ambedkar, Constituent Assembly of India Debates (Proceedings), Volume VII, 4 November 1948, <http://164.100.47.194/Loksabha/Debates/cadebatefiles/C04111948.html> accessed 29 May 2019. See also Stepan, Linz and Yadav (n 32) 120.

[36] In contrast, the concern of the American framers was to protect sovereign states *coming together* to form a union, from the 'tyranny of the majority' or the *demos*. The features of the Indian upper house are viewed by scholars as a *demos-constraining* feature, to enable bargaining between sovereign states *coming together* to form a Union; Stepan, Linz and Yadav (n 32) 120. See also Gregory Ablavsky, 'Empire States: The Coming of Dual Federalism' (2019) 128 Yale Law Journal 1792.

[37] The petitioners in the writ petitions challenging the passage of the Aadhar Act 2016 as a Money Bill were Jairam Ramesh Writ Petition (Civil) No 231 of 2016, S G Vombatkere and Bezwada Wilson Writ Petition (Civil) No 797/2016) and Shantha Sinha Writ Petition (Civil) No 342/2017. See also Writ Petition No 15147-8 of 2017 filed by Madras Bar Association before the Madras High Court.

enabling logic[38] of the individual's recourse to the courts is that the division of powers between the Centre and States is intended to guarantee individual liberty, by assuring greater participation in the political process. When citizens vote in smaller constituencies, and directly on issues that affect them, the value of their individual vote is notionally higher, enabling them to 'affect outcomes in the political process'.[39] In addition, the individual is also entitled to represent her particular interests as a member of a sub-national social, cultural or linguistic group. The *demos*-constraining logic for the individual's recourse to the courts is the liberty-interest in being governed by a limited government.[40]

Both the *demos*-enabling and *demos*-constraining bases described here comport with *Puttaswamy I's* fundamental tenet: that the relationship between the individual and the State is marked by a sphere of individual autonomy to represent herself and affect outcomes in the political process. Therefore, any analysis on the validity of the passage of the Aadhaar Act as a money bill by the Lok Sabha, must account for the central role of individual autonomy, as sought to be protected in the *demos*-enabling and *demos*-constraining structure of bicameral government in India.

3. The Gap Between the Bicameral Structure's Function and Capacity: The Problem of Political Practice

Despite the aims of the Indian bicameral structure, political reality in India demonstrates that the majoritarian *demos* is far from constrained, and the sub-national *demos* are far from enabled. Instead, the entrenched majority in the lower house has resulted in a form of 'majoritarian parliamentarism'. In the present instance with the Aadhaar Act, constitutional primacy of the lower house over money bills was exploited by the majority, to pass laws without the approval or due consideration of the views of the upper

[38] William Riker argued that bicameralism protects individual liberty against the tyranny of the majority. Alfred Stepan points out that this is specific to the American federal arrangement in which the Senate is *demos-constraining*. Individuals might also use bicameralism to represent themselves as members of their collectives, against the tyranny of the majority. In India, these collectives are sub-national linguistic or cultural groups ensconced in the states, who are represented in the upper house, proportionate to their population in an asymmetrical federal arrangement. The Indian upper house in Stepan's view is, to that extent, also *demos*-enabling; Stepan (n 13) 22-4, 29-31.

[39] Singh and Rao (n 32) 15.

[40] *Bond v US* 564 US 211 (2011) (US Supreme Court).

house—where the majority (at the relevant time) was not held by the governing party.[41]

The evolution of majoritarian parliamentarism must be understood in contrast with the constitutional design of the Indian system to realise a 'constrained parliamentarism'.[42] In this system, there is a

> *written constitution with an enumerated bill of rights, a supreme or constitutional court with judicial review powers which extend to the invalidation of legislative acts, conditionally co-equal bicameral legislature, an upper house of the legislature that is not as powerful as the lower house, independent agencies [43], for example an independent electoral commission or an auditory body.*[44]

These features are in addition to existing elements of the Westminster system, like the subordination of executive authority to parliamentary authority by way of Parliament's ability to terminate the former through a vote of no-confidence.[45]

In this section, we unpack the conditions of 'majoritarian parliamentarism' that result from a breakdown of constrained parliamentarism. In addition, we examine the gap between the upper house's functions and its capacity to perform such functions, under conditions of majoritarian parliamentarism.

The capacity to fulfil the functions of bicameralism is dependent on factors outside the reach of the codified constitutional text,[46] which we classify in two categories: in the realm of constraining the *demos,* parliamentary and political practice as exemplified by mechanisms for deliberation and accountability within the Parliament; and in the realm of enabling the *demos,* political practice as exemplified in the mechanisms of cooperative federalism and federal bargaining between States and the

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[41] See The Supreme Court (Number of Judges Amendment) Act 2019 and the Aadhaar Act 2016.

[42] Richard Albert, 'The Fusion of Presidentialism and Parliamentarism' (2009) 57 American Journal of Comparative Law 531, 536.

[43] Kaarlo Tuori, 'Popular sovereignty and independent bodies' (2019) (They, The People: People, Popular Sovereignty And The Constitution of Illiberal Democracy conference, Budapest, May 2019) 7, for constrained parliamentarism's dependence on independent bodies with value-based justifications and constitutional or statutory origins.

[44] Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633, 718-20.

[45] Subhash Kashyap, 'Executive-legislature interface in the Indian polity' (2004) 10(2-3) The Journal of Legislative Studies 278-94.

[46] George Tsebelis and Jeannette Money, *Bicameralism* (1st ed, CUP 1997) 73-8.

Union. Both these sets of factors diminish the capacity of our bicameral structure of government to serve its functions.

A. Parliamentary and Political Practice in the Demos-Constraining realm

The *demos*-constraining functions of bicameralism are to act as a check on a majoritarian lower house from advancing its legislative agenda without adequate discussion or consultation, and as a corollary, holding the executive government accountable. At a minimum, the upper house should subject the justifications for the lower house's action to a certain level of scrutiny. The erosion of the capacity of the upper house of the Indian Parliament to fulfil these functions is owed to a distortion of the executive-legislative relation, which may be present under conditions of constrained parliamentarism, but is exacerbated under conditions of majoritarian parliamentarism, and results from two factors: the internal practices of the Parliament, as well as internal practices of the political parties. We will discuss each of these in turn.

1. Internal Practices of Legislatures and Executive-Legislative Relations

Even under conditions of constrained parliamentarism, the capacity of the upper house to fulfil its functions may be eroded due to a disuse of parliament's internal deliberative structures, the proliferation of executive involvement in the law-making process, and an erosion of the oversight and accountability mechanisms of the Parliament.[47] However, the

[47] Another way to understand this is that the capacity of bicameral structure of government to achieve its functions is eroded when the *horizontal* (referral to select or standing committees), *diagonal* (questions) and *vertical* (lower house opposition or committees raising questions to the political executive) institutional routes chosen for managing the gap between the functions and capacity of bicameral government show signs of disuse, as has been the case. For example, while literature is not available relating to the Rajya Sabha, in a study of the 14th Lok Sabha, only 11.04 per cent of the total notices received were admitted, and few were responded to. See Rahul Verma and Vikas Tripathi, 'Making Sense of the House: Explaining the Decline of the Indian Parliament amidst Democratization' (2013) 1(2) Studies in Indian Politics 153, 161. For more on this, see generally, Devesh Kapur and Pratap Mehta, 'The Indian Parliament as an Institution of Accountability', Democracy, Governance and Human Rights Programme Paper Number 23 (January 2006) <https://pdfs.semanticscholar.org/2afd/3b8b66df3d25594cdcd7d18dcc5c74f13f35.pdf> accessed 18 August 2019.; Sandeep Shastri, 'Parliamentary committees in India and legislative control over administration in Ajay Mehra and Gert Kueck (eds), *The Indian Parliament: A Comparative Perspective* (Konark Publishers 2003). See also, Arthur Rubinoff, 'The Decline of India's Parliament' (1998) 4(4) The Journal of Legislative Studies 13–33 (on the reduction of the importance of Indian Parliamentary opposition views in the

departure from these parliamentary conventions can only partly explain the failure of the bicameral structure of government to realize its *demos*-constraining aims, especially in the case of the Aadhaar Act's passage. The other part of the explanation is the nature of the relationship between the legislature and executive, under conditions of majoritarian parliamentarism.

Under conditions of constrained parliamentarism, the nature of the relationship between the executive and the legislature in Indian politics exhibited a hybrid *transactional-hierarchical* form. [48] *Transactional* relationships between the executive and the legislature develop when each derives its existence and authority independent of one another. This is rare in parliamentary systems, where the executive is drawn from members of the ruling party or coalition of parties in the legislature. Yet, coalition based governments, which were common in India until 2014, had the capacity to develop transactional relationships, in that the executive-legislature relations while 'hierarchical in terms of the formal relation of the executive to the legislature...are transactional in terms of the relationship of parties to one another, because a bargain between two or more parties is necessary for a government to originate and then survive in office.'[49]

Relationships between the legislature and the executive display *hierarchical* characteristics when executive authority, comprising an executive head and her cabinet, arises out of the legislative assembly and is subject to potential dismissal through a no-confidence vote.[50] Under the hierarchy thesis, executive authority is subordinated to legislative authority because the former's existence is conditioned on the latter's approval in the parliament. This should be a hallmark of parliamentary democracies.

However, the hierarchy in the executive-legislature relationship is inverted when a single party obtains a majority of the seats in the lower

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legislative process). This question of institutional design is also the subject of democracy building literature, cf., International IDEA, 'Bicameralism: (Legislatures with Two Chamber) (Overview)' <http://constitutionnet.org/sites/default/files/bicameralism_0.pdf> accessed 30 May 2019.

[48] For this typology, see Matthew Søberg Shugart, 'Comparative Executive-Legislative Relations' in Sarah Binder, R Rhodes, and Bert Rockman (eds), *The Oxford Handbook of Political Institutions* (OUP 2008) 345.

[49] ibid 354. An example of the expression of this transactional element in the relationship between the legislature and the executive is the manner in which the UPA government in 2008 narrowly won a trust vote in the Lok Sabha on the issue of the Indo-US nuclear deal, at a time when its Left party coalition partners withdrew support for the government over this specific issue; 'A look back at the 2008 floor test when UPA faced no-confidence' (*Hindustan Times,* 22 July 2008) <https://www.hindustantimes.com/india-news/a-look-back-at-the-2008-floor-test-when-upa-faced-no-confidence/story-zEf4TMGoSOK89oYiTrbMnN.html> accessed 18 August 2019.

[50] Article 75(3) of Constitution of India 1950 see also Rule 198 of Rules of Procedure and Conduct of Business in Lok Sabha 1952.

house, thus subordinating legislative authority to executive authority. This is termed 'majoritarian parliamentarism'.[51] The majorities obtained by the Bharatiya Janata Party as the core of the National Democratic Alliance (a coalition comprising a number of other, smaller, regional parties) in both federal elections in 2014 and 2019, exemplify this phenomenon.

The structure of bicameral government, which is intended to multiply the veto points designed to be bulwarks against a lower house majority are easier to bypass under majoritarian parliamentarism. At least three veto points ensure that constitutionally suspect legislation is not passed by brute force. The first veto point is the set of strict textual conditions under which this power of the lower house may be exercised. That is, an ordinary bill 'shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses'.[52] The second veto point is the Speaker's certification of bills that the lower house desires to pass but not as "ordinary bills". In this instance, the Speaker, acting as a constitutional functionary, was to certify the Aadhaar Act as a "money bill" only if it met the conditions laid down in Article 110.[53] The third veto point arises at the stage of judicial review of such certification by the Speaker, albeit to a limited extent given the Speaker's position as a constitutional functionary. However, under conditions of majoritarian parliamentarism, where the executive is in a hierarchical position with respect to the legislature, the weakness of these veto points is such that it permits 'political representatives to restructure the legislative process and to reframe the options open to political executives'[54].

The passage and validation of the Aadhaar Act exemplifies the weaknesses of all three veto points. First, in the course of the constitutional challenge, the Court examined issues on the substance of the Act—surveillance, data protection, data minimization, purpose, limitation, time period for data retention, data security; and privacy;[55] the fundamental rights of children; and the validity of Section 57 of the Aadhaar Act—before it came to the issue of the passage of the Act as a money bill.[56] This indicates that the Court had presumed that the legislation could be classified and passed as a money bill within the meaning of Article 110, by answering the substantive issues first. This approach validates the failure of the first veto point. The majority judgment

[51] Søberg Shugart (n 48) 14.
[52] Article 107(2) of Constitution of India, 1950.
[53] *Mangalore Ganesh Beedi Works v State of Mysore* 1963 Supp (1) SCR 275; *Mohd Saeed Siddiqui v State of UP* (2014) 11 SCC 415; *Yogendra Kumar Jaiswal v State of Bihar* 2016 3 SCC 183.
[54] John Uhr, 'Bicameralism' in Sarah Binder, R Rhodes and Bert Rockman (eds), *The Oxford Handbook of Political Institutions* (OUP 2008) 480.
[55] *Puttaswamy II* (n 6) [231].
[56] ibid [398].

of the Court then failed to analyse the decision of the Speaker to certify the Bill as a money bill extensively.[57] When examining the passage of the Act, the first task at hand was to decide if the Speaker's certification was judicially reviewable since the issue was in question; were it not, the Court could not possibly have forayed into examining if the Bill was actually a money bill.[58] This represents a validation of the failure of the second veto point. That the Court chose to validate the two veto point failures is a failure of the third veto point.

In order to restore the capacity of the upper house to fulfill its *demos*-constraining functions, all three veto points need to do the work, and in tandem, under conditions of majoritarian parliamentarism. With all the veto points having failed, the autonomy of the individual in her interactions with the State suffers under the *demos*-constraining rationale.

2. Internal Practices of Political Parties and Executive-Legislative Relations

The internal practices of political parties plays an important role in ensuring that a multiplicity of voices is heard in the framing of law.[59] In the political reality of majoritarian parliamentarism in post-2014 India, when a single party obtains a majority of seats and a charismatic political executive head is able to minimise internal democracy within the party, the political party is fused with the executive, which already occupies a hierarchical position vis-à-vis the legislature.[60] Strong party discipline rules in India, by further centralising power in the executive, further fail to constrain the majoritarian *demos.* This has knock-on effects on the Union-State relations, as the State governments helmed by the same political party as the Union, come under the Union-executive's control through party channels.

While the presumption is that political parties have electoral incentives to preserve the structural Union-State relation,[61] scholars have noted that the resurgence of States after Congress dominated rule ended,[62] might

[57] ibid [412].

[58] ibid [487]. Justice Bhushan, however, sequences the issues appropriately.

[59] In addition to this, consultation with coalition partners in government also plays an important role as exemplified by the internal disagreements in the UPA-II in 2013 about the best way to create institutional arrangements to tackle terrorism; 'Indian Media: Disagreement Over Anti-Terror Centre' (*BBC News*, 6 June 2013_ <https://www.bbc.com/news/world-asia-india-22793402> accessed 18 August 2019.

[60] ibid.

[61] See Mikhail Filippov, 'Riker and Federalism' (2005) 16(2) Constitutional Political Economy 93, 97-9; Goutam Sarkar, 'Federalism & Coalition Politics: A Study on Indian Context,' (2016) 21(4) IOSR Journal of Humanities and Social Science 56 citing William Riker, *Federalism: Origin, Operation, Significance* (Little Brown Boston 1964).

[62] For literature on this point see Balveer Arora et al, 'Indian Federalism' (2013) 2 Political Science 100, 112-14.

have had more to do with *parties* at the state level asserting *their* interests, as opposed to *states* asserting their 'linguistic, cultural, or subnational identity' concerns.[63] In the same vein, centralized national party leadership, even in parties exhibiting a federated structure, can elicit states' complicity if the state is governed by the same party.[64] These developments are anticipated by Riker, who notes that the extent of party control over its legislators—'party discipline'[65]—and the frequency with which such control is wielded over the federal and the State governments—degree of 'disharmony'[66]—can determine the quality of federal bargaining between States and the Union. In India, party discipline as well as a high degree of disharmony are constitutionally sanctioned, as members of legislatures are mandated to obey whips issued by their party high command, on the threat of expulsion from the house, under the Tenth Schedule of the Constitution. This, we suggest, skews outcomes, as political parties are neither required to be[67] nor are internally democratic in India.[68] In addition, political parties are externally unanswerable to voters.[69] This is because voter choice is either based primarily upon a candidate's capabilities (which results in an implicit affirmation of her party affiliation), or upon the political party's capabilities (which results in an implicit

[63] Sudhir Krishnaswamy, 'Constitutional Federalism in the Indian Supreme Court' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (CUP 2015) 369.

[64] Chanchal Kumar Sharma and Wilfried Swenden, 'Modi-fying Indian Federalism? Center-State Relations under Modi's Tenure as Prime Minister' (2018) 1 Indian Politics & Policy 51, 57.

[65] Jorge Gordin, 'Testing Riker's Party-Based Theory of Federalism: The Argentine Case' (2004) 34 Publius: The Journal of Federalism 21.

[66] William Riker and Ronald Schaps, 'Disharmony in Federal Government' (1957) 2 Behavioral Science 276, 277ff.

[67] Pratap Bhanu Mehta, 'Reform Political Parties First' (2001) <https://www.india-seminar.com/2001/497/497%20pratap%20bhanu%20mehta.htm> accessed 1 June 2019.

[68] Studies find that candidates are nominated by a central committee and are not chosen democratically in the two major national parties in India. Likewise, it is unclear if there is a democratic election for selecting party leadership; Ruchika Singh, 'Intra-party Democracy and Indian Political Parties' (2015) The Hindu Centre for Politics & Public Policy Report (No 7) Chapters III and IV<https://www.thehinducentre.com/migration_catalog/article22981929.ece/BINARY/Intra_Party_Democracy_Ruchika_Policy_Report> accessed May 29, 2019.

[69] Since MPs are answerable to their political parties, and political parties are not answerable to voters, MPs answering to their political parties cannot be answerable to the voters who elected them into power. In other jurisdictions, parties conduct primaries (of their own volition or under legal regulation) in which either all voters, or voters registering support for the particular party - the 'selectorate' - choose from a pool of candidates vying for the party's endorsement. See Giulia Sandri, Antonela Seddone, and Fulvio Venturino (eds), *Party Primaries in Comparative Perspective* (Ashgate 2015) 9.

affirmation of the party's choice of candidate).[70] Consequently, once candidates are elected as parliamentarians, the candidate's party is not anchored to voters' preferences. Since members of parliaments and legislatures are constitutionally mandated to obey whips,[71] they are unable to translate voter preferences that diverge from the party line into policy preferences. These factors combine to create informal channels of power within parties such that diktats of party leadership issued from the central unit override voter preferences.

Thus, party-practices under conditions of majoritarian parliamentarism distort Union-State relations, which is aggravated by the inversion of the executive-legislature hierarchy. This has deleterious consequences for the bicameral structure, which ends up enabling rather than constraining the majoritarian *demos,* whose voice is channelled by the political party holding electoral majority.[72]

B. On the Political Practice of Federal Bargaining in the Demos- Enabling Realm

The *demos*-enabling function of bicameralism is to enable the voice of sub-national interests—be they ethnic, linguistic, or geo-political—of citizens residing in the various States. The erosion of the capacity of the upper house of the Indian Parliament to fulfil this function is owed to the seeming complicity of states in the agenda of the Union-executive—in this case to establish and institutionalise Aadhaar.

While the Aadhaar project began under conditions of constrained parliamentarism, it was reified and operationalised under conditions of majoritarian parliamentarism. States were solicitous of Aadhaar as early as in 2010—when the legal basis for Aadhaar was a mere notification[73]—evidenced by the MOUs they signed with the Unique Identification

[70] This may be why parliamentary or assembly election campaigns are becoming increasingly modelled on campaigns for presidential elections; Eswaran Sridharan, 'Behind Modi's Victory' (2014) 25(4) Journal of Democracy 20.

[71] Tenth Schedule of Constitution of India 1950.

[72] There are no structural or design features that guard against such concentration of power. The only factor tempering is 'the possibility that internal party disagreements might come into the open.' Søberg Shugart (n 48) 354.

[73] Notification No. A.03011/02/2009-Adm dt 28 January 2009 introduced when the National Identification Authority of India Bill, 2010 had been rejected by a Parliamentary Standing Committee Report; the Aadhaar Act 2016 was passed as a money bill, and received Presidential assent on 25 March 2016.

Authority of India (UIDAI) to implement it.[74] The MOUs were signed at the same time that UIDAI received a budgetary boost for developing Aadhaar infrastructure.[75] States went on even to link Aadhaar to social welfare programs.[76] Needless to say, the Union Government continued to enlist[77] the states' cooperation successfully[78] after enacting the Aadhaar Act 2016. Reportedly, the Union Government also contemplated incentivizing State governments to enact and implement Aadhaar, for "Direct Benefit Transfer" (DBT) under all central sector and centrally sponsored schemes,[79] and encouraged States to bring State sponsored schemes under

[74] All the MOUs between UIDAI and States/UTs were signed between March and August 2010; 'MOUs Signed with State Registrars' <https://uidai.gov.in/ecosystem/enrolment-documents/mous.html> accessed 1 June 2019.

[75] Sujay Mehdudia, 'Big boost for UIDAI' (*The Hindu*, 26 February 2010) <https://www.thehindu.com/sci-tech/technology/Big-boost-for-UIDAI/article16832285.ece> accessed 1 June 2019.

[76] Yogendra Kalavalapalli, 'UID gets off the ground with test phase in Andhra Pradesh' (*The Hindu*, 08 April 2010) <https://www.thehindu.com/news/national/UID-gets-off-the-ground-with-test-phase-in-Andhra-Pradesh/article16365266.ece> accessed 1 June 2019; Sangeetha Unnithan, 'Unique ID cards for schoolchildren' (*The Hindu*, 7 January 2010) <https://www.thehindu.com/todays-paper/tp-national/tp-kerala/Unique-ID-cards-for-schoolchildren/article15963137.ece> accessed 1 June 2019; Press Trust of India, 'Maharashtra to link school admission with Aadhaar' (*The Hindu*, 23 April 2015) <https://www.thehindu.com/news/national/other-states/maharashtra-to-link-school-admission-with-aadhaar/article7134236.ece> accessed 1 June 2019; PTI, 'LPG subsidy to be credited directly in bank accounts from June 1 in 18 districts' (*The Hindu* 29 May 2013) <https://www.thehindu.com/business/Economy/lpg-subsidy-to-be-credited-directly-in-bank-accounts-from-june-1-in-18-districts/article4762963.ece> accessed 1 June 2019.

[77] The 11th Inter-State Council Meeting, held on 16 July 2016, had on its agenda "Use of Aadhaar as an identifier and use of DBT for providing Subsidies, Benefits and Public Services". The Prime Minister stated: "The passage of this Act enables us to use Aadhaar for Direct Cash Transfers for subsidy and other services. As on date, 102 crore Aadhaar cards have been distributed in our country of 128 crore people. 79 per cent of our people now have Aadhaar cards. Among adults, 96 per cent people have Aadhaar cards. ... Therefore, eschewing criticism, we must lay emphasis on promoting social reform schemes through mutual cooperation. Many of these schemes have been designed by subgroups of Chief Ministers under the aegis of the NITI Aayog." See Press Information Bureau Government of India (PIB), 'Prime Minister to chair the Inter-State Council meeting tomorrow' (15 July 2016) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=147109> accessed 1 June 2019; PIB, 'English rendering of excerpts of the PM's inaugural address in eleventh Inter State Council Meeting at New Delhi' (16 July 2016) <http://interstatecouncil.nic.in/wp-content/uploads/2016/08/inaug-pm-english.pdf> accessed 1 June 2019.

[78] The Prime Minister's remarks were: "The Prime Minister expressed happiness at the near total acceptance of Aadhaar as a tool to promote good governance and transparency." PIB, 'PM's concluding remarks at the Inter State Council Meeting' (16 July 2016) <http://interstatecouncil.nic.in/wp-content/uploads/2016/08/concld-pm.pdf> accessed 1 June 2019.

[79] Special Correspondent, 'States to get sops based on Aadhaar's DBT platform' (*The Hindu*, 23 July 2016) <https://www.thehindu.com/business/Economy/States-to-get-sops-based-on-Aadhaar%E2%80%99s-DBT-platform/article14503122.ece> accessed 1 June 2019.

the Aadhaar-DBT mission. [80] Complying with centrally-issued instructions,[81] several States took steps to institutionalise Aadhaar, even though the constitutionality of the centrally enacted Aadhaar Act was an undecided matter at the time. [82] As a descriptive matter, through the mechanisms of federalism that were at work from as early as 2010, States had "cooperated" with the Union to such an extent, that the passage of the Act had become a mere formality.

Normatively, the seeming complicity of the States with the Union-executive on the Aadhaar project was made possible by the shared legislative powers for the Union and the States in this sphere. Aadhaar and the UIDAI were brought into being in 2009[83] by the Ministry of Planning, acting under the legislative field "economic and social planning",[84] which, like other social welfare fields[85] is open to both the Union and the States to legislate on under List III.[86] In the realm of this shared legislative power, even our best-case scenario[87] could not have led to *demos*-enabling outcomes any more than the outcome of *Puttaswamy II*.[88] After the States had signed MOUs with the Union for establishing Aadhaar and expended

[80] Arup Roychoudhury, '3,500 state, central schemes worth Rs 6 lakh cr to come under DBT soon' (*Business Standard,* 6 September 2017) <https://www.business-standard.com/article/economy-policy/3-500-state-central-schemes-worth-rs-6-lakh-cr-to-come-under-dbt-soon-117090500535_1.html> accessed 1 June 2019.

[81] Aman Sharma, 'States act on Aadhaar, link it to local schemes' (*The Economic Times,* 30 August 2017) <economictimes.indiatimes.com/articleshow/60283931.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 1 June 2019; See UIDAI Circular No 23011/Gen/2014/Legal-UIDAI 15 June 2016.

[82] For instance, the Maharashtra Act2017 with effect from 2016, Uttar Pradesh Act 2018, with effect from 2017, Uttarakhand Act 2018, with effect from 2017; Haryana Act 2017; Gujarat Act 2017, Rajasthan Act 2017, Jharkhand Act 2017, Karnataka Act 2018. Noteworthy outliers were West Bengal, which challenged the Aadhaar Act in the Supreme Court in *State of West Bengal v Union of India* Writ Petition (Civil) No. 841 of 2017 and Madhya Pradesh which enacted the Madhya Pradesh Act 2019 after *Puttaswamy II* (n 6).

[83] Notification No. A.03011/02/2009-Adm.

[84] List Entry 20 of Constitution of India 1950.

[85] List Entry 23-5 of Constitution of India 1950. The only outlier is List II Entry 6.

[86] Article 246(2) of Constitution of India, 1950.

[87] The two best cases are if the Speaker had not certified the bill as a money bill in 2016, and Rajya Sabha had returned or rejected the Bill, or if the Court had struck down the Aadhaar Act for not being a money bill, in 2018.

[88] In examining if the bill was indeed a money bill, the Court tried to save the passage of the Aadhaar Bill by substantively modifying the scope and content of the Aadhaar Act. These interpretive gymnastics, aimed at portraying the appropriation from the Consolidated Fund of India as the linchpin of the Act, enabled the Court to conclude that it was validly a money Bill. This reasoning is a fatal error, not least for the fact that the Court puts the cart before the horse. The only way the Aadhaar Act could have been constitutional was if it contained "only provisions" dealing with powers enumerated under Article 110(1)(a)-(f) or any matter incidental to them. This was not true of the Aadhaar Act, which contained all manner of provisions on setting up and running the Aadhaar infrastructure.

resources to discharge obligations under them,[89] the Bill's passage was necessarily in the interests of the States as political units. However, since States as political units are mere proxies for the sub-national interests ensconced within them, it is those unique and subjective sub-national contexts and interests that ought to have been advanced by the States' representatives in the upper house. In other words, States ought to have been voicing the interests of the *demos* that inhabit them, for the bicameral structure of the government to have the capacity to be *demos*-enabling.

The takeaway from the Aadhaar experience is key: under conditions where States are willing collaborators with the Union in a shared legislative field as a matter of political practice, the structure of Union-State relations fails to enable the sub-national *demos,* whose particular views are rendered irrelevant when the upper house is bypassed. Instead, the political practice of Union-States relations enabled the majoritarian *demos* and constrained the sub-national *demos.* Consequently, the individual's autonomy to affect political outcomes, or to represent herself as a member of a social group, or even to be governed by a limited government was compromised. In this fashion, the capacity of the bicameral structure of the government to enable the sub-national *demos* is eviscerated.

How can this capacity be restored? The avenue for states to advance their various interests as claims to autonomy[90] of various citizens and social groups, in the realm of shared powers, is constitutional "process".[91] States retain executive power in shared legislative fields in which the Union has not yet enacted laws.[92] To this extent, the interests of sub-national *demos* inhabiting States are safeguarded.[93] Yet, States were either unable or

[89] The MOUs signed with UIDAI in 2010 required state governments to 'Put in place an institutional mechanism to effectively oversee and monitor the implementation of the UID project in general', 'Provide required financial and other resources to the Registrars to carry out the enrolment processes as per the phasing decided by the State Government/Union territory', and 'Cooperate and collaborate with and provide all assistance and support to the Deputy Director Generals (DDG) concerned of the UIDAI and other staff members/consultants/advisors of the UIDAI to effectively implement the UID project in the State of Uttar Pradesh.'

[90] Scholars note that government can only be "federal" as distinguished from "decentralized" if the Union and States have distinct spheres of autonomy from each other. Singh and Rao (n 32) 4 ; Thiruvengadam (n 32) 75 citing Mahendra Prasad Singh, *Indian Federalism: An Introduction* (National Book Trust Delhi 2011) 20. See also Heather Gerken, 'Federalism 3.0' (2017) 105 California Law Review 1695, 1698.

[91] The constitutional processes that states may use to defend states' autonomy are laid out in Article 80, 254, 263 and the Fourth Schedule of Constitution of India 1950.

[92] Proviso to Article 73(1) of Constitution of India, 1950; *Union of India v V Sriharan* (2016) 7 SCC 1.

[93] By virtue of the States retaining executive power over shared fields, the Union could have validly exercised executive powers in "economic and social planning" only if Parliament had passed an Aadhaar legislation. Since the Aadhaar Act was not forthcoming till 2016, all acts of the UIDAI and the Ministry of Planning between 2009 and 2016 are unconstitutional.

unwilling to resist the Union's impositions in the period between 2010-16 despite a constitutional recognition of their powers in the field. To be clear, States have in the past successfully used these constitutional processes and powers to espouse their interests.[94] This shows that while constitutional processes are necessary, they are not a sufficient condition for enabling the sub-national *demos* in various States. Something more is necessary.

One such necessity is leverage. The question to ask is whether States can exempt themselves from obligations that are centrally imposed, in mammoth centrally-imposed programs such as the Aadhaar.[95] States might be unable to resist the Union's impositions if they lack the leverage to bargain with the Union.[96] Since the Union Government has funds but lacks personality, centrally conceptualized programs are reliant on state infrastructure, personnel and resources to realize their aims. States will be equipped to push the Union towards a more favourably designed welfare program, provided they control sufficient resources or infrastructure to use as leverage.

A second necessity for States, particularly for their political leadership, is the incentive to resist coercive bargains imposed by Union. As we argued in the previous section, political parties helming State governments are assumed to act on electoral incentives, while in fact, they answer to the incentives of the political party. Thus, even when States have leverage, in the absence of their legislative and regulatory autonomy being guaranteed in balance with the Union's in the realm of shared legislative powers, States' political leadership may have no incentive to obey voter preferences. Since constitutional doctrine on legislative and regulatory

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[94] See Rajeshwari Deshpande et al, 'States as Laboratories: The Politics of Social Welfare Policies in India' (2017) 16 India Review 85, 96-8.

[95] The (US) Affordable Care Ac, 2010, which was challenged in *National Federation of Independent Business v Sebelius* (2012) 567 US 519 (US Supreme Court) is a comparable "cooperative federalism" welfare program from the US. See Samuel Bagenstos, 'The Anti-Leveraging Principle and the Spending Clause after NFIB' (2013) 101 Georgetown Law Journal 861.

[96] The lack of state leverage is meant to be a descriptive claim. Indeed, one cannot assert a normative claim to leverage against the Union's impositions, being that States' resource endowments are a consequence of historically, sociologically and geopolitically contingent variables. Descriptively speaking, little is known of the type of leverage States possessed against the promised incentives or rewards, when they were made to sign the Aadhaar MoUs, besides scant journalistic reportage such as here; Special Correspondent, 'States to get sops based on Aadhaar's DBT platform' (*The Hindu*, 23 July 2016) <https://www.thehindu.com/business/Economy/States-to-get-sops-based-on-Aadhaar%E2%80%99s-DBT-platform/article14503122.ece> accessed 1 June 2019.

autonomy of states[97] is focused on which side was empowered to act,[98] such doctrine applied to the present context reduces the issue into a zero-sum analysis of which side ought to "win".[99] On the other hand, cooperative federalism has not been illuminating on the degree of state autonomy either.[100] As Singh and Rao note, 'the difficult problems are often ones where...one party in a dispute can gain only at another's expense.'[101] Policy recommendations emerging from the cooperative federalism standpoint, they note, appear to be mere 'exhortations [to the Union and States] to get along with each other.'[102] If this was all that was needed, the Constitution need do no work; extra-constitutional factors like party-hierarchy and leaders' personal relations[103] have dictated the degree to which States and the Union got along in the era of nationalised parties.[104] To restore the capacity of the bicameral structure of government to realize its *demos*-enabling function, incentives to bargain with the Union for the subjective interests of the *demos* inhabiting them, must be restored to States' political leadership.

4. Conclusion

In this article, we set out to understand whether the holding in *Puttaswamy II* on the money bill question is consonant with the holding in *Puttaswamy I* that the individual's autonomy is central to her relationship with the State.

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[97] See *KC Gajapati Narayan Deo v State of Orissa* AIR 1953 SC 375; *State of Rajasthan v G. Chawla* 1959 SCR Supl.(1) 904; *Gujarat University v Krishna Ranganath Mudholkar* 1963 SCR Supp (1) 122; *Hoechst Pharmaceuticals Ltd v State of Bihar* 1983 SCR (3) 130; *Vijay Kumar Sharma v State of Karnataka* (1990) 2 SCC 562; *State of Karnataka v Drive-in Enterprises* (2001) 2 SCR 378.

[98] This is not the case in the realms of President's rule under Article 356, and the termination of Governor's service at the pleasure of the President, in which the partisan perversion of constitutional design is tackled frontally by the Courts.

[99] Gerken (n 90) 1699.

[100] See Inter-State Council Secretariat, 'Report of the Sarkaria Commission on Centre-State Relations' (2016). Inter-State Council Secretariat, 'Report of The Commission On Centre-State Relations' (2010). The Bharatiya Janata Party, in its election manifestos for national elections in 2014 and 2019, also used this idiom, see Bharatiya Janata Party, 'Sankalp Patra: Lok Sabha 2019'.
<https://www.hindustantimes.com/static/ht2019/4/BJP2019.pdf> accessed 4 February 2020.

[101] Singh and Rao (n 32) 90.

[102] ibid.

[103] ibid 49.

[104] Balveer Arora and KK Kailash, 'The New Party System: Federalised and Binodal' in Ajay Mehra (ed), *Party System in India: Emerging Trajectories* (Lancer Publishers 2013) 235, citing Daniele Caramani, *The Nationalization of Politics: The Formation of National Electorates and Party Systems in Western Europe* (CUP 2004).

We set the stage for this analysis by showing that the bicameral structure of government was constitutionally designed to serve functions that enhance the autonomy of the individual. These functions are to constrain the majoritarian *demos* which finds expression in the popularly elected lower house, by requiring reflection, and to enable the sub-national *demos* inhabiting the various states, by requiring representation. Notwithstanding this, we find ourselves governed by an ordinary law—the Aadhaar Act—because it was passed as a "money bill" by the majoritarian lower house, not subject to upper house scrutiny. In other words, the Aadhaar Act's passage enabled the majoritarian *demos* and constrained the sub-national *demos* and thus effaced the relationship of the individual vis-à-vis the state, as envisioned by *Puttaswamy I.* This, we concluded was possible owing to the emergence of majoritarian parliamentarism in India post-2014, in contrast with the constitutional design for a constrained parliamentarism.

We set out, then, to analyse the points at which the bicameral structure is denuded of the capacity to fulfil its functions, under conditions of majoritarian parliamentarism. The first point of capacity-loss lay in the internal practices within the Parliament, in which the executive occupies a hierarchical position vis-à-vis the legislature, and the veto points of constitutional text, the Speaker's power to certify compliance with constitutional text, and judicial review powers over the Speaker's decision, all fail successively. The second point of capacity-loss lay in the internal practices of political parties. Owing to party discipline norms, and the absence of internal democracy and answerability to voters, we found that the political party voted by an electoral majority can not only become fused with the political executive, but also exert control through party channels over State governments helmed by the same party. This, we found, not only further concentrates power in the already hierarchically dominant executive vis-à-vis the legislature, but also distorts the Union's relations with the States. Both these points of capacity loss impinge on the *demos*-constraining function of the upper-house. The final point of capacity loss—in the realm of federal bargaining between the States and the Union, in legislative fields shared concurrently by both—impinges on the *demos*-enabling function of the upper house. We found that even though States were constitutionally protected both by powers and by process to resist the Union's impositions to set up the Aadhaar program, they were either unable or unwilling to do so. This, we found, was because States as advocates of the interests of their many ethnic, linguistic, and socially disparate *demos*, lack not only the leverage to exempt themselves from centrally imposed obligations, but also the incentive to resist such imposition. Since political practice is noticeably centripetal, we are sceptical that the upper house can advance the interests and preferences of sub-national *demos* inhabiting the various States.

We conclude that these three points of capacity-loss must be reckoned with, for the upper-house to restore its capacity to discharge its *demos*-enabling and *demos*-constraining functions. We also found that all capacity-loss occurs in political practice, whether within parliament or outside of it. From this, we conclude that the manner in which non-judicial, political actors work the Constitution of India is key to understanding outcomes which—despite being contrary to constitutional principles and design—are validated as "constitutional".

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TURNING POINT ANALYSIS OF BRAND LOVE TRAJECTORIES

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ABSTRACT

Brand love is a recent consumer construct that examines the passionate and emotional feelings of satisfied consumers. The present study examines the journey that consumers have with their loved brands from the first contact to the present moment through the lens of turning points. *Using semi-structured interview and Retrospective Interview Technique (RIT), the present study identifies nine turning points and five different trajectory types. Out of the nine turning points that have been identified, six turning points were found to help the brand love development, and three of the turning points were found to hinder the development of brand love. Further, five patterns of brand love trajectories were inductively categorized, which shows that the formation of brand love does not follow a specific pattern. The trajectories indicate that consumers do not experience love at first sight, thereby suggesting that brand love formation is complex.*

INTRODUCTION

Satisfaction has been at the core of all marketing-related activities for a very long time (Carroll and Ahuvia, 2006; Durgee, 1999; Larsen and Wright 2020; Naylor and Kleiser, 2002; Oliver, 1989; Swan, Martin, and Trawick, 2003). However, there have been significant efforts to look for concepts beyond satisfaction, as today's business environment requires constructs over and above satisfaction to improve the financial performance of firms (Chaudhuri and Holbrook, 2001; Homburg, Wieseke, and Hoyer, 2009). In this vein, Fournier and Mick (1999, p.11) suggested that "satisfaction as love probably constitutes the most intense and profound satisfaction of all."

Brand love, a consumer construct, is defined as the amount of passionate, emotional attachment that satisfied consumers have for their loved brands (Carroll and Ahuvia, 2006). In other words, brand love can be understood as a construct that explains variation in post-consumption behavior of satisfied consumers (Carroll and Ahuvia, 2006). Brand love has been a topic of interest to many researchers in the recent past (e.g., Carroll and Ahuvia, 2006; Batra, Ahuvia and Bagozzi, 2012; Rossiter, 2012; Sarkar, 2014). This increase in interest can be attributed to the crucial managerial consequences that the brand love has to offer, such as brand loyalty (Batra et al. 2012; Bairrada, Coelho and Coelho, 2018), positive word of mouth (Carroll and Ahuvia, 2006; Bairrada et al. 2018), willingness to pay a premium (Bairrada et al. 2018), resistance to negative information (Batra et al. 2012), etc.

Though there has been a surge in the research publications on brand love, a literature review suggests that most research on brand love has taken a snapshot approach to capture this phenomenon (Palsuk, Koles, and Hasan, 2019; Langner et al. 2016). In other words, most of the studies on brand love have examined the already formed brand love (Palsuk et al. 2019; Langner, Bruns, Fischer, and Rossiter, 2016) and have not looked at the *trajectory* of brand love (Langner et al. 2016).

The trajectory of brand love is an essential investigation because love is an emotion and, like all the other emotions, it is episodic in nature (Batra et al. 2012; Sternberg, 2003). Hence, brand love is subjected to constant change. As love is dynamic in nature, the consumer–brand relationships that are based on love also change and so do the relational feelings and the underlying behaviors of that relationship (Avtgis, West, and Anderson, 1998). Therefore, it is crucial to understand the cause of change in the trajectories of these relationships (Baxter and Bullis, 1986). This cause of change has been termed as turning points (Bolton, 1961) and they serve as a useful function of describing relational processes and change (Baxter and Bullis, 1986).

The present study contributes to the literature on brand love by examining the dynamic nature of brand love through the lens of turning points. Studying the trajectories of consumer–brand relationships might better the understanding of how relationships evolve, change, refuel, stagnate, redefine, and reduce. Past research on brand love has demonstrated that consumers and brands can also end up in divorce (Hemetsberger, Kittinger-Rosanelli, and Friedmann, 2009). Hence, it can be understood that the intensity of love in consumer–brand relationships can also reduce. An understanding of what causes a reduction of intensity can be a crucial insight for marketers. Thus, the objective of the present study is to understand how love for a brand forms and what causes the reduction in feelings of love for a brand.

Specifically, the present study attempts to answer the below two research questions:

RQ1: *What are the turning points that shape the trajectories of brand love?*
RQ2: *How do brand love trajectories evolve over a period of time?*

Brand love as a concept has been examined in various contexts such as fashion (Joshi and Garg, 2020), wine (Correia Loureiro and Kaufmann, 2013), destinations (Amaro, Barroco, and Antunes, 2020), etc. However, the construct has received limited attention in the context of electronic appliances. Electronic appliances as a category includes both consumer electronics and household appliances that are often sold by the same retailer[1]. While consumer electronics (e.g., mobile phones, laptops, etc.) are consumed both privately and publicly, household appliances are generally used in private spaces (e.g., Trimmers, Washing Machines, etc.). Hence, the category contains offerings that address both symbolic and functional needs of the consumers. An examination of consumer responses to the offerings of such a category can provide a deeper understanding of the phenomenon (Joshi and Garg, 2020).

The present study has been conducted in Indian geography. India has a population of 1.2 billion people, which indicates that the Indian market is a high potential market (Kumar and Paul, 2018). The revenue of consumer electronics of Indian geography alone stood at USD $48,575 million in 2020 and revenue from the sale of household appliances stood at USD $1,308 million in 2020. These revenue figures reiterate the managerial significance of exploring the concept of brand love.

In the following, the present study provides a brief theoretical background. Then, it presents the methodology and explains the turning points that have been identified and the emergent trajectories of brand love. After the elucidation of findings of the paper, the paper presents a discussion section. After the discussion section, the paper provides a section on limitations and future research directions, followed by the conclusion.

THEORETICAL BACKBROUND

Love is regarded as a complex emotion (Correia Loureiro and Kaufmann, 2012) that contains positive and negative elements (Strongman, 1996). The positive elements of this complex emotion are interest, joy, pleasure, happiness, euphoria, etc. Research on love in a consumption context was pioneered by Shimp and Madden (1988) based on the Triangular

Theory of Love that was proposed by Sternberg (1986). According to this theory, love is based on three components: intimacy, passion, and decision/commitment. Intimacy is a component that is made of feelings of warmth, closeness, communication, support, and respect. Passion refers to the motivation that is primarily derived from emotion. Decision/commitment is the cognitive component of love that refers to the acknowledgment of love and willingness to stay or maintain a long-lasting love-relationship. Based on these three components, Shimp and Madden, in their conceptual study, suggested that eight possible consumer–object relationships could emerge. They are: nonliking, liking, infatuation, functionalism, utilitarianism, inhibited desire, succumbed desire and loyalty.

Ahuvia (1993, 2005) furthered the literature on brand love by conducting empirical research on consumer's ability to love objects, such as brands. Using an interpretative paradigm, Ahuvia found that consumers can also develop love for inanimate objects. Further, Ahuvia's work suggested that there are fundamental similarities between brand love and interpersonal love. This thought process received support from other researchers too (e.g., Thomson, MacInnis, and Park, 2005).

Literature on brand love demonstrates that not everyone has considered brand love as analogous to interpersonal love. In other words, it has been observed that literature was divided in terms of different conceptualizations. In addition to interpersonal conceptualization, there were two other conceptualizations of brand love. One of the two considered brand love as analogous to parasocial relationships (Fetscherin, 2014). Parasocial relationship as a term was introduced by Perse and Rubin (1989) and was based on the concept of parasocial interaction that was developed by Horton and Richard (1956). Parasocial relationships are those that are unidirectional in nature, and only one of the two parties is expected to hold emotions (Fetscherin, 2014). In the context of consumption, only consumers hold emotions for the brands, and they do not expect brands to reciprocate the emotions (Fetscherin, 2014). The third and most significant conceptualization of brand love was posited by Batra et al. (2012), which suggested the use of a grounded theory approach to capture the phenomenon of love in the context of consumption. However, Batra et al. (2012) suggested that it is, in fact, appropriate to use the interpersonal theory in the consumption context, as there is a similarity of the attribute of love in both constructs, though the objects in the relationships are starkly different.

The present study also considers the interpersonal conceptualization of brand love, as companies of this day and age are in a constant dialog with the consumers by responding to queries and grievances promptly and emphatically (Sarkar, 2014).

Research on interpersonal relationships demonstrates that not all relationships progress in the same way (Baxter and Bullis, 1986). That is, there are people who fall in love at first sight and there are also people who gradually end up in love and between these two extremes, there are various interpersonal circumstances that trigger falling in love (Flicker, Sancier-Barbosa, Afroz, Saif, and Mohsin, 2019; Sangrador and Yela, 2000). Barelds and Barelds-Dijkstra (2007), in their research, mentioned that the speed of falling in love has no relation with the ultimate duration or perceived quality of the relationship. Riela, Rodriguez, Aron, Xu and Acevedo (2010) found that 56% of the participants in their study rated their speed of falling in love as "fast or very fast" and 44% of the participants in their study rated their speed of falling in love as "slow or very slow." Further, their study also mentioned that love at first sight could be attributed to physical appearance, and the speed of love is majorly impacted by dispositional traits such as human personality traits and mate preferences (Riela et al. 2010).

Building on the research of Gupta and Singh (1982), Iyengar (2010), made a similar observation. Iyengar (2010) compared arranged marriages and love marriages in a longitudinal study and found that love marriages tend to score higher than arranged marriages after the first year of marriage on the Rubin love scale, and arranged marriages tend to score higher than love marriages after ten years of marriage on the same scale. This shows that relationships change

from time to time and various factors govern the relationship trajectories. This also explains that the speed of falling in love does not assure the quality of the relationship. Another interesting point that can be inferred from this study is that there can be different paths to love, which are shaped by various factors and circumstances. As brand love is considered analogous to interpersonal love, it can be understood that there can be different trajectories in the case of brand love, too. Relationship trajectory techniques have been used extensively in interpersonal relationships to trace the evolution of the relationships (e.g.: Graham, 1997); however, the use of relationship trajectory techniques in the field of brand love has not been much (Palsuk et al. 2019; Langner et al. 2016).

A review of the literature indicates that past studies on relationship evolutions have been largely influenced by linear stage models (Duck, Rutt, Hoy and Strejc, 1991; Knapp, 1984), which have a beginning, middle, and an end. Though these models are parsimonious and straightforward, they do not offer critical insights pertinent to relationships, as relationships sometimes dissolve only to be reborn in another, and this is a critical aspect in understanding the evolution of relationship trajectories. As seen above, relationships are redefined from time to time and can involve turning points that are instrumental in relationship development and redefinition. The turning point can be defined as "any event or occurrence that is associated with a change in a relationship" and is central to a process view of relationships (Baxter and Bullis, 1986). In other words, turning points are the substance of change in relationships (Baxter & Bullis, 1986).

The concept was first used by Bolton in 1961 and was found to be beneficial in understanding relational processes and changes (Baxter and Bullis, 1986). They are instrumental in triggering a reinterpretation of what relationships mean to the respondents (Graham, 1997). These meanings can influence the perceived importance of the relationships and rationale for staying invested in a particular relationship. For example, most individuals would perceive *prompt corrective action* from the brand as a turning point that signifies a point of relational redefinition. Therefore, turning points in the present study's context can be viewed as symbolic interpretations and evaluations of events or incidents that shape brand love relationships. Roughly, turning points can be understood as factors that cause a change in the development of brand love trajectories. Understanding the turning points in the context of brand love (consumer–brand relationships) can help practitioners craft better strategies.

The first empirical study in this direction was conducted by Langner et al. (2016), who used Rossiter's (2012) brand love measure (hate, dislike, neutral, like and love). Brand love measure of Rossiter (2012) was chosen for Y-axis (hate and dislike on the negative Y-axis and like and love on the positive Y-axis), and the time period from the first contact to today was chosen for X-axis by Langner et al. (2016). The study revealed five different types of brand love trajectories. They are: *slow development*, *liking becomes love*, *love all the way*, *bumpy road*, and *turnabout*. The body of work indicated that two types of formative experiences shape these trajectories: integral formative experiences and incidental formative experiences. Integral formative experiences are crafted by the brand managers, and incidental formative experiences are beyond the control of managers. Langner et al. (2016), in their study, noted that the majority of the experiences that shape brand love trajectories are incidental and beyond the control of managers. Thereby, Langner et al. (2016) specifically posited that achieving brand love formation is "serendipitous."

The study of Langner et al. (2016) has been highly beneficial, as the study could effectively demonstrate that consumer–brand relationships similar to interpersonal relationships do not follow a particular path. The present study is an extension of the study of Langner et al. (2016) by studying the development of brand love trajectories through the lens of turning points as they are effective in describing relational processes and change (Baxter and Bullis, 1986).

METHODOLOGY

To address the objectives of the study, the authors employed the qualitative research method, as it unravels the meanings that people ascribe to a social phenomenon and provides the reasons for underlying behaviors (Weinrich, 1996). Further, the present study was conducted in India, an emerging market (Kumar and Paul, 2018; Sarkar and Sarkar, 2016). Indian population is young and has been noted as the population that enjoys shopping (Atwal and Bryson, 2014). Love is an experiential consumption and is expected to reach a peak at a young age (Belk, Ger and Askegaard, 2003). Therefore, the present study employed young adults who experienced brand love as respondents. In this regard, the personal networks of the authors were used for identifying respondents (Lee, Noh and Kim, 2013). In addition to this, the authors also leveraged social media sites and snowballing sampling technique to find a suitable sample. Interview requests were posted on the authors' personal pages and on various relevant pages to select respondents.

Sampling Technique

The study employed a purposive sampling approach to choose respondents who suited the study requirements (Kuzel, 1992; Palys and Atchison, 2008). Sampling for the present study followed a two-step process. Participants who showed interest in the study were asked to briefly outline their love for their favorite electronic appliances brand. To validate the emotional bond, Carroll and Ahuvia's (2006) scale of brand love was chosen as a screening criterion. The scale items were used as a screening questionnaire and were administered to the potential sample of the present study. All the respondents who chose Strongly Agree and Agree (a five-point Likert scale was used for this purpose) for all the positively coded questions were chosen as respondents for the present study. One hundred twenty-seven participants took part in the sampling process (the majority of them did not fall in the sample category). The authors interviewed only the participants who suited the requirements (those who chose Strongly Agree and Agree as responses for the positively coded questions) of the study. The authors fixed appointments as per the convenience of the respondents. All the respondents were briefed about the study's objective and were assured that all the information would be kept confidential. The final sample of the present study stood at 30, after which the data collection was stopped as authors were experiencing theoretical saturation (Lincoln and Guba, 1986).

Respondents' Profiles

The average age reported by the respondents was 28.03 years, with the range being 22 to 40. The mean annual family income of the respondents was 1,811,667 rupees, which is equivalent to USD 24,155.56 (1 USD = 75 Rupees). The average annual income of the respondents was observed to be high in the Indian context (Sarkar, Sarkar, and Rao, 2016), and it was assumed that affluent consumers would engage more in experiential consumption due to higher disposable income (Atwal and Bryson, 2014). The respondents included students, businesspeople, and working professionals from various parts of the country. India is a land of diversity and drawing a sample from various parts of the country broadened the scope of the data (Sarkar, 2014).

Data Collection

All authors were involved in data collection. Semi-structured and Retrospective Interview Techniques (RIT) were used to collect data. The data collection began with the semi-structured interview technique to understand the underlying reasons for loving their respective brands (Creswell, Hanson, Clark Plano, and Morales, 2007). To this end, each respondent was asked to describe their loved brand, experiences with the loved brand, reasons for loving the brand, and their efforts to stay close to the loved brand. Probing questions were also used

wherever it was deemed necessary. After this deliberate memory priming interviewing, the authors used RIT for the collection of data; an approach used to capture turning points (Baxter and Bullis, 1986; Huston, Surra, Fitzgerald, and Cate, 1981). Using this technique, the authors of the study captured all of the turning points (along with sketching of the path) of each respondent with his or her loved brand since the first contact to present moment on a graph template that was used by Langner et al. (2016). The X-axis of the template represented the time, and the Y-axis represented the intensity of feelings where liking and love were on the positive end and dislike and hate on the negative axis. At each identified turning point, the authors probed for additional information. The verbal descriptions were recorded and transcribed for further analysis. On average, each interview lasted for about 65 minutes. After plotting the graph, each respondent was given adequate time to make any alterations, if necessary. All the 30 graphs collected during this process were scanned and shared electronically with all three authors for further analysis.

Data Analysis

After completing the transcription process, the authors read and re-read all the transcripts to familiarize themselves with the data. This was followed by a coding process to categorize various turning points that have been observed. To this end, the authors used the constant comparison method (Glaser and Strauss, 1967). All the authors carried out the analysis independently, and the final categories were refined in consultation with each other. In case of any disagreement, the authors deliberated until consensus was reached. During the coding process, the authors also conducted a member check procedure (Bitsch, 2005) by meeting the respondents to verify if the interpretations of the authors were in tune with the intended meaning of the informants.

In addition to the above analysis, the authors also categorized the emerging brand love trajectories. The authors used the constant comparison method (Glaser & Strauss, 1967) to determine similarities among the RIT graphs (trajectories) for categorization purposes. The authors deliberated until a consensus was reached. Disagreements in the whole process were amicably sorted. At the end of this process, five types of brand love trajectories were ascertained: *Turnaround to Love, Drop in Love, Liking to Love, Gradual Development*, and *Roller Coaster Ride.*

FINDINGS

Turning Points in Brand Love Trajectories

A total of 98 turning points were identified at the end of the process, with a mean of 3.26 turning points per respondent. These 98 turning points were finally categorized under nine broad categories, with six turning points being positive and three turning points being negative, as shown in Table 1.

Positive Turning Points

Positive turning points are events that have helped the trajectories in the development process of love for the brand. As per the analysis, 71 positive turning points were observed.

Functional Value. From Table 1, it can be understood that functional value is the most frequently reported turning point in the development of brand love. Functional value can be defined as the utility received from a brand's perceived quality and expected performance (Sweeney and Soutar, 2001).

Table 1: Frequencies of Turning Points

No.	Turning Points	Frequency (N=98)
	A. Positive Turning Points	***Frequency (N=71)***
i.	Functional Value	42
ii.	Positive Peer Influence	15
iii.	Prompt Corrective Action	5
iv.	Spokesperson Endorser Influence	1
v.	Hedonism	5
vi.	Social Value	3
	B. *Negative Turning Points*	***Frequency (N=27)***
i.	High Price	9
ii.	Negative Past Experience	16
iii.	Negative Peer Influence	2

"It was actually very slim, had a very good quality build-up, and had that sandy texture, which was not used by any phone at that time. It caught my attention. I used it for a while. I was very impressed by the smoothness and safety features." (R1, One Plus)

"When I used it for my activities, I could see that even with less storage, it was even able to outperform windows machine for computational activities. These things triggered a positive affect, and that became love over a period of time." (R6, Apple)

"I get the quality here. The speed of the mobile doesn't change. From day one, it more or less remains the same. That is something that is attracting me towards Apple." (R10, Apple)

Though brand love describes the emotional nature of consumer–brand relationships, one must not forget that brand love has a cognitive grounding (Sarkar, 2014; Fournier, 1998). Further, Batra et al. (2012) found that consumers love brands that offer superior performance, superior value for money, and superior attributes. Thus, for a brand to be loved, it must be a brand that offers superior functional values. It has also been noted that "cognitive activity causally precedes an emotion in the flow of psychological events" (Lazarus, 1999). Hence, for the brand love to form, it is also imperative for the brand to deliver on the rational attributes, failing which the formation of brand love is hindered (Huber, Meyer and Schmid, 2015). As love is a post-consumption evaluative response (Thomson et al. 2005), cognitive satisfaction derived from a brand is crucial for the formation of brand love. This emotional satisfaction that occurs because of cognitive attributes has been found to match the effect of emotional satisfaction that is gained from hedonic attributes (Fournier, 1998; Carrol and Ahuvia, 2006). Hence, the realization of superior functional value was considered as a positive turning point.

Positive Peer Influence. The second turning point, "positive peer influence," was the second most reported positive turning point. It refers to the events where friends and family have influenced the respondents positively. The below illustrations can shed some light on this turning point:

> *"I bought the phone [iPhone] because all my friends were using iPhone, so from negative feelings, I developed some positive feelings for iPhone."* (R13, Apple) (Quote 1)

> *"Slowly what happened is I started getting testimonials from my friends who were using Macbook. [...] That is when my liking started taking a very steep inclination".* (R6, Apple) (Quote 2)

> *"Actually, in Punjab, everybody had an Apple iPhone. It is a cultural norm. If you did not have, you are considered an outlier."* (R9, Apple) (Quote 3)

A literature review suggests that consumer behavior cannot be fully understood without considering the interpersonal influence on the development of attitudes, norms, values, aspirations, and purchase behavior (Stafford and Cocanougher, 1977). Additionally, past research has also shown that consumers can love objects just to strengthen their social relationships (Miller, 1998). A comprehensive review and analysis of articles on various aspects of susceptibility to interpersonal influence by McGuire (1968) concluded that susceptibility to interpersonal influence varies across people. A person's ability to be influenced in one situation tends to significantly impact a range of other situations. Consumer susceptibility to interpersonal influence can be defined as the need of a consumer to identify with or enhance one's image in the eyes of significant others through the purchase and use of products and brands (Bearden, Netmeyer, and Teel, 1989).

Research in consumer behavior showed that interpersonal influence is manifested through normative influence or informational influence (Deutsch and Gerard, 1955). Normative influence can be understood as a tendency to conform to the expectations of others (Burnkrant and Cousineau, 1975). Further, literature in consumer behavior has divided normative influence into value expressive and utilitarian influences (Bearden and Etzel, 1982; Park and Lessig, 1977). Value expressiveness can be understood as an individual's desire to better the self–image by associating with a reference group. This type of interpersonal influence is motivated by an individual's desire to better his or her self–concept through referent group identification (Kelman, 1961). It can be observed from quote 1 that the respondent developed some positive feelings for the brand because all her friends used the same brand.

Utilitarian influence, the other type of normative influence, is seen in individuals' attempts to stay in tune with the expectations of others to achieve rewards or avoid punishments (Burnkrant and Cousineau, 1975; Bearden and Etzel, 1982). From quote 3, it can be understood that the respondent was under the utilitarian influence and had to have an iPhone, as he would be considered an "outlier" if he did not have one.

On the other hand, informational influence can be understood as a tendency to accept information from others as evidence about reality (Deutsch and Gerard, 1955). According to Park and Lessig (1975), informational influence occurs either by searching for knowledgeable individuals or by making inferences based on the observation of the behavior of others. This can be observed in the excerpt of R6 (second quote), who mentioned that his liking for the brand took a 'steep inclination' once he started getting testimonials from the people who used Macbook. Therefore, a positive informational influence that acts as evidence can trigger cognitive satisfaction, leading to the formation of strong brand love (Oliver, 1999). Keeping

all the above substantiations in view, it can be concluded that the *positive peer influence* turning point helps in the development of brand love trajectory.

Prompt Corrective Action by Brand. Prompt corrective action can be understood as the measures taken up by a brand to bring back a product to the stage of normalcy. This turning point refers to the post-purchase services of the firm in case of a performance failure. Below is an excerpt that illustrates the prompt corrective action turning point.

> *"I had an issue with my Macbook charger, for which I had to visit the service center. [...]They followed up with me very well. The kind of prompt response that I wanted they matched to it. They stuck to their deadlines. They were very prompt."* (R2, Apple) (Quote 4)

> *"Apart from the utility, the second thing is service. I had a couple of problems; they were only hardware problems, not software problems. Whenever I went to a Lenovo service store, they repaired my laptop in a day or two without any fuss. It values its customers and tries to give the best service. That was something that attracted me."* (R4, Lenovo) (Quote 5)

> *"There is an application on my phone, where if I register a complaint, they come and pick up the phone. That is the feature that they give you. This I am talking about the post-sales support. Any part of the hardware or software, it does not get damaged; even if it does, they will change it immediately. [...] posted something about a very common problem of One Plus [on Facebook]. I was really amazed to see that One Plus responded within two minutes. I was really impressed by that."* (R1, One Plus)

Literature has shown that successful performance and positive events with respect to the interaction with a brand are instrumental in driving customer satisfaction (Bitner, Booms, and Tetreault, 1990). The experiences that are instrumental in shaping the customer evaluations of a firm that is executing the service are rooted in their reactions to how they were treated by the employees of the firm (Bitner, 1995). Hence, the attitudes, behaviors, and expertise of service employees in these encounters capture the performance of the firm (Brady and Cronin, 2001). Further, attention and valuing of the particularity, understanding and responsibility have been identified as the three dimensions of respect, and any combination of these components will seed respect (Ali and Ndubisi, 2011; Dillon, 1992). Respect has been observed as one of the most effective ways for brands to forge relationships with consumers because respect includes being moral, compassionate, and responsive towards consumers (Ali and Ndubisi, 2011; Dillon, 1992).

This positive experience with a brand's employees (and post-purchase service) can lead to positive evaluations of the brand and cognitive satisfaction. As brand love is the amount of passionate, emotional attachment that a satisfied consumer has for a particular trade name (Carroll and Ahuvia, 2006), it can be concluded that prompt corrective action can lead to the formation of brand love. It can be understood from quotes 4 and 5 that the brands were responsive to the consumers in solving performance failures. Thus, by being prompt in taking corrective actions, the consumers have received respect from the brand. This is evident from quote 5 of the respondent, who said that the brand values its customers. Further, respect has been observed as an indicator of interpersonal love (Hendrick and Hendrick, 2006). Hence prompt corrective action by a brand has been found as a turning point of brand love trajectory.

Hedonism. Hedonism was observed to be a significant marker event in the present study. The below excerpts shed some light on the same:

> *"I used to play PUBG and all high end [graphic] games, when these games used to play without any glitches, without any lag then I used to feel good."* (R7, One Plus)

> *"The product was also visually very good. I loved using that product."* (R30, Asus) (Quote 18)

> *"The bright logo that appears fascinated me so much. There is no doubt that Macbook is beautiful, the design and the sleekness are all very good."* (R21, Apple) (Quote 19)

Hedonism can be defined as positive feelings of pleasure, fun, excitement, and enjoyment (Triantafillidou and Siomkos, 2014). Research suggests that hedonic experience has been commonly seen in young people (Wilska, 2003). Hedonism has emerged as a crucial turning point as consumers purchase products or brands because they expect some benefit from the consumption experience (Leroi-Werelds, Streukens, Brady and Swinen, 2014). On this account, the concept of customer value started gaining prominence in the area of consumer behavior (Zeithaml, 1988; Woodruff, 1997; Smith and Colgate, 2007). To this end, Holbrook (1996) specifically differentiated two types of value: extrinsic and intrinsic value.

Extrinsic value refers to the instrumentality of a brand and covers the potential ability to perform a function by providing a superior perceived quality (Holbrook, 1996). On the other hand, intrinsic value refers to the feelings such as enjoyment, pleasure, fun, or excitement experienced on using a brand (Holbrook, 1996) and these experiences have been found to create a strong emotional base that can lead to the formation of a robust consumer-brand relationship (Sheth, Newman, and Gross, 1991; Fournier, 1998; Smith and Colgate, 2007). Further, it has been found that hedonism gives rise to delight (Chitturi, Raghunathan and Mahajan, 2008), which, in turn, can generate higher levels of arousal (Oliver, 1997). Hence, hedonism has been found to be a turning point in the development of brand love trajectories.

Social Value. Social value was also found to be a turning point in the development of brand love trajectories. The below excerpts indicate social value as a turning point:

> *"Samsung was an aspirational brand, and I wanted to have an image like Samsung, that is being relevant and cool. [...] Since our college days, Samsung was always treated well in my peer circle". (R28, Samsung) (Quote 16)*

> *"If you are a Sony user, you are a premium user. That's the feel. There were many phones even then Samsung, Sony, Nokia, but Sony was considered premium. I don't have to say anything about myself, but my Sony phone would do the talking for me, even if the Sony phone was not so expensive". (R22, Sony) (Quote 17)*

A literature review suggests that consumers use brands to shape their identities (Malar, Krohmer, Hoyer, and Nyffenegger, 2011) and establish themselves in a social context (Naylor and Kleiser, 2002; Sprott, Czellar, and Spangenberg, 2009; Wallace et al. 2014). Consumers attempt to incorporate the features of a brand into their own identity by purchasing and consuming the brand (Becerra and Badrinaryanan, 2013). Hence, in addition to performing various functions, brands also provide value to the consumers by serving as a platform to

express themselves and to differentiate themselves from others in a social context. This value is referred to as social value. Social value is defined as the utility derived from the ability to enhance one's social self-concept through the consumption of value-offering (Sweeney and Soutar, 2001). Self-concept can be understood as "the totality of the individual's thoughts and feelings having reference to himself as an object" (Rosenberg, 1979, p.7). Self-concept has four dimensions: actual self-image, ideal self-image, social self-image, and inner self-image (Dolich, 1969). Quotes 16 and 17 indicate that the respondents derived enhancement of social self on purchasing and consuming their loved brands. Past research has shown that a strong connection between social-self of an individual and brand can lead to enhancement of social-self. This enhancement can, in turn, lead to strong affective responses for the brand (Aaker, 1997; Naylor and Kleiser, 2002; Carroll and Ahuvia, 2006; Bergkvist and Bech-Larsen, 2010; Malar et al. 2011). Further, it has also been noted that a brand that fits a consumer's personality and facilitates a consumer to express his or her social-self will also deliver the consumer a sense of comfort (Huber et al. 2015). Hence, it can be concluded that social value leads to the formation of brand love.

Spokesperson Endorser Influence. As per the analysis of the paper, spokesperson endorser influence was found to be a turning point in the development of brand love trajectories. The illustration of this turning point reads as below:

> *"I pretty much knew about Apple and products of Apple from 2010. One of the key reasons for me to love the brand initially was Steve Jobs. There was this weird fascination to own Apple products which included iPhone, Macbook, and iPad, though I did not own one then. So, I used to follow Apple keynotes and releases very rigorously."* (R12, Apple) (Quote 7)

It has been established that consumers are always in the process of defining their self–identities and desired self-images (Escalas, 2004). Consumers tend to buy certain brands in view of this process, as these brands would facilitate fulfilling of self-definitional needs (Belk, 1988). According to the theory of meaning movement (McCracken, 1989), cultural meanings from cultural space are transferred to objects. This is because brands have the ability to possess strong symbolic associations that are instrumental in making a match with consumer's sense of self. Over a period of time, these brands develop strong relationships with consumers and generally facilitate favorable brand attitudes and behavioral intentions (Escalas, 2004). In the same line of thought, McCracken (1989) explained a theory of meaning movement, a process by which cultural meanings are moved from cultural space to material objects and into the lives of consumers. When an endorser is associated with a brand, there is a transfer of the endorser's personality and lifestyle-related associations into the brand (and the products of the brand) (McCracken, 1989). If the brand endorser transfers symbolic associations that are in tune with the self-concept of a consumer, then the consumer can develop a strong equation with the brand and also develop favorable brand attitudes and behavioral intentions. In other words, consumers have a strong drive to act in a manner that can establish or enhance their ideal-self, and in this process, they consider certain endorsers (or people with strong social presence) as inspirational personalities, which can trigger the activation of ideal – self (Boon and Lomore, 2001; Escalas and Bettman, 2003). Hence, to achieve this ideal self, consumers are inclined to conform to or follow the attitudes and behaviors of these endorsers. Keeping this in view, it can be concluded that endorser influence impacts brand love positively.

Negative Turning Points

Negative turning points are those events that have hindered the development of brand love trajectories. A total of 27 negative turning points were observed in the present study.

High Price. From the analysis, it has been understood that high price is the most observed negative turning point. A typical illustration of this turning point reads as follows:

> *"Initially, I felt the phone was unnecessarily expensive."* (R13, Apple)

> *"I realized that for a phone with these features, this price is way too high."* (R2, Apple)

> *"I do not have such love feelings for the brand now. I have realized that the brand is releasing way too expensive phones."* (R26, Apple)

A literature review suggests that price and value are related constructs (Sheth et al. 1991). While price measures the monetary sacrifice that a consumer had to make to obtain a product or service, value refers to the consumer's judgment in terms of the benefit(s) received. Additionally, price can be judged easily, but value has an idiosyncratic and personal component (Zeithaml, 1988). Broadly, consumers understand value as what they pay and receive (Sawyer and Dickson, 1984). This judgment of value by consumers facilitates an internal price reference through which consumers judge prices of the products and prices of similar products (Lalwani and Monroe, 2005).

Further, research has shown that dis/satisfaction is based mainly on value analysis (Day and Crask, 2000). Therefore, if the high price of a brand's product is not justified (Day and Crask, 2000), it can lead to dissatisfaction, an antecedent of brand hate (Bryson, Atwal, and Hulten, 2013). A literature review suggests that prices and related price judgments influence loyalty formation and consumption behavior (Thomson et al. 2005). Further, loving brand relationships are driven by rational components (Langner et al. 2015). This was also noted by Huber et al. (2015), who mentioned that the role of rational benefits in brand love increases with the increase in relationship duration. Thus, high prices of a brand can lead to cognitive dissatisfaction. To add to it, brand love, which is based on cognition, is weakened as cognitive dissatisfaction leads to weaker brand love. Hence, the trajectories of brand love experienced a dip due to high price.

Negative Peer Influence. Negative peer influence refers to those critical incidents where friends and families of respondents have triggered negative feelings about a brand. Few descriptions are given below:

> *"I was surrounded by friends [peers] who criticized Macbook; hence I never thought of buying a Macbook". (R2, Apple)*

> *"My best friends did not like Apple; hence even I had negative feelings for Apple". (R13, Apple)*

From the above excerpts of the interview, it can be understood that the respondents did not consider purchasing Apple as they did not want to project themselves negatively to the peer group or significant others. Research has shown that negative association of brand image and desired social image are important determinants of brand hate (Hegner, Fetscherin, and Van Delzen, 2017). The incongruence between the desired social self and the brand image results in a phenomenon called brand embarrassment. In other words, negative brand social expressiveness is a significant factor for causing brand embarrassment (Sarkar, Sarkar J G, Sreejesh, Anusree and Rishi, 2020). Brand embarrassment is a feeling of awkwardness experienced by consumers and is based on the perception of getting negatively evaluated by others while consuming a brand in a social context (Sarkar and Sarkar, 2017).

Further, Walsh, Albrecht, Hofacker, Grant, and Takahashi (2016), in their research, mentioned that brand embarrassment is a consumer's self–conscious emotion and impacts purchase decisions. In addition to impacting purchasing decisions, brand embarrassment creates brand hate (Sarkar et al. 2020). From this perspective, a negative interpersonal influence turning point pulls the trajectories of brand love downwards towards feelings of dislike and hate. Hence, negative peer influence impacts brand love negatively.

Negative Past Experience. Below are the few excerpts that illustrate negative past experiences with brands from the interviews of the respondents:

> *"The cable wire got broken and another thing is that there is a pin in the earphone jack which got broken so I could not use the earphone jack. So, I had to buy a Bluetooth earphone. This is the first time that something in a phone that got broken. So, I was a little disappointed at that point in time". (R7, One Plus)*

> *"The model had a huge hinge problem like the hinges of the laptop used to run out in a year or so. I had to replace the hinges like three to four times now". (R4, Lenovo)*

> *"I realized that Bose had better noise cancellation when compared to Sennheiser, that disappointed me so much". (R20, Sennheiser)*

> *"I loved using that product until last year, when the service guys did not do a good job but started blaming me for some internal damage. [...] I strongly feel the internal damage was done by one of those service guys in the process of repairing. For the first time, I just let it go because all this while Asus had given me a good experience. But the same thing happened again, this time I was so mad at them. I also did not like the way they communicated with me. My love for the brand instantly dropped". (R30, Asus) (Quote 6)*

Negative product experiences can be either because of the failure of products, dissatisfaction with the offering, or negative country of origin associations and service failures (Hegner et al., 2017; Bitner et al., 1990). Literature suggests that consumers buy various brands for various reasons; however, the most basic expectation of any consumer is an adequate product or service performance (Lee et al. 2009a, 2009b). After consuming a product or service, consumers compare their initial expectations of a product or service with the actual performance, and consumer expectations can be met or unmet (Oliver, 1980; Halstead, 1989). When consumers' expectations of a brand match the performance, it results in confirmation, thereby satisfaction (Hegner et al. 2017). On the other hand, disconfirmation occurs when consumers' expectations are either above or below the actual performance (Oliver, 1980). Further, negative disconfirmation occurs when the actual performance of a brand is below the expectations, which can eventually result in dissatisfaction (Oliver, 1980). This dissatisfaction is a strong determinant of brand hate (Bryson, Atwal, and Hulten, 2013; Zarantanello, Romani, Grappi, and Bagozzi, 2016). Additionally, past research has shown that disconfirmation leads to distrust (Nam, Baker, Ahmad, and Goo, 2020). As trust is a crucial component of brand love (Fehr, 1998), a negative impact on trust can lead to a drop in the positive feelings for the brand.

In addition to the performance failures, research has shown that customers who experience service failures are found to love a brand less intensely, perceive a brand less favorably and are also found to exhibit less happiness (Aaker, Fournier, and Brasel, 2004; Soscia, 2008) as seen

in quote six. Specifically, as seen in quote six, it has been noted that repeated experiences of performance failures can lead to the elicitation of anger (Oliver and Westbrook, 1993), a component of brand hate (Fetscherin, 2019). Further, Hegner, Fetscherin, and Delzen (2017) found that there is a positive relationship between negative past experience and brand hate. Therefore, it can be concluded that negative experiences with the product can lead to a dip in the trajectories of love.

TRAJECTORIES OF BRAND LOVE

As mentioned previously, five categories of brand love trajectories (patterns) were inductively derived as per the coding process. The resulting patterns are illustrated as below:

Table 2: Turning Points Observed Across Trajectory Types

Trajectory Types	Trajectory Names	Turning Points Observed
I	Turnaround to Love	Positive Peer Influence; High Price; Negative Peer Influence; Functional Value; Prompt Corrective Action; Negative Past Experience; Hedonism; Social Value
II	Drop in Love	Positive Peer Influence; High Price; Functional Value; Negative Past Experience; Hedonism
III	Gradual Development	Positive Peer Influence; Functional Value; Negative Past Experience; Endorser Influence; Hedonism; Social Value
IV	Liking to Love	Positive Peer Influence; High Price; Functional Value; Negative Past Experience; Hedonism; Social Value
V	Roller Coaster Ride	Positive Peer Influence; High Price; Negative Peer Influence; Functional Value; Prompt Corrective Action; Negative Past Experience

Tables 3 and 4 provide additional information about the brand love trajectories.

Turnaround to Love

The first type of trajectory (refer to Fig. 1a), *Turnaround to Love*, where five respondents were categorized under this trajectory type, indicates a reversal of the curves from negative affect zone to positive affect zone. The respondents categorized under this trajectory initially held negative feelings for their favorite brands due to high price and negative peer influence. However, the respondents developed positive feelings for these brands due to functional value, hedonism, and social value. A typical illustration of this type of trajectory is:

> *"It was not love at first sight. It seemed to me like Apple was overpricing its product just to be in the luxurious category without even providing the required specifications or features. [...] and when I used it for my activities, I could see that even with less storage, it was even able to outperform windows machine for computational activities. These things like triggered a positive affect and that became love over a period of time" (Respondent 6, Apple) (Quote 14).*

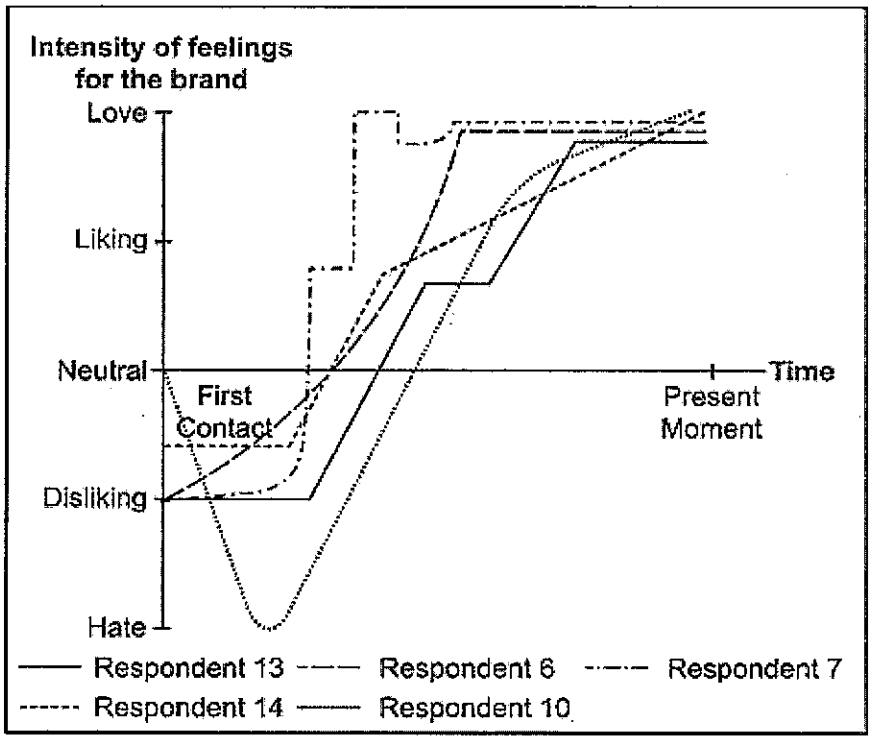
Another illustration of this type of trajectory reads as follows:

> *"Initially I had a negative perception about iPhones because it was too expensive, and it was not well-suited for Indian use"* (Respondent 10, Apple) (Quote 15).

Interestingly, all the respondents whose paths turned positive experienced a flat path at the present moment, as one of the respondents stated,

> "*[...] after that my journey is like stable*" (Respondent 7, One Plus).

Figure 1A: Type I—Turnaround to Love



Drop in Love

Drop in Love depicts a reduction in the intensity of positive feelings (refer to Figure 1B). The respondents categorized under this trajectory type, experienced drop in intensity of feelings, after reaching a state of love, due to negative experience and high price. Five respondents were categorized under this trajectory type. Interestingly, all the respondents of this trajectory have terminated their relationships with their loved brands. One of the respondents who was asked to explain the entire journey said:

> *"I think from 2011, I liked it. By the time it was Apple iPhone 4 or 5 during 2016-17, I was in the love stage. After iPhone 6S, it declined. It was not able to meet up to my expectations, and it inconvenienced me on several occasions, which led to many other problems"* (Respondent 9, Apple) (Quote 8).

Further, it was observed that the respondent still held positive feelings even after switching to another brand:

Table 3: Frequencies of Turning Points Across Trajectories

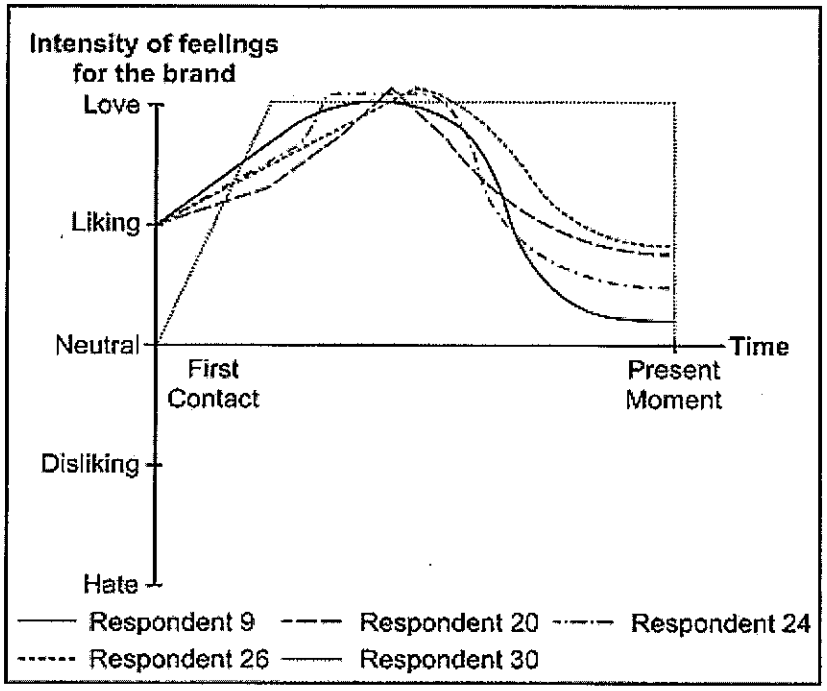
Trajectory Types	*Positive Peer Influence*	*High Price*	*Negative Peer Influence*	*Functional Value*	*Prompt Corrective Action*	*Negative Past Experience*	*Endorser Influence*	*Hedonism*	*Social Value*
Turnaround to Love	2	4	1	8	1	1		1	1
Drop in Love	3	2		5		5		1	
Gradual Development	4			13		3	1	2	1
Liking to Love	4	2		15		3		1	1
Rollercoaster Ride	2	1	1	1	4	4			
SUM:	15	9	2	42	5	16	1	5	3

Table 4: Number of Respondents Across Trajectories

Trajectory Type	Number of Respondents
Turnaround to Love	5
Drop in Love	5
Gradual Development	8
Liking to Love	5
Roller Coaster Ride	2

"I still love Apple (iPhone), it's not like I hate Apple (iPhone). I really like it. I appreciate it really that, Apple (iPhone) is something, but it is not for me now" (Quote 12).

Figure 1B: Type II—Drop in Love



Another respondent who also fell under this category and had terminated his relationship with the brand mentioned:

> *"It broke my heart. It is a very bad experience because I was letting go off my companion of ten years"* (Respondent 30, Asus).

When asked about the status of perceptions for the brand, he said:

> *"I still feel it is a respectable brand and there is every chance of revival, if need be"* (Quote 13).

From the quote above, it can be understood that people break up with the brands that they love, and the breakup can be a painful experience too. Another respondent was found to have reduced his intensity of feelings, as the brand has increased its prices over a period, which has forced him to rethink continuing his relationship with the brand:

> *"I have found that Apple is a very good phone. All the features of the phone are really good. [...] I am disappointed with the price range of the phones. The brand is too expensive"* (Respondent 26, Apple) (Quote 9).

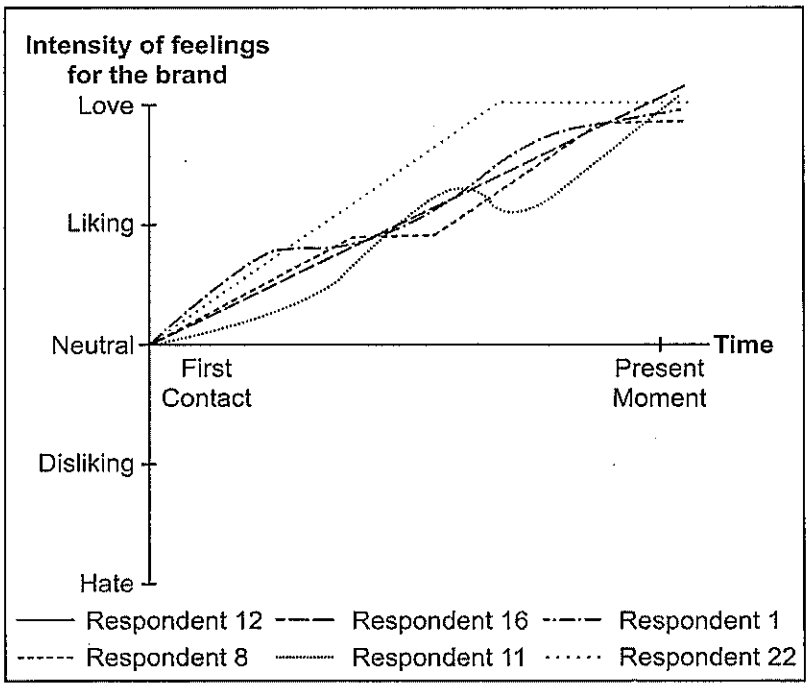
Further, another respondent of this trajectory type terminated his relationship with his loved brand because the brand was expensive. The illustration of the same is as follows:

> *"I am not using a Sennheiser right now. It's expensive, my other earphones which are of some other company is giving a better feature for a lower price"* (Respondent 20, Sennheiser) (Quote 10).

Another respondent also experienced a drop in the feelings when his favorite brand did not continue to provide offerings to public at large. The illustration of this is as follows:

> *"It's a shame that they did not evolve but they held onto their model. Eventually they fell behind. I would have loved had they evolved. It was disappointing. [....] They misread the demand. They were quite complacent with whatever they had. When the crisis came, I was kind of lost"* (Respondent 24, Nokia) (Quote 11).

Figure 1C: Type III—Gradual Development



Gradual Development

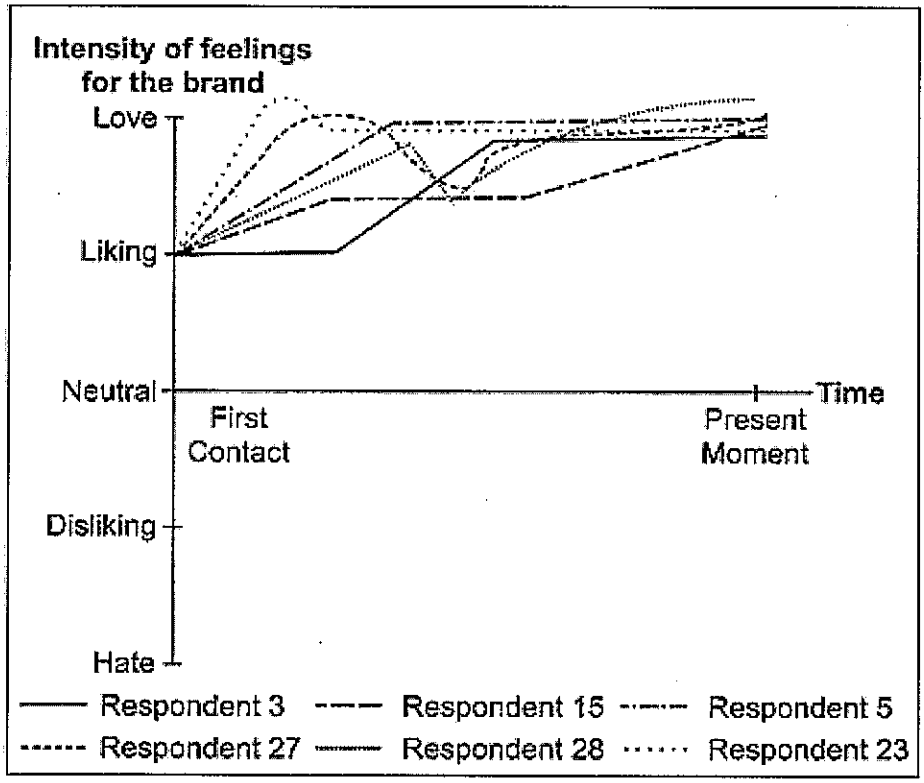
The third brand love trajectory (refer to Figure 1C), *Gradual Development*, refers to the slow and steady progress toward a fully intense positive feeling of love. The respondents categorized under this trajectory type experienced steady increase in feelings due to functional value, positive peer influence, hedonism, and social value. As illustrated in the figure, most respondents had neutral feelings at the first contact, and over a period of time all the respondents developed love-like feelings, eight respondents were categorized under this trajectory. A typical illustration of this type of trajectory reads as follows:

> *"I had neutral notion about the brand. I got to know about this particular product from my friend and he recommended me, then I bought it, I had a positive experience using it, I was delighted. I liked it, and since then, it's a completely positive graph"* (Respondent 8, Philips Trimmer).

Another respondent of the same trajectory type started off with a slightly positive affect, typifying his trajectory; he mentioned:

"So I pretty much knew about Apple and products of Apple from 2010. One of the key reasons for me to love the brand was Steve Jobs. I got to know about what they did and how Apple products have been made from 1970s by watching a movie called Pirates of Silicon Valley. I watched that in my college. There was this weird fascination to own Apple products. I used to keep myself updated with all the latest updates and various product lines of Apple" (Respondent 12, Apple).

Figure 1D: Type IV—Liking to Love



Liking to Love

The fourth brand love trajectory (refer to Figure 1D), where ten respondents were categorized under this trajectory, *Liking to Love* refers to the pattern of those respondents who had a liking for that brand from the first contact itself. This type of trajectory has been majorly influenced by functional value turning point. An example of this trajectory type reads as follows: One of the respondents (Respondent 3, Bose), whose love evolved from mere liking stated that:

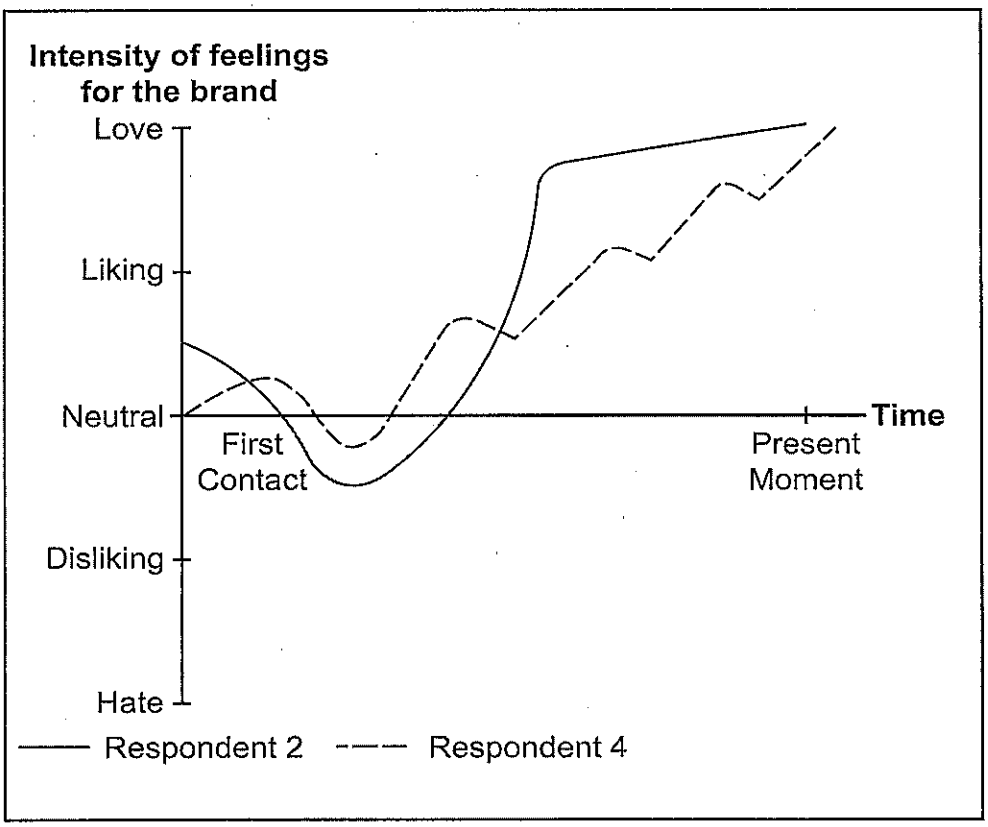
> *"the first contact happened during the first year of my B. Tech. At my hostel, one of my friends was using the Bose speaker. The sound quality, the loudness, everything*

was perfect. Everyone used to appreciate it. When I first went to his room and I heard the music, I really liked it."

This respondent added further that,

"I happened to go to Kolkata during my semester holidays. There I had walked into an electronics store and I happened to see the same Bose speaker that my friend was using. I could not resist, and I just bought it and I started using it rigorously from that day and my liking became love."

Figure 1D: Type V—Roller Coaster Ride



Roller Coaster Ride

The fifth brand love trajectory (refer to Figure 1E), where two respondents could be categorized under *Roller Coaster ride*, was characterized by considerable changes and fluctuations. Two respondents were categorized under this trajectory type; both the respondents started off on a positive note, but experienced negative feelings due to negative peer influence and negative past experience. However, both these respondents ended up being in love with their favorite brands. A typical illustration is as follows:

"One of my friends in my college has been using Macbook since a long time [...] he influenced me positively [...] I used his Macbook for quite some time, like 2 – 3 months and I felt the feasibility, the way Macbook functions and its usage really good and is helpful and easy. So, I thought maybe I should give it a try. [...] Earlier, I had HP and that used to crash frequently but now I can use this Macbook without any disruption [...] from there, love for the brand is continuing" (Respondent 2, Apple).

DISCUSSION AND IMPLICATIONS

The purpose of this exploratory study was to illuminate the trajectories of brand love through the lens of turning points. A total of nine turning point categories were identified, and five types of trajectories emerged from the categorization of all the RIT graphs. At a basic level, the study results suggest that there are significant critical events that affect the intensity of feelings that a consumer has for a brand. The identification of 98 turning points and five trajectory types across all the respondents is evidence that consumer–brand relationships are as dynamic as interpersonal relationships. Further, the present study has shown that the element of reciprocity can also be observed in the trajectories which have been positively impacted by brand communication, pricing, and prompt corrective actions initiated by brands. The study ascertains that consumer-brand relationships are bidirectional in nature. Further, the present study has also observed that any positive action initiated by brand, has resulted in increase in the intensity of positive feelings. Of the nine categories of turning points, six types of turning points helped develop brand love trajectories (positive turning points), and three types of turning points were identified as those that hindered the development of brand love trajectories (negative turning points).

Functional value was reported as the most frequently reported turning point, which indicates the perceived brand quality and expected performance of the product (Sweeney and Soutar, 2001). The high frequency of this turning point across the trajectories indicates the importance of rational attributes like superior brand quality and superior performance in the formation of brand love (Sarkar, 2014; Batra et al. 2012). Hedonism was also found as a turning point in the development of brand love trajectories. Rational attributes of a brand provide satisfaction, but hedonic values of a brand provide delight, which creates more arousal (Oliver, 1999). Hence, the brand managers of electronic appliances are advised to provide stimulating and pleasant experiences through their value-offerings. Further, as observed in quotes 18 and 19, aesthetics of electronic appliances plays a major role in providing hedonic benefits. Keeping this in view, brand managers should also place emphasis on producing products that are visually pleasing.

In addition to hedonic values, the present study also showed that social value as a turning point leads to the formation of brand love. Social value, as mentioned previously, is the utility derived from the product's ability to enhance social self-concept of a consumer (Sweeney and Soutar, 2001). Past research has noted that consumers strongly identified with the objects that they loved as they express their identities and facilitated enhancement of their identities (Belk, 1988; Escalas and Bettman, 2003). This expression of identity not only established a strong connection with the brand, but also facilitated a strengthening of interpersonal relationships (McAlexander, Schouten, and Koenig, 2002). Keeping this in view, managers are encouraged to provide holistic value through their electronic appliances that can lead to the formation of brand love.

The present study also identified that *positive peer influence* as a turning point played a significant role in the formation of brand love. Positive peer influence is characterized by either normative influence or by informational influence (Deutsch and Gerard, 1955). This signifies that brand love formation does not happen only because of the integral brand factors (factors created by brand managers), but also with incidental factors (factors that are beyond the control of managers). As informational influence plays a role in the formation of brand love, brand managers of electronic appliances can consider refer-a-friend program for promotional activities. Since positive peer influence is also characterized by normative influence, brand managers can produce electronic appliances that are self-expressive in nature. Therefore, brand managers can carefully craft product communication that is self-expressive in nature. Interestingly, the frequency of positive peer influence as a turning point was more than the frequency of negative peer influence as a turning point. Managers, then, are encouraged to design programs and build strong brand communities that can constantly facilitate the expression and enhancement of consumers' identities. On the other hand, the present study has also observed that 'negative peer influence' impacts the brand love formation. Interestingly, negative peer influence was observed only in the initial stages of brand love development and had no influence with increased duration.

The second most reported turning point in the present study is *Negative Past Experience*, which was found in all the trajectory types, and the high frequency of this turning point seconds the notion that dissatisfaction will always exist (Huefner and Hunt, 2000). This suggests that managers will have to deal with utmost caution in providing a good product and service experience. A failure in providing a good experience, as observed, can also lead to termination and reduction of brand love, as seen in quote six. However, as a counter to negative past experience, a prompt corrective action has been instrumental in helping the development of brand love, as seen in quotes 4 and 5. So, in addition to providing superior functional attributes, brand managers are also encouraged to provide an adequate post-purchase service which can help in resurrecting the trajectories. Prompt corrective action is essential, keeping in view the high frequency of negative past experiences as a turning point. Failing which, as observed in the present study, can lead to a severe drop in feelings, even for an established consumer–brand relationship. On similar lines, past research has also noted that dissatisfaction can lead to an exit of a consumer and retaliation, which can severely damage the reputation and business of brands (Huefner and Hunt, 2000). Hence, electronic appliances' brands are advised to establish processes so that dissatisfied customers can voice their dissatisfaction. As seen in the past, voice is not just about empowering the customer (Naylor, 2003; Huefner and Hunt, 2000); it is also an opportunity for the brands to strengthen their emotional relationships with consumers. Further, literature has noted that brands that offer resolution reported higher satisfaction than the brands that did not offer resolution (Naylor, 2003). Hence, electronic brands can establish annual maintenance contract schemes and account management practices so that there is continuous feedback in place and a scope to initiate prompt corrective actions which can mitigate the dissatisfaction of consumers created by performance failures (negative past experiences). Further, brands are also advised to establish quick resolution procedures, as the longer the time taken to resolve a problem, the lower is the customer satisfaction level (Naylor, 2003).

The present study has also found that *spokesperson endorser influence* plays an essential role in helping the development of brand love trajectories. Thus, brand managers of electronic appliances should organize various events that can make use of endorsers in promoting the value offerings of the brand.

Though willingness to pay a premium has been regarded as a consequence of brand love (Bairrada et al. 2018), the present study has noted that high price as a turning point hindered the development of brand love. Keeping this in view, the present study suggests managers to design communication in such a way that it justifies the price of their offerings. Pricing needs utmost caution as high price can lead to initial negative feelings about a brand (quote 14 and quote 15) and can also lead to drastic reduction in feelings of love for a brand (quote 8 and quote 9) in the long run.

The present study also found that not everybody starts off with the same intensity of feelings. Interestingly, the present study did not observe any love at first sight type of trajectories which was seen in the study of Langner et al. (2015). This suggests that the consumers of electronic appliances, of Indian geography take considerable time to fall in love with a given brand.

Further, it has been observed that there can be a dip in the intensity in feelings of love (Fig.2b). Interestingly, a few respondents who were categorized under this type of trajectory have terminated their relationships with their loved brands (as seen in quote 8, quote 9, and quote 10). Basing on interpersonal literature, Fajer and Schouten (1995) found that physical separation, new brands replacing the old ones and partner behavior can lead to alienating the other party, as the major reasons for brand relationship termination. The negative turning points that were observed in the trajectory type of drop in love are *Negative Past Experience* and *High Price*. Quotes 8 and 9 suggest that the respective brands exhibited a behavior that has alienated the respondents, which led them to terminate their relationships with their loved brands. On the other hand, quote 11 indicates that the brand ceased to continue in the marketplace which is analogous to the physical separation mentioned by Fajer and Schouten (1995). Further, literature also noted that consumer–brand relationships can deteriorate due to brand dyadic stress (Andreasen, 1984; Fournier, 1998). Brand dyadic stress refers to the damage caused by someone breaking the rules of a relationship, a breach of trust or failure to keep a promise and poor performance of brand or inability to strengthen consumer commitment (Hemetsberger et al. 2009). Brand dyadic stress was observed in quote 10, where it can be understood that the respondent found that the loved brand was not the best, as the respondent could see a competitor brand providing a better value. This amounted to drop in the intensity of feelings because loved brands were praised for being the best available and getting to know that a better brand existed provided a reason for the reduction in intensity of feelings for his favorite brand (Batra et al. 2012). Interestingly, quote 13 suggests that even after a drastic reduction of feelings and termination of relationship with the brand, the respondent showed signs of getting back to the brand. Keeping these instances in view, managers are encouraged to address the grievances (prompt corrective action) with utmost seriousness so that the positive feelings are resurrected. As suggested above, account management practices should be established to counter the drop in intensity of feelings. Additionally, electronic appliances' brands can also introduce mobile applications for addressing such grievances. Top management of these brands can personally monitor the grievance redressal processes, which will only benefit the brands in the long run.

Interestingly, the turning points that led to brand love termination have been *Negative Past Experience* and *High Price*, which are rational in nature. This suggests that consumers and brands can get separated due to rational reasons. Therefore, managers are encouraged to emphasize on the rational attributes like product performance, service delivery and high price. This also suggests that with increasing duration, rational attributes of a brand become more significant for brand lovers (Huber et al. 2015). The present study also showed that even after a drastic reduction in feelings, a few respondents demonstrated positive perceptions about their loved brands which can

be inferred from quote 12 and quote 13. This is because consumers take a longer time to emotionally detach themselves from their loved brands even after physical termination (Hemetsberger et al. 2009). Hence brand managers may consider ameliorating such problems by initiating prompt corrective actions.

The *Turnaround to Love* trajectory type of the present study has signified that a person having dislike and hate for a brand can also be nurtured to the state of brand love. The analysis of the present study has demonstrated that the trajectory type has all the identified negative turning points. However, the most frequently reported negative turning point of the trajectory was *High Price*. Hence, this reiterates that high price of a brand can lead to initial negative feelings of consumers.

LIMITATIONS AND FUTURE RESEARCH DIRECTIONS

The present study is a purely exploratory study and has been specific to Indian context and electronic appliances product category. Future research can explore the trajectories of brand love in other contexts so that the generalizability of the phenomenon can be enhanced. Further, future research can also consider performing a cross-cultural study, as brand love has received limited cross-cultural examination (Palsuk et al. 2019).

The present study is a purely qualitative study, and the results of this study are subjective and not generalizable (Day, 2002). Hence, insights gained from the present study can be used in other studies by employing quantitative research methods.

Researchers can also explore the role of consumer's personality in the development of brand love trajectories. An understanding of personality can help brand managers in designing strategies accordingly. Additionally, future researchers can also look at the influence of gender on brand love development. This insight is crucial because past research has noted that men and women differ in terms of forming relationships with brands (Monga, 2002). Knowledge of the turning points that play a role in this context can help marketers craft suitable strategies.

The RIT method facilitates a depiction of consumer–brand relationships that is rich in information. Keeping this in view, future researchers can leverage RIT to understand various other constructs that explain the nature of consumer–brand relationships such as brand trust, brand loyalty, brand devotion, etc.

The present study has examined the development of brand love by analyzing the trajectories through the lens of turning points. Thus, the insights of the study do not suggest the possible impact of the trajectories on outcomes such as brand loyalty, positive word of mouth, willingness to pay premium, resistance to negative information, etc. Future research can look at the possibility of exploring the types of outcomes with respect to each trajectory type. Further, future research can also understand if each type of trajectory has a different impact on crucial consequences such as brand loyalty, willingness to pay premium, positive word of mouth, etc.

CONCLUSION

The present study has been an attempt to understand the brand love trajectories of electronic appliances product category. The literature of brand love suggests that most of the research on brand love has examined the concept from a static perspective (Palsuk et al. 2019) and this is one of the very few studies that have examined the concept of brand love from a dynamic perspective. The present study adds to the literature of brand love by focusing on consumers who are presently experiencing brand love and also who have experienced brand love in the past. Hence the study illuminates turning points that can help in brand love formation and also those that can

hinder brand love formation. The present study has shown that achieving brand love is a complex process, with majority of turning points indicating that they are in control of brand managers. This suggests that achieving brand love is not serendipitous.

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India's Take on Legal Remedy of Passing Off: A Celebrity's Perspective

Niharika Salar & Sonal Sinha

The development of mass media led to the development of intrigue and curiosity around celebrities and their persona, and the profits hidden therein. Harping upon this intrigue, stakeholders realised the brand power behind celebrity personalities. However, problems arose when there was an increase in the unauthorised exploitation of celebrity personalities. While on the legal front, several remedies are resorted to, William Prosser narrowed down these into four, i.e., intrusion into one's private space, disclosure of one's personal and private facts, disclosure of incorrect facts that puts one under a false light and misappropriating one's personality for commercial gain. Hinged on the brand value of a celebrity's personality, the right to publicity emphasises the right of a celebrity to claim control over the commercial value of their identity. Remedy against the unauthorised commercial exploitation of a celebrity's identity is commonly found in the tort of passing off. The article assesses the contours of the remedy of passing off as availed by celebrities and implemented by the Indian Courts. The article also draws a comparison with the approaches employed by American and English law in their understanding of celebrity personality, contrasting the same with the Indian approach.

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INDIA'S TAKE ON LEGAL REMEDY OF PASSING- OFF: A CELEBRITY'S PERSPECTIVE

Niharika Salar[*] *& Sonal Sinha*[**]

ABSTRACT *The development of mass media led to the development of intrigue and curiosity around celebrities and their persona, and the profits hidden therein. Harping upon this intrigue, stakeholders realised the brand power behind celebrity personalities. However, problems arose when there was an increase in the unauthorised exploitation of celebrity personalities. While on the legal front, several remedies are resorted to, William Prosser narrowed down these into four, i.e., intrusion into one's private space, disclosure of one's personal and private facts, disclosure of incorrect facts that puts one under a false light and misappropriating one's personality for commercial gain. Hinged on the brand value of a celebrity's personality, the right to publicity emphasises the right of a celebrity to claim control over the commercial value of their identity. Remedy against the unauthorised commercial exploitation of a celebrity's identity is commonly found in the tort of passing off. The article assesses the contours of the remedy of passing off as availed by celebrities and implemented by the Indian Courts. The article also draws a comparison with the approaches employed by American and English law in their understanding of celebrity personality, contrasting the same with the Indian approach.*

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I. INTRODUCTION

Brand value sells, and with the increasing stakeholders and investments involved, concerned parties are prepared to go to lengthy extents to protect or exploit the same. The fundamental issue in this article's context, therefore, is to appreciate and assess how celebrities capitalize on the non-tangible assets that they possess and the legal remedies at their disposal in cases of unauthorized exploitation of this asset.[1]

Throughout the world, legal systems have largely taken the help of varying approaches; including the recognition of rights in personalities themselves,[2] creating rights in images,[3] unfair competition,[4] and tortious liability, among many others.[5] Some jurisdictions have also evolved a jurisprudence that presents a cocktail of the above as an underlying principal solution.[6] The Indian approach is partially one of them. This which has not been spoken about at length in popular literature, probably because it is still in its initial stages.

While there is a farrago of rights associated with personality, it was William Prosser who tried to compartmentalise these into four, namely—intrusion into one's private space, disclosure of one's personal and private facts, disclosure of incorrect facts that puts one under a false light, and misappropriating one's personality for commercial gain.[7] The right to publicity is an aspect of personality rights that recognises the commercial value of the celebrity's persona. The concept was introduced by Melville B Nimmer,

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1 Stuart B. Walzer & Jan C. Gabrielson, 'Celebrity Goodwill' [1986] Journal of the American Academy of Matrimonial Lawyers 35, 44.

2 See Mark Bartholomew, 'A Right is Born: Celebrity, Property, and Postmodern Lawmaking' (2011) 44 Connecticut Law Review 301.

3 Jan-Jaap Kuipers, 'Towards a European Approach in the Cross-Border Infringement of Personality Rights' (2011) 12 German Law Journal 1681, 1706.

4 Restatement (Third) of Unfair Competition (1995) has stated that misappropriation of publicity rights is a form of unfair competition.

5 See annx 1.

6 Ingrid Pusey & Marc Morgan, 'Celebrity Personality Rights in Jamaica: A Path for Development' (2012) 61 Social and Economic Studies 99, 125.

7 William Prosser, 'Privacy' (1960) 48 California Law Review 383.

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Electronic evidence at Trial: Appreciating digital issues and Adjudication process

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Abstract:
How to admit electronic evidence to decide cases has become a major conundrum in Indian judicial practice. As a new branch of evidence with high technology, digital evidence has been playing an increasingly important role in solving legal disputes. In the meantime, it has also brought variety of issues and challenges into the legal system regarding evidence, such as how to search, seize and preserve digital evidence, how to analyse, review and digital evidence, and more importantly, how to effectively decide cases based on electronic evidence.

Digital or electronic evidence is any probative information stored or transmitted in digital form that a person to a court case may use at trial. Before accepting digital evidence a court will determine if the evidence is relevant, if it is authentic, if it is hearsay and if a copy is acceptable or the original is required.

INTRODUCTION

How to admit electronic evidence to decide cases has become a major conundrum in Indian judicial practice. As a new branch of evidence with high technology, digital evidence has been playing an increasingly important role in solving legal disputes. In the meantime, it has also brought variety of issues and challenges into the legal system regarding evidence, such as how to search, seize and preserve digital evidence, how to analyse, review and digital evidence, and more importantly, how to effectively decide cases based on electronic evidence.

Digital or electronic evidence is any probative information stored or transmitted in digital form that a person to a court case may use at trial. Before accepting digital evidence a court will determine if the evidence is relevant, if it is authentic, if it is hearsay and if a copy is acceptable or the original is required.

E-Evidence is found in any digital forms like e-mails, digital photographs, ATM transaction logs, word processing documents, instant message histories, files saved from accounting programs, spreadsheets, internet browser history and databases etc.

The courts were sceptical in admitting the digital evidence in the very beginning. But slowly they started admitting he same and gave them the status of corroboratory evidence. The opinion of Indian Judiciary at that point of time is that digital evidence is very much fragile and is prone to manipulation. Indian courts in number of cases opined that Digital Evidence be likely to be more voluminous, easy to destroy, easily modified and duplicated, potentially more expressive and more readily available.

Significance of Cyber Forensics:

Recently a new branch of forensics has developed and helped in bringing authenticity to the electronic or digital evidence found in computers and any digital storage mediums. The goal of computer forensics is to explain the current state of a digital artifact which can include a computer system, storage medium (hard disk or pen drive), an electronic document (e.g., a spam email message or ads on browser) or even a sequence of packets moving in a computer network.

Computer forensics is a branch of forensic science pertaining to legal evidence found in any computers and any digital storage mediums. Computer forensics is also known as digital forensics. The goal of computer forensics is to explain the current state of a digital artifact.

The term digital artifact can include, a computer system, storage medium (hard disk or pen drive), an electronic document (e.g. an email message or any URL link) or even a sequence of packets moving in a computer network.

Development of Law relating to Electronic Evidence:

The information and Technology Act,2000 authenticated or recognized all kinds of electronic evidences. The definition of 'documentary evidence' has been modified to include all other documents, including electronic records produced for inspection by the court. Section number 3 of the Evidence Act, was amended to the effect that all electronic documents, records were given a legal status of evidence.

The Information Technology Act is based on the UNCITRAL (United Nations Commission on International Trade Law) model Law on Electronic Commerce.

Amendments to the Indian Evidence Act 1872, the Indian Penal Code 1860 and the Banker's Book Evidence Act 1891 provides the legislative framework for transactions in electronic world.

The definition of 'evidence' has been amended/modified to include electronic records.

The definition of 'documentary evidence' has been amended to include all the documents, including electronic records produced for inspection by the court.

Section 3 of the Evidence Act, 1872 says evidence as under:

"Evidence" - Evidence means and includes: -

1)----------

2) any documents including electronic records produced for the inspection of the court.

The term 'electronic records' has the same meaning as that assigned to it under the IT Act. IT Act give for "data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer-generated microfiche". The definition of 'admission' (Section 17 of the Evidence Act) has been changed to include a statement in oral, documentary, or electronic form which suggests an inference to any fact at issue or of relevance. New Section 22A has been placed

into Evidence Act to provide for the relevancy of oral evidence regarding the contents of electronic records. It provides those oral admissions regarding the contents of electronic records are not suits unless the genuineness of the electronic records produced is in question.

Issue of Primary and Secondary Evidence vis-à-vis Electronic Evidence:

According to Section 61 of IEA, contents of documents may be given either by Primary or by Secondary evidence. As per section 62 Primary Evidence says the document itself produced for the inspection of the Court.

When the question regarding submission of primary or secondary evidence in relation to electronic documents arises, Section 65A provides that contents of electronic records may be proved in accordance with the provisions of Section 65B. as per the general rule laid down in the Indian Evidence Act all the document shall be proved with the help of primary evidence [1]. Therefore, acceptance of Secondary Evidence is only an exceptional provision which is subjected to the conditions mentioned in Section 65.[2]

Any electronic document whether it is primary or secondary is not humanly readable. Court cannot take a view of its own because the document is written in binary language and readable only in a binary reading device ie.. a computer. Hence according to one view Hence Electronic Documents are to be always produced only with another human being providing a written testimony to what the document contains and the discussion regarding the "primary" and "Secondary" nature of documents in electronic form is practically of not any use.

Section 65B of Indian Evidence Act indicates the manner in which a certificate has to be produced in sequence to make an electronic document admissible in a Court. It is not necessary to discuss whether it is admissible as a "Primary" document or a "Secondary" document.

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[1] Sec 64

- [2] Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:
  - (a) When the original is provided or appears to be in the possession or power of the person against whom the document is sought to be shown, or of any person **out of reach of,** or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it.
  - (b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in notice.
  - (c) When the original has been tear down or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time.
  - (d) When the original is of such a nature as not to be **easily movable**;
  - (e) When the original is a public document within the meaning of Section 74.
  - (f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence.
  - (g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in the Court, and the fact to be proved is the normal result of the whole collections.

When the hard disk that is taken out of a computer and said to contain an electronic document, it is only a "Container" of an "Electronic Document" is not the electronic document itself. It applies even to a CD which contains only one document which is under reference of the Court. The subject document can only be read by a human being when the "container" is connected to a compatible electro mechanical device namely the "Computer System" and read through an operating system such as Windows with an application such as "Microsoft word". Even if the Judge fixes a computer in the Court room and himself reads the document, his reading is dependent on the device called the "Computer", the operating system and the application which should be functioning normally. Hence an electronic document has to be always certified to the effect that this is what the document means when read in a computer with appropriate application running in an appropriate operating system". The person who provides the certification assists the Court like an "Expert". This has been recognized and implemented in the Section 65A calling itself as "Special Provision" and indicating the certification process under "Section 65B"

The Core Law relating to admission of electronic evidence:

Section 65B provides that notwithstanding anything contained in the Evidence Act and any information contained in an electronic record, is deemed to be a document and is admissible in the evidence without further proof of the original's production, provided that the conditions are set out in Section 65B are satisfied.

Section 65B(1) states that if any information is in an electronic record produced from a computer (known as computer output) has been copied on to a optical or magnetic media, then such electronic record has been copied 'shall be deemed to be also a document' subject to conditions set out in Section 65B(2) being satisfied.

Both in relation to the information as well as the computer in question such document 'shall be admissible in any of proceedings when further proof or production of the original same as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.'

The conditions specified in Section 65(B)(2) are:

1. Starting, the computer output containing the information should have been given by the computer during the period of which computer was used regularly to store or process information for the purpose of any activities regularly carried on over that particular period by the person having lawful control over the use of the computer.

2. The second requirement says that it must be shown that during the said period the information of the type contained in electronic record or of the kind from which the information contained is derived was 'regularly fed into the computer in the ordinary course of the said activity'.

3. A third requirement points that during the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time that break is not affect either the record or the accuracy of its contents.

4. The fourth requirement points that the information present in the record should be a reproduction or derived from the information fed into the computer in the ordinary course of the said activity.

Under Section 65B(4) the certificate which identifies the electronic record having the statement and describes the manner in which it was produced giving the items of the device involved in the production of that record and deals with the conditions mentioned in Section 65(B)(2) and is signed by a person occupying a responsible official position in relation to the operation of the relevant device 'shall be evidence of any matter stated in the certificate'.

Judicial Recognition of Electronic Evidences:

Slowly courts have started accepting evidences recorded digitally. For instance in Amitabh Bagchi Vs. Ena Bagchi[3] the court happned that the physical presence of person in Court is optional for purpose of adducing evidence and the same can be done through medium like video conferencing.

State of Maharashtra v Dr Praful B Desai[4] involved the question whether a witness can be examined by the way of a video conference. The Supreme Court observed that video conferencing is an improvement of science and technology which permits seeing, hearing and talking with someone who is not physically present at the court with the same facility and ease as if they were physically present. The legal requirement for the presence of the witness does not mean actual physical presence. The court allowed to examination of a witness through video conferencing and concluded that there is no reason why the examination of a witness by video conferencing should not be an essential part of electronic evidence.

In Tomaso Bruno and Anr. v. State[5] of Uttar Pradesh, a three-Judge Bench observed that "improvement of information technology and scientific temper must pervade the way of investigation. Electronic evidence was relevant to build the facts. Scientific and electronic evidence can be a very help to an investigating agency".

Judicial Interpretation of Sec 65 A and 65B:

In Bodala, Mr. Murali Krishna Vs. Smt. Bodala Prathima[6] the court held that, "the amendments carried to the Evidence Act by introduction of Sections 65-A and 65-B are in relation to the electronic record. Sections 67-A and 73-A were introduced as regards proof and verification of digital signatures. As regards presumption to be drawn about such records, Sections 85-A, 85-B, 85-C, 88-A and 90-A were added into law. This provisions are referred only to demonstrate the emphasis, at present, is to recognize the electronic records and digital signatures, as admissible pieces of evidence."

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[4] AIR 2003 SC 2053.
[5] MANU/SC/0057/2015 : (2015) 7 SCC 178.
[6] **(2007 (2) ALD 72)**

In Dharambir, CBI(Central Bureau of Investigation)[7], the court arrived at the conclusion that when Section 65B talks of an electronic record produced by a computer referred to as the computer output) it would also include a hard disc in which information were stored or was earlier stored or continues to be stored.

It distinguished as there being two levels of an electronic record. One is the hard disc which is used itself becomes an electronic record in the relation to the information regarding the changes. Hard disc has been subject to and which information is retrievable from the hard disc by using a software program.

Another level of electronic record is the active accessible information recorded in the hard disc in the form of a sound file, text file or a video file etc. Such information's are accessible and can be converted or copied as such to another magnetic or electronic device like a CD, pen drive etc.

Even a empty hard disc which has no information but was once used for recording information can also be copied by producing a copied had or a mirror image.

In State (NCT of Delhi) v Navjot Sandhu[8], there was an appeal against conviction of the attack on Parliament held on December 13, 2001. In this case dealt with the proof and admissibility of telephone call records.

While taking the appeal against the accused for attacking the Parliament, a submission was made on be-half of the accused that no reliance could be put on the mobile telephone call records, due to the prosecution had failed to produce the relevant certificate under Section 65B(4) of the Evidence Act.

The Supreme Court finalized that a cross-examination of the competent witness acquainted with the functioning of computer during the relevant time and the manner in which the printed copies of the call records were taken was sufficient to prove the call records.

In *Mr. Jagjit Singh vs State of Haryana*[9] the speaker of the Legislative Assembly of the State of Haryana rejected a member for defection. While hearing the matter, the Supreme Court took the appreciation of digital evidence in the form of interview transcripts from the ZeeNews television channel. The Aaj Tak television channel and the Haryana News of Punjab television channel. The court found that the electronic evidence placed on record was admissible and upheld the reliance placed by the speaker on the recorded interview while reaching the conclusion that the voices recorded on the CD were those of the persons taking action. The Supreme Court found no infirmity in the speaker's reliance on the digital evidence and the conclusions reached by him. The comments written in this case indicate a trend emerging in Indian courts. i.e., judges are recognize and appreciate the importance of digital evidence in legal proceedings.

In Twentieth Century, The Fox Film Corporation vs NRI Film Production Associates (P) Ltd. [10]certain conditions have been break down for video-recording of evidence:

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[7] (148 (2008) DLT 289)
[8] **(AIR 2005 SC 3820).**
[9] (2006) 11 SCC 1
[10] (AIR 2003 Kant 148)

"1. Before a witness is examined in terms of the Audio and Video Link, witness is to place an affidavit or an undertaking duly verified before a notary or a Judge that person, who is shown as the witness is the same as who is going to depose on the screen. A copy is to be provided to the other side. (Identification affidavit).

2. The person who examines with the witness on the screen is also to file an affidavit/undertaking before taking the examining the witness with a copy to the other side with regard to identification.

3. The witness must be examined during working hours of Indian Courts. Oath is to be administered through the media.

4. The witness should not plead any inconvenience on account of time different between India and USA or any other country.

5. Before taking examination of the witness, a set of plaint, written statement and other documents must be read and sent to the witness so that the witness has acquaintance with the documents and an acknowledgement is to be filed before the Court in this regard.

6. Learned Judge has to record such kind of remarks as is material regarding the demur of the witness while on the screen.

7. Learned Judge must note the objections raised during recording of witness and to take the same at the time of arguments.

8. Once recording the evidence, the same has to be sent to the witness and his signature is to be obtained in the presence of a Notary Public and thereafter it forms part of the record of the suit proceedings.

9. The visual has to be recorded and the record would be at the both ends. The witness also is to be alone at the time of visual conference and notary is to certificate to this effect.

10. The learned Judge may also impose such other conditions as they are necessary in each set of facts.

11. The expenses and the arrangements are to be made by the applicant who wants this facility."

Relevancy and admissibility of the Electronic Evidence:

In Kundan Singh Vs. The State, the genuineness of mobile records was called in question. The CDR copy was retrieved from archives of the company but was not stamped[11]. The computer output submitted shall satisfy the conditions laid down in Sub clause 4 of Sec 65[12].

[11] [MANU/DE/3674/2015]

[12] "The certificate under sub-section (4) to Section 65B must state the following:

(a) Identify the electronic record by identifying the statement, that is "computer output" in form of printed copies, recorded, or stored optical or magnetic media.

Another controversy was also clarified regarding the issue of whether the certificate issued under Sec 65 shall be issued along with the submission of evidence or during the trial when the person is called for Evidence. In Mr. Anwar P.V. (S) vs P.K. Basheer[13] and Others, the Supreme Court has held that the certificate shall accompany the electronic record such as print out ",

The supreme court referred to Anwar P.V. Basheer wherein it is noticed the differences between the relevancy and admissibility, which is examined at the initial stage and genuineness, veracity and reliability of the evidence, which is seen by the court subsequently or in the second stage.

In Mr. Ram Singh and Ors. vs. Col. Ram Singh[14], a Three-Judge Bench considered the said issue. The court felt that "it will be wrong to reject the law of evidence advantages to be gained by new techniques and new digital devices, given the accuracy of the recording can be proved. This kind of evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same."

In Mr. Shafhi Mohammad vs. The State of Himachal Pradesh[15] one of the questions which during the trial whether videography of the 'scene of recovery' during investigation should be necessary to inspire confidence in the form of evidence collected. The court re-created its decision rendered in Navjotsingh Sandu and held that "The applicability of procedural requirement Under Section 65B(4) of Evidence Act to furnishing certificate is to be applied only when such electronic evidence is given by the person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In this case, electronic evidence is produced by a party who is not in position of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be reject of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such kind of document is kept out of consideration by the court in absence of certificate Under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Therefore, requirement of certificate Under Section 65B(h) is not always mandatory".

(b) Particulars of the device present in the production of that electronic record to show that the electronic record was produced by the computer; and

(c) State that the computer output has many information, which was stored or input into the computer over the stated period when computer was regularly used to store or process information. The computer output consists of information or data or is derived from information regularly fed into the computer in ordinary course of such activities.

(d) The certificate should state as required by sub-clause (c) to sub-section (2) that the computer is during the relevant periods was working properly and if it was not operating properly during the time or a part of the said time, it had not affected the electronic record or accuracy thereof."

[13] [MANU/SC/0834/2014].
[14] MANU/SC/0176/1985 : 1985 (Supp) SCC 611.
[15] MANU/SC/0058/2018

In Mr. Arjun Panditrao Khotkar vs. Mr. Kailash Kushanrao Gorantyal and Ors[16]. The video recording evidence is the election commission office was submitted which was duly certified by the concerned officer. The court held that " the certificate required Under Section 65B(4) is a possible precedent to the admissibility of evidence by the way of electronic record, as correctly held in Anvar P.V. , and incorrectly "clarified" in Shafhi Mohammed. Oral evidence in the this place of such certificate cannot possibly suffice as Section 65B(4) is a compulsory requirement of the law." Section 65B(4) of the Evidence Act clearly states that the secondary evidence is admissible only if lead in the manner stated or not. To hold otherwise would render Section 65B(4) otiose".

Most of the judgment given by J. Rama Subramaniam and J. Rohinton clearied the position of law regarding the admissibility of primary and secondary electronic evidence. Most view is "The evidence relating to electronic record, as noted before, being a special provision, the general law on secondary evidence Under Section 63 read with Section 65 of an Evidence Act shall yield to the same. *'Generalia specialibus non derogant'*, special law will always be prevail over the general law. It looks, the court skipped to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no record in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, statement of law on admissibility of secondary evidence pertaining to electronic record, as mentioned by this Court in Navjot Sandhu case, does not lay down the proper legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements Under Section 65-B are satisfied. Hence, in the case of CD, DVD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which secondary evidence pertaining to that electronic record, is inadmissible".

So the Supreme court has finally laid the controversy to rest by saying that Original evidence is admissible U/s 62, Certificate U/s 65B is mandatory for secondary evidence, 65B(2) to be complied, Certificate U/s 65B can't be substituted by the statement of the witness. It also clarified that in a criminal trial, Certificate U/s 65B is to be filed before the start of trial but in appropriate cases, the certificate U/s 65B could be produced at a later stage. Judge is given a discretion to produce fresh 65B in place of defective certificate. Court U/s 91 or 311 Cr. P.C. or 165 Evidence Act, can direct the party possessing the original evidence to produce the certificate U/s 65B.

- In case of CDR, the opposite party cannot challenge the veracity of the evidence if the same is destroyed, so direction be issued to the companies to preserve the evidence for production during trial.
- Laddi v State of Haryana (2013), SC in Pratap Singh v State of Punjab
- The relationship between the law and technology is not easy. One and law has indeed yielded in favor of technology.

[16] MANU/SC/0521/2020

- tape recording of a relevant conversation is admissible under sec 7 of the IEA
- Rakesh Kumar v State (2009), 65B makes admissible as a document, printed paper of electronic records stored in optical or magnetic media generated by a computer subject to the fulfillment of subsection (2) of 65 B.
- Delhi High Court, Mr. Abdul Rahman Kunji vs. State of west Bengal, 65 B is a complete code.
- In Mr. Kundan Singh vs. State, the Bench of Delhi High court has held that "secondary evidence in the form of a printed paper or media output produced by copying, recording or storing data files is treated as document and are admissible and bear the same status as 'direct evidence" on the question of admissibility. The provision negates and does not require production of the original computer, equipment/media which the data was stored and from which computer output be it in the form of paper print or optical medium data has been obtained.
- Raksha Jindal v CBI (2015) The Delhi High Court eschewed the electronic evidence on record as the certificate requirement under sec 65B was not complied with.
- State of Harayana v Shamsher (2014) the Punjab and Harayana High Court called the electronic evidence as "rickety evidence" and as it was not at all supported by a certificate under section 65B acquitted some of the accused in a murder case.
- State v Om Prakash Srivastav (2013), a case of extortion where the entire evidence rested on call and SMS records Delhi District Court acquitted the accused for want of sufficient evidence as the certificate under Sec 65 B was not produced.
- Khalistan Zindabad Force (2015) for alleged smuggling of drugs and where the raid resulted in heavy arms and ammunitions the Delhi High Court rejected the digital evidence in the form of intercepted conversations and the CDRs for want of certificates. The trial court had relied on the same and convicted the accused.
- Vicky v State of Rajasthan (2015), Rajasthan High Court rejected call records on the ground of lack of 65B certificate but convicted on the ground that defective investigation cant be a ground for acquittal.
- ARK Shipping Co Ltd (2008) the Bombay High Court held – an affidavit of evidence in lines with the requirements under sec 65B were sufficient compliance with the requirement of the said provision for proving electronic records.
- Puneet Malhotra (2014) a case was registered for circulation of obscene messages, a lady receiving vulgar messages complained and the accused acquitted for noncompliance with 65B certification. It held that deposition in examination in chief. In a manner akin to section 65B of IEA was of no consequence. (District Court)

Oral Evidence on Electronic Evidence

- This difference provides clarification on when a "Oral Admission" may be relevant is same as the application of Section 45A the role of a Digital Evidence Examiner referred to under Section 79A of ITA 2000/8

- The Judgment looked to Section 22A of IEA which stated, *"Oral admissions as to the contents of electronic records are not relevant, until the genuineness of the electronic record produced is in question."*

- Judgment also referred to Section 45A as per which the opinion of Digital Evidence Examiner (under Section 79A-When appointed) is relevant only if the genuineness of an already admitted electronic evidence is in question.

- Under Section 65B (4) of an Evidence Act, if it is desired to provide a statement in any proceedings pertaining to an digital record, it is permissible provided the following conditions are satisfied:
  (a) There must be a certificate which says the electronic record containing the statement;

- (b) The certificate must describe the way the digital record was produced.

- (c) The certificate must furnish the type of the device involved in the production of that record.

- (d) The certificate must engage with the applicable conditions mentioned Under Section 65B(2) of the Evidence Act; and

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- (e) The certificate must be signed off by the person occupying a responsible official position in relation to the operation of the relevant device.

Stage of submission of the certificate:

- Trial

- Anvar stopped with saying the certification is mandatory

- Silent about the stage of submission?

- Who will certify?

- Created confusion – resulted in many acquittals for want of certificate

- Salman Salim Khan v The state of Maharashtra (2015)
  - death of one platform dweller.
  - rejected the evidentiary value of receipts for want of 65 B certificate which proves that he took drinks in a Bar

Sudir Engineering Company vs. Nitco Roadways Ltd. (23.03.1995 - DELHC) : MANU/DE/0414/1995

- Any document submitted by either party passes through 3 stages before it is held proved or disproved. These are:
- First stage: when the documents are submitted by either party in the Court; these documents are on file, do not become part of the judicial record.
- Second stage: when the documents are produced as evidence by the party and the Court admits the documents in evidence. A document admitted in evidence becomes a part of the judicial record of the case and constitutes evidence.
- Third stage: the documents which are held "proved or not proved or disproved" when the Court is called upon to apply its judicial mind by reference to Section 3 of the Evidence Act. Normally, this stage arrives 31 the final date of the suit or proceeding.
- Hence the certificate is required at the stage of evidence

  According to the amendment to Section 17 of Indian Evidence Act (IEA) newly introduced by ITA 2000, evidence are consists of 3 types namely

  a) Oral

  b) Documentary

  c) Electronic Document

- This amendment has introduced new "Third Category of Evidentiary Statement" called "Electronic Documents" to the two other type of documents.
- It's treated as a documentary evidence
- *"Electronic record are produced for the inspection of the court is documentary evidence under Section 3 of The Indian Evidence Act, 1872."* (IEA),
- Presumption in Law: In any proceedings involving a secure digital record, the court shall presume, unless contrary is proved, that the secure electronic record has not been altered until the specific point of time, to which the secure status relates. The law also says that in any proceedings, involving secure digital signature, the court shall allow, unless the contrary is proved, that the secure digital signature is affixed with the intention of signing or approving the electronic record
- *Mrs. Societe Des products Nestle SA case* 2006 (33) PTC 469 & *State v Mohd Afzal,* 2003 (7) AD (Delhi)1
- By virue provision of Section 65A, the contents of digital records may be proved in evidence by parties in accordance with provision of 65B.
- Held- Sub section (1) of section 65b does admissible as a document, printed paper of electronic records stored in optical or magnetic media produced by a computer subject to fulfillment of conditions specified in subsection two of Section 65B.

- The computer from record is generated was regularly used to store or process information or data in respect of activity regularly carried on by the person having lawful control over the period and relates to the period over which the computer was regularly used.
- Information was inserted into the computer in the ordinary course of the activities of the person having lawful control over the computer.
- The computer was operating properly, and if not, was not such as to affect the electronic record or its accuracy.
- Information or the data reproduced is such as is fed into computer in the ordinary course of activity.

What is primary and what is secondary?
65A is independent of other sections:

- According to Section 61
  - Contents of documents may be given either by Primary or by Secondary evidence
- According to Section 62
  - Primary Evidence is the document itself produced for the inspection of the Court

  65A is independent of other sections
- According to Section 63
  - Secondary Evidence is and includes
    - Certified copies provided under the provisions hereinafter contained.
    - Copies made from the original evidence by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies.
    - Copies prepared from or compared with the original.
    - Counter parts of the documents as against the parties who did not execute them.
    - Oral accounts of the contents of documents are given by some person who has himself seen it.
- According to Section 64
  - Documents are proved by primary evidence except in the cases hereinafter mentioned.
- Acceptance of Secondary Evidence is therefore only an exceptional provision
- It is subject to conditions mentioned in Section 65

Exceptions for invoking Section 65:

- The secondary evidence may be given of the existence, condition or contents of a document in the following cases:
  - (a) When the original evidence is shown or appears to be in the possession or power of the person against whom the document is sought to be proved or any person out or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it.
  - (b) When the existence or a condition or a content of the original evidence have been proved to be admitted in writing by a person against whom it is proved or by his representative in interest.
  - (c) When the original evidence has been break down or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default produce it in reasonable time.
  - (d) When the original evidence is of such a nature as not to be easily movable.
  - (e) When the original evidence is a public document within the meaning of Section 74.
  - (f) When the original evidence is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;
  - (g) When the original evidence consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collections.

Every Electronic Document has to be "Certified":

- Hence an electronic document has to be always certified to the effect
  - "This is what the document means when read in a computer with appropriate application running in an appropriate operating system"
    - » The person who provides the certification assists the Court like an "Expert"
- This has been recognized and implemented in the Section 65A calling itself as "Special Provision" and indicating the certification process under "Section 65B"

Anvar P.V. Vs P.K.Basheer and others (Supreme Court of India Appeal No 4228 of 2012) Mr. Lodha R.M, Mr. Kurian Joseph and Miss. Rohinton Fali Nariman:

- First Principle enunciated by Basheer Judgment

"Evidence is built by the Plaintiff and challenged by the defendant. Construction is through pleadings and submitted the evidence by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the Court after the stage of relevancy and admissibility".

- This distinction provides clarity on when a "Oral Admission" may be relevant as well as the application of Section 45A role of a Digital Evidence Examiner (DEE) referred under Section 79A of ITA 2000/8

- The Judgment pointed to Section 22A of IEA which stated as the *"Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question."*

- Judgment again pointed to Section 45A according to which the opinion of Digital Evidence Examiner (under Section 79A-When appointed) is applicable only when the genuineness of an already admitted electronic evidence is in question.

- According to ITA 2000,

- *A document is being generated or having been prepared or have been prepared in a formalized way and intended to be processed or being processed or has been processed in a computer system and in any kind will be considered as an "Electronic Record/Document".*

- In view to the above, the "Computer Printout" which for all ordinary person looks like a "Document" (category 2 of section 17 of IEA), is to the discerning eyes, actually a "Document in Electronic Form" (category 3 of Section 17 of IEA).

- This fine distinction refers to an important aspect of Section 65B and same to which of the computer print -outs require section 65B certification and which don't.

- When a person signing the printed document is the person who is the owner of the content of the print out, he might simply affix his signature to the document without a Section 65B certificate similar to a case where we use a Computer as a Type writer.

- Therefore, if any Bank Manager is signing a statement of account of a customer. He will simply sign without Section 65B certificate since he is already authorized by the Bank to take responsibility for the transactions represented by the statement.

- If, a document is viewed by a person other than the person who owns the content, and he wants to provide a print out of the document. Then he needs to provide a Section 65B certification.

- Hence, A kiosk operator of e-Governance system who can view the land records in the computer can five a certified copy as a printout though he is not the Tahasildar or the Village accountant provided he appends certificates as required under Section 65B.

- *Proof of digital record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The vary caption of Section 65A of the Evidence Act. Read with Sections 59 and 65B is enough to hold that the special provisions on evidence relating to electronic*

record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code."

- It categorically mentioned that "Being a special law, the general law under Sections 63 and 65 has to yield."

- *"An digital record by means of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied."*

- It continued to state,

- *"in the case of CD, DVD or chip and etc., the same shall be accompanied by the certificate in means of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible"*

- It also stated,

- *"The situation would have been different the appellant adduced primary evidence, by making available in evidence data, the CDs used for records and songs. Had those CDs used for objectionable songs or records been duly got seized through the police or Election Commission and had same been used as the primary evidence, the High Court could have played major of the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements or records were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification.*

- *It is clear that notwithstanding what we have stated in the preceding paragraphs on the secondary evidence on digital record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same can be admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act."*

Who can give the 65B certificate ?.

- Section 65B also makes a straight statement that a computer output produced with Section 65B certificate is to be considered as "also a document" and does not state it is a primary or secondary document. It only mention that this computer output is also deemed to be a document acceptable without the production of the "original" and does not specifically state that it is a "acceptable secondary document"

- Section 79A is an enabling provision which mentions as under.

- Section 79A Central Government to notify Examiner of Electronic Evidence

- The Central Government may or may not, for the purposes of providing expert opinion on digital form evidence before any court or other authority specify, by notification in the official Gazette, any department, body or patries of the Central Government or a State Government as an Examiner of Electronic Evidence.

- Explanation: - the purpose of this section, "Electronic Form Evidence" (EFE) says any information or data of probative value that is either stored or sent in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines".

- This section has introduced in the Information Technology Amendment Act 2008 and became an effective from 27th October 2009. Under this provision the Indian Government was empowered to appoint any "agency of the Central or State Government" as an "Examiner of Electronic Evidence". This is not meant for individual parties but only for an organization.

- It is expected that any organization would follow few standard practices which make their process reliable enough for the Court to consider the evidence certified by it as authentic enough to proceed with the trial.

- Section 45A of the Indian Evidence Act (IEA) stipulates the opinion of the examiner of the electronic evidence appointed pursuant to sec 79A of the IT Act would be a relevant fact.

- Expert of cyber forensics comes under section 5 but 45A excludes all of them

- Evidence Act for both civil and criminal cases.

- It will be a main process in all such forensic investigations that lab will on receipt of a material create cloned copies so that any request for production of the evidence in the form in which it was presented to them is fulfilled.

- But just because of evidence is certified by a "Digital Evidence Examiner", Court cannot refuse to allow the defendant to question the evidence. This would volume to trampling of the rights of the defendant.

- Therefore, we should accept the use of Digital Evidence Examiner should be considered as "discretionary" and not "mandatory". Whenever there is a "reasonable" doubt as to the authenticity of an electronic document presented as evidence, then court may adopt a mandatory requirement of examination by an "accredited digital evidence examiner" while the Police will continue to have the discretion to adopt it as a "Best Practice".

- The Supreme Court bought out an in-depth analysis of the law governing digital records in India and UK wherefrom Section 65B bears its genesis and held inter alia as follows:

- The certificate required under Section 65B(4) is a condition precedent to the admissibility of digital evidence by means of electronic record and overruled the judgment passed in Mr. *Shafhi*. Further, the judgment in *Tomaso Bruno v. State of U.P.* [(2015)7SCC178] was ordered per incuriam and the judgment in *K. Ramajyam v. Inspector of Police* [(2016)Crl.LJ1542] passed by Madras High Court was overruled.

- Section 65B (1) couched in a non-obstante class clarifies that admissibility and proof of information or data contained in an digital record must follow Section 65B, being a special provision and Sections 62 to 65 are irrelevant with respect to such electronic records.

- Digital records have be the original data of information contained in the "computer" itself and copies made therefrom, such "original" being primary evidence while the copies being

secondary evidence. Therefore, the certificate in Section 65B (4) is unnecessary if the original evidence itself is produced. Such production of the original may be by way of the owner of a laptop, tablet or a mobile phone into the witness box and fiving that the concerned device, on which the original information is first stored, is owned and/or operated by him. This kind of proof however cannot be adduced if the device cannot be physically brought to Court [in such case the only means of proving the data will be in accordance with Section 65B(1) read with Section 65B(4)]. Accordingly, the Court clarified that the last sentence in paragraph 24 of *Anvar* which reads as "...if an electronic record as such is used as primary evidence *under Section 62 of the Evidence Act...*", may more appropriately be read without the words "under Section 62 of the Evidence Act".

- The risk in obtaining a document can be avoided by many statutory provisions:

(i) Section 165 of the Act empowers a Judge to order production of any document or thing in order to discover or obtain proof of relevant facts; (ii) Order XVI of the Civil Procedure Code. In 1908 deals with 'Summoning and Attendance of Witnesses' and the Court can issue orders for the production of documents;

(iii) Sections 91 and 349 of the Code of Criminal Procedure, 1973.

- In other situation where the certificate has been applied for the person or authority does not comply in such request, any parties can apply to the Court to direct the person to produce the certificate. Even if pursuant to the directions of the Court certificate cannot be get, the alleged disobedience of the law of excused.

- Sec 65B is silent as with and when the certificate is to be produced. Though generally the certificate can accompany the digital record when the same is produced as evidence, though there is some level of discretion that may be exercised depending on the facts of each case. Insofar as criminal trials are concerned though generally documents are to be filed before commencement of the trial. The Court may exercise discretion and allow production later if no prejudice is caused.

- General directions are also issued to cellular companies and internet service providers to maintain CDRs and other relevant records as per the law and it has been directed to appropriate rules and directions should be formed in exercise of the Information Technology Act (ITA) 2000.

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Mother Tongue As A Medium Of Instruction In Gujarat: Measuring The Impact On Personality Development In Children Through Core Self-Evaluation Approach

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Quality education is one of the key sustainable development goals. The New education policy in India emphasizes on mother tongue instruction upto class 5 to foster a faster learning process, improved learning outcomes, enhanced classroom participation and decrease in school dropout rate. These benefits if experienced, helps in building the personality of the child and enhances the quality of education. This study is an attempt to understand the impact of mother tongue based instruction till class 5 on the personality development of the child through core self evaluation scale. A total of 600 children whose mother tongue is Gujarati, who underwent mother tongue based instruction till class 5 and are now studying in 6th, 7th and 8th classes in Gujarati medium schools in Gandhinagar district, Gujarat have been considered for the study. Results showed that there no impact of mother tongue based instruction on the personality development of a child.

Introduction

New Education Policy emphasizes on teaching in mother tongue till class-5 (1,2 and 3). Proponents of mother based instruction emphasize a positive impact of the mother tongue based instruction on personality development(4,5,6,7,8,9,10 and 11). This study is an attempt to understand the impact of mother tongue based instruction on the personality development of children. To understand the impact of mother tongue based instruction till class-5, children who studied in mother tongue till class-5 and are now continuing their education in mother tongue have been considered for the study. Personality development is being measured among the students who are in 6^{th}, 7^{th} and 8^{th} classes. The mother tongue being considered is Gujarati and the geographic area of study is 10 Gujarati Medium schools in Gandhinagar District, Gujarat.

Research Methodology

Core self evaluation as a personality trait was measured in this study (12,13 and 14). Core self evaluation trait is a combination of four important sub-personality traits Self Esteem, Neuroticism, Generalized Self-Efficacy and Locus of Control. There are two approaches to measure core self evaluation i.e. Direct and Indirect approaches. Direct approach uses the combined score of all the items in the questionnaire and doesn't consider the sub-personality traits separately. Indirect approach uses the scores of each of the four sub-personality traits. Indirect approach has been employed in this study to measure and analyze each of the four sub-personality traits

Questionnaire

The Core Self Evaluation questionnaire consists of the following 12 items (12).

1. _____ I am confident I get the success I deserve in life.
2. _____ Sometimes I feel depressed. (reverse scored)
3. _____ When I try, I generally succeed.
4. _____ Sometimes when I fail I feel worthless. (reverse scored)
5. _____ I complete tasks successfully.
6. _____ Sometimes, I do not feel in control of my work. (reverse scored)
7. _____ Overall, I am satisfied with myself.
8. _____ I am filled with doubts about my competence. (reverse scored)
9. _____ I determine what will happen in my life.
10. _____ I do not feel in control of my success in my career. (reverse scored)
11. _____ I am capable of coping with most of my problems.
12. _____ There are times when things look pretty bleak and hopeless to me (reverse scored)

Responses to these questions have been collected on five-point Likert Scale with

1- Strongly Disagree	2- Disagree	3-Neutral	4-Agree	5- Strongly Agree

Sampling and Data Collection

10 schools where the medium of instruction is Gujarati have been considered for the study. All these schools are located in Gandhinagar District, Gujarat. A random sample of 20 students each from 6^{th}, 7^{th} and 8^{th} classes has been drawn from every school. A total of 600 responses have been collected

Research Technique

Two way ANOVA with replication is being employed to conduct the analysis of the data. Gujarati medium schools and Personality traits are being considered as variables. Data of 6^{th}, 7^{th} and 8^{th} classes are being considered as samples under each Gujarati medium school

Following Hypotheses were tested

$H1_0$= There is no difference in the mean scores between the Gujarati Medium schools

$H2_0$= There is no difference in the mean scores between the personality traits of the Children studying in Gujarati Medium Schools

$H3_0$= There is no impact of Gujarati Medium Schools on Personality Traits of Children

Findings of the Study

The table below presents the average scores of the personality traits of school children surveyed across the 10 Gujarati medium school sin Gandhinagar district, Gujarat.

Table-I. Personality trait scores of respondents

School	Class	Personality Traits			
		Self Esteem	Neuroticism	Generalized Self Efficacy	Locus of Control
School-1	6	3.47	4.12	3.52	3.87
	7	3.48	4.05	3.35	3.87
	8	3.47	4.12	3.47	3.85
School-2	6	3.67	4.17	4.33	4.17
	7	3.33	4.33	3.17	3.83
	8	2.83	3.50	3.17	3.67
School-3	6	3.67	4.17	3.50	4.33
	7	4.00	4.50	3.67	3.83
	8	3.67	4.17	4.50	3.67
School-4	6	3.67	4.33	3.17	3.83
	7	3.00	4.00	4.17	3.83
	8	3.67	4.17	3.67	3.83
School-5	6	4.00	4.33	2.67	4.00
	7	3.33	4.00	3.67	3.67
	8	3.67	4.17	4.50	3.67
School-6	6	3.33	4.33	3.17	3.83
	7	3.50	3.67	2.67	4.00
	8	3.67	4.17	3.83	4.00
School-7	6	3.00	4.00	4.17	3.83
	7	4.00	4.33	3.33	4.00
	8	3.33	4.50	3.50	3.67
School-8	6	3.33	4.17	3.83	4.00
	7	3.67	4.17	4.50	3.67
	8	3.00	4.17	3.33	4.17
School-9	6	3.50	3.67	2.67	4.00
	7	3.33	4.00	3.33	4.00
	8	3.33	4.50	3.50	3.67
School-10	6	3.50	3.67	2.67	4.00
	7	3.67	4.17	4.00	3.50
	8	3.33	4.33	3.17	3.83

The results of two way ANOVA performed are placed in the table below. This two way ANOVA with replication has been performed between Gujarati medium schools and core self evaluation personality trait. The replication has been done among class 5, 6 and 7 students of each

school. Also mentioned are the basic descriptive statistics of each Gujarati medium school that has been considered for the study.

TABLE –II. Two way ANOVA With Replication

SUMMARY	Self Esteem	Neuroticism	Generalized Self Efficacy	Locus of control	Total
School 1					
Count	3	3	3	3	12
Sum	10.41666667	12.28333333	10.33333	11.58333	44.61666667
Average	3.472222222	4.094444444	3.444444	3.861111	3.718055556
Variance	9.25926E-05	0.001481481	0.007315	9.26E-05	0.082750421
School 2					
Count	3	3	3	3	12
Sum	9.833333333	12	10.66667	11.66667	44.16666667
Average	3.277777778	4	3.555556	3.888889	3.680555556
Variance	0.175925926	0.194444444	0.453704	0.064815	0.249789562
School 3					
Count	3	3	3	3	12
Sum	11.33333333	12.83333333	11.66667	11.83333	47.66666667
Average	3.777777778	4.277777778	3.888889	3.944444	3.972222222
Variance	0.037037037	0.037037037	0.287037	0.12037	0.125420875
School 4					
Count	3	3	3	3	12
Sum	10.33333333	12.5	11	11.5	45.33333333
Average	3.444444444	4.166666667	3.666667	3.833333	3.777777778
Variance	0.148148148	0.027777778	0.25	2.96E-31	0.153198653
School 5					
Count	3	3	3	3	12
Sum	11	12.5	10.83333	11.33333	45.66666667
Average	3.666666667	4.166666667	3.611111	3.777778	3.805555556
Variance	0.111111111	0.027777778	0.842593	0.037037	0.236531987
School 6					
Count	3	3	3	3	12
Sum	10.5	12.16666667	9.666667	11.83333	44.16666667
Average	3.5	4.055555556	3.222222	3.944444	3.680555556
Variance	0.027777778	0.12037037	0.342593	0.009259	0.214436027

School 7					
Count	3	3	3	3	12
Sum	10.33333333	12.83333333	11	11.5	45.66666667
Average	3.444444444	4.277777778	3.666667	3.833333	3.805555556
Variance	0.259259259	0.064814815	0.194444	0.027778	0.201178451

School 8					
Count	3	3	3	3	12
Sum	10	12.5	11.66667	11.83333	46
Average	3.333333333	4.166666667	3.888889	3.944444	3.833333333
Variance	0.111111111	00	0.342593	0.064815	0.196969697
School 9					
Count	3	3	3	3	12
Sum	10.16666667	12.16666667	9.5	11.66667	43.5
Average	3.388888889	4.055555556	3.166667	3.888889	3.625
Variance	0.009259259	0.175925926	0.194444	0.037037	0.21780303

School 10					
Count	3	3	3	3	12
Sum	10.5	12.16666667	9.833333	11.33333	43.83333333
Average	3.5	4.055555556	3.277778	3.777778	3.652777778
Variance	0.027777778	0.12037037	0.453704	0.064815	0.214436027

Total				
Count	30	30	30	30
Sum	104.4166667	123.95	106.1667	116.0833
Average	3.480555556	4.131666667	3.538889	3.869444
Variance	0.083028416	0.061635057	0.294278	0.03322

Source of Variation	**SS**	**Df**	**MS**	**F**	**P-value**	**F crit**
Gujarati Medium Schools	1.185002315	9	0.131667	0.962487	0.477149135	1.999115
Personality Traits	8.309969907	3	2.76999	20.24867	0.0000000007	2.718785
Interaction	1.563803241	27	0.057919	0.423386	0.9930732	1.625513
Within	10.94388889	80	0.136799			
Total	22.00266435	119				

Discussion and Analysis

The first null hypothesis $H1_0$ says that there is no difference in the mean scores between the Gujarati Medium schools. The $F_{calculated} < F_{critical}$ and p value >.05. So the null hypothesis $H1_0$ is accepted.

The second null hypothesis $H2_0$ says that there is no difference in the mean scores between the personality traits of the Children studying in Gujarati Medium Schools. The $F_{calculated} > F_{critical}$ and p value <.05. So, the null hypothesis $H2_0$ is rejected.

The third and final null hypothesis $H3_0$ says that there is no impact of Gujarati Medium Schools on Personality Traits of Children. The $F_{calculated} < F_{critical}$ and p value >.05. So, the null hypothesis $H3_0$ is accepted.

Conclusion

It has been established that the personality development among students studying in the selected Gujarati medium schools is the same. Also, medium of instruction cannot alone be considered as a factor in studying the personality development among children. If considered alone, there is no impact of it on the personality development among children

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Authors whose papers will be published in ECST are also urged to submit their papers to one of the Society's peer-reviewed journals: the Journal of The Electrochemical Society (JES) or the ECS Journal of Solid State Science and Technology (JSS). While the expectation is that six months is sufficient time to revise an ECST paper to meet the stricter standards of the journals, there is no deadline for submission. Submissions to the journals must be made using the online submission system. Click here for author instructions: http://ecsdl.org/site/ecs/manuscript_submissions.xhtml.

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Privacy Preserving Big Data Publication on Cloud using Fisher Yates shuffling Anonymization algorithm and Deep Neural Networks.

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Abstract— In recent trends, privacy preservation is the most predominant factor, on big data analytics and cloud computing. Every organization collects personal data from the users actively or passively. Publishing this data for research and other analytics without removing Personally Identifiable Information (PII) will lead to the privacy breach. Existing anonymization techniques are failing to maintain the balance between data privacy and data utility. Here privacy preservation is achieved for streaming data by using one of the anonymization techniques called 'shuffling' with Big data concept. K- anonymity, t-closeness, l-diversity are usually used technique for privacy concern in a data. But in all these techniques information loss and data utility are not preserved very well. Dynamically Anonymizing Data Shuffling (DADS) technique is used to overcome this information loss and also to improve data utility in streaming data. In order to provide a trade-off between the privacy of the users and data utility, a Fisher Yates based *k*-anonymity approach is proposed. To protect the privacy of high-dimensional data Deep Neural Network (DNN) based framework is proposed. The experimental result shows that the proposed approach mitigates the information loss of the data without compromising privacy.

Keywords: Data management, Privacy preservation, Machine learning, k-anonymity

I INTRODUCTION

Nowadays, many organizations collect data from users actively or passively. The individual's data are also collected from various databases. Such data contains personally identifiable information (PII) through which the individual can be identified. Researchers and data analyst would like to get an insight from the published data by the organizations. So there is a huge risk of privacy breach could happen if the PIIs have not been removed or anonymized. The big data is generated every day through every electronic activity, so the size of the data growing exponentially every day. This makes privacy preservation more challenging.

Data anonymization is the process of modifying the information in order to prevent the personal data of the individuals. Organizations publish data for research by anonymizing the data. Anonymization refers to hiding or changing sensitive attributes. Sensitive attributes directly identify individuals. Such published data contains Quasi- Identifiers. Quasi identifiers, when joined with other databases, individual can be identified.

In [1] *k*-anonymity technique is proposed to address this problem. *k*-anonymity groups the QI's of the database. *k*- anonymity property is satisfied if at least *k*-1 records in the database are sharing the same quasi identifier.
It is possible to have common quasi identifiers for all databases. This is made possible through generalization and suppression techniques.

Though *k*-anonymity techniques are effective in preserving the privacy of the individuals, it is inefficient for multi- dimensional data and high dimensional data. Fig. 1. shows various dimensions of data and its privacy preserving approaches. Multi-dimensional data can be anonymized through multi-dimensional k-anonymity technique called Fisher Yates shuffling algorithm. This technique provides multi-dimensional anonymization which groups the data based on its aggregation.

High dimensional data streams and images cannot be protected by traditional anonymization

approaches as it is difficult to define the quasi-identifiers. Deep Neural Networks are effective in protecting the privacy of high dimensional data. DNN extracts the features from the data and creates a model through which the privacy of the data is protected.

In this paper, a Fisher Yates k-anonymity based multi- dimension a *k*-anonymity approach to publishing big data on the cloud with neural networks is proposed. The proposed approach partitions the data as numerical and high-dimensional data. On numerical data, the modified Fisher Yates *k*-anonymity techniques are applied and the high dimensional data are modeled into a DNN. Adversaries may try to infer personal information from the DNN model. Hence, Laplace noise to be added to the model through differential privacy technique to protect the private information.

I LITERATURE SURVEY

A. Privacy Preservation using K-Anonymity

A privacy-preserving protocol employing *k*-anonymity property for data collection is proposed. The data are anonymized in a distributive and collaborative way before the data reaches the collector from the data owners. The privacy is preserved by grouping the data holders with at least *k*-1 other data holders with common QI. Thus it is impossible for an individual to be identified also it neutralizes the internal and external identity disclosure attacks. The demerits of this protocol are it is prone to privacy attacks like membership disclosure and attribute disclosure.

A k-anonymity based privacy preserving data publishing model is proposed. This model addresses insider and outsider privacy attacks. Insider attacks are neutralized by adopting Oracle vault technique. Outsider threats are solved through *k*-anonymity techniques. This model also utilizes the role-based access control method to deny access to the database and protects the privacy of the individual while publishing through k-anonymity techniques.

Privacy issues in transaction data and trajectory data are addressed through a *k*-anonymity- - uncertainty based privacy prevention model. This model aims to banish identity disclosure and sensitive identity disclosure in trajectory data. Identity disclosure in is eliminated through k-anonymity techniques where the number of trajectories or sub-trajectories are not less than k. Sensitive identity disclosure is eliminated through suppression techniques.

Privacy leakages in the publication of location-based data are addressed. A trajectory data based on frequent path approach to preserve location privacy is proposed. This approach adopts the *k*-anonymity technique to divide the trajectories into similar set of candidate groups. The frequent paths are identified and protected by replacing it with highest similarity trajectory. This provides a balance between privacy preservation and data utility. However, this approach has failed to preserve a more frequent pattern.

An incremental anonymization technique based on k- anonymity techniques is proposed into protect the incremental datasets in cloud computing. The proposed algorithm aims to mitigate the performance overhead in terms of computation time and storage also to provide a better privacy and data utility. The incremental data anonymization algorithm first partitions the data into smaller blocks which are later stored in the cloud. These blocks are anonymized and for every new data new blocks are formed, anonymized and added to the cloud.

B. Privacy Preservation using Differential Privacy

Background knowledge attack is one of the privacy attacks through which the attacker tries to identify the individual from the published data. Many privacy protection models are vulnerable for such attacks so in order to resist such attacks a differential privacy approach based on fog computing is proposed. MaxDiff Histogram technique is used to develop a data publishing algorithms. The differential privacy is applied by adding Laplace noise to the downloaded dataset. This protects the individual's privacy from the attackers even though they have strong background knowledge.

A *k*-correlated differential privacy mechanism is proposed in to solve the invalidation problem of records in differential privacy. It is solved by adjusting the record value based on the correlated value. The proposed method uses machine learning algorithms to calculate correlation sensitivity. In block differential privacy mechanism the records are divided and then it is correlated based on the correlation value. Thus efficiency of preserving individuals privacy is big data is improved.

Privacy-preserving strategy to publish SCADA (Supervisory Control and Data Acquisition) data based perturbation technique is presented. The proposed system partitions the original dataset vertically in order to improve perturbation performance. The dataset is then clustered based on its similarity. The process of the perturbation technique is to replace the actual attributes with the centroid value of the cluster. It provides a balance between data privacy and usefulness of the data. However, this method takes more computational time

C. Privacy Preservation using Attribute-Based Encryption

To protect the privacy of users from the cloud servers, an attribute-keyword based data publication scheme is proposed. An attribute-based encryption technique is adopted to encrypt the data and to reveal the information an outsourced decryption technique is used. A searchable encryption algorithm is proposed to support multiple publishers and subscribers. To share the secret key among the publishers and subscribers LSSS (Linear Secret Sharing Scheme) structure is used. The proposed scheme is designed to resist keyword guessing attack through trapdoor privacy model.

The privacy issues in stream data publication are addressed. A restricted attribute-based sequential anonymization (RSA-SA) based on attribute-based encryption method is proposed. In this method, two privacy restrictions are introduced they are semantic diversity through which the semantics of the data are protected and sensitive diversity to restrict the sensitive attributes which are published. The sensitive attributes are protected by replacing it with a random noise to the set of m-1 sensitive values. Thus it anonymizes the sensitive attributes and prevents data from disclosure attacks.

Maximum delay anonymous clustering feature (MDACF) treed at a publishing algorithm is presented into publish the sensitive data in social networks. The proposed scheme uses balanced iterative reducing and clustering hierarchies(BIRCH) algorithm to develop an anonymous clustering feature tree in order to anonymize the sensitive data before publishing it to the social networks.

There are number of anonymization method like cryptographic, substitution, character masking, shuffling, nulling out, date variance and number variance. In spite of all those methods, shuffling method can achieve high data utility and less information loss. Analytics is what makes big data come alive. Analytics, comprising a number of different computational technologies, is what fuels the big-data revolution. Analytics is what creates the new value in big datasets, vastly more than the sum of the values of the parts. Each of these analyses will produce some insights which are to be favorable to both analyst as well as customers. In DADS method of data masking process, streaming of data can be analyzed in real time without revealing any sensitive values. Considering about the data size and speed, it can be only processed with the help of big data concepts. There are many Hadoop components and ecosystem to process this much of volume and velocity of data and DADS method makes data to solve re-identification of original sensitive values and maintain the utility of data in balanced state.

A. Privacy Preservation using DNN

Organizations may use deep neural networks (DNN) to predict sensitive attributes of personal data through the non- sensitive data. Towards privacy-preservation of the data during machine learning and deep learning □-differential privacy is modified to propose three privacy preserving approaches in. Parameter wise □-differential privacy algorithm is proposed for the approaches they are Anonymizing First, Learning First, and Anonymized Learning. In Anonymizing First approach, the database is first anonymized using k-anonymity technique later machine learning algorithm is applied to the anonymized database. In Learning First approach, first data is learned through machine learning algorithms then differential privacy noise is added to the result. In Anonymized Learning approach, every parameter in the machine learning model is anonymized.

A cloud-based deep learning application for mobile devices is proposed in. ARDEN a framework is proposed in order to partition the DNN over mobile devices and cloud data centers. The privacy of DNN cloud servers is ensured through a lightweight privacy-preserving mechanism which nullifies the

arbitrary data and adds random noise. To improve the cloud network robustness on perturbated data, noisy training data is provided. Differential privacy techniques are utilized for perturbation which not only preserves privacy but also improves the inference of the data.

A bipartite topology based privacy preserving deep learning classification model is proposed in. The proposed system targets to preserve privacy by means of a privacy partition framework. This framework consists of a trusted local partition and untrusted remote partition. This algorithm sustains input recovery attack.

An additive homomorphic encryption based privacy- preserving deep learning system is presented in. This method enables multiple participants to train a neural network model and protects the privacy of the local participants from the cloud server. Additive homomorphic encryption method encrypts the gradients of the data set before uploading it to the cloud server. This protects the data from the curious server also this provides better accuracy in deep learning.

B. Privacy Preservation of Bigdata

IoT and big data analytics facilitate the researchers to gain better insight from the data but the sensitive attributes of the data generate privacy issues. In the cause of protecting the privacy of the user data during deep learning applications a mathematical based kernel learning model, multi-kernel learning and hybrid learning models are combined and to develop a privacy- preserving deep learning model.

A raw data collection method for IoT and big data, without trusted authority is proposed in [19]. An anonymous data collection protocol is proposed based on differential privacy and k-anonymity. Differential noise is added to the collected data in order to preserve privacy.

A secure big data healthcare system to protect the patient's data and also to provide better access control during the emergency and normal case, a smart IoT based healthcare system with privacy-preserving big data storage and self- adaptive access control system is proposed in [20]. In this system, the patient medical records are protected using attribute-based encryption technique with a cross-domain access policy. The self-adaptive access control system is developed using break-glass access methodology in order to provide access to medical records during emergency situations. This system resists plain text attack.

Mobile device users install various applications in their mobile devices. Advertisers and application owners frequently collect information about app installation history in order to share the profit. There is a possibility for the privacy of the users to be breached. A differential privacy based scheme is proposed in [21] to preserve the privacy of mobile device users. Laplace distribution and aggregation of data is used to add noise to the database thus the original data is protected.

To preserve the privacy of edge computing in an enhanced mobile crowd sensing a task allocation framework is proposed. Participants privacy are protected by introducing edge nodes. A genetic algorithm based on obfuscation matrix is used to invalidate the inference attack with background knowledge.

Privacy-preserving authentication (PPA) protocol is presented to provide the security and privacy of the mobile service applications. This protocol utilizes RSA and Public key cryptosystem methods to encrypt the user data over the wireless network, thus the protocol protects the data from various attacks and privacy of the user is protected.

IV PRELIMINARIES

A. K-Anonymity

A database is said to be *k*-anonymized if it contains at least *k-1* individual rows in the database shares common identifiers [1]. Let database *D* has a table *T* which contains *QI* (Quasi Identifiers)$T(Q1,Q2,...,Qn)$.The database *D* is said to satisfy the *k*-anonymity property if and only if at least *k-1* records in *T* same *QI*. Most of the databases won't have common *QI* it can be made common through generalization and suppression techniques.

1) Quasi Identifiers(QI)

Aquasi-identifier is a set of attributes$[Q1,Q2,...,Qn]$ in table *T* which can be merged with other

external released database to re-identify the individual records. TABLE 1. shows the example of patient records table with quasi-identifiers.

2) Sensitive Identifiers(SI)

A sensitive identifier is an attribute in the table *T* which directly identifies the individual records (Ex: social security number, email-id, phone number etc.,). Sensitive attributes should be removed from the database before publication.

3) Generalization

Generalization is a method of replacing the actual attribute with a less specific but semantically correct value in order to group the attributes. TABLE I shows the actual table and TABLE II shows the generalization of attributes.

4) Suppression

Suppression is a method of replacing (partially or fully) the actual attributes of table *T* with a special character such as '*'. TABLE III shows the suppression of attributes.

B. Differential Privacy

Differential privacy is one of the a randomization mechanism to add noise to the datasets based on random values to protect the private information. If datasets *D1* and *D2* are adjacent, threshold *P* is privacy mechanism, if it satisfies the□- differential privacy for any inputs *x, x'* □*D* for any output *P(f(x,x'))*——➝□*R*

$$Pr[P(f(D1)) \in _S] \leq e _Pr[A(f(D2)) \in _S] \quad (1)$$ Where *f* is the query function.

1) LaplaceMechanism

Foraqueryfunction*f*anddataset*D*,andtheparameter□the Laplace mechanism *A* satisfies the followingequation.

$$A(D) = f(D) + Laplace(GS/\square) \quad (2)$$

C. Deep NeuralNetworks

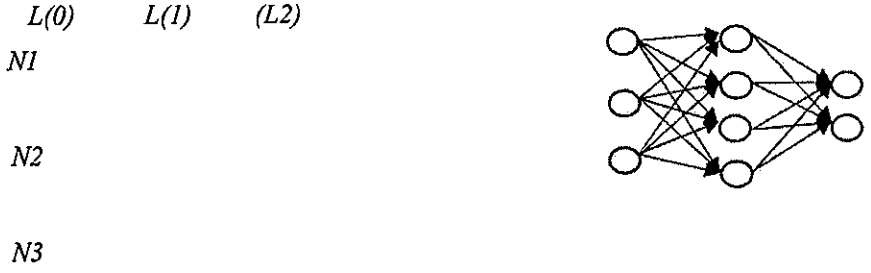


Fig. 2. Structure of Deep Neural Network *L(2)*

Deep neural networks are a mathematical model to process data in complex ways. Deep neural networks are efficient in protecting multi-dimensional data such as images and videos.

In Fig. 2 *L* represents the layers of deep neural networks. There are 3 layers in the neural network, *L(0)* denotes the input layer, *L(1)*denotes the hidden layer and *L(2)*denotes the output layer.

N represents the nodes of the layer and the hidden nodes have weight values to calculate the complex values.

D. Fisher Yates Anonymity

Fisher Yates is a multidimensional *k*-anonymity algorithm. It follows a greedy approach. Fisher Yates partitions the *QI's* into different group of generalized attributes. Each partition would satisfy the *k*-anonymity property. A dataset is said to Fisher Yates anonymized if and only if the set of *QI's* □*D* divided into aset of generalized *QI's* such as *G1(QI), G2(QI), ...Gn(QI).*

After conversion of data, it under goes a selection process called attribute selection. In data sets, there may be 3 types of data that is sensitive data, insensitive data and quasi identifier. During anonymization process the sensitive data has to be left out for customer safety and insensitive data are not used for anonymization. Among these data quasi identifier attribute is very much considered for data anonymization process. So only quasi attributes are considered for this DADS method for data masking.

Next step is applying shuffling method for selected data. Shuffling can be achieved in many ways. In DADS method, shuffling is done with a method called 'Fisher–Yates shuffle'. This method is quiet efficient, sequential, time complexity is optimal. Using shuffling will decrease the information loss in the data set and increase the data utility. The output from this shuffling method is discussed with data owner and then released to data analysts or any research scholar without revealing the patient details.

Let the given array be *arr[]*. A simple solution is to create an auxiliary array *temp[]* which is initially a copy of *arr[]*. Randomly select an element from *temp[]*, copy the randomly selected element to *arr[0]* and remove the selected element from *temp[]*. Repeat the same process n times and keep copying elements to *arr[1], arr[2], ...* The time complexity of this solution will be O(n^2).

Fisher Yates shuffle algorithm works in O(n) time complexity. The assumption here is, we are given a function rand() that generates random number in O(1) time.

The idea is to start from the last element, swap it with a randomly selected element from the whole array (including last). Now consider the array from 0 to n-2 (size reduced by 1), and repeat the process till we hit the first element.

Following is the detailed algorithm

To shuffle an array a of n elements (indices 0..n-1):

```
for i from n - 1 down to 1 do
    j = random integer with 0 <= j <= i
    exchange a[j] and a[i]
```

Following is implementation of this algorithm.

I. ALGORITHM DADS

SD-Streaming data StD-Structured data

AS-Attribute selection data AN-Anonymized data

1. Input the credential details to access the streamdata(SD).
2. Using Apache Flume Source, grab SD to processing phase.
3. Redirect SD to store in database.
4. If SD is unstructured or semi- structured
   4.1. Convert to structured data(StD)
5. Else
   5.1 SD=StD.
6. Apply attribute selection

7. Find sensitive attribute, quasi identifier, insensitive attribute
8. If StD is sensitive attribute discard that.
9. Else if StD is insensitive attribute discard that.
10. Else StD=AS
11. Apply shuffle method
    - 11.1. For (i=AS.length- 1;i>0;i--)
    - 11.2. A=AS[index]
    - 11.3. AS[index]=AN[i]
    - 11.4. AN[i]=A
12. Return Anonymized data(AN)

I. PROPOSEDMETHOD

Original Table (To)

ID	Name	Age	PIN Code	Problem / Issue
P00001	Madan	30	123456	Cancer
P00002	Pavan	45	654321	Chest Pain
P00003	Mahi	60	324561	Head Ache
P00004	Jyothi	23	234561	Kidney Problem
P00005	Salman	54	345216	ILD
P00006	Rajesh	40	432165	Dengue Fever
P00007	Anvesh	60	122546	Paralysis
P00008	Sumati	55	213456	Arthritis
P00009	Raji	38	432155	Viral Fever
P00010	Laxmi	48	234546	Heart Defect
P00011	Suren	36	543122	BP
P00012	Teja	23	236541	Dengue Fever
P00013	Manu	21	132654	Malaria
P00014	Ramya	30	654321	Jaundice
P00015	Laxman	22	432651	Hepatitis
P00016	Ramani	38	453216	Sinus
:	:	:	:	:
:	:	:	:	:
P05000	Sanghvi	43	634829	Malaria

Disease Master Table (T_{DM})

DCode	Disease
0001	Allergie

0002	Asthma.
0003	Cancer.
0004	Celiac Disease.
0005	Crohn's & Colitis.
0006	Heart Disease.
0007	Black fungus
0008	Liver Disease.
0249	measles, mumps, rubella, chicken pox, and shingles.
0250	hepatitis.

Modified Table (T_{MoD})

ID	Name	Age	PIN Code	Problem / Issue
P00001	Sumati	55	213456	Liver Disease
P00002	Jhon	20	546321	Gastroparesis
P00003	Sanvi	53	264531	Non-Hodgkin lymphoma
P00004	Abhi	23	234561	Kidney Problem
P00005	Virini	45	416532	Cervical cancer
P00006	Ramani	24	365421	Breast cancer
P00007	Rajesh	35	524612	Brainstem glioma
P00008	Venu	76	213456	Kidney disease
P00009	Nayesh	42	211335	HIV
P00010	Vishwesh	15	542364	II Neoplasms
:	:	:	:	:
:	:	:	:	:
P05000	Laxmi	48	234546	Multiple Sclerosis

Key Table(T_K)

ID	Key
P0001	8
P0002	20
P0003	200
P0004	153
:	:
:	:
P05000	10

Privacy Preserving Fisher YatesK-Anonymity

In this section, the implementation of the privacy-preserving Fisher Yates based anonymization

approach is described. Assume that the dataset T has n records. Each record in T has a set of sensitive attributes (SI) $\{S1, S2, S3, \ldots, Sn\}$ and the set of$QI's$
$\{Q1, Q2, \ldots, Qn\}$. As Fisher Yates k-anonymity can only be applied on numerical attributes, all record in the dataset T are analyzed and the categorical data are converted into numerical data. The proposed approach consists of 1) Greedy partitioning algorithm and 2) Information Loss metric 3) DNN

1) Greedy Partitioning Algorithm

This algorithm partitions the multidimensional regions that cover the domain space. Then based on the recoding functions the statistics are constructed from each region. This algorithm comprises of strict partitioning and relaxed partitioning algorithm. In strict partitioning, the median value is calculated from the attributes and then partitioned. In relaxed partitioning, the split values are provided manually for the partitioning.

2) Information Loss Metrics

Normalized Certainty Penalty (NCP) [24] is used to calculate the information loss.

$$NAS^{G} - NIN^{G}$$

Where *Laplace (GS/□)* is Laplace distribution and parameter □is privacy

$$NCP\text{Æ}\ NuN(G) = \frac{ANuN\ ANuN}{NAS ANuN - NIN ANuN}$$

III RESULTS AND DISCUSSIONS

In this section, the proposed approach is evaluated against the traditional approaches. The adult dataset download from UCI repository is used in our implementation. The dataset contains 15 attributes out of which 7 attributes are considered as quasi-identifiers. Totally 32k records are available in the dataset. The categorical attributes are converted to numerical values. Thus the experimental result shows that the proposed approach has performed better when compared with the traditional data anonymization techniques. The information loss is mitigated through the selection of attributes and multi-dimensionality of the anonymized database. Also, the proposed system doesn't compromise the privacy of data. It is also noticed the proposed approach is faster than existing approaches

CONCLUSION

Privacy-preserving data publication for big data and cloud computing has received significant attention from data analyst and researchers. The various data anonymization techniques and DNN model for privacy preservation have been deeply studied. It is observed that the existing data anonymization techniques are inefficient in protecting the privacy of the data and to provide data utility. In this work, a modified Fisher Yates k-anonymity technique with DNN model is proposed to preserve the privacy of data with minimal information loss. The experimental result shows that the proposed approach outperformed existing methodologies. Future work will include the hybrid structure of deep learning, in order to enhance the privacy of big data and cloud.

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CRITICAL EXAMINATION OF THE USE OF AGGRAVATING AND MITIGATING FACTORS IN CARTEL CASES IN INDIA

- MR. SUDHANSHU KUMAR*

ABSTRACT

*Cartels are considered as one of the most egregious violation of competition law. In order to deter cartel conduct, the penalty should be 'optimal' and the scheme of fining should be clear and consistent. Moreover, the computation of penalty has to be guided by sound legal reasons. There has to be a scientific connection between the reasons provided and the final computed penalty. Lack of transparency in the adjudication of penalty leads to multiple court litigations and loss of credibility of the competition authority. The present article assesses the factors that have been employed by the Competition Commission of India ["**CCI**" or "**Commission**"] in the computation of penalty for cartelization and examines if the Commission has been consistent in the application of these factors.*

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I. INTRODUCTION: 'CARTELS'

'Cartel', in the simplest terms, means an arrangement or understanding between similarly placed firms in the market to 'not compete'.[1] This, in turn, robs the market of the very benefits competition is said to provide in the form of low prices, better and innovated products, and increased choices. Oligopolistic firms may choose to enter into a cartel arrangement to increase their market power. The profit maximizing decision of the cartel is akin to that of a monopolist and leads to similar negative effects including allocative inefficiency, productive inefficiency and dynamic inefficiency.[2] Cartels have the most direct impact on consumers as they face increased prices and reduced supply of products or services.[3] The impact of cartels becomes multifold when the same is considered in developing economies,[4] and especially with respect to small and medium enterprises. Since, the objective of a cartel is to limit or eliminate competition between competing firms and increase profits of the constituent members, without *"producing any objective countervailing benefits"*,[5] many jurisdictions of the world consider cartels as *per se* illegal. As per Section 3(3) of the Indian Competition Act, 2002 ["**ICA**"], cartels are presumed to have appreciable adverse effect on competition ["**AAEC**"] and therefore, the Commission is not required to

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[1]As per Section 2(c) of Indian Competition Act 2002, 'cartel' *"includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services."*

[2]H. Leibenstein, 'Allocative Efficiency v. X-efficiency' (1966) 56 American Economic Review 392.

[3]The average increase of sale price due to price fixing cartels has been estimated to be around 10% and the average decrease in output to be close to 20%. See OECD 'Hard Core Cartels' (2000) <https://www.oecd.org/competition/cartels/2752129.pdf> accessed 30 September 2020. Cartels have been proven to cause great harm especially in poor and developing economies as it restricts access to essential goods and services. See also World Bank, 'Global economic prospects and the developing countries 2003 – investing to unlock global opportunities : Global economic prospects and the developing countries 2003 : investing to unlock global opportunities' (2003) <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/867491468124755492/global-economic-prospects-and-the-developing-countries-2003-investing-to-unlock-global-opportunities> accessed 31 August 2020; UNCTAD, 'Impact of Cartels on the Poor' (2013) <https://unctad.org/meetings/en/SessionalDocuments/ciclpd24rev1_en.pdf> accessed 30 September 2020.

[4]M. Ivaldi and others, *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects* (Springer 2016).

[5]Commission, 'Glossary of Terms used in EU Competition Policy' (2002) <https://op.europa.eu/en/publication-detail/-/publication/100e1bc8-cee3-4f65-9b30-e232ec3064d6> accessed 30 September 2020.

Cambridge Law Review (2021) Vol VI, Issue ii, 24–61

The Inevitable Inconsistency of the Death Penalty in India

Pranav Verma *

Abstract

This article is an attempt to develop the theoretical framework of 'inevitable inconsistency' to re-evaluate the desirability of the death penalty in India, and propose it as a *sui generis* ground for revisiting its constitutionality. It highlights new and robust empirical research on the administration of the death penalty including: (a) sentencing trends followed by the trial courts; (b) the judicial attitudes of judges in the Supreme Court and; (c) the disparate impact of the death sentence on the socially and economically marginalized sections of the society. These research studies dictate significant deviations from the sentencing framework evolved by the Indian Supreme Court to administer the death sentence. To establish 'inevitable inconsistency', the article ventures into hypothesizing a 'best-case scenario' that removes such deviations by infusing consistency and fairness into death sentencing, to the maximum extent possible. It then highlights how even such 'best-case scenario' fails to prevent inconsistencies or arbitrariness at a magnitude not acceptable in a rule-based system. This failure of the 'best-case scenario' leaves our search for consistency with only two options – either a mandatory death sentence, or no death sentence at all. Given, that the former already stands declared unconstitutional in India, abolition emerges as the only viable end to the search of consistency that this article embarks upon. Accordingly, the article argues that the 'inevitable

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inconsistency' framework, when coupled with the unique, irrevocable nature of the death sentence, must inform the constitutional inquiry into its retention in law.

Keywords: death penalty, inevitable inconsistency, best-case scenario, Bachan Singh, arbitrariness.

I. Introduction

The year 2021 marks forty-one years since the Supreme Court of India, by a majority of four to one (with Bhagwati J dissenting), upheld the constitutionality of the death penalty in *Bachan Singh v State of Punjab* (or 'in *Bachan Singh*').[1] The decision in *Bachan Singh* was the first attempt by the Indian Supreme Court to limit the application of the death penalty to only the most extreme cases, and to that end, the Court laid down a comprehensive sentencing framework for future courts administering the death sentence. The Court's decision in *Bachan Singh* was premised upon the perceived utility of the death penalty, but at the same time acknowledged the need to limit its application and infuse consistency into its sentencing through a sentencing framework.

I aim to highlight how the actual practice of death sentencing complies with the *Bachan Singh* sentencing framework. Instead of making an argument on abolition from the very start, I first highlight the existing gaps between the theory and the actual practice of death sentencing in India. I then evaluate how the identified gaps between the theory and practice can be possibly removed. This would involve an attempt at discovering a system where death sentence is carried out in as non-arbitrary a manner as possible. This would be followed by a critical evaluation of this supposed 'best-case scenario', and I subsequently propose to see if such scenario too leaves rooms for errors which would be unacceptable in any rule-based system. This search for non-arbitrariness (which I take to mean consistency in this context), then, would lead to only two possible alternatives, theoretically speaking – a mandatory death sentence (already abolished in India) or no death sentence at all.

This trajectory becomes worth exploring because *Bachan Singh* upheld the death penalty as it was convinced of it being administered consistently under the sentencing framework evolved by it. To not just highlight the failure of that framework but to also better upon it and still conclude the practical impossibility of a consistent application of the death penalty, even in such a 'best case scenario', would provide a stronger case for abolition and a more persuasive argument for retentionists to engage with. This shows promise to lead to a conclusion

[1] (1980) 2 SCC 684.

Sep 8, 2021 6 min read

Personality Rights and NFTs: Another Intellectual Property Law Conflict?

Authored by: Niharika Salar and Rhea Reddy.

What is the NFT buzz all about?

NFTs (Non-Fungible Tokens) are the talk of the town, especially amongst the digital and the IP community. Apart from allowing artists to monetize their work in ways that were never explored before, NFTs facilitate a self-perpetuating chain of ownership in a particular object, which can range from anywhere between a tweet to a musical piece. NFT transactions are tracked on a blockchain ledger, allowing individuals to see whether the NFT originates from the creator. Buyers can then easily spot forgeries and avoid fraudulent purchases, motivating them to invest in NFTs. It also ensures the artistic integrity of the underlying asset and prevents manipulation of protections. However, the underlying asset may be replicated once bought. In addition, blockchains only track transactions, due to which the underlying asset resides separately. This may create issues when the asset is deleted or changed on the host platform.

Copyright and NFTs

NFTs are advantageous as decentralised marketplaces transacting in art are inherently creator friendly. This is because such platforms eliminate intermediaries and connect content-creators directly to buyers. This prevents intermediaries from having claims of ownership, controlling how the digital work is distributed, or from even taking a sizeable cut of the creator's earnings. They have also been argued to reinforce the underlying rights subsumed in copyright law. This is because NFTs, while allowing the original artist to retain copyright, have the added bonus of giving royalties to the original artist every time it changes hands. In addition, original work can be identified by associating it with the NFT, solving the dilemma of easily replicable digital works protected by copyright. It also protects moral rights, such as the right to preserve the integrity of a work, even after a sale or commission; and permits creators to choose the context in which a previously purchased work can be exploited.

NFTs also have benefits for digital files under copyright protection. Since 'digital first sale doctrine' is not categorically recognised, it has resulted in the issue of infinite reproductions of digital assets, known as the 'double-spend' problem, where buyers could not ensure that a digital file or unit of currency was sent to only one party. With a risk that a digital currency can be spent twice, it is a potential problem unique to digital currencies. However, as NFTs use blockchain technology that tracks the origin and subsequent transactions of the NFT, it solves the 'double-spend' problem for digital files.

However, NFTs also exacerbate the issue of copyright infringement and undermine the concept of ownership in an artistic work. The immutability of blockchain means that publication of a token and its associated rights cannot be revoked. This is problematic when the NFT is minted without the artist's permission, after which they would not be able to receive profits or enforce their rights against the unalterable or indestructible digital asset. For instance, many artists reported earlier this year that their work had been stolen and sold on NFT sites without their permission.

It would also now be easier for well-intending artists who have created derivative works to be held liable for "exploiting" protected IP. This may subsequently impact trade of NFTs because the reseller may be found liable if the work expressed in the NFT infringes copyright. Moreover, marketplaces and platforms that facilitate the trade of such NFTs mostly do not guarantee the uniqueness, originality, or quantity of the work or metadata contained on the token. Due to this, consumers are also affected as they don't have surety that the underlying work is not an infringement of IP, especially since the anonymity on such platforms makes it difficult to verify the rightful creator or owner in the underlying work. Thus, their now worthless NFTs may be removed by the marketplace due to copyright. However, though platforms themselves have removed some infringing NFTs, there has been no application filed or cases before courts involving NFTs and digital art. In the United States, DMCA take-down notices may be issued to bring down copyright infringing content as well.

With respect to enforcement, blockchain is decentralised technology due to which there is no central authority to take down NFTs. The responsibility of regulation falls on individual platforms. However, platforms like OpenSea, which have committed to mitigating traditional risks, have also not successfully regulated infringing content. Moreover, internationality and use of pseudonyms make it difficult to identify the infringer and take action against them. Regulators would then have to use sophisticated computer forensics to identify the owner of a digital wallet address associated with the pseudonymous account to hold them liable.

Personality Rights and NFTs

Personality rights are a wing of intellectual property law that seeks to protect celebrities from people trying to commercialise on aspects of persona. Because a certain celebrity may have a global reputation and outreach, opportunities to monetize on the celebrity's reputation and fame are sought. The legal position on personality rights can be broadly divided into defining a right in itself i.e. right of publicity (followed in countries like USA) and protection via the common remedy of passing off (followed in countries like UK & India).

NFTs that depict individuals have been considered valuable, both in monetary and brand promotion terms. For example, professional athletes have entered the NFT market, offering digital collectibles of themselves. Violation of personality rights may be involved when NFTs make use of an individual's name, image, or reputation without their authorisation.

When this occurs, an entity involved in trading that NFT may then be liable for infringement of personality rights because such NFTs are considered for commercial use due to its financial transaction. In the same way, even purchasers of the infringing NFT may be liable for both reselling the NFT as well as using the underlying work to promote their commercial interests. This would include liability for using the valuable or desirable NFT to drive customers to their business. Trading platforms may also be held liable for secondary or contributory infringement depending upon applicable state law. In this manner, personality rights create a strong deterrent against selling, purchasing, and even hosting another's rights.

Some have also argued that NFTs help celebrities take back their personality rights. They present a new marketing opportunity for athletes and celebrities to profit from their name, image, or likeness. This has allowed athletes to become their own marketing platforms and negotiate for these rights to fall outside the scope of collective bargaining agreements. Pursuant to this, many athletes, as mentioned above, have sold their own trading cards and digital collectibles outside of leagues and team structures, thereby allowing them to reclaim their personality rights. Moreover, each time the NFT is resold, featured celebrities receive a cut. NFT's popularity would also result in celebrities exploiting their own names and likeness as

OTHERS

Is it Kurta? Is it a Kaftaan? It's GUCCI: Why GUCCI May Not be Accountable This Time Too

by SpicyIP November 29, 2021 Leave a Comment

We're pleased to bring to you a post by Niharika Salar. Niharika is an Assistant Professor at the NALSAR University o Hyderabad.

Is it Kurta? Is it a Kaftaan? It's GUCCI: Why GUCCI May Not be Accountable This Time Too

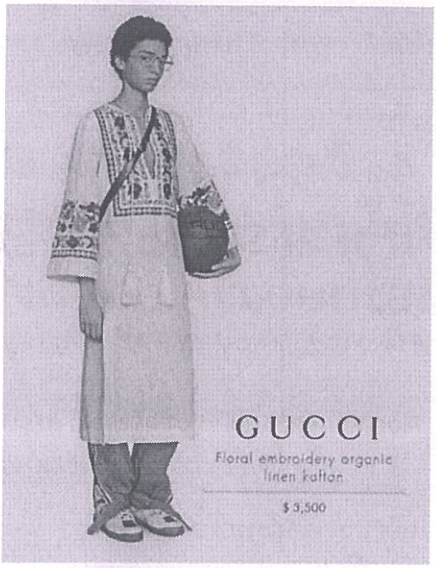


Image from here

A few months ago, Gucci was found selling a peculiar outfit named "organic kaftan". Following this incident, news of Zara selling lungi as 'check mini skirt' years ago had resurfaced on social media. This isn't the first time Gucci and fashion houses have been involved in such an act, but an interesting qu remains: what are the available legal remedies and attached limitations?

Why cultural appropriation matters even more today?

Defined as "the act of taking or using things from a culture that is not your especially without showing that you understand or respect this culture", cu appropriation is a growing phenomenon through mediums including bu restricted to apparel clothing. Blogs on similar themes in music and appare been written earlier arguing for reformation in the legal system to hold suc accountable, especially from a Traditional Cultural Expressions or perspective. However, it is important to revisit these themes from a holistic approach to bring justice to legal analysis.

Anything which may bear cultural significance to a community is no l restricted to the respective community itself. More people are willing to exploit such attached meanings and intell property law is trying to keep up with such conflicts, but with boundaries getting blurry with each step. Typically, it dissociation of the garments from their traditional roots that lead people to label cases as those of cultural appropr A previous post on SpicyIP has covered the issue in detail.

Many have suggested that cultural borrowing turns into cultural appropriation when the items are utilised w consent or without informing those whose culture is being appropriated, or that it is when originators of the cu expressions do not get credit or remuneration for their creations. Similarly, others have argued that context, partic as it relates to power relationships, is a key factor in distinguishing borrowing from exploitative cultural appropriatio

Kurta or Kaftan alike garment? Does it matter?

The Indian subcontinent gave birth to the popular traditional attire – the Kurta. The dress is commonly worn in cou such as Nepal, Pakistan, Afghanistan, and Sri Lanka along with India. Considered a part of ethnic wear, Kurtas different varieties depending on their design and fabric. No community or individual per se have any protection ov kurta. However, certain types of embroidered kurtas, such as Kasuti kurta from Karnataka (India) and Chikankari from Lucknow, are GI protected due to the embroidery. But even here, it's only the embroidery which is protected ar the silhouette of the Kurta per se.

The Kaftan, on the other hand, was initially worn as a robe or a tunic and can be traced back to Morocco in th century, although the Kaftan has been worn across the Middle East and Persia long before this time. To the w world, Kaftan-like dresses were introduced by designers such as Paul Poiret and Mario Fortuny in the early 20th centu the 1950s/1960s, this style was adapted by French couturiers such as Christian Dior and Balenciaga and appeared world of high fashion. By 1966, Vogue had described the kaftan as an essential garment for every member of the crowd. From the mid-1970s, the kaftan shifted from the runway to being associated with resort wear. Tom For reanimated and shortened it to a micro-mini length for the Gucci Spring 1996.

A mention of Kaftans can be found under the Indian Geographical Indications Journal no.37 and Journal no. 19 applications for protection of a certain work can be found and the apparels include a Kaftan. Yet, this may not be ei to ascertain any claims over the concept of a Kaftan itself. Mention in the Journal No. 37 is with respect to trad Bagru Hand Block Print of Rajasthan, which is to be applied to Kaftans, and the one in Journal No. 19 is with resp Nakshi Kantha, traditional embroidery art from Bengal. What these mentions protect with respect to Kaftans a prints which are applied to it. If Gucci were to apply any of these prints to a kaftan, then they may be held liabl without that, they cannot be held accountable.

Here, the discussion of some previous instances of cultural appropriation is relevant. Navajo (a Native American reached a settlement with Urban Outfitters after the tribe's name was illegally used for a collection that included "N hipster panties" and a "Navajo print flask". The tribe registered the name Navajo as a trademark in 1943 which h their stance in the litigation. Last year in November, French fashion designer Isabel Marant had to apologise aft Mexican government accused her of appropriating traditional indigenous patterns in one of her garments du display.

As far as protection is concerned, there appears to be no explicit traditional knowledge protection for either garments. Very few countries have laws for protecting the traditional knowledge like Panama and the Philip However, such protection is limited to the national level and does not look beyond borders.

The last few decades have seen an increase in the activities around seeking international protection for traditional cu expressions. In 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rig Indigenous Peoples (UNDRIP), which seeks to provide protection against any discrimination and contemplate intellectual property rights protection to indigenous people. Further, the World Intellectual Property Organization (has also created an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Know and Folklore (IGC), in order to contemplate upon an international legal instrument or instruments for the protect TCEs. Despite attempts like a push for a sui generis protection (covered in a previous blog) there has not been a cor solution to the situation of cultural appropriation.

The other side of the coin?

It is clear from the literature referenced above that appropriation occurs when a member of a dominant cultur position of power or art is able to take aspects of a marginalized culture, rakes away them from their original me and use them for entertainment value without considering their original context or having to deal with the ne consequences that someone from that culture would face as a result of that same action. Usually, replicating d without taking into account their cultural importance always comes with a potential risk of dilution of a commu identity.

However, in the interest of a more holistic approach, it is only fair to also consider the other side of the argument times, huge fashion house brands consider themselves worthy of credit for reinventing an otherwise "lost" pi

INDIA'S TAKE ON LEGAL REMEDY OF PASSING- OFF: A CELEBRITY'S PERSPECTIVE

Niharika Salar[*] *& Sonal Sinha*[**]

ABSTRACT *The development of mass media led to the development of intrigue and curiosity around celebrities and their persona, and the profits hidden therein. Harping upon this intrigue, stakeholders realised the brand power behind celebrity personalities. However, problems arose when there was an increase in the unauthorised exploitation of celebrity personalities. While on the legal front, several remedies are resorted to, William Prosser narrowed down these into four, i.e., intrusion into one's private space, disclosure of one's personal and private facts, disclosure of incorrect facts that puts one under a false light and misappropriating one's personality for commercial gain. Hinged on the brand value of a celebrity's personality, the right to publicity emphasises the right of a celebrity to claim control over the commercial value of their identity. Remedy against the unauthorised commercial exploitation of a celebrity's identity is commonly found in the tort of passing off. The article assesses the contours of the remedy of passing off as availed by celebrities and implemented by the Indian Courts. The article also draws a comparison with the approaches employed by American and English law in their understanding of celebrity personality, contrasting the same with the Indian approach.*

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I. INTRODUCTION

Brand value sells, and with the increasing stakeholders and investments involved, concerned parties are prepared to go to lengthy extents to protect or exploit the same. The fundamental issue in this article's context, therefore, is to appreciate and assess how celebrities capitalize on the non-tangible assets that they possess and the legal remedies at their disposal in cases of unauthorized exploitation of this asset.[1]

Throughout the world, legal systems have largely taken the help of varying approaches; including the recognition of rights in personalities themselves,[2] creating rights in images,[3] unfair competition,[4] and tortious liability, among many others.[5] Some jurisdictions have also evolved a jurisprudence that presents a cocktail of the above as an underlying principal solution.[6] The Indian approach is partially one of them. This which has not been spoken about at length in popular literature, probably because it is still in its initial stages.

While there is a farrago of rights associated with personality, it was William Prosser who tried to compartmentalise these into four, namely—intrusion into one's private space, disclosure of one's personal and private facts, disclosure of incorrect facts that puts one under a false light, and misappropriating one's personality for commercial gain.[7] The right to publicity is an aspect of personality rights that recognises the commercial value of the celebrity's persona. The concept was introduced by Melville B Nimmer,

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1 Stuart B. Walzer & Jan C. Gabrielson, 'Celebrity Goodwill' [1986] Journal of the American Academy of Matrimonial Lawyers 35, 44.

2 See Mark Bartholomew, 'A Right is Born: Celebrity, Property, and Postmodern Lawmaking' (2011) 44 Connecticut Law Review 301.

3 Jan-Jaap Kuipers, 'Towards a European Approach in the Cross-Border Infringement of Personality Rights' (2011) 12 German Law Journal 1681, 1706.

4 Restatement (Third) of Unfair Competition (1995) has stated that misappropriation of publicity rights is a form of unfair competition.

5 See annx 1.

6 Ingrid Pusey & Marc Morgan, 'Celebrity Personality Rights in Jamaica: A Path for Development' (2012) 61 Social and Economic Studies 99, 125.

7 William Prosser, 'Privacy' (1960) 48 California Law Review 383.

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COVID-19 and supreme court contractual disputes in India: A law and economics perspective(Article)

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Abstract

The COVID-19 pandemic has unleashed a catena of contractual disputes. The paper synthesises the Indian Contract Act and relevant case laws to present a legal position on force majeure, frustration of contract and contractual gaps, in the context of COVID-19. Using the economic analysis of law, it examines contractual disputes from various sectors, including power, construction and real estate, rental, event management and hospitality, and analyses these disputes from legal- and economic-efficiency points of view. Where contracts are not a good instrument for achieving equitable distribution of economic gains and losses, public policy is better suited to address equity and other related issues arising from long-term contracts. © 2021 Economic and Political Weekly. All rights reserved.

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REVISTA DE DIREITO INTERNACIONAL
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A critical legal analysis of gende equality in international trade agreements

Uma análise jurídica crítica da igualdade de gênero nos acordo comerciais internacionais

Parul Shuk

Sheikh Sultan Aadil Huqu

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A critical legal analysis of gender equality in international trade agreements*

Uma análise jurídica crítica da igualdade de gênero nos acordos comerciais internacionais

Parul Shukla**
Sheikh Sultan Aadil Huque***

Abstract

Trade can greatly improve women's lives by creating new job opportunities, increasing consumer choice, and increasing women's market position in society. If not properly monitored and regulated, it can also lead to unemployment and concentrate the work in low-skilled jobs. Given the complexity and particularity of the relationship between trade and gender, it is important to assess the potential impact of trade policies on men and women and develop appropriate evidence-based strategies to ensure that trade provides power for all. Data are limited and there is a lack of understanding of the relationship between women's economic roles as workers, consumers, and decision makers and the importance of gender equality in international trade. Hence, in order to understand the importance of gender equality in international trade , as well as to ascertain the role of WTO in ensuring the same and what are the challenges in having a gender inclusive rather a women rights supportive scenario in International trade. With this in mind, this paper examines discriminatory legislation and other obstacles women face as business leaders and entrepreneurs through a doctrinal method of study. It also highlights examples of existing legislative measures both in national and international forum which aims at elimination of discrimination against women in business and economy. Further, this research paper will also analyse the various regional treaty agreements, free trade agreements & Bilateral Investment Treaties and how they have addressed the issue of gender equality or women related provisions while negotiating and drafting the agreements. Thus, this paper ponders upon the legal issues like, "What steps have been taken in the international legal scenario to eliminate discrimination against women in the economic sphere?, What are the provisions of CEDAW , SDG which advocates for inclusion of women in the economic sector ?, How far WTO arrangements are gender neutral and so far what measures have been taken by WTO to ensure equal participation of women in the global trade ? To answer this questions, the methodology adopted in the development of this research is bibliography, descriptive and exploratory and the paper will engage in critical legal analysis by interpretation of various provisions of trade agreements.

Keywords: *Gender & Trade, WTO, Regional Treaty Agreements,FTA, BITs, CEDAW, SDGS.*

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Resumo

O comércio pode melhorar muito a vida das mulheres ao criar novas oportunidades de emprego, aumentar a escolha do consumidor e aumentar a posição das mulheres no mercado na sociedade. Se não for devidamente monitorado e regulamentado, também pode levar ao desemprego e concentrar o trabalho em empregos de baixa qualificação. Dada a complexidade e particularidade da relação entre comércio e gênero, é importante avaliar o impacto potencial das políticas comerciais sobre homens e mulheres e desenvolver estratégias apropriadas baseadas em evidências para garantir que o comércio forneça poder para todos. Os dados são limitados e há uma falta de compreensão da relação entre os papéis econômicos das mulheres como trabalhadoras, consumidoras e tomadoras de decisão e a importância da igualdade de gênero no comércio internacional. Assim, a fim de compreender a importância da igualdade de gênero no comércio internacional, bem como averiguar o papel da OMC na garantia da mesma e quais são os desafios em ter um cenário inclusivo de gênero e não de apoio aos direitos das mulheres no comércio internacional. Com isso em mente, este artigo examina a legislação discriminatória e outros obstáculos que as mulheres enfrentam como líderes empresariais e empreendedoras por meio de um método de estudo doutrinário. Também destaca exemplos de medidas legislativas existentes tanto em fóruns nacionais como internacionais que visam a eliminação da discriminação contra as mulheres nos negócios e na economia. Além disso, este trabalho de pesquisa também analisará os vários acordos de tratados regionais, acordos de livre comércio e tratados bilaterais de investimento e como eles abordaram a questão da igualdade de gênero ou disposições relacionadas às mulheres ao negociar e redigir os acordos. Assim, este trabalho pondera sobre questões jurídicas como: "Que passos foram dados no cenário jurídico internacional para eliminar a discriminação contra a mulher na esfera econômica? Quais são as disposições da CEDAW, ODS que defende a inclusão das mulheres no setor econômico?, Até que ponto os acordos da OMC são neutros em termos de gênero e até agora quais medidas foram tomadas pela OMC para garantir a participação igualitária das mulheres no comércio global? Para responder a essas questões, a metodologia adotada no desenvolvimento desta pesquisa é bibliográfica, descritiva e exploratória e o trabalho envolverá a análise jurídica crítica por meio da interpretação de diversos dispositivos dos acordos comerciais.

Palavras-chave: Gênero e Comércio, OMC, Acordos de Tratados Regionais, FTA, BITs, CEDAW, SDGS.

1 Introduction

The Sustainable Development Goals have envisaged an inclusive development. Women's developmental targets are addressed in Goal 5 of this list. It goes a step further from the MDGs in recognising that women are not just one segment must even among these there are many vulnerable groups. Women should be included in all the verticals of the business of the world and this includes trade. Women have not been well represented as exporters and have not been able to contribute to many of the countries' economies. For example International Trade Centre data report specifies that only one out of five companies which are into international exports is managed by a woman owner and businesses like these remain very vulnerable to impediments in international trade.[1]

Women's marginalization has been accepted as a necessary "collateral damage" of trade reforms followed due to its possible advantage in the direction of improving tha balance of payments of a country. Therefore trade measures and trade agreements have to be looked into because they could play a role in giving priority to women's well-being.[2] There is thus a need to study the interrelation of gender and participation of women in trade. Trade has both positive and negative effects on women. If women participate as entrepreneurs, they are more likely to employ women and thereby contribute to bridging gender gaps in employment. This would in turn improve the social standing of women and which in return add to larger participation of women in the economy.

[1] Report titled "Unlocking Markets for Women to Trade" , 5 (ITC, Geneva, 2015), Accessed on 10th May 2021, http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/women_in_trade_web(1).

[2] ZARRILLI, Simonetta. *International trade is at risk of leaving Women behind.* Avaiable in: http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1741&Sitemap_x0020_Taxonomy=Trade,%20Gender%20and%20Development;#2139;#UNCTAD%20. Accessed on: 10 May 2021.

The research article titled, *"Freedom from Violence, Full Access to Resources, Equal Participation, and Empowerment: The Relevance of CEDAW for the Implementation of the SDGs"*[3], examines "how the monitoring processes on CEDAW implementation can be used for promoting gender-sensitive SDG implementation. It also analyzes the possible synergies between the SDGs and CEDAW, in particular with respect to the national, regional, and global follow-up and review processes under the SDGs."In the UN Women Report titled *"Roadmap for Women's Economic Empowerment in India"*[4], various issues acting as barriers in economic inclusion of the women has been discussed. Especially this report stresses on the informal and agricultural sector.This report also highlights policy reccomendations that are needed for improving women's economic empowerment.

While, the Quantum Hub Research Report , titled *"Women's Economic Empowerment in India: A Policy Landscape Study"*[5] has suggested that "investing in women's economic empowerment (WEE) has important linkages with gender equality, poverty eradication, and inclusive growth". As per the report evidence, it shows that "increasing the share of household income controlled by women, either through their own earnings or cash transfers, translates into greater investment in children's education, health, and nutrition." Additionally, report points out that "women who have access to property and credit are able to ease hardships for their families during financial shocks". So, women's economic empowerment can have an overall positive impact on the country's GDP growth and economic activity.

Further, reports such as those of the *World Bank*[6], World Economic Forum which include *Annual Global Gender Gap Report*[7] and *the Industry Gender Gap Report* point to statistics which show how women fare in business related numbers.

So, there are several factors associated with a more global world strengthen the incentives for action toward greater gender equality, which are as follows:

- Gender inequality is more costly in an integrated world because it diminishes a country's ability to compete internationally—particularly if the country specialises in female-intensive goods and services.
- International peer pressure has also led more countries than ever to ratify treaties against discrimination.
- Growing media exposure and consumers' demands for better treatment of workers has pushed multinationals toward fairer wages and better working conditions for women.
- Globalisation is shifting gender roles and norms:
- Increased access to information, primarily through television and the Internet, allows countries to learn about social mores in other places, which can change perceptions and promote the adoption of more egalitarian attitudes.
- Economic empowerment for women reinforces this process by promoting changes in gender roles and allowing women to influence time allocation, shift relative power within the household and exercise agency more broadly.

Globalisation has the potential to contribute to greater gender equality. However, in the absence of public policy, globalisation alone cannot end gender inequality. Despite significant increases in agency and in access to economic opportunities for many women in many countries, large gender gaps remain in some areas. Public action is needed to close gender gaps in endowments, agency, and access to economic opportunities. Only then will countries be able to capitalise on the potential of globalisation as a force for greater gender equality. Women's economic empowerment boosts productivity, increases economic diversification and income equality in addition to other positive development outcomes.[8] For example, increasing the female employ-

[3] RUDOLF B. Freedom from Violence, Full Access to Resources, Equal Participation, and Empowerment: The Relevance of CEDAW for the Implementation of the SDGs. In: Kaltenborn M., Krajewski M., Kuhn H. (eds) Sustainable Development Goals and Human Rights. Interdisciplinary Studies in Human Rights, v. 5. Springer, Cham. https://doi.org/10.1007/978-3-030-30469-0_5

[4] NADI S. (2020) Roadmap for Women's Economic Empowerment in India, UN Women. Accessed on 18th May 2021, https://asiapacific.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2020/10/in-roadmap-for-womens-economic-empowerment-in-india.pdf?la=en&vs=144

[5] WOMEN'S Economic Empowerment in India: A Policy Landscape Study 2020 , Quantum Hub . Accessed on 19th May 2021, https://thequantumhub.com/wp-content/uploads/2020/12/Overall-Summary-Document-WEE-Policy-Landscape-Study-Final.pdf

[6] World Bank, and World Bank. "Women and Trade: The Role of Trade in Promoting Gender Equality." (2020).

[7] Global Gender Gap Report 2021, WEF Accessed on 18th May 2021, https://www.weforum.org/reports/global-gender-gap-report-2021

[8] International Monetary Fund (2018). Pursuing Women's Economic Empowerment Accessed on 15th May , 2021 https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/05/31/pp053118pursuing-womens-economic-empowerment

ment rates in OECD countries to match that of Sweden, could boost GDP by over USD 6 trillion,[9] recognizing, however, that. growth does not automatically lead to a reduction in gender-based inequality. Conversely, it is estimated that gender gaps cost the economy some 15 percent of GDP.[10]

Women's economic equality is good for business. Companies greatly benefit from increasing employment and leadership opportunities for women, which is shown to increase organizational effectiveness and growth. It is estimated that companies with three or more women in senior management functions score higher in all dimensions of organizational performance. In the context of women as a segment, there is a need to ask the question of why some portions of the law behave differently than what was desired of them. For example, if we consider the economic rights of women flow from the same Constitution in democratic countries. The other rights flowing from a plethora of legislations which look perfect also flow from the same Constitution. They look perfect on the outside and may just have been drafted perfectly. So, if we take the example of terms of international trade and the rights of women entrepreneurs, there are laws which are designed to encourage women.[11] For example, in India a woman requiring patent has to go through a less rigorous procedure and waiting.[12] Also, under Indian Constitution, there are laws emanating from art 15(3) of the Constitution of India[13] and all policies look like either gender neutral or which support women's economic endeavours.

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) has been ratified by India with some 'réservations'. Even in Post CEDAW era the gender disparity for women and girls with respect to educational enrolment, life expectancy, participation in trade and labour force has remained although may have considerably shrunk. Gender gaps persist, particularly with regard to higher mortality rates of girls and women, disparities in girls' education, unequal access to economic opportunities and differences in household and societal decision-making

Therefore there is a need to recognise that norms be understood from both a normative and non-normative context and behaviour. There is a need to throw light on and relook at the fundamental provisions and social constructs traceable to the legal system which help women entrepreneurs and those which do not. It is to be understood if women need a separate set of norms or the current laws are sufficient to deal with gender gaps in international trade participation of women and how international organisation like WTO plays a crucial role in protection and promotion of the same, similarly how various regional trade agreements have acknowledged and incorporated provisions promoting gender equality. Thus, this research paper aims at addressing the following research questions:

1. What steps have been taken in the international legal scenario to eliminate discrimination against women in the economic sphere?

2. How far WTO arrangements are gender neutral and so far what measures have been taken by WTO to ensure equal participation of women in the global trade ?

3. What role does Regional Trade Agreements play in inclusion & promotion of women ?

4. What are the provisions of CEDAW which advocates for inclusion of women in the economic sector?

2 Role of World Trade Oragnisation in Promotion of Gender Equality

The stated objective of the WTO is "to help trade flow smoothly, freely, fairly and predictably." The original GATT was limited to facilitating trade in goods by eliminating so-called 'trade barriers' (e.g. quotas, tariffs) and articulating the basic principles of free trade (i.e. non-discrimination, fiscal and regulatory independence of states)"[14] . The scope and power of the organiza-

[9] PwC, Women in Work Index 2018. Accessed on 15th May 2021, https://www.pwc.co.uk/services/economics-policy/insights/women-in-work-index.html

[10] CUBERES, David, and Marc Teignier. "Aggregate effects of gender gaps in the labor market: A quantitative estimate." Journal of Human Capital 10, n. 1, p. 1-32, 2016.

[11] Department of Promotion of Industry and Internal Trade, Draft Patent Rules 2018, Accessed on 16th May 2021.https://dipp.gov.in/whats-new/draft-patent-rules-2018.

[12] Department of Promotion of Industry and Internal Trade, Draft Patent Rules 2018, Accessed on 16th May 2021.https://dipp.gov.in/whats-new/draft-patent-rules-2018.

[13] Constitution of India 1949, art. 15(3).

[14] BARFIELD, Claude E. "Free Trade, Sovereignty, Democracy: Future of the World Trade Organization." *Chi. J. Int'l L.* 2 (2001):

tion, however, has greatly increased. Today, "the WTO's reach includes issues of service provision, intellectual property, health and safety standards, and a vast array of products. It is now the primary actor in international trade, administering multilateral agreements, hosting negotiating sessions, handling disputes, monitoring national trade policies, and providing technical assistance and training for developing countries".[15] With good reason, the WTO has been described as "the institutional face of globalization.

The WTO has a key role to play in gender equality in global trade. Ongoing talks related to services, agriculture (which employs a large number of women in developing countries), electronic commerce and micro, small and medium sized enterprises are key to identifying and eliminating barriers to women's participation in trade. The WTO also provides a forum where members discuss tariff and non-tariff barriers across a range of sectors and members' trade policies. Improving transparency on gender-related policies can help establish good practices and draw attention to the challenges that women face in participating in world trade. As stated in the preamble to the Marrakesh Agreement establishing the WTO, sustainable development is a key objective of the Organization.[16] The preamble states that the WTO should conduct its activities "with a view to raising standards of living ... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development". The preamble also states that a "commensurate share in the growth in international trade" for developing and least developed countries needs to be ensured.The mandate for the Aid for Trade initiative states: "Aid for trade should be rendered in a coherent manner taking full account ... of the overall goal of sustainable development".Since its establishment over 20 years ago, the WTO has sought to put trade at the centre of development and aid strategies. As a result, trade has helped to lift millions of people out of poverty. The WTO also seeks to ensure that everyone benefits from the opportunities offered by trade, including women and small businesses.

2.1 Buenos Aires Declaration on Trade and Women's Economic Empowerment

For the first time in the history of the World Trade Organization, "WTO members and observers have endorsed a collective initiative to increase the participation of women in trade. In order to help women reach their full potential in the world economy",[17] WTO members and observers agreed to "support the Buenos Aires Declaration on Trade and Women's Economic Empowerment, which seeks to remove barriers to, and foster, women's economic empowerment".[18]However, instead of being good news, this initiative rings several alarm bells. First, "this document does not propose any new approach to the WTO's way of working or its agreements. Instead of assessing the negative gendered impacts in multiple areas (as described above) of such liberalisation, it proposes more liberalisation as the ultimate solution and a key driver for women's empowerment. A few cosmetic words here and there cannot change nor address this"[19]. Further, "the initiative has the potential to make the WTO agreements sound very beneficial for women if gender issues are addressed in very trivial and perfunctory ways.[20]The declaration also mentions areas such as government procurement, e-commerce, MSMEs, and GVCs, all of which are new issues in the WTO and have no agreed mandate for WTO intervention or rule making."[21] These are also areas where rule making has been resisted by most developing and least developed countries as these constrain their policy space and push new forms of libera-

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[15] ACHARYA, Rohini; ALAMO, Olga Falgueras; AL-BATTASHI, Salma Mohamed Thabit; BOGHOSSIAN, Anoush der; GHEI, Naghm; HERRERA, Tania Parcero, JACKSON, Lee Ann *et al.* Trade and Women—Opportunities for Women in the Framework of the World Trade Organization. *Journal of International Economic Law*, v. 22, n. 3, p.323-354, 2019.

[16] HOEKMAN, Bernard M.; MAVROIDIS, Petros C. World Trade Organization (WTO): law, economics, and politics. *Routledge,* 2015.

[17] DER BOGHOSSIAN, Anoush. *Women's economic empowerment: An inherent part of Aid for Trade.* No. ERSD-2019-08. WTO Staff Working Paper, 2019.

[18] RIVOLI, Pietra. *The travels of a t-shirt in the global economy: An economist examines the markets, power, and politics of world trade. New preface and epilogue with updates on economic issues and main characters.* John Wiley & Sons, 2014.

[19] GONZÁLEZ, Arancha. "Pressing for progress with SheTrades." In *International Trade Forum*, no. 1, pp. 3-3. International Trade Centre, 2018.

[20] TRUE, Jacqui. "Trading-off gender equality for global Europe? The European Union and free trade agreements." *European Foreign Affairs Review* 14, no. 5 (2009).

[21] Hannah, Erin, James Scott, and Rorden Wilkinson. "The WTO in Buenos Aires: The outcome and its significance for the future of the multilateral trading system." *The world economy* 41, n. 10, p. 2578-2598, 2018.

lisation, often in disguise, for which they are not ready. Liberalisation of these areas could in fact create adverse impacts on weaker constituencies in developing countries, including women as described above.[22]

The apprehension is corroborated by the fact that "the follow-up discussion schedule proposed by the WTO and partners covers topics such as government procurement and the digital economy, all new issues not under WTO mandate, but not on important traditional issues such as agriculture; informal work of women in export industries; and access to medicines, services and natural resources; many of which are seen to be important issues for women in developing countries."[23]This Declaration "does not seem to have any mandate from or been designed in consultation with progressive women's rights groups that have been raising concerns about gender and trade for a long time. This is reflected in a letter which was released in response to the Declaration and was endorsed by 164 (now about 190) women's rights groups and their allies."[24] This challenged the premise of the Gender Declaration and called on Member States "to refrain from adopting the proposed "Joint Declaration on Trade and Women's Economic Empowerment"[25]. It said "we appreciate that governments are increasingly recognising the gendered impact of international trade and trade rules imposed through the WTO and preferential trade agreements. However, this declaration fails to address the adverse impact of WTO rules and instead appears to be designed to mask the failures of the WTO and its role in deepening inequality and exploitation".[26]They argued that "in any case women's rights groups felt that gender and trade in any fora must be discussed and acted on with their engagement, consent and based on their recommendations."[27] The current approach in the WTO indicates instrumentalisation and misuse of women's rights groups' genuine concerns on gender impacts of trade by using them as a Trojan horse.

A question to explore is also which space is best suited for achieving gender equality or readjustment against the adverse impacts of trade policy and liberalisation. Is it the "trade agreements, or should it be done in other enabling spaces such as the Human Rights mechanisms, or should it be done through domestic policy i.e. through a mix of enabling domestic macroeconomic policy (including sector-specific policies) and supportive policy to trade policy."[28] In the current scenario of hard trade negotiations driven by large commercial interests and influenced directly by mega MNCs, the latter two are clearly better spaces. The overall approach of trade agreements, at multilateral, bilateral and plurilateral levels, has so far been to push for more aggressive liberalisation which works against women's rights and equality in general. As long as this approach does not change, talking or attempting to make rules about gender and trade remains cosmetic and is actually an effort to hijack issues of real concern to simply push more liberalisation. It is also clear that "any effort to address gender and trade has to be encased in an enabling trade policy for developing countries without which women in these countries cannot benefit".[29]

2.2 SPS & WTO With Respect To Women Centric Provisions

Over the period March 2010 to March 2018 the SPS Committee met a total of 25 times. The minutes of these meetings, whilst not providing a comprehensive record of the proceedings, do provide a good sense of the issues that were raised and discussed. The words "gender" or "women" occur a total of four times in the

[22] Ibid

[23] Acharya, Rohini, Olga Falgueras Alamo, Salma Mohamed Thabit Al-Battashi, Anoush der Boghossian, Naghm Ghei, Tania Parcero Herrera, Lee Ann Jackson et al. "Trade and Women—Opportunities for Women in the Framework of the World Trade Organization." *Journal of International Economic Law* 22, no. 3 (2019): 323-354.

[24] Women, U. N. "Promoting Women's Economic Empowerment: Recognizing and Investing in the Care Economy." *Issue Paper, UN Women, New York* (2018).

[25] MONTEIRO, José-Antonio. *Gender-related provisions in regional trade agreements.* No. ERSD-2018-15. WTO StafWagner, Constance Z. "Looking at regional trade agreements through the lens of gender." . *Louis U. Pub. L. Rev.* 31 (2011): 497.f Working Paper, 2018.

[26] STATEMENT: Women's Rights Groups Call on Governments to Reject the WTO Declaration on Women's Economic Empowerment Asia Pacific Forum on Women, Law and Development (APWLD), Accessed on 14th May 2021. http://apwld.org/statement-womens-rights-groups-call-on-governments-to-reject-the-wto-declaration-on-womens-economic-empowerment/.

[27] STATEMENT: Women's Rights Groups Call on Governments to Reject the WTO Declaration on Women's Economic Empowerment Asia Pacific Forum on Women, Law and Development (APWLD), Accessed on 14th May 2021. http://apwld.org/statement-womens-rights-groups-call-on-governments-to-reject-the-wto-declaration-on-womens-economic-empowerment/.

[28] HASSAN, Hend. The relationship between gender equality, women empowerment and sustainable development. *New Trends in Sustainable Business and* Consumptio, p. 41, 2020

[29] CHEMALI, Elie-Charbel A. *The future of the international trade system.* PhD diss., Notre Dame University-Louaize, 2019.

minutes of these meetings. Two of these four occurrences relate to the nature of SPS measures being applied by a WTO member state, namely, French labelling provisions for BPA in food contact materials out of concern for the potential risks to pregnant women and young children, and Japanese maximum residue levels (MRLs) for pesticide that take account of the likely dietary intake of both men and women. The two further references are part of reports on SPS-related technical assistance, namely the need to specifically focus on women (by the STDF) and the fact that technical assistance projects had benefited women (by the International Trade Centre (ITC)).[30]

A further indication of the limited extent to which gender issues are considered by the SPS Committee is provided by the inventory of specific trade concerns raised by WTO member states that is maintained by the SPS Secretariat.This inventory provides a summary of the nature of the respective SPS measure and the concern raised. Across the entire inventory, the words "gender" and "women" occur once; related again to French labelling requirements for BPAs in food contact materials.[31] The functioning of the SPS Committee, of course, very much reflects the nature of the SPS Agreement, and the rights and responsibilities that it enacts on WTO member states. The agreement itself makes no mention of the socio-economic impacts of trade--related SPS measures, including the impacts on women and even the implications for poverty.Whilst the SPS Agreement recognises that low and middle-income countries can face challenges in complying with trade--related SPS measures, and furthermore in complying with their responsibilities under the Agreement, these concerns mainly relate to weaknesses in the SPS capacity of these countries. More generally, whilst Article XX of the GATT enables member "states to take measures in pursuit of public policy concerns, even where these may violate their WTO obligations, no specific mention is made of social or economic considerations, including gender Montour 2014."[32]

Reflecting the routine business of the SPS Committee, the responsibilities and expertise of delegates largely lie with technical aspects of food safety, plant health or animal health, and/or trade. In the case of larger WTO member states, "the delegation can consist of multiple members. Rarely, however, do delegations include individuals with expertise and/or responsibilities related to the socioeconomic impacts of trade-related SPS measures, and most notably gender".[33] This is a potential weakness of the Committee at the current time, in terms of the resources at its disposal for in-depth discussions of the often complex gender issues associated with traderelated SPS measures. Looking to the future, the SPS Committee could and should be the forum in which WTO member states raise and discuss the gender issues associated with trade-related SPS measures. Furthermore, it can be instrumental in promoting gender mainstreaming in the promulgation of national SPS measures, and in the provision of SPS-related technical assistance. Achieving such a radical shift in the proceedings of the SPS Committee, however, will require sustained leadership by the most influential WTO member states. This can include "consistently raising gender issues on a case-by-case basis, applying concerted pressure for a regular gender agenda item, and including gender specialists in their national delegations".[34]

2.3 Recent Steps Taken By WTO For Women Empowerment & Inclusion

In June 2017, the WTO nominated for the first time a Trade and Gender Focal Point tasked with coordinating work among divisions, taking stock of what the WTO is doing, and considering opportunities for further work and new initiatives.[35]

The WTO will frame and structure its actions based on four objectives:

1) raising awareness on the link between trade and gender;

2) facilitating WTO members' action on trade and gender;

[30] HENSON, Spencer. *Gender and Sanitary and Phytosanitary Measures in the Context of Trade:* a Review of Issues and Policy Recommendations. 2018

[31] WOLFE, Robert. Reforming WTO Conflict Management: Why and How to Improve the Use of 'Specific Trade Concerns'. *Journal of International Economic Law*, v. 23, n. 4, p. 817-839, 2020.

[32] HENSON, Spencer. *Gender and Sanitary and Phytosanitary Measures in the Context of Trade:* a Review of Issues and Policy Recommendations. 2018.

[33] HENSON, Spencer. *Gender and Sanitary and Phytosanitary Measures in the Context of Trade:* a Review of Issues and Policy Recommendations. 2018.

[34] Supra f.n. 34

[35] HANNAH-MOFFAT, Kelly. Gridlock or mutability: Reconsidering gender and risk assessment. *Criminology & Pub. Pol'y,* v. 8, p. 209, 2019.

3) generating new data on the impact of trade on women;

4) providing training to government officials and to women entrepreneurs.

i.Technical assistance

The WTO's Technical Assistance plan 2018-2019 includes a section on gender providing a mandate for the WTO to develop a training module on trade and gender. The objective of the module is to focus "on trade policy with the aim to raise awareness and enhance the aptitude of policy makers to incorporate gender considerations in their analysis and trade policy development or negotiations".[36]

ii. Women entrepreneurs' programme

The WTO is planning to create a women entrepreneurs' programme to provide women with specific tools and information on how to use trade for their economic development.

iii. Empowering women through Aid for Trade

The final report of the Aid for Trade Task Force, created in 2006, provides a clear mandate for gender equality to be included in the Aid for Trade initiative: "Aid for trade should be rendered in a coherent manner taking full account ... of the gender perspective and of the overall goal of sustainable development ... Donors and partner countries jointly commit to the harmonization of efforts on cross-cutting issues, such as gender."[37] Subsequent Aid for Trade global reviews have highlighted a broad range of areas in which Aid for Trade has had a positive impact on women's economic empowerment.

3 Role of Regional & Foreign Trade Agreements in Gender Inclusion

3.1 The Evolution of Gender-Related Provisions in Regional Trade Agreements

Regional Trade agreements (RTAs) are sometimes considered as laboratories in which new types of provisions are negotiated to address recent trade-related issues. Although the inclusion of gender-related provisions in RTAs is not a recent phenomenon, only a limited but increasing number of RTAs refer explicitly to gender-related issues. These gender-related provisions are highly heterogeneous and differ in terms of location in the RTA, language, scope and commitments. Some of the most detailed gender-related provisions are found in stand-alone chapters on gender. Cooperation provisions on gender-related issues, including labour, health and social policy, remain the most common type of gender-related provisions found in RTAs.[38]

The inclusion of "provisions referring explicitly to gender is not a recent phenomenon. The very first gender-related provision was found in the 1957 Treaty of Rome establishing the European Economic Community (EEC) requiring each member state to guarantee the application of the principle of equal pay for women and men. More than 25 years later, the 1983 Treaty establishing the Economic Community of Central African States (ECCAS) was the first RTA signed by developing countries to include a gender-related provision"[39]. The provision found in the article on cooperation in social affairs committed the parties to develop collective research aimed at improving the economic, social and cultural status of women in urban and rural areas and increasing their integration in development activities.[40]Nine years later, the first gender-related provisions referring to the general principle of equality between men and women were found in the 1992 Maastricht Treaty of the European Union (EU). The same year, the North American Free Trade Agreement (NAFTA) established in its labour cooperation agreement a couple of provisions referring in more detail to gender-related labour principles, namely the elimination of employment discrimination based on sex and equal pay for women and men. As suggested by these four RTAs, and confirmed in greater detail below, genderrelated provisions found in RTAs address various issues and remain highly heterogeneous.

[36] WORLD BANK. "Women and Trade: The Role of Trade in Promoting Gender Equality." (2020).

[37] The final report of the Aid for Trade Task Force,(2006)

[38] MONTEIRO, José-Antonio. *Gender-related provisions in regional trade agreements.* No. ERSD-2018-15. WTO Staff Working Paper, 2018.

[39] SARTER, Eva K. "The Legal Framework Of Contracting: Gender Equality, The Provision Of Services And European Public Procurement Law." *Wagadu: A Journal of Transnational Women's & Gender Studies* 14 (2015).

[40] MONTEIRO, José-Antonio. *The evolution of gender-related provisions in regional trade agreements.* No. ERSD-2021-8. WTO Staff Working Paper, 2021.

The following gender-relevant issues apply in relation to FTA and RTAs and trade policy:[41]

> 1. Trade negotiations often represent and reproduce existing gendered structures. Men are thus overrepresented and women underconsulted.
>
> 2. TAs/RTAs are not gender neutral if they don't distinguish between (trade outcomes for) men and women, in fact, they are gender blind.
>
> 3. Gender-differentiated distributional effects of trade are not identified, if no gender-relevant (social and economic) impact assessments are conducted.
>
> 4. Trade reforms, policies, trade agreements and AfT will –without knowledge about genderrelated impacts of trade- not include any corrective measures and/or additional clauses.
>
> 5. Trade negotiations, for (trade) policy reforms and AfT need to take into account TArelated gendered impacts through potentially expanding (or contracting) sectors.
>
> 6. The overall losses in government revenues through tariff cuts and compensatory efforts need to be:

a) analysed and calculated and

b) designed in a way not overly affect women, children and the poor.

3.2 RTAs & Gender Specific Provisions

Over the years, the number of RTAs with explicit gender-related provisions has increased slowly but relatively steadily. "RTAs representing 14% of all agreements analysed, include at least one provision explicitly referring to gender or gender related issues".[42] Of these 83 agreements, "58 (70%) were negotiated between developed and developing economies (North-South RTAs), 13 (16%) between developing economies (South-South RTAs) and 12 (14%) between developed economies (North-North RTAs)"[43]. In total, "67 RTAs with gender-related provisions have been notified to the WTO and are currently in force. 13 other RTAs with gender-related provisions have either not yet entered into force or been notified to the WTO. Three remaining RTAs with gender-related provisions are no longer in force."[44]

Table. 1 - Main structures of gender-related provisions

Structure of gender-related provisions	Number of RTAs
1. Main text of the RTA	**76**
- Preamble	12
- Non-specific article(s) on gender	64
- Specific article on gender	10
- Specific chapter on gender	9
- Annex(es)	17
2. Side document(s) to the RTA:	**12**
- Side letters	1
- Joint statement(s)	1
- Protocol(s)	2
- Labour cooperation agreement	8
3. Post-RTA agreements/decisions on gender:	**13**
- Declaration(s)/recommendation(s)	4
- Decision(s)/resolution(s)/directive(s)	6
- Agreement(s)/Protocol(s)	3

Table 2 - Main types of gender-related provisions

Types of Gender Related Provisions	Number of RTAs	First Year
1. Definitions	1	1999
2. Principles	19	1992
3. International agreements and instruments	10	1999
4. Domestic gender-related policies	40	1957
- Right to regulate	9	1992
- Adoption	19	1992
- Harmonization	8	1992
- Uphold	4	2006
5. Exemptions/Reservation measures	7	2003
6. Corporate social responsibility	5	2017
7. Cooperation	69	1983

[41] HANNAH, Erin; SCOTT, James; WILKINSON, Rorden. The WTO in Buenos Aires: The outcome and its significance for the future of the multilateral trading system. *The world economy,* v. 41, n. 10, 2578-2598, 2018.

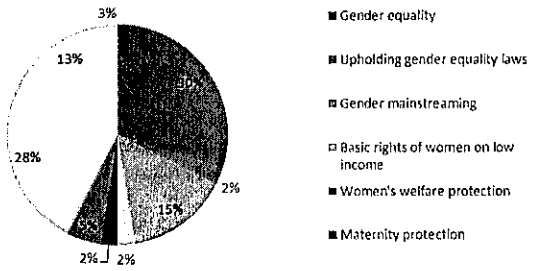
[42] MONTEIRO, José-Antonio. *The evolution of gender-related provisions in regional trade agreements.* No. ERSD-2021-8. WTO Staff Working Paper, 2021.

[43] MONTEIRO, José-Antonio. *The evolution of gender-related provisions in regional trade agreements.* No. ERSD-2021-8. WTO Staff Working Paper, 2021.

[44] RUBÍNOVÁ, Stela; SEBTI, Mehdi. The WTO Global Trade Costs Index and its determinants. No. ERSD-2021-6. *WTO Staff Working* Paper, 2021.

Types of Gender Related Provisions	Number of RTAs	First Year
- Cooperation principles	17	1992
- Political dialogue	1	2012
- Cooperation forms	8	2016
- Cooperation areas	68	1983
8. Transparency	6	2016
9. Public participation	1	2020
10. Institutional arrangements	11	1993
11. Relation with other chapters/agreements	3	2017
12. Consultations procedures	6	2016
13. Dispute settlement coverage	7	2016

Most provisions on gender-related principles are found in RTAs



Typically, "gender provisions have been included in the preamble or the development and inclusive growth chapters and in most cases have not been mainstreamed through the entire FTA. These provisions have concerned cooperation on gender and gender-related issues, including labour, health and social policy, workplace discrimination, and equal pay."[45]The 1957 Treaty of Rome establishing "the European Economic Community (EEC) also included the first gender-related article to guarantee equal pay."[46] Then, the first RTA signed by developing countries to include a gender-related provision was the 1983 Treaty establishing the Economic Community of Central African States (ECCAS). Later in 1992, the Maastricht Treaty on the European Union (EU) included the first gender-related provisions referring to the general principle of equality between women and men.

3.3 How do gender and trade chapters in FTAs help to promote equality in international markets?

For the first time three recent bilateral FTAs have included a chapter dedicated to gender and trade: Canada and Chile , Chile and Argentina , Canada and Israel . These gender-modernised FTAs have already entered into force. An FTA, "between Chile and Uruguay signed on 4 October 2016, also includes a chapter on gender and trade, and it is still pending to enter into force. The content of the trade and gender chapters in each of these FTAs is similar. They include general provisions that highlight the importance of incorporating a gender perspective to promote inclusive growth in light of goal 5 of the SDGs. They affirm their commitment to promoting gender equality through laws, regulations, policies and practices and acknowledge that women's enhanced participation in the labour market and their economic independence contribute to sustainable and inclusive economic growth".[47]The agreements also include "the reaffirmation of the commitment to effectively implement the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the commitment to undertake cooperation activities which aim to improve capacity and conditions for women to benefit from opportunities created by the FTA."[48]

Each FTA mentioned above has established a trade and gender committee with the purpose to determine, organize, facilitate and report on the cooperation activities, and make recommendations on the implementation and operation of the trade and gender chapters, as appropriate. The Canada and Chile FTA has published its work plan for implementing activities on trade and gender.Finally, the chapters "include an article on dispute resolution and settlement, which states that the parties are meant to make every effort through dialogue, consultation and cooperation, to settle any matter

[45] BENERÍA, Lourdes, Günseli Berik, and Maria S. Floro. Gender, development, and globalization: Economics as if all people mattered. *Routledge*, 2015.

[46] BENERÍA, Lourdes, Günseli Berik, and Maria S. Floro. Gender, development, and globalization: Economics as if all people mattered. *Routledge*, 2015.

[47] HILL, Catherine. Enabling rural women's economic empowerment: Institutions, opportunities and participation. In *Background paper:* UN women expert group meeting Accra, Ghana, p. 20-23. 2011.

[48] ODERA, Josephine A.; MULUSA, Judy. SDGs, Gender Equality and Women's Empowerment: What Prospects for Delivery?. *Sustainable development goals and human rights:* springer, p. 95-118, 2020.

arising in relation to the specifications included in the chapter."[49] With the exception of the Canada-Israel agreement, each of the other FTA's with gender chapters explicitly prohibit the parties to use the dispute resolution mechanism for resolving breaches in gender commitments included in the chapters.This lack of recourse to dispute settlement is a cause for concern for women in those countries where resolution of disputes is not reached via dialogue. Thus, while the existence of a gender chapter in the Canada-Chile, Argentina-Chile and Chile-Uruguay FTAs is a sign of significant progress, the Canada-Israel agreement has gone farthest in ensuring gender equality.[50]

Some examples of Free Trade Agreements In Ensuring Gender Neutrality

The African Continental Free Trade Area

The 54 members of the Africa Union recently joined the African Continental Free Trade Area to create a single continent-wide market for goods and services. In its preamble, the treaty establishing this trade zone recognizes the importance of gender equality for international trade and development. Including gender equality considerations in the preamble is an effective way of mainstreaming gender perspectives, as it can be instrumental in determining the intentions of the negotiators or drafters of the agreement.[51] Moreover, Article 3 identifies gender equality as a "general objective, frontloading gender concerns even further in the agreement". Another interesting example is Article 27, "where parties promise to muster resources to improve the export capacity of women entrepreneurs and small and medium-sized enterprises (SMEs)". This legal provision is a best practice example, as identifying or mobilizing funds for gender-related commitments is fundamental for their implementation. This provision also supports building the capacity and technical skills of SMEs and women entrepreneurs, which again is a crucial lever for empowerment. The nod to gender equality in the African Continental Free Trade Area agreement and the importance it attaches to gender considerations reflect "a broader appreciation among Africa's regional economic communities of the key role that women play in domestic economies and the positive impact their inclusion can have on economic growth and development".[52]

The United States' trade agreements with Morocco, Oman, Bahrain, Chile, and Guatemala have used "negotiations to push pre-ratification conditions around labor laws. Oman, for example, had a law that placed severe restrictions on labor organizing within the countryand needed to reform the law as a condition for completing a preferential trade agreement (PTA) with the US"[53] . A similar tool could be used to reform laws restricting women's rights to work and/or run a business.

In addition, treaty language can address gender inequality. Some existing US bilateral trade agreements include language around gender issues. The Peru Free Trade Agreement includes a labor cooperation and capacity-building mechanism which includes "development of programs on gender issues, including the elimination of discrimination in respect of employment and occupation."[54]Future agreements could be more specific about the particular discriminatory barriers to be addressed, and supporting legislation could specifically fund mechanisms to help address those discriminatory issues as well as lay down timelines and review mechanisms.

4 Gender provisions in bilateral investments treaties

There are clear linkages through which trade and investment policies and agreements can affect gender dynamics. Sengupta[55] categorizes the linkages as the following: "(i) work sphere affecting employment and incomes, terms of employment, work conditions; (ii)

[49] JAQUETTE, Jane S., and Gale Summerfield, eds. *Women and gender equity in development theory and practice: Institutions, resources, and mobilization*. Duke University Press, 2020.

[50] MALHOTRA, Nisha, and Andrey Stoyanov. *Analyzing the Agricultural Trade Impacts of the Canada-Chile Free Trade Agreement*. No. 1619-2016-134692. 2008.

[51] KUHLMANN, Katrin; AGUTU, Akinyi Lisa. The African Continental Free Trade Area: Toward a new legal model for trade and development. *Geo. J. Int'l L.* v. 51, p. 753, 2019.

[52] LUKE, David; MACLEOD, Jamie (eds.). Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective. *Routledge*, 2019.

[53] KENNY, Charles, and Megan O'Donnell. "Making Global Trade More Gender-Inclusive." *CGD Notes, February* 6. 2017.

[54] COVARRUBIA, Patricia. The EU and Colombia/Peru free trade agreement on GIs: adjusting Colombian and Peruvian national laws?. *Journal of Intellectual Property Law & Practice*, v. 6, n. 5, p. 330-338, 2011.

[55] SENGUPTA, R. The gender dynamics of trade and investment and the post-2015 development agenda: A developing-country perspective. *Third World Network*, 2013.

access to resources (land, water, credit, technology); access to basic services (e.g., health, education); (iii) home situation affecting care work, unpaid work, within household inequality/empowerment; (iv) migration, including both domestic and international, and of both men and women; (v) women as consumers; and (vi) affecting the policy space for gender-friendly policies and social policies"[56]. Unlike trade agreements, "very few BITs currently include gender provisions. Out of almost 80 model agreements published online by UNCTAD's Investment Policy Hub, only six explicitly address gender, albeit through broad provisions that refer o fair and equitable treatment between men and women"[57]. All of the agreements that mention gender were adopted in the last six years, showing a positive trend in this regard. Nonetheless, others from the same time period did not include such protections, which shows that there is still room for growth.A few others make reference to international agreements, such as the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights[58], suggesting that "companies abide by certain standards of responsible business, by implementing policies that address various issues, including gender." Among the few examples of countries that have submitted model BITs containing gender provisions is the Netherlands[59], with the most recent version of the Government's model BIT recently published by UNCTAD's Investment Policy Hub platform. Amid the interesting changes introduced, the 2019 model includes "a commitment to promote equal opportunities and participation for women and men in the economy." The preamble recognizes the "importance of gender equality in international trade and investment policies" and Article 6, paragraph 3 of the Netherlands Model Investment Agreement states the following (emphasis added):

"The Contracting Parties emphasize the important contribution by women to economic growth through their participation in economic activity, including in international investment. They acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth. This includes removing barriers to women's participation in the economy and the key role that gender-responsive policies play in achieving sustainable development. The Contracting Parties commit to promote equal opportunities and participation for women and men in the economy. Where beneficial, the Contracting Parties shall carry out cooperation activities to improve the participation of women in the economy, including in international investment."[60]

The model also addresses gender issues in "Article 9 (Treatment of investors and of covered investments) and Article 20 (Constitution and functioning of the Tribunal) of the Agreement." The Dutch model BIT is relevant because it sets the scene for a new generation of international investment agreements and it highlights the importance of incorporating a gender perspective in the promotion of inclusive growth and equal opportunities between men and women. Previously, "when investment agreements mentioned gender equality, they mostly focused on gender equality in arbitral dispute resolution and the gender division among arbitrators"[61]. This seems to be changing, but the impact of investment treaties and foreign direct investment on gender equality are notions that need to have more concrete ground in international investment treaties.

A similar trend is observed with regard to BITs. "Of the 2,899 BITs signed to date, only six mention gender in the text of the agreement". Interestingly, there is little correlation between the countries that addressed gender in their model BITs and the countries that signed BITs that addressed gender. Whereas "Brazil stood out as one of the few countries whose recent model investment agreement did not address gender, the government addresses the issue in most of its recently signed investment cooperation and facilitation treaties"[62]. Con-

[56] SENGUPTA, R. The gender dynamics of trade and investment and the post-2015 development agenda: A developing-country perspective. *Third World Network,* 2013.

[57] AMARAL, Renata Vargas; JALLER, Lillyana Sophia Daza. The role of regulation and MNEs in ensuring equal opportunities for women. *Transnational Corporations Journal,* v. 27, n. 3, 2020.

[58] CERNIC, Jernej Letnar. "Corporate responsibility for human rights: A critical analysis of the OECD guidelines for multinational enterprises." *Hanse L. Rev.,* v. 4, p. 71, 2008.

[59] DUGGAL, Kabir AN; VAN DE VEN, Laurens H. *The 2019 Netherlands Model BIT:* riding the new investment treaty waves. 2019. p. 347-374.

[60] Art. 6,Netherlands Model Investment Agreement 2019

[61] VERBEEK, Bart-Jaap; KNOTTNERUS, Roeline. The 2018 Draft Dutch Model BIT: A Critical Assessment. *Investment Treaty News,* v. 16, n. 2, 2018.

[62] VERBEEK, Bart-Jaap; KNOTTNERUS, Roeline. The 2018 Draft Dutch Model BIT: A Critical Assessment. *Investment Treaty News,* v. 16, n. 2, 2018.

versely, whereas Morocco's 2019 model BIT addressed gender, its most recent BIT signed with Japan in August 2020 does not.[63]

5 SDG 5 on Gender Equality

Concerns around the negative consequences of globalization spurred the adoption of the Millennium Development Goals. States pledged to develop an "open trading and financial system" (free trade-based), and also to address the "special needs" of developing countries (fair trade-based).One such special need is gender equality. The third Millennium Development Goal aims to "promote gender equality and empower women," which includes addressing economic gender disparity.[64]

U.N., Goal 3: Promote gender equality and empower women.The U.N. Inter-Agency Network on Women and Gender Equality has stressed that states and international trade institutions must evaluate trade rules and policies to determine whether they deepen or reduce existing gender inequalities.Although trade policy has long been considered "gender-neutral," it is now recognized that international trade in goods and services has a differential impact on gender, particularly in developing countries. For example, female workers comprise a large portion of labor-intensive industries, serving as "cheap labour surplus in developing countries." As compared to men, women are less likely to hold regular wage and salaried employment, are more likely to be employed in the informal economy, and are typically paid less in all parts of the world.[65]Trade contributes to SDG 5 by creating employment opportunities for women and by increasing women's participation in the economy. When women have their own incomes, they improve not only their standard of living but also their status and bargaining power in the family increase. This is sometimes known as the "power of the purse".[66]

Women invest most of their incomes (about 90 per cent - World Bank) back in their families (notably on education and health) and in their communities. Increasing their economic power has therefore a "snowball effect" on society, increasing living standards for all and consequently reducing poverty. In the long run, this leads to changes in social attitudes and an improvement in women's rights.

6 CEDAW & Women Economic Empowerment

As all WTO members are also member states of the U.N., they are bound to U.N. agreements that prohibit gender discrimination. This core principle is elucidated in the Preamble to the U.N. Charter: "We the Peoples of the United Nations Determined . . . to reaffirm . . . the equal rights of men and women and of nations large and small."[67]CEDAW was adopted by the U.N. General Assembly. CEDAW creates clear guidelines that prohibit discrimination. This applies both to internal structures of business and corporate governance as well as actions of corporations as they discriminate against and impact women externally. CEDAW imposes "a state obligation to ensure women's right to equality in political, social, and economic spheres". It imposes an "obligation on states parties to ensure the full development and advancement of women in all fields, particularly the political, social, economic, and cultural fields"[68]. By explicitly "guaranteeing the exercise and enjoyment of human rights and fundamental freedoms as the purpose of the full development and advancement of women, this locates women as rights-holders, not just as objects or prospective beneficiaries of development policy". CEDAW also specifically requires the taking of "all appropriate measures to ensure that women have rights on the same or equal terms with men in public life (article 7), acquisition of nationality (article 9), education (article 10), employment (article 11), health care (article 12), credit (article 13), and in the rural sector (article 14). State obligation extends to the private sphere as well as

[63] AMARAL, Renata Vargas; JALLER, Lillyana Sophia Daza. The role of regulation and MNEs in ensuring equal opportunities for women. *Transnational Corporations Journal*, v. 27, n. 3, 2020.

[64] Satterthwaite, David, ed. *Millennium Development Goals and Local Processes: Hitting the Target Or Missing the Point?*. IIed, 2003.

[65] OGATO, Gemechu Shale. "The quest for gender equality and womens empowerment in least developed countries: Policy and strategy implications for achieving millennium development goals in Ethiopia." *International Journal of Sociology and Anthropology* 5, no. 9 (2013): 358-372.

[66] GROWN, Caren, Chadrika Bahadur, Jessie Handbury, and Diane Elson. "The financial requirements of achieving gender equality and women's empowerment." (2006).

[67] LOCKWOOD JR., Bert B. The United Nations Charter and United States Civil Rights Litigation: 1946-1955. *Iowa L. Rev.* v. 69, p. 901, 1983.

[68] Article 3 , CEDAW

the public sphere: states must take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise (article 2(e))."[69] This obligation is an obligation on the state party to exercise due diligence to prevent discrimination against women by non-state bodies.

6.1 How CEDAW provides for Economic Inclusion of Women ?

CEDAW protection of women's equality in social and economic rights elaborates on the article 3 equality provision of the CESCR, which applies "in particular" to "political, social, economic and cultural fields." Economic and social rights are directed at ensuring women's economic independence and free choices within society.

Among the most important and relevant provisions for women and business are article 4 of the Convention and general recommendation. Article 4 of the Convention allows "for States to adopt temporary special measures to accelerate equality between men and women without being considered discrimination". Article 11 "ensures equal opportunities, free choice of profession, the right to promotion and equal remuneration and equal treatment, among others". Additionally article 13 highlights equal access to bank loans and credit and equal rights in economic and social life. Article 14 specifically addresses "discrimination against women in rural contexts and afford them equal access to economic opportunities through employment or self employment, including through organising self help groups and cooperatives". General recommendation 28 on the core obligations of States parties under article 2 of the Convention highlights obligations not to cause discrimination against women through acts or omissions and to react actively to discrimination against women whether carried out by the State or private actors. The optional protocol to CEDAW also allows the Committee to consider complaints made by individuals about the violations of rights enshrined in the Convention including those related to equality in the work sphere as well as violations of rights by non-state and private sector actors.[70]

One factor behind lower female participation in business and trade as both workers and employers is that "79 countries worldwide restrict the type of jobs women can do on the grounds of their sex alone, including 15 countries that have 8 or more such restrictions. Fifteen countries have laws on the books saying husbands may prevent their wives from accepting jobs."[71] Countries "that impose work-hour or industry restrictions have lower female labor force participation rates (45 percent compared with 60 percent with no restrictions)".[72]And the restrictions stand in contravention of the global norms laid down in Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):[73]

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment...

6.2 CEDAW & 'Gender-Responsive Budgeting'

The United Nations adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979, which mainly contained pledges and guidelines for countries to reduce gender inequality. Although CEDAW does not include a specific provision on budgets, its principles require that women have both formal and substantive equality, which means that policies should account for differences in their impact on men and women. Gender-responsive budgeting (GRB) was first introduced at the Fourth World Conference on Women in 1995 in Beijing, China,

[69] RADAY, Frances. Gender and democratic citizenship: The impact of CEDAW. *International journal of constitutional law*, n. 10, n. 2, p. 512-530, 2012.

[70] World Health Organization. Preventing gender-biased sex selection: an interagency statement-OHCHR, UNFPA, UNICEF, UN Women and WHO. World Health Organization, 2011.

[71] POWELL, Gary N. Women and men in management. Sage Publications, 2018.

[72] BRAUNSTEIN, Elissa. Gender-inclusive industrialization for growth and development in the context of globalization. *Gender equality and inclusive growth*: Economic policies to achieve sustainable development, 2019.

[73] Art. 11, CEDAW ,2006.

to inculcate in decision-makers the principle of looking at national budgets through a gendered lens.

"With representatives from 189 governments, over 17,000 participants and two weeks of debate, the GRB was brought into the mainstream at the event, and governments, NGOs, civil society organisations and academics have advocated for its use since then."[74]Over the years, various countries have made attempts to create women-centric schemes and allocate funds for them. GRB goes beyond this; it is related explicitly to allocating portions of national budgets to promote women's advancement and study the gendered impacts of such allocations to different government departments. It also considers how money is raised to make the budget, in terms of direct and indirect taxes and fines, and how this affects men and women differently.

The Fourth World Conference produced the Beijing Platform of Action, which contained the specific reference of using budgets for the advancement of women, in chapter VI (Financial Arrangements) clause 345:[75]

"Full and effective implementation of the Platform for Action, including the relevant commitments made at previous United Nations summits and conferences, will require a political commitment to make available human and financial resources for the empowerment of women. This will require the integration of a gender perspective in budgetary decisions on policies and programmes, as well as the adequate financing of specific programmes for securing equality between women and men."[76]Australia was the first country to introduce GRB in 1984, even before the Fourth World Conference on Women, and each government ministry was tasked with analysing the effect of the yearly budget on women. Canada followed in 1993 and South Africa in 1995. Since then, over 80 countries have tried some variant of GRB.

International Commitments to GRB

Year	Agreement	Association with GRB
1979	Convention on the Elimination of All Forms of Discrimination Against Women	Women's participation in public life is connected to dimensions of the budget: revenue, expenditure, macroeconomics, and decision-making
1995	Beijing Declaration and Platform for Action	Declares the need for integrating a gender perspective in budgetary decisions on policies and programmes, including financing of schemes that promote gender equality
2015	2030 Agenda for Sustainable Development	Commits governments to "a significant increase in investments to close the gender gap"

6.3 Stand Taken By CEDAW Committee

The CEDAW Committee has observed that there is an "urgent need to ensure that globalisation, policies and plans of action that facilitate international trade and the transition to market economic policies are gender--sensitive and improve the quality of life of women"[77]; and that "if sustainable development is to realise economic, social and environmental goals, women's needs and concerns must be given equal priority with those of men." Similarly the World Bank has said that "ignoring gender disparities comes at great cost to people's well--being and to countries"[78] abilities to grow sustainably, to govern effectively, and thus to reduce poverty.' The CESCR Committee has clarified that the equal right of men and women to the enjoyment of economic, so-

[74] Wotipka, Christine Min, and Francisco O. Ramirez. "World society and human rights: an event history analysis of the convention on the elimination of all forms of discrimination against women." *The global diffusion of markets and democracy* 3096 (2008): 303-343.

[75] Women, U. N. "The Beijing declaration and platform for action turns 20." (2015).

[76] Women, U. N. "The Beijing declaration and platform for action turns 20." (2015).

[77] CEDAW Committee's Concluding Comments include: Re Cameroon, 23d session (2000)

[78] World Bank Policy Research Report, Engendering Development: Through Gender Equality in Rights, Resources and Voice (January 2001)

cial and cultural rights is "a mandatory and immediate obligation of states parties."[79]This is in itself a major breakthrough as it is acknowledged that the right of women to social and economic equality is not a qualified right, dependent on the ability of the state according to its resources, but rather an absolute right which requires the equitable distribution of existing resources. The Committee has considered "the relationship between gender and economic development: seeking information and expressing concern about the impact on women of economic crisis, structural adjustment programmes, observing that economic growth and development may not benefit women as much as men"[80]. It has requested states to ensure that all poverty alleviation programs fully benefit women to enhance "monitoring of the impact of economic development and changes on women and to take proactive and corrective measures, including increasing social spending, so that women can fully and equally benefit from growth and poverty reduction." The Committee has also welcomed the introduction of microcredit or microenterprise schemes that facilitate women's independence through enhancement of their economic self-sufficiency. It has expressed concern about women's poverty and social exclusion, which have been exacerbated by the global downturn from 2008. The Committee has linked sustainable development with "people-centered human development, based on equality and equity, participation of government and civil society, transparency and accountability in governance."[81]

7 Conclusion & Reccomendations

Women's self-employment is encouraged as it significantly increases women's income and therefore family wellbeing, and so reduces poverty . In the study of MIDAS–SMEF[82], "a majority of the respondents said that their parents, husbands, even children, discouraged them from entering into business". Buvinic & Furst-Nichols,[83] in a study in Brazil, found that "children's survival rates increased 20 percent when household income was controlled by their mother". Human rights are not mentioned in WTO law, but the organization has embraced some fair trade values.For example, the Preamble of the Marrakesh Agreement, the document that established the WTO, includes "sustainable development" as an objective.42 Members also pledge to enter into reciprocal and mutually advantageous arrangements "directed to the substantial reduction of . . . barriers to trade and to the elimination of discriminatory treatment in international trade relations."[84] After its establishment, the WTO framework was immediately used as a medium for human rights protections.One such example is the WTO Dispute Settlement Mechanism's (DSM) interpretation of Article XX of the GATT in U.S–Import Prohibition of Certain Shrimp and Shrimp Products. Article XX lays out exemptions from "GATT rules on environmental protection, one being when the measure constitutes unjustifiable discrimination between countries where the same conditions prevail"[85]. This does not apply if the measure is a disguised restriction on international trade. The DSM held that "Article XX must be considered contextually, and the notion of trade liberalization should not be applied without question." Rather, many factors should be considered in determining discrimination between countries, including the impact on human rights.Specific WTO agreements focus on the female-dominated agriculture and services sectors and implicate human rights policy. For example, the Agreement on Agriculture imposed regulations in three specific areas: "domestic support, market access, and export subsidies."These regulations did not go without criticism; the export subsidies agreement, which required developed countries to reduce export subsidies, was condemned for giving developed countries a leg up on exports.Although these regulations required developed countries to reduce export subsidies by at least thirty-five percent between 1995 and 2000, they still allowed these countries to continue to subsidize

[79] Committee on Economic, Social and Cultural Rights, General Recommendation 28

[80] I Committee on Economic, Social and Cultural Rights, General Recommendation 28

[81] HRC, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev 1/Add.10

[82] SHOMA, Chowdhury Dilruba. "Gender is a human rights issue: The case of women's entrepreneurship development in the Small and Medium Enterprise sector of Bangladesh." *Journal of International Women's Studies* 20, no. 7 (2019): 13-34.

[83] BUVINIĆ, Mayra, and Rebecca Furst-Nichols. "Promoting women's economic empowerment: what works?." *The World Bank Research Observer* 31, no. 1 (2016): 59-101.

[84] MARRAKESH Agreement Establishing the Word Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

[85] APPELLATE Body Report, United States–Import Prohibition of Certain Shrimps and Shrimp Products, WTO Doc. WT/DS58/23 (Nov. 26, 2001)).

farmers in a way that developing countries could not sustain.[86]The World Bank's World Development Report 2011[87] said that some countries should pay attention to the elimination of unfair practices towards women. Increasing the level of skill of women would increase such a country's productivity by almost 25 percent. The reason for this is that in the patriarchal society men are considered as the family breadwinner and women are given care-giving responsibilities in the family.[88] Brush et al. points out: "Many societies mainly define women through roles connected to family and household responsibilities; societal values implicitly interpret women's entrepreneurship as less desirable and, as a result, provide lower normative support."[89]Further, promoting gender related provisions in international trade laws and national legislations can led to the following benefits:

> 1. Trade can expand women's role in the economy, decrease inequality, and improve women's access to skills and education.
>
> 2. **Exporters employ more women:** "In developing countries, women make up 33 percent of the workforce of exporting firms compared with just 24 percent of non-exporting firms."[90]
>
> 3. **Trade creates better jobs for women:** "When women are employed in sectors with high levels of exports, they are more likely to be formally employed in a job with better benefits, training and security."[91]
>
> 4. **Trade increases women's wages and increases economic equality:** "Developing countries that double their manufacturing exportsa typical increase for developing countries that open themselves to trade would see women increase their share of total manufacturing wages from 24% to 30% through a combination of increased employment and higher salaries."[92]

If we refer to the World Bank Report[93], it provides the following challenges with respect to gender equality in trade:

> 1. Trade policy is inadvertently biased against women, resulting in lower levels of employment and higher prices for consumer goods.
>
> 2. Although no country overtly imposes tariffs according to gender, implicit biases can amount to "pink tariffs" that put women at an economic disadvantage;as both producers and consumers.
>
> 3. Compared to men, women tend to spend a larger share of their income goods with high tariffs, such as food. Removing import tariffs could help women gain 2.5 percent more real income than men.
>
> 4. Targeted policies can help women maximize the benefits of trade. These include removing trade barriers that impede women's access to international markets and improving women's access to education, financial services, and digital technologies.
>
> 5. The lack of gender-specific data reinforces biases against women in trade policymaking. Sex-disaggregated data is necessary to assess how different policies and obstacles impact women and men differently

Apart, from that it can be observed from the above study on International Trade & Women Participation that "in 2017, World Trade Organization (WTO) members agreed to a Joint Declaration on Trade and Women's Economic Empowerment, which aims to increase women's participation in trade. While the declaration is non-binding, it includes provisions for sharing on gender-related information in Trade Policy Reviews. It also tries to lower barriers for women in trade while identifying Aid for Trade as an initiative to help develop

[86] YARWOOD, Lisa. Trade Law as a Form of Human Rights Protection. *NUJS L. Rev.* n. 3, p. 13, 2010.

[87] WORLD BANK. *World development report 2012: Gender equality and development.* The World Bank, 2011.

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[93] WOMEN and Trade: The Role of Trade in Promoting Women's Equality, World Bank Report 2020.

the tools for crafting gender-responsive trade policies. A number of recent bilateral and regional trade agreements are also including chapters on trade and gender."[94] But on the one hand, legal enforcement removes flexibility and the possibility of adopting trade policies that coincide with national development strategies. The mere threat of legal action may be sufficient to force a government to change their policies. The dispute settlement process also limits participation and transparency because only governments can act as complainants and defendants in the proceedings. Furthermore, effective participation in a dispute proceeding is very costly and requires specialized training. Finally, the legal forum focuses very narrowly on specific rules and facts, ignoring the broader context and full range of values and factors relevant to justice and development. Gender issues, for example, are usually not legally relevant.

Making progress on the trade and gender agenda will not revitalize the negotiating pillar of the WTO, lead to the successful negotiation of new multilateral rules, or save the dispute settlement system. But getting this agenda right may improve the monitoring functions of the WTO, and it is one pathway for giving the WTO renewed purpose at a time when the other areas of its work are in peril. We must remember that the end game is not shoring up an institution in crisis; it is using trade policy and the multilateral trading system as levers for sustainability, gender equality, welfare and economic opportunities for all. Successfully delivering on this agenda could improve the lived experiences of some of the world's most vulnerable people.

Recommendations:

1. Adopt a do no harm principle: At a very minimum, WTO members could be encouraged to adopt a "do no harm" principle, ensuring that new agreements (eg. the Trade in Services Agreement, micro, small, and medium enterprises, or MSMEs, E-commerce, FTAs) do not increase gender-based or other forms of inequality. This could involve, for instance, cautioning against EU plans to move away from the WTO practice of listing all service sectors that are included in liberalization to one where all service sectors are automatically liberalized unless explicitly named as excluded. The problem here is that women are disproportionately represented among workers and users of public services, and we know from past trade agreements that their liberalization has gendered effects as women take on the increased costs (including unpaid care work) that come with the loss of these services. A more cautionary, positive-list approach is therefore preferable.

2. Develop a methodology for conducting gender-impact assessments: All signatories to the WTO declaration have committed to conducting ex ante impact assessments of new trade rules using gender disaggregated data. There is a need to develop a methodology that accounts for the gendered impacts of new and existing trade rules, not just on employment and earnings but also on job segregation and working conditions, consumption and on the provisioning of public services. This includes a consideration of how these things have the potential to increase unpaid labour in the household.

3. Identify ways of using existing WTO rules to achieve gender equality: Already existing flexibilities contained in the WTO Agreements (such as GATT Article XX, the TRIPS public health declaration, or the expired green-light subsidies under the Agreement on Subsidies and Countervailing Measures) may allow carve outs that enable governments to minimize the adverse impacts of trade liberalization on vulnerable populations, particularly on women's health or on women in working environments that are precarious or "hyper-precarious," low paying or unpaid. Other WTO agreements, such as the Government Procurement Agreement (GPA), may allow positive gender-based discrimination in pursuit of gender equality. Canada can work with members (and the WTO's Trade and Gender Focal Point) to explore how the WTO's Trade Policy Review Mechanism can help identify best practices already underway.

4. Link trade, gender and environmental sustainability: Existing gender and environmental sustainability chapters in trade agreements share the common pitfall that they are typically excluded from dispute settlement. Yet, the impacts of environmental depletion and climate change are inextricably linked to gendered power relations in society. Environmental degradation hits the poor the hardest and, in many countries, women are among the most vulnerable groups that are set to bear the costs of deteriorating environmental con-

[94] HANNAH, Erin; SCOTT, James; WILKINSON, Rorden. The WTO in Buenos Aires: The outcome and its significance for the future of the multilateral trading system. *The world economy*, v. 41, n. 10, 2578-2598, 2018.

ditions. There is a need to work on gender and trade issues in order to revitalize the discussion about how the global trading system could be put on sustainable footing.

Some other practical recommendations that can be inculcated through legal & policy measures are as follows:

1. Advocate for, and support the provisioning of, gender-responsive public services, from basic infrastructure to social protection

2. Recognize, reduce and redistribute women's unpaid work, including in family enterprises and farms and in care work and domestic chores

3. Bring visibility, recognition and rights to women farmers and women informal workers

4. Ensure that more money reaches women's hands

5. Improve work conditions for women by bringing about wage parity and providing social security and workplace facilities (e.g. childcare)

6. Create an environment that enables women to secure their rights and realize their full potential Push up investments across the four drivers from both government and the private sector Invest in job-oriented skills for women and upskill women entrepreneurs to boost local job demand

7. Establish public and private investment funds to support women's entrepreneurship

8. Signifi cantly improve the work conditions in the informal sector,3 which are currently precarious

9. Increase the number of women in the so--called "non-traditional" jobs and sectors

10. Close the digital gender gap

11. Monitor existing laws, including labour laws, municipal laws, land laws and other laws which aff ect informal and agricultural women workers and broader policies and programmes

12. Ensure implementation of existing laws and policies to enhance empowerment of women in the informal economy and agriculture

13. Develop a framework for intervention for women microentrepreneurs in the informal economy including those in family enterprises inorder to highlight the role of women micro entrepreneurs and to advocate for measures to increase their earnings and scale

14. Need of comprehensive legal and policy framework for the rights of women farmers to ensure the visibility and recognition of women farmers and their entitlements

15 Need for a social security net for informal workers including agricultural workers with a focus on women's needs

16. Restructuring existing statutes in line with CEDAW provisions to ensure protection, inclusion and promotion of women in socio-economic sphere.

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ARTIFICIAL INTELLIGENCE IN HEALTH CARE SECTOR OF INDIA: LEGAL REGULATORY CHALLENGES & WAY FORWARD

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ABSTRACT

Though there is potential for AI to transform healthcare in India, ethical, legal, and cultural factors need to be considered by developers, practitioners, and policy makers when designing, using, and regulating AI. But there are some major regulatory issues of concern with respect to AI in health care like: How do AI programs ensure patient consent and privacy of sensitive medical data? How to address the questions of apportionment of liability among the practitioner, hospital, and the AI system developer, trainer and manager in case of an act of medical negligence? Further in the event of an AI diagnostic error how to determine the degree of accountability of the operating physician when a wrong diagnosis or treatment occurs due to an error in the primary data feed or an AI systemic glitch? With all this issues in hand & with the advancement of AI in health care, this paper aims to seek a review of India's existing legal framework & AI policy regulation and how far are they efficient enough in addressing the intrinsic issue which might make the journey of AI in regulatory terms bit cumbersome. The paper will also analyse the steps taken by European Union in regulation of AI in health care and how India can learn from world best practices in order to come up with a robust & fair regulatory mechanism.

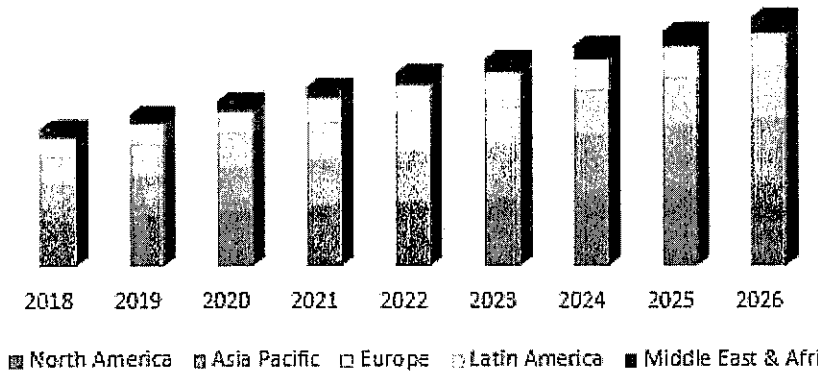
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ARTIFICIAL INTELLIGENCE IN HEALTH CARE SECTOR

With India's untenable patient-doctor ratio, global analysts expect that the pressure to improve healthcare delivery will lead to a faster inclusion of Artificial Intelligence (AI) and Deep Learning (DL) into the country's existing diagnostic and treatment processes. Artificial Intelligence has the potential to provide large incremental value to a wide range of sectors globally, and is expected to be the key source of competitive advantage for firms. While advancements in AI are India's best bet yet to sustain its crumbling healthcare infrastructure, visionless implementation of AI medical technology and the absence of a robust legal framework can only compound the crisis, and not mitigate it. These kinds of technologies may increase patient safety and help to control, for example, the use of antibiotics to reduce antimicrobial resistance.[i]

Global Artificial Intelligence Healthcare Market, by Region



[ii]

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The use of these new technologies requires a constant exchange of information between the patient and the service provider. The patient's personal information, such as medical history and physiological conditions, are considered Sensitive Personal Data or Information ("SPDI") under the Data Protection Rules ("Rules"), of which certain provisions apply when a body corporate collects, stores, transfers or processes such information. Consent is a clear requirement under the Rules.[x] However, despite the existence of these rules, there has been minimal compliance in India due to lack of enforcement mechanisms. Questions have also been raised about the legislative scope of these rules which while drafted under a data security provision, may be seen as going beyond its scope. Section 79 of the Act suggests that intermediary service providers in the field of information technology are merely the carriers of content. Barring exceptions, under Section 79, they would not be held liable for the substance of the content.[xi] This rule may have to be re-examined with the implementation of AI systems that are devised by the carriers. Further, data localisation will be of prime concern in case of devices manufactured outside India.

Electronic Health Records Standards, 2016:

The EHR Standards are an attempt to regulate data ownership and privacy standards around the storage of health data collected from patients. This includes data from medical establishments as well as data from medical devices and self-care devices and systems. The government has recognised the need for standardisation of such data, and has accordingly laid down standards relating to information capture, storage, retrieval, exchange and analytics, including images, clinical codes and data. These include ISO and other national standards to be used for EHRs.[xii] In the latest review report prepared by the ministry of electronics and information technology (MeitY) titled Adoption of Electronic Health Records: A Roadmap for India highlighted that the government hospitals and dispensaries have very little ICT infrastructure with only some major public hospitals, such as the All India Institute of Medical Sciences (AIIMS) and the Postgraduate Institute of Medical Education and Research (PGIMER), have computers and connectivity.[xiii] Except for a handful of large healthcare organizations in India, there has not been a major effort towards EHR implementation. Thus, when we lack in terms of basic infrastructure the adoption and implementation of the same is highly doubtful and risky.

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Medical Devices Rules, 2017

It has been drafted with the intention to distinguish between medical devices and pharmaceuticals for the purpose of regulation. The Rules define what shall be classified as medical devices, and the scope of these Rules is limited to those devices that fall within its ambit. The Rules do not contain separate provisions for sale of medical devices.[xiv] The slow pace and method of medical device regulation has been a concern for the industry for a while now, and the Draft Notification is a means of extending the regulatory ambit of the MDR.[xv]

Digital Information Security in Healthcare Act (DISHA):

The MoHFW created the draft for the Digital Information Security in Healthcare Act (DISHA) with the aim of securing the healthcare sector data in India, giving people complete ownership of their health data. For example, if you are visiting a doctor for a check-up and the doctor places your results into an electronic health record (EHR) that information is completely protected by DISHA as it is placed within the healthcare system.[xvi] DISHA proposes three main objectives such as: setting up a digital health authority at national and state levels; enforcing privacy and security measures for electronic health data; and regulating the storage and exchange of electronic health records. Additionally, the draft also provides details on the establishment of National and State Electronic Health Authorities (NeHA and SeHA). In effect, it would provide extensive data protection to Indian subjects, as well as govern the data portability. But it still has certain inherit flaws like the patient seems to be the focal point of DISHA. Throughout the act, there is much power given to the patient over his/her medical data and very rightfully so. However, it is unclear of how will a nation having over a billion people be educated about a) rights over the data b) need for consent c) how and when to decide to provide or reject consent d) what is the mode for receiving and auctioning on a consent request and many more such important aspects.[xvii]

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STEPS TAKEN BY EUROPEAN UNION TO REGULATE AI IN HEALTH CARE

In February, 2020, the European Commission published a white paper on artificial intelligence (AI) as well as an accompanying communication and report. It aims to pursue a uniform approach to AI across the EU in order to avoid divergent member state requirements forming barriers to its single market. The paper sets out policy options to facilitate a secure and trustworthy development of AI and considers health to be one of its most important areas of application.[xviii] The white paper distinguishes high-risk AI applications from all other AI applications, with the aim of applying the new regime of regulation and conformity assessment only to the high-risk applications. According to the paper, high-risk AI applications are those used in a sector where "significant risks can be expected." The legislation establishing the new regulatory framework should "specifically and exhaustively" list the high-risk sectors, which might initially include "healthcare".[xix] Some of the relevant portions from the white paper with respect to regulation of AI in health care are as follows:

Certification:

The commission also plans to offer a "trustworthy AI" certification, to encourage voluntary compliance in low-risk uses. Certified systems later found to have breached the rules could face fines. Further, it provides for the training data requirements would aim at "providing reasonable assurances that the subsequent use of the products or services that the AI system enables" would be safe, non-discriminatory and protective of privacy. Developers or deployers of AI systems would need to demonstrate, for instance, that their proposed AI systems "are trained on data sets that are sufficiently broad and cover all relevant scenarios needed to avoid dangerous situations." In addition, the data sets must be "sufficiently representative, especially to ensure that all relevant dimensions of gender, ethnicity and other possible grounds of prohibited discrimination are appropriately reflected."[xx]

Issue of Privacy Concerns:

The white paper recommends no new specific requirements to ensure that proposed AI systems adequately protect personal data, instead suggesting that these issues can be addressed under the GDPR and its companion law enforcement data privacy directive. Record-keeping rules

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would be imposed "in relation to the programming of the algorithm, the data used to train high-risk AI systems, and, in certain cases, the keeping of the data themselves." [xxi]

Developers and deployers of high-risk AI systems must provide information concerning the "AI system's capabilities and limitations, in particular the purpose for which the systems are intended, the conditions under which they can be expected to function as intended and the expected level of accuracy in achieving the specified purpose." In addition, "citizens should be clearly informed when they are interacting with an AI system and not a human being. "The paper states that, the commission will draft new laws including a ban on "black box".AI systems that humans can't interpret to govern high-risk uses of the technology, such as in medical devices. The commission also recommends requirements ensuring that the AI systems are "robust and accurate, or at least correctly reflect their level of accuracy [, and] … that outcomes are reproducible … and can adequately deal with errors or inconsistencies during all life cycle phases." And it calls for "human oversight" of high-risk AI systems, recognizing that "the appropriate type and degree of human oversight may vary from one case to another."[xxii]

Liability:

The white paper points out that the use of AI technologies may complicate the application of product safety laws when harms occur. Difficulty in identifying whether the AI technology was the cause of the harm, in whole or in part, "in turn may make it difficult for persons having suffered harm to obtain compensation under the current EU and national liability regime." [xxiii]The commission suggests, as a general rule, apportioning liability according to the actor best placed to have addressed the risk of harm, while noting that some of those actors may be located outside the EU.[xxiv] More specifically, it proposes that strict liability be imposed where a product contains defective software or other digital features. It also invites comment on the possibility of reversing the burden of proof, so that a plaintiff would not be responsible for proving the chain of causation when a product relying on AI applications malfunctions.

RECOMMENDATIONS

Thus, as we can see above how EU has specifically drafted a white paper aligning all the possible regulatory aspects of AI in health care under a single policy approach covering

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necessary integration for protection. Similarly, in India there is a need of a more comprehensive legal framework of checks and balances, which must be developed to ensure compliance so that the benefits of medical. Since, as of now we don't have single policy formulation with respect to the vision of AI and its possible legal regulatory issues. It is the time for the Indian lawmakers and the judiciary to step in and pave the way for a successful transition of India's healthcare sector into the age of artificial intelligence and solve India's complex healthcare problems. Some of the feasible and practical recommendations in this regard are as follows:

Feasible Alternatives:

1. **Setting up a dedicated regulatory framework to oversee AI in India:**

At present there is no regulatory oversight in this area, and there are fears that over-regulation could lead to a stifling of innovation. This calls for a national-level regulatory agency that oversees developments in AI in addition to formulating a framework that ensures transparency and accountability of AI systems while promoting and enabling innovation. Something in line of European Union can be adopted.

2. **Design standards and appropriate certification system for health systems driven by AI:**

Proof of a clinical trial appears to be the most common certification system asked for by hospitals and other practitioners when considering an AI solution. Yet clinical trials are not tailored for AI technologies and are cost and time intensive. An appropriate certification system is needed to qualify the security and quality of health systems driven by AI. Such a system can incentivise developers to meet needed standards and can work to build trust amongst health practitioners and patients. Design standards are also needed to encourage the development of 'responsible AI' guiding principles to encourage "responsible AI".[xxv]

3. **Liability Framework:**

Predictive AI currently faces limitations in the form of high costs and questions around liability. These can be addressed through understanding the cost vs. quality of care vs. insurability and access. The limitation of liability as described in the IT Act, 2000 may also be unfit to operate

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in the era of artificial intelligence. Section 79 of the Act suggests that intermediary service providers in the field of information technology are merely the carriers of content.[xxvi] Barring exceptions, under Section 79, they would not be held liable for the substance of the content.[xxvii] This rule may have to be re-examined with the implementation of AI systems that are devised by the carriers. Similarly, one of the issues is that the traditional tort law concept of "foreseeability" may not work when AI systems perform a medical diagnosis and treatment. For an individual to be held liable for negligence, the damage that occurred must be ordinarily foreseeable.[xxviii] However, AI or machine learning systems are supposed to learn from the past data and patterns and may behave in ways that the AI developers and designers may not be able to foresee reasonably. The concept of Principle& Agent can be used but still in case of an Artificial Intelligence is bit complex to define who exactly the principle is. Thus, there is a need to create an exclusive liability fixation measure with respect to use of Artificial Intelligence.

4. Emphasize Privacy and Security:

The Supreme Court of India in *Justice K.S.Puttaswamy (Retd.) v. Union of India*[xxix] upheld that privacy is a fundamental right, which is entrenched in Article 21 i.e. Right to Life &Liberty of the Constitution. This led to the formulation of a comprehensive Personal Data Protection Bill 2019. However, presently the Information Technology Act, 2000 contains specific provisions intended to protect electronic data (including non-electronic records or information that have been, are currently or are intended to be processed electronically). The Bill proposes provides for breach notification mandatory. Further, any data breach then would be punishable with a fine and could also attract an imprisonment of up to five years. The Bill proposes the legislative inclusion of the right to be forgotten. Individuals would then be able to limit, delete, delink, or correct any information about him which is misleading, embarrassing, and irrelevant. The Bill states that a data subject has a right to prevent the data fiduciary from using such data or information if data disclosure is no longer necessary, the consent to use data has been withdrawn or if data is being used contrary to the provisions of the law.[xxx] But still issue such as protection of Sensitive Personal Data is yet to be well defined and formulated.[xxxi] The collection and storage of health related data and the potential for bias to be reproduced through the technology raises privacy and security concerns. A key step towards ensuring privacy and

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[xxiv] *Ibid.*
[xxv] *Supra* f.n. 2.
[xxvi] Malvika Kapil Kalra, Intermediary Liability under the Information Technology Act: Time for an Amendment? Bar & Bench (Available at: https://www.barandbench.com/columns/intermediary-liability-under-the-information-technology-act-time-for-an-amendment, last accessed on 19th July 2020 at 03:49PM)
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[xxviii] *Supra* f.n. 8
[xxix] *Justice K.S.Puttaswamy (Retd.) v. Union of India* [Writ Petition No. 494/ 2012]
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[xxxi] Mohan Dewan, Personal Data Protection Laws in India, 13th May 2020 , R.K. Dewan & Co. (Available at: https://www.rkdewan.com/articledetails.php?artid=183, last accessed on 19th June 2020 at 01:11PM)

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HEALTH RIGHTS OF MANUAL SCAVENGERS: RIGHT TO ACCESS HEALTH DENIED?

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INTRODUCTION:

"Not all soldiers come with guns to ensure our safety and protect us, some soldiers do come with brooms and bare hands to ensure a safe hygienic surrounding for us…"

No one likes to look at shit, "*if it's so hard to look at shit for a couple of hours, imagine what it must feel like to clean it every day and sometimes die in it"* .This paper deals with the powerful indictment of society's apathy towards the thousands who are tasked with cleaning public toilets and sewers. An utter disregard for the life and safety of the manual scavengers, penny crunching by employers resulting in the absence of the bare minimum of safety equipment and an utter desperation to earn that forces many into this job. The paper will explore how the very definition is problematic for many reasons; one being that it doesn't explicitly include sewage workers, who are subjected to a lifestyle which is hardly any better. Secondly, by this definition, workers who use 'tools' are also often overlooked, as it is believed that the safety gears provided to them would aid them to carry out their daily tasks in a hygienic manner. In reality, these tools are either not provided to the workers at all, or are in such bad conditions that they actually hinder their work. As per the workers, the gloves provided to them give off such bad lingering odour that they rather clear the garbage and dispose human excreta with their bare hands. The only purpose these low-qualities, counter-productive tools serve is that the authorities involved can claim that they play no active role in the declining health of the people, as they have dutifully supplied such gears. The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 (the 1993 Act), declared the employment of manual scavengers and construction of dry toilets to be punishable with fines and imprisonment. Superseding the 1993 Act, the 2013 Act goes beyond prohibitions on dry latrines, and outlaws all manual excrement cleaning of

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insanitary latrines, open drains, or pits. And, importantly, it recognizes a constitutional obligation to correct the historical injustice and indignity suffered by manual scavenging communities by providing alternate livelihoods and other assistance.

Some key points that need to be observed are as follows:

1. *The Constitution of India has banned cleaning human waste by hands, there are some articles of the constitution show what the law says. But law is not very comprehensive regarding manual scavenging and sanitation work, hence loopholes.*
2. *Most deaths have been attributed to septic tanks, which tend to be huge tanks where person has to drop inside to clean it. These deaths if shown on TV are termed as "Accident", "Slipped and Fell" and some were as ridiculous as a person's phone fell so he jumped in. There is no accountability on the part of government or contractors.*
3. *The basic fundamental challenge is with respect to their health rights, they are clearly being denied proper access to the health care facilities; there are hardly any governmental programs or scheme which is ensuring them their health rights.*

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The hygiene of the workers seems to be of the least priority. They are also asked to 'take care' of unclaimed dead bodies that the police finds, no matter at what stage of decomposition it is in, without appropriate safety measures. The workers also are asked to dispose dirty sanitary napkins which give worse stench than human faeces. The plight of these workers are yet to be cured, even though we have laws to protect but on ground their health and lives are most vulnerable to various ailments and even death. It's high time that Government should realise the need to increase the ambit and understanding of manual scavengers and come up with policies to protect their health rights and prevent their health exploitation. It is the matter of utmost shame that our nation is burdened with, the one who are the real soldiers of "Swacch Bharat Mission" are hardly cared for and they still continue to struggle with their health and hygiene. Not all soldiers come with guns to protect you some soldiers do come with brooms and bare hands to ensure a safe hygenic surrounding and we are hardly concerned about them.

MANUAL SCAVENGING –HEALTH AT STAKE

Who is a 'manual scavenger'?

A manual scavenger can be defined as any one falling under the following categories:[1]

- Any person who has been employed to handle undecomposed human waste from an insanitary latrine, open drain or pit or railway track is a manual scavenger under this law.
- The person could have been employed by any one - say, someone from their village or by an agency or contractor.
- It does not matter if he/she was given regular employment or engaged on contract basis, he/she is covered under this law.
- Exception - Any person who has been employed to clean human waste and does so with the help of the appropriate protective gear and equipment will not be considered a manual scavenger under this law.
- Another group of people called 'safai karamcharis' are also sometimes considered as manual scavengers - however, they usually refer to people working as sweepers or cleaning workers in the municipalities, government or private organisations.

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HEALTH HAZARDS FACED BY MANUAL SCAVENGERS:

The workers are commonly exposed to gases like hydrogen disulphide, methane, ammonia and carbon monoxide. As per a report which studied 26 sewer workers exposed to smell and found that 53.8% developed sub-acute symptoms including sore throat, cough, chest tightness, breathlessness, thirst, sweating, irritability and loss of libido. Further, a large number of latrines are 'serviced' by pigs. Many contract leptospirosis through contact with pigs' blood, urine and other body fluids.[2] Leptospirosis causes high fever, joint pain, anaemia, and liver and kidney infections and it can be fatal. People that are heavily exposed to poultry and pigs are most likely to be affected. Another danger is the presence of swine brucellosis, a bacterial disease that can be transmitted to humans from infected pigs through contamination

[1] Law against Manual Scavenging, Vikaspedia (Available at: http://vikaspedia.in/social-welfare/social-awareness/legal-awareness/law-against-manual-scavenging, last accessed on 23rd August 2020 at 11:03PM)

[2] Dr. Ashish Mittal, Pranjal Jyoti Goswami, Hole to Hell, A study on Health & Safety Status of Sewer workers in Delhi, Center for Education and Communication, 2006.

of your eyes, nose, mouth or any open wounds. These workers should need to be brought under occupational health services, which should include pre-placement and periodic health monitoring. But the Government has miserably failed to secure access to these basic health care facilities. The Health & Hygiene problem is not only limited to the safai karmacharis, but the problem is much beyond , its not just about their present generation but also it's about their children and upcoming generations. Due to lack of access to basic health care facilities we are not only making their life but rather we are also making their upcoming generations vulnerable to many diseases apart from the cancer of caste based discrimination. It is a catastrophic situation, even worst than the nuclear disasters or bhopal gas tragedy if you consider the health conditions of thousands manual scavengers and taking into consideration their children and upcoming generation.[3] Hence, it is very critical to discuss about their health , as they are first of all human beings , not only Universal declaration on Human Rights or Constitution of India provides them with that fundamental right rather by birth irrespective of caste, profession , nationality and religion they are entitled to their Health Rights . With this background, we can postulate the following research question which will be elaborated in rest of the paper.

i) What has government done towards ensuring health rights of cleaning staffs?

ii) What process the State has adopted in order to govern access to health in health spheres through various legal & welfare policies for the people who are working as manual scavengers/ associated with sewage & garbage cleaning?

RIGHT TO HEALTH & GOVERNMENTALITY

The program of hygiene as a regime of health for populations entails a certain number of authoritarian medical interventions and controls. Government is defined as a right manner of disposing things so as to lead not to the form of the common good, as the jurists' texts would have said, but to an end that is "convenient" for each of the things that are to be governed.[4] This implies a plurality of specific aims: for instance, government have to ensure that the greatest possible amount of wealth is produced, that the people are provided with sufficient means of subsistence,[5] that the population is enabled to multiply, and so on. Thus, there is a

[3] *Supra* f.n. 1
[4] *Ibid.*
[5] Paul Rabinow, Governmentality, Essential Works of Foucault 1954-1984

whole series of specific finalities that become the objective of government as such. In order to achieve these various finalities, things must be disposed and this term, "dispose," is important because, with sovereignty, the instrument that allowed it to achieve its aim that is, obedience to the laws was the law itself: law and sovereignty were absolutely inseparable. On the contrary, with government it is a question of not imposing law on men but of disposing things: that is, of employing tactics rather than laws, and even of using laws themselves as tactics to arrange things in such a way that, through a certain number of means, such and such ends may be achieved. Considering the laborious and risky nature of the jobs, there is no compensation for injuries occurring within the work site. Physical Injuries of the manual scavengers majority of them are faced head injury, Leg injury, fainting, burning of eyes and nose burning, ear burning and bleeding, with the issue of manual scavenging, there is a view of that "Right to Health" must be included in the Fundamental Rights of Indian citizens, without any discrimination. Majority of the workers are at health risk but yet no specific governmental program relating to their health has yet been formalized or worked on. They are unable able to access any kind of emergency medical needs.[6]

INDIAN CONSTITUTION & RIGHT TO HEALTH

The Constitution has made health care services largely a responsibility of State governments but has left enough manoeuvrability for the Centre since a large number of items are listed in the concurrent list. When we look at right to health and healthcare in the legal and constitutional framework, it is clearly evident that the Constitution and laws of the land do not in any way accord health and healthcare the status of rights. In late 1970s, the Supreme Court began to give an expanded meaning to the term 'life' appearing in Article 21[7]. Over the years it has come to be accepted that life does not only mean animal existence but the life of a dignified human being with all its concomitant attributes. This would include a healthy environment and effective health care, whereas in case of manual scavengers it is clearly a violation of their fundamental right under Article 21.[8] The 'Right to Health' is inseparable from 'Right to Life', and the 'Right to Medical Facilities' as a concomitant of 'Right to Health' is also part and parcel of Right to Life. In a welfare state, the corresponding duty to the right to health and medical facility lies with the State facilities. It, is the duty of the state

[6]Paul Rabinow, Health A Social Medicine, Essential Works of Foucault 1954-1984
[7] Article 21,Constitution of India ,1950
[8] Goswami, S. Manual scavenging: A stinking legacy of suffocation and stigma, Down To Earth,2018

to ensure that in order to ensure right to life of Manual Scavengers, they should also ensure proper medical facilities and schemes so that, they don't feel alienated and denied their fundamental right to life which also include right to health as its basic constituent.[9]

RIGHT TO HEALTH & ACCESSIBILITY

Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions[10]:

- ***Non-discrimination*:** Health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.
- ***Physical accessibility*:** Health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas.
- ***Economic accessibility* (affordability):** Health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.
- ***Information accessibility:*** Accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

  If you consider the above types of barriers, we can very well connect how much the manual scavengers and safai karmachari's are denied their basic right to health because of accessibility issue. First of all there is no such exclusive health policy or

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[9] Tiwari, R.R.,Occupational health hazards in sewage and sanitary workers, Indian Journal of Occupational and Environmental Medicine, 12(3): 112–115.

[10] Adv. Mihir Desai & Adv. Kamayani Bali Mahabal, Fundamental Right to Health and Public Health Care Health Care Case Law in India A Reader, Centre for Enquiry into Health and Allied Themes Survey No. 2804 & 2805.

scheme is there for taking care of their medical needs, further because of the caste discrimination and low wages they face challenges in accessing the existing health care facilities also, even some have reported that in government hospitals doctors and nurses even avoid to interact and treat them cause of their caste and nature of work. Considering the kind of diseases and infection they are being exposed to, it needs special medical care and money for treatment. Due to lack of such intensive medical facilities and lower governmental hospitals, they are not being entitled to proper treatment and they are unable to afford the treatment considering financial constraints. So, as a whole we can conclude that the manual scavengers are facing worst form of denial when it comes to their access to health care facilities.

LEGAL SAFEGUARDS –HOW MUCH EFFECTIVE?

The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 ("Act") is a law against manual scavenging in India, prohibiting dry latrines and all kinds of manual cleaning of excrement, as well as the cleaning of gutters, sewers and septic tanks without protective gear (§7 & §9). However, since sanitation is a state subject, the implementation of the law is state-specific. However, the act of manual scavenging is more than a state issue; it is also a human rights violation. The Constitution of India, in conformity with the international position, abolishes un-touchability (Art. 17) and prohibits caste-based discrimination (Art. 15). Furthermore, under the Constitution human dignity is an inalienable right which is part of the fundamental right to life. [11] The Courts have held human dignity to be the most important, fundamental, inalienable and transcendental of rights. 'Dignity' has been interpreted to include equal treatment and respect, and equal protection of law. It is a universally recognized right, endorsed by instruments such as the Universal Declaration of Human Rights by way of Articles 1, 22 and 23.[12]

Sadly, despite such constitutional safeguards, manual scavengers remains victims of discrimination. There are a number of reasons for this.

[11] Swapnil Tripathi, Right to Dignity, not for Manual Scavengers: The neglected state of rights of scavengers in India, Oxford Human Rights Lab (Available at: https://ohrh.law.ox.ac.uk/the-dignity-and-rights-of-manual-scavengers-in-india/, last accessed on 24th August 2020 at 09:20PM)

[12]Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) available at http://www.un.org/en/universal-declaration-human-rights/

Firstly, as India is a federal democracy and sanitation falls within the competency of the states (Entry 6, List II, Schedule VII, and Constitution of India), the implementation of the prohibition on manual scavenging rests solely within the domain of the states. Hence, no collective/nation-wide action can be taken by the federal government.

Secondly, the law requires that the rehabilitation of scavengers has to be carried out as per the existing schemes, even though these very schemes have not been successful in eradicating the practice in the past.

Thirdly, it is not just the law but the attitude of public authorities which aggravates the plight of the scavengers. The Government has repeatedly sought an extension of deadline to curb the problem, exhibiting its lack of commitment. The present scheme of law therefore fails in protecting the dignity of manual scavengers. The end to manual scavenging can come not only by modernizing sanitation but by also ensuring former scavengers do not go back to it as a result of poverty or unemployment. Amendments to the current law, strict enforcement, and a change in mind-set are needed.

LOOPHOLES & CHALLENGES:

The MS Act 2013 prohibits manual scavenging and states that no person or agency can employ manual scavenger. Local authorities should demolish existing insanitary latrines (household or public) that require manual cleaning and it shall be illegal to construct any such latrines after this law. However, for cleaning sewers and septic tanks, the Act stops short of completely banning the practice of manual cleaning and states safety measures that should be taken. However, a study by Rashtriya Garima Abhiyan shows that most of the provisions are not adhered to as per the law.[13] The study covered 51 incidents in which 97 deaths were reported. It was found that not even in a single incident protective gear and safety devices were provided to the victims who are required under section 4 and 5 of the Act. Under section 6, various precautions like periodical check of protective gears and safety devices, providing body suits to the manual scavengers, presence of supervisor at the site of the cleaning, checking for oxygen level to avoid asphyxia were hardly followed. Similarly, section 7 of the Act require safety precautions in case of emergency; harness or any other method to bring injured manual scavenger out and availability of ambulance in close proximity to transport

[13] Rashtriya Garima Abhiyan (Justice Denied: Death of Workers engaged in manual scavenging while cleaning the Septic Tank or Sewer.

the injured. The study shows that the precautionary measures were almost absent in the incidents documented. Most of the deaths could have been avoided if these guidelines were followed. Hence, the implementation of the Act is far from satisfactory.[14]

RIGHT TO HEALTH CARE OF WORKER: CASE LAWS

Health and Health Care of Workers is an essential component of right to life. In ***CERC vs. Union of India,***[15] the Supreme Court was dealing with the rights of workers in asbestos manufacturing and health hazards related to it. The Court was dealing essentially with private employers involved in asbestos mining and industry. To begin with, the Court noted that the right to health and health care of a worker is a component of the fundamental right to life guaranteed under Article 21 of the Constitution of India. The Court observed:

"Article 38(1) lays down the foundation for human rights and enjoins the State to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Art. 46 direct the State to protect the poor from social injustice and all forms of exploitation. Article 39(e) charges that the policy of the State shall be to secure the health and strength of the workers". Article 42 mandates that the States shall make provision, statutory or executive "to secure just and humane conditions of work". Article 43 directs that the State shall "endeavour to secure to all workers, by suitable legislation or economic organisation or any other way to ensure decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workers". Article 48-A enjoins the State to protect and improve the environment .The right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery. Lack of health denudes his livelihood."

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Facilities for medical care and health against sickness ensure stable manpower for economic development and would generate devotion to duty and dedication to give the workers best physically as well as mentally in production of goods or services. Health of the worker enables him to enjoy the fruit of his labour, keeping him physically fit and mentally alert for

[14] Manual Scavenging In India: Tata Trust Policy Brief (Available at: https://www.tatatrusts.org/upload/pb-manual-scavenging.pdf, last accessed on 26th August 2020 at 11:18PM)
[15] Consumer Education & Research Centre vs Union Of India & Others, 1995 SCC (3) 42

leading a successful life, economically, socially and culturally. Medical facilities to protect the health of the workers are, therefore, the fundamental and human rights to the workmen.

On 12th July, 2011, in the case of, ***Delhi Jal Board Versus National Campaign for Dignity and Rights of the Sewerage and Allied Workers & Others*** [16] the Supreme Court held that the State could not "*absolve themselves of the responsibility to put in place effective mechanisms for ensuring safety of the workers employed for maintaining and cleaning the sewerage system*". The Supreme Court has recognised the plight of sewerage workers and the high risks they face in their jobs as amounting to a denial of their fundamental rights of equality, life and liberty. Hence, the Supreme Court pulled up the central government for its callousness in not enacting a law to ban manual scavenging and criticised the government for being insensitive to the safety and well-being of the workers. Numerous directives provided by the Supreme Court are outlined below:

- *Free medical examination and treatment to sewer workers and continuation of treatment until recovery or payment of compensation to those suffering from any occupational disease, ailment or accident in accordance with the provisions of the Workmen's Compensation Act, 1923;*
- *Sewer workers, including contract workers, shall get the payment of all statutory dues such as provident fund, gratuity and bonus;*
- *Workers shall be provided with all possible modern protective equipment;*
- *Employers shall provide soap and oil to all the workmen;*
- *Workers should be provided with restrooms and canteens, first-aid facilities, safe drinking water, washing facilities, latrines and urinals, shelters and crèches. These are to be provided at what are known as 'stores' or places where the workers assemble to give their attendance and from where they depart to their respective work sites.*

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STATUS OF HEALTH OF SAFAI KARMACHARIS

The Mortality rate in the category of these workers is higher in comparison to other trade/occupation. No data on their Mortality Rate/Infant Mortality Rate has been collected and compiled separately. Infant Mortality Rate also seems to be higher. Their infants are also

[16] Delhi Jal Board Versus National Campaign for Dignity and Rights of the Sewerage and Allied Workers & Others, Civil Appeal No..5322 OF 2011.

victims of malnutrition. Mostly due to being unaware, common vaccines like Polio, DPT, Khasra, Hepatitis etc. which are provided by the Government free of cost, are also not administered to their children, resulting a large number of their children suffering from such diseases which could have been avoided by immunizing. Due to un-hygienic conditions they work and live in, the Infant Mortality Rate (IMR) and Mother Mortality Rate(MMR) are very high in this group of people. However, no segregated data is maintained by the Central as well as State Governments.

CONCLUSION

Basic human rights cannot be denied to people who are working and rendering services to the larger community. However, if one looks at the condition of sewerage workers then a grotesque picture, wherein workers have been subjugated and marginalised, comes to light. Work health and safety aims and welfare of workers at work has been severely compromised in the case of sewerage workers. Very few workers are covered under the National Health Insurance Scheme. The permanent employees have the option of a deductible component from their salary, which goes towards maintaining an insurance plan. Owing to the low wages and the optional status of the same, it is not very effective. Contract workers have no access to medical facilities and tests by design.[17] Non availability of comprehensive Occupational Safety and Health Act, separate Occupational Safety and Health Administration and even the non-availability of waste management workers occupation safety rules and regulations. Sanitation and health-care are essential components for a good quality of life. A safai karamchari or a scavenger or other sanitation worker handling night soil, filth, garbage, dead animals, cleaning of sewers, nallas including sweeping of streets and roads, all are exposed to serious health hazards and are prone to contacting diseases.

In Safai Karamchari Andolan v. Union of India[18], the Supreme Court directed the government to completely abolish the practice and provide for the rehabilitation of people released from manual scavenging. However, no progress has been made.[19]It is clear that the judiciary has been taking active steps to ensure respect for the human rights of manual scavengers, but such steps without the support of the others organs of government is to no avail. The Ministry of Social Justice and Empowerment has recently drafted a proposal for an

[17] Supra f.n. 11
[18] Safai Karamchari Andolan v. Union of India , Writ Petition (Civil) No. 583 Of 2003
[19] *Ibid.*

improved implementation of the Act. The proposal provides for revised safety standards, stricter punishments for contractors and better rehabilitation machinery for the scavengers. It is hoped that the proposal will be implemented quickly. They continue to work hard even after undergoing major surgeries like hysterectomy, without being allowed enough time to rest. This causes them to lead not just an unhealthy life, but a painful one as well. In Mahatma Gandhi's words:

"We have reduced them to the level of the beast. They earn a few coppers but only at the expense of their human dignity. The weight of oppression has crushed them. It is enough to break one's heart to see them eating their food, covering under the shadow of the latrine wall."[20]



[20]National Commission for Safai Karamcharis Report 2006-2007, (Available at: https://ncsk.nic.in/sites/default/files/Binder4.pdf, last accessed on 28th August 2020 at 12:34AM)

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Privacy preservation for Abstracting Anonymization Techniques using Generalization Algorithm

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Abstract— The ongoing improvements around open information featured the significant issue of anonymization with regards to information distributing. Many research endeavors were given to the meaning of strategies performing such an anonymization. Anyway the determination of the most applicable method and the satisfactory calculation is perplexing. Effective choice relies right off the bat upon the capacity of information distributers to comprehend the anonymization systems and their related calculations. In this paper, we center around the decision of a calculation among the various ones executing one of the anonymization systems, to be specific speculation. Through a reflection procedure displayed in this paper, we give information distributers improved depictions for the speculation system and its calculations. These depictions encourage the comprehension of the calculations by information distributers having low programming aptitudes. We present additionally some other use instances of these deliberations just as an experimentation directed to approve them.
Keywords : Anonymization, Programming aptitude.

INTRODUCTION

The open information activity is an open door for making an immense measure of data available to end clients. In any case, information distributers are confronting the issue of discharging helpful information without trading off protection. The eventual fate of their business relies upon their capacity both to offer helpful information to open, to examiners, to scientists, and so on and to pick up the trust of information proprietors. The last requires executing forms that forestall the abuse of their delicate data. Thusly, information on anonymization methods gets essential for information distributers. In specific, through this information, they should pick the suitable calculation given their unique circumstance.

Scrambling calculations are various. They are commonly portrayed gratitude to their launch in a given setting. Papers portraying these calculations center around the experimentations prompting execution assessment. In addition, a few reviews proposed in the writing are utilization arranged. They for the most part break down various anonymization procedures featuring their focal points and downsides so as to propose explore headings. Others are method situated. Their correlations of calculations are for the most part devoted to scientists wishing to take a shot at information anonymization and in this manner are not open to information distributers having commonly low aptitudes in information anonymization. Moreover, existing devices are obscure. Regardless of whether they propose a few procedures, they execute, more often than not, just a single calculation for every strategy without portraying it. Additionally, the vast majority of these apparatuses don't give direction to the selection of calculations or procedures.

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Notwithstanding, this assistance comprises in exhibiting an assessment of the anonymized informational collection coming about because of the client's unique informational collection. On the off chance that the client is unsatisfied, the instrument offers him/her the likelihood to change the information parameters of the calculation. In this way, its utilization requires a lot of aptitude. At long last, the extent that we know, there exists neither one of the knowledges bases where information distributers could look for the missing data nor ways to deal with direct them in the anonymization procedure. Our exploration questions are: How can an information distributer pick an anonymization system and, in the arrangement of calculations actualizing this procedure, an anonymization calculation? An initial move toward responding to these inquiries is to furnish information distributers with improved depictions of the methods and the calculations, permitting them to get them, even without the necessary programming abilities. We are persuaded that this progression is important for basic leadership. These disentangled depictions are acquired through a reflection procedure comprising in removing and formalizing information inserted in the writing so as to make it accessible through data assets. Confronting the wealth of the writing, in this paper, we focus our exertion on the speculation system for relational databases.

2 Preliminaries

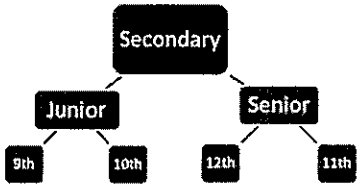
Privacy is one of the major concerns when publishing or sharing data. It refers to different forms of disclosureregarding the type of published or shared content. Identity disclosure, for instance, can occur when publishing orsharing personnel data. In our research, we focus on microdata (atomic data elements describing the individualobjects) contained in relational databases. Each tuple has a value (microdata) for each relational attribute. The lattercan be an explicit identifier, a quasi-identifier, a sensitive attribute or a non-sensitive one. An explicit identifier (EI) A quasi-identifier (QI) is an attribute set which, when linked to external information, enables the re-identificationof individuals whose identifiers were removed ({sex, zip code, and birthdate} is a well-known quasi-identifier inmany data sets). A sensitive attribute (SA) represents data that individuals don't want to divulgate, such as medicalinformation. Non-sensitive attributes (NSA) are all attributes that are not included in previous categories. Forinstance, at Fig. 1a representing the original data set to be anonymized, the attributes "Age" and "Education" mayconstitute a QI. The attribute "Disease" is a sensitive attribute (SA).

Explicit identifier	Quasi Identifier		Sensitive attribute
Name	Age	Education	Disease
Ajay	20	10^{th}	Flu
Chand	20	9^{th}	Flu
Ram	28	9^{th}	Diabetes
Krishna	30	9^{th}	Cancer
Sudhir	23	11^{th}	Cancer
Basha	23	11^{th}	Cancer

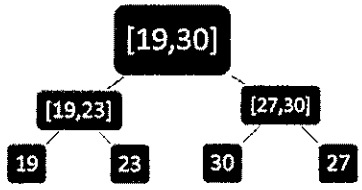
(a)

Age	Education	Disease
[19,23]	Junior	Diabetes
[19,23]	Junior	Cancer
[27,30]	Junior	Flu
[27,30]	Junior	Flu
[19,23]	Senior	Cancer
[19,23]	Senior	Cancer

(b)



(c)



(d)

Fig. 1. (a) Original data; (b) generalized data; (c) & (d) generalization hierarchies

Companies may implement specific techniques to protect their data from disclosure risk. Most of them are knownas privacy preserving data publishing (PPDP) or mining (PPDM) techniques. To our knowledge, the mostfamiliar

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techniques for microdata anonymization are: data swapping,adding noise, micro-aggregationandgeneralization. In this paper, we focus on the generalization technique and its algorithms. The generalization isapplied on a QI. Each QI attribute could be either continuous or categorical. A continuous attribute is numerical andmay take an infinite number of different real values (e.g. "Age" in Fig. 1a). A categorical attribute takes a value in alimited set and arithmetic operations on it do not make sense (e.g. "Education" in Fig. 1a). Generalization techniquerequires the definition of a hierarchy for each attribute of the QI. Each hierarchy contains at least two levels. Theroot is the most general value. It represents the highest level. The leaves correspond to the original data values andconstitute the lowest level. As an example, the tree at Fig. 1c represents a generalization hierarchy of the attribute"Education". The node "Junior" is at the level 1 of the Education hierarchy. To avoid possible re-identification ofindividuals, several privacy models have been proposed: k-anonymity, l-diversity, t-closeness, etc. In this paper, weplace special emphasis on k-anonymity since all generalization algorithms are based on it. Let k be an integer. Atable satisfies k-anonymity if each release of data is such that every combination of values of QI can be indistinctlymatched to at least k individuals11. As an example, the table in Fig. 1b is a generalization of the original table of Fig.1a satisfying 2-anonymity, regarding (Age, Education) QI.The generalization technique is implemented thanks to several different algorithms. The best known are:-argus, Datafly, Samarati's algorithm, Incognito, Bottom Up Generalization, Top Down Specialization,Median Mondrian, Infogain Mondrian and LSD Mondrian. In our previous work, we have compared thesealgorithms in terms of process models, having four main constituents: pre-requisites, inputs, process logic, andoutputs. Regarding the inputs, all generalization algorithms require at least: (i) to set the value of k (corresponding tok-anonymity), (ii) to declare which columns constitute the QI, and (iii) to provide the generalization hierarchies.

From a process point of view, we can notice that some algorithms are completely automatic. Moreover, some ofthem are bottom up processes i.e. small groups of tuples are constituted and then iteratively merged until eachgroup contains at least k rows (k-anonymity satisfaction). Others are top down processesi.e. they start from agroup containing all rows and iteratively split each group into two subgroups while preserving k-anonymity.Regarding the outputs, some algorithms compute an optimal k-anonymity solution but they are limited to small datasets[20]. Others are based on heuristics and thus do not guarantee the optimality. Finally, the algorithms perform threedifferent generalizations that we define as: full-domain, sub-tree and multidimensional generalization. Full-domainmeans that, for a given QI column, all the values in the output table belong to the same level of the generalizationhierarchy. Sub-tree means that values sharing the same direct parent in the hierarchy are necessarily generalized atthe same level, taking the value of one of their common ancestors. Finally, in multidimensional generalizations, twoidentical values in the original table may lead to different generalized values (i.e. are not always generalized at thesame level). In terms of usage scenario, let us note that bottom up generalization, top down specialization andInfoGain Mondrian produce data for classification tasks. LSD Mondrian is used when regression must be performedon data.

3 Abstraction approach

We aim at providing data publishers with a deep knowledge of generalization algorithms' behavior. Hence, weperformed an abstraction process of all these algorithms, allowing us to map them into a common frame. Ashighlighted by Wing: "The abstraction process introduces layers. In computer science, we work simultaneouslywith at least two, usually more, layers of abstraction: the layer of interest and the layer below; or the layer of interestand the layer above". In our case, using an example artifact of the algorithm (layer below), we defined anabstraction of the algorithm artifact (layer of interest). Moreover, in software and information systems engineering,the motivations for abstraction are manifold. In our

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research, two main reasons strengthen our choices. First, throughthis abstraction process, we aim to describe the different steps of the generalization algorithms as simply as possibleto facilitate their appropriation and adoption. Second, we wish to highlight the requirements of each algorithm inorder to introduce them as meta-data. Taking into account these two motivations, we built an abstraction byparameterization. As defined by Navrat et al., "Abstraction by parameterization extracts an essential core of somecomputational elements and reifies them as a named element of its own, leaving parameters to be filled in when theabstraction is instantiated". Moreover, in order to reach an overall understanding of these algorithms, we conductedan inductive process, also called generalization in Navrat et al that presents all these algorithms using a commondescription. These two sub-processes are described in the following paragraphs.

3.1. Abstraction by parametrization of the generalization algorithms

In most papers, the generalization algorithms are presented in such a way that they can be directly translated intoa program. Usually, they are usually partially instantiated using an example of a table to be anonymized. Their basicprinciples are textually described. Therefore they are dedicated to computer scientists or to professionals having aprogramming background. To produce a more abstract description of the generalization algorithms, we have filteredaway all irrelevant information and sometimes added information in order to facilitate the extraction of content.Since an algorithm is a dynamic artifact, we chose to represent it via a flowchart. The latter is quite helpful inunderstanding the logic of complex problems. For lack of space, we present the results of our abstraction process foronly three algorithms: Datafly, Top Down specialization (TDS) and Median Mondrian algorithms. Datafly was thefirst algorithm able to meet the k-anonymity requirement for a big set of real data. It combines generalization of dataand suppression of tuples in order to avoid an excessive generalization which would reduce data usefulness. At eachiteration, DataFly (a) generalizes the attributes having the highest number of distinct values, (b) and checks whetherthe resulting table complies with the k-anonymity. If the number of tuples which do not satisfy k-anonymity is equalor lower than k, then these tuples are removed and the algorithm stops. Otherwise, the algorithm performs anotheriteration of generalization. In the description of Fig. 2a, let PT represent the table to be anonymized, k the kanonymityconstraint threshold, DGHAi the generalization hierarchy of the attribute Ai, and MGT the resulting Fig. 2(a) focuses more on the implementation of Datafly than on its functioning principle.

INPUT: Private Table PT; quasi-identifier $QI = \langle A1, \ldots, An \rangle$, k constraint; hierarchies DGH_{Ai}, where $i = 1, \ldots, n$.

Output: MGT, a generalization of $PT[QI]$ with respect to k

Assumes: $|PT| \geq k$

Method:

1. $freq$ ← a frequency list contains distinct sequences of values of $PT[QI]$, along with the number of occurrences of each sequence.
2. ***While there exists*** sequences in $freq$ occurring less than k times that account for more than k tuples ***do***
2.1. ***Let*** A_i be attribute in $freq$ having the most number of distinct values
2.2. $freq$ ← generalize the values of A_i in $freq$
3. $freq$ ← suppress sequences in $freq$ occurring less than k times.
4. $freq$ ← enforce k requirement on suppressed tuples in $freq$
5. *Return MGT* ← construct table from $freq$

(a)

1. ***Algorithm TDS***
2. Initialize every value in T to the top most value.
3. Initialize $Cut_i$to include the top most value.
4. ***while*** some $x \in UCut_i$is valid and beneficial ***do***
5. Find the Best specialization from $UCut_i$.
6. Perform Best on T and update $UCut_i$.
7. Update $Score(x)$ and validity for $x \in UCut_i$.
8. ***end while***
9. ***return*** Generalized T and $UCut_i$.

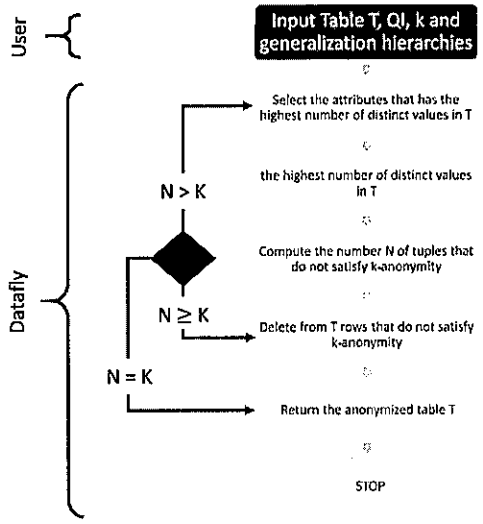
(b)

Fig. 2. (a) Datafly Algorithm13; (b) Top-Down Specialization Algorithm (TDS)

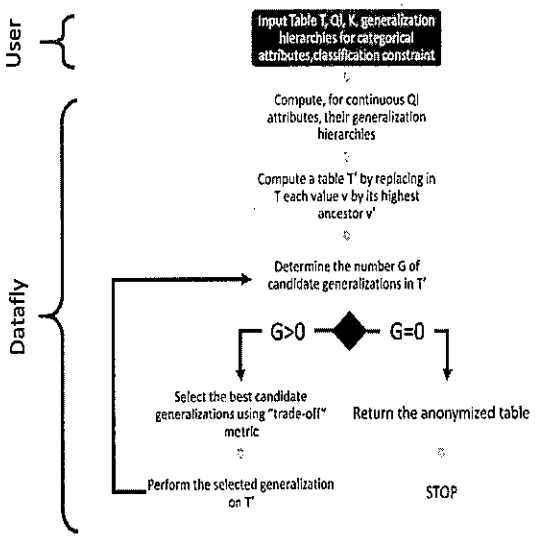
The abstractpresentation at Fig. 3a highlights the basic principle and therefore facilitates the understanding. In this abstraction,Datafly generalizes one attribute at a time. At each iteration, it selects (as mentioned in step 2) the one that has thebest score (the highest number of distinct values in the current table). The execution stops when the k-anonymity isreached. The second example describes the TDS algorithm extracted from Fung et al.16 (Fig. 2b). It browses thegeneralization hierarchy

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from top to bottom. A high generalization of all the values of the



(a)

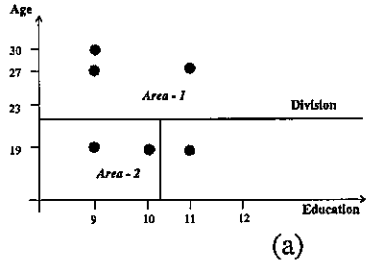


(b)

Fig. 3. (a) Abstraction of Datafly algorithm; (b) Abstraction of TDS algorithm

original table preserves k-anonymitybut can negatively impact the quality of the resulting table in terms of classification. Therefore TDSperforms iterations to find the best specializations i.e. those that not only satisfy k-anonymity but also generate lessanonymity loss, thus enabling better classification quality. Intuitively, in this algorithm, ∪CUTi represents all the candidate specializations (the process is a top down process in the sense that it browses the generalizationhierarchies from top to down). At the initialization step (line 3) ∪CUTi is a single set, denoted CUTi in thealgorithm. Valid and beneficial specializations (denoted x) are specializations that do not violate the k-anonymityand that respect the classification constraint (TDS is dedicated to data mining usage, and especially to classificationalgorithms). Best specializations are valid and beneficial specializations that, moreover, reach the best score(denoted Score (x) in the algorithm) in terms of security and quality. This score is computed using the trade-offmetric20. The abstraction process of this algorithm leads to the model sketched at Fig. 3b.Through this abstraction we exhibit the fact that TDS starts from a table T' which represents a high level ofgeneralization, giving priority to security at the expense of quality. Then in order to find the best compromisebetween quality and security (the trade-off metric serves this purpose), TDS tries to get closer to the actual values ofT.

The last example of generalization algorithm is Median Mondrian[17]. Its principle is to divide the set ofindividuals (tuples) represented in the table into groups such that each group contains at least k individuals. Then,the individuals of the same group will have the same value for their QI via the generalization process. Moreprecisely, individuals (tuples of the original table) are represented, thanks to the values of their QI, in amultidimensional space where each dimension corresponds to an attribute of the QI (Fig. 4a). The splitting of thespace into areas generates the groups. It is performed using the median value of the attribute.



(a)

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```
Anonymize (partition)
1. if (no allowable multidimensional cut for partition)
2. then return Φ : partition → summary
3. else
   3.1. Dim ← choose_dimention( )
   3.2. fs ← frequency_set(partition, dim)
   3.3. splitVal ← find_median(fs)
   3.4. lhs ← {t ∈ partition : t.dim ≤ splitVal}
   3.5. lhs ← {t ∈ partition : t.dim ≤ splitVal}
   3.6. return Anonymize (rhs) ∪ Anonymize (lhs)
```

(b)

Fig. 4. Principle of Median Mondrian and its algorithm

At each iteration, the algorithm chooses a dimension and checks the possibility of splitting a group into twogroups (i.e. splitting the area on the median value of this dimension). A group can be divided into two groups if eachresulting group contains at least k individuals. If the division is not possible, the corresponding group is marked. Thesplitting process switches to another dimension when all groups are marked for the current dimension. It stops whenall dimensions have been explored. Then the algorithm performs the possible generalizations, replacing the differentvalues in the same area with the value of their first common parent in the generalization hierarchy (recodingprocess). As shown at Fig. 4b, the algorithm is recursive. At the first iteration, "partition" contains all the tuples ofthe table to anonymize. The function "choose_dimension()" (resp. "frequency_set(partition, dim)") returns thechosen dimension (resp. the set «fs» of values taken by a given dimension "dim" in a given partition "partition").

The function find_median(fs) returns the value "splitVal" of the median. "t.dim" is the value of a given dimension"dim" for the tuple "t". The summary consists of the generalization of a set of values belonging to the samepartition. It is defined by a value range where the lower limit (resp. upper limit) corresponds to the smallest value(resp. to the largest value) in the partition. Our abstraction of Median Mondrian leads to the activity diagram at Fig.5.

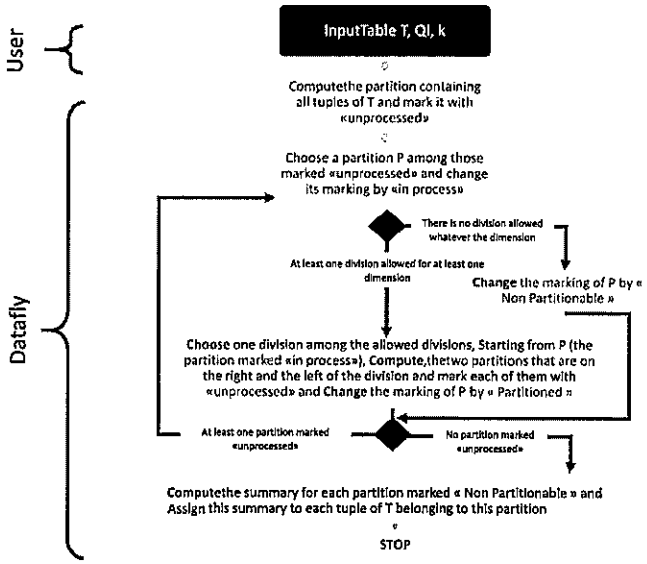


Fig. 5. Abstraction of Median Mondrian

In order to validate our contribution, we conducted an experiment. The objective was to evaluate theunderstandability of our abstraction by comparing it with those found in the literature. We performed thecomparison for two algorithms, namely Datafly and Median Mondrian. A total of 12 participants were recruited.They were all either post-graduate students or researchers in computer science. Therefore, all of them were familiarwith algorithmic and programming techniques but not aware of anonymization algorithms. To avoid any biasedinterpretation of the results, we have provided the participants with the same types of representations: ourabstractions have been transformed into textual representation (algorithms).

The experiment lasted about four hours. First the participants had to fill a questionnaire about their level ofknowledge in anonymization techniques (they had to evaluate their level using a scale of 1 to 10) and theirprogramming skills (they had to say if they have ancient, recent or very recent programming skills). Second, allparticipants were given a brief presentation on anonymization with emphasis on the generalization technique. Thenthey received a copy of the slides and sheets of papers for taking down notes. Third, they were

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divided into twohomogeneous groups based on their programming profiles. We have defined three profiles (1 for ancient, 2 forrecent, and 3 for very recent). Then we provided all the participants with a small table to anonymize and asked themto execute manually three algorithms mentioned in their sheet without time limit. For the first group of participantswe proposed, successively, our abstraction of Datafly, then the algorithm of Figure 2a and, finally, the MedianMondrian of Figure 4b. The second group had to execute our abstraction of Median Mondrian, followed by theMedian Mondrian of Figure 4b and Datafly of Figure 2a. We attached to Median Mondrian and Datafly theexplanation proposed by their authors. Whenever a participant met a problem to complete the execution of an algorithm, he (or she) was invited to indicate on his/her sheet the reason for blockage. In the last phase of theexperiment process, the participants had to answer the following questions:

□ Was the initial presentation sufficient for being able to execute the algorithms? If your answer is no, pleaseexplain which information was missing.
□ Did you detect similarities between some of the algorithms you had to execute?
□ Did you detect identical algorithms (even if differently described)?
□ Do you think that one algorithm helped you in understanding another one?
The participants had also to assign to each algorithm a level of difficulty on a scale from 1 to 10

Following the experiment, we started analyzing the collected information. 12 participants executed threealgorithms each. We rejected three illegible executions out of the 36. For each algorithm, the legible executions havebeen grouped into three classes. The first (resp. the second one) gathered all the correct executions (resp. all thepartial executions). The last class contained all the erroneous executions. For the partial executions we have deducedfrom the comments of the participants three reasons for blocking. The first one is related to the interpretation of the while instruction of the original Datafly (Fig. 2a). The second one was the disability to understand the data structure"freq" in the same algorithm. Finally, the third reason for blocking was the double recursion of the original MedianMondrian (Fig. 4b). Table 1 summarizes the results. For each algorithm and each profile, the percentages oferroneous, correct and partially correct executions are mentioned.

	Datafly of Fig. 3a			Datafly of Fig. 2a			Median Mondrian of Fig. 5			Median Mondrian of Fig. 4b		
Class	Erroneous	Correct	Partial	Erroneous	Correct	Partial	Erroneous	Correct	Partial	Erroneous	Correct	Partial
Profile 1	20%	0%	0%	20%	0%	0%	20%	20%	0%	20%	0%	10%
Profile 2	0%	40%	0%	0%	20%	20%	0%	20%	0%	0%	20%	10%
Profile 3	0%	40%	0%	0%	20%	20%	0%	40%	0%	0%	40%	0%

Table 1. Synthesis of data collected from the experiment

All the participants who have executed our abstractions didn't face blocking difficulties. Moreover, only thosethat had ancient knowledge obtained erroneous executions and they are few. Only those who first performed theexecution of Datafly abstraction have then proposed a correct execution of the original Datafly. The sameobservation emerged for Median Mondrian. They unanimously mentioned in the post questionnaire that ourabstraction helped them understanding the original algorithms. Moreover they have ranked the original algorithmsas more difficult to understand than our abstractions. All the participants that met a blockage in the original Datafly(40%) have not executed our abstraction. It is the same

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for the original Median Mondrian. Finally, over the 20%who delivered an erroneous execution for the original Median Mondrian, 50% had not used our abstraction.

To sum up, this analysis revealed that the lack of intelligibility of the original algorithms impacts all participantswhatever their programming skills. Threats to validity must be mentioned due to the limited size of ourexperimentation group and the restriction of the study to only two algorithms. However, this first analysisencourages us to persevere in this abstraction effort. We wanted to check if our algorithm representation was easierto understand than the classical one. Therefore, our pool of testers was composed of persons with programmingskills. Thus, they were able to understand both representations. We evaluated both perceived usefulness andobjective usefulness. Perceived usefulness was captured through direct queries regarding how they could understandthe underlying logic of each algorithm. Objective usefulness was measured through the correctness of the resultobtained by participants. Thus, if users with programming skills prefer better perform our abstraction, how muchmore data publishers with less programming skills will be at ease with it.

3.2. Generalization process of the abstracted algorithms.

The nine algorithms reviewed in our research are all based on generalization techniques. Our abstraction processled us to the identification of three categories using the parameterization and the generalization process describedabove. This abstraction process followed a bottom-up logic and a one-to-many mapping. Abstracting each algorithm allowed us eliciting similarities and grouping algorithms into categories. Each category is also associated to anabstract representation. Hence we defined a one-to-many mapping between this representation and the differentalgorithms belonging to this category.

We have first grouped the algorithms into categories regarding their basic principles and their type of resultinggeneralization. The first category called MR Recoding1 groups together the algorithms generating multidimensionalgeneralizations (Median Mondrian, InfoGain Mondrian and LSD Mondrian). Their basic specificity is to considertogether all the attributes of the QI.

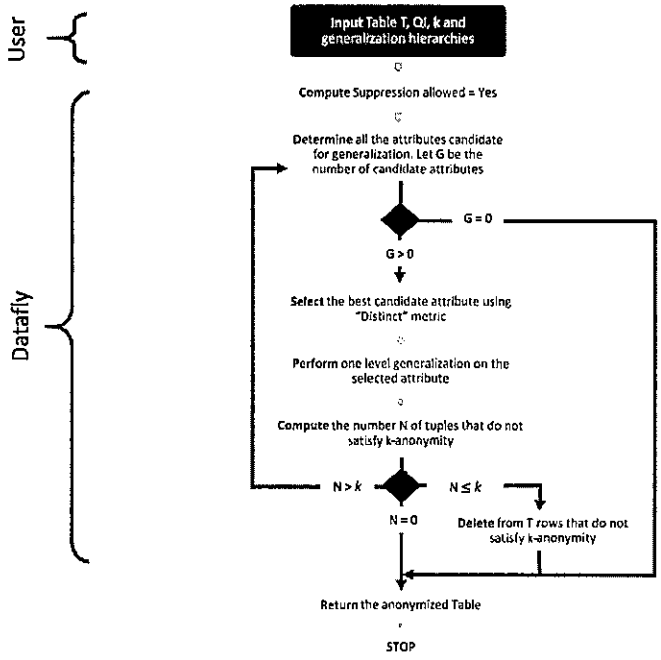


Fig. 6. Homogenized abstraction of Datafly algorithm

They iteratively divide the set of tuples into groups such that each group satisfiesk-anonymity. Conversely, in the two other categories (LR Recoding and TR Recoding), the generalizations are notmultidimensional. Moreover, at each iteration, they only deal with one attribute of the QI. LR Recoding

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gathersalgorithms based on a lattice structure representing all the possible generalizations of the original table. Samaratiand Incognito algorithms belong to this category. Finally, TR Recoding includes Datafly, μ-argus, bottom-upgeneralization and top down specialization algorithms. Their specificity is to build directly and iteratively ananonymized table. In order to provide each category with an abstraction, we had to homogenize the nineabstractions. For instance, we had to transform TR Recoding abstractions since some algorithms of this category aretop down processes and others are bottom up, some of them include local or global suppressions and others onlyperform generalizations. Thus, we have introduced a parameter allowing or disallowing suppressions. For example,Datafly allows suppressions (Fig. 6).

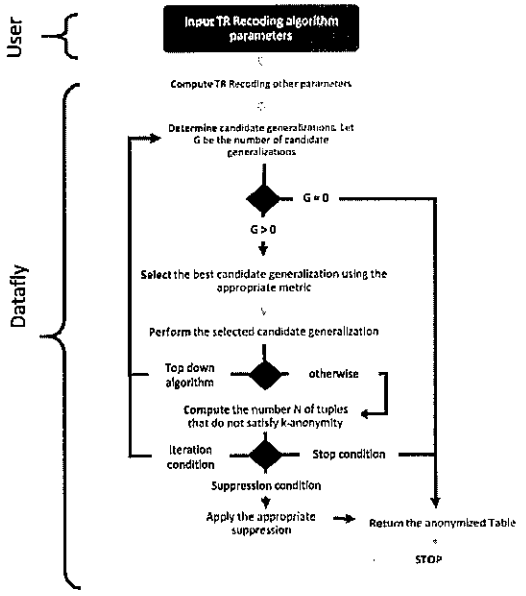


Fig. 7. Abstraction of TR Recoding algorithms

We also rephrased some instructions by defining new concepts in order to reach a unique abstraction for eachcategory of algorithms and thus to allow parameterization. For instance, in order to homogenize the concepts "candidate generalization" and "best candidate generalization" with Datafly concepts, we introduced in the latter theconcepts of "candidate attribute" and "best candidate attribute". As another example of standardization, since eachalgorithm has its own metric to select the best generalization, we introduced a parameter called "appropriate metric"
in the abstraction of TR Recoding (Fig. 7). This parameter takes the value "Distinct metric" for DataFly and "Tradeoffmetric" in TDS. Thus, the abstraction of Fig. 7 may be instantiated into the four algorithms thanks to a correctparameterization. The same process allowed us to obtain an abstraction for all nine algorithms and for the threerecoding categories. For space reasons, we cannot provide the reader with all the abstractions. Following thisbottom-up logic, we have performed the same abstraction effort to homogenize the three types of recoding. Wegenerated the abstraction of Fig. 8a which in fact represents the generalization technique. Figure 8b instantiates thisprocess for Recoding TR. Step numbers refer to Fig. 7. Thus our recurring abstraction process resulted in ataxonomy of generalization algorithms (Fig. 8). We have defined an abstraction by parameterization usingflowcharts for all the nodes of this taxonomy.

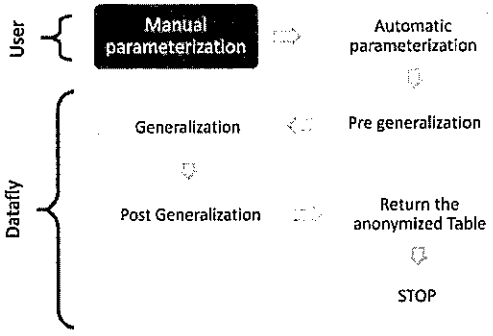


Fig. 8. (a) Abstraction of the generalization technique;

Parameterization components	Instantiation for TR recoding
Manual parameterization	step 1
Automatic parameterization	step 2
Pre generalization	step 3 and 4
Generalization	step 5
Post generalization	step 6 and 7

Fig 8 (b) An instantiation of the generalization technique

Thus our recurring abstraction process resulted in a taxonomy of generalization algorithms (Fig. 8). We havebuilt an

abstraction by parameterization using flowcharts for all the nodes of this taxonomy.

4. Conclusion

An extensive attention has been paid to privacy protection by statistics and computer science communities overthese past years. A large body of research deals with anonymization techniques and algorithms. Our research is notdevoted to new algorithms or new techniques. We want to help data publishers with low programming skills inunderstanding the existing techniques and algorithms. This help is made possible thanks to simplifiedrepresentations associated to each technique and algorithm. In this paper, we focused on the generalizationtechnique and on nine of its algorithms, since it is one of the most used techniques for tabular data. The simplifiedrepresentations have been obtained through an abstraction process described in the paper. The abstraction effortallowed us to detect similar behaviors between the nine algorithms and thus to define three main categories ofgeneralization algorithms. We also defined an abstract model for each category and finally an abstraction of thegeneralization technique. Finally, thanks to our categorization, we built a taxonomy of these generalizationalgorithms, helping a novice to understand how all these anonymization algorithms may be differentiated. For spacereasons, the paper only contains some abstraction models. We conducted a controlled experiment, leading toencouraging results since participants found that the proposed abstractions were very useful to understand thealgorithms whatever their programming skills. These abstractions constitute a first step towards the design ofpatterns that will be part of a catalog. The latter will be made available through a guidance approach we plan todesign. A pattern documents either a technique or an algorithm through its intent, its context of use, its inputs, and

its process with an illustrative example. The first three constituents of the pattern are extracted from our previousAnother use case of our abstractions lies in the context of e-learning. Our abstractions may serve as a basis for thedevelopment of tutorials whose purpose is to assist data stewards, students and researchers in learning how to useanonymization algorithms and then to provide them with a well-informed usage of existing anonymization tools. Toensure a better transfer of knowledge, these tutorials could be contextualized according to the level of expertise oftheir potential users. Moreover, we are convinced that our taxonomy can be a starting point for the design of anontology of anonymization techniques and algorithms. This ontology will exhibit conflicts between techniques andthen will contribute to a definition of combined anonymization scenarios for a whole database. Finally, we believethat the availability of such knowledge should facilitate the adoption of new anonymization techniques andminimize the loss of competencies that arise when an employee leaves the company.

Finally, we also expect to develop ontology of techniques andalgorithms. This ontology could be the main component for a decision support system helping a data publisher inselecting the suitable technique and algorithm given a context.

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Enforcement of foreign arbitral awards and the public policy exception: a comparative analysis of English, French and Indian approaches

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*278 Abstract

Public policy is the most frequently invoked ground to resist enforcement of a foreign award. Nevertheless, it is shrouded in uncertainties. The concept is vague. The criteria to refuse enforcement has only a semblance of objectivity and the ease at which the ground can be invoked poses a serious challenge to the efficacy of international commercial arbitration as a mechanism by causing delay. The courts have a duty to protect the public interest, which they do by invoking the doctrine of public policy, but they must not ignore the public interest involved in the timely enforcement of foreign awards. In this paper I have analysed the approach of the English, French and Indian courts with respect to the criteria adopted, the threshold followed by them to refuse the enforcement and also the extent of their powers to review an award.

I. Introduction

Public policy is a ground which is invoked quite frequently to resist recognition and enforcement of foreign arbitral awards.[1] Among all the grounds mentioned in the New York Convention permitting refusal to enforce an award,[2] it is "probably the most misused ground".[3] Despite its crucial significance this is an area "in *279 respect of which"[4] "discrepancies"[5] still continue. This ground is generally invoked to defend public interest, which is a very vague concept.[6] Owing to the said vagueness, it is so easy to invoke this ground, it is rightly said that it has become "fashionable" to raise it.[7] In the same vein, another commentator quips that it would require a "pedestrian lawyer to fail to find some basis for invoking public policy in most moderately complex commercial disputes".[8] Even though it is rarely invoked with success,[9] the invocation surely causes delay,[10] which is an anathema to international arbitration.

It was essential to provide this ground in the New York Convention because no nation state can be expected to open its legal system completely without reserving a right to refuse enforcement of rights acquired under foreign laws, which it considers harmful or repugnant to its sense of justice or morality.[11] Public policy is the tool which enables a state to achieve this. A major problem with this ground is that it "evades a general precise definition",[12] owing to "States' sovereignty over defining"[13] it.

Determining the concept and the threshold

Despite numerous discussions by legal philosophers, jurists and courts, the concept of public policy has remained elusive. Thus, Shatten says that fundamental questions like "What is public policy? How is it determined? What are its *280 limitations?", have remained inconclusive despite having received attention of the likes of Ehlrich, Pound, Holmes and Cardozo.[14] Similarly, according to Sir John Donaldson MR: "Considerations of public policy can never be exhaustively defined".[15] Therefore, the wise have advised to resist the temptation to get astride since it is an "unruly horse".[16] On the other hand, the courageous think that: "With a good man in the saddle, the unruly horse can be kept in control".[17] It has received extraordinary contradictory treatment, as Winfield says that some judges have treated "it more like a tiger, and have refused to mount it at all ... Others have regarded it like Balaam's ass which would carry its rider nowhere".[18]

Kent Murphy is very apt when he says that: "Public policy occupies a unique position in the law as a vague body of moral and legal percepts, which have successfully resisted statutory formulation or judicial definition".[19] He further states that "it is now generally accepted that public policy is defined by the use courts find for it".[20] This means its functional aspect is a lot more important than the conceptual one. Accordingly, I shall focus on the functional aspect of the doctrine without worrying much about a juristic definition of the same.

It is true that public policy is such an area where it would be futile to achieve uniformity as far as its content is concerned. "Even the drafters of the New York Convention did not seek overtly to attempt to harmonize public policy by establishing an international standard".[21] There is no dispute that the content of public policy would vary from state to state. But what is desirable is a kind of a predictable threshold, required for a state to invoke this highly potent weapon from its armory to torpedo the attempt to enforce a foreign award in its territory.[22]

Such a threshold was mentioned by a US court in the RAKTA[23] case which is often relied upon internationally in this respect.[24] The court in RAKTA stated that: "Enforcement of foreign arbitral awards may be denied on this basis (i.e. public policy) only where enforcement would violate the forum state's most basic notions of morality and justice".[25] This standard is in one way quite objective, but involves a great degree of subjectivity too, as the courts have tremendous leverage in determining what constitutes the basic notions of morality and justice in their legal *281 order, and can thus refuse to enforce an otherwise valid award. At times this may be a case of misuse of the concept and at times misunderstanding it. There is a constant need to address both.

The applicable variant

In furtherance of the same, we first need to know the type of public policy which shall be applied by the national courts at the time of enforcement of a Convention award. There are three variants of public policy, namely domestic public policy, international public policy and transnational public policy.[26] Among them, domestic public policy has the widest amplitude and transnational public policy the narrowest. According to the New York Convention, enforcement can be refused if it would violate the public policy of the country where enforcement is sought.[27] Thus, it is clear that the framers of the Convention did not intend to apply the transnational public policy, but it is not clear whether the reference is to the domestic public policy or the international public policy of the country of enforcement.[28] According to van den Berg, the notion of public policy in art.V(2)(b) of the New York Convention refers to international public policy and not to domestic public policy.[29] It is so because the

New York Convention requires that "the public policy criterion should not be given a broad scope of application"[30] and it does not require much explanation that international public policy is narrower than domestic public policy.[31]

The problem of not specifying the variant of public policy applicable at the stage of enforcement of a foreign award is prevalent in domestic legislation also. Thus, s.103(3) the English Arbitration Act 1996 states that: "Recognition or enforcement of the award may also be refused ... if it would be contrary to public policy to recognise or enforce the award".[32] Although Indian law provides that enforcement can be refused if it would be against the *public policy* of India, it too does not specify whether the reference is to the domestic public policy or international public policy.[33] Among the three jurisdictions discussed here, only French law makes it clear that enforcement of an award can be refused if the enforcement "is contrary to international public policy". ***282** [34]

The various uncertainties associated with the public policy ground, necessitates a constant effort to remove or at least minimise them, so as to make its invocation more predictable and "discourage speculative challenges and facilitate the finality of arbitral awards".[35] This cannot be done in isolation. We need to learn from each other's experiences. In this process I am going to analyse herein, the approaches of the English, French and Indian courts with respect to the application of the public policy defence, provided under the New York Convention.

II. The English approach

Section 103(3) of the English Arbitration Act, allows refusal of the recognition and enforcement of a Convention award on the ground of public policy. The expression is very open ended as it does not specify the type and place of public policy, unlike France and India. However, there is hardly any doubt that the reference is to the international public policy of England.[36]

Scope of the doctrine

The English courts have applied the doctrine narrowly because under English law, enforcement of an arbitral award is in itself considered an important public policy concern, and refusal to enforce an award is allowed in clear cases only.[37] Therefore, the ground though invoked many times has been rarely successful.[38]

Deutsche Schachtbau v Ras Al Khaimah[39] is one of the initial cases after England became a signatory to the New York Convention, where the enforcement of a foreign award was challenged on the ground of public policy. In this matter, the determination of the proper law of the contract was left by the parties to the wisdom of the arbitration tribunal. The three member tribunal in Geneva decided the dispute on the basis of "internationally accepted principles of law governing contractual relations".[40] The defendant's objection was that enforcing an award which has decided the rights and obligations of the parties "not on the basis of any particular national law, but upon some unspecified, and ill defined, internationally accepted principles of law",[41] would be violative of the public policy of England.[42]

Today, it is well accepted that the proper law of the contract need not be any national law. Thus, a tribunal in international arbitration has a very wide choice, but this has not always been the case. Thus Professor Ibrahim Fadlallah mentions three well-known cases, where the selection of the Sharia law as the proper law of the contract by the parties was not considered a valid choice.[43] In Ras Al Khaimah the court said that for denying enforcement on the public policy ground: ***283**

"It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised".[44]

The court did not find any of the said grounds applicable in the present case, and hence, dismissed the application to refuse enforcement. There was no violation of public policy as there was nothing illegal in making the above-mentioned choice.

Illegality, a recurring ground

Illegality of the underlying contract has been a recurring ground for parties to invoke the public policy exception before the English courts. Nevertheless, the ground has been used so exceptionally that there was a time when it was said that "there is no case in which this exception has been applied by an English court".[45] Finally in the year 1999, the exception was applied in Soleimany v Soleimany.[46] Although the case involved enforcement of a domestic award, it is nevertheless referred to, to understand the approach of English courts with respect to the application of the doctrine of public policy in the context of foreign arbitral awards also.[47]

However, Soleimany is not the only exception in this respect. Long before the said case, enforcement had been refused by the English courts in Taylor & Son v Barnett Trading Co.[48] This is another rare instance where an English court has refused to enforce an award because of public policy considerations, as the underlying contract was illegal. The main contract was for the supply of Irish stewed steak, for which the price was a little more than the price fixed by emergency legislation. The defendant resisted the enforcement on the ground of public policy since the main contract was illegal. The Court of Appeal accepted that enforcing an arbitral award based on a contract suffering from illegality would be violative of the public policy of the country, hence it could not be allowed.

Soleimany v Soleimany[49] was decided almost half a century after Barnett.[50] In this well-known case, the underlying contract was for exporting carpets from Iran which was not allowed under Iranian law and thus amounted to smuggling and involved bribing custom officials in Iran. A dispute arose about sharing the sale proceeds. The matter was referred to arbitration. The arbitrator in an award made on 23 March 1993, had acknowledged the illegal nature of the transaction. The award mentioned that, "the plaintiff purchased quantities of carpets and exported them *illegally*, out of Iran".[51] At another place, it described the said dealings as ***284** "illicit"[52] and considered the same to be the reason for keeping little record of it.[53] The court refused to enforce the award not because of the illegality of the underlying contract, but for the reason that it was on the face of the award. It is important to ask that if the transaction was valid according to the applicable law, on what basis did the arbitrator say that it was illicit? It would be risky to predict what course of action the court would have adopted, had the illegality not been on the face of the award.

Illegality of the underlying contract was again raised in Westacre v Jugoimport,[54] where enforcement of an award passed in Geneva was resisted before the English courts on the ground of public policy, as the underlying contract was alleged to have been procured through bribery and personal influence. The contract was for the supply of certain defence products, and the appellant, a consultant was hired to procure the deal. The said activities were illegal under the law of the state of performance of the contract. However, such activities were not illegal according to the proper law of the contract, which was Swiss law in this case. The tribunal addressed the issue of illegality and found the agreement to be valid.

The defendant applied for the annulment of the award before the Swiss courts on the ground of corruption and public policy. The Swiss Federal Tribunal accepted that the agreement would be void under the Swiss law, if the allegation of bribing the governmental officials was proved, but as a reviewing court, it refused to go beyond the facts found by the arbitration tribunal.

Extent of judicial review

It is well established that the courts at the place of enforcement can review an award to see whether it violates the public policy of the forum. The grey area is, however, the extent of the review. Can a court look into the facts behind the award at this stage? The court in Westacre v Jugoimport[55] was involved with this issue. The enforcement of the award before English courts was resisted on the ground of violation of public policy.

The defendant's argument for refusing enforcement was that it involved a contract to use personal influence, and such a contract has been denied enforcement in Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd[56] on the ground of violation of public policy.[57] But there was a crucial difference between the two cases. Unlike Lemenda[58] in Westacre[59] the court was not to enforce a mere contract, but an arbitral award. In order to deny enforcement, it was required to look into the facts behind the award. Can it do so? The court held that there is not an absolute bar in this respect but it would do so only in "exceptional circumstances".[60] Notwithstanding this, the principle laid down in Lemenda cannot ***285** be applied to refuse enforcement of arbitral awards because there is a need to distinguish between enforcement of a contract and enforcement of an award.

Two valuable interests compete against each other here. One is the public interest in not allowing illegal contracts to be enforced, and the other is the public interest in respecting the finality of arbitral awards. There is a need to strike a balance between them and decide on a case-by-case basis which one will outweigh the other. The formula adopted by the English courts is to not revisit the issue of illegality if the same has been addressed by the tribunal. Otherwise, it would be acting like an appellate court and undermining the public interest in the finality of an award. But in some cases, there may be a compelling public policy concern which may require the court to revisit the question of illegality.[61]

English courts have more leverage to refuse enforcement if arbitration was conducted under English law or, English law happens to be the proper law of the contract or the underlying contract will be performed in England. On the other hand, in the case of a foreign award, if the tribunal has looked into the question of illegality and the award has become final, it is highly improbable that an English court will re-examine the issue of illegality of the underlying contract. This informs us about a very valuable principle, i.e. of "trusting the foreign arbitrators".[62]

Though Soleimany[63] and Westacre[64] gave opposite decisions, they do not contradict each other. The crucial distinguishing factor between them is that in Soleimany, although the underlying activity was not illegal according to the governing law of the contract, the illicit object of the contract was acknowledged in the award. On the other hand, in Westacre the allegations of illegality were rejected by the arbitration tribunal. In other words, according to Soleimany the alleged activity did happen, though not illegal, because the parties had cleverly selected the governing law of the contract. The underlying activity was illegal not only according to the law of the place of performance of the contract but according to the curial law too. On the other hand, in Westacre, the allegations of bribery were rejected by the tribunal and as far as the act of lobbying was concerned, it was not illegal, either under the proper law of the contract or under the curial law.[65]

Variants of illegality which can trump enforcement of an award

It is right that if the illegality is on the face of an award, enforcement is to be refused. But it does not mean that whenever the tribunal rejects the allegations of illegality, enforcement is to be allowed. The position is that enforcement is to be refused when the balance between finality and not allowing the process of courts to be abused, tips in favour of the latter. The intriguing issue is: when does that happen? According to both the decisions, it can happen in the following situations. First, the illegality is of such a type that the tribunal lacks jurisdiction to deal with the matter in the first place, for example an agreement between robbers to settle their dispute through arbitration.[66] This is in essence an arbitrability issue, which ***286** eventually depends

upon public policy. This is not a problematic issue. Thus, the Court of Appeal in Soleimany observed that: "The parties cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract".[67] In such a situation, English courts will ignore the well-established principle of separability.

Secondly, there are some norms of public policy that, if violated, would result in non-enforcement, irrespective of the proper law of the contract and place of performance.[68] These would include "universally condemned activities such as terrorism, drug trafficking, prostitution, paedophilia, anything short of corruption or fraud in international commerce".[69] It is interesting to notice here that the court is referring to transnational public policy, though s.103(3) refers to international public policy.

The third situation which is quite problematic is when the tribunal has the jurisdiction to deal with the alleged illegality and it rejects the allegation. Can a court in such a situation go behind the award, to ascertain the veracity of the decision? Both the cases agree that the award in such a situation protects the alleged underlying illegality from scrutiny by the enforcing court to a great extent, but not absolutely. The Westacre[70] judgment provides a higher degree of protection as compared to Soleimany.[71] And that is their point of divergence, i.e. in what circumstances is that protective layer to be lifted and the enforcement court able to go behind the award? According to both the decisions, it would depend upon various factors. However, they differ about the factors. The Court of Appeal in Soleimany had observed that:

"In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality?" [72]

The problem with this view is that, if a prima facie suspicion would allow a court at the time of enforcement to investigate the facts of the matter, it would make serious inroads into the policy of finality. On the other hand, Westacre shows more faith in the decision of the tribunal. The test according to Westacre is that, if the issue of illegality was considered by the arbitration tribunal and the court at the seat of arbitration, the court at the place of enforcement will reopen the facts only if some new evidence has come up which was not available to the party at the time of the said proceedings and the evidence must be decisive. Otherwise, "it would appear to present an open invitation to disappointed litigants to re litigate their disputes". ***287** [73]

In contrast to this, according to Soleimany as mentioned above, the investigation can be done on the basis of prima facie evidence, which needs not to be new. In Soleimany, the court had shown some type of suspicion about arbitration. Justifying the low threshold to embark upon the inquiry it said that: "Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances".[74] Thus, it recommended that the judge needs to see "whether it is proper to give full faith and credit to the arbitrator's award".[75] It is remarkable here that Soleimany involved a domestic award while Westacre involved a foreign award. This could be a distinguishing factor between the two decisions for setting different standards to review an award, when the defence of public policy is raised.

A failed attempt to commit fraud not a violation of public policy

In RBRG v Sinocore[76] the Court of Appeal had to deal again with a challenge concerning enforcement of a foreign award on the ground of illegality of the underlying transaction. The main contract was for the supply of certain goods by Sinocore to RBRG. The payment was to be made through an irrevocable documentary letter of credit. The buyer unilaterally instructed the issuing bank to change the date of shipment. The seller submitted a bill of lading in which the date of shipment was forged to comply with new instructions given by the buyer and submitted it to the issuing bank for payment. The issuing bank denied the payment because of the forged dates. Thus, the fraud Sinocore attempted did not succeed.

The arbitration tribunal held that the cause of termination of the contract was the unilateral change made by RBRG, not the forgery committed by Sinocore and passed an award in the latter's favour. Sinocore sought enforcement in England and RBRG raised the public policy objection. The court of first instance rejected the public policy challenge and so did the Court of Appeal. The Court of Appeal expressly "preferred" the majority opinion given in Westacre over the views of Weller J in the same case and Soleimany.[77]

The Court of Appeal was of the opinion that the challenge mounted by RBRG was not even "sufficient to engage [the] public policy" ground.[78] This shows the reluctance of English courts to allow a challenge on the basis of the said ground. The court further observed that even if public policy ground was engaged, it was bound to fail. The reason being that the allegations were duly considered by the tribunal. This shows the faith English courts repose in international arbitral tribunals. Accordingly, it did not go behind the findings of the tribunal. The final outcome of the case was that enforcement can be refused only if a party is actually defrauded. A failed attempt to commit fraud does not violate public policy so as to stall enforcement of a foreign arbitral award. The same principle was applied ***288** in National Iranian Oil v Crescent Petroleum,[79] wherein a failed attempt to bribe could not come in the way of enforcement of the final award.

Public policy and penal damages

Another important issue which can give rise to public policy concerns at the time of enforcement is enforcing an award which provides for penal damages authorised by the underlying contract. A pre-estimation of damages in the event of breach of contractual obligation is a valid act. If the pre-estimation is proportionate to actual losses, it is termed as liquidated damages, and when disproportionate it's a penalty. An agreement providing for the former is enforceable but the latter is not, as a matter of public policy.[80]

Pencil Hill Ltd[81] involved enforcement of such a foreign award, which was based on a penalty clause. The agreement was about financial rights related to the transfer of a football player and provided for an amount equal to the outstanding amount in the event of failure to pay the installment on time. The arbitration tribunal in Switzerland found the penalty exorbitant and reduced it from €6,720,000 to €1,680,000—a reduction of 75% in accordance with the governing law. An appeal against the reduction was rejected by the court at the seat of arbitration.

Balancing competing values

The enforcement of that part of the award which provided for the penalty, was challenged before the English courts on the ground of public policy. Only a year before this matter, the Supreme Court had recognised that the rule against penal clauses in contracts is a matter of public policy.[82] But the High Court allowed the enforcement of the award because it was neither a "universal principle of morality",[83] nor "so clearly injurious to the public good",[84] which could outweigh the public policy which lies in enforcing foreign arbitral awards.[85]

It is important to recall here that the element of unconscionableness from the penalty clause had been already removed by the arbitration tribunal and upheld by the curial court. Thus, it was no more a penalty clause.[86] What would have been the approach of the English courts had the amount been not reduced? It can be safely presumed that even then the court would not have refused enforcement. First, the change of the penalty clause into a non-penalty clause was an additional, not the primary, reason as per the judgment. The primary reason was the failure to meet the threshold required to offset the policy concern in enforcing foreign awards. A foreign award enforcing a penalty clause has every chance of enforcement, except when the unconscionability is so

extreme that it will be universally condemned, like the hypothetical example given by Earl of Halsbury, *289 in Clydebank v Don Jose,[87] where he had talked about paying a penalty of millions of pounds for a contract of £50.

This is hypothetical even in the case of a contract, and the possibility of an award allowing such a clause is even more imaginary. A contract is up for scrutiny before the national courts for the first time. But in an award, such a clause will be filtered by the arbitration tribunal and in the case of a foreign award by the courts at the seat of arbitration too. Therefore, a foreign arbitral award enforcing a realistic penalty clause will not be refused enforcement in England.

Upholding foreign arbitral awards is in itself a very important public policy concern in England. The refusal would "require a very strong and unusual case".[88] Enforcement will not be refused even if it is against domestic public policy. If the underlying contract is to be performed abroad, enforcement can be refused only if it is against "universally condemned activities"[89] like "terrorism, drug trafficking, prostitution or paedophilia".[90]

III. The French Ordre Public Externe

Scope of public policy

According to arts 1525 and 1520-5 of the French Code of Civil Procedure, enforcement of a foreign arbitral award can be refused, if it is against international public policy. It is a settled position that the reference under art.1520-5 of the said code is not to the truly international public policy, but to the "French conception of international public policy".[91]

The swinging extent of judicial review

It is rare that in France, a foreign arbitral award is denied enforcement on the ground of public policy. The French courts have consistently favoured a narrow application of the doctrine. On the other hand, this consistency has been lacking as far as the extent of the judicial review at the time of enforcement is concerned, when the public policy defence is raised. The French approach has been oscillating between the maximalist and the minimalist approach.

The maximalist approach

The French courts started with the idea of having maximum power to review an award at the stage of enforcement. Thus, in the Pyramid[92] case the Court de Cassation held that: *290

"However, whilst the power of the Court of Appeal, seized by virtue of Arts. 1502 and 1504 of the New Code of Civil Procedure, is limited to the examination of the grounds listed in these provisions, its power to examine both the legal and factual elements concerning said grounds, is in no way restricted."[93]

This approach was reiterated by the Court of Appeal in European Gas Turbine v Westman International Ltd.[94]

Switching to the minimalist review

The approach of the French courts to have wide powers however changed with the turn of the century as the French courts switched over to the minimalist approach in this respect. Thus, in Verhoeft v Moreau the Cour de Cassation held that the violation

should be, "flagrant, effective and concrete"[95] in order to deny enforcement on the ground of being contrary to international public policy. This was a clear move in favour of the minimalist approach, which was followed by many subsequent cases for almost a decade. Thalès v Euromissile[96] is a leading example in this respect.

Thalès applied for annulment of an award on the ground that the underlying transaction was anti-competitive and violated European competition law, which was considered to be a part of French international public policy. The Paris Court of Appeal reiterated the formula, that the violation of international public policy must be "flagrant, effective and concrete"[97] so as to deny enforcement or allow annulment. Explaining the meaning of the terms, the Court of Appeal said that a violation would be flagrant if it is

"discernible immediately by the annulment court while 'effective' is a violation that determines an actual conflict with public policy and 'concrete' suggests that a violation must result in a resolution that is materially contrary to public policy."[98]

Though the alleged illegality was dubbed to be something which "bursts the eyes"[99] of the court by the complainant, the court did not find it even met the ***291** threshold. The case is regarded as a "landmark"[100] case with respect to the public policy criterion. Interestingly the said objection had not been raised before the arbitration tribunal. Nevertheless, the Court of Appeal allowed the objection to be raised on the basis that whether a foreign arbitral award is contrary to international public policy, cannot depend upon the attitude of the parties. The reason is that public policy concerns interests of third parties, which cannot be waived by the parties to arbitration.

A couple of years later in SNF v Cytec,[101] the Court of Appeal reiterated the above-mentioned approach and held that although the power of the court to review questions of law and fact is limitless, the control is extrinsic only and thus favoured minimal review again. All the above cases involved violation of European competition law, but in Schneider v CPL Industries,[102] the award was challenged on the ground that the underlying contract was procured through bribery. This allegation was tried by the arbitration tribunal and rejected. The Court of Appeal held that the petitioner actually wanted a retrial of the matter in the garb of annulment proceedings, which could not be allowed. At the stage of enforcement only the compatibility of the award with international public policy has to be seen, which the court in the present case did not find lacking and consequently rejected the challenge. The decision was upheld by the Supreme Court in 2014.[103]

The Mummy Returns: reverting back to the maximalist approach

The year Schneider was decided, a trilogy of cases involving allegations of corruption, saw the shift in the approach of the courts from the minimalist to the maximalist as adopted in the Pyramid case. It was the year when the mummy of the maximalist approach returned. Gulf Leaders[104] was the first case in this trilogy. In this matter, a company named CFF had agreed to give a loan to another company called Gulf Leaders. Two installments had been made, when Gulf Leaders alleged that CFF had bribed someone who knew the CEO of Gulf Leaders, to procure the contract. The arbitration tribunal tried the allegations and rejected them. An award was passed against Gulf Leaders, which was challenged on the ground of violation of public policy.

Although the Court of Appeal eventually dismissed the challenge, two significant changes happened in this case with respect to the approach of the French courts in dealing with the public policy objection. First, it dropped the word "flagrant" as a criterion to judge public policy violation. Secondly, it did not merely review the award but also reviewed the facts of the underlying transaction on its own. It ***292** did not accept the facts as established before the arbitration tribunal and used its own opinion. This was clearly the return of the maximalist approach.

A similar situation occurred in Congo v SA Commissions Import Export,[105] where the arbitral award was challenged as violative of public policy on account of corruption, in procuring the underlying contract. The state had alleged that the persons approving

the main contract did not have the requisite power to do so and it was approved because of corruption. The allegations of corruption were based on conjectures. Apart from making a bald statement that there was a general atmosphere of corruption in the administration, no specific evidence was provided to prove the allegations.[106] These allegations had been tried and rejected by the arbitration tribunal. Nevertheless, the Court of Appeal did "its own analysis of the facts",[107] and thus affirmed the maximalist approach re introduced by Gulf Leaders.[108]

The third decision in this trilogy is Man Diesel v Al Miamana[109] which was passed just 20 days after Congo v SA Commissions Import Export. Man Diesel a French company had entered into an agreement with an Iraqi company Al Miamana, for procuring sale orders for its products in Iraq on a commission basis. Subsequently the scope of the agreement was also extended to Syria. A dispute arose with respect to commission and an arbitral award was passed against Man Diesel in an ICC arbitration in Switzerland. This time along with corruption, the appellant alleged that Al Miamana would use the money to fund a terrorist organisation. The court reiterated its position that for allowing an application on the ground of violation of international public policy, the violation must be effective and concrete.[110] After reviewing the facts, the court said that Man Diesel failed to establish the allegations and dismissed the appeal.

The latest trend: limited grounds but unlimited power of review

After the above-mentioned three cases in a row in the year 2014, the next important decision came after a gap of three years in Kyrgyz Republic v Belokon.[111] This is a rare case, as the public policy challenge was successful, which necessitates an analysis of the facts of the case in detail. ***293**

In the year 2007, a Latvian citizen Mr Belokon, had successfully participated in a tender announced by the National Bank of the Kyrgyz Republic for the acquisition and rehabilitation of a bank named Insaan Bank, subsequently renamed as Manas Bank. In the year 2010, the existing government was changed and the erstwhile President was ousted for rigging the elections and on account of charges of massive corruption committed by him and his son. It was suspected that Manas Bank was involved in money laundering activity and was patronised by the erstwhile regime because Mr Belokon had close ties with the son of the ousted President. In view of all these circumstances the new regime passed an order which took over the administration of five banks including Manas Bank and suspended their currency transactions.

Soon, criminal investigations were initiated against Manas Bank and its assets were also seized as a security measure to ensure payment of compensation. Mr Belokon finally initiated arbitration proceedings against the Republic of Kyrgyzstan. He claimed a compensation of US $33 million which was opposed by the host state, on account of money laundering activities. The tribunal stated that the state could grant a temporary injunction on mere suspicion of money laundering but it must eventually prove the occurrence of the alleged activity, within a reasonable time, and with concrete evidence. As this did not happen, the arbitration tribunal in the absence of any concrete evidence of the alleged activity before it, passed an award of US $15.02 million against Kyrgyzstan, excluding interest and legal costs.[112]

The Kyrgyz Republic challenged the award under art.1520-5 before the Court of Appeal. The court conducted a de novo review of the facts of the case, took into consideration new evidence and held that the relationship between Mr Belokon and the son of the erstwhile President was inappropriate. On the other hand the arbitration tribunal had refused to attach the same label to it, since in its opinion the said relationship was superficial.[113] The court held that the bank was acquired by Mr Belokon for the purpose of money laundering and permitting enforcement of the award in such circumstances would mean to allow Mr Belokon to reap the benefits of a crime which would "manifestly, effectively and concretely"[114] violate the international public order[115] and would thus fall foul of art.1520-5 of the French Code of Civil Procedure.

Though the court had used the expression "manifestly", it can be said with a reasonable degree of certainty that it was an observation of the factual situation, rather than reintroducing the previously used criterion of flagrant violation since *294 the court analyzed the facts quite minutely. The court exercised stricter control and thus once again sided with the maximalist approach.

MK Group v Sarl Onix[116] is another rare case wherein enforcement has been declined on the ground of violation of international public policy. The case involved a memoranmdum of understanding among five different parties. MK Group was a Russian company which had agreed to transfer 60 per cent of its shares to Onix. There were two documents in this respect. According to one of them, submitted by the MK Group, which was in the native language of the host state, the transfer of the shares was contingent on Onix making an investment of US $12.5 million in the host state. According to the other document written in English, there was no such condition. A dispute arose between the parties with respect to the share transfer.

The tribunal concluded that there was no condition precedent to make an investment. Hence, Onix was entitled to the shares. The award was challenged by the MK Group under art.1520-5 alleging violation of international public policy.

The Court of Appeal analysed the facts very minutely as it had done in Kyrgyz Republic.[117] It held that even if there were no falsified documents filed by the defendant as alleged by the appellant, the fact that there were two versions of the memorandum of understanding from the very beginning to get the administrative approval fraudulently, was violative of international public policy. To reach this conclusion it relied upon a resolution passed by the General Assembly of the United Nations, acknowledging the sovereignty of peoples and nations over their wealth and natural resources. According to this resolution, states can make a law to regulate investment within their territory in accordance with international law. Thus, the approval sought fraudulently was a violation of not only the local laws but a norm accepted internationally, hence a violation of international public policy under art.1520-5.

As in Kyrgyz Republic[118] the Court of Appeal in this case too relied upon an international instrument for considering violation of a norm amounting to the violation of French international public policy.[119] Thus, the French approach in practice is moving towards truly international public policy.[120] The court in this case too, used the expression "manifestly" as it held that enforcing the award would

"confer on Onix a legally protected title in the international order on an investment made through the fraudulent obtaining of an administrative authorization to which the legislation of the Republic of Laos subordinated the exploitation of natural resources on its territory, manifestly, effectively and concretely violates international public order." *295 [121]."

But the extensive review of the facts, which the court did in the case, makes it clear that it is not used in the sense the word "flagrant" was used in the cases adopting a minimalist approach.

The present position is that the power of a court at the stage of enforcement is restricted to the grounds mentioned in art.1520, but with respect to the said grounds there is no limitation on the power of the court to "seek in law and in fact all the elements concerning the defects in question".[122]

IV. Public policy, the Indian style

Narrowing the scope of the doctrine: Renusagar's contribution

The starting point for understanding the application of the concept of public policy, in the Indian context invariably has been the Supreme Court's decision in Renusagar.[123] Though the case was decided under a very old Act, i.e. the Arbitration Act 1940, the

apex court adopted a very progressive approach and applied the narrow version of the doctrine of public policy. Accordingly, it held that enforcement can be refused on the ground of public policy, only if enforcement would be contrary to "the fundamental policy of Indian law, or the interests of India or justice or morality".[124] It is remarkable here that Renusagar has been relied upon by many subsequent cases decided under the new Act, i.e. the Arbitration and Conciliation Act 1996, as well.[125]

Exponential expansion of the concept

The problem with respect to the application of the doctrine of public policy started with the Supreme Court's decision in ONGC v Saw Pipes.[126] In this case the court expanded the scope of the doctrine by adding patent illegality as one of its facets, in addition to the already existing three facets propounded by the court in Renusagar.[127] Notwithstanding that ONGC v Saw Pipes[128] was a case with respect to a domestic award, the Supreme Court in Venture Global Engineering v Satyam Computer Services[129] applied the patent illegality ground to a foreign award as well. This was made possible because the apex court in Bhatia International v Bulk Trading[130] had itself dismantled the wall between Pt I and ***296** Pt II of the 1996 Arbitration Act.[131] The effect of this approach was that the version of the doctrine, which was wider than required, even in case of domestic awards, was now applicable to foreign awards too.

Venture Global[132] was undoubtedly a misadventure.[133] The enforcement of the award, which was passed in London, was not sought in India but in the US. Nevertheless the Indian Supreme Court prohibited the Indian party from enforcing the award in the US. All this was done in the name of public policy. The positive effect of the case was that it was now indispensable to bring some reforms and restore the balance disturbed by the interventionist approach of the Indian judiciary, which had started with Bhatia International v Bulk Trading.[134]

The steady return to the narrow application of the doctrine

The anomaly was created mainly by the Supreme Court, so it took upon itself the responsibility to rectify it too. Thus, when the opportunity came before it in Bharat Aluminium v Kaiser Aluminium, popularly known as BALCO,[135] a five judge constitution bench decided that the provisions of Pt I would be applicable only when the seat of arbitration is in India, and will have no application in a foreign seated arbitration. Thus, it restored the wall between Pt I and Pt II of the 1996 Arbitration Act, which it had dismantled in Bhatia International.[136] The important bearing of this decision on the public policy doctrine was that now the patent illegality ground invented by the court in ONGC v Saw Pipes,[137] was no longer applicable to foreign awards. Consequently, the approach of applying the narrow version of the doctrine of public policy was restored. However, as the judgment was to apply prospectively, arbitration agreements formed prior to the said judgment were not to benefit from this decision. Hence a wider form of the doctrine, as evolved in Saw Pipes[138] and Venture Global,[139] continued to apply in cases related to agreements formed before 6 September 2012, which was the date the BALCO[140] judgment was pronounced by the court. In BALCO the Supreme Court had observed that:

"The judgment in Bhatia International was rendered by this court on 13.3.2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this court on numerous occasions. In fact, the judgment in OMP No.46/2013 Page 59 of 61 Venture Global Engineering has been rendered on 10.1.2008 in terms of the ratio of the decision in Bhatia International. Thus, in order to do complete justice, we hereby order, that the law now declared by this court shall apply prospectively, to all the arbitration agreements executed hereafter. ***297** "[141]

Accordingly, the Delhi High Court in Union of India v Reliance Industries[142] allowed an application for setting aside a foreign arbitral award under s.34, which is applicable to domestic awards only on the basis of Bhatia International[143] and its allies and the rule of prospective application laid down in BALCO.[144] The court found the issues related to the refund of taxation, royalty and service tax, etc. to be non-arbitrable. In its opinion allowing the arbitration of such issues where important connecting factors were related to India would be contrary to the public policy of the country.

The court also observed that since the English courts would apply the public policy of England, the public policy concerns of India would get ignored. It usurped jurisdiction to set aside an award where it had none by giving an extremely wide interpretation to the doctrine of public policy. It held that the government of India will have to contest before the English courts, "claims which may be eventually impermissible to be enforced".[145] This would be wastage of public money and hence it is a question of public policy.

Two years before the said decision, the Supreme Court in Phulchand Exports Ltd v OOO Patriot[146] had justified the reasoning given by it in ONGC v Saw Pipes,[147] that the patent illegality ground falling under s.34 of Pt I of the Arbitration Act is applicable to foreign awards too. However, it did not find the ground to be applicable to the facts of the case in hand and dismissed the public policy objection. As Phulchand[148] was a decision given prior to BALCO,[149] it was not a strange observation. It is remarkable here that principally even after BALCO,[150] the wide notion of public policy envisaged for domestic awards continued to apply to foreign awards too, if application of Pt I of the Arbitration Act was not excluded by the parties. However, the courts searched for grounds to interpret the intention in a manner which would result in excluding the application of Pt I to foreign seated arbitrations, and thus avoided applying the broad notion of the doctrine to foreign awards.

Accordingly, when the Delhi High Court's judgment in Union of India v Reliance Industries[151] came up before the Supreme Court in appeal, it interpreted the intention in a manner which excluded the application of Pt I, unlike the High Court, and held that the High Court lacked jurisdiction in the matter.[152] Consequently, the Supreme Court applied the narrow concept of the doctrine and rejected the public policy challenge.[153]

In Shri Lal Mahal v Progetto Grano[154] the apex court held that the meaning given to public policy under s.34, which is applicable to an award passed in India, cannot be applied to a foreign award. Furthermore, it admitted that the observation ***298** made by it in this respect in Phulchand[155] was wrong.[156] It makes it more interesting, that Justice R.M. Lodha was a part of the bench in both cases. Shri Lal Mahal[157] involved supply of certain goods by an Indian party to an Italian party. The certificate assuring the quality was issued by SGS India as contemplated under the contract. Notwithstanding this, the buyer subsequently got a certificate from SGS Geneva, which found the goods to be of inferior quality. The arbitral tribunal passed an award on the basis of the second certificate in favour of the buyer.

The seller raised the public policy argument during the enforcement proceedings in India. According to the seller, the award was patently illegal since it was not in accordance with the terms of the contract as the tribunal relied upon a certificate issued by an agency not provided under the contract. The court rejected the contention and opined that the patent illegality ground is not applicable in case of foreign awards. Further, it stated that a narrow version of the public policy doctrine as contemplated in the Renusagar[158] case is applicable in matters involving conflict of law principles.[159]

This finally put the derailed train on the track. Subsequently, the Bombay High Court in Louis Dreyfus Commodities v Sakuma Exports[160] followed the line of reasoning developed in cases like Renusagar[161] and Shri Lal Mahal.[162] The Delhi High Court in XSTRATA stated that, "the expression 'fundamental policy of Indian law' does not mean the provisions of Indian Statutes" but the "substratal principles on which Indian Law is founded."[163] It can be safely said that now the Indian courts are consistently

applying the narrow notion of the doctrine.[164] Daiichi Sankyo v Malvinder Mohan Singh[165] is another prominent example in this respect.

The matter involved a dispute related to a share purchase and subscription agreement, whereby Daiichi had purchased the entire shareholding of Indian Pharmaceutical giant Ranbaxy Pvt Ltd, owned by the respondents. The Indian company was supplying generic drugs in 150 countries. At the time of the sale to Daiichi it was under scanner of the US FDA and DOJ for fabricating data with respect to the drugs it sold in the US. This information was alleged to be concealed from the buyer. Daiichi alleged that this amounted to fraud as defined under s.17 of the Indian Contract Act. The information was material and it would not have bought the Indian company but for the fraud. The arbitration tribunal in Singapore passed an award in favour of Daiichi, which it sought to enforce before the Delhi High Court.

Enforcement was resisted mainly on the ground of being contrary to the public policy of India. It was argued by the respondents that the arbitration tribunal was wrong in accepting the plea of fraud and it was absolutely wrong in calculating the damages. Indian law was the governing law of the contract and it was objected *299 that the tribunal had awarded penal, multiple and consequential damages, not allowed under Indian law. Also, it was argued that the claim of Daiichi before the arbitration tribunal was barred by the law of limitation. Allowing a time-barred claim would be contrary to the public policy of India. Relying upon the Renusagar[166] and Shri Lal Mahal[167] line of cases, the court opined that none of the objections raised would amount to violation of public policy, even if true. The court reiterated that the arbitration tribunal is the final decision-maker with respect to questions of fact and appreciation of evidence. A court at the stage of enforcement cannot have a second look on the merits of the decision. The question of limitation being a mixed question of fact and law is also to be decided by the tribunal and not open to be reviewed by the courts, and does not give rise to public policy issues.

However, the court refused to enforce the award against some of the respondents who were minors at the time of the formation of the share purchase and share subscription agreement, because protection of minors is a part of "fundamental policy of Indian Law".[168] It was argued by Daiichi that the deal was entered into by the agents of the minor respondents, who were their natural guardians too, and according to s.8 of the Hindu Minority and Guardianship Act 1956, the natural guardian of a Hindu minor is allowed to do any act which is necessary or reasonable and proper for the benefit of the minor.[169] Thus, the award is based on the said statutory provision, and hence cannot be violative of the public policy of India.

The court held that according to the said provision, a natural guardian can take only those actions which are for the benefit of the minor. The court stated that:

"There is nothing in Section 8 which would show that the natural guardian can, when selling shares of the minor, carry out a fraud on a third party, and expose the estate of a minor to grave risk and prejudice and a liability for the fraud played by him".[170]

It further observed that any such act "cannot bind or fasten any damages or liability on the estate of the minor".[171]

It is right that the Indian courts have pronounced strange judgments with respect to the application of the doctrine of public policy, but we must not ignore that the period of aberration has been brief and the courts have rectified the mistake themselves. After passing the Arbitration and Conciliation Act 1996, it was only in the year 2008, that the misadventure in Venture Global[172] exposed the foreign awards to a broad notion of the doctrine. Also, the damage caused was substantially controlled just four years later through the BALCO judgment.[173]

The present position

It is satisfying to know that the Indian approach has moved in the right direction. The insertion of the word "fundamental" in s.48(2)(b) by the amendments made *300 to the Arbitration Act 1996, in 2015, makes it amply clear that the narrow version of the doctrine shall apply.[174]

"Plainly, the expression 'fundamental Policy of Indian law' does not mean the provisions of Indian Statutes. The key words are Fundamental Policy; they connote the substratal principles on which Indian law is founded."[175]

It is remarkable here that the explanation added to s.48(2)(b) mentions three situations which would be regarded as violative of public policy, but "the interests of India" mentioned in the Renusagar[176] judgment is not one of them.

In the said case, the court had held that any violation of the provisions of the Foreign Exchange and Regulation Act (FERA) would be against the economic interests of the country, and hence contrary to the public policy of India. The possibility of violation of the Foreign Exchange Maintenance Act (FEMA) was the public policy concern raised in Venture Global[177] too. Since the other two situations mentioned in Renusagar[178] are incorporated in the explanation to s.48(2)(b), the absence of "interest of India" as one of them indicates that violation of the provisions of the FEMA Act won't in itself be sufficient to invoke the public policy ground.

As public policy depends upon the social economic and political conditions, the Renusagar[179] judgment has to be interpreted in the light of the said conditions existing at that time. When the said judgment was delivered, the Indian economy had just been liberalised and the Forex reserve of the country was in doldrums. Today, when it has emerged as a very strong economic power, it needs not be as sensitive about its foreign exchange laws, as it was required to be, prior to, and in the initial years of economic liberalisation. In the present times, violation of the provisions of FEMA would not amount to violation of the public policy of India. Accordingly, in Vijay Karia[180] the Supreme Court strongly disapproved the violation of public policy defence, alleging direct violation of the FEMA laws.

Reiterating its position in favour of the narrow application of the doctrine, the court stated that the expression "'Fundamental Policy' refers to the core values of India's public policy as a nation which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the courts. Judged from this point of view, it is clear that resistance to the enforcement of a foreign award cannot be made on this ground".[181] It is remarkable here that taking a strong pro-arbitration stance, the court imposed a cost of 5 million rupees so as to discourage invocation of the public policy ground.

Unfortunately, when the position with respect to the application of the doctrine appeared to be settled and in line with international best practices, in NAFED v Alimenta[182] the apex court once again applied the broad concept of the doctrine. The court refused to enforce a foreign award on the ground of it being violative *301 of the export policy of India, and more importantly, s.32 of the Indian Contract Act. Section 32 of the Indian Contract Act deals with contingent contracts and provides that if the contemplated contingency does not happen, the contract becomes void.

The court held that according to the contract, the supply was contingent upon governmental approval, which was denied because of drought and scarcity of the goods agreed to be supplied. Once the permission was refused by the government, the contract became void as provided under s.32 of the Indian Contract Act, and going ahead with the performance of the obligation would have been in violation of the export policy of the country. Referring to various international authorities, the court agreed that a review of the award cannot be sought on the merits, and the defence of public policy shall be construed narrowly.[183] It however looked into the merits of the decision, applied the broad notion of the doctrine and consequently refused to enforce the award.

The problem with the Indian approach is that it lacks the desired certitude and keeps on swinging like a pendulum between the broad and the narrow concept of the doctrine. In a way, this is similar to the French approach, as the French approach too has been swinging between the maximalist and the minimalist approach. However, that is with respect to the scope of the review

by the French courts and not with respect to the width of the doctrine itself, i.e. what activities can come with the purview of public policy. On that front, the French courts have been quite consistent in applying the doctrine narrowly. India's legislative approach is of course in line with international best practices but as far as the judicial approach is concerned, it will probably take some more time to settle down.

V. Conclusion

It is very clear from the discussion above, that all three jurisdictions discussed here apply their international public policy to decide whether to enforce a foreign award, if the public policy ground is invoked. This is very much in line with the intentions of the framers of the New York Convention, i.e. applying a narrow version of the doctrine, which enables enforcement of more awards.

Although the English courts have wide powers to review a foreign award, they exercise that power with a tremendous degree of restraint. They are very reluctant to look into issues already looked into by the arbitration tribunal despite having the power to do so, since they have a great faith in international arbitration tribunals. The principle of finality of an arbitral award is in itself a matter of public policy under English law. It would be allowed to be trampled upon only in situations where enforcement would violate more valuable concerns. A remarkable aspect of the English approach is that it is very difficult to persuade the English courts to entertain an application to review an award when the public policy ground is invoked, unlike their counterparts in France and India.

The problem with the French courts is that they have been quite inconsistent in their approach with respect to the extent of the review by them. At times, they have claimed very wide powers to review an award at the stage of enforcement, have then changed their stance to a minimalist approach, and have again claimed ***302** unlimited powers to review an award. The French approach is that though the grounds are limited, once a legitimate ground is invoked the power of a court to review is unlimited.

Furthermore, the French courts have been quite liberal in the application of their powers to review an award and delve deep and explore de novo, the issues decided by arbitration tribunals. They analyse questions of fact as well as evidence minutely even though already looked into by the arbitration tribunal. On the other hand, English courts look into questions of fact and evidence only if it is a new discovery, is decisive and could not have been presented before the tribunal.

Though the French courts go for extensive review, the threshold to refuse a foreign award on the ground of violation of public policy is as high as in England, if not more. Both seem to be moving towards applying transnational public policy, i.e. enforcement is refused if it would result in facilitating acts which are condemned universally. This is a very pro-arbitration approach.

On the other hand, the Indian approach has been quite hostile in this respect. The Indian courts have been quite sensitive, or at times even hypersensitive, about issues concerning public policy, despite the legislative mandate to be more liberal towards foreign awards. Unlike their English and French counterparts, the Indian courts cannot reopen questions of facts and evidence. Though, they have done so in the past by creating a ground named patent illegality. Fortunately, that issue has been addressed and the said ground does not apply to foreign awards anymore. The Indian courts most often have recognised that it is the narrow form of the doctrine which applies to foreign awards. However, they must avoid the aberrations they commit when applying the doctrine, in order to be counted as one of the leading pro-arbitration jurisdictions.

It is important to realise that the public interest lies not only in enforcement, but timely enforcement of foreign arbitral awards. Therefore, it is not sufficient that the plea of violation of public policy is eventually rejected. What is needed is that the courts at the place of enforcement should restrain themselves from embarking upon an enquiry, like the courts in England do, so as to fulfill the main purpose and promise of international arbitration, which is a fast settlement of a dispute.

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Footnotes

1 Rajesh Kapoor teaches at NALSAR University of Law, Hyderabad, India. The author is grateful to Mr Gary B. Born for his valuable support and encouragement in the preparation of this article. However, any shortcomings are the sole responsibility of the author.

1 See Pieter Sanders, "A Twenty Year Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1979) 13 The International Lawyer 269, 270; *Reinmar Wolff, "Public Policy, Article V (2) (b)" in Reinmar Wolff (ed.), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—Commentary (Munich: C.H. Beck, 2012), p.405*; *Sabina Gabriela Fugaru, "Enforceability of Foreign Arbitral Awards and State Public Policy" (Juridice, 30 January 2015)*, https://www.juridice.ro/358492/enforceability-of-foreign-arbitral-awards-and-state-public-policy.html; Felix Dasser and Piotr Wojtowicz, "Challenges of Swiss Arbitral Awards Updated Statistical Data as of 2017" (2018) 36 ASA Bulletin 276, 281; *Gary Born, International Commercial Arbitration, 3rd edn (Alphen aan den Rijn: Wolters Kluwer, 2021), Vol.3, p.4000.*

2 See art.V of the New York Convention 1958.

3 *Jan Paulson, "The New York Convention in International Practice-Problems of Assimilation" in The New York Convention of 1958 (1996) ASA Special Series No.9, 100, 113.*

4 Pierre Mayer and Audley William Sheppard, "Final ILA Report on Public Policy as a Bar to Enforcement to International Arbitral Awards" (2003) 19 Arbitration International 249, 254.

5 Mayer and Sheppard, "Final ILA Report on Public Policy as a Bar to Enforcement to International Arbitral Awards" (2003) 19 Arbitration International 249, 254.

6 *All Answers Ltd, "Public Policy as a Limit to the Enforcement of Foreign Arbitral Awards" (Law Teacher, 23 July 2019)*, http://www.lawteacher.net/free-law-essays/international-law/public-policy-as-a-limit-to-the-enforcement-of-foreign-arbitral-law-essay.php.

7 Choong Yoe Choy and Warren P. Ganesh, "Public Policy considerations in Arbitration Proceedings in Selected Common Law Jurisdictions" (2014) 44 Hong Kong L.J. 179, 195.

8 *All Answers Ltd, "Public Policy as a Limit to the Enforcement of Foreign Arbitral Awards" (Law Teacher, 23 July 2019)*, https://www.lawteacher.net/free-law-essays/international-law/public-policy-as-a-limit-to-the-enforcement-of-foreign-arbitral-law-essay.php.

9 *United Nations Commission on International Trade Law, UNICITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (United Nations, 2016), p.248*, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf, wherein it is stated that, "applications to refuse recognition and enforcement of a foreign arbitral award made under article V(2) (b) of the New York Convention have rarely been successful"; Sanders, "A Twenty Year Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1979) 13 International Lawyer 269, 270: "Although this ground for refusal is often invoked, it is seldom invoked successfully"; *Wolff, "Public Policy, Article V (2) (b)" in New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—Commentary (2012), p.405*: "Article V (2) (b)'s public policy defense is one of the grounds which are often invoked but rarely granted".

10 Mayer and Sheppard, "Final ILA Report on Public Policy as a Bar to Enforcement to International Arbitral Awards" (2003) 19 Arbitration International 249, 255. See also National Agricultural Cooperative Marketing Federation of India v Alimenta SA (2020) SCC Online SC 381. In this case, a petition was filed before the Delhi High Court in the year 1993, for the enforcement of a foreign arbitral award. The same was resisted by the award debtor on the ground of violation of public policy. The single bench of the Delhi Court rejected the objection, but after a long period of 7 years. Against this an appeal was made to the division bench of the same High Court where it met with the same fate, but after a period of 10 years. Unperturbed by all this the award debtor approached the Supreme Court which accepted the public policy challenge and refused to enforce the award in its decision dated 22 April 2020.

11 Kent Murphy, "The Traditional View of Public Policy and Ordre Public in Private International Law" (1981) 11 Georgia Journal of International and Comparative Law 591, 596; *Wolff, "Public Policy, Article V (2) (b)" in New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards —Commentary (2012), p.403.*

12 *Wolff, "Public Policy, Article V (2) (b)" in New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—Commentary (2012), p.403.*

13 *Wolff, "Public Policy, Article V (2) (b)" in New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—Commentary (2012), p.403.*

14 Michael L. Shatten, "The Determination of Public Policy" (1965) 51 American Bar Association Journal 1048.

15 Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co [1987] 3 W.L.R. 1023 at 1035.

16 Justice Burrough in Richardson v Mellish (1824) 2 Bing. 229 at 252.

17 Enderby Town Football Club Ltd v Football Association Ltd [1971] 1 All E.R. 215 at 219.

18 Percy H. Winfield, "Public Policy in the English Common Law" (1928) 42 Harv. L. Rev. 76, 91.

19 Murphy, "The Traditional View of Public Policy and Ordre Public in Private International Law" (1981) 11 Georgia Journal of International and Comparative Law 591, 595.

20 Murphy, "The Traditional View of Public Policy and Ordre Public in Private International Law" (1981) 11 Georgia Journal of International and Comparative Law 591, 592.

21 *All Answers Ltd, "Public Policy as a Limit to the Enforcement of Foreign Arbitral Awards" (Law Teacher, 23 July 2019)*, http://www.lawteacher.net/free-law-essays/international-law/public-policy-as-a-limit-to-the-enforcement-of-foreign-arbitral-law-essay.php.

22 Murphy, "The Traditional View of Public Policy and Ordre Public in Private International Law" (1981) 11 Georgia Journal of International and Comparative Law 591.

23 Parsons and Whitmore Overseas v Societe Generale de L'Industrie du Papier (RAKTA) 508 F.2d 969 (2d Cir., 1974).

24 *UNCITRAL et al, "Article V (2) (b)" in The Guide*, https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=626&opac_view=-1: "In the words of the often-quoted judgment of the Second Circuit of the United States Court of Appeals in Parsons, '[e]nforcement of foreign arbitral awards may be denied on [the basis of public policy] only where enforcement would violate the forum state's most basic notions of morality and justice'. Several jurisdictions outside the United States have relied on this passage when assessing the public policy exception".

25 Alona E. Evans, "Parsons & Whitmore Overseas Co. Inc. v Societe General de L'Industrie Du Papier (RAKTA)" (1975) 69 American Journal of International Law 897, 899.

26 Luke Villiers, "Breaking the Unruly Horse: The Status of Mandatory Rules of Law as a Public Policy Basis for the Non Enforcement of Arbitral Awards" (2011) 18 Australian International Law Journal 155, 161.

27 See art.V(2)(b); *Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, Redfern and Hunter on International Arbitration, 6th edn (Oxford: Oxford University Press, 2015), para.11.109*: "It is clear that the 'public policy' referred to in the New York Convention is the public policy of the enforcement state".

28 Article V(2)(b) provides that: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: The recognition or enforcement of the award would be contrary to the public policy of that country."

29 *Albert Jan van den Berg, The New York Convention of 1958 (Den Haag: T.M.C. Asser, 1981), p.360.*

30 *Wolff, "Public Policy, Article V (2) (b)" in New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—Commentary (2012), p.410.*

31 *Wolff, "Public Policy, Article V (2) (b)" in New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—Commentary (2012), p.409.*

32 Emphasis added.

33 See s.48(2)(b) of the Indian Arbitration and Conciliation Act 1996.

34 Article 1520-5 of the French Code of Civil Procedure states: "An award may only be set aside where: ... recognition or enforcement of the award is contrary to international public policy". See *"Code of Civil Procedure, Book IV, Arbitration" in Lise Bosman (ed.), International Handbook on Commercial Arbitration (ICCA) (Alphen aan den Rijn: ICCA and Kluwer Law International, 2020), p.14.* Furthermore according to art.1525 of the code the grounds provided in art.1520 apply to refuse recognition or enforcement of foreign awards. See *"Code of Civil Procedure, Book IV, Arbitration" in ICCA International Handbook on Commercial Arbitration (2020), p.15.*

35 Mayer and Sheppard, "Final ILA Report on Public Policy as a Bar to Enforcement to International Arbitral Awards" (2003) 19 Arbitration International 249, 255.

36 *Albert Venn Dicey, John Humphrey Carlile Morris and Lawrence Collins, Dicey, Morris and Collins on Conflict of Laws, 15th edn (London: Sweet & Maxwell, 2012), para.16-149.*

37 *Dicey, Morris and Collins on Conflict of Laws (2012), para.16-150.*
38 See *Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, Redfern and Hunter on International Arbitration (2015), para.11.104.*
39 Ras Al Khaimah National Oil Co [1987] 3 W.L.R. 1023.
40 Ras Al Khaimah National Oil Co [1987] 3 W.L.R. 1023.
41 Ras Al Khaimah National Oil Co [1987] 3 W.L.R. 1023 at 1032.
42 Ras Al Khaimah National Oil Co [1987] 3 W.L.R. 1023 at 1032.
43 Ibrahim Fadlallah, "Arbitration Facing Conflicts of Cultures: The 2008 Annual School of International Arbitration Lecture Sponsored by Freshfields Bruckhaus Deringer LLP" (2009) 25 Arbitration International 303.
44 Ras Al Khaimah National Oil Co [1987] 3 W.L.R. 1023 at 1035.
45 Michael Kerr, "Concord and Conflict in International Arbitration" (1997) 13 Arbitration International 121, 140.
46 Soleimany v Soleimany [1999] Q.B. 785; Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, Redfern and Hunter on International Arbitration (2015), para.11.104.
47 See e.g., *Jean Francois Poudret and Sebastien Besson, Comparative Law of International Arbitration (London: Sweet & Maxwell, 2007), para.937; Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, Redfern and Hunter on International Arbitration (2015), para.11.104.*
48 Taylor & Son v Barnett Trading Co [1953] 1 W.L.R. 562.
49 Soleimany [1999] Q.B. 785.
50 Taylor & Son [1953] 1 W.L.R. 562.
51 Soleimany [1999] Q.B. 785 at 790.
52 Soleimany [1999] Q.B. 785 at 790.
53 Soleimany [1999] Q.B. 785 at 790.
54 Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd [2000] Q.B. 288; [1999] 3 W.L.R. 811.
55 Westacre Investments [2000] Q.B. 288.
56 Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd [1988] Q.B. 448.
57 The court found it contrary to the public policy of the place of enforcement, i.e. England, and the place of performance of the contract, i.e. Qatar.
58 Lemenda Trading [1988] Q.B. 448.
59 Westacre Investments [2000] Q.B. 288.
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61 Westacre Investments [2000] Q.B. 288 at 311.
62 *Michael J. Mustill and Stewart C. Boyd, Commercial Arbitration, 2nd edn (London: Butterworths and Co, 2001), companion volume, p.95.*
63 Soleimany [1999] Q.B. 785.
64 Westacre Investments [2000] Q.B. 288.
65 Swiss law was the proper law of contract and curial law also.
66 Soleimany [1999] Q.B. 785 at 799.
67 Soleimany [1999] Q.B. 785 at 800.
68 Westacre Investments [2000] Q.B. 288 at 304.
69 Westacre Investments [2000] Q.B. 288 at 302.
70 Westacre Investments [2000] Q.B. 288.
71 Soleimany [1999] Q.B. 785.
72 Soleimany [1999] Q.B. 785 at 800.
73 Westacre Investments [2000] Q.B. 288 at 306.
74 Soleimany [1999] Q.B. 785 at 800.
75 Soleimany [1999] Q.B. 785 at 800.
76 RBRG Trading (UK) Ltd v Sinocore International Co Ltd [2018] EWCA Civ 838; [2019] 1 All E.R. (Comm) 810.
77 RBRG Trading (UK) [2019] 1 All E.R. (Comm) 810: "Where the arbitration tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts the English court should not allow the facts to be re-opened, save possibly in exceptional circumstances. In this connection, I consider that the views expressed on this issue by the court in Westacre are to be preferred to those put forward by Waller LJ in the same case and in Soleimany".
78 RBRG Trading (UK) [2019] 1 All E.R. (Comm) 810.
79 National Iranian Oil v Crescent Petroleum [2016] EWHC 1900 (Comm); [2017] 1 All E.R. (Comm) 566.

80 *Michael Furmston and Brenda Suffrin, "Illegality and Public Policy" in Michael Furmston (ed.), The Law of Contract—Common Law Series (London: Butterworths, 2007), p.1686.*

81 Pencil Hill Ltd v US Citta Di Palermmo SpA, unreported, 19 January 2016, Queen's Bench Division (Mercantile Court).

82 Mackdessi v Cavendish Square Holdings BV [2015] UKSC 67; [2016] A.C. 1172.

83 Pencil Hill, unreported, 19 January 2016, Queen's Bench Division (Mercantile Court).

84 Pencil Hill, unreported, 19 January 2016, Queen's Bench Division (Mercantile Court).

85 Pencil Hill, unreported, 19 January 2016, Queen's Bench Division (Mercantile Court), the court stated that "the important public policy against enforcement of penalty clauses is not sufficient to permit me to refuse enforcement".

86 Pencil Hill, unreported, 19 January 2016, Queen's Bench Division (Mercantile Court).

87 Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo Y Castaneda [1905] A.C. 6 at 11.

88 Tongyuan International Trading Group v Uni-Clan Ltd, unreported, 19 January 2001, Queen's Bench Division (Commercial Court).

89 Pencill Hill, unreported, 19 January 2016, Queen's Bench Division (Mercantile Court).

90 Pencill Hill, unreported, 19 January 2016, Queen's Bench Division (Mercantile Court).

91 *Fouchard, Gaillard and Goldman on International Arbitration, edited by Emmanuel Gaillard and John Savage (Alphen aan den Rijn: Kluwer Law International, 1999), para.1647.*

92 Southern Pacific Properties Ltd v Republic of Egypt, "The Pyramid Case", Cour de Cassation, 6 January 1987, 1987 Rev. Arb. 471 (note by Phillippe Leboulanger).

93 *"Southern Pacific Properties Ltd. v. Southern Pacific Properties (Middle East) Ltd., The Arab Republic of Egypt, Cour de Cassation [Supreme Court], Not Indicated, 6 January 1987" in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1988 (Alphen aan den Rijn: ICCA and Kluwer Law International 1988), Vol.13, pp.152, 154.*

94 "Société European Gas Turbines SA v Société Westman International Ltd, Cour d'appel de Paris (1Ch. C), 30 September 1993", 1994 Rev. Arb. 359; See Bernard Hanotiau and Olivier Caprasee, "Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention" (2008) 25 Journal of International Arbitration 721, 734.

95 "Verhoeft v Moreau, Cour de cassation (1re Ch. civ.), 21March 2000", 2001 Rev. Arb. 805; Pierre Pic and Asha Rajan, "The Public Policy Exception in International Arbitration: A Snapshot from France" (2017) 6(1) Indian Journal of Arbitration Law 198, 201.

96 "SA Thalès Air Défense v GIE Euromissile, Cour d'appel de Paris (1re Ch. C), Not Indicated, 18 November 2004", 2005 Rev. Arb. 751.

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98 *Piero Bernardini, "The Scope of Review in Annulment Proceedings, in International Arbitration and Public Policy" in Devin Bray and Heather L. Bray (eds), International Arbitration and Public Policy (Saarbrücken: Juris, 2015), p.167*, quoted in Pic and Rajan, "The Public Policy Exception in International Arbitration: A Snapshot from France" (2017) 6(1) Indian Journal of Arbitration Law 198, 201.

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101 "Société SNF SAS v Société Cytec Industries BV, Cour d'appel de Paris (1re Ch. C), Not Indicated, 23 March 2006", 2007 Rev. Arb. 100.

102 "Société M Schneider Schaltgerätebau und Elektroinstallationen GmbH v Société CPL Industries Limited, Cour d'appel de Paris (Pôle 1 - Ch. 1), Not Indicated, 10 September 2009", 2010 Rev. Arb. 548.

103 "*Société M. Schneider Schaltgerätebau und Elektroinstallationen v Société CPL Industries Limited*, Court of Cassation of France, First Civil Law Chamber, Arrêt n° 123 FS-P+B+I, pourvoi n° T 10-17.076, 12 February 2014", 2014 Rev. Arb. 389.

104 "Gulf Leaders for Management and Services Holding Company v SA Crédit foncier de France, Court of Appeal of Paris, 4 March 2014", 2014 Rev. Arb. 955.

105 "*République du Congo v S.A. Commissions Import Export (Commisimpex)*, Court of Appeal of Paris, 14 October 2014", 2014 Rev. Arb. 1030.

106 "République du Congo v S.A. Commissions Import Export (Commisimpex), Court of Appeal of Paris, 14 October 2014", 2014 Rev. Arb. 1030. Free translation of "alléguer un climat général de corruption

au sein de son administration, sans indication des personnes susceptibles d'être en cause et sans que les bénéficiaires éventuels aient fait l'objet de poursuites".

107 *Patricia Peterson, "The French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged: Is the Requirement of 'Flagrant' Breach Now Gone?" (Kluwer Arbitration Blog, 10 December 2014)*, http://arbitrationblog.kluwerarbitration.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/.

108 "Gulf Leaders for Management and Services Holding Company v SA Crédit foncier de France, Court of Appeal of Paris, 4 March 2014", 2014 Rev. Arb. 955.

109 "SAS Man Diesel & Turbo France v Société Al Maimana General Trading Company Ltd, Court of Appeal of Paris, 4 November", 2015 Rev. Arb. 543.

110 "SAS Man Diesel & Turbo France v Société Al Maimana General Trading Company Ltd, Court of Appeal of Paris, 4 November", 2015 Rev. Arb. 543, 549, "whether the recognition and enforcement of the award effectively and concretely violates international public order". Free translation of "si la reconnaissance ou l'exécution de la sentence viole de manière effective et concrète l'ordre public international".

111 "République du Kirghizistan v M. Belokon, Court of Appeal of Paris, 21 February 2017", 2017 Rev. Arb. 915.

112 "République du Kirghizistan v M. Belokon, Court of Appeal of Paris, 21 February 2017", 2017 Rev. Arb. 915, 922.

113 Emmanuel Gaillard, "The emergence of transnational responses to corruption in international arbitration" (2019) 35 Arbitration International 1, 9.

114 "République du Kirghizistan v M. Belokon, Court of Appeal of Paris, 21 February 2017", 2017 Rev. Arb. 915, 929: "Considering that the recognition or enforcement of the award, which would result in Mr. Belokon benefiting from the proceeds of criminal activities, violates manifestly, effectively and concretely international public order; it is therefore appropriate to pronounce the requested annulment". Free translation of: "Considérant que la reconnaissance ou l'exécution de la sentence entreprise, qui aurait pour effet de faire bénéficier M. Belokon du produit d'activités délictueuses, viole de manière manifeste, effective et concrète l'ordre public international; qu'il convient donc de prononcer l'annulation sollicitée".

115 The court relied upon the, United Nations Convention Against Corruption, which among other activities prohibits money laundering. See "République du Kirghizistan v M. Belokon, Court of Appeal of Paris, 21 February 2017", 2017 Rev. Arb. 915, 922.

116 "Société MK Group v SARL Onix et autre, Court of Appeal of Paris, 16 January 2018", 2018 Rev. Arb. 401.

117 "République du Kirghizistan v M. Belokon, Court of Appeal of Paris, 21 February 2017", 2017 Rev. Arb. 915.

118 "République du Kirghizistan v M. Belokon, Court of Appeal of Paris, 21 February 2017", 2017 Rev. Arb. 915.

119 The United Nations General Assembly Resolution of 14 December 1962, which acknowledges states' sovereignty over their natural resources. See "Société MK Group v SARL Onix et autre, Court of Appeal of Paris, 16 January 2018", 2018 Rev. Arb. 401.

120 See Ministre De La Justice, "June 3rd, 2020, ICCP-CA RG n°19/07261- International arbitral award-International sanctions-Mission of the arbitrator and international public policy" (3 June 2020), https://www.cours-appel.justice.fr/paris/03062020-rg-ndeg1907261-sentence-arbitrale-internationale-international-arbitral-award. The Court of Appeal observed that the sanctions issued by the United Nations Security Council and the European Union are a part of the French international public policy.

121 "Société MK Group v SARL Onix et autre, Court of Appeal of Paris, 16 January 2018", 2018 Rev. Arb. 401, 408. Free translation of: "Considérant que la sentence, qui a pour effet de conférer à Onix un titre juridiquement protégé dans l'ordre international sur un investissement réalisé grâce à l'obtention frauduleuse d'une autorisation administrative à laquelle la législation de la République du Laos subordonnait l'exploitation des ressources naturelles sur son territoire, viole de manière manifeste, effective et concrète l'ordre public international et doit donc être annulée".

122 "Société MK Group v SARL Onix et autre, Court of Appeal of Paris, 16 January 2018", 2018 Rev. Arb. 401, 404. Free translation of: "Si la mission de la cour d'appel, saisie en vertu de l'article 1520 du Code de procédure civile, est limitée à l'examen des vices énumérés par ce texte, aucune limitation n'est apportée au pouvoir de cette juridiction de rechercher en droit et en fait tous les éléments concernant les vices en question".

123 Renusagar Power Co Ltd v General Electric Co (1994) Supp. 1 SCC 644.

124 Renusagar (1994) Supp. 1 SCC 644 at 675.

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QUESTIONING THE POSSIBILITY OF UPLIFTMENT OF FARMERS IN TELANGANA AND ANDHRA PRADESH THROUGH ENTREPRENEURIAL OPTION IN LAND TENANCY

Dr. G. Mallikarjun[1]

Abstract: Tenancy reform is an important policy mechanism to provide better access to and distribution of our country's land resources. It was established within the country to achieve the dual purpose of rationalizing the use of scarce land resources by changing tenure terms and setting caps on such tenure. Therefore, he has two purposes in it. One is to protect tenants from unfair rents and sudden evictions, and the other is to protect the rights of landlords. Another is to redistribute agricultural land in favour of the less fortunate classes and improve the conditions of actual farming by actual farmers. Since then, various states, where most people in rural areas depend on agriculture and related activities for their livelihoods, have enacted rental laws eliminating intermediaries. Regulate rents, provide security for tenants or transfer ownership to ensure a fairer distribution of land resources to initiate agricultural restructuring through farm consolidation to prevent land fragmentation. The paper tries to explore the Tenancy Laws in the State of Telangana and Andhra Pradesh and thereafter the problems with the exiting law and its implementation are explored to provide a possible solution by exploring the option of entrepreneurship to plug the gaps.

Key Words: Tenancy Reform, Intermediaries, Consolidation of Land and Prevention Fragmentation

I. INTRODUCTION

It is a well-known fact that the enhancement of efficiency in the case of resource allocation forms a central theme of economic development in any nation, and land is in itself one such vital resource. In the case of India, the need for land,[2] and the indisputable and categorical privileges towards it are owing to the basic fact that India is chiefly an agrarian country and thus its economic advancement is predominantly associated with land, and its availability. The right to land is a fundamental right directly related to the right to subsistence, which is the minimum level that needs to be guaranteed for proper functioning and a sustained level of living of the nation's people. Further land proves to be the main strength and add to the security of the individual, apart from being a mere socio-economic privilege[3]. Therefore, land rights, mainly in countries like India, where agriculture is also principally the largest employer in numeric terms, plays a vital role, in both economic and social

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[2] In agrarian countries like India, no or limited access to land can be effectively seen as a hindrance in the way to make income, i.e., the process of generating capabilities to spawn income, even according to celebrated thinkers like Streeton.

[3] The distributive measures were meant to achieve this by delivering material resources to the poor as promised by the Constitution of India, especially those who required land as a productive resource. This was to be achieved by redistributing land ownership from large landholders to the landless, specifically from socially weaker sections. *See* R.S. Deshpande, '*Current land policy issues in India*', *available at* http://www.fao.org/docrep/006/y5026e/y5026e0b.htm (last accessed October 01, 2015).

respects, and the limited or no access to land may make the populace insecure and incompetent to meet their basic requirements.

Tenancy reforms are one major policy mechanism which has strived to enable better access and distribution of land resources in our nation. It has been instituted in the country to fulfill the following two purposes: one, to rationalize the use of the scanty land resources by altering the conditions of holdings and imposing ceilings on such holdings, and two, to redistribute agricultural land in favour of the less privileged classes, and improve the terms and conditions of cultivation by the actual tillers. Therefore, its aim is twofold: one to protect the tenants from irrational rents and sudden eviction, and on the other hand to protect the rights of the land owners. Consequently, various States, including Andhra Pradesh[4] where more than 75% of the people in rural areas depend on agriculture and allied activities for their livelihood, have enacted tenancy legislations which abolish intermediaries; regulate rent, provide security of tenure to tenants or confer ownership in order to ensure more equitable distribution of land resources. These legislations have also imposed ceilings on land holdings; and ushered agrarian reorganization by consolidating holdings and preventing fragmentation of land, a process which has helped in the setting up of cooperative farms. Some of these legislations have also enabled tenants to obtain institutional credits.

Part II of the Paper explores the Tenancy Laws in the State of Telangana and Andhra Pradesh. Thereafter the Problems with the Law and its implementation are explored in Part III in a detailed manner. Part IV and Part V try to provide a solution to the problems highlighted by exploring the option of entrepreneurship and exploring the avenues in which the Government has tried to plug the gaps. In Part V, the issues involved with the proposed solution are also explored, and the paper is then concluded in Part VI.

II. Tenancy Laws in two Telugu States: An Overview

Tenancy in Telangana

The leasing out of land by large landholders is prohibited. Small holders owning below three family holdings are, however, allowed to lease out land. The lease in such cases shall be for such periods as the Collector may fix. Landholders owning land up to three family holdings may lease out their land for a period of five years and must, subject to a right of resumption, renew it for further periods of five years. The right of resumption is limited to one family holding for each adult member in the landholder's family. As the family holding can be a considerable area, the resumption can result in total or substantial dispossession of the tenant who is not guaranteed a minimum area. Thus, in reality, there is no effective restraint on the leasing out of land nor is the tenant accorded real security of tenure.

Tenancy in Andhradesh

Tenancy in the Andhra Area is governed by the AP (AA) Tenancy Act of 1956. The main object of this legislation is to see that the tenant feels secure and dedicates himself to the task of production and it was thought that this feeling of security can be created in him by conferring certain occupancy rights for him in the

[4] Andhra Pradesh has legislated many enactments in order to ensure secure land rights to the poor some of which include AP Land Reforms (Ceiling on Agricultural Holdings) Act, 1973; AP (Andhra Area) Tenancy Act, 1956; AP (Telangana Area) Tenancy And Agricultural Lands Act, 1950; and Andhra Pradesh Occupants Of Homesteads (Conferment Of Ownership) Act, 1976, etc.

land and by fixing maximum rent payable to the landlord and all the rights of cultivating tenant are heritable. The cultivating tenant has a right to first purchase the land leased to him. However, in the event of a change in the ownership of any land, the cultivating tenant shall be entitled to continue the tenancy on the same terms and conditions.

All tenants under the Act were treated as single class unlike in the Telangana Act. The maximum period of all further leases was fixed at 6 years. Provision was made for the termination of the tenancy and eviction of the tenant during the currency of the lease in case the tenant failed to pay the rent due or misused the land. The landlord was also permitted to take back the land from his tenant for "personal cultivation", which was defined loosely to include cultivation through supervision by any member of the landlord's family.

III. Where Does the Problem Lie?

Historically, in 1947 after the independence, India inherited three types of land revenue systems from the British which broadly defined the relationships among the layers of land rights and control exercised by the state, landowners, landlords, tenants, and laborers.[5] Consequently, instantaneously a certain sect of the society got intermediate rights to control the land and its revenue to the disadvantage of the poor and landless, who were the actual possessors and cultivators of the land, making a living from the said pieces of land. The then tenancy system strongly helped the landowners to enrich themselves and their riches, at the cost of the tillers. Immature legal protection was provided to this aspect. Tenancy agreements continued to be made orally, or even if written, were terminated pre-maturely without any minimum notice period and the rents charged were phenomenally high, mainly due to the prevalent illiteracy of the cultivators and incompetent teething of the law.

Land reform measures focussing on the abolition of intermediaries, tenancy reform and the imposition of land ceilings, as discussed above, were drafted and enforced, but have however had limited impact. These improperly implemented legislations in conjunction with imperfections in other key markets (e.g., the market for credit), resulted in inequalities continue to constrain long-run economic growth and, in particular, the transfer of land towards high return activities. Thus, intense debates have emerged around how governments should regulate the terms on which land can be handled to benefit the society as a whole, including the landowners and tenants.

Further, in India most of the tenancies being oral and informal, it is very difficult to make an accurate estimate of the incidence of tenancy. Even after passing of tenancy laws by various states, the position of tenants, particularly of share croppers, continues to be precarious in several parts of the country. In the circumstances, it is contended that there is a need to plug the loopholes in the existing tenancy laws and to better implement enacted laws, rather than liberalizing tenancy and the lease market.

[5] *See* P.S. Appu, Land Reforms in India, (Vikas Publishing, 2006); *Also see* G. Kotosky, Agrarian Reforms In India, (People's Publishing House ,1964).

The present era of economic liberalization, has placed small and marginal farmers at a disadvantage when it comes to participating in domestic and foreign markets. This disadvantage stems from their inability to grow the commodities that are in demand in world markets due to lack of knowledge and the high cost of cultivation of these goods. It has been argued that this disadvantage can be overcome by allowing entrepreneurs to enter the agricultural sector and incur the risk of competition. To enable this change of policy, a re-examination of land reforms is being advocated. It is also being argued that liberalization of tenancy would not only increase the availability of land in the lease market but would also increase the poor people's access to land.

There are scholars (for example Haque)[6] who question the blind adoption of this approach and ask policymakers to examine whether tenancy laws of various states in fact constrain agricultural growth; whether liberalization of tenancy would lead to the improvement in the condition of poor tenants or whether it would bring back the era of absentee landlordism.

IV. Entrepreneurship as an Option in Aiding Farmers Through Land Tenancy

Today, land reform in rural India is at a cross-roads now. Increasingly, there is a demand for re-examination of the land reform issue. The new draft National Agricultural Policy states that its approach on land reforms will focus on the 'development of lease market for increasing the size of the holdings by making legal provisions for giving private lands on lease for cultivation and agri-business'. It is also envisaged that "private sector participation will be promoted through contract farming and land leasing arrangements to allow accelerated technology transfer, capital inflow and assured market for crop production, especially of oilseeds, cotton and horticultural crops". Several state governments, in Andhra Pradesh, Gujarat, Karnataka, Punjab and Tamil Nadu, are actively promoting contract farming, changing laws to enable and support it, and providing companies interested in it with a variety of incentives, including lifting of land ceilings, subsidies and tax rebates. Other state governments, including in West Bengal, are under active pressure to change their policy towards contract farming.[7] It is also being argued that liberalization of tenancy would not only increase the availability of land in the lease market but would also increase the poor people's access to land. Apart from the past costs of large-scale evictions, many commentators point to the on-going costs of this large body of tenancy reform legislation. These include: (1) reduced supply of land available for rent, resulting in decreased land access for poor (and other) households who would like to rent-in; (2) non-use or under-utilization of land by landowners who are unwilling or unable to cultivate their land and fear losing their land if they rent it out; and (3) lack of any legal protection for most tenants who are forced to operate in concealed, informal tenancies.[8].

[6] Tajamul Haque, *Impact of Land Leasing Restrictions on Agricultural Efficiency and Equity in India* 134-142, *available at* http://www.landandpoverty.com/agenda/pdfs/paper/haque_full_paper.pdf (last accessed October 01, 2015); Pushpendra and B.K. Sinha, 1999. Some Aspects of Tenancy Debate: Implications for Policy Reforms, Contributory Papers for National Workshop on 'Whither Tenancy?' (Mussoorie: Centre for Rural Studies), xi-xvi.

[7] Jayati Ghosh, *Corporate agriculture: The implications for Indian farmers* (2003), available at http://www.macroscan.org/fet/dec03/pdf/Corp_Agri.pdf (last accessed October 01, 2015).

[8] UN FAO, *Land and livelihoods: Making land rights real for India's rural poor, a document produced food and agricultural organisaton of the United Nation*, available at http://www.fao.org/docrep/007/j2602e/j2602e03.htm (last accessed October 01, 2015).

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Right To Privacy In India: The Technical And Leg

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Abstract

'Data Protection' and 'Privacy' of the individuals are inseparable an key data belonging to an individual or an organization is not secur accessible to the public, it raises concerns of intrusion of privacy. Th of every individual should be protected and should not be made a public. Data protection is a method of legally safeguarding an ind organization's information in the virtual world of communication a With the passage of the Information Technology Act of 2000 an revision, India has officially recognised the need of data priv Considering that India's existing laws on data protection and other rel as the IT Act of 2000 and the Information Technology (Reasonable S and Procedures and Sensitive Personal Data or Information) Laws provide adequate remedies, the Personal Data Protection Bill 2019 w the Lok Sabha on December 11, 2019, and has since been passed. Th individual, in the present digital world, is continuously at stake on various e-surveillance methods, interception of digital communi collection of personal data in various forms at various stages by v Therefore, the author in this paper makes an attempt to highlight surveillance, censorship and the interception of digital communicatio on the right to privacy and to what extent the present Bill will protect t and safeguard the privacy of the individual.

Introduction:

Right to Privacy vis-à-vis Protection of Personal Data:

Since personal information can be accessed by a variety of people and for a variety of purposes in the digital age, it is extremely difficult to maintain privacy and protect personal data. For example, by the state for surveillance or even by

an individual without consent of the said ind techniques like da geotagging and geoc which is collected can business advertisemen personal ends.

In fact, with the adven an increase in tecl privacy concerns ag

concepts that can take on a wide variety of appearances depending on the context, the time of day, the issue under discussion, and even who is bringing the case.

Principles of Data Protection

As the amount of data being created and stored continues to expand at unprecedented rates, the need for data protection is becoming more critical. When it comes to data security, we're talking about preventing sensitive information from being lost, damaged, or accessed by unauthorized parties. In today's highly advanced and frantic new world, it is critical to save and retain all of your important data. Data is becoming more valuable as new technologies emerge and new use cases are established, resulting in a greater need to preserve and safeguard this information. Protecting data and making it accessible in any situation is the fundamental goal of information security measures. Both data backup and business continuity/disaster recovery are technically referred to as "data protection" (BCDR). It's becoming increasingly difficult to protect data in two ways: through acquisition and through management. We're talking about two distinct but intertwined concepts here: lifecycle and data management. Life cycle management is an automated procedure that moves critical information between online and offline storage. It's a complete approach for measuring, cataloguing and protecting information assets against operating and user errors, malware and viral attacks, system failures or breakdown and interruption.

Data Storage and Protection: Technological Frame work

Data backup plays an important role in ensuring that data continues to remain available. To this end, a number of storage technologies are available. These include the creation of a backup copy of a disk or an alternative tape based device whose purpose is to copy specific information to an offline storage device for storing it securely. Although this mechanism has the drawback of being time consuming and slow, it offers strong protection as it is portable and naturally available offline making it safe from network based attacks.

In addition to these methods however, an organization can use a technology known as a "mirror" which creates an "image" of a specific site or file so as to make it available in more than one location. In any case, the practice of data backup on the cloud is gaining increased acceptance and is now commonplace. Often, backup data is moved to a cloud-based repository or to a public cloud. Local discs and libraries can be replaced or protected data can be added to these backups. The process of creating data backups is an extremely important function to effective protect data. Current technological advancement has meant that backup has moved from an independent activity to an integrated component of other activities to conserve storage as well as reduce expenses. Modern backup data protection involves the use of a built-in system that adds or exchanges backups and protects against potential problems.[1]

In the current day and age, data is all pervasive and has become an indispensable component in almost every activity. Data is generated and shared as a consequence of most of our day to day activities including traveling, ordering food or even purchasing anything. This places a high value on this data which is not often recognized and several persons and organizations have found ways to utilize this data which highlights the need for data protection and digital privacy.

Right to Privacy in India: The Legal Framework

Constitutional texts across the world provide for privacy protection in one form or the other. The most notable examples of these are the US Constitution's Fourth Amendment,[2]On the International Covenant on Civil and Political Rights and on the European Covenant on Civil and Political Rights (Article 17 and Article 8).

[1]*Ibid.*

[2]The Constitution of the United States. amend. IV.

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Human Rights.[3] Even at its lowest point in American constitutional jurisprudence, the right to privacy was said to be a part of the Bill of Rights' penumbra, if not an integral part or a substantive right on its own.[4]

In India, however, privacy jurisprudence has taken a different line of evolution altogether. While it has been dealt with in a wide variety of constitutional as well as sub constitutional contexts [5], the fact remains that on its own, privacy is almost alien to the Indian judicial imagination. While other jurisdictions can claim to source the right to privacy from a concrete text, India cannot. The best way out of this quagmire so far has been an expansive interpretation of Article 21, which mandates that the right to life and personal liberty can only be taken away by a lawfully established procedure. Indeed, Indian law has a fairly rich history of attempting to create a somewhat robust right to privacy from Article 21. The first real "privacy" cases in Indian constitutional law relate to the police surveillance of individuals with criminal records ("history sheeters"). In **Kharak Singh v. State of Uttar Pradesh,**[6] the petitioner claimed that police surveillance, and specifically night-time house visits, of history sheeters was violative of Article 21. Citing American jurisprudence extensively, the Supreme Court held that a right of privacy was implicit in Article 21's guarantee of personal liberty.

Next in line was **Gobind v. State of Madhya Pradesh,**[7] in which the Supreme Court encountered another instance of visitation and harassment by the police against a history sheeter. Gobind is an important case to understand the Article 21and how it articulates the right to privacy in the context of use of internet. This is because the ruling in Gobind directly challenges the foundations of the most invasive elements of India's national security apparatus. One such feature is the retention of communications metadata by service providers for a period of two years.[8] Another is Netra, a mass surveillance programme that gives security agencies the ability to collect and store all communications data (as well as metadata) flowing through India's internet infrastructure. Gobind, by following the tradition of Kharak Singh before it, laid down strict limitations upon the targeted surveillance of an individual by police officers. If targeted surveillance of an individual based on a probable cause or a criminal record requires such standards to be followed, there can be no question that even more stringent due process constraints must be in place for the collection and storage of data en masse from every single internet user in the country.

Thus, at first glance, it would seem that Kharak Singh and Gobind have established a right to privacy within the Indian constitution through the Article 21 route. However, my thesis is that such a right, even if it does exist, isn't nearly robust enough to stand the test that pervasive internet surveillance poses. I argue that this is because of the inherent limitations that plague the Article 21 articulation of the right to privacy, and that these limitations have been highlighted by the manner in which the Supreme Court has treated the ways in which the right to privacy can be infringed upon by the state.

The biggest limitation of an Article 21 right to privacy is that the provision and its jurisprudence are fundamentally at odds with the framework of the privacy debate. In today's world, privacy has been couched as an individual, collective or human right that states have an obligation to protect, except when faced with grave national security concerns. The privacy v. security debate is of such a nature that states, when violating the privacy of their

[3] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 1950, art.8.

[4] *Griswold v. Connecticut*, 381 US 479 (1965).

[5] *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632 for example, discusses the right to privacy in the context of civil wrongs committed by private parties against one another, rather than in the context of constitutional commitments of a state towards its people.

[6] 1964 SCR (1) 332

[7] (1975) 2 SCC 148

[8] AnirudhRastogi, *Cyber Law: Law of Information Technology and Internet* 212 (LexisNexis 2014).

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citizens, routinely get away with heavy-handed tactics in the name of the "national interest" (or some equally vague variant of the term).

The manner in which Article 21 has been encapsuled has led to real consequences in the privacy context, where in the ability/power of state to restrict or abridge the privacy of citizen and the consequences thereof. In **Gobind vs. State of M.P.,**[9] the Supreme Court laid down the test of compelling state interest or compelling public interest. In theory, this was an attempt to borrow an American constitutional principle[10] and adapt it to the Indian context in order to emphasize that a "compelling" public interest required to take away an individual's privacy would be a higher threshold than the state interest or public interest thresholds present in Article 19(2) or Article 19(5). Further, the American doctrine of compelling state interest was accompanied by a requirement that any infringement upon the right be tailored as narrowly as possible. Thus, an overbroad measure (the monitoring of all internet traffic within the country, for instance) would immediately pose a constitutionality problem within this test.

The Growing Need for Novel Policy

India does not have a complete law that deals with data protection and privacy. Existing policies and regulations are, in fact, part of its core. These industry rules are a related provision of that IT Act, 2000 and thus provide the rules governing the collection process, the use of such confidential information and sensitive confidential information or the date by the companies' organization within India.

The government is regulating the development of some comprehensive laws that help regulate privacy and data protection. Additional efforts are needed in the process initiated by a team formed by a privacy expert led by Justice A.P. Shah, a judge of the Delhi High Court, presented his full report on October 16, 2012.

The government then appointed a single expert commission under the leadership of Justice Srikrishna who was the previous judge of the Last Resort in India, reviewing issues related to data retention in India and specific recommendations needed to benefit the Central Government on the principles to be considered for data protection in India in the framework of the proposed data protection bill.

There are other important legal provisions that focus on and regulate privacy protection and the provision of personal data

However, data protection in India was achieved through the provision under various laws and regulations apart from provisions of the constitution,[11] such as the following:

• **Information Technology Act, 2000** - (aIt is illegal for companies that deal with sensitive personal information, such as credit card numbers or health records, to profit improperly or unfairly from that data. In accordance with Section 72-A, any service provider that discloses personal information about a person without their consent or in violation of a legally binding contract is subject to criminal prosecution.

• **Telegraph Act, 1885** –The Central Government of India and the Provincial Governments of India are governed by Sections 5 and 24 of the Indian Constitution, respectively.

• **Telegraph Regulations, 1951**- For the issuance of disconnection orders, Law 419-A sets up specific processes and criteria.

• **Unlawful Activities Prevention Act, 1967** - If the responder is not given a copy of the restraining order, the illegal communication cannot be used as evidence.

• **Access to Information Act, 2005** – According to Section 8 (1 (j) of the Privacy Act, personal information that is not related to any public

[9] *Supra* n.12.

[10] *See, eg., Grutter v. Bollinger*, 539 US 306 (2003).

[11] Constitutional protection in respect of the right to privacy as a fundamental right under Part III of the Constitution as opined in the case of *Justice K.S. Puttaswamy vs. Union of India* (2017) 10 SCC 1.

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CONSTRAINTS IN REALIZING LINGUISTICALLY SENSITIVE PRACTICES: A STUDY OF TEACHER PERCEPTIONS

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Abstract

In federally funded educational contexts, teachers are expected to provide the *types of assistance* that multilingual learners need to successfully learn both academic content and skills through English while developing proficiency in English. Research claims that by adopting and sustaining linguistically sensitive practices teachers can capitalize on learners' multilingual capabilities in two ways: one, to support literacy engagement and literacy development and; two, to nurture a possibility of educational equity and empowerment in multilingual learners. However, current literature also shows that teacher engagement in multilingual practices is not tension-free and that it is a deliberate *choice* made by the teacher. Pertinently the research concern has been to understand how teachers engaged in multilingual practices and; what they considered as constraints of their classroom and how they appraised the constraints in order to engage in multilingual practices? It is the second question that interests us in the Indian context. Hence this paper has two purposes: 1) to understand through a literature synthesis *how and why* teachers engaged with multilingual practices and 2) to present the findings of a study which documented aspects that teachers deem constrains their multilingual practices for literacy engagement in the Indian context. Based on survey and interview responses of 16 (of 65 English teachers) of government schools in Andhra Pradesh (India) the study identifies aspects that constraint their adoption of multilingual practices in the classroom.

Keywords: linguistically-sensitive pedagogic practices, teacher cognition, multilingualism, critical pedagogy, monolingual mindset

1. Why do 'Realities and Choices' matter? Towards an introduction

Research claims that multilingual pedagogic contexts evolve synergistic multilingual and multimodal assemblages of toolkits for information processing, thinking and knowing (Casterns, 2015). Plurilingual appeal is the defining linguistic feature of such diversity and classroom is the space where sociocultural-economical-institutional interests meet learner-specific multilingual repertoires of resources and intentions for engaging in education. Consecutively researchers/teachers working in bi/multilingual

education for equity, social justice and empowerment have constantly pointed out two contrasting realities of the classroom: one, the asymmetric power relations and ideologies that create constrains for learner/learning and which need to be critically questioned; two, the increasing diversity in the resources that learners possess which are waiting to be *invested* for literacy development. Hence, research investigating such plurilingual educational spaces makes three primary arguments:

1. A legitimate recognition of the linguistic and cultural diversity amongst students, which means that teaching find means and ways to affirm their identities and encourage learner resources in literacy development.
2. Institutional recognition of multilingualism as the norm rather than the exception. This implies a reexamination of assumptions and ideologies that place monolingual abilities as the standard and multilingual behavior as deficiency-driven.
3. A shift from the monolingual mindset which recognizes "everything in terms of a single language" (Clyne, 2008) to a multilingual mindset which students' strongest languages are utilized as resources for meaning making and social cohesion.

Increasingly research posits that it is "up to the teachers now" to question power structures in small but significant ways for maximizing literacy learning opportunities and learning experiences (Cummins, 2011: 154; DeJong and Harper, 2005). However, this capability to be a critical practitioner demands a reflective stance of their own role vis-à-vis their assessment of the institutional policies, teaching contexts, learners and practices. Given the inherent multilingual nature of the classrooms, and the need for teacher sensitivity to multilingual realities, there is a need to re-examine the curricular goals for teacher education. In short, the crucial question being asked is how can teachers be prepared for multilingual classrooms? And how can teachers capitalise on learner multilingual resources?

We believe, any educational endeavor is a planned and mediated event and any planned event involves rhetoric *choices* at different levels (policy, management and implementation levels). Everyone involved in the exercise of education makes choices but the choices made by the teachers are our concern. The choice to follow the curriculum to-the-word or deviate from it marginally or to incorporate aspects not conceived by the curriculum, is never solely a contravention of external realities. Each choice made is deliberated by appraisal of externally imposed realities (such as policy, ideology-driven curriculum, assessment practices, learner

languages, knowledge of learner sociological realities and community traits of poverty and discrimination) and internally regulatory realities (such as her experiences, beliefs and knowledge of language of instruction and their visible outcomes). Despite the constraining realities, teachers exercise relative degrees of freedom in making choices regarding their classroom. They do possess, even in restrictive work conditions, the freedom to structure interactions to achieve social and curricular learning goals and whether they would value, affirm and build their practices on the learners' prior experiences and seek community support in this regard or ignore them. Therefore, in synchrony with the research community that believes that teachers are the potential agents of empowerment, we believe they can evolve and sustain practices for engaged literacy development. However, such a capability would require a critical negotiation of *what is* and *what ought to be* in their specific context of work (NEP, 2020). Hence the focus of the paper is to present a small-scale investigation on the constraints that teachers, in their classrooms, perceive restrict their engagement in multilingual practices for learner literacy development.

In the ensuing sections, we first present a research synthesis of literature that has investigated *why and how* teachers engaged with multilingual practices. This is done for two reasons: one, identify teaching practices based on multilingual resources and two, help in designing the initial survey questionnaire. The paper then presents the findings of a study where the survey questionnaire was used with 65 English teachers on what constrains them from engaging in multilingual practices in their classrooms (see Chimirala, 2017).

2. So How did We Identify Studies for the Synthesis?

Two strategies suggested by Reed and Baxter (2009) were employed in searching and identifying primary studies that have investigated teacher practices for employing learner resources for engaging in literacy development: One, a computer search of research databases and websites of publishers and peer-reviewed professional journals. Two, pearl searching relevant documents identified through strategy 1. We identified 26 studies using a criteria-based search process. The findings from the studies were synthesized following Cooper and Hedges (2009) i.e., to translate the 'line of argument' or a central metaphor found in a study across different studies i.e., look for common threads despite treatment, methodological and analytical variations in the study. For instance, studies that look at teacher modeling of bilingual abilities in teacher talk enabled learner participation. Similarly, studies that looked at bilingual

materials also find that access to such teaching/learning materials enabled participation. In both the cases participation as a metaphor for cognitive engagement and interest in the classroom events was common. Hence common themes (as findings) had to be gleaned from a reanalysis of the findings of the primary studies. In the next part we present the themes identified from the synthesis.

3. What 'Choices' did Teachers make for Engaging Learners? Why?

The synthesis of research on teacher practices elucidates three themes: a) Leveraging multilingual toolkits: Nurturing access and participation, b) Leveraging multilingual and multimodal materials: Nurturing Access and participation, c) Validating multilingual/ multimodal resources and d) Transformations through experiencing multilingual pedagogy.

3.1 Leveraging multilingual toolkits: Nurturing Access and participation

The first theme that the synthesis highlighted is the deliberate 'leveraging' of multilingual resources by teachers. 'Leveraging' as Michaels (2005: 4) defines is a calculated move to "recruit as strength" everyday communicative practices in very specific ways to nurture different academic capabilities (and not just aspects of language). The goal of leveraging is not to celebrate the learners' everyday virtuosity or look for opportunities to enable direct transfer of everyday practice to a school task but to expand the learners' ability to use their resources to their advantage irrespective of the context of application (home or school). Leveraging could be captured in teacher modeling 'languaging' in the classroom and by modeling multilingual and multimodal materials in the classroom. Gort and Pontier (2013) studied teacher multilingual talk in a school which implemented a language separation policy and discouraged switching of languages. Each class has 2 teachers one for each language and the 4 teachers in the study implemented the separationist policy differently. Teachers were in the bilingual mode if they 'switched' in an interaction sequence which involved a learner and were 'monolingual' if did not switch in their interaction. A breakdown of the language mode (monolingual/ bilingual) as documented in a show-and-tell activity shows that despite the variations in implementing the separatist policy, teachers through their aligned instructional practices "created safe spaces for students to adopt their emerging bilingual repertoire for learning purposes" (p: 33).

Yet another teacher practice is whether to follow the mandate of language separation at all. Garza and Langman (2014) study Ms A, a grade 5 teacher of science and social studies in a dual language school. Though

curriculum mandates that science be taught in English and social studies in Spanish, she uses English and other modes of representing information such as drawing and uses different colors of different elements involved in order to engage learners in accessing the concept and for co-constructing meaning of the concept. The teacher argues that though English is the language of science curriculum, language choice should not be the issue, because in the Community of Practice of science (CoP) the rules of engagement suggest that all literacies be brought to use for understanding "without having any sort of sanctions" (p.41). Hence the authors argue that modeling by teachers needs to go beyond the question of which language is used and with whom, to address what effect it could have on the learners with respect to the concept being discussed at that specific moment. In short using a shared set of tools for making sense of concepts should be seen as an unmarked legitimate practice.

When English is hegemonically reified as the lingua franca of science (established thus by the "self-reinforcing loop of language flow", Tonkin 2011: 3), much is at stake for learners where the textbooks are in English and academic access, participation and success is invariably bound to ability to access that knowledge coded in English. Hence the science professor in Mazak and Herbas-Donoso (2014: 10) explains his slide in Spanish but retained the concept term - 'leaching' in English. The professor was aware that his students were processing a cognitively demanding scientific discourse and that his explanation in Spanish would serves twin purposes: 1) support access to the concept while googling the literature and 2) enable a common terminology for participation in a discourse community.

But what if the teacher does not share the learners' tongue? The economics professor in Paxton (2009) encouraged his participants to identify 'terminology' in their languages for concepts in Economics in English. The study reports that students developed a "whole paragraph in Xhosa for a single term in English" (p: 8) when direct translations of terms were not available. Such discussions force the learners to traverse the BICS end of isiXhosa to the CALP end which meant that a deeper understanding of the concept would need to be reached (Cummins, 2021). In short, lack of terminology or language variations between teachers and learners cannot be a hurdle for critical discussions on concepts and that 'allowing' learners to articulate the concept in their language creates opportunities to leverage their resources to explore ideas across languages.

3.2 Leveraging multilingual and multimodal materials: Nurturing Access and participation

In order to enable learners deal with the variations in literacy orientations and expectations between Japanese and English writing in academic contexts, Garcia and Kano (2014) design a multilingual pedagogy while Adamson and Coulston (2015) design a 'bridging technique'. Both the studies argue that learners' need to "use their entire linguistic repertoires flexibly in order to construct their own meaning and develop strong English essays" (Garcia and Kano, 2014: 263). While Garcia and Kano (2014) are helping their Japanese learners cope with variation in the text organization and voice expectations in SAT essays, Adamson and Coulston (2015) are preparing their learners to cope with the demands of writing a scientific report at the end of their course. Both the studies provided texts in English and Japanese on themes that learners might encounter. Based on qualitative learner interview data on the efficacy of the multilingual practices both the studies report that the multilingual classroom triggered the learners' metalinguistic and metacognitive awareness. They claim that learner engagement in the parallel texts nurtured their agency to self-regulate their language practices to suit the need of the task on hand (an observation reported in both the studies).

Yet another mode in which multilingual materials find place in the classroom has been through deliberate pedagogy of contrastive analysis and translation exercises. Makelela (2015: 205) aimed at examining the effect of translation techniques on reading development of grade 6 learners in a rural school in Limpopo province. Paxton (2009) designed a glossary exercise where his undergraduate participants had to collaboratively create definitions for terminology in isiXhosa, sePedi, Sotho and Tswana. Both the studies report positive learning experiences; significant improvement in biliteracy development; increased reading comprehension besides deepening learners' conceptual knowledge; provided opportunities to clarify and reconstruct their understanding of concepts.

3.3 Validating multilingual and multimodal learner investments

The theme contends that valuing learner linguistic repertoires is explicitly recognizing the diversity of voices as legitimate characteristics of the classroom space. The metaphor of linguistic repertoires as an 'investment' essentially invokes a deliberate, intention-mediated cognitive leveraging on the part of the learners to make sense of events around them vis-à-vis their linguistic experiences. Validating these investments could mean authenticating practices that could be against the institutional/ policy

norms; or challenging their own beliefs and ideologies on language status or reorienting their pedagogic objectives to accept multilingual 'learning behaviors'. Therefore, this theme invokes contrasting imageries: one, where teachers validate learners' multimodal/lingual investments, negotiate their roles and identities at every instance of language use (oral and written); and two, where teachers', given their assessment of the socioeconomic value for a language, show a contracted anxiety in their own practices in enabling language capabilities.

Creese, Blackedge and Takhi (2015) in their study represent how a teacher negotiates a word meaning with her learners and validates her learners' knowledge in a Panjaabi Complementary School in Birmingham, UK. Through her interaction over the word 'leeray' with two learners, she affirms learner identities as experts and acknowledges the value of home knowledge. She crosses the boundaries of languages, identities and time in making connections between home and school for herself and her learners. Complementing this observation, in Palmer, Martínez, Mateus, & Henderson (2014) we see the teacher celebrating the learners' awareness of cognate relationship between the languages.

In contrast to teachers' using multilingual/multimodal resources, learner's use in written texts is far more complicated. Buthainah, the participant in Canagarajah (2011) uses her languages (English and Arabic), her beliefs (religious notions and motifs), translated expressions, and Islamic signs to present her identity, voice and her strategies to engage readers in her text. Buthainah reiterates her multilingual identity and further demands a better understanding from educators and the reader, usually a native speaker in her context, to negotiate the meaning with her rather than expect it to be coded in entirety. The study highlights the range of "multilingual, multimodal, multisensory, multilateral, and therefore multidimensional processes" (p. 15) leveraged for meaning making, the study also highlights the complexity involved in validating the multimodality of texts especially for assessing the text. On one hand teachers accept the authenticity of multilingual/modal text creation as legitimate practices of communication, but on the other hand concerns of how to assess such texts not only transgresses the legitimacy of multilingual behaviors but also points, as Setati, Adler, Reed & Bapoo, (2002) argue, for the need for legitimizing alternative routes of learning – routes that do not cling to the monolingual model. In short accepting learner multilingual/multimodal languaging practices questions the monolingual ability as the norm and fosters multilingual awareness.

3.4 Experiencing multilingual pedagogy: Anxieties and transformations

Across the studies teachers opined that engaging in multilingual talk/materials has initiated changes in their objectives and goals for their activities. Nevertheless, they also present several concerns about the applicability of multilingual pedagogy in an English-preferred context. From a teacher education angle, Martinez-Roldan (2015) document their teacher candidates (TCs) reactions to learners' language choices in a dual language programme. Their TCs supported meaning-making by encouraging the learners read text in both Spanish and English, yet they seemed to insist on English. The need to be good in one language over the other magnifies the TCs understanding of academic equality or inequality and English dominance over bilingual abilities. Given that the State tests are in English, and that English has a higher surrender value learners' use of Spanish generated discomfort in the TCs. However, when the TCs worked for an extended two semesters with the same programme a significant change in the TCs conceptualization of the objectives and goals for the class is reported – from an emphasize on English to an emphasis on bilingual development. This study captures the teachers' tensions – tensions between what teachers want as bilinguals and as teachers in a state-run bilingual educational setup; tensions in teachers' objective of the class and the objective as mandated by the State and tensions in their ideologies of which language holds what value for whom – a concern voiced by Palmer et al., (2014) and Fennema-Bloom (2009). Contrasting this tension is the teacher's willingness to question the dominant assimilationist ideology in Duran and Palmer (2013) by positioning herself in favor of multiliteracies pedagogy. This positioning alters the way she sees the learners – as experts, as cognate cops and as contributors to the classroom activity and to curricular objectives. In sum, this theme shows that multilingual pedagogy has the potentiality to impact several teacher aspects: teachers are aware of 1) their multilingual capabilities in creating 'learning spaces' and; 2) learners as agents in-charge of their learning.

So... what does the synthesis imply?

The synthesis shows that 'aware' teachers exercise their choice by engaging in four dimensions of engaging learners in literacy:

1. Scaffold meaning and meaning making processes by erecting multilingual support systems that will enable learners carry out the tasks.
2. Engage in deliberate instruction aims at activating prior experiences on which new knowledge could be integrated.

3. Affirm learner identity to trigger identity investment in their literacy activity that could transform the nature of classroom interactions.
4. Extend language and language use components across languages.

In summary, teacher has a role in enabling equity and academic justice. Teachers are expected to be theoretically aware of the context-independent nature of language use and that literacy is an 'acquired' capability that has to scaffolded and taught; and are aware of the marginalizing impact of the monolingual practices on multilingual learners when their identities and language resources are unvalued. The synthesis further indicates that the teachers in the studies reviewed were trained for multilingual learners; and were conscious of the impact of their practices and were aware of their constraints but willing to beat them. This implies that they were aware of the conflict in their idiosyncratic language policy(ies) and the institutional policy; impact the conflict could have on learner and learning and; were willing to adopt practices that were supportive of learning. However, in the Indian context can we assume teachers in the government schools of Andhra Pradesh would engage in multilingual practices to support their learners? To understand this question, we investigated two questions: one, do teachers consciously engage in multilingual resources as pedagogic resource? And two, what constraints do teachers perceive as they engage in multilingual practices? The study, we present, in the ensuing sections reports the findings.

4. What did we do? The Study: Participants, tools, data and procedures

The participants of the study are practicing teachers in 39 government schools. We randomly approached teachers in 63 schools for the study of which, 65 English teachers from 39 schools consented to participate in the study. Teachers taught between grades 5-10; had varying periods of teaching experience (mean 10.8 years; range: 6 to 22 years); were trained teachers; had worked in at least two districts and; were keen on research in their classrooms. 3 of them had registered for research degrees in the local universities. 35 of the teachers attended Telugu-medium schools, while 19 of them attended English-medium schools and 11 of them attended both for varying periods of time. 11 teachers were speakers of tribal languages (Saora, Relli, Paidi, Konda, Jatapu, Koya and Lambada).

65 teachers attempted a survey questionnaire that consisted of yes-no questions on teachers' multilingual practices in their classroom. Open-ended questions were reserved for teacher interview tool. Based on the responses of the survey, the questions on the interview were individually calibrated to probe why the teachers had responded thus and hence were

encouraged to provide examples and express experiences. The data for this study comprises of the survey responses and the interview transcripts of teachers and learners. Teacher interviews comprise of 9.35 hours of recorded speech.

The survey questionnaire was analyzed first to identify the patterns of response. 16 teachers who said they did not use any multilingual practices in their classroom were approached for the interviews. The audio files of the interviews were transcribed verbatim and analyzed qualitatively using the open coding option in ATLAS.ti.2.0 software. To enhance reliability in coding, the analysis was redone after a gap of one month and randomly redone by the researcher and a fellow-researcher. Overlaps in categories were identified and resolved. Correspondingly, four themes that evolved are presented in the next section.

5. What does the data say about teachers' perceived constraints?

The survey responses were thus. When asked if they viewed their learners' languages as resources for learning, 36% responded in positive; 54% responded in negative and 10% were not sure. When asked if they could implement multilingual practices to nurture literacy engagement in their classrooms, 64% responded in negative; 23% in affirmative and 13% were not sure. When asked if they had 'freedom' to take decisions about their classroom activities 68% of the teacher responded that they did not have; 12% said in affirmative; and 20% was not sure of it. When asked if they could allow their learners use their languages in the classroom, 83% responded that they would not while 17% said that they would. When asked if they could use learners' language in teaching, 58% said that they would while 47% responded that they could not. When asked if they would 'allow' their learners respond in their languages, 76% responded in negative; 14% said in affirmative while 10% were not sure. The variations in the responses of participants necessitated further probing as to why they could not adopt multilingual practices. Probing further would reveal the constraint and conflicts that teacher face and mitigate on a daily basis. Based on the interview responses 4 themes that teachers deem as 'constraints' are explicated below: The reality-theory wide and transference problems; Training that endorses separatist views of literacy; 'Transmitting' insensitivity to learner community needs and; 'Adhering' to lock-step procedures for testing compliance.

5.1 The Reality-Theory Wide and Transference Problems

Excerpt 1

> The school is a real world- a world that is both misrepresented and underrepresented in the education college.... The theory that we are taught neither takes into account our realities as students nor our experiences as language users. Everything is reduced to 'write a brief note on' in the examination. We were never asked to think about transferring those ideas into real classrooms. It is like the books treat the classroom as zero-conflict and zero-context spaces and as if learners were blank slates. In my context we have 3 language speakers as learners – Saora, Paidi and Telugu. The Saora are the most disengaged in class simply because they cannot understand what is happening in the class and I desperately try to get them to understand in English when even Telugu is difficult. Neither the B. Ed college nor SSA prepares you for this – where learners are not making sense not because of the subject is complex but because of the language that the learner does not understand. How to deal with this? (MK-BUPS[1])

9 out of 16 teachers pointed out the contrast in real classroom and the imagined classroom of their lectures on in their pre-service training classes. MK-BUPS makes the point clear. He contends that the construct of a classroom is misrepresented to be context-neutral and conflict-free space in the lectures and that such a description is problematic on two accords: one, their own learner realities are traded for imagined idealization of the learner and classroom and; two, concepts and theorizations that could increase awareness of learners in real-classroom is reduced to an 'exam' question. MKBPS points that such an education hardly prepares one for the reality of his context. His awareness of his Saora learners' lack of engagement in the classroom due to the alien language and his inability to engage them through multilingual practices, he attributes it to his pre-service and in-service training. His question 'How to deal with this?' points sharply to what Cummins (2009) hints as the problem of transference to which Martinez-Roland (2015) suggests teachers' sustained engagement with the field could counter.

5.2 Training that Endorses Separatist Views of Literacy

Excerpt 2

> When we did a sample module in the training programme, it was fun. I could see the methodology and the learning objective but I am not sure if it will work for my learners. The textbooks stress on pair and group

[1] MK-BUPS: MK is the first letter of the teachers' name and BUPS is the code for teachers working in a particular school.

> works … children love them but give the response in their L1. How do I stop that? How to bring them to English? At the training programme, I raised this point but the trainer could not respond satisfactorily. After all I am their English teacher not their Telugu teacher. All the activities are like that. I think, personally they are interesting but are they for my learners? will they be able to access it? …compete with city children? I have to build their English so I will not let them switch even if they make mistakes. (JS-BNHS)

The perpetual demand from learners and officials to improve 'spoken' English capabilities has initiated training programmes with this aim. 14 (of 16) teachers highlighted that the in-service training programmes expected them to follow the methodology they advocate to build English proficiency and these training sessions leave several of the teachers' concerns unaddressed. JS-BNHS points out gaps in in-service training as a constraint in adopting multilingual practices. She does not deny using the L1 in class but is apprehensive about letting her learners use their L1. In excerpt 1, JS-BNHS is referring to a training session for teachers of class 9 and 10 that stressed the need to improve spoken skills. The impetus of the training was on pair/group work and collaborative project work, leaving unattended a major preconception and fear among teachers that encouraging pair/group work could also mean allowing for the use of the other languages. JS clearly articulated the 'methodological silence' (Atkinson, 1987) which is a lack of clarity in whether the learners' L1 is of pedagogic relevance, results in uneasiness which many teachers experience and which manifests itself as an apologetic/ accusative stance to multilingual capabilities. This is visible when JS-BNHS asks whether she was a teacher of English or Telugu – a rhetorical question that manifests the teachers' assumption of the separatist views of language capabilities. She questions whether her 'economically and contextually disadvantaged' learner has access to education given that they would not have the 'exposure' a city-breed learner would have. Precisely the concern of equal access to academic space that teachers in Paxton (2009) voiced along with Adamson and Coulston (2015) and Mazak and Herbas-Donoso (2014) are concerned with. However, unlike them, despite her multilingual capabilities and her awareness of her learners' multilingual capabilities, she chooses to uphold a monolingual model of learning language. Why? What tensions and rationale necessitate such a choice?

5.3 'Transmitting' Insensitivity to Learner Community Needs

Excerpt 3

> [h]alf-explained concepts served in half-visible platters by half aware butlers who were parroting ideas that look fine on paper but will they

> work in class? In class you deal with real learners.... not imaginary...who live in a real world to whom our expectations seem unachievable.... I don't have a word..... but we are expected to deliver to learners whose 'active presence' in the class is as much a myth as the objectives of attaining specific competencies'... I find that though the overall aims seem to be the same, how we have to reach are different. I find a short-sighted use of the learner languages is framed. It is not even a comparable version as in the MLE project. Even there it is a stepping stone. Why? Learners are the same here too then why the difference? Why not start with what they value?... I am forced to get them to read the guides rather than think and respond. (R-MPTS)

5 (of 16) teachers problematized the contextual and learner neutrality as the base curricular assumption which sets out a Minimum Level of Learning (MLL). They argue that such an assumption places undue pressure to achieve the minimum levels of learning on both the learner and the teachers. In excerpt 2, R-MPTS who has worked in a tribal school where the Multilingual Education Programme (MLE) was implemented, makes the argument and observation. R-MPTS in referring to the same training programme mentioned by JS-BNHS (in excerpt 1), problematises two aspects that he thinks constrains his capability to experiment with multilingual practices. One, the inability of the in-service trainer to clarify the role various languages can have in enabling access to learning in the classroom and; two, the problematic categorization of learner communities as tribal and non-tribal when they are all learning English; could be facing similar if not identical problems and; have a right to use their languages as resources. He calls the trainers as 'half-aware butlers' who parrot ideas that problematically assume neutrality in context and learners. He comments that when learners' resources are not validated as legitimate (as it is done for about 5 years in MLE schools) learner participation becomes a 'myth' like the learning objectives laid-down by the curriculum. He adds that his learners in the current class are like the learners in the MLE programme and both the learner communities need their L1 to be framed as a thinking resource and not treated as a blotch. Nonetheless, he points out, that when the curriculum does not see the sociocultural variations in learners and their contexts of study, he is forced to look for ways that will ensure 'quick-fix' learning such as depending on guides. He does so despite his recognition of learner community as being identical across his contexts of work and that affirming their identity has its payoffs.

5.4 'Adhering' to Lock-Step Procedures for Testing Compliance

Excerpt 4

> The whole scheme of education is testing centric...testing all the time and month after month. I feel like I am running constantly and making my learners also run too. I have to document the tests too because some inspector might ask for it. Stronger and sturdier kids who are already OK in their studies can manage but the weaker students are the ones who suffer the most.... The learning load is really heavy on these children. Their ability to write without errors is bad enough, so I have to ensure that they do that and also manage the next topic. So, the easy way out is that we both adopt short cuts like memorizing.... I also know how to help my learners...study hours. (MK-YHS)

MK-YHS was one of the participants who said that she does use several languages in her classes. Interactions with her revealed that MK-YHS being from marginalized group is aware of how English can make an impact in their academic and economic growth and so she says she takes 'extra care'. She takes extra classes for the X class learners and runs study hours in the morning. This she points out nobody can stop her from doing because it is her decision and hence she points that she does have the choice no matter whether the State values it or not. Testing procedures and documenting testing outcomes according to MK-YHS contravene in realizing teaching objectives and in scaffolding learning. Mukhopadhyay and Chimirala (2014) find that teachers' educational background was a significant variable that not only impacts assessment practices, but also sensitizing teachers to their own assessment practices and its impact on their teaching could have positive pedagogic effect on assessment practices and in creating scaffold for learning but in the absence of knowledge on how to bank on learner multilingual resources to construct support systems for struggling learners, testing becomes a ritual and counter learning. Corroborating the study, in excerpt 3 Ms. MK-YHS points out at testing procedures as a device that curtails her choice to use multilingual practices. She draws our attention to several effects of the testing paradigm: on herself as the teacher and the learner; her awareness of her learners struggles and her strategies for teaching. She critiques the importance being placed on documenting learning for inspection purposes over and above the processes of learning and learner participation. She voices her constrains in engaging in meaningful learner centric practices when she has to comply with the demand to 'evidence' learner performance. Since she has to ensure learner readiness despite incompatibility between the current level of the learner and the expected levels, she adheres to 'study hour' as a resort to enabling 'passing'.

5.5 So, What have we Found?

This study investigated two aspects: one, through a synthesis of literature we engaged with *why and how* teachers engaged in multilingual practices; and two, we wanted to know if teachers, engaged in such practices and what constraints they perceived in engaging in multilingual practices. To understand the second purpose, we designed two tools: an initial survey questionnaire that probed whether teachers engaged in multilingual practices and then an interview with 16 teachers to engage in what constraints they perceived that restricted their engagement in such practices. The survey revealed that majority of teachers used several languages to get their learners understand and cope with the lesson- a pedagogic sensitivity to realities of their students. This pedagogic adaptation they attributed to the linguistic level of the learners. In this aspect this study corroborates research that investigated the purposes of teachers' code switching in the classroom. However, the other questions of the survey which probed whether teachers adopted multilingual strategies other than 'teacher talk' documented negative response. Why? The teachers' responses on the interview presented four aspects that according to them pertain to their training (pre-service and in-service) and testing aspects as mandated by the curriculum.

The findings of this study, in synchrony with several studies reviewed, substantiate the fact that teachers operate in a context of overt linguistic hierarchies that create several divides: the English-Vernacular divide (Ramanathan, 2005) and the double-divide (Mohanty, 2018). Needless to say, 'orientations' to language, the efficacy of the language and the very attitudes regarding languages and how could support pedagogy are influenced (Ruiz. 1984). Even when teachers are aware of their learners' struggles, they choose to follow the norms, the materials and policies/objectives of the institution. Those teachers who maintain that they do not adopt any multilingual practices to enable the language they teach could be doing so for either of the two reasons or both. Reason 1, the norms of the institution mandate thus and; reason 2, a gap in their knowledge system. Taking either of the two reasons as given would mean that three ecologies: where the teachers are prepared for their responsibilities; where their development as teachers is aimed at and; where they function as teachers is riddled with a monolingual mindset. A mindset, which deems that access to employment and educational opportunities, can be routed only by through English and the teachers work is to enable that. Correspondingly, traces of this hegemonic mindset are evident in the excerpts where teachers' dilemmas on the efficacy of other languages for their language classroom are voiced but go unanswered.

Themes identified in the results section substantiate the point that the gap in teachers' knowledge system. Unlike the teachers in Paxton (2009) and Garza and Langman (2014) and Martinez-Roldan (2015), our teachers have not had the opportunity to engage, at the pre-service education level, in the literature that argues that bi/multilinguals are not two monolinguals in one and that they manipulate their processing modes to suit their needs (Grosjean 1989). Their in-service training provides them with the 'know how' and 'why' of utilising learners' multilingual resources as the teachers in Paxton (2009) does. Such learning ecologies through which our teachers pass through could, as Setati, Adler, Reed, & Bapoo, (2002) argue breed institutional practices that endorse 'separatist' practices to legitimise one specific cognitive route for learning and one specific set of resources for learning and knowing in MLLs. Thus, annihilating the possibility of capitalising on any other cognitive route as legitimate learning ways happens often with serious consequences. Recall MK-BUPS (excerpt 1) laments that her Saora learners are the most disengaged. This teacher clearly highlights the consequences of such situations – the inaccessibility of educators' language of transaction coupled with the imposition of restrictions on the learners' language of thinking and meaning-making could have dire results, such as learners being pushed out of the learning space and eventually from the school space (Mohanty, 2015). On the same chord, R-MCT points out that multilingual resources are discussed in the in-service training sessions, for learners from the tribal communities and that such discussions not only create learner categories but also picturises learner resources as-a-pedestal-for-take-off rather than a legitimate capability that needs to be nurtured.

All the 16 teachers we interviewed were aware of learners' diverse language levels, learning levels and possessed several languages in their functional repertoires; and that they needed different levels of help to cope with the classes. None of the teachers we interviewed cited their learners' English proficiency neither as the need to adopt multilingual practices nor as the cause for their reluctance to adopt. Have the teachers assumed a neutral position regarding their learners' realities and their own roles and working conditions? And what needs to be done? This study brings to the fore two significant concerns. The first is that research on the inextricable interdependent nature of the languages of bi/multilingual learners and how learners draw on them in soft assembling their multilingual repertoires for their learning is yet to be disseminated. Therefore, awareness of the interdependence between languages and the cognitive benefit that these languages can accord remains unexploited by teachers. Teachers' conscious inability to capitalise on learners' multilingual

resources and transfer their understanding of theory to learning is in part driven by the pre-service and in-service programmes. The second is that the first aspect could have a ripple effect on assessment practices and using the assessment outcomes for erecting support systems for learning.

Conclusion

One major limitation of the study is that it restricted its data to teacher survey responses and interviews rather than triangulate it with actual classroom interactions or teacher's classroom work. Nevertheless, the study confirms that teachers could be key players in recognising learners' languages either as a resource or as an impediment and that they could play a significant role as agents of change in multilingual classrooms, provided that teachers be 'allowed' to uncover, analyse and question ideologies. Given that teachers are subjected to in-service training sessions that advocate selected methodologies and techniques as sacrosanct sure-shot practices for developing English capability, one cannot but note the varied and conflicting discourses within the data. Some teachers despite recognising learners' multilingual resources as cognitive assets are apprehensive about using them for pedagogy since, according to them, neither their training nor their own education has not warranted it. The reasons for this inability range from the hegemonic position held by English (over other languages) to knowledge gaps in in-service and pre-service training that impact transference of knowledge to real life classrooms, for scaffolding teaching learning and assessment for learning. To this extent, courses in teacher education have to be designed so that teachers instead of becoming 'a cog in the Policy Wheel' (Mohanty, Panda and Pal, 2010) are aware of their own ideologies and contribute to their learners' empowerment and self-regulated access to educational opportunities.

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Assessing the role of creativity and motivation to measure entrepreneurial education and entrepreneurial intention

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Abstract

Purpose

The study aims to investigate the association between Entrepreneurial Education (EE) and Entrepreneurial Intention (EI) and the multiple mediation model of Creativity and Entrepreneurial Motivation (EM).

Design/methodology/approach

The study employed a sample of 300 students who have studied entrepreneurial development courses (short-term and vocational courses) from higher educational institutes located in four States of Northern India. The data were analyzed by employing the structural equation modeling (SEM) technique.

Findings

The investigation revealed that EE has a significant association with EM and EI but not with creativity. It is also seen that EM facilitates the affiliation between EE and EI, but creativity does not.

Practical implications

The investigation results help the Institution, Policymakers, Government, to include entrepreneurial activities in their programs.

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VIEWPOINT ARTICLE

THE DARK SIDE OF OVERUSE OF INTERNET: A STUDY OF INDIAN COLLEGE STUDENTS

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ABSTRACT

INTRODUCTION

The extensive use of the internet and its effect on our lives can no longer be overlooked. While the internet is a result of the rapid advancement of science and technology, its impact on students depends on how they use it. The present study identifies Internet usage patterns, nature of use, and Internet Addiction (IA) among India's undergraduate and postgraduate students and its consequences on their lives.

METHODS

This empirical examination uses the Multistage Sampling Method (MSM) and cross-sectional method. The structured questionnaire distributed (N=1,200) to ungraduated college students. We included at least ten institutes of every state in India and thirty participants from each institution in this study.

RESULTS

The study revealed that overuse of the internet is statistically significant with internet addiction concerning gender but not with age and education. Overuse of the internet strongly impacts IA. The study further investigates the relationship with the consequences of overuse of the internet with age, gender and education and found that genders significantly differ with the physical and psychological problem but not with a behavioural and relationship problem; level of education has a significant difference with physical and behavioural problem but not with relationship and psychological problems.

CONCLUSION

Our investigation helps college, university or educational policymakers to frame good mental health policies or create programmes to reduce or constrain the adverse effect of overuse of the internet. The results show a compelling need to reduce the overuse of the internet (OI) by promoting psychological competence.

KEYWORDS

Internet Addiction, Overuse of Internet, Gender, Consequences, India, College and Students.

INTRODUCTION

As technological devices become prolific in our lives, they are increasingly embedded and concealed in ourselves as we gradually integrate with them. Extensive merging of humanity and technology is inevitable and such amalgamation is bound to have implications in all aspects of our lives. Technology has tremendously changed lifestyle within a short period, given that instant access to information was unimaginable just a few decades ago.

The proliferation of technology in our personal and professional lives has also changed how we interact with it to the extent of becoming dependent on it. There are ongoing debates and discussions on classifying behaviour characterized by excessive non-work-related technology, especially those related to the internet. Such excessive use has been recognized as an addiction. Overindulgence in Internet-based activities, i.e., gaming, blogging, surfing, chat rooms, shopping and pornography, is now considered an addiction disorder. The disorder has various names, including Problematic Internet Use, Internet Addiction Disorder (IA), Compulsive Internet Use and Impulse Control Disorder. These disorders are akin to conventional addictions such as pathological gambling, which may not necessarily involve narcotic usage. The stark rise in the figure of nternet users in India from 394 million in 2000 to 6 billion in the 4th quarter of 2020 – the second largest in the world, indicates the country's prevalence for digital addiction disorders. [1] These disorders are associated with depression, lack of concentration, high anxiety, psychomotor agitation, salience, mood modification, obsessive thoughts, and sleeplessness. The World Health Organization has included "gaming disorders" into the International Classification of Diseases, highlighting the growing and severe problem of IA throughout the world.

Prominent researchers of internet addiction suggest that internet addicts exhibit the same symptoms as those with impulsive control disorder and drug or alcohol addicts. [2] IA is believed and has proven to have wide-ranging unpropitious outcomes that impact large domains of lives, ranging across physical, emotional, psychological, occupational and interpersonal. The negative impacts have severely impacted young people who spend excessive time online and neglect their family, professional and social life and most importantly, their interests. [3]

Previous literature compares internet usage with cigarette smoking and individual behaviour. [4] Internet usage becomes so addictive that individuals start neglecting their work which can cause many issues such as family conflict, relationship conflict, boredom and low self-esteem. [5] Whether we codify it within a clinical framework or not, the alarming nature of IA is significant in recognizing the potential negative impact of this problem. Studies have been undertaken on internet addiction and the workplace but there is less study on students' internet usage and academic performance. There is an urgent need to attend to the crisis of IA by academics, health experts, professional institutions, society and government. [6] The current study proposes the framework of how Overuse of Internet (OI) becomes internet addiction and its further association with gender, age and educational level.

RESEARCH BACKGROUND & HYPOTHESIS DEVELOPMENT

There have been many studies on IA, as seen in an extensive review by Mak & Young. [7] A semind introductory study of addiction with computers emerged as early as 1989 in a book by Shotten, which reported the enchantment of students in the UK by machines, to the exclusion of their other activities. [8] Dr Kimberly Young first introduced the notion of 'IA' in August 1996 at the American Psychological Association [9] but this presented many controversies. It was believed the term could only use in substance addiction and abuse, such as in drug addiction; thus, some studies have referred to the overindulgence in internet activities as for IA. [10] Others have called it terms such an IA Disorder [110], pathological operation of internet [12] depression [13] and pathological internet use. [14] Over time, researchers have propounded the term and concept of IA to simplify the exploitation or adverse Usage of Interenet (UOI) and the uncontrollable use of Internet of Things (IoT). [15] Studies have also recognized various disorders caused by IA, similar to drug or alcohol addiction. [6, 16] On comparing internet addicts to non-addicted users of the internet, the former reported more harmful and adverse consequences significantly as a result of excessive Internet use, such as the compulsive need to go online when offline, along with mixed feelings of guilt and anxiety about the amount of time spent on Internet [17] and hiding the details of time spent on the Internet to their peers. [18]

Earlier studies have identified specific negative consequences of OI, such as time mismanagement, lack of sleep, and missed meals [19], all of which could directly affect on personal and professional fronts. [20] Studies have recognised IA symptoms including psychomotor agitation [21], changes in appetite [22], gloominess or depression, lack of self-control [23], impairment of function [24], inability to make decisions [25], disorganized eating habits [26], and irresistible online surfing despite its detrimental effects on personal welfare. [23] Studies revealed that hefty Internet use for leisure is highly connected with decreased Academic Performance because of synchronous chat rooms. [14] Studies have also highlighted common problems created by extensive Internet use like disrupted marriages and marital issues. [27] Studies hitherto have primarily focused on four factors, viz., personal, social, academic and Internet-related to define and explain the problems related to IA. Despite studies discussing and studying IA's impact, few reports study the entire pathway that includes therapy. Most of the studies focused only on the adverse impact rather than the positive impacts of Internet use. [28]

To the best of our knowledge, few studies have assessed the adverse effect of the internet but there is no clarity how internet usage becomes internet addiction. Recent studies revealed that usage of internet vary with gender. [4] For example, in terms of gender, some studies have shown that men are more addicted to the Internet in developed and high-tech economies. [4; 29] while other researchers have shown no such differences between the genders in the extent of UOI. [30] While many studies have tried to assess and analyse the factor of addiction by measuring the amount of time spent online, such studies are complicated by the fact that students are connected to the Internet or Wi-Fi all the time in modern times and rely strongly on the Internet for academic's purposes, acquiring news and information and for communication and entertainment. Thus, IA is now a multidimensional and

multifaceted concept that must be explored across a broad perspective to understand the issue comprehensively. The following hypotheses were proposed to gain such understanding:

- **Ho_1** There is no significant difference in the overuse of internet and Internet Addiction across the (a) gender, (b) age and (c) education.
- **Ho_2** Overuse of internet has no significant impact on Internet Addiction among students.
- **Ho_3** There is no significant difference with consequences of Overuse of Internet across the (a) gender, (b) age and (c) education.

METHODOLOGY

DATA, DEMOGRAPHIC, PROCEDURE AND INSTRUMENT

This empirical examination has used the Multistage Sampling Method (MSM) [31] and the cross-sectional method; [32]. MSM is viewed as reasonable to minimalise and control for bias, which diminishes the study's expense and time. The current survey examination has 39 items (accumulative) scale, and previous research has suggested that 5-10 response for one item is adequate for the study. [32] So, the current study required (39*10) 390 responses, but we distributed the (N= 1200) structured questionnaire to graduate and postgraduate college students of Delhi and NCR, Haryana, Uttrakhand, Himachal Pradesh and Uttar Pradesh states in India regardless of their level, stream of study. We included at least ten institutes from each state and thirty participants from each institution. Previous studies suggests that structured questionnaire surveys circulated through email or by hand are generally more appropriate for social science fit in sociology research. [33] Seven hundred and nineteen responses were obtained, with a response rate of 47% (online survey) and 79% (personal survey method). The final study sample comprised 626 participants (61% male; 39% female; M = 3.372, SD=0.794, with ninety-three rejected because data was imprecise or nonresponsive. The demographic of respondents can be seen in Table 1. The IA Test, developed by Young [21], was used in this work. The data obtained were organised, tabulated, and analysed systematically using SPSS 25 software.

TABLE 1: DEMOGRAPHIC PROFILE OF SURVEY RESPONDENTS

Demographic Characteristics		Frequency	Percentage
Age	15-20 Years	161	25.7
	20-25 Years	382	61.0
	25-30 years	79	12.6
	More than 30 Years	4	.6
Gender	Male	384	61.3
	Female	242	38.7
Education level	Graduation	249	39.8
	Post Graduations	377	60.2
Nature of Accommodation	With Family	429	68.5
	Hostel with friends/rent	197	31.5
Income Categories	Upper Class	15	2.4
	Upper Middle Class	258	41.2
	Lower Middle Class	353	56.4
Nature of Relationship	Single	466	74.4
	In relationship	122	19.5
	Complicated	38	6.1

RESULTS

1 Pattern and Purpose of using Internet in the class

It is impossible to circumvent technology and the internet in modern times but educating users on the right way to engage with it is essential. Students increasingly use the internet and its various educational applications to obtain information for academic purposes, and pattern results (Table 2) of this investigation show that respondents use the internet for about four hours every day. The internet is a source of extensive knowledge where everything can be accessed quickly and easily and these purposes for using the internet was studied. Reliability (α) was calculated for all measurements and found to be .781, indicating that the construct is reliable enough for further statistical analysis (Table 3). The mean (2.19) and SD (1.025) suggests that students were using the internet more other than for class purposes. The descriptive study (Table 3) followed by the texted or checked mailbox or online status while in class with a mean of 1.964 and SD=1.062. Receiving a sexually suggestive photo or video scored the lowest mean of 1.139 with SD=.474 and followed by online gaming in the class with mean =1.362 and SD=.889.

TABLE 2 INTERNET USES PATTERN

Demographic Characteristics		Frequency	Percentage
Average Hours of Uses	0-2Hours	105	16.8
	3-4 hours	261	41.7
	5-6 hours	97	15.5
	7-8 hours	72	11.5
	9-10 Hours	44	7.0
	11-12 hours	36	5.8
	13-14 hours	7	1.1
	15-16 hours	4	.6
Practices of Switching of Notification in class	Yes	536	85.6
	No	90	14.4
Can live without internet	Yes	233	37.2
	No	293	46.8
	can't say/ do not know	100	16.0
Can internet be regulated	Yes	288	46.0
	NO	160	25.6
	Can't Say	178	28.4
Uses of Internet in class room	never	280	44.7
	Sometimes	294	47.0
	Most of the times	52	8.3
Visiting pattern of porn site in a week	1-3 time	440	70.3
	4-6 times	146	23.3
	7-9 times	40	6.4
Feeling of Internet Addiction	Not at All	55	8.8
	Not much	163	26.0
	Some what	257	41.1
	Very Much	151	24.1

TABLE 3 DESCRIPTIVE ANALYSIS (CR, MEAN AND STANDARD VALUE OF CONSTRUCTS)

CONSTRUCTS	CR	MEAN	SD
Using Internet	0.781	1.9649	1.06224
Internet Addiction	0.929	2.0815	0.71876
Causes of internet overuse	0.867	2.8315	0.7946
Physical Problems	0.917	2.2764	0.98478
Psychological Problems	0.938	2.18	1.01878
Behavioural Problems	0.907	2.1465	0.91039
Relationship Problems	0.936	1.7688	0.81293

1.1 Causes of Internet overuse

While the UOI in terms of information and entertainment cannot underestimate, its overuse can cause depression, obsession, anxiety, and even isolation, all of which are IA symptoms. A literature survey identified various causes of Internet Overuse (IO), and students were asked to rate on intrenet use according to their preferences. Reliability (a) (see table 1) was calculated for all the measurements and found to be .867, indicating that the constructs were reliable enough for further statistical analysis. Sexual exploration was one of the fundamental reasons disclosed by students with mean score 3.426 and SD=1.412, followed by the statement "I want to escape harsh realities of life" with a mean of 3.372 and SD of 1.230. Leisure time or Free time scored the lowest mean of 2.126 and SD=1.054.

1.2 Consequences of overuse of Internet

A series of internet overuse consequenecs were identified from the literare including physical problems, psychological problems, behavioral problems and relationship problems and in our survey, students were asked to rate these consequences on a scale of 1 to 5. Reliability (a) (see Table 3) was calculated for all the constructs and found to be between .907 to .938, indicating that the construct was reliable for further statistical analysis. Descriptive statistics showed that 'Physical problem' had the highest mean (mean = 2.276) followed by 'Psychological Problems' (mean = 2.180), 'Behavioral problem' (mean = 2.146) and 'Relationship problem' (mean = 1.768). the attribute' Sleep disturbance" scored highest with a mean of 2.580 and SD of1.298 followed by dry eyes/eye strain, with a mean of 2.539 and SD of 1.245, and backaches had a mean value of 2.492 and SD of 1.263.

For the different measurement variables of psychological problems, "feelings of guilt" scored the highest mean of 2.596 and SD=1.362, followed by "Loss of interest" with a mean of 2.427 and SD of 1.289. In regard to behavioral problems, attributes like "Loss of interest in study/work" scored the highest mean of 2.385 and SD=1.239, followed by "Often losing to track of time when online" with mean =2.379 and SD=1.182. Attributes such as "Displaying anger due to time loss" had the lowest mean of 1.852 and SD=1.071. Regarding relationship problems, attributes such as "Decreased time spent with family and friends" had the highest mean of 2.016 with SD=0.991, followed by attributes like "Deceiving others about the amount of time spent on the Internet" with mean =1.971 and SD=1.035. "Thoughts of "getting online", or of sexual behaviour, seep into your mind when you are not online or engaged in sexual behaviour (i.e., work, with family)" scored the lowest mean of 1.499 and SD=0.824.

2 Hypothesis testing

The values calculated experimentally using the one-way ANOVA; Table value of OI and IA (3.85) found is less than the calculated value (F=5.188, p=.023, p>.05) of IA & Internet overuses (F=5.540, p=.019). Hence, (Ho1) was rejected, which shows that male and female students are significantly different concerning OI and IA. [38; 12; 29] However, the analysis has not found enough evidence to say there is a difference between OI and IA with age and educational levels. F value = 2151.630, p>.05 showed (H2) Overuse of the Internet has a significant difference with Internet Addiction. The pooled mean of all measurement variables calculated for assessing IA; regression analysis was carried out and was found to be moderately significant (f=82521.042, P=.000b, t=287.265, p=.000) and contributed 99.2% (R2 = 0.992) to the IA. IA= (B=0.037+.979*), the results revealed that the beta values for Internet overuse were 0. .979 and thus, it had a strong effect on IA; hence it is concluded that Internet overuse is

a prime cause. OI, the f-value was found to be greater than the table value (3.85) in the case of Physical Problems (11.113) and Psychological Problem (14.15) as against to behavioral problem (2.547) and relationship problem (1.807) at 1 degree of freedom and 0.05 level of significance. Therefore, (Ho3) was rejected; the mean values of the physical problem and psychological problem differed significantly between the genders. However, the mean values of behavioral and relationship problems do not differ significantly between men and women. The f value of (Ho3) was more significant than the table value (3.85) in the case of Physical Problems (5.320), Behavioral Problem (4.065) as against Psychological Problem (3.622) and relationship problem (.999) at 1 degree of freedom and 0.05 level of significance. Therefore, it concludes that the mean of the physical problem and behavioral problem differs significantly across the respondents' level of education but is accepted in psychological problems and relationship problems. Thus, psychological and relationship problems do not differ significantly across respondents' levels of education.

TABLE 3 ONE WAY ANOVA OF MEAN OF INTERNET ADDICTION AND INTERNET OVERUSES ACROSS THE GENDER, AGE AND EDUCATION

GENDER		SUM OF SQUARES	DF	MEAN SQUARE	F	SIG.
Internet addiction	Between Groups	3.141	1	3.141	5.188	0.023
	Within Groups	377.739	624	0.605		
	Total	380.88	625			
Internet overuse	Between Groups	3.473	1	3.473	5.54	0.019
	Within Groups	391.141	624	0.627		
	Total	394.614	625			
AGE		**SUM OF SQUARES**	**DF**	**MEAN SQUARE**	**F**	**SIG.**
Internet addiction	Between Groups	2.307	3	0.769	1.264	0.286
	Within Groups	378.573	622	0.609		
	Total	380.88	625			
Internet overuse	Between Groups	2.208	3	0.736	1.167	0.322
	Within Groups	392.405	622	0.631		
	Total	394.614	625			
EDUCATION		**SUM OF SQUARES**	**DF**	**MEAN SQUARE**	**F**	**SIG.**
Internet addiction	Between Groups	0.435	1	0.435	0.713	0.399
	Within Groups	380.445	624	0.61		
	Total	380.88	625			
Internet overuse	Between Groups	0.488	1	0.488	0.772	0.38
	Within Groups	394.126	624	0.632		
	Total	394.614	625			

TABLE 4: IMPACT OF INTERNET OVERUSE ON INTERNET ADDICTION: REGRESSION ANALYSIS

MODEL		UNSTANDARDIZED COEFFICIENTS		STANDARDIZED COEFFICIENTS		
		B	Std. Error	Beta	T	SIG.
1	(Constant)	.037	.010		3.722	.000
	Internet overuse	.979	.003	.996	287.265	.000
R= .996[a] R² .992 F= 82521.042 P=.002[b] Std. Error of the Estimate=0.06768						
a. Dependent Variable: Internetaddiction1						

DISCUSSIONS AND CONCLUSION

Addiction generally refers to compulsive behaviour those results in adverse effects. The amount of time an individual spends on the internet is a critical factor in increasing IA risk. The Study found that IA's sternness levels increase with an OI. [39; 13] Thus, the risk of becoming IA becomes higher as students spend on the Internet increases. This study indicated that OI and IA are more significant among female students than male students. An earlier study also indicated significant differences in Internet overuse and IA between gender categories, age of the students and the students of UG and PG. [36] IA's prevalence is significant with gender, age, and education. [40]

Our study results show that most tertiary level students use the internet for more than 4 hours every day. From the ANOVA results, it can seem that the mean OI differs significantly. The present investigation also highlights the consequences of OI on the internet, such as sleep disturbance, interpersonal relationship issues, eyes strain, backache. [37; 38] Further investigation suggests that OI and IA harm sex life, family life, individual behaviour, loss of interest, lack of concentration, and short temperament. The current examinations also suggest that overuse of the internet has a significant difference in physical and psychological problems faced by each gender. A recent study also suggests that females feel shyer in relation to the internet in comparison to their male counterparts. That could be the reason why males and females face different problems. [4; 5] Male are more expressive, so they express themselves, whereas females are shy (especially in India), which could be a possible gender difference regarding physical and psychological problems. [4; 39] This study also reports that IA was associated with students' physical, psychological, behavioural, and relationship issues. [40] The present study revealed that students are unaware when their usage becomes an addiction. So, institutions and policymakers should come forward to make policies to regularise the usage of the internet. Psychological distress (PD) and addiction to the internet have been positively linked as a predictor of IA. Students need to be tested for PD and IA because there is a significant risk of coexisting and escalating issues. [41; 42]

IMPLICATION, LIMITATION & FUTURE SCOPE

Although the internet is regarded as the most powerful tool of modern times and people use it for various purposes, the user needs to know how it starts to take over life and impede other daily activities. IA in India appears to be a significant emerging mental health disorder among students at all UG and PG levels. Our investigation helps college and university or educational policymakers frame suitable policies or create a Programme to reduce or aware the adverse effect of overuse of the internet. The results of the compelling need to reduce the OI by promoting psychological competence among students. Without clarifying Internet use or abuse outcomes, it is unjustifiable to consider it an issue; the current investigation additionally endeavours this path. These activities would help provide early referrals for diagnosis and care to specialist centers. Thus, raising awareness among students and faculty about IA and its risk factors would be an excellent initial step towards safe Internet use. The study carried out before the Covid pandemic, and Internet usage increased during and after the pandemic due to the online classes. So, future research will explore the relationship between OI, IA and its consequences after the pandemic, which gives more clarity. The cross-sectional technique constrains the casualty, and participants are limited to Delhi NCR College and university, which bound the results the future researcher can work on this and generalize it for a large population. Since the study is limited to quantitative methodology and a single methodology has limitations in relation to when individual behaviour and

perception are involved, future research in this area can have a mixed methods approach so as to present the holistic model of OI, IA and their consequences.

CONFLICT OF INTEREST:

The authors declared no potential conflicts of interest with this article.

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ARTICLE

Dark side of skin-lightening products: Social responsibility of advertisers

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Abstract

The obsession with fair skin in India has prompted the Ministry of Health and Welfare to propose an amendment in the Drugs and Magic Remedies (Objectionable Advertisements) Act of 1954. This amendment proposes to impose a ban on advertisements promoting skin-fairness products. However, with the proposed amendment, companies have adopted innovative strategies to rebrand their products and shift the spotlight from fair skin to glowing skin. Yet, the underlying message remains the same. The burgeoning growth of skin-whitening creams in India calls for urgent attention to study the Indian consumers' motivations to purchase these products. The research study utilises self-determination theory (SDT) to develop a grounded framework. The study results highlighted that intrinsic motivation and the two types of extrinsic motivation, namely, introjected regulation and external regulation, were positively associated with consumer buying behaviour. Surprisingly, attitude has no association with consumer buying behaviour. The results of the first moderator gender suggested that females are under social pressure to look fair for better jobs and marital prospects. The second moderator country of origin revealed that Indian consumers prefer foreign brands compared to Indian brands.

Open Research

PEER REVIEW

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DATA AVAILABILITY STATEMENT

The data that support the findings of this study are available on request from the corresponding author. The data are not publicly available due to privacy or ethical restrictions.

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Subverting Narratives of Nationalism: A Cross-National Study of Borges and Muktibodh

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Subverting Narratives of Nationalism: A Cross-National Study of Borges and Muktibodh

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Abstract
The mid-twentieth century Argentina and India witnessed a discursive construction and circulation of national identity closely entwined with literary production. This caused a surge in nationalistic sentiments, often culminating in socially discriminatory consequences. This paper shall analyse the role Jorge Luis Borges and Gajanan Madhav Muktibodh played in subverting nationalism, as members on the ideological margins of their respective countries. The study involves two interconnected inquiries in the authors' works. First, a study of reasons behind their rejection of nationalistic writing— their personal lives as affected by it, their discontent with literary movements they were part of, literary censorships, and loss of jobs on account of their ideological differences. Second, a study of the alternatives the two writers offered against nationalism— literary forms, styles, and techniques. Placing the two inquiries together, the paper will study their works as writings of resistance that surface through a fusion of political opinion and social critique. It will further argue how resistance through writing conditions guides their existence.

Keywords: Nationalism, Borges, Muktibodh, Modernism, Post- Colonial

Introduction

The contemporary global political canvas presents an upward emergence of right-wing populism. This rise primarily rooted in neo-liberal economic grievances (Fraser, 2018), has concerns of social security and national identity deeply entwined with it. Instances from countries like India, U.S. Russia, Brazil, Philippines, Argentina, Turkey, and Hungary among others, show a rising trend of national unification that reduces systemic drawbacks to biological threats. Implementation of the CAA, and subsequent lobbying for the NPR by the Indian government; construction of the U.S.-Mexico wall to prevent the entry of Central American refugees; Brazilian government enflaming the indigenous genocide; unidentified encounters under the garb of Philippine drug war, or Macri's xenophobic immigration policies against the Bolivian, Paraguayan and Peruvian people, are merely a few examples. The instances listed here have been driven by a common concern originating from the questions of national identity and security, influencing the vote- banks. Contemporary forms of nationalism that we see today manifest from here (Fraser, 2018).

The study of nationalism becomes complex when one observes that many countries under its sway have served as erstwhile colonies before. Nationalism is the inevitable tool that has been used to respond to colonial forces in different forms. Two of these contrasting forms have played a major role— traditionalism and modernity. While the former focuses on reviving the pre-colonial cultures and traditions circled mainly around religious and social hierarchies, the latter is more oriented towards the realization of enlightenment to organize the country on the path of liberation and freedom (Omvedt, 1993, p. 25). However, tradition and modernity may not be

understood here as two polarities but instead as two interacting frameworks which equally determine the characteristics of any nationalism. It may also be added that the emergence of nationalism through the interaction between tradition and modernity does not necessarily imply conservative attributes to traditionalism and rational features to modernity, as Partha Chatterjee argues in *Nationalist Thought and the Colonial World* (Chatterjee, 1989, p. 622). Since the two frameworks that shape up nationalism are contradictory, the contents of aspirations and evidence cited by each are also bound to contradict the other.

It is in this contradiction between tradition and modernity that any post-colonial nationalism and a subsequent (re)construction of a nation is anchored. Literature plays a central role in documenting the (re)construction of a nation. . Bhabha, in *Nation and Narration* argues that the "supplementary movement of writing" (Bhabha, 1990, p. 305) materializes into social and cultural identifiers which define the nation and its people. Literature and nationalism together contribute to nation-building in varying degrees. The flexibility of literature makes it suitable for the purposes of both, establishing leadership as well as exercising a check on it. In the case of the latter, it serves as a mighty tool for those who refuse to support the relatively extremist forms of nationalism. This paper engages with two authors who may be studied in this regard— Jorge Luis Borges (1899-1986) and Gajanan Madhav Muktibodh (1917- 1964). It attempts to study the conceptual framework of nationalism through a cross-national (Rokkan, 1993) study of the works produced by the two authors during the mid-twentieth century.

Borges and Muktibodh never worked in each other's company directly. Nonetheless, a comparative study of their works is possible. First, they both played key roles in leading the movement of literary modernism in their respective countries. Second, the national politics in Argentina and India during the mid-twentieth century was faced with a similar crisis of creating a unified national identity, owing to prolonged colonization in both countries. Third, being contemporaries, the two authors dedicated their lives to the discovery of the perfect form(s) of writing which would adequately capture the social and political realities of their respective countries. A comparative study of the two authors will thus help establish that literature across genres, both influences and is influenced by its immediate social, political and cultural milieu(Bhabha, 1990, p. 54).

Locating Borges and Muktibodh in National Politics

The mid-twentieth century was a transitory phase for Argentina and India. While Argentina had gained independence back in 1816, it was now grappling with the diversity of its cosmopolitan population which had decentred the possibility of Argentine culture. Almost a century after its independence it was confronted with the necessity of a national cultural identity. This led to a conflict between conservative and socialist ideologies. The conservative radical of the two factions believed that the revival of suburbs and rural traditionalism would restore the Argentine spirit (Sarlo, 1993a). The other faction, socialists, stood by the living and working conditions of the immigrants (Rock, 1972), so that Argentina would become more receptive towards its cosmopolitan crowd. However, with the military coup of 1930, the radical- right asserted its rule in Argentina.

India's struggle towards independence brought two opposing views at loggerheads in the country. Ranajit Guha, while categorizing both as elitist (Guha, 1982), differentiates between them

by referring to one as the colonial faction whereas the other as nationalistic. The former worked through a process of negotiation with the Raj, whereas the latter through consistent conspiracies and manoeuvres to resist and oppose it. The former category joined it only after realizing that adopting the culture of the colonizer brought no difference to them being treated as unequal, subordinate citizens. Therefore, they returned to their native culture and participated in its revivalism. The latter category, staunchly rejected the colonizer's culture and therefore, was never faced with the issue of adopting it. Nonetheless, a matter they were confronted with was the relevance of traditional revivalism in the present. In order to update the tradition according to the demands of growing modernity, religio-cultural reforms were initiated. These reforms looked at Hinduism anew through figures such as Dayanand Saraswati, Swami Vivekanand, and Sister Nivedita. Sumit Sarkar in *Writing Social History* calls it the transition from Hindu to Hinduism (Sarkar, 1998, p. 370).

The domestic transition taking place in the two countries was further aggravated due to the influence of the Second World War and the Cold War, creating a widespread atmosphere of ambivalence and indeterminacy. Consequently, the literary history of the two countries underwent a series of changes. This may be understood better through Bhabha's view of the transitional history of a nation, which he claims highly influences the narratives (Bhabha, 1990, p. 2) and discourses that produce a nation. In the sphere of literature, this period is characterized by a complex adoption of Modernism. The adoption is complex as it includes a string of overlapping, intermediary movements like Surrealism, Ultraism, Vanguardia, and Boom in Argentina; and Shadowism, Progressivism, Experimentalism, New Poetry, and New Story in India. The active literary participation of Borges and Muktibodh in these movements and the narratives produced thereof, make the narrative method inevitable in mapping the history of these countries.

The Chilean humanist and scholar Andres Bello suggests, "the history of a country does not exist except in incomplete and scattered documents, in vague traditions that must be weighed and judged, the narrative method is indispensable." (Bello, 1999, p. 180)Nonetheless, the writing of history through narratives is never a neutral chronicle since it is institutionalized by statism (Guha, 2009, p. 307). Once written, it culturally manifests the geographical borders, lending social meaning of belonging to them. As a counter-measure against the characteristic rigidity of these narratives, there are also narratives that are grounded in imagination. The imaginative compositions introduce instability to the often biased historical re(construction) of a nation, as will be evident from the writings of Borges and Muktibodh in this paper.

The unstable imaginative literature is important on account of two reasons. First, the role played by it is crucial to the perception of 'nation' in a post-colonial country where there is an underlying tendency to totalize history as a homogeneous narrative (Bhabha, 1990, p. 77). Second, the literary movement towards modernism, amidst domestic political shifts, in both countries was characterized by transitory instability. It is the instability of these narratives that lends them particularity and strength, as Fanon observes in *The Wretched of the Earth* (Fanon, 1965, p. 226). Therefore, the narrative method maintains plurality in the narration of the nation by refuting the possibility of stable national culture as forcibly derived from these literary narratives. A quick succession of uneven events cannot be forcibly united into a singular stable history. It may thus be established that the instability of mid-twentieth century Argentina and India was marked by shifting power dynamics, apparent from the political as well as literary transitions taking place.

If Argentina was struggling under a military coup, India was undergoing a transfer of power from Raj to the Indian government. The partition of 1947 made it worse, plundering the country economically, politically, and culturally. Beyond the domestic turmoil, there was an over- weighing rejection of these countries in the global power structure. Anibal Quijano's study in *Coloniality at Large* may be referred to here (Moraña et al., 2008, p. 190). According to Quijano, on one side are the powerful, developed countries which are recognized in terms of the virtuous norms; whereas on the other side are the developing countries, always recognized through the lack of those norms. If hegemony is characterized by rationality, scientific temperament, civility, modernity, and northernism; the 'other' is always known by its irrationality, mythic history, primitiveness, traditionality, and southernism, respectively. Both Argentina and India have been at the receiving end of this hierarchized perception of countries in terms of binary in global politics.

Space created by this disjunctive and unequal recognition opens avenues for narrating countries like Argentina and India. "It invents nations where they do not exist" (Gellner, 1964, p. 169). During the mid-twentieth century in Argentina and India, it resulted in an upsurge of revivalist narratives mostly mythic and at times allegorical in nature, talking about the origins and glorious past of these countries. On one hand, this stood in defiance of the Western ideas of enlightenment, refusing to be embarrassed by the east-west distinctions Quijano discusses. However, on the other hand, this also led to an overlapped reception of myths as history, undercutting the idea of truth or factual accuracy. Levi Strauss' distinction between myths and history substantiates this well. According to him, myths are stagnant and therefore belong to a closed system. Their closed characteristic gets altered when they are layered successively to qualify as history since the latter belongs to an open system (Lévi-Strauss, 1978, p. 17).

The mythic creation of the collective identity of Gauchos in Argentina or Hindus in India exemplify how the cultural, social, and political signifiers are often clubbed together to establish the illusion of purity. Therefore, myths cannot be accounted for for factual accuracy or truth. These rising mythic narratives grounded in nationalism, left little room for any critical evaluation. In both countries historicized myths were overlaid with religious reservations of the nationalists— Catholicism in Argentina (Spektorowski, 1994, p. 164) and Hinduism in India. Figures such as Julio Meinveille and Leonardo Castellani with their firm subscription to the mandates of Fascism and Catholicism were influential amongst the masses. Their writings endorsed Fascism as a preface to the ultimate answer— Catholicism (Spektorowski, 1994, p. 162). Other major leaders with pro-Fascist or pro-Axis affiliations were Leopold Lugones and Manuel Galvez.

In India, nationalists were a little variegated on account of regional differences. For an instance, Elleke Boehmer's study of Bengal's freedom radicals (Boehmer, 2005, p. 111) informs us of a spiritual undercurrent where the leaders were either categorized as revolutionaries or mystics. This included people like Aurobindo, Sister Nivedita, and Bipin Chandra Pal, and it also stands to be true of other parts of India. The figure of goddess Kali (Chatterjee, 1993, p. 9) invoking a "warlike-spirituality" (Boehmer, 2005, p. 45) would be a suitable example. Of these leaders, Pal belonged to the Lal- Bal- Pal triad known for their radical anti-colonial stance. The other two members, Bal Gangadhar Tilak and Lala Lajpat Rai were actively involved with Hindu traditionalist revivalism. Similar to Argentina, Indian leaders like Subhash Chandra Bose too, lent support to the Axis members during the Second World War. The near- fundamentalist orientation of nationalist

narratives created a dominant presence for itself, while also steadily becoming more intolerant towards differing narratives and opinions.

Amidst this series of shifting power dynamics, authors like Borges and Muktibodh occupied ideological margins. Writing against the dominant current, Borges undertook the task of stretching the narratives of mythic origins far beyond the markers of truth. This distancing from facticity while remaining loyal to the overall truth value of exclusion and discrimination made his writing universal (Kefala, 2011, p. 41) instead of national(istic). Poems in *Fervor de Buenos Aires* may be approached through this universalist perspective. With a universal appeal, his writings stood true to depicting other countries, especially one like India which was undergoing a similar series of changes. This also became a founding causality of his entry into Vanguardia. One of the symbolic representations of this is through the image of the orilla. The orillas used in his poems symbolize a point of reconciliation between past and present, between tradition and modernity, and between the creoles and the immigrants, respectively.

The function of orillas expands beyond their symbolic signification. According to Sarlo, they act as ideologemes (Sarlo, 1993b) which strike a balance between the mythification required for de-realization while also not falling prey to the bait of nationalistic glorification. His persistence in referring to his continent as "South America" (Fiddian, 2017, p. 160) over "Latin America" testifies to the flexibility of transcending strict cultural parameters of identity and entering a larger realm of shared identity. In "The Full Extent of My Hope" he says,

> "I want neither progressivism nor criollismo in the way those words are commonly used. The first means subjecting ourselves to being almost- North- Americans or almost-Europeans, a tenacious being almost- others. The second, once a word of action (the horseman's mockery of pedestrians, the mockery of those born on their feet), is today a word of nostalgia (the slack appetite for the countryside, the illusion of feeling oneself a bit like Moreira). Not much fervour in either, and I'm sorry about that with regard to criollismo" (Borges, 2010, p. 47).

Similar to Borges, Muktibodh too, was not an uncritical believer of established norms and narratives. His life was short-lived but was spent during the years of significant turbulence at the national as well as international levels. He was born in 1917 when India's anticolonial assertion started taking a new turn towards Gandhian nationalism. He completed his education in Madhya Pradesh and began working there as a school- teacher. To improve his living conditions, he soon moved to Nagpur where he worked as an editor and journalist. It was the publication of his poems in *Tar Saptak*,1943 that gave Muktibodh his meagre share of fame as an author during his life. In the subsequent years his inclination towards Marxist intellectual ideas became stronger which manifested through his involvement with the Progressive Writer's Association. However, his financial and health conditions over the next few years only worsened, leading to his death in 1964.

According to Namvar Singh, the genius (Singh, 2009, p. 4) of Muktibodh lay in blending the social critique and political opinions as part of the representative aspect of the narrative to complement the meticulously created compositional aspect.Nothingness of depth is a recurrent symbol in Muktibodh's works. It manifests through different forms such as void, kund (deep reservoir) or chimneys. This acutely surfaces through lines from his poem "शून्य" ("The Void"). Not only do these

lines express turmoil and emptiness within an individual but is also representative of the same in the heart of a newly decolonized country. These lines express an emptiness that is devouring the country.

भीतर जो शून्य है

उसका एक जबड़ा है

जबड़े में मांस काट खाने के दाँत हैं;

उनको खा जाएँगे,

तुमको खा जाएँगे।

The void within us

has jaws,

jaws with predatory teeth;

teeth that will chew all up,

teeth that will chew you too.

A chief contributor to the turmoil that seized the two countries was the tension between the beliefs of postcolonial rebirth (Gopal, 2007, p. 160) and postcolonial reconstruction, . The difference between the two may be better elucidated through the contradiction between independence and liberation (Fanon, 1965, p. 102). Achieving independence does not guarantee liberation from the issues that have been existing from the pre-colonial and pre-national times. These issues are often relegated by nationalist movements during the independence struggle and remain unresolved. The concept of postcolonial rebirth apathetically presupposes that the country is free from the issues of gender, caste, or class. Such apathetic blanket imposition of the idea of being reborn violently suppresses and subsequently erases the history of systemic hierarchized discrimination against the minorities of the country.

The Making of Ideological Minorities

Both Borges and Muktibodh differed from the postcolonial rebirth approach as is evident from their participation in various literary movements of the mid-twentieth century. They put more emphasis on producing literature that would be mindful of the violent historical past of discrimination. Nonetheless, their non-participation in the celebratory rebirth of their respective countries should not be assumed as an implication of their disinterest in the affairs of the nation. It also becomes important at this juncture to emphasize the complex origin of nationalist movements and the plurality that characterizes them. It is on this account that the third-world scholarship on nationalism has constantly resisted being clubbed under a model-like study. One of the most prominent works here would be Aijaz Ahmad's "Jameson's Rhetoric of Otherness and the National Allegory" where he argues in favour of the third- world writers' eclectic authorship and how it should not necessarily be reduced to national allegories (Ahmad, 1987). According to Ahmad canonical reductionism should be eliminated by introducing flexibility and plurality in writing.

These complex plural opinions regarding the idea of a national and thereby nationalism, indicate the presence of multiple forms of nationalisms. Some forms are dominant, backed by fundamentally charged support groups while others are not. It is in the latter, less glorifying, and more critical end of nationalism, that the works of Borges and Muktibodh should be situated. Their writing not only counters colonialism's narrative of civilizing the barbaric colonies but is also careful to not resort to cultural glorification in the name of extremist nationalism. Their works bring forth the urgency of the postcolonial reconstruction as opposed to postcolonial rebirth. Owing to their peripheral approach toward nationalism, the two writers often found themselves at the receiving end of extremist nationalist forces. They were exposed to severe public criticism, at times also escalating into a public ban.

Two years before Muktibodh's demise in September, 1964, he was confronted with a series of trials and ban protests led against his book *Bharat: Itihas Aur Sanskriti*. The ban is believed to have deeply distressed him, acting as one of the many reasons that triggered his ill- health. The book written as a school textbook and banned on the grounds of containing "objectionable and obscene matter about religion, history and great personalities" (Muktibodh, 2009, p. 239) was a work Muktibodh relied heavily upon, to improve his impoverished living conditions. The book was an attempt to compile the thoughts of various historians regarding India's culture and social formations. Muktibodh assumed the role of a curator whose aim was to inform the students of higher secondary schools about selective writing of history. A total of ten selections were included in the petition filed in the High court of Madhya Pradesh as potentially disruptive of public order, decency, and morality.

Most of these selections were outcomes of erroneous reading of the words. However, Muktibodh repeatedly insisted that these errors were a deliberate construction on the part of publishers and right-wing organizations such as the Rashtriya Swayam Sevak (RSS) which had formed a nexus against him. For an instance, a sentence was called out to be disrespectful towards Mahatma Gandhi as it mentioned the names of Kasturba Gandhi and Mahadev Desai together, creating an ambiguous pronunciation of Kasturba to be Desai's wife. Similarly, one of the selections where Muktibodh was praising the marvel of Jain sculptures through the example of Gomteshwara Bahubali, was misread to be insulting. The court dismissed the plea to remove eight such selections. The two selections it ordered to be eliminated from the text, commented on the interstitial spaces of flexibility that existed in the caste and racial structures in India.

To illustrate this, Muktibodh compiled passages from the works of Indian historians, which indicated Hindu gods Ram and Krishna were born out of a union between an Aryan and a non-Aryan parent. Another example talked about the sexual relations that Brahmin men often established with Shudra women. The court found the abovementioned two examples to be amply justified and intelligible on part of the author. Nonetheless, to contain the possibilities of future protests and agitations, it ordered the text be republished after the elimination of these excerpts. The court pronounced its final judgement in April, 1963 until which, for one complete year, Muktibodh faced severe public rejection and criticism. He understood that this arose from intolerance towards his ideological beliefs. In a clarificatory letter to the governor, he identified the ordeals he underwent for refusing to ultra-nationally and communally colour history, under three major threats (Muktibodh, 2009, p. 263).

First, the discriminatory writing and documentation of history to favour those situated at the apex of the power structures. Second, the shrinking of academic freedom and tolerance. Third, the communal and fringe nationalist elements embodied in right-wing organizations Muktibodh's frugal lifestyle is the price he had to pay for exercising his critical opinion. This is evident from a letter he wrote to Nemichandra Jain in 1945 where he described his utterly destitute condition as follows,

> "I want to do and can do a lot. First, I want to be a well-placed man so that I may be truly self-dependent and quite assured of myself. I think I can earn Rs. 500 a year by books. I don't want to be in rags and broken chappals and looked down upon by the people. Don't want to be a tragic figure" (Lotz 2001, 108).

He switched jobs, often juggling between multiple professional roles of a writer, teacher, journalist, and editor. In 1954, he had to quit his job at the Secretariat as he was under constant espionage on account of his Marxist political inclinations. Muktibodh's life involved a constant tussle with his financial worries, which mostly stemmed from his political beliefs. In another letter written to Nemichandra Jain in 1949, he confesses,

> "I have given up passing through those streets where the blessed physician, the grocer, the tea-shopwallah watch the debtors for a good hunt. We passed the last three months in this condition, changed doctors for want of money, used all tricks and tactics to keep them away" (Lotz 2001, 107).

Similarly, Borges' livelihood too, for a considerable period, remained affected due to his ideological inclinations. After Borges moved to Buenos Aires in 1921, he started giving shape to his ultraist ideas that surfaced quite prominently through his role in the ultraist magazine, *Martin Fierro.* Borges' earlier encounters with literary movements in Europe occurred to be overlapped with the upheaval created by the first world war. He understood literature to be closely entwined with politics. However, *Martin Fierro* owing to its political neutrality, proved to be restricting Borges' writerly aspirations. Evidently, it interfered with Borges' open support for Hipólito Yrigoyen. At this, Borges unhesitatingly resigned from the board of *Martin Fierro.* Over the next few years, he struggled with his political disappointments that left incomplete his reimagination of an inclusive form of criollismo. Not only did he foresee an approaching fascist tendency that would overtake Argentina through the *coup de tat* of 1930, but also eventually felt that Argentina's cultural and social causes would remain defeated during Yrigoyen's second term.

Borges was critical of Perón's labour-oriented policies and saw in them his personal ambition to manufacture the masses' opinion. He signed petitions opposing a complete takeover by Perón but it remained futile. Nonetheless, Peron avenged this opposition in 1946 by promoting Borges to the post of inspector of chicken and rabbits from his earlier held post of the librarian. Borges was quick to resign from the new office, notwithstanding his financial woes. Two years later, his dissenting views led to the imprisonment of his mother and sister who had participated in a protest march against Perón's dictatorial policies, as Borges describes in one of his interviews with Richard Burgin. This insult did not dissuade him from speaking against Perón's regime, neither during nor after his downfall. This is evident from the same interview where Borges elaborates on the similarities that Perón shares with leaders like Hitler and Mussoloni,

> "Perón was a coward. Besides, I think Hitler believed in himself and Perón didn't. Perón knew he was a humbug. And all his henchmen knew he was a humbug. They were all out for loot. Very different..... Perón was more like Mussolini. Though Mussolini was far more intelligent than Perón.....But Perón could be very cruel. I mean he had people tortured, killed" (Burgin & Borges, 1969, p. 121).

Emir Rodriguez Monegal in "Borges and Politics" addresses Borges' radical anti- establishment outlook towards politics (Monegal et al., 1978, p. 69), almost extending into a strong dislike for prolonged status- quoism. Upon carefully analyzing Monegal's thoughts it can be observed that the lives of both Borges and Muktibodh, were modelled equally on dissent against dictatorial regimes, as they were on discontent with literary movements of which they were a part. Despite being ideological minorities, they kept their commitments above their personal ambitions. Even a slight deviation from these commitments as effectuated by a literary movement resulted in their withdrawal from it, including the ones founded by them.

Writing as Resistance

The participation of both the authors in literary movements of their respective countries was brief but noteworthy. The literature they produced was situated at the intersection between their immediate social and political conditions. Their unique approach gave a new identity to the literary movement of modernism by creating a confluence of art and politics on the one hand, and individual and society on the other. In *Taar Saptak* Muktibodh talks about the potential role art and aesthetics can play in society. He firmly believed that the very site of art was the common person and therefore, it was important for them to be conscious of their reality. While he believed that art had a larger role to play in society, he knew its purpose would remain unfulfilled without an individual leading it. It was in this attempt to strike a balance between an individual's desire and their responsibility towards society, that he could never completely fit into a literary movement.

> "कला का केन्द्र व्यक्ति है, पर उसी केन्द्र को अब दिशाव्यापी करने की आवश्यकता है। फिर युगसन्धि काल में कार्यकर्ता उत्पन्न होते हैं, कलाकार नही, इस धारणा को वास्तविकता के द्वारा ग़लत साबित करना ही पड़ेगा।" (Muktibodh, 1943, p. 11)

> "A person is the centre of art, but it is necessary for this person to move in the right direction. Further, the belief that the transitory phase between two eras produces workers and not artists, will have to be proven wrong".

These lines from *Taar Saptak,* published in 1943, are important for two reasons. First, they highlight the necessity of political foregrounding of literary art during a transitory phase as India was undergoing in the mid- twentieth century. Second, they bring to fore the importance of striking a correct balance between thinking and creativity in activism. The two reasons raise caution against communal forms of nationalism which were spreading like wildfires in India then. Around the same time, Borges too, was confronted with a similar problem of nationalism. The issue of othering based on racial origins had started to surface in Argentina. It was directed against the immigrants who were perceived as being the "dangerous other" (Geist et al., 1999, p. 240) because their culture

and beliefs did not correspond with the native Hispanic population. Borges identified in suburbs, the potential to reconcile the markers of otherness.

Beatriz Sarlo in "Borges: Tradition and the Avant-Garde" observes that Borges' affinity towards putting emphasis on reading marginal texts is an approach towards collating ideology and literature. His politically- correct literary techniques made the Argentine identity more inclusive without uprooting it from its earlier cultural signifiers. By reinventing Argentina as an accommodative space (Kefala, 2011, p. 40), Borges also subverted the exclusionary forms of Argentine nationalism. Cityscape is a component that both the authors have made extensive usage of, and common to their usage of it is the difficulty of access to the readers. Most of these city-images are intricately mythologized, often through the aid of eerie, forlorn architecture, or similar abandoned spaces. Muktibodh's "Brahmarakshas" makes use of this technique as is evident here,

शहर के उस ओर खंडहर की तरफ

परित्यक्त सूनी बावड़ी

के भीतरी

ठंडे अँधेरे में

बसी गहराइयाँ जल की...

सीढ़ियाँ डूबी अनेकों

उस पुराने घिरे पानी में...

समझ में आ न सकता हो

कि जैसे बात का आधार

लेकिन बात गहरी हो।

Beyond the city lights, towards the ruins

The abandoned empty *baoli*

And its heart's

Dark frost

Occupied by the labyrinths of water...

Neath it, numerous buried stairs

Inside the ancient water...

Like, those obscurities

We could never touch

But know, are buried deep within.

These lines simultaneously invoke nostalgia of the past and caution towards future, a paradox that captures the uncertainty of the mid-twentieth century India. Similar is the sentiment documented in Borges' poem "Nineteen- Hundred- Twenty- Something" where he records,

> We had no idea the future contained the lightning bolt,
>
> We had no foreboding about shame, fire, the monstrous night of the Alliance;
>
> Nothing told us that Argentine history would talk the streets,
>
> History, indignation, love,
>
> The masses like the sea, the name of Córdoba,
>
> The taste of the real and the incredible, the horror and the glory.

These sentences resound those of Muktibodh, cited above. Additionally, the poem if analysed as a whole is also suggestive of the "stodginess and cultural barrenness of Buenos Aires" (Borges, 2010, p. ix) which compelled Borges to take refuge in mythology. The two authors did not restrict their writing to merely thematically register resistance but also documented it at the level of literary composition. Accordingly, they tailored the forms and structures of their works such that it captured the changing mood of their times. The initial literary years of both authors were marked by their involvement in literary magazines and newspapers. The print media was also a product of the transitioning period and played a significant role in documenting social and cultural changes through experimental literary forms. These magazines cemented together literary creativity with political consciousness, and paved the way for literary movements such as Ultraism, Vanguardia, Pragativad, and Prayogvad, which would lead toward a fuller realization of Modernism.

Writing for magazines was a choice both authors preferred due to a range of considerations. For Muktibodh, the shorter forms like poetry gave him the independence to explore the truth of reality over narrative unity and linearity. Goulding in his thesis, *The Cold War Poetics of Muktibodh* analyzes that writing prose was never the first choice for the author. His weak financial situation combined with the politics of publication in post-independent India (Goulding, 2015, p. 142) often led him to write a few frequently. As for Borges, in a shorter form such as a short- story it was, "possible for everything to be essential" (Sorrentino, 1982, p. 120). These forms allowed the two authors to experiment with innovative forms of narrative composition— long poems in the case of Muktibodh, and short fiction in the case of Borges. Little magazines like *Prisma, Proa, Martin Fierro, El Hogar, Sur* in Argentina, and *Taar Saptak, Kriti, Kalpana, Vasudha, Sarathi* in India gave writers, especially ideological minorities like Borges and Muktibodh, a platform to voice their critical opinion and participate in the task of nation- building.

For an instance, Borges repeatedly registered his disagreement with Argentina lending support to Axis power during the second world war. "The Definition of a Germanophile" (1940) published in *El Hogar* is one of the prominent works of caution against fascist tendencies in Argentina. "Our Poor Individualism" (1946) published in *Sur* analyzed how the flawed Argentine nationalism had resulted in a State constantly interfering with the personal rights of individuals. Against this autocratic tendency of the Argentine government under Peron's regime, Muktibodh wrote a piece in *Sarthi* in 1956. The article "अर्जेंटीना के विद्रोह की तस्वीर" ("A Look into Argentina's Uprising") criticized the censorship of press that was brought into effect by Juan Perón who banned *La Prensa*

(Easum, 1951). The article also discussed the importance of organizing a critically aware mass of workers against authoritarian strategies.

Likewise, writing columns in newspapers also gave impetus to their voices. Some of the most important works of their lives were initially published in newspapers. This includes Borges' short-stories from *A Universal History of Infamy* published in *Critica,* and Muktibodh's *Ek Sahityik Ki Diary* published initially in *Naya Khoon.*The fact that a major portion of their writings was initially published in mass media such as newspapers and magazines, illustrates two important and inter-connected factors. First, the relevance of resistance literature in mid-twentieth century nation-building, and second, the creation of discourse on self-critical nation-building. Writings by the two authors on linguistic and cultural diversity visibly brought forth the presence of these two factors.

Muktibodh wrote an article "सन 1965 तक हिंदी केंद्रीय राजभाषा बन सकती है" ("Hindi Might Be Declared the Only Official language by 1965") for *Naya Khoon* in 1958 on the possible declaration of Hindi as the only official language of India by 1965. This would have meant a complete phase-out of the English language from official usage. Here, the author discussed the perils of such a sweeping move, especially when the Southern states of India had been dismissive of Hindi language's hegemony. The imposition of language and culture occupies a central role in such nationalistic unificatory processes. The interplay between the two factors is equally evident in "The Complaint of All Criollos" where Borges talks about two images of any nation— apparent and essential (Borges, 2010, p. 25). The contradiction between the two images that he proposes may be better elucidated using Bhabha's analysis of how a nation's narration is always split between the pedagogical and the performative (Bhabha, 1990, p. 297).

The writings of Borges and Muktibodh show their rejection of a unified national identity. Their method of nation-building has at its very foundation, the identification of their respective nations' shortcomings. A recurring literary technique in Muktibodh's free- verse is his usage of a brusque lexicon which is often dismissed as unscholarly. This curtness is deliberate to evade the smooth, comforting rhythm of the poems. Therefore, he picks up the most mundane terms and installs them in the most de-realized, often mythic situations, making the poem dry, hitting, and discomforting. A few lines from his poem "चाँद का मुँह टेढ़ा है" (The Moon's Face is Crooked) substantiate this,

> गंजे-सिर चांद की सँवलायी किरनों के जासूस
>
> साम-सूम नगर में धीरे-धीरे घूम-घाम
>
> नगर के कोनों के तिकोनों में छिपे हैं !!
>
> Spies of the bald moon-like silhouette rays
>
> Stroll silently around the dark city
>
> Hide behind the triangles of the city's corners.

This poem was published after Muktibodh's demise and was written at a later point in his life, coinciding with India's newly achieved independent status. However, the description of the city-

space here is gloomy and fear-inspiring, which punctures the bloated sentiment of nationalism. If Muktibodh subverts flawed nationalism through a curt lexicon, Borges debunks grammatical standards in his short- stories to achieve this end. In "Man on Pink Corner" he uses phrases such as "There were two men in black..." (Borges, 1998, p. 45) or "We was big talkers..."(Borges, 1998, p. 49) to impersonate ground realities of low life as observed in the suburban Buenos Aires. Both Muktibodh and Borges acutely depicted the unequal social composition and cultural differences within the society through their works.

Robin Fiddian in *Postcolonial Borges* contrasts Borges' prose 'Buenos Aires' (1921) with his verse 'Benarés'(1923) to observe the relational creation of identity in the two works. Fiddian's analysis of the two cities being "partners in a dialogue about history, lived experience, culture, and identity" (Fiddian, 2017, p. 181) fits true to both authors. Like Borges' understanding of Argentina, Muktibodh's understanding of India too comes from the knowledge of changes taking place in other countries, especially the post-colonial countries. His articles are not merely restricted to the criticism of authoritarian regimes, class politics, and alienation in India, but are also as much true to the countries and people being faced with a similar kind of turmoil and disturbance. His poems "Chand Ka Muh Tedha Hai", "Andhere Mein", "Baechain Cheel", "Raat Chalte Hain Akele Hi Sitaare", "Poonjivaadi Samaj Ke Prati", "Brahmarakshas" or "Shoonya"; to name a few, describe the process of coming to terms with alienation, which would be relatable to a person both within India as well as outside of India.

Conclusion

The shifting political paradigms that marked the mid-twentieth century Argentina and India highly destabilized them. Establishing a unified national identity came across as a viable option to many, also considering the fluctuating global political scenario. However, Borges and Muktibodh were aware of the long-term implications of it and therefore they adopted an approach that was introspective, honest, and well-founded in the ground reality. The inclusive relational approach of the two authors makes their writings relevant and significant to us in the present. Today, when there is an urgent need to register resistance against the different forms of injustices and discrimination, it becomes imperative to identify the real issues plaguing the nations and return to critical writings. The works of Borges and Muktibodh bring forth consciousness of the social realities and cultural diversities. Their literary works promise a future where freedom of thought and speech can prevail.

Despite the numerous austere situations, the two authors were subjected to, they never compromised with their principled take on the inclusive construction of a nation. This makes their writings distinct. Borges and Muktibodh serve as exemplars for other authors whose works future researchers may want to contextualize as writings of resistance. The reconciliation the two writers introduced between their role as an author and a politically aware responsible citizen actively contributes to the genre of literary activism. Their works introduce new avenues to approach responsible authorship in times of political uncertainties. Further, their works also broaden the limited Euro- American framework of modernism which anchors the movement in the formal newness of the narratives. This broadening of the definition of modernism becomes possible through the two authors who base their modernism on the country's social, historical, and political circumstances. Such a study of modernism would be helpful to scholars of alternative postcolonial

modernism. Finally, their writings are intricately entwined with the very question of their existence. The two cannot be decoupled. Writing is a prerequisite for them to exist. As long as they lived, they wrote, and through writing they resisted.*

Declaration of Conflicts of Interests

No potential conflicts of interest.

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Abstract

This article analyses the track record of Justice N V Ramana as the Chief Justice of India on the metrics of judicial appointments, progress on major constitutional challenges, and transparency in the exercise of the CJI's prerogative as the master of roster. The article argues that on these metrics, there was only marginal improvement over the track record of his immediate predecessors.

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E-career canvas for individuals' initiative and MBA graduate employability: an exploratory study

Pinaki Nandan Pattnaik, Mahendra Kumar Shukla

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Abstract

Purpose

The purpose of this paper is to propose a model developed through a thorough qualitative analysis of pertinent stakeholder perceptions that can be used to map Master of Business Administration (MBA) students' aspirations, goals, strengths and weaknesses to create optimal interventions and enable better employability.

Design/methodology/approach

This study used an exploratory research design. The authors conducted interviews with 60 stakeholders to identify themes that form constituents of the E-Career Canvas for Individuals (E-CCI) model. To assess the impact of the proposed initiative, 30 random participants were chosen for interviews from among alumni, present students, faculty, recruiters and the university administration across five years.

Findings

The proposed model captures the short-term and long-term goals of students concerning their career aspirations. This study has qualitatively explored the impacts of the E-CCI initiative on graduating students' outcomes. The impacts are positive. The findings also suggest that recruiters do experience an incremental difference among graduates who have participated in the E-CCI program at an educational institute in India.

Practical implications

Business schools may adopt this model to create profiles of their MBA students. Students, as well as institutional administration, may work on mitigating the shortcomings and weaknesses identified through E-CCI initiatives and target the roles matching the profiles of students during placements.

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Originality/value

This paper presents a novel model of E-CCI to capture the aspirations of MBA graduates and direct them to fulfil their goals. This study takes into consideration the viewpoints of key stakeholders involved to map the effectiveness of the model.

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Employability | Master of Business Administration (MBA) | University education | Student experience | Career mapping | Student experience | Learner aspirations | Career canvas | Quality education

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Pinaki Nandan Pattnaik, Mahendra Kumar Shukla

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Abstract

Purpose

The purpose of this study is to examine the dimensionality of relational benefits in public bike sharing (PBS) and explore the mediating role of user satisfaction and engagement on the linkage between relational benefits and continuance intention.

Design/methodology/approach

This study used a mixed method approach. Data were collected using convenience sampling technique from 411 users of PBS in Bhubaneswar, India. In the first part of the study, in-depth interviews were conducted to identify a set of relational benefits for scale development. In the second part, CB-SEM was used to establish the reliability and validity of the scale and test the hypotheses linking relational benefits with user satisfaction, engagement and continuance intention.

Findings

The analysis suggests that relational benefit is a second order construct having five distinct yet related dimensions namely economic, convenience, environmental, identity related and health and safety benefits. Also, the impact of relational benefits on continuance intention is positively and significantly mediated through user satisfaction and engagement.

Research limitations/implications

This study is conducted in only one Indian city and is limited to PBS, which, is one of the elements of green transportation and does not cover other modes of transportation. Therefore, generalization of findings beyond this region and the mode of transportation should be done with caution.

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Assessing Justice N V Ramana's Term as CJI

FAIZAN MUSTAFA, PRANAV VERMA

This article analyses the track record of Justice N V Ramana as the Chief Justice of India on the metrics of judicial appointments, progress on major constitutional challenges, and transparency in the exercise of the CJI's prerogative as the master of roster. The article argues that on these metrics, there was only marginal improvement over the track record of his immediate predecessors.

Justice N V Ramana took over the reins of the Supreme Court at a time when it was being seen as increasingly transforming itself into an executive court. These included stalemates within the collegium over judicial appointments, the opaque manner of the exercise of the chief justice's prerogative as the master of roster; and keeping pending constitutional matters in which the political executive had vital stakes. It is, then, worthwhile to examine where Justice Ramana has left the Court on these parameters, after completing his term as the Chief Justice of India (CJI).

Judicial Appointments

On the front of judicial appointments, Justice Ramana's tenure certainly marked an improvement over that of his predecessor—Justice S A Bobde—who demitted office without making a single recommendation on an appointment to the Supreme Court. By contrast, the Justice Ramana-led collegium made a total of 11 recommendations for appointments to the Supreme Court, out of which nine were made in one go (Vishwanath 2022a). This is second only to former CJI Ranjan Gogoi during whose tenure a total of 14 judges were appointed to the Supreme Court (*Economic Times* 2018). In fact, the duration of the tenure of Justice Ramana and Justice Gogoi did not significantly differ. Prior to their tenures, the highest number of appointments ever made during a CJI's tenure was only seven—a number reached twice each during the tenures of Justice S H Kapadia and Justice Altamas Kabir. At the bottom of the appointments track record would be the tenures of Justice H L Dattu (owing to the deadlock over the National Judicial Appointments Commission [NJAC]) and Justice Bobde, during which no appointments were made at all to the Supreme Court (Vishwanath 2021). From this standpoint, Justice Ramana's tenure saw the Supreme Court get a record number of judges second only to the tenure of Justice Gogoi and that too just by a margin of three (Kanu 2022) (Table 1).

As far as clearing the collegium recommendations for Supreme Court appointments is concerned, there was very little to no conflict between the union government and the collegium under the tenure of Justice Ramana as the CJI. However, the quantitative improvement evident in Table 1 may not necessarily be an evidence of the strengthened independence of the Supreme Court. One of the main criticisms of the Justice Ramana-led collegium was its failure to recommend the name of Justice Akil Kureshi for the Supreme Court, for, as some commentators have pointed out, his past orders had been unfavourable to the political executive.[1] In fact, the reported reason that Justice Ramana's predecessor was unable to recommend a single name for the appointment to the Supreme Court was that within the collegium, Justice Nariman had insisted on first recommending Justice Kureshi's name before any other name could be forwarded. However, soon after Justice Nariman's retirement, the Justice Ramana-led collegium made its recommendations, excluding Justice Kureshi from the list (Venkatesan 2021).

Table 1: Appointments to the Supreme Court under the Last 12 CJIs

Tenure	Chief Justice of India	Judges Appointed
14 January 2007–11 May 2010	Justice K G Balakrishnan	4
12 May 2010–28 September 2012	Justice S H Kapadia	7
29 September 2012–18 July 2012	Justice Altamas Kabir	7
19 July 2013–26 April 2014	Justice P Sathasivam	4
27 April 2014–27 September 2014	Justice R M Lodha	6
28 September 2014–2 December 2015	Justice H L Dattu	Nil
3 December 2015–3 January 2017	Justice T S Thakur	5
4 January 2017–27 August 2017	Justice J S Kehar	5
28 August 2017–2 October 2018	Justice Dipak Misra	4
3 October 2018–17 November 2019	Justice Ranjan Gogoi	14
18 November 2019–23 April 2021	Justice S A Bobde	Nil
24 April 2021–26 August 2022	Justice N V Ramana	11

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Justice Kureshi's appointment was overlooked despite him being the second senior-most judge in the all-India combined list of high court judges (Sinha 2021). Likewise, seniority was also overlooked when the Justice Ramana-led collegium recommended the appointments of Justice Sudhanshu Dhulia and Justice J B Pardiwala. Justice Dhulia was ranked 30th in the all-India seniority of high court judges and was appointed superseding 29 judges, and Justice Pardiwala was ranked 49th in seniority but was appointed superseding 48 judges (Mahapatra 2022). However, this was certainly not the first time that the collegium under a CJI overlooked seniority while recommending appointments to the Supreme Court (F P Staff 2019). For instance, under the tenure of Justice Gogoi as the CJI, Justice Sanjiv Khanna was appointed when he was ranked 33rd in the all-India seniority, and similarly, Justice Dinesh Maheshwari was appointed despite being ranked 21st in the all-India seniority. In fact, the recommendation to elevate Justice Khanna and Justice Maheshwari was made after revoking the earlier recommendation to elevate Justice Pradeep Nandrajog (the then chief justice of the Rajasthan High Court) and Justice Rajendra Menon (the then chief justice of the Delhi High Court), instead (Singh 2019).

It was not just the collegium that deemed it proper to supersede senior high court judges, but the government too did not object to the same. However, in the case of Justice K M Joseph, the government lowered his seniority by delaying his confirmation. It cited the "time-tested principle of seniority" to justify this move, as Justice Joseph was ranked 39th in the all-India seniority of high court judges (PTI 2018). It would, therefore, not be entirely incorrect to argue that there seems to be no principled basis behind deviating from the convention of seniority while elevating high court judges to the Supreme Court—the convention having been followed and breached in almost equal measure in recent times.

Moreover, throughout the tenure of Justice Ramana, the union government continued with its past practice of cherry-picking names from the collegium recommendations or sitting on some while accepting others. For instance, the union government had sat on the names of senior advocates Anish Dayal and Amir Sharma while clearing the rest of the recommendations for the appointments to the Delhi High Court, affecting their seniority when their names were cleared later after an unexplained delay (Singh 2022). Likewise, for the Madras High Court, the government sat on four of the six names recommended by the collegium, clearing only two in one go (Vishwanath 2022b). Another notable example here is of senior advocate Saurabh Kirpal—vocal about his gender identification—whose name was recommended by the collegium in November 2021, but till date continues to await a response from the union government (Singh 2022). These instances led Justice (retd) Madan Lokur to describe the Supreme Court collegium as "nothing more than a post office with a fancy pin code" (Lokur 2022). Nonetheless, Justice Ramana defended the collegium's appointment practices in a public speech, claiming that it "cannot get more democratic than this" (Mandhani 2022).

The union government's practice of cherry-picking names from the collegium's recommendations, however, is not unique to Justice Ramana's tenure. The most prominent example is that of renowned senior advocate Gopal Subramaniam whose name was recommended by the collegium headed by the then CJI Justice R M Lodha. Even though the collegium had recommended four names in one go, the government segregated Subramaniam's name alone, turned it down, and confirmed the other three names. Had the collegium unanimously reiterated Subramaniam's name, the government would have been bound to appoint him—and he would have gone to serve as the CJI—but Subramanium withdrew his name from consideration owing to the controversy surrounding his recommendation (Venkatesan 2014a, 2014b; Rautray 2014).

Procedural Silences

This practice of cherry-picking collegium recommendations enables the union government to exercise an unofficial "pocket veto" of sorts—not provided for in the memorandum of procedure (MOP)—which as of now simply states that the union minister for law and justice "will put up the recommendations to the Prime Minister who would advise the President in the matter of appointment."[2] Ideally, therefore, all the names in a recommendation should be acted upon together through either confirmation or rejection. Even though this is not specifically provided for in the MOP as it currently stands, any other interpretation would endorse the government's exercise of the pocket-veto, enabling it to cherry-pick names by sitting on some and acting on the rest.

In fact, after the NJAC decision, the Supreme Court had asked the government to revise the MOP so as to improve the working of the collegium system. However, more than six years have passed, and the MOP awaits to be streamlined (Sharma 2021). This uncertainty has, in the meanwhile, enabled the government to continue cherry-picking from the collegium recommendations and sit on names. One would have hoped for a stronger nudge from Justice Ramana for the finalisation of the MOP, with fixed timelines for the government to respond. However, the process of finalisation of the MOP seems to have no end in sight.

It would be unfair to not acknowledge that the Justice Ramana-led collegium also withstood executive pressure on

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several occasions by reiterating its recommendations sent back by the union government; under the current MOP, the government is bound by the collegium's unanimous reiteration of its recommendations. For instance, the collegium reiterated its recommendation to appoint 12 judges across the high courts of Allahabad, Rajasthan, Calcutta, Jammu and Kashmir, and Karnataka (PTI 2021). Likewise, the collegium reiterated its recommendation to elevate five advocates as judges to the Allahabad High Court (Vishwanath 2022c), and also reiterated eight names for appointments across the high courts of Patna, Calcutta, Bombay, and Jharkhand (PTI 2022a).

On Constitutional Matters

Although Justice Ramana's term saw a more proactive—even if not a necessarily more independent—collegium, little difference was seen on the front of progress in deciding pending constitutional matters, particularly the ones in which the political executive continues to have high stakes involved. On this measure, Justice Ramana's tenure as CJI, and his role as the master of roster, was not much different from that of his predecessor. For instance, the challenge to the electoral bonds scheme has been long pending, and despite a verbal assurance in the Court by Justice Ramana that the matter would be taken up, the same awaits adjudication (Ananthakrishnan 2022). Likewise, the challenge to the de-operationalisation of Article 370—which now seems to be fait accompli—awaits adjudication. The fate of the challenge to the Citizenship (Amendment) Act (CAA), 2019 is also similar. These challenges had arisen before Justice Ramana entered office and remain pending without significant developments more than a year since, when he demitted office.

In fact, the sittings of the constitution benches in general froze over Justice Ramana's term. Not only did the existing constitutionally significant matters remain pending, hardly any new constitution benches were set up, despite no dearth of issues requiring authoritative interpretations of the Constitution; take the recent Sabarimala review petition, for instance, in addition to the above-mentioned matters like the CAA, Article 370, and electoral bonds. After his retirement, Justice Ramana himself acknowledged that he could not pay attention to the issues of listing and posting of matters and unprecedently apologised for the same (PTI 2022b).

On the other hand, there were significant movements on matters such as Pegasus, where the Justice Ramana-led bench set up an expert committee, which submitted its report in August, stating that there was "no conclusive proof" on the presence of the malware in the devices examined, and also that the union of India failed to cooperate with the committee's proceedings (Bhatia 2022). Further, in a landmark ruling on sedition, the Justice Ramana-led bench directed that all pending proceedings under Section 124A in the Indian Penal Code be kept in abeyance and expressed its "hope" that no new proceedings would be initiated till the union government reviews the provision (Prakash 2022). The Lakhimpur Kheri incident was another instance where Justice Ramana took a proactive stance to ensure a fair investigation, given the political clout of the accused (Dave 2021).

A Success in Publicity

It would appear, therefore, that while Justice Ramana's tenure made some improvements in the areas of judicial appointments, and the hearing of important cases, his track record cannot be considered to have been significantly better than that of his predecessors. At the end of the day, while the collegium increased its activity and success rate in getting the union government to accept its recommendations, it did not necessarily emerge out as significantly independent than before when it came to appointing judges perceived as "inconvenient" by the political executive. Likewise, major constitutional disputes remained pending, which were perceived as politically sensitive by the executive. Given this marginal improvement, the publicity around the new-found judicial independence of the Court, which ensued even before Justice Ramana demitted office, seems a bit inexplicable. This can perhaps be explained as attempts to improve the public perception on judicial independence through speeches in various public forums. However, as the instances laid out above would show, the track record is more chequered.

The Supreme Court certainly stands on a better footing than what it did at the time Justice Ramana took over, but the promise of leading it back on the path of independence in appointments and case listings remains to be fulfilled to its true potential.

NOTES

1 It is, however, one thing for the collegium to make a recommendation and for the political executive to reject it—a decision the union government is entitled to reach—but quite another for the collegium to not make a recommendation in the first place, anticipating resistance from the executive. This would imply that the union government's views are accounted for not just after a recommendation is sent (as is the ideal procedure) but now also at the stage of deciding whom to recommend in the first place. It can hardly be said that this marks an improvement on the metric of judicial independence. See https://theleaflet.in/why-justice-kureshis-omission-from-collegium-list-raises-questions, viewed on 1 September 2022.

2 "Memorandum of Procedure of Appointment of Supreme Court Judges," Department of Justice, India, https://doj.gov.in/memorandum-of-procedure-of-appointment-of-supreme-court-judges/, viewed on 5 September 2022.

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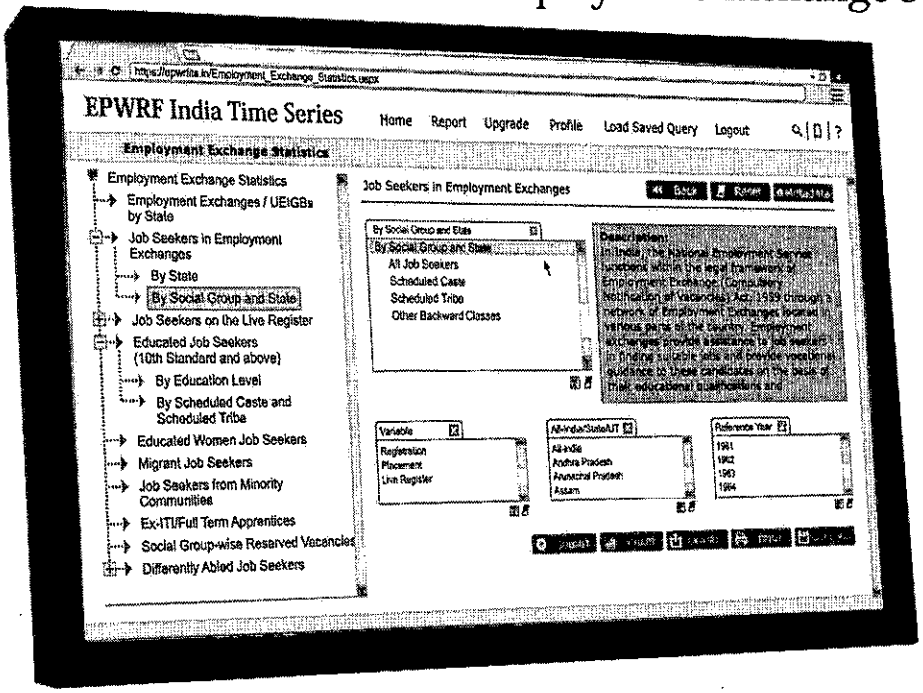
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Research

The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016

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Keywords
Cross-border, Bankruptcy, Insolvency, IBC, UNCITRAL Model Law

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The research article has been divided into three sections to achieve the core aim. The first section provides a background to the paper. The second section compares the essential provisions in the United Nations Commission on International Trade Law (UNCITRAL) Model Law with the relevant provisions of the Insolvency and Bankruptcy Code, 2016 (IBC). The third section explores the challenges and opportunities regarding the cross-border system in the IBC, including a critical analysis of the Insolvency Law Committee's (ILC) recommendations. The last section of the research article lays down the concluding remarks and suggestions.

The main findings of the research article can be summarized in three points. First, the UNCITRAL Model Law can serve as a great blueprint for designing the cross-border insolvency system in India. As evident from a reading of Sections 234 and 235 of the IBC, the scheme of entering into separate bilateral agreements or issuance of letters of request is not very efficacious, and therefore, the Indian transnational insolvency system should have a proper mechanism of cooperation and coordination between local courts and insolvency representatives on one hand, and foreign courts and foreign representatives on the other hand. The ILC's recommendations should be given due regard in this scenario.

Second, while the ILC has recommended the retention of the public policy exception, it may be invoked to deny recognition of foreign proceedings. This can be a huge challenge for the foreign creditors who seek to get relief under the cross-border insolvency system as proposed under the IBC. Third, with the incorporation of a separate part in the IBC, in consonance with the recommendations of the ILC, it is possible to have a robust cross-border insolvency framework in place. However, certain changes as proposed by the author may be beneficial to the policymakers.

Cross-border insolvency is a concept that is garnering a lot of attention in contemporary times owing to the rise in transnational business and commerce. With more and more corporate bodies and companies setting up shops across the world, there is a growing network of subsidiaries. Therefore, in cases of financial distress, the complexities involved with the resolution of insolvency related to corporate entities have only compounded. Generally, countries are governed by their domestic insolvency resolution laws or regulations, leading to the creation of a scenario wherein the foreign creditors may not be well-versed with the process. While some countries may have similar insolvency regimes, the creditors dealing with certain countries that have distinctly different regulatory environments may face difficulties in the resolution of the corporate insolvency process. General principles of private international law are no longer sufficient to resolve conflicts between countries arising from such cross-border insolvency proceedings. There could be around three instances concerning cross-border insolvency (Saxena & Singh, 2016).

First, the foreign creditor may lay claim on the assets of the corporate debtor in a different country wherein the proceedings have been initiated. In this case, if the creditor is Mr X and the company is ABC Ltd, would Mr X follow the cross-border insolvency process as required by the country, P, where proceedings have been initiated against ABC Ltd? Second, the corporate debtor may have assets in more than one country, apart from the country where the proceedings have been initiated. For instance, if ABC Ltd has five branches or places of business, R, Q, S, and T, apart from the principal place of business, P, and the proceedings have been initiated in P, how would the insolvency process affect the foreign creditor? Third, if the corporate debtor is subjected to multiple proceedings in P, Q, and R, how would the foreign creditor, Mr X, get relief in this instance? The recognition and enforcement of such proceedings would depend on the system adopted by the country concerned. There could be three scenarios in this regard.

First, if the country follows the 'territorialism' approach, it would resort to its domestic set-up for resolving the cross-border insolvency (Trautman et al., 1993). One example would be Singapore which under the old Companies Act followed this school of thought (Halimi, 2017). Second, if the country follows the 'universalism' approach, the proceedings in the debtor's home country would gain worldwide recognition in the other countries where it has assets (McCormack, 2012). This concept has been articulated by Lord Hoffman in the Cambridge Gas Corp case (*Cambridge Gas Corp v. Official Committee of Unsecured Creditors*, 2006). He stated that universalism in insolvency proceedings is a concept that should be treated as the golden thread of common law. However, subsequently, the judiciary in the United Kingdom showed an inclination to adopt another school of thought which has been discussed further.

Third, if the country follows the 'modified universalism' approach, it would ask the other competent countries to try out the proceedings in their respective courts to yield to the jurisdiction of that country's court for a more equitable allocation of the corporate debtor's resources or assets if the main assets of the debtor are located in that country (Clift, 2004). One example in this regard would be the United States, wherein Chapter 15 of the Bankruptcy Code refers to the United Nations Commission on International Trade Law (UNCITRAL) Model Law (US Bankruptcy Code, Section 1501). The Model Law espouses the concept of modified universalism. The rationale behind this school of thought is that instead of pursuing corporate insolvency in a piecemeal manner, it is better that one court takes charge of the proceedings and distributes the assets as per the relevant provisions and principles. The critical question that arises at this stage is this: What is the scheme in India concerning cross-border insolvency?

The Insolvency and Bankruptcy Code (IBC) is an important piece of legislation that seeks to make the insolvency resolution process more robust, quick, and efficient. It consolidates and amends the laws relating to the insolvency resolution process for companies, LLPs, partnership firms, and individuals (IBC, Preamble). It has repealed some of the previous outdated laws such as the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 (IBC, Section 243, subject to certain savings), while amending certain other laws such as The Indian Partnership Act, 1932, The Central Excise Act, 1944, The Income-tax Act, 1961, The Customs Act, 1962, The Recovery of Debts due to Banks and Financial Institutions Act, 1993, The Finance Act, 1994, The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, The Sick Industrial Companies (Special Provisions]) Repeal Act, 2003, The Payment and Settlement Systems Act, 2007, The Limited Liability Partnership Act, 2008, and The Companies Act, 2013 (IBC, Sections 245–255).

The Code contains a provision for overriding other laws. This was tested in the *Innoventive Industries Limited* case wherein the Supreme Court held that the IBC is an exhaustive code on the subject of insolvency relating to corporate entities (*Innoventive Industries Limited v. ICICI Bank Limited*, 2017). The IBC also focuses on developing entrepreneurship in India, maximizing the availability of credit in the market, balancing the interests of the relevant stakeholders, while also establishing the Insolvency and Bankruptcy Board of India in the country (IBC, Preamble). The IBC contains five parts, dealing with aspects such as insolvency resolution and liquidation for corporate persons, insolvency resolution and bankruptcy for individuals and partnership firms, and regulation of insolvency professionals, agencies, and information utilities. The scheme dealing with cross-border insolvency is contained in just two provisions under Part V of the Code. At this point, it is pertinent to have a brief overview of the history leading to the inclusion of the cross-border insolvency provisions in the IBC.

There have been some studies on the incorporation of cross-border insolvency provisions in India. In 2000, the high-level committee on *Law relating to the Insolvency and Winding Up of Companies*, under the chairmanship of Mr Justice V. Balakrishna Eradi, suggested an amendment to the Companies Act, 1956 for the inclusion of provisions relating to cross-border insolvency along the lines of the Model Law (High Level Committee on Law, 2000). The report of *The Advisory Group on Bankruptcy Laws*, under the chairmanship of Dr N. L. Mitra, is one of the most comprehensive studies dealing with cross-border insolvency in India. The report advocated the adoption of the Model Law in the country (Export Committee on Bankruptcy, 2001). The most recent Bankruptcy Law Reforms Committee (BLRC) report also emphasized the importance of having a framework to deal with cross-border insolvency in India. The BLRC specifically mentioned in its Interim Report that there is a requirement of deeper analysis before the adoption of a framework based on the Model Law.

The BLRC also emphasized that other documents including the *EC Regulation on Insolvency Proceedings*, the *American Law Institute's NAFTA Transnational Insolvency Project*, and the *International Bar Association Cross-Border Insolvency Concordat*, may be considered before drafting the domestic cross-border insolvency framework (Bankruptcy Law Reform Committee, 2015). Additionally, it noted that the adoption of the cross-border insolvency scheme should take place after the other provisions of the IBC have been adopted as the success of the former would depend upon the success of the latter. The Insolvency Law Committee (ILC) is one of the latest bodies to provide comments relating to the cross-border insolvency system in India. It underscored the need for a comprehensive cross-border insolvency framework in the country in its first report (ILC, 2018a, p. 13). However, similar to the observations of the BLRC report, it noted that the adoption of a framework along the lines of the Model Law is a complex exercise and would require an analysis of international practice in this regard. The ILC report highlighted that recommendations relating to cross-border insolvency would be released upon the completion of such an exercise.

The ILC released its second report advocating the inclusion of the draft Part Z in the IBC (ILC, 2018b, pp. 50–69). The Committee recommends that the cross-border system under the Code can be initiated for corporate debtors. It can be expanded to cover individual insolvency subsequently. It refers to Singapore as an example. The Committee also recommends certain amendments to the current provisions under the Code, including Section 234, to make room for the smooth streamlining of the new Part. The ILC unambiguously recognizes that the current cross-border system is a mechanism that is bound to encounter delays and uncertainties. It also notes that while the resolution of insolvency regarding enterprise groups could be tricky, the evolution of the Model Law inspired framework could provide for that at a later stage. Recently, the Working Group on Group Insolvency produced a report dealing with group insolvencies. However, the Working Group does not address group insolvencies in the cross-border context. It adopts a similar line of reasoning as the ILC stating that it could be implemented at a later stage, focusing only on the domestic entities in the first phase (Working Group on Group Insolvency, 2019).

While the ILC has produced a very comprehensive report on cross-border insolvency, it does not refer to some of the other documents as proposed by the BLRC such as the *American Law Institute's NAFTA Transnational Insolvency Project*, and the *International Bar Association Cross-Border Insolvency Concordat*. If the Committee had referred to these significant international documents before suggesting the recommendations, it might have proposed a more comprehensive cross-border framework. The Model Law has been adopted by various countries. Some notable adoptees include Canada, New Zealand, the United Kingdom, and the United States. Countries which have not yet adopted the Model Law include Brazil, China, India, and Russia. As noted by Mohan (2012, pp. 12–19), several countries such as Mexico, Mauritius, New Zealand, Romania, Poland, Canada, Japan, and the United States have made different qualifications to the Model Law, dealing with various aspects such as the introduction of the reciprocity requirement, the exclusion of diverse entities from the scope of their laws, the changes to the public policy exception, the introduction of restrictions concerning the role and the powers of the foreign representative, and certain other deviations.

For instance, Mexico, Romania, and South Africa have incorporated provisions dealing with reciprocity in their domestic insolvency laws, and Japan has made substantial modifications regarding concurrent proceedings (ILC, 2018b, pp. 18, 44). However, it is very pertinent to note that none of the BRIC nations, that is, Brazil, Russia, India, and China, have adopted the Model Law. Given the potential for foreign investments in all these countries, they should create effective mechanisms for dealing with cross-border insolvency (Kargman, 2014). The comments in the BLRC and the ILC reports regarding the creation of a cross-border insolvency system in India, drawn from the Model Law, are very encouraging, and if adopted immediately, it will undoubtedly provide relief to several parties affected by cross-border insolvency proceedings in the country.

THE FRAMEWORK OF CROSS-BORDER INSOLVENCY UNDER THE UNCITRAL MODEL LAW

The UNCITRAL Model Law

The UNCITRAL Model Law on Cross-border Insolvency was enacted in 1997 to help nations in designing their insolvency laws to address issues stemming from cross-border proceedings (UNCITRAL Model Law, 2019c). The Model Law aims to facilitate an efficient, fair, and cost-effective manner of managing transnational insolvency cases. While there was an increase in cross-border insolvency proceedings since the 1990s, there was no uniform framework which the states could adopt for dealing with transnational insolvency. The Model Law is an excellent document adopted by about 44 countries, as of 2019, including the United States, Canada, Australia, New Zealand, Japan, Singapore, and South Africa (UNCITRAL, 2019a).

The UNCITRAL has worked tirelessly to promote the adoption of the Model Law in different jurisdictions. It collaborates with prominent international bodies such as the Asian Development Bank, the World Bank, the International Bar Association, and the International Association of Restructuring, Insolvency and Bankruptcy Practitioners to spread awareness about the benefits of adopting the Model Law (Mohan, 2012, p. 8). For instance, the World Bank's *Principles for Effective Insolvency and Creditor/Debtor Regimes* refers to the Model Law and reiterates the drive to ensure consistency with the UNCITRAL Legislative Guide on Insolvency Law (World Bank, 2019a). The UNCITRAL Legislative Guide is a remarkable document which strives to help different countries enact or review current domestic insolvency laws (UNCITRAL, 2019b). It makes quite a few references to the Model Law so that the countries are encouraged to adopt the same. It also encourages the countries to adopt suitable cross-border insolvency provisions in their domestic laws.

The Model Law essentially has a broad scope of application, covering all types of debtors. However, Article 1 (2) includes the possibility of excluding certain entities such as banks or insurance companies, which are usually subject to special insolvency regimes in the concerned states. Many jurisdictions have adopted laws that exclude these entities from their insolvency regimes in line with the Model Law (Mohan, 2012, p. 14). For example, in the United States, the insolvency law does not apply to banks and railways, although the application of the law does not exclude foreign insurance companies (US Bankruptcy Code, Section 1501). In the United Kingdom, the insolvency regime does not apply to credit institutions and insurance undertakings (The Cross-Border Insolvency Regulations, 2006). Reciprocity is not a requirement under the Model Law. However, countries such as the British Virgin Islands, Mexico, and South Africa have adopted the same either de jure or de facto (Chan Ho, 2012).

The Model Law has four key elements concerning cross-border insolvency. First, 'access' (as stipulated under Chapter II of the Model Law), wherein foreign creditors are provided with a right of access to the courts of the enacting state for seeking assistance with regard to the insolvency proceedings. According to Article

9 of the Model Law, a foreign representative can apply directly to a local court (UNCITRAL Model Law, art. 9). Article 11 of the Model Law specifies that a foreign representative can commence a proceeding for insolvency under the local laws if the conditions commencing such a proceeding are otherwise met (UNCITRAL Model Law, art. 11). Article 12 of the Model Law enables the participation of a foreign representative in a local insolvency proceeding of the debtor, upon recognition of a foreign proceeding (UNCITRAL Model Law, art. 12). Article 13 of the Model Law provides the right of access to foreign creditors vis-a-vis local/domestic creditors. Article 13.2 also requires that at the minimum, foreign creditors must receive the treatment provided to general unsecured creditors, unless they constitute a class of creditors where the domestic creditors would also be subordinated (UNCITRAL Model Law, art. 13).

Second, 'recognition', wherein qualifying foreign proceedings are recognized to save time and resources. A qualifying foreign proceeding can be either recognized as the main proceeding at a jurisdiction where the debtor has its centre of main interests (COMI) at the date of commencement of the foreign proceeding) or a non-main proceeding at a place where the debtor has an establishment. This establishment can be any place of operation where the debtor carries out a non-transitory economic activity with human means and goods or services (UNCITRAL Model Law, arts. 2. c & 2.f). Article 15 of the Model Law allows foreign representative to apply for recognition of the foreign proceeding by enclosing certain documents such as the certified copy of the decision commencing the foreign proceeding and the certificate from the foreign court affirming the existence of the foreign proceeding (UNCITRAL Model Law, art. 15). While Articles 15 and 16 of the Model Law lay down the application procedure for recognition of the foreign proceeding, Article 17 provides that once the requirements have been met, a foreign proceeding shall be recognized as a foreign main proceeding or a foreign non-main proceeding depending on the criteria enshrined under the Model Law (UNCITRAL Model Law, art. 17).

Third, 'relief' accorded to assist the foreign proceeding is one of the principal aims of the Model Law. Central elements of the relief available include an interim relief provided by the court at its discretion, a stay upon recognition of a foreign main proceeding, and relief provided by the court at its discretion, in connection to both foreign main and non-main proceedings. Article 19 of the Model Law provides that the court, to protect the interests of the creditors or protect the assets of the debtor, may grant provisional relief upon application by the foreign representative. Some of the interim reliefs include staying execution against the debtor's assets and entrusting the administration or realization of the debtor's assets to the foreign representative or another person designated by the court (UNCITRAL Model Law, art. 19). The effect of recognition depends on whether the foreign proceeding is a foreign main or non-main proceeding. Article 20 states that upon recognition of a foreign main proceeding, certain automatic reliefs such as a stay of actions of individual creditors against the debtor, a stay of execution against the debtor's assets, and suspension of the debtor's right to transfer or encumber its assets can be availed (UNCITRAL Model Law, art. 20).

Fourth, cooperation and coordination, wherein the Model Law empowers the courts to communicate directly with the foreign courts and coordinate concurrent proceedings. Articles 25 and 26 of the Model Law provide that the local courts and insolvency representatives should cooperate to the maximum extent possible with foreign courts or foreign representatives (UNCITRAL Model Law, arts. 25 and 26). Article 27 lists the different forms of cooperation possible such as communication of information by means deemed appropriate by the court, coordination of the administration of the debtor's assets, and implementation of agreements (by courts) regarding the coordination of the insolvency proceedings (UNCITRAL Model Law, art. 27). Article 28 of the Model Law deals with the commencement of a local insolvency proceeding upon the recognition of a foreign main proceeding. Such commencement can proceed if the debtor has assets in the state, or in other words, even if he does not have a local establishment, the initiation of the proceedings can be done (UNCITRAL Model Law, art. 28).

Article 29 states that when there are concurrent local and foreign proceedings, the court should cooperate under Articles 25, 26, and 27 and grant appropriate relief (UNCITRAL Model Law, art. 29). Article 30 provides that in the circumstances of multiple concurrent foreign proceedings, the court should seek cooperation and coordination among the proceedings under Articles 25, 26 and 27 of the Model Law (UNCITRAL Model Law, art. 30). Therefore, the Model Law presents a modest (Westbrook, 2005a), yet viable approach (LoPucki, 2005) for resolving cross-border insolvency issues. Certain aspects of the Model Law are not extremely clear such as the determination of the COMI of the corporate debtor, procedural due process (Bufford, 2005), recognition of foreign discharges (Westbrook, 2005b), and choice of law. It is, however, an important step towards dealing with transnational insolvency proceedings.

The IBC's Cross-border Insolvency Provisions

There are only two sections in the IBC that are relevant as far as cross-border insolvency is concerned: Sections 234 and 235. These two provisions were inserted as enabling provisions following the recommendations of the Joint Parliamentary Committee (Joint Committee on the Insolvency and Bankruptcy Code, 2016). Section 234 of the IBC deals with agreements entered into with foreign countries. It provides that the Indian Government may enter into an agreement with the government of another country for enforcing the provisions of the Code. The Indian Government may direct that the application of the IBC, as regards the assets of the corporate debtor or debtor, located in a country outside India with which reciprocal arrangements have been made, shall be subject to the conditions as stipulated (IBC, Section 234). The IBC, therefore, emphasizes reciprocity as observed in the insolvency regimes of countries such as South Africa (Ailola, 1999).

Section 235 of the IBC deals with letters of request to countries situated outside India in certain cases. It lays down that if during the pendency of the insolvency resolution process, or liquidation, or bankruptcy proceeding, the resolution professional, liquidator, or bankruptcy trustee feels that the assets of the corporate debtor or debtor are located in a country outside India with which reciprocal arrangements have been made, he may apply to the Adjudicating Authority (the National Company Law Tribunal) under the Code regarding the procurement of evidence or initiation of action in relation to such assets. The Adjudicating Authority, upon the receipt of such application, may issue a letter of request to a court or a competent authority to deal with the request on being satisfied that evidence or action with regard to the foreign assets is required in connection with the insolvency resolution process, or liquidation, or bankruptcy proceeding (IBC, Section 235). While the inclusion of these two provisions in the IBC is noteworthy, certain challenges should be addressed.

OPPORTUNITIES AND CHALLENGES UNDER THE IBC

Opportunities

The IBC was introduced to deal with the scheme of insolvency and bankruptcy in India. Following the introduction of the IBC, there has been a remarkable improvement in India's ease of doing business ranking, as per the latest World Bank report. The report lauds India's attempt to make insolvency more accessible by adopting the new Code (World Bank, 2019b). The two provisions dealing with cross-border insolvency were inserted to ensure that the Code was not incomplete, and they certainly add to the overall presentation and organization of provisions in the IBC. The author reached out to eminent academics, experts, and practitioners in this area to gather their perspectives on the impact of the IBC in India. The respondents were asked to provide their feedback through the questionnaire shared by the author. The questionnaire had both objective and subjective components. Most of the respondents who provided their feedback on the questionnaire circulated by the author felt that the adoption of the IBC can create a positive economic environment for the creditors and can improve India's ease of doing business ranking in the near future (17 out of the 20 respondents provided such feedback to the questionnaire). Further, ASSOCHAM and EY in their joint study point out that the Code does not maintain any distinction between the domestic and foreign creditors, therefore, leading to the assumption that the two categories of creditors would be treated in an equivalent manner (ASSOCHAM India & EY, 2017, p. 29).

The ILC recommends that while the foreign creditors will have access to the domestic courts under the current framework of the IBC, the cross-border system should be incorporated based on reciprocity, which can be taken away later depending on the evolution of the insolvency regime in India (ILC, 2018b, pp. 18–19). This indicates that the ILC has adopted a rather cautious approach towards the inclusion of the cross-border insolvency system, perhaps, keeping in view the unique circumstances of the country as regards insolvency and bankruptcy. While the Code is exhaustive as regards the domestic insolvency proceedings, the incorporation of just two provisions relating to cross-border insolvency is grossly inadequate to deal with this transnational problem effectively. This view is supported by the

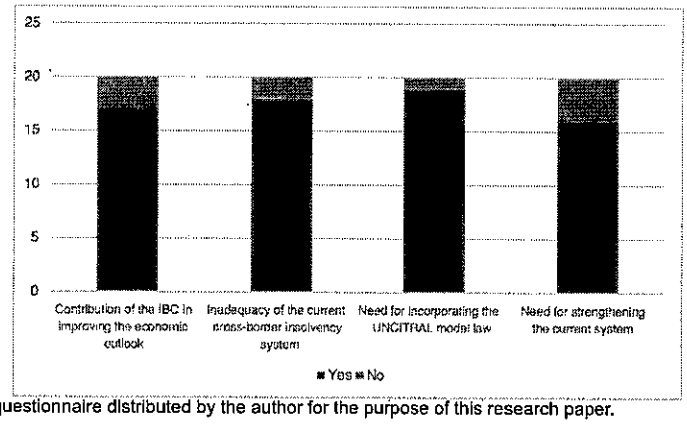
feedback of the majority of the respondents (16 out of the 20 respondents provided such feedback). The BLRC and the ILC reports underscore the need to adopt an effective framework dealing with cross-border insolvency under the IBC, drawn from the Model Law. Therefore, the main opportunity presented in the IBC to address the issue of cross-border insolvency stems from the inclusion of Sections 234 and 235. The challenges associated with having just two provisions relating to cross-border insolvency have been discussed further.

Challenges

The majority of the respondents who provided their feedback on the questionnaire felt that the two provisions dealing with cross-border insolvency under the IBC were not sufficient (18 out of the 20 respondents provided such feedback). First, dealing with Section 234 of the IBC, as the Indian government needs to enter into bilateral agreements with different countries, it may not be practically feasible to negotiate such agreements which could be long drawn and time consuming. Second, there is a possibility that each country may choose to incorporate different provisions in their bilateral instruments which would only lead to fragmentation of India's cross-border insolvency regime. Last, this could lead to the multiplicity of litigations in cases where a corporate debtor has assets in more than one foreign jurisdiction, wherein the countries would fall back on their separate bilateral agreements to raise claims in connection with the insolvency proceedings. While the IBC has provisions for imposing a moratorium on all suits and proceedings against the corporate debtor in India during the insolvency resolution period, a creditor or contract counterparty can initiate proceedings in another jurisdiction (Kumar, 2017). Further, even though Section 234 of the IBC has been notified, India has not entered into any bilateral agreement so far.

Section 235 of the IBC promotes the spirit of cooperation between a local court and a foreign court/authority as embodied in the Model Law, however, there are certain lacunae. First, there are no specific provisions which lay down the manner of cooperation between the local authorities and the foreign court or competent authority. Second, there is no mechanism for dealing with the coordination of concurrent proceedings. Last, the dependence on letters of request for cooperation may cause an unnecessary delay as they have to be routed through the official channels of the local and foreign jurisdictions. They can in turn cause inconvenience to the creditors affected by such insolvency proceedings. The noteworthy inferences drawn from the responses received through the questionnaire are illustrated in Figure 1.

The draft chapters proposed by the ILC seem promising. The chapters should be incorporated into the IBC after certain modifications. Chapter II deals with *access* of foreign representatives and creditors to the Adjudicating Authority, wherein Clause 7 specifies that the foreign representative shall be entitled to apply to the Adjudicating Authority, subject to the code of conduct as prescribed. While this seems to be in line with the *access* principle stipulated under Article 9 of the Model Law, the main departure from the Model Law concerns direct access. The ILC has discussed few reasons why a *direct access* system may not be conducive for India, including the inability of foreign lawyers to practice currently and the fledgling nature of the country's cross-border insolvency regime. The ILC notes that the foreign representatives may be represented by domestic insolvency experts and left it to the discretion of the Central Government to provide subordinate legislation as regards the extent of the right to access. The ILC recommended the inclusion of the code of conduct provision as the Model Law does not prohibit the domestic courts from penalizing the foreign representatives for any misconduct (ILC, 2018b, pp. 26–29). While this provision serves an important function, perhaps, the legislators may provide a detailed code of conduct in the subordinate legislation itself instead of explicitly including it in Clause 7 (2).



Source: Author's own work drawn from the questionnaire distributed by the author for the purpose of this research paper.

Figure 1 : Comparison of Some Noteworthy Responses (Objective)

The second pillar stipulated in the Model Law deals with *recognition* of the foreign proceedings. Chapter III of the draft Part provides for the provisions in this regard. Clause 15 draws heavily from Article 17 of the Model Law to decide whether the foreign proceeding should be treated as a foreign main proceeding or a foreign non-main proceeding. The foreign proceeding would be treated as a foreign main proceeding if the corporate debtor has a COMI in the foreign country and a foreign non-main proceeding if the corporate debtor has an establishment in that country (ILC, 2018b, p. 35). However, as per Clause 4, which reflects Article 6 of the Model Law, notwithstanding anything contained in the draft Part, the Adjudicating Authority may refuse to recognize a foreign proceeding if it *manifestly* violates India's public policy. While the ILC states that India could draw inspiration from the practices of the courts in the United States where the public policy exception has been construed narrowly (ILC, 2018b, p. 23), the Adjudicating Authority still has the discretion to interpret the scope of the exception in a slightly broad fashion. This is not very encouraging for the foreign creditors and could very well defeat the purpose of the draft Part in the IBC.

The third pillar dealing with *relief* is stipulated under Clauses 17 and 18 of the draft Part. The ILC discouraged the inclusion of 'interim relief' under the draft Part due to the bad example set by the cases brought under the Sick Industrial Companies (Special Provisions) Act, 1985. Clause 17 deals with 'mandatory relief' and reflects Article 20 of the Model Law wherein it provides for the imposition of an automatic moratorium upon the recognition of a foreign main proceeding. Clause 17 (2) provides that the moratorium as regards foreign main proceedings should be similar in scope to the proceedings, as provided in Section 14 of the IBC, including the exceptions and limitations (ILC, 2018b, pp. 30–38). Clause 18 is drawn from Article 21 of the Model Law and specifies that 'discretionary relief' would be provided by the court irrespective of whether the proceeding is a foreign main proceeding or a foreign non-main proceeding (ILC, 2018b, pp. 38–41). The ILC notes that Section 14 of the IBC should guide the provision of mandatory and discretionary reliefs as regards foreign proceedings (ILC, 2018b, pp. 37–38). While the moratorium may not be modified (ILC, 2018b, p. 37), the legislators should leave additional space for the provision of discretionary reliefs as the foreign proceedings may require certain other mechanisms. While Clause 18 (1) (f) that deals with the possibility of additional reliefs, seems to be a catch-all provision, the legislators may specify the principles that would guide the application of this provision in the subordinate legislation.

The final pillar, dealing with *cooperation and coordination* has been provided under Chapters IV and V of the draft Part. The relevant provisions concerning cooperation have been incorporated in the draft Part without substantial modifications. The ILC notes that *direct communication*, as provided under Article 25 of the Model Law, between the Adjudicating Authority and the foreign courts is premature at this stage. Therefore, the ILC recommends that the Central Government should frame guidelines in this regard, as reflected in Clause 21 of the draft Part. Chapter V deals with concurrent proceedings, and as per the recommendation of

the ILC, the relevant provisions of the Model Law have been incorporated without significant deviations in the draft. The ILC notes that as the provision of interim reliefs has not been included in the draft Part, the same shall be excluded from Chapter V (ILC, 2018b, pp. 42–47). While Chapter V seems to be adequately comprehensive, Chapter IV of the draft Part requires more clarification from the legislators due to the lack of specific provisions. Perhaps, the legislators could make this chapter more robust following the application of the proposed provisions to cross-border insolvencies in India.

Conclusion

One of the recent instances which highlight the impact of not having an effective cross-border insolvency resolution framework is the Nirav Modi episode which rocked the nation. One of the news reports notes the ingenious ways in which some of the entities associated with Nirav Modi have filed for bankruptcy in the United States, in an attempt to avoid dealing with the Indian regulators (Merwin, 2018). Another case which the National Company Law Tribunal is dealing with relates to the Jet Airways fallout. The Tribunal in Mumbai had refused to provide relief to the Dutch insolvency administrator when it was approached for recognition of the foreign proceedings. The administrator, therefore, moved the National Company Law Appellate Tribunal to hear the matter (Solanki, 2019). The Appellate Tribunal has allowed the Dutch administrator to attend the company's Committee of Creditors' meetings while also finalising the cross-border insolvency protocol that would apply to Jet Airways (*Jet Airways (India) Ltd. v. State Bank of India, 2019*). Given the lack of a proper framework to deal with cross-border insolvency under the IBC, the observations made by the Appellate Tribunal indicate the potential of India to develop positive judicial trends as regards cross-border insolvency.

Such cases should, however, serve as a clarion call for the Indian legislators so that the entire process of framing the detailed provisions dealing with cross-border insolvency is expedited. The Model Law provides an efficient system of dealing with cross-border insolvency proceedings. However, since India has not adopted the Model Law yet, its transnational insolvency regime is yet to develop like it has evolved in other countries that have adopted the Model Law. The Model Law can serve as a great blueprint for designing the cross-border insolvency regime in India, and therefore, positive work towards this direction could be beneficial for the country (19 out of the 20 respondents supported this view). The scheme of entering into separate bilateral agreements or issuance of letters of request is not very efficacious. Therefore, the Indian transnational insolvency system should have a proper mechanism of cooperation and coordination between local courts and insolvency representatives on the one hand and foreign courts and foreign representatives on the other hand, in line with the provisions of the Model Law.

The ILC has stated in its second report that it has considered the international practice with reference to cross-border insolvency. It is imperative, however, to have clarity about the effective incorporation of the Model Law in other domestic frameworks (16 out of the 20 respondents supported this view). Different countries such as Colombia, Greece, Japan, Poland, and South Korea which have adopted the Model Law have made several deviations concerning the coordination of multiple proceedings. The ranking of claims, especially in relation to the foreign creditors, the recognition of foreign proceedings, and the provision of interim relief (Mohan, 2012, p. 18). As recommended by the ILC, given the special nature of banks and insurance companies, the legislators may exclude the applicability of the cross-border insolvency provisions to such entities, as stipulated in Article 1 (2) of the Model Law. With regard to India, the insolvency of these institutions can critically affect the financial interests of several members of the public. It may require quick decision-making, requiring specialised insolvency regimes (ILC, 2018b, p. 17).

(Late) Mr Arun Jaitley, while talking about the IBC, had pointed, "You can't amend the law every time, but certainly this is a point worth consideration on the agenda..." (NDTV Profit, 2018). While the IBC presents amazing opportunities for improving the domestic insolvency system in the country, it is high time that India implements a comprehensive framework dealing with cross-border insolvency under the Code, in line with the recommendations of the ILC, without delay. Policy prescriptions adopted at the right time can significantly add to the overall effectiveness of these instruments. Therefore, it would be beneficial if the law makers and legislators exercise a far-sighted approach in incorporating important provisions in legislation in the future. For instance, if the draft Part dealing with cross-border insolvency was a part of the IBC from the beginning, it might have aided the courts/tribunals to have a clear picture of the entire system. It would also promote the government's pitch in portraying India as a trade and investment hub where resolving cross-border insolvency is quick and efficient.

Before incorporating the draft Part, as proposed by the ILC, the legislators may also consider the *American Law Institute's NAFTA Transnational Insolvency Project* and the *International Bar Association Cross-Border Insolvency Concordat*. While the former primarily focuses on the resolution of insolvencies associated with corporations and other commercial business enterprises, the latter suggests certain general principles which the participants can tailor to their unique circumstances and needs. Given that the ILC has chosen to keep the cases of individual insolvencies beyond the purview of the cross-border system under the IBC (for now), reference to these two international documents could add tremendous value to the efficacy of the cross-border insolvency system in India. The legislators may also consider the *Regulation (EU) 2015/848 of the European Parliament and of the Council* that deals with insolvency proceedings as regards members of group companies. The cross-border insolvency regime in the country could be at its nascent stage, currently, but with steps in the right direction India can serve as a model for other countries.

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I Cannot Let Go of the Passion: Comparing the Interpersonal and Intrapersonal Conceptualizations of Brand Passion

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Abstract

Brand passion is a consumer construct that has garnered a lot of attention in the recent past. The literature on brand passion is divided by two broad conceptualizations, which have resulted in nomological inconsistency. The present research tackles this conceptual disagreement by identifying and contrasting the two broad conceptualizations of brand passion. In this vein, the current study compares the impact of brand passion on consumer well-being, positive word of mouth, and social media following. The study also examines the role of "duration of use" as a moderator on the proposed relationships. A total of 336 responses were analyzed using structural equation modeling, and the findings indicate that interpersonal conceptualization is a better conceptualization. The study also elucidates implications and future research directions.

Keywords

Brand passion, unidimensional brand passion, harmonious brand passion, obsessive brand passion

Introduction

Brands have been trying various strategies to establish relationships with consumers. Particularly, emotional relationships have been found to deliver important managerial outcomes such as brand loyalty (Batra et al., 2012), positive word of mouth (PWoM) (Carroll & Ahuvia, 2006), and willingness to pay premium (Bauer et al., 2007) to name a few. In this vein, it is found that brand passion (BP) is the ultimate emotional connection that can be established with consumers (Swimberghe et al., 2014).

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BP is a highly affective construct that is experienced by satisfied consumers (Swimberghe et al., 2014). Literature suggests that BP is a critical element that signals an emotional link between consumers and brand, thus contributes to the development of loyalty (Pourazad et al., 2019).

Research suggests that Harley Davidson, Apple, and Starbucks are a few examples of brands that could create and maintain deep affective bonds with consumers (Bauer et al., 2007). Consumers have shown willingness to pay premium to acquire products of these brands (Bauer et al., 2007). Passionate consumers of brands have also gone onto develop brand communities and have helped brands in product development activities (Füller et al., 2008).

Theoretically, BP is connected to internal motivation in driving commitment toward a brand (Das et al., 2019). Hence, it can be understood that BP is a crucial construct with strong theoretical foundation essential for long-term relationships with consumers (Das et al., 2019).

However, review of literature suggests that literature on BP has been plagued by two starkly different conceptualizations (Pourazad et al., 2019). BP as a stream of research was initiated using the unidimensional approach (e.g., Albert et al., 2013; Sarkar et al., 2012). Criticizing this approach, Swimberghe et al. (2014) came up with a dualistic approach to capture BP, as the unidimensional approach could not capture the concept of "self." Since then, there have been multiple papers that have captured BP using the dualistic conceptualization (e.g., Astakhova et al., 2017; Das et al., 2019). While the unidimensional approach considers interpersonal analogy, the dualistic approach considers the intrapersonal analogy (by incorporating the concept of "self") to capture BP. In other words, the former considers the passionate relation between consumers and brands like that of any passionate relationship between two individuals (Albert et al., 2013). However, the latter represents strong inclination for an activity and contributes to optimal functioning and joy of living (Swimberghe et al., 2014; Vallerand et al., 2003).

Due to inconsistent conceptualizations, the antecedents and consequences of BP that were identified are not directly comparable or generalizable. Further, there has been no empirical research that has identified a better conceptualization of the two. This indicates that there is an urgent need to address the debate over the two conceptualizations that have been used to explain BP (Pourazad et al., 2019). Hence, this study investigates the impact of these two conceptualizations on crucial managerial consequences and aid managers in decision-making.

Literature review suggests that consumers who are passionate about brands cultivate strong effects such as PWoM (Albert et al., 2013), an important factor for the success of a business (Bairrada et al., 2018). So, the present study considers comparing the effect of BP on PWoM. An intense consumer–brand relationship has been found to be beneficial to consumers and brands. Consumer well-being (CWB), as a concept, is of interest to both academics and practitioners. Interestingly, the definition of marketing has also progressed to highlight "well-being" (Pancer & Handelman, 2012). Hence, the present study aims to also compare the effects of both the types of BP on CWB. Of late, there is an increased interest in the role of social media in consumer research (Ramaswamy, 2008). Particularly, research has looked at how social media facilitates brands and opportunities to continuously interact with consumers from various walks of life (Labrecque, 2014). Further, these interactions have benefited the brands in many ways (Ramaswamy, 2008). Therefore, the present study examines the impact of BP on social media following (SMF).

In addition to addressing the debate over the two conceptualizations, the study also intends to understand the dynamic nature of passion in a consumption context by using "duration of use" as a moderating variable. Relationship stage models indicate that all relationships change with increasing duration and so do the feelings and behaviors that underlie the relationship (Avtgis et al., 1998). Hence, the factors that are influenced by the passionate feelings might have different effects with change in time. Further, literature on BP has largely focused on the determinants and outcomes of BP and has not considered the

impact of time on BP relationships (Pourazad et al., 2019). Hence, the present study addresses this gap by using "duration of use" as a moderator.

The current study is the first to discuss, investigate, and compare the two conceptualizations of BP. The study assesses the impact of two approaches of BP on these three crucial managerial consequences. To the best of authors' knowledge, this is also the first study to empirically validate the effect of BP on CWB and measure the moderating impact of duration of use on these three consequences.

The flow of the article is as follows: after the introduction, a section on theoretical background and hypotheses development is provided. Second, the methodology employed in the present study is elucidated. Third, the results of the study are illustrated. Finally, a conclusion that covers implications and limitations and future research directions is provided.

Background and Hypotheses Development

Brand Passion

In the present section, passion has been reviewed, and the application of passion in the context of consumption is outlined. Passion as a word is derived from the Latin word "passio," which means suffering (Swimberghe et al., 2014). The debate on passion dates back to Kant (1724–1804) and Hume (1711–1776) (Swimberghe et al., 2014). Kant regarded passion as a desire which becomes a habitual inclination to destroy freedom (Vallerand et al., 2003). Hence, passion was considered evil and had a negative connotation. Both Kant and Hume subscribed to the view that passion and reason are independent of each other. However, Spinoza (1632–1677) and Descartes (1596–1650) had a contrary view (Vallerand et al., 2003). According to them, passion and reason are not independent of each other. Spinoza recognized "the possibility of passions themselves being transformed into a form of reason" (Dilman, 1984, p. 86). Hence, the argument of passion not being fundamentally evil and can result in positive outcomes, "as long as reason underlies the behavior" (Vallerand et al., 2003, p. 756) started taking shape as a separate school of thought. This implies that there have been different conceptualizations of passion from the beginning.

Passion, as a term, has often been used in interpersonal relationships. Sternberg (1986), posited in his triangular theory of love that passion is an integral component of interpersonal love. It is a motivation that is derived from an emotion or affect, which leads to psychological arousal in romantic relationships (Sternberg, 1986). Continuing the discussion, Hatfield and Walster (1978) defined passion as an intense desire for union with another. In addition to the sexual needs, other needs such as self-esteem, nurturance, succorance, dominance, affiliation, self-actualization, and submission also contribute to the experience of passion (Sternberg, 1986). Baumeister and Bratlslavsky (1999) defined passion as "strong feelings of attraction for the other person. These feelings are typically characterized by physiological arousal and the desire to be united with the other person in multiple senses" (p. 52). Hence interpersonal passion indicates frequent thinking of the partner, idealization of both the partner and the relationship, sexual attraction, and a desire of reciprocity (Hatfield, 1988). Further, passion can occur as a single and exclusive feeling for another person or as one component of a complex emotion like love (Sternberg, 1986) (Table 1).

Shimp and Madden (1988) used this framework in the context of consumption and suggested that passionate feelings of a consumer held for a brand are analogous to the passionate feelings held for another consumer. Further, Fournier (1998) regarded that passion is central to high-quality consumer–brand relationships. Consequently, marketing researchers used passion as a component to understand emotional brand attachment (Thomson et al., 2005), brand love (Carroll & Ahuvia, 2006), romantic brand love (Sarkar et al., 2012), and other allied consumer–brand constructs.

In addition to this, BP was also used as an independent factor to understand passionate consumers. In one of the pioneering empirical studies on BP, Bauer et al. (2007) provided a clear explanation of the determinants and outcomes of BP. Later, Albert et al. (2013) also studied BP as a sole component and looked at the antecedents and consequences of BP.

However, disputing the "narrow" approach of Sternberg (1986), Swimberghe et al. (2014) came up with a dualistic model to capture BP that was proposed by Vallerand et al. (2003). In line with the arguments of Spinoza and Descartes, Vallerand et al. (2003) argued passion as "a strong inclination toward an activity that people like, that they find important and in which they invest time and energy" (p. 757). Additionally, they argued that there are two types of passions—harmonious and obsessive. This distinction was based on the way an individual internalizes the passionate activity into one's self-identity.

According to this conceptualization, if a passionate individual can keep passion in harmony with other aspects of life, then the individual is experiencing harmonious passion. It is a result of autonomous internalization of a brand into a consumer's identity (Swimberghe et al., 2014). This kind of passion has a crucial but not overriding space in the consumer's identity and is in harmony with other facets of consumers.

On the other hand, if the passion dominates individual's existence thereby causing an imbalance, then the individual is experiencing obsessive passion, a result of controlled internalization activity (Swimberghe et al., 2014). Such an internalization emanates from internal and/or external reasons either because the brand is attached with feelings of social acceptance and/or social esteem or because the amount of excitement or pleasure that is derived from the brand is uncontrollable (Swimberghe et al., 2014). As the relationship with the brand is out of control, the passionate consumer eventually is dominated by the brand; therefore, the individual becomes obsessed with the brand, and the passion starts interfering with other aspects of life (Swimberghe et al., 2014). It has been observed that obsessively passionate people develop ego-invested structures (Hodgins & Knee, 2002) and demonstrate rigid and conflicted forms of engagement that impede the experience of volition. This kind of BP should not be misinterpreted with the concept of addiction. An addict does not view the addictive activity as a pleasurable activity, while loving and valuing the activity are the necessary requirements for obsessive passion (Philippe et al., 2009).

From the above-mentioned example, it can be understood that the literature of BP has two broad conceptualizations. They are interpersonal conceptualization (Unidimensional BP—UBP) and intrapersonal

Table 1. Some Definitions of BP.

Definition	Author(s)
An emotional, extremely positive motivation for a brand that leads to intense emotional attachment and influences crucial consumer behavior.	Bauer et al. (2007)
A passionate consumer is found to engage in an affective relationship with the brand and will miss the brand, if not available.	Matzler et al. (2007)
Behavior indicating a strong desire to use a brand, invest resources into a brand, and a demonstrated history of doing so.	Batra et al. (2012)
A psychological construct that is embraced by very few consumers and contains excitement, infatuation, and fixation for a particular brand.	Albert et al. (2013)
An intense emotional attachment with a brand that people value, find significant, desire to acquire and/or consume, integrate into their identity, and invest resources over time.	Swimberghe et al. (2014)

Source: The authors.

conceptualization (dualistic BP—DBP). While the former is based on a person's strong inclination for another person (Sternberg, 1986), the latter is based on strong inclination of a person for an activity. Hence, it can be understood that the essence of both the conceptualizations is starkly different.

The literature suggests that BP was linked to various antecedents and consequences. However, due to two broad conceptualizations, the nomological framework of BP lacks consistency. Hence, the studies that have looked at the determinants of BP are not comparable. For example, Albert et al. (2013) examined the equation between BP and willingness to pay premium, using unidimensional conceptualization, and found that the direct relationship between the two was insignificant. On the other hand, Swimberghe et al. (2014) found that there was a significant direct effect of both harmonious BP (HBP) and obsessive BP (OBP) on willingness to pay premium.

As there are two conceptualizations of BP, the literature has witnessed use of different scales to understand the phenomenon (as seen in Table 2).

Table 2. Various Scales Used in BP Literature.

Scale	Attributes	Conceptualization
Sternberg (1997)	• Source of pleasure or happiness • Significantly important in life • Romantic involvement • Frequent thinking • Adoration • Idealizing • Intention to invest in the relationship • Magical relationship	Interpersonal
Keh et al. (2007)	• Irreplaceable • Source of pleasure/happiness • Frequent thinking • Strong urge	Interpersonal
Albert et al. (2009)	• Source of pleasure/happiness • Idealization	Interpersonal
Vallerand et al. (2003)	• Variety of experiences • Discovery of new things • Memorable experiences • Reflection of self • Harmony with life • Crucial part of life • Strong urge • Emotionally dependent • Uncontrollable • Obsessive	Intrapersonal
Thomson et al. (2005)	• Declaration of passion • Real trust • Attached • Appealing • Delight	Interpersonal

(Table 2 continued)

(Table 2 continued)

Scale	Attributes	Conceptualization
Merz et al. (2018)	• Addiction • Admiration • Declaration of love	Interpersonal
Sarkar et al. (2012)	• Attractive • Delight • Captivating • Fascinating	Interpersonal
Matzler et al. (2007)	• Important • Frequent thinking • Declaration of passion • Inclination to invest time with the brand • Exciting	Interpersonal
Batra et al. (2012)	• Willingness to invest resources • Desirability • Involvement	Interpersonal
Kim & Kim (2018)	• Irreplaceable • Attraction • Significant	Interpersonal
Fritz et al. (2014)	• Frequent thinking • Source of happiness • Magical relationship • Attractive • Idealization • Separation anxiety • Irreplaceable	Interpersonal
Baldus et al. (2015)	• Declaration of passion • Feelings of good • Helping others	Interpersonal

Source: The authors.

Consumer Well-being

Well-being is a topic of interest for several researchers and has resulted in several meanings (Philippe et al., 2009). CWB in consumption context has been associated with the satisfaction of consumer's affective, economic, physical, and social needs (Jaikumar et al., 2018). CWB can be understood as the sum of consumer's subjective well-being and objective well-being (Sirgy, 2008). The former contains life satisfaction, quality of life, and overall happiness, while the latter includes financial, social, and environmental well-being (Sirgy, 2008). Further, subjective well-being is instrumental in building consumers' repetitive and long-run buying behavior, as the chances of manipulating "well-being" are very less (Zhong & Mitchell, 2012). Hence, the present study adapts the perceived quality of life model, which captures the consumer's perception of product's influence (or brand's) on overall life (Sirgy et al., 2007). In other words, CWB captures the impact of the product on aspects like personal life and professional

life. Perceived satisfaction in different life avenues is a balance between the benefits received and cost incurred (Sirgy et al., 2007). The emotions of consumers are episodic in nature and may impact perceptions of quality of life (Kemp et al., 2018).

Past research has suggested that emotions and satisfaction are crucial elements for long-duration consumer–brand relationships (Carroll & Ahuvia, 2006). Further, research has also noted that these relationships are not just because of satisfaction with a product but its impact on other consumer needs (Junaid et al., 2020). As BP is a feeling that satisfied consumers' experience (Swimberghe et al., 2014), it can therefore be understood that BP leads to CWB. Further, passion for an activity has been found to contribute to happiness and self-growth of an individual (Vallerand et al., 2003). Additionally, brand love, which encompasses BP, has been found to positively influence CWB (Junaid et al., 2020).

H1: UBP positively impacts CWB.
H2: HBP positively impacts CWB.
H3: OBP positively impacts on CWB.

Positive Word of Mouth

Word of mouth (WoM) is regarded as any remarks (affirmative or negative) made by future, present, or past consumer about a brand or a product. Consumers would spread PWoM, especially when they develop positive affect for a brand (Carroll & Ahuvia, 2006). Further, satisfied consumers are known to engage in PWoM, thereby enhancing holistic marketplace reputation (File & Prince, 1992). In other words, PWoM acts as a low-cost promotional alternative for the brands.

It has been observed that infatuated consumers or consumers with excitement regarding a brand speak positively about their passionate brands (Pourazad et al., 2019) as part of their identity-building process (Batra et al., 2012). Swimberghe et al. (2014) further found that HBP is positively related to PWoM, and obsessively passionate consumers have an inclination to do more than just "share the good word" about their favorite brands. Hence, it is proposed that irrespective of conceptualization, BP positively impacts PWoM.

H4: UBP positively impacts PWoM.
H5: HBP positively impacts PWoM.
H6: OBP positively impacts PWoM.

Social Media Following

As mentioned previously, the impact of social media in consumer–brand relationships has been immense (Ramaswamy, 2008). Social media has helped consumers to interact with brands and share information about the brands to fellow consumers (Labrecque, 2014). Further, managers perceive social media as a platform for feedback from consumers while they interact (Holt, 2016). In this regard, it has been observed that social media enhances BP by providing communication exchanges among homogeneous consumers (Gensler et al., 2013). These interactions reinforce the self-concept of the consumers, thereby enhancing BP (Hsu et al., 2015). The quality of consumers' involvement with the brand on social media signals the intensity of the consumer–brand relationships (Labrecque, 2014). Hence, the present study proposes that BP has an impact on SMF, that includes "liking" and/or "following" the brand or "sharing" content pertinent to the brand.

Further, consumers who are obsessed about brands are prompted by the feelings of self-esteem and/or social acceptance (Swimberghe et al., 2014). The uncontrolled liking for brands that comes from OBP is likely to push consumers to support brands by not just sharing the good word about the brand but also by engaging in building brand communities. Hence, we hypothesize that BP positively impacts SMF.

H7: UBP positively impacts SMF.
H8: HBP positively impacts SMF.
H9: OBP positively impacts SMF.

Duration of Use

Literature of BP suggests that empirical examination of the role of moderators has been scant (Pourazad et al., 2019). There have been repeated calls for empirical investigation of length of consumer–brand relationships (Huber et al., 2015; Pourazad et al., 2019). The current study aims to investigate the moderating role of "duration of use" in the relationships between BP and the above-mentioned consequences (PWoM, CWB, and SMF). "Duration of use" is a crucial examination as passion is an emotion, and it is temporary in nature (Batra et al., 2012). So, BP is subjected to fluctuations. Hence, relationships that are based on BP also fluctuate and so do the intensity of feelings and behaviors associated with it (Avtgis et al., 1998). Hence, the present study analyzes the impact of "duration of use" on various above-mentioned consequences.

H10: Impact of BP on CWB is significantly moderated by increasing duration of use.
H11: Impact of BP on PWoM is significantly moderated by increasing duration of use.
H12: Impact of BP on SMF is significantly moderated by increasing duration of use.

Methodology

To test the above-mentioned hypotheses, a self-administered online survey questionnaire was designed. The respondents were advised to fill the questionnaire, keeping in view their most favorite brand, an approach commonly used in branding stream of research (e.g., Bairrada et al., 2018; Joshi & Garg, 2021). Convenience sampling, a nonprobability sampling technique, is an efficient way to collect information quickly for a large population (Munikrishnan et al., 2021).

The questionnaire was designed on Google Forms and was disseminated on social media platforms to attract responses by all the three authors (Munikrishnan et al., 2021). Further, the authors came from different geographical backgrounds and institutions, thus adding to the diversity of the sample. A total of 336 usable responses from Indian geography were obtained, which was suitable for covariance-based structural equation modeling (SEM; Hair et al., 1998).

The scales of Albert et al. (2009) and Vallerand et al. (2003) for UBP and DBP approaches, respectively, were adapted. CWB, PWoM, and SMF were adapted from Grzeskowiak and Sirgy (2007), Carroll and Ahuvia (2006), and Wallace et al. (2014). A 5-point Likert scale ("strongly disagree" to "strongly agree") was used for measuring all the items of the scale (Appendix A).

Lavaan package of R was used for analysis (Rosseel, 2012). Confirmatory factor analysis (CFA) and SEM were executed in a sequential two-step process to analyze the obtained data (Anderson & Gerbing, 1988; Patnaik & Shukla, 2020). In line with the objective, the authors conducted separate analysis for both the unidimensional approach and dualistic approach. Model 1 contained the measures of UBP, CWB, PWoM, and SMF. While Model 2 contained the measures of DBP, CWB, PWoM, and SMF.

Table 3. Demographic Summary of the Respondents.

	Percentage	Frequency
Gender		
Female	33.63	113
Male	66.37	223
Age group		
18–25	25.29	85
25–35	33.92	114
35–45	16.36	55
45–55	19.34	65
55 and above	5.05	17
Duration of use		
0–2 years	17.85	60
2–5 years	22.91	77
5–10 years	29.46	99
10 and above	29.76	100

Source: The authors.

Findings

Common Method Bias

Common method bias (CMB) was tackled prior to and post data collection. The instructions of the questionnaire indicated that there was no correct or incorrect answer in any of the questions and requested the respondents to fill the questionnaire without any biases. It was also mentioned that the responses would be used for academic purposes and kept confidential. Before performing CFA and SEM, the data were evaluated for CMB using Harman's single-factor test. The results indicated 42.94% variance for Model 1 and 42.31% variance for Model 2, which is acceptable as it is below 50% (Podsakoff, 2003). Therefore, CMB does not exist in both the models.

The model fit indices (Table 4) of both the CFA models suggest a fit between the data and the hypothesized model (Hair et al., 2010).

The data for all the variables were found to be reliable as Cronbach's alpha values (as seen in Tables 5 and 6) were greater than 0.7 for all variables of both the models (Nunally, 1978). The average variance extracted (AVE) of each measure was observed to be more than 0.5, thereby suggesting that convergent validity exists (Fornell & Lacker, 1981) among the items of all the constructs.

Discriminant validity (DV) was observed, as the AVEs of all the measures exceeded their respective squared inter-scale correlations (Tables 7 and 8).

Path Analysis

SEM was performed using bootstrapping of 5,000 samples (Joshi & Garg, 2021). Values from Table 9 show that UBP positively impacts PWoM, CWB, and SMF at a significance level of 5% ($p < 0.05$).

Table 4. Fit Indices.

Indices	Unidimensional Fit Indices (model 1)	Dualistic Fit Indices (model 2)
CFI	0.939	0.913
NFI	0.910	0.897
TLI	0.925	0.883
RMSEA	0.076	0.085
SRMR	0.049	0.056
Chi-squared/df	2.929	3.406

Source: The authors.

Table 5. Factor Loadings, Cronbach Alpha, and AVE (model 1).

Items	Factor Loading	Cronbach's Alpha	AVE
UBP1	0.672	0.812	0.519
UBP4	0.729		
UBP5	0.725		
UBP6	0.752		
CWB1	0.696	0.799	0.570
CWB2	0.803		
CWB3	0.763		
PWoM1	0.752	0.888	0.666
PWoM2	0.782		
PWoM3	0.864		
PWoM4	0.859		
SMF1	0.835	0.898	0.641
SMF2	0.683		
SMF3	0.844		
SMF4	0.864		
SMF5	0.762		

Source: The authors.

Table 6. Factor Loadings, Cronbach's Alpha, and AVE (model 2).

Items	Factor Loading	Cronbach Alpha	AVE
HBP2	0.614	0.778	0.542
HBP3	0.809	0.918	0.653
HBP4	0.771		
OBP1	0.770		
OBP2	0.831		
OBP3	0.789		
OBP4	0.894		
OBP5	0.826		
OBP6	0.728		

(Table 6 continued)

(Table 6 continued)

Items	Factor Loading	Cronbach Alpha	AVE
CWB1	0.761	0.721	0.564
CWB2	0.740		
PWoM1	0.752	0.888	0.665
PWoM2	0.776		
PWoM3	0.866		
PWoM4	0.862		
SMF1	0.833	0.899	0.641
SMF2	0.692		
SMF3	0.843		
SMF4	0.863		
SMF5	0.760		

Source: The authors.

Table 7. DV for Model 1.

	UBP	CWB	PWoM	SMF
UBP	**0.720**			
CWB	0.604	**0.755**		
PWoM	0.618	0.638	**0.816**	
SMF	0.521	0.544	0.697	**0.800**

Source: The authors.

Table 8. DV for Model 2.

	HBP	OBP	CWB	PWoM	SMF
HBP	**0.736**				
OBP	0.489	**0.808**			
CWB	0.706	0.728	**0.751**		
PWoM	0.591	0.394	0.616	**0.815**	
SMF	0.519	0.550	0.536	0.697	**0.801**

Source: The authors.

Values from Table 10 also show that DBP positively impacts PWoM, CWB, and SMF at a significance level of 5%. The results suggest that effects of variables are significant irrespective of the type of conceptualization. However, the model fit indices, as presented in Tables 9 and 10, indicate that interpersonal conceptualization (Model 1) is superior to intrapersonal conceptualization (Model 2). Further, the coefficients (β and R^2) of Model 1 are also found to be better than Model 2.

Through the analysis, it was found that inducing passion in a consumer benefits both the brand and the consumer. The impact on CWB is even higher when the passionate consumer considers the favorite

Table 9. Standardized Regression Weights (unidimensional brand passion—model 1).

Hypothesized Path	β	R^2	p-Value
UBP → CWB	0.605	0.366	0.00
UBP → PWoM	0.618	0.381	0.00
UBP → SMF	0.521	0.271	0.00
Model fit indices	CFI	0.939	
	TLI	0.925	
	NFI	0.910	
	RMSEA	0.076	
	SRMR	0.049	

Source: The authors.

Table 10. Standardized Regression Weights (dualistic brand passion—model 2).

Hypothesized Path	β	R^2	p-Value
HBP → CWB	0.574	0.329	0.00
OBP → CWB	0.398	0.158	0.00
HBP → PWoM	0.530	0.289	0.00
OBP → PWoM	0.134	0.017	0.031
HBP → SMF	0.328	0.107	0.00
OBP → SMF	0.389	0.151	0.00
Model fit indices	CFI	0.913	
	TLI	0.898	
	NFI	0.880	
	RMSEA	0.082	
	SRMR	0.056	

Source: The authors.

brand as a relationship partner instead of an activity. Further, consumers who consider brands as relationship partners are more likely to spread a positive word when compared to consumers who do not consider brands as relationship partners. Similar results were observed with SMF, and the interpersonal conceptualization was found to be a better approach when compared to intrapersonal conceptualization.

Moderating Effects

Multigroup analysis was used to examine the moderating effect (Joshi & Garg, 2021) of "duration of use" on the above proposed relationships of BP (of both conceptualizations). It facilitates dividing the data into two subgroups and running the SEM model simultaneously on both the subgroups (Tarhini et al., 2014).

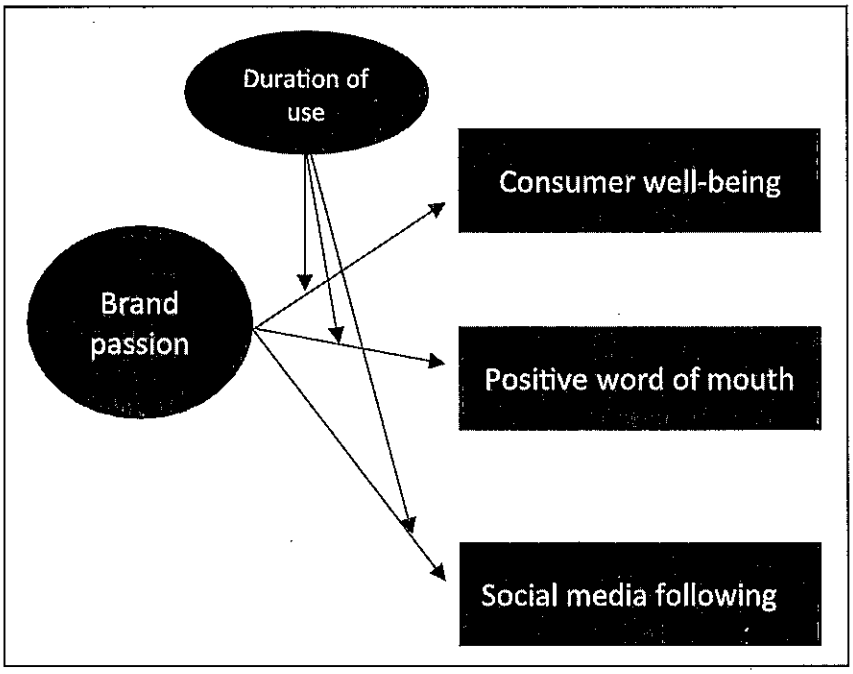


Figure 1. Structural Model of the Present Study (Model 1 and Model 2).

Source: The authors.

Table 11. Moderating Effect: Duration of Use (unidimensional approach).

	Duration of Use	β	p-Value
H10	BP* 0–2 years → CWB	0.202	0.086*
H11	BP* 0–2 years → PWoM	0.417	0.001#
H12	BP* 0–2 years → SMF	0.297	0.008*
H10	BP* 2–5 years → CWB	0.342	0.013*
H11	BP* 2–5 years → PWoM	0.398	0.008*
H12	BP* 2–5 years → SMF	0.372	0.012*
H10	BP* 5–10 years → CWB	0.154	0.261#
H11	BP* 5–10 years → PWoM	−0.004	0.983#
H12	BP* 5–10 years → SMF	−0.110	0.466#
H10	BP* 10 and above years Years → CWB	−0.199	0.091#
H11	BP* 10 and above years → PWoM	−0.109	0.297#
H12	BP* 10 and above years → SMF	−0.087	0.442#

Source: The authors.

Note: # $p>0.05$; * $p<0.05$.

The moderating role of duration in the above proposed relationships were examined using pair-wise comparison of four categories, as shown in Tables 11 and 12. The results of moderating effect of duration among majority of the proposed relationships across both the models seem insignificant. Therefore, an increase in relationship duration does not enhance CWB, PWoM, and SMF. Hence, the present study rejects H10, H11, and H12.

Past literature suggests similar reports of moderating role of relationship duration. "Duration of use" as a moderator was found to have an insignificant impact on the link between satisfaction and WoM (Ranaweera & Menon, 2013). Coulter and Coulter (2002) also found that "duration of use" has an insignificant impact on promptness—trust relationship. Additionally, Raimondo et al. (2008) also had no significant impact on satisfaction and behavioral loyalty. Sabiote and Román (2009) also found that the "duration of use" has an insignificant effect on the equation of social regard and WoM. Further, it also had an insignificant impact on the relationship between brand love (which contains BP as a component) and consumer engagement (Junaid et al., 2020).

Table 12. Moderating Effect: Duration of Use (dualistic approach).

	Duration of Use	β	p-Value
H10	HBP* 0–2 years → CWB	0.018	0.940#
H10	OBP* 0–2 years → CWB	0.039	0.855#
H11	HBP* 0–2 years → PWoM	0.324	0.105#
H11	OBP* 0–2 years → PWoM	−0.091	0.491#
H12	HBP* 0–2 years → SMF	0.097	0.554#
H12	OBP* 0–2 years → SMF	0.118	0.322#
H10	HBP* 2–5 years → CWB	0.277	0.044*
H10	OBP* 2–5 years → CWB	−0.116	0.523#
H11	HBP* 2–5 years → PWoM	0.113	0.580#
H11	OBP* 2–5 years → PWoM	0.021	0.914#
H12	HBP* 2–5 years → SMF	0.110	0.490#
H12	OBP* 2–5 years → SMF	0.086	0.544#
H10	HBP* 5–10 years → CWB	0.291	0.112#
H10	OBP* 5–10 years → CWB	−0.550	0.000*
H11	HBP* 5–10 years → PWoM	0.370	0.010*
H11	OBP* 5–10 years → PWoM	−0.169	0.254#
H12	HBP* 5–10 years → SMF	0.118	0.434#
H12	OBP* 5–10 years → SMF	−0.100	0.482#
H10	HBP* 10 years and above → CWB	0.008	0.957#
H10	OBP* 10 years and above → CWB	0.099	0.526#
H11	HBP* 10 years and above → PWoM	0.100	0.652#
H11	OBP* 10 years and above → PWoM	−0.141	0.290#
H12	HBP* 10 years and above → SMF	0.288	0.022*
H12	OBP* 10 years and above → SMF	−0.072	0.568#

Source: The authors.
Note: # p>0.05; * p<0.05.

There can be many reasons for the insignificant moderating role of "duration of use" on the hypotheses. As mentioned previously, BP is an emotion, and it is episodic in nature. Hence, the passionate consumer–brand relationships may undergo significant changes with increasing duration. Brands of this day and age frequently bring in innovation in their products, by adding new features, which are instrumental in renewing the passion of consumers, thereby significantly impacting PWoM, CWB, and SMF. This can be supported by the fact that Indian consumers are materialistic in nature (Davidson et al., 2018) and allocate majority of their income in purchasing offerings of reputed brands (Sharda & Bhat, 2018). Additionally, materialistic consumers acquire possessions that are symbolic in nature (Fitzmaurice & Comegys, 2006). Further, majority of the respondents are young, that is less than 35 years of age (Table 3), who always desire "something new" and "something different" (Kang, 2015).

Conclusion

Discussion and Implications

At the outset, the study has proved that passion for brands benefits consumers and practitioners, thereby suggesting that BP is a significant construct. The primary objective of this study is to discuss, investigate, and compare the two conceptualizations of BP. Accordingly, it compared the two conceptualizations using a few consequences of which a few, as per the review of literature, are untested relationships. Through the analysis, it has been observed that irrespective of the conceptualization, BP as a phenomenon that leads to CWB, PWoM, and SMF. Also, the regression coefficients of interpersonal conceptualization are better in influencing CWB, PWoM, and SMF. So, the study encourages practitioners to promote brands as relationship partners instead of activities, as this kind of positioning benefits both brands and consumers. The study has also added to the body of knowledge by introducing a few untested relationships—they are UBP–CWB, HBP–CWB, OBP–CWB, HBP–SMF, OBP–SMF, and OBP–PWoM.

To evaluate the efficacy of marketing campaigns, brand managers need to calibrate BP. The current study compares the two conceptualizations of BP, which will help managers identify the most apt scale to gauge the passion that consumers have for their favorite brands.

The study has demonstrated that irrespective of the conceptualization, BP enhances CWB. However, the well-being is higher when consumers treat brands as relationship partners. Further, the CWB is higher when the passion of consumers is harmonious in nature. Analysis has also shown that CWB is the least when it is OBP.

The study has also shown that passionate consumers spread a positive word about their favorite brands. This is even higher when the passionate consumers regard their favorite brands as relationship partners. Surprisingly, obsessively passionate consumers' tendency to spread a positive word is very less when compared to HBP and UBP.

The study has also shown that BP has a positive impact on SMF. These findings are an extension to past findings that show that social media facilitates strengthening of consumer–brand relationships (Pourazad et al., 2019). The results suggest that UBP has a stronger impact on SMF when compared to HBP and OBP. However, OBP has a stronger impact on SMF when compared to HBP. This suggests that obsessively passionate consumers tend to strengthen brands on social media through their engagements.

The present study addresses a major gap in the literature by examining the moderating impact of duration of use on the above proposed hypotheses. The results suggest that relationship duration does not enhance the value of BP relationships. Hence, practitioners are advised to make efforts to rejuvenate BP for desired outcomes. The possible reason can be that with increasing duration, the characteristics of the brand may change, which may conflict with the passionate consumer's idealization (Albert et al., 2013). Past research suggests that passionate consumers of Coke reacted in a similar manner when the brand launched "New Coke" (Albert et al., 2013).

Further, the current study highlighted that positioning brands as relationship partners in a materialistic society like India will help brands in achieving PWoM and SMF, which can help in generating positive user-generated content. Therefore, managers are encouraged to design communications following the idea of Sternberg (1986). Interestingly, results further indicate that if managers consider consumer–brand relationships as intrapersonal relationships, the managers will still achieve desired outcomes.

Limitations and Future Research Directions

This study has a few limitations. First, the study has been conducted in Indian geography, and the results of the study cannot be extended beyond the current sampling framework. Hence, future research can consider using a multi-country sample.

The study has demonstrated that interpersonal brand passion is better than intrapersonal BP. So, future research can investigate the nature of interpersonal BP and suggest if it is a perfect two-way or an imperfect two-way relationship.

The study acknowledges that having researcher-selected brands for assessment would increase variance of measures, thereby contributing to stronger brand relationships. Hence, future researchers are encouraged to have researcher-selected brands so that individual biases are minimized. Future research can investigate other moderators such as age, gender, and income.

Appendix A

Survey Questionnaire

Name _____
Gender _____
Age_____
Favorite brand_____
Duration of Use (in Years)
0–2 years
2–5 years
5–10 years
10 and above

Unidimensional Brand Passion (Albert et al., 2009)

UBP 1: There is something almost "magical" about my relationship with my favorite brand.
UBP 2: There is nothing more important to me than my relationship with my favorite brand.
UBP 3: I idealize this brand.
UBP 4: By buying my favorite brand, I take pleasure.
UBP 5: Discovering new products from my favorite brand is a pure pleasure.
UBP 6: I take a real pleasure in using my favorite brand.
UBP 7: I am always happy to use my favorite brand.

Dualistic Approach Brand Passion (Vallerand et al., 2003)

Harmonious Brand Passion

HBP 1: My favorite brand allows me to live a variety of experiences.
HBP 2: The new things that I discover with my favorite brand allow me to appreciate it even more.
HBP 3: My favorite brand allows me to live memorable experiences.
HBP 4: My favorite brand reflects the qualities I like about myself.
HBP 5: My favorite brand is in harmony with the other activities in my life.
HBP 6: For me, it is a passion that I still manage to control.
HBP 7: I am completely taken with my favorite brand.

Obsessive Brand Passion

OBP 1: I cannot live without my favorite brand.
OBP 2: The urge is so strong. I cannot help myself from my favorite brand.
OBP 3: I am emotionally dependent on my favorite brand.
OBP 4: I have a tough time controlling my need to be with my favorite brand.
OBP 5: I have almost an obsessive feeling for my favorite brand.
OBP 6: My mood depends on me being able to be with my favorite brand.

Consumer Well-being (Grzeskowiak & Sirgy, 2007)

CWB 1: My favorite brand satisfies my overall needs.
CWB 2: My favorite brand plays a very important role in my social well-being.
CWB 3: My favorite brand plays an important role in my leisure well-being.
CWB 4: My favorite brand plays an important role in enhancing the quality of my life.

Positive Word of Mouth (Carroll & Ahuvia, 2006)

PWoM 1: I have recommended my favorite brand to a lot of people.
PWoM 2: I "talk up" my favorite brand to my friends.
PWoM 3: I try to spread the good word about my favorite brand.
PWoM 4: I give my favorite brand tons of positive word of mouth advertising.

Social Media Following (Wallace et al., 2014)

SMF 1: I click "Like" for my favorite brand in order to talk up the brand to my friends.
SMF 2: I click "Like" for my favorite brand as it enhances my Facebook profile.
SMF 3: I click "Like" for my favorite brand in order to spread the good word about this brand.
SMF 4: I give my favorite brand a lot of positive word of mouth online.
SMF 5: I recommend my favorite brand to friends and family on Facebook.

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Resilient Leadership – A Case Study of Sir Winston Churchill

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Abstract

Resilient leadership is the ability of a leader to see failures as temporary setbacks and recover quickly from those failures to bring organisations back to normal. Resilient leaders maintain a positive attitude and a strong sense of opportunity during periods of turbulence. The characteristics of a resilient leader include: having a vision, being self-conscious, being attentive, having courage, having a positive attitude, having motivation, having composure, having reasoning, having tenacity, and being able to collaborate. The present study focuses on how resilient leadership is paramount in these post-pandemic hard times in organisations across the globe. A majority of the organisations in the world were badly affected by COVID-19, except a few industries like pharmaceuticals, software and services, and fast moving consumer goods (FMCGs). This case study showcases the resilient leadership of Sir Winston Churchill during World War II against the tyrant, blood thirsty, warmonger Adolf Hitler and his Nazi Germany. This article analyses the attributes of Sir Winston Churchill as a resilient leader and why the same kind of vision, composure, and tenacity are required for business leadership, and leaders of the world, to overcome the unprecedented pandemic of monumental proportions, which posed the greatest challenge to mankind.

Keywords: Resilience, COVID-19, FMCG, Resilient Leadership

Introduction

Leadership is one of the areas on which continuous and rigorous research is being done over centuries, to explore and understand the importance, impact, and effectiveness of leadership behaviours or styles on organisational performance. Right from IOWA leadership studies that identified three styles of leadership, viz., Autocratic, Democratic, and Laissez-faire or Free-Rein, to the present resilient leadership style, different prominent leadership thinkers, researchers, and management gurus across the globe have come up with various leadership styles that best fit organisational effectiveness. In most of the studies, it was found that no single style or behaviour is sufficient or suitable for organisational success. Resilient leadership is just one leadership style that is most effective in turbulence situations where leaders have to bounce back quickly to the new normal situation with their abilities, and run organisations successfully against all odds. This paper aims to throw light on the importance of resilient leadership in the post-pandemic times in organisations across the world, where the organisations were severely affected by COVID-19, in terms of performance. The authors have taken the case study of Sir Winston Churchill as a resilient leader – how he has shown courage and responded quickly, and firmly resisted the invasion of Britain by German Nazi forces, and how he defeated Germany in World War II. The resilient leadership is not only effective in political systems, but in organisations as well. This article has been written to discuss the characteristics of a resilient leader and how resilient leadership is important in these hard times of the pandemic all over the world, to bring organisations back to normal functioning.

Human Resilience

Human resilience is a physical and psychological response against all odds during the course of life. Human resilience is the ability to recover from or adjust easily to misfortune

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or change. Resilience is the process of adapting oneself during adversity, trauma, tragedy, threats, or stress due to family and relationship problems, serious health issues, work pressure, and financial burdens.

Being resilient means bouncing back when we face failures. Overall, resilience gives us the power to overcome setbacks, so that we can live the life we have always imagined. Resilient people are aware of situations, their own emotional reactions and limitations, and the behaviour of those around them. To manage emotional feelings, it is essential to understand what is causing them and why. Being aware, resilient people can maintain, manage situations, and think of innovative ways to tackle problems.

Ten Characteristics of Resilience

- Having vision
- Being self-conscious
- Being attentive
- Having courage
- Having a positive attitude
- Having motivation
- Having composure
- Having reasoning
- Having tenacity
- Being able to collaborate

An Individual can Know Whether He/ She is Resilient by Looking at the Following Traits

- You find yourself accountable for mistakes, rather than finding fault with others.
- You are the best judge of your own self.
- You are never ashamed of asking for help, if you really need it.
- You want to be yourself, and never compare yourself with others.
- You plan well, but you also know that not everything goes as per plan.
- You are better equipped to take care of yourself.

What is Resilient Leadership?

A resilient leader is a person who sees failures as temporary setbacks; they can recover from failures very quickly. They maintain a positive attitude and a strong sense of opportunity during periods of turbulence. When faced with ambiguity, a resilient leader finds ways to move forward and avoids getting stuck. Resilient leaders have the ability to sustain their energy level under pressure too; to cope with disruptive changes and adapt resilience is a crucial characteristic of high-performing leaders.

Brief Biography of Sir Winston Churchill

Sir Winston Leonard Spencer Churchill (30 November 1874 – 24 January 1965) was a British politician, army officer, and writer. He was Prime Minister of the United Kingdom from May 1940 to July 1945, when he led the country to victory in the Second World War, and again from October 1951 to April 1955. Apart from two years, between October 1922 and October 1924, Churchill was a Member of Parliament (MP) from January 1900 to September 1964, and represented a total of five constituencies. Ideologically an economic liberal and imperialist, he was for most of his career a member of the Conservative Party, as leader from October 1940 to April 1955. He was a member of the Liberal Party from May 1904 to March 1924. Winston Churchill became Britain's prime minister on 10 May 1940. It is for his leadership through the fraught years of 1940-1941, through Dunkirk, the Battle of Britain and the Blitz, that Churchill is best remembered. Crucially, he rallied the nation in defiance of Hitler.

As a Prime Minister, during most of World War II (1940-45), Winston Churchill rallied the British people and led the country from the brink of defeat to victory. He shaped the allied strategy in the war, and in the war's later stages, he alerted the West to the expansionist threat of the Soviet Union.

Winston Churchill – A Resilient Leader

Winston Churchill is quite eloquent in criticising Nazism and he was determined to stop Adolf Hitler's war juggernaut. There was no talk of surrender. He delivered strong speeches and visited areas that had been bombed

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AN EXPLORATORY STUDY ONGREAT RESIGNATION IN U.S. AND INDIA DURING COVID-19 PANDEMIC

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bstract

1 2020, resignation rates across the US were very low due to the fear and uncertainty caused by the pandemic situation. lut however, one year later, as the workforce experienced a huge collective burnout, individuals have left their jobs at nprecedented rates, leading some experts to describe the phenomenon as the Great Resignation or Big Quit.

Great resignation is a trend in the year 2021 in which employees have voluntarily resigned from their jobsen masse. ccording to the US Labour Department report, 4.5 million workers left their jobs in November, 2021. This corresponds ecord numbers observed in September and accounted for 3% of the workforce quitting their jobs each month. Estimates ndicate that around 75.5 million people in America resigned in 2021. And also,according to a ResumeBuilder.com poll, round 23% of the workforce will seek new jobs in 2022.

In India, the situation is not as terrible as in the U.S. but still cause for concern. Following the Great Resignation, the IT ector has hiredemployees at unprecedented rates, with the top five Information Technology companies have hired around .7 lakh people in 2021. Not only are people in the workforce changing jobs, but according to a survey by Amazon India onducted in September 2021, nearly 51% of job seekers are looking for opportunities in industries where they have little to o experience.

The Great Resignation has largely been fuelled by burnout in India, but other factors also include the shift to working from ome and the desire of employees to move into a more stable profession. An MIT Sloan study found that more innovative ompanies suffer from a higher turnover as they demand more from their employees and project a sense of instability due) their cutting-edge nature. Obviously, companies that report high rate of employee satisfaction are better at retaining their mployees comparing to companies with low employee satisfaction. And also, MIT Sloan analysis found that a toxic corporate ulture is the higher predictor of attrition and over ten times more important than salary in predicting turnover.

The causes for this phenomenon include Low Salary, Limited Career Opportunities, Not being Valued by Management, 'oor Employee Benefits, Being Forced to Return to On-site work after working remotely etc.

The impact on the companies in the light of these resignations, the labour market has incentivised companies to offer etter benefits and higher salaries.Economists predict that the race to attract top talent will continue with larger companies ho can offer better salaries winning out.

There are a number of ways that companies can retain top talent. The first and foremost is to provide opportunities for ateral job moves. In the MIT Sloan study, it was found that people experience burnout due to a lack of new challenges and he opportunities to try something new. When employees are offered with new jobs at their companies, they are almost 12% ess likely to resign for their jobs

It is also found that companies that have a healthierorganisational work culture are less likely to lose employees.Creating a better workplace includes hosting more cooperate social events, providing employees with benefits like happy hours and organising more tours to outside the office. This has the dual benefit of creating fun experiences and strengthening connections between team members.

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Water Poverty in Agricultural Sector: Role of Conjunctive Irrigation in West Bengal

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Access to an adequate amount of clean water is essential for maintaining good health and also that access to water is essential for food production. People can be water poor in terms of lack of accessing an adequate amount of water to meet their basic needs in the absence of sufficient water sources in the local ecosystem. Present paper is an attempt to analyse the link between poverty and access to irrigation at the farmer level. This paper is also an attempt to understand role of conjunctive irrigation for improved access to irrigation. Primary data at household level has been collected from two districts of the state. Results show that income poverty is directly related to water poverty in terms of its use for irrigation. It also explores the factors influencing access to irrigation water. Use of conjunctive irrigation for better access to irrigation has been discussed at country and state level.

Introduction

Among the various determining factors of incidence and magnitude of poverty, natural resource endowments, access to health care and education services causes spatial variations in the incidence and magnitude of poverty (Erenstein et al, 2009). More importantly, water as a natural resource, plays an important role in terms of influencing the well-being and human wellbeing exists in a continuum of poverty[1] (Hussain and Giordano, 2004; MEA, 2005). Water impacts livelihoods of people in the form of water consuming agriculture and industrial activities, usage and sanitation and ecosystem services. Access to an adequate amount of clean water is essential for maintaining good health and also for food production as the lack of an adequate water supply can hamper both health and output. However, people's low- and varying-income levels might make it difficult for them to access an adequate amount of water (Lawrence et al, 2002).

In this regard it is well known that rivers, as one of the major sources of water can ensure adequate availability of water. To have an adequate amount of water supply as also to avoid water scarcity people tend to tap basin as a source of water. In short, water is not only a key element of human life but also a major factor in explaining poverty. For example, it has been pointed out in the Indian context that irrigation is an important factor associated with rural poverty and that a better irrigation access holds larger implications for poverty reduction and sustenance of food production of the nation (Narayanmurthy, 2001; Bhattarai et al, 2002). As rivers are a major source of water, people tap basins for meeting agricultural, industrial, domestic and various other requirements. It is often assumed that the availability of river water from in a given geographical area can bring in benefits to human life leading to a better state of wellbeing as well as a reduction in poverty (Lawrence et al, 2002; CGIAR, 2006; MEA, 2005).

Research Problem

It is a known fact that there exist regional disparities in India regarding the incidence of poverty in terms of per capita expenditure, state domestic product, and agricultural wages. Besides, disparity exists across as well as within states, especially within urban and rural areas (Deaton and Dreze, 2002). According to the 61st round National Sample Survey Organisation (NSSO) data 2004-2005, rural poverty, in terms of poverty head count ratio and marginal per capita expenditure, is concentrated in some pockets of India (Chaudhuri and Gupta, 2009). However, a closer look into the data on poverty and water availability across river basins in India presents a different picture, altogether. For instance, much of the rural poverty is concentrated in a few states that fall under the Ganges River basin (Sharma et al, 2008) though Ganges River accounts for the highest water potential (in terms of annual average surface water flow, CWC, 2005). It is rather strange to note that although about 40 percent of the Indian population lives in and around Ganges basin, it is home to the largest number of people living in poverty. (Upali et al, 2005). This kind of a paradoxical situation necessitates a more detailed analysis of the data in order to understand the relationship between water accessibility and poverty which in any way does not seem to be a straightforward one. In other words, the mere presence of adequate water at the basin level does not mean less rural poverty. There could be other determining factors as well among which access to water resources is an important one. Against this background, the present study attempts to understand the relationship between water and poverty across river basins besides identifying factors that explain the existing relation between these two in the Indian context.

Research Objective

1) To explore the link between poverty and irrigation.
2) To explore the factors influencing access

to irrigation at farmer level.

3) To understand role of conjunctive irrigation for improved access to irrigation.

Methodology

Keeping in view the existing water related issues in the Ganges basin, the area of study has been selected on the basis of NSSO, 61st Round data on District level poverty head-count ratio (Chaudhuri and Gupta, 2009) for West Bengal state, with a view for understanding the status of water accessibility for irrigation and domestic use at different levels of rural poverty in greater details. West Bengal is one of the states within the Ganges basin with a high incidence of rural poverty and irrigation is based on the use of both ground and surface water as rain water is available for a few months per annum as well as it has already been studied that state small land holding farmers are facing livelihood constraints (Shah et al, 2008). The major problem of water control in West Bengal is to store rainwater and surface water during the deficit months (Rawal, 2001). Major sources of irrigation include ground water followed by canals.

Estimating water poverty in terms of access to water:

Lawrence et al, (2003) provide methods for estimating the degree of access to water in domestic and agricultural sectors. According to their study, access means safe water for drinking and cooking and also water for irrigating crops and non- agricultural uses.

taking the percentage of irrigated land relative to the internal water resource use and then calculating the index.

The extent of access to water for human use is accounted for not only the distance to a safe source but also the time needed for the collection of a household's water requirements and other significant factors. Access means not only simply safe water for drinking and cooking but also water for irrigating crops or for industrial use. The index is explained as; countries with a high proportion of irrigated land relative to low internally available water resources are rated higher than countries with a high proportion of irrigated land relative to high internally available water resources (Lawrence et al, 2002).

The extent of access to water for human use is accounted for not only the distance to a safe source but also the time needed for the collection of a household's water requirements and other significant factors. Access means not only simply safe water for drinking and cooking but also water for irrigating crops or for industrial use. The index is explained as; countries with a high proportion of irrigated land relative to low internally available water resources are rated higher than countries with a high proportion of irrigated land relative to high internally available water resources (Lawrence et al, 2002).

However, how to organize the society and water resources for the wellbeing of the poor for providing a better access to water is complex and still highly challenging (Hamson et al, 2008). The growing competition over water resources warrants a stronger focus on the access to water for the resource poor (Vadiyanathan and Oudshoom, 2004).

We have examined the issues of access to water across different levels of rural poverty using primary data. For this purpose, we collected data from two villages from two districts under the state of West Bengal. This state consists of two parts: Northern part is the Himalayan region comprising Darjeeling, Jalpaiguri, Kochbihar districts with poverty level ranging from 10 to 30 percent in this part. The other one is Gangetic delta consisting of eastern Bhagirathi plain, western Bhagirathi plain, Mayurkhshi plain, Rupnarayan plain, Damodar, Kangshabati, Kanthi and Medinipur plain. Gangetic delta is watered by river Ganges and its tributaries. Rural poverty level varies from 10 percent to more than 55 percent in this part. At the district level the highest level of rural poverty exists in Murshidabad district (55.9 percent) and the lowest rural poverty exists in Nadia District (18.3 percent). Out of the total geographic area 97.58 percent of Nadia and 94.65 percent of Murshidabad are under rural coverage. The above mentioned two districts of eastern Bhagirathi Plain of the Gangetic delta in West Bengal are drained by Jalangi and Bhagirathi Rivers (branch of Ganges River) respectively (Government of India, 2010). Access to water and its relation to the level of rural poverty has been studied for these two districts of West Bengal. Table 2 gives important characteristics of these two districts. In terms of geographical area and population, Murshidabad district is bigger than Nadia. However, the percentage of rural area is almost the same for both the districts. Also, both districts share the same soil type, temperature, and livelihood, while rainfall is more in Murshidabad as compared to Nadia. Also, both the districts have similar land tenure and holding pattern.

Selection of sample households

At first, a household level census was carried out in both the villages for collecting household level information on landholdings. It was found that the number of household in Bahadurpur village stood at 1211 and that of Pirtala village at 445. Among them 249 households in Bahadurpur village were primarily or secondarily engaged in farming whereas it is 180 households were emerged in farming in Pirtala village. We decided to collect primary data from 15 percent of households, i.e., 38 from Bahadurpur and 27 from Pirtala engaged in farming from each village. Probability proportionate sampling procedure was used for the sample selection. Based on the size of own agricultural land holdings, households in each village were divided in to three groups (less than one acre, one to two acres and more than two acres). The procedure adopted for the selection of villages and households are given below in table 2.

Table 1: Five Key Components of WPI

Component	Description
Resources	The physical availability of both surface and ground water, while taking account of the variability and quality of the resources as well the total amount of water.
Access	The extent of access to water for human use, accounting for not only the distance to a safe source , but the time needed for collection of water by a household and other significant factors. Access means not only simply safe water for drinking and cooking but also water for irrigating crops or for industrial uses.
Capability	The effectiveness of people's ability to manage water ; capacity is interpreted in the sense of income allowing the purchase of improved water , and education and health which link with income indicating a certain capacity to lobby for and manage water.
Use	The ways in which water is used for different purposes: domestic , agricultural and industrial .
Environment	An evaluation of environment integrity related to water and ecosystem goods and services from aquatic habitats in the area.

Source: Sullivan & Meigh, (2003)

There are three components in Access Index of WPI:

- Percentage of population with access to safe water.
- Percentage of population with access to sanitation.
- An index which relates to irrigated land as a proportion of arable land to internal water resources. This is calculated by

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A Review on the Changing Dimensions of Digital Forensics in Criminal Investigations
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A REVIEW ON THE ETHICAL AND LEGAL IMPLICATIONS OF THE USE OF DNA DATABASES AND BIG DATA IN CRIMINAL INVESTIGATIONS

Dr. K.V.K. Santhy*[1]
Abhishek Sharma Padmanabhan**

Abstract
The field of forensic genetics has grown in importance as a tool for criminal investigation and evidence-gathering activities in court hearings in jurisdictions all over the world. Criminal DNA databases are being built in several parts of the world to support the activities of the criminal justice system. In recent years, the use of approaches that combine different sources of digital information for preventing and anticipating the danger of crime (in the form of DNA Database using Big Data) has been increasingly popular among law enforcement officials as a viable strategy for crime control. The purpose of this research paper is to present an overview of the development of technical systems geared toward genetic surveillance of incarcerated populations. A full mapping of the main ethical, social, and political concerns associated with the increasing usage of DNA databases on a global basis is also provided.
Keywords: DNA Databanks, Ethics, Genetic Privacy, Crime Control, Big Data

1. Introduction

In legal systems around the world, DNA has become an important resource for criminal investigations and in evidence gathering.[2] In the Criminal Justice system, one of the most visible features of the use of Forensic Genetics is the development and extension of centralised National DNA databases, which contain Genetic profiles that are entered and maintained in accordance with the criteria defined in the legislation of each country's Criminal code.[3] Genetic profiles of suspects, victims, volunteers and other persons of interest may be stored in these databases.

The Genetic profiles in a Database are derived from biological samples taken from a variety of people. Traces recovered at the Crime scene or on the victim's body can be tested for DNA profiles and compared to those in the DNA Database, helping investigators to identify the source of the trace.[4] The creation of Forensic Databases with DNA profiles began in the mid-1990s, where England and Wales established the first Forensic Genetic Database in 1995, followed by the Netherlands (1997), Austria (1997), and Germany (1998).[5] It is estimated that at least 34 countries are beginning the process of constructing their own database, and it is anticipated that 69 countries throughout the world are now using this type of Database. In recent years, the number of such databases has grown significantly in Asia, particularly in China, India and South

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Korea.[6]

It is argued that we are living in a culture of maximum surveillance because of the rise of the so-called "information society" in the mid-1980s, which has prompted the development of Databases to aid in Criminal investigations.[7] Big Data is a phenomenon related with technical advancement and the growing relevance of the digital world. It is a method of aggregating and analysing large amounts of data, putting it into algorithms, numerically categorised, and identifiable by a determined index.[8] This method can be used in Business, Consumption, Health, Social Security, Marketing, and Immigration. In the present work, the authors shall emphasize on the possibility of employing Big Data in the sectors of Criminal Investigation and Security by analysing the intricacies and challenges of using DNA Databases and Big Data in Criminal Investigations.

2. Evolution of DNA Databases as a tool for Criminal Investigation

DNA databases as used in Criminal Investigations are vastly different in terms of size, structure, and governance and may be used for criminal identification, civil identification, and scientific research objectives, according to Legislation.[9] It is possible to determine who has access to the information in the Database and how broad that access is. Furthermore it is possible to analyse, if only information concerning matches between genetic profiles is permitted to be disclosed, or whether additional information is permitted to be communicated (e.g., personal data relating to the person identified by means of the genetic profile).[10] The rules for insertion and removal of Genetic profiles and Biological samples are also frequently set by Legislation of the concerned Nation.

The type of Crime committed, the degree of Punishment, the individual's traits, and the possibility of recurrence are all factors that influence the scope and degree of access to the DNA database in different jurisdictions.[11] Individuals and conditions under which DNA profiles may be entered into the database are expected to be addressed by Laws. Further the question as to what happens to suspects' or prisoners' biological samples and are there any restrictions on retention of DNA profiles after they are generated, will have to also be regulated by a Law. [12] The criteria for adding and removing profiles and samples will have the greatest impact on the growth of such Databases. It is possible that a country will be labelled as having an Expansionist tendency in relation to the creation of DNA databases if a specific law (for example, the inclusion of the DNA profile of any

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individual suspected of any penal offence) places few restrictions on the insertion of profiles into DNA Databases for forensic purposes, whether a suspect or a convicted person.[13] Countries with a restrictive inclination, on the other hand, are those whose Legislations now have a variety of restrictions and limitations on the use of DNA Databases, such as the imposition of limits on the sorts of punishments or crimes that are suitable for the insertion of profiles.[14] It should be highlighted that the apparent split between Expansionist and Restricting inclinations refers to the potential specific implications of Legislative provisions. Among other things, these effects can be seen in the percentage of the National population in each country's Database.[15]

3. The Constitutionality of DNA Databases – Privacy and Ethical Implications

DNA Databases are now widely recognised as being useful for Criminal investigations and Evidence collection in Legal proceedings, and they may potentially aid in Crime prevention and deterrent in the future. The use of such Databases raises a wide range of complicated and multifaceted Ethical, Societal, and Political issues that must be addressed by a wide range of social actors, including Lawmakers, Judges and Forensic professionals.[16] DNA Databases have been criticised by experts from a variety of fields and scientific disciplines for not taking into account Ethical considerations and the need to Human Rights including, Autonomy, Privacy, and the Presumption of Innocence and Equality when being used.[17]

It's the criteria used to choose which DNA profiles to include in a Database for Criminal investigation that are at the heart of the most heated Ethical debates about DNA Databases.[18] The idea of DNA profiling's infallibility may cause Courts to ignore possible Laboratory errors and other flaws, marginalising or even eliminating alternative sorts of Evidence. Quality assurance in all Technical Procedures is also an Ethical problem because identification errors have grave and irreversible consequences.[19] The use of Familial search may reveal Kinship links which result in violation of Privacy. These databases increase socioeconomic inequities as they are more likely to include members of certain minority groups, leading to racial surveillance.[20] It also leads to "reconstructive surveillance", in which persons and their behaviours are not observed but are inferentially reconstructed using expert methods, producing a "circuit surveillance system".[21] They are also used to keep individuals already labelled Criminals isolated from the rest of society

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[21] Dick Leary & Ken Pease, *DNA and the active criminal population*, 5 CRIME PREVENTION AND COMMUNITY SAFETY 7–12 (2003)

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and to ensure their detection in the event of a new crime.[22] There are significant costs connected with building and maintaining a DNA database, and there are no studies that consistently demonstrate its efficacy, value, or deterrence effect. It is argued that resources could be better used in Crime prevention policies, Social reintegration programmes for offenders, and ways to protect the most vulnerable people in Society.

The kind of Criminal Justice system that seems to be passionate about using DNA Databases appears to be one focused on identifying and punishing Criminals and preventing crime. Every person has the potential to be guilty, and the goal of Judicial system is to find out who committed the Crime and punish the perpetrators.[23] In terms of the relationship between the Rights' of Community and the Individual rights, it is believed that the community's interests are more important than the individual's, and that keeping people safe and fighting Crime are common grounds that justify restricting rights of individual. A society with more effective procedures for policing its citizens and guaranteeing their safety is valued more highly when seen from this perspective since it is more effective at finding those responsible for Crimes.[24]

The section of society opposing the DNA Databases stresses the possible risks and costs of using such Databases in the Criminal Investigations, while also acknowledging that the primary objective of the Justice system is to unearth the truth and safeguard the Rights of innocent people.[25] It is widely understood that Defendants are believed innocent until and until they are proven guilty in Court and the procedures that safeguard Defendants from mistakes and enable equitable access to evidence for both sides should be given special consideration. It is to be noted that this approach broadens consideration of the potentially adverse effects for Democracy that can result from a Society that prioritises on public safety as an ultimate good; however it may be disproportionate to the potential benefits of expanding the criterion for inclusion of information in DNA Databases.[26]

It is possible that the use of DNA Databases by Law Enforcement organisations may lead to significant changes in the way Justice is administered around the world and the value of such Databases may increase in the future as DNA technology continues to progress.[27] There must be sufficient safeguards in place to prevent the misuse of DNA samples that might produce a 'rich information about an individual', hence in order to preserve Personal Privacy, DNA databases containing genetic profiles should be treated with the utmost care and prudence.[28]

It is to be noted that providing Justice in most circumstances "requires a sophisticated balancing of numerous considerations", and this delicate balancing act may be required, if the right use of

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[22] Michael Briody, *The Effects of DNA Evidence on Sexual Offence Cases in Court*, 14 CURRENT ISSUES IN CRIMINAL JUSTICE 159–181 (2002)

[23] Claude Roux et al., *Dna profiling and criminal justice: A contribution to a changing debate*, 36 AUSTRALIAN JOURNAL OF FORENSIC SCIENCES 34–43 (2004)

[24] Bobby Naude, *The retention of DNA data and the private-life interests of suspects*, 43 THE COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA 213–238 (2010)

[25] Kate Cashman & Terese Henning, *Lawyers and DNA: Issues in Understanding and Challenging the Evidence*, 24 CURRENT ISSUES IN CRIMINAL JUSTICE 69–83 (2012)

[26] Mark Findlay & Julia Grix, *Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials*, 14 CURRENT ISSUES IN CRIMINAL JUSTICE 269–282 (2003)

[27] Hugh III Miller, *DNA Blueprints, Personhood, and Genetic Privacy*, 8 HEALTH MATRIX: JOURNAL OF LAW-MEDICINE (1998)

[28] Eric Colvin, *Fairness and Equality in The Criminal Process*, 6 OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 1–25 (2006)

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DNA Evidence has to be ensured without infringing the Privacy of any individuals. It is critical to limit or reduce the disparity between Industrialised and developing countries in the usage of DNA technology in their legal systems.[29] It is argued that in order to ensure that advances in technology benefit the greatest number of people, it is imperative that they be guided and controlled. There could be a lot of long-term controversy and unproductive Inter-Jurisdictional conflict if research on DNA Technology and the use of Databases in the Criminal Justice system is not controlled[30] and it is believed that the National or International Policies/ Regulations/ Law alone can help in preventing the misuse.

4. The Application of Big Data in Criminal Investigation

There has been an increase of Public and Academic interest on the topic of Big Data during the past few years. Big Data as a method refers to gathering data from multiple sources and analysing it using digital technologies and its core can be characterised by three "V"s: volume, velocity, and variety.[31] It assures a high level of completeness, encompassing entire populations in data sets that contain contextual information that can be used to identify particular and specific situations, wherein instead of identifying groups or types of people, it makes it possible to identify specific persons.[32] These data sets are also relational allowing for cross-referencing data from many sources and flexible where they can incorporate new data at any moment. Big Data's "mythological" element is akin to the social imaginaries linked with Forensic genetics, and it is equally susceptible to engender expectations of generating unquestionable truths in the identification of offenders.[33] It is possible to expand and strengthen surveillance activities by creating new contours while reproducing "old" behaviours based on social expectations regarding Big Data. The predictive and anticipatory nature of risk is essential to Big Data's implications for Criminal Investigation.[34] The expansion of automatic alert systems, which monitor people who have never had any encounter with the criminal justice system on an unprecedented scale, enables Big Data to reinforce the trend towards anticipating and predicting risk through vast quantification and new opportunities for rapid cross-checking of data from previously dispersed sources.[35] It can consequently be used to provide information for Criminal investigations, allowing quantification of risk and classification of individuals based on risk. It is possible to predict the likelihood that a particular person would commit a crime or terrorist act using Big Data approaches, as it has the ability to quantify the level of risk posed by particular person. However this also can be promote the surveillance of social groups and individuals who are more

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[29] Aaron Opoku Amankwaa, *Trends in forensic DNA database: transnational exchange of DNA data.*, 5 FORENSIC SCIENCES RESEARCH 8–14 (2020), http://www.ncbi.nlm.nih.gov/pubmed/32490305 (last visited Oct 20, 2022)

[30] Anika Ludwig & Jim Fraser, *Effective use of forensic science in volume crime investigations: identifying recurring themes in the literature*, 54 SCIENCE & JUSTICE : JOURNAL OF THE FORENSIC SCIENCE SOCIETY 81–88 (2014), https://pubmed.ncbi.nlm.nih.gov/24438782/ (last visited Oct 24, 2022)

[31] Rob Kitchin, *Big Data, new epistemologies and paradigm shifts*, 1 BIG DATA AND SOCIETY (2014)

[32] *DNA Databases and Big Data*, *in* FORENSIC GENETICS IN THE GOVERNANCE OF CRIME 57–70, https://link.springer.com/chapter/10.1007/978-981-15-2429-5_5 (last visited Nov 02, 2022)

[33] Janet Chan & Lyria Bennett Moses, *Making sense of big data for security*, 57 BRITISH JOURNAL OF CRIMINOLOGY 299–319 (2017)

[34] Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AMERICAN SOCIOLOGICAL REVIEW 977–1008 (2017)

[35] Tobias Matzner, *Beyond data as representation: The performativity of big data in surveillance*, 14 SURVEILLANCE AND SOCIETY 197–210 (2016)

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prone to police suspicion is reinforced, thereby strengthening societal mechanisms of stigmatisation and perpetuating social inequities.[36]

5. Conclusion

The use of DNA Evidence for the enforcement of Justice and the protection of a person's Right to Privacy are two important goals of society that go hand in hand.[37] There are always Ethical and Legal considerations in Forensics with the gathering, storage, and use of sensitive personal data. It is not essential to use a database to search for DNA profile matches among known suspects or to delete samples or profiles once the case has been solved,[38] rather the present problem is assessing whether it is necessary to preserve a DNA profile or sample and to assure its confidentiality and privacy in its usage.

DNA databases and Big Data technology are both viewed in this research article as processes that have resulted in the configuration of new and effective social control modalities as a part of the Political and government strategies for prevention and control of Crimes. In societies that are becoming less tolerant of "suspicious" citizens and more willing to adopt more intensive regimes of social control, regulation, and inspection, these processes are common.[39]

It is believed that following a detention, the Police should be able to get DNA samples, which can be used to identify suspects, when looking for someone with specific/ distinguishable features. In this regard, even Medical records contain such personal genetic information, but the usage of such information is regulated and is used to prevent, detect, and punish severe offences. [40] The ability of the police to enforce such norms is also questioned in relation to use DNA Evidence from Databases, due to lack of Regulatory frameworks and effective third-party monitoring. Furthermore it also important to make "cost-benefit analysis" for maintenance and management of DNA Databases, as it demands sophisticated infrastructure which demands high investment. The objective of this article is not to propose a novel philosophy for addressing the obstacles associated with human genetic material and information; rather, it discusses a few issues, methods, and solutions that could aid in the proper management of human genetic information and also in the responsible use of DNA technology.

It's imperative to take extra precautions when dealing with sensitive material like DNA. Individual privacy has always been a significant Human Rights' concern, and recent developments in DNA Technology have created a number of new concerns.[41] In order to address such new issues, a comprehensive legislative framework would be necessary for regulating the management of DNA Databases.

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[36] Filipe Santos & Helena Machado, *Patterns of exchange of forensic DNA data in the European Union through the Prüm system*, 57 SCIENCE AND JUSTICE 307–313 (2017)

[37] Martin Neil et al., *DNA Profiling Technologies in Forensic Analysis*, 15 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 257–284 (2000)

[38] Balding D. J. & Steele C. D., *Weight-of-evidence for Forensic DNA Profiles*, 6 FORDHAM LAW REVIEW 12 (2012)

[39] Paul E. Tracy & Vincent Morgan, *Big brotherand his science kit: DNA databases for 21st century crime control?*, 90 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 635 (2000)

[40] Roberta Julian & Sally Kelty, *Forensic Science and Justice: From Crime Scene to Court and Beyond*, 24 CURRENT ISSUES IN CRIMINAL JUSTICE 1–6 (2012)

[41] Christopher McCrudden, *Human dignity and judicial interpretation of human rights*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 655–724 (2008)

THE CURIOUS CASE OF DOUBLE FRAUD ON CONTRACT LABOUR IN INDIA - AN ANALYSIS OF CONTRACT LABOUR UNDER THE LABOUR CODES.[1]

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Abstract

The scheme of labour can be theorised as smaller circles within a large circle with minor and major overlaps. While the law recognises what is morally acceptable and within its limits by declaring rights against forced labour or child labour to be fundamental, in reality, labor is regulated through an agreement, however shoddy it might be. Thus, the external circle encompasses all forms of labour regulated by any agreement between parties. Within this, there are smaller circles with overlapping predicates - contract labour, inter-state migrant labour, bonded labour, free labour, child labour, care labour etc. This overlap is the fundamental commonality and yet the reason for the distinct variation. Albeit, precisely owing to this, the law regulating labour is diversely distinct, securing distinctly diverse needs. The codification initiated by the 2nd National Commission on Labour (2002) intended to accord standardisation and uniformity to this distinct diversity of labour legislations. Specific importance has been accorded to the 'problem' of contract labour in the commission reports and a 'double fraud' has been identified which plague the contract labour system in India. Whether the new codes are able to disable this fraud is the question to be answered. This paper does just this by comparing the erstwhile position of contract labour with their position under the new codes vis-a-vis judicial decisions.

Keywords- Contract Labour, 2nd National National Commission on Labour, Automatic Absorption, Abolition and Regulation, Labour Codes.

1. Introduction:

The widespread usage of contract labour in India has been attributed to the rigidities of labour laws and, specifically, Chapter VB of the Industrial

[1] The author is indebted to Ms. Kanu Garg, 5th year NALSAR student, for her invaluable assistance to the project.

Disputes Act 1947.[2] It has been claimed that rigidities in labour laws are the reason for hindrances in foreign investment and competitiveness.[3] While this may be partly correct an unhindered capitalist society, on the other hand, concludes at (race to) the bottom. Labour laws represent the balance between these two extreme schools of thought. The curious history of law's interaction with labour has been dialectically diverse.[4] From outlawing all collective activities to recognising craft councils and eventually to regulating the work process itself,[5] this interaction has meandered to limits beyond human comprehension wherein some have equated the history of mankind through the history of the division of labour itself.[6] Debatable as that may be, labour in some form has been existent since antiquity and contract labour, as has been characterised by the law, has existed since before the country's independence. The scheme of contract labour (herein onwards 'CL') can be theorised as a smaller concentric circle within the large circle of labour regulated via agreements. Of course, the inner circles have minor or major areas of overlap for e.g. there is serious overlap between inter-state migrant labour, CL and bonded labour - X's father had taken a loan from the local *jamadar*. The loan persisted post X's father's demise and the jamadar now *owes* labour from X. In order to do so, X is sent from West Bengal to Orissa to work in a construction site. While the law recognises what is morally acceptable and within its limits by declaring rights against forced labour to be fundamental,[7] in reality; X's father's agreement, however shoddy it might be, was within the moral limits of the market being regulated by an agreement. This idea emanates from the market's normative belief in efficiency - the possibility of allocating resources in a manner that makes X better off without making Y worse off. Albeit an impossibility, an unjust mercantile exchange can be defended if any changes to it make the beneficiaries of the system worse off.[8] Thus, the largest external circle encompasses all forms of labour regulated by any kind of agreement between parties. There are multiple

[2] Radhicka Kapoor and P. P. Krishnapriya, *'Explaining the contractualisation of India's workforce'* Indian Council for Research on International Economic Relations Working Paper 369, (2019).
[3] Ministry of Labour – Government of India, *Report of the Second National Commission on Labour*, 329, (2002) (*hereinafter* NCL 2002).
[4] Andrew Hodge, *The Curious History of Trade Union Law* 4 Denning L. J. 92 (1989).
[5] *Id.*
[6] See *generally* Karl Marx and Friedrich Engels, Karl Marx and Frederick Engels Selected Works., Vol. 1, Progress Publishers (1969).
[7] The Constitution of India 1950, Refer to Art 23.
[8] Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets*, 19 Oxford University Press (2010).



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Editor's Note

It gives me immense joy to present Volume I of the NLUA Journal of Intellectual Property Rights, 2022. The Journal is a Peer Reviewed Bi-Annual Online Journal. In recent times, the discussions around the law of intellectual property rights have taken great momentum. It is a known fact that the development of humankind depends on new creations and inventions. These creations and inventions require a lot of effort, time, energy etc. To recognise and encourage such further developments, it is important to give these creators, rights in the form of IPR to exploit their creations. Also, IPR has become an important component of national economic policies. The governments are under pressure to design an IP system that best serves the interest of the country. Thus, it is important to understand the implications of different IP policies. Keeping these in mind, the journal aims to serve the purpose of promoting research in legal, economic, socio-legal, technological and entrepreneurial aspects of new and emerging areas of IPR. The contributions for this issue have been made by leading academicians, lawyers, researchers and students. This issue covers articles on AI in IP; the Conflict of Copyrights in Sound Recordings; Cryptocurrency, IPR and Competition Law; Economic Analysis of IPR Markets; Protection of Trade Dress; Managing IP in Utilising Robotic Process Automation in Healthcare during Covid-19; GI and Impact on Agriculture; Copyright and Competition Laws and Traditional Knowledge in North East India. I am thankful to Prof. (Dr.). V.K. Ahuja, Hon'ble Vice-Chancellor of NLUJA, Assam for entrusting me the responsibility of editing the first volume of the Journal and I am extremely thankful to the Editorial Members of this issue, Ms. Sharmistha Baruah and Ms. Dolly Kumar for their dedicated and sincere work. I also thank Dr. Kankana Baishya for her support in bringing out this issue.

Dr. Jupi Gogoi
Editor

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AI TRENDS IN IP: ARE MACHINES THE NEW AUTHORS?

*Ambika Aggarwal**

*Anindya Sircar***

Abstract

GAN and related ML systems have branched out from brute force computation to cultural productions like the Next Rembrandt. Scepticism is rife about possible consequences of AI transforming into an automated artisan. This apprehension ignites cross-sectoral debates on the emergence of 'machine autonomy'. Until AI's status as conscientious participant in human society remains muddled, AI-generated works may not clearly fall into a protectable copyright niche. This paper provides a harmonised view amongst a scholarship polarised between choosing 'humans or machines'. We argue that the correct perspective is 'humans behind the machines'. Human contribution, as much as is required by copyright law, is not difficult to identify in complex generative works. The upstream and downstream uses are not infringements ipso facto. Concerns for rights violation in data use and allocation of ownership can be resolved by adopting more legislative clarity. The benefits of permitting and protecting emergent works outweigh the mistrust and assumptions, that borne from the AI Knowledge Gap, caution against facilitation of AI-assisted creativity. AI is helping professionals amplify their creative expression and is steadily becoming more accessible for common use. A pragmatic, technologically-agnostic interdisciplinary approach can pave the way for pluralistic dimensions of authorship, originality and ownership in place of existing procrustean standards.

Keywords: Artificial Intelligence, Automation, Ownership, Balance of Rights, AI-assisted Works.

1. Introduction

In ancient times, Aristotle envisaged new instruments of production that would, of their own accord, compose and perform music and weave new textiles.[1] Roald Dahl created a similar idea with his elaborate typewriters in "The Great Automatic

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1 C. Craig and I. Kerr, "The Death of the AI Author", Osgoode Legal Studies Research Paper (March 25, 2019), *available at*: https://ssrn.com/abstract=3374951 (last visited on March 30, 2022).

Grammatizator".[2] Fictional laws governing artificial intelligence premise the works of Isaac Asimov.[3] While the storied ambit of science fiction continues to evolve, scientists working on artificial intelligence (AI) are transmuting theoretical concepts into practical applications.

One might expect that visual arts would be the last thing computers could be good at, as they are abstract, expressive of one's personality, and tied to an individual culture and psychology.[4] However, a collaborative project between ING, TU Delft, Mauritshuis Museum & Microsoft has produced 'The Next Rembrandt'[5]. We look at the story behind the painting that has won over 60 advertising awards.[6]

The team designed deep learning algorithms to upscale 346 high-resolution scans of Rembrandt paintings. This followed a tedious demographic and anatomical study to arrange final selections as "a portrait of a Caucasian male with facial hair, between the ages of thirty and forty, wearing black clothes with a white collar and a hat, facing to the right."[7] "An algorithm measured the distances between the facial features in Rembrandt's paintings and calculated them based on percentages. Next, the features were transformed, rotated, and scaled, then accurately placed within the frame of the face. Finally, we rendered the light based on gathered data in order to cast authentic shadows on each feature."[8] Same procedure was followed to calculate and create height maps from UV-based paint that gave the painting a 3-D effect. Over 500 hours of processing rendered 150 gigabytes of data that resulted in a new painting bearing resemblance to the works of the old master.

This was unique for not only the output that was generated but also because of how clearly it highlighted the human-machine link. The non-human creator is created by human creators, but the work created by the non-human agent is not directly created by

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2 R. Dahl, *The Great Automatic Grammatizator and Other Stories* (Viking, London, 1996).

3 I. Asimov, *I. Robot* (Fawcett Publications, Greenwich,1950).

4 K. Hristov, "Artificial Intelligence and the Copyright Dilemma", 57 (3) *IDEA The Journal of the Franklin Pierce Center for Intellectual Property* 431 (2017).

5 Superhero Cheesecake, "The Next Rembrandt", *available at*: https://www.nextrembrandt.com/ (last visited on February 22, 2022).

6 Dutch Digital Design, "The Next Rembrandt: Bringing the Old Master Back to Life", *Medium*, Jan. 24, 2018 *available at*: https://medium.com/@DutchDigital/the-next-rembrandt-bringing-the-old-master-back-to-life-35dfb1653597 (last visited on February 22, 2022).

7 *Supra* note 5.

8 *Ibid.*

the humans.[9] Albeit, the AI software (even though a self-learning algorithm) would not have produced an output without constant human inputs.

One scathing criticism of the Next Rembrandt project calls it "a horrible, tasteless, insensitive and soulless travesty of all that is creative in human nature", lacking "the emotional heft of a human original."[10] Perhaps we digress, but, Rembrandt may himself have appreciated "the mingled passion and haplessness of the ginned-up painting"[11]; given his own application of instruments like camera obscuras – nascent technologies at the time.[12]

Nevertheless, such critique opens us to pertinent questions in copyright's sphere. Is mapping data points from a large pool of public domain works a sufficiently creative endeavour? Can *substance* produced using AI technologies which can only mimic existing authorial *styles* be considered original? Are AI practitioners legally protected under fair use/fair dealing provisions to use other authors' works as training data corpus? Most pertinently, with the human link with work's creation now disturbed, who is the true author?

We map the effect of 'AI Knowledge Gap' on recent copyright scholarship and argue that legal perceptions are prematurely giving in to the provoked intrigue of pop-culture and publicised conceptions of the potential of Generative AI. To this effect, Part II contains a detailed exposition of AI and ML as relevant to copyright law. Part III delineates prevailing contradictions on machine authorship and offers a new theoretical basis grounded in post-structuralism. Part IV deals with issues of originality, creativity, copying and alleged market disruptions purported to be caused by AI-based works. Part V identifies probable owners to affix legal liability. Part VI is the conclusion. This study is restricted to current and expected state-of-the-art of AI; bearing in mind the incremental, not exponential, progress predicted by AI practitioners. The terms 'AI-based' and 'emergent works' are used interchangeably.

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[9] M. Coeckelbergh, "Can Machines Create Art?", 30 *Philosophy & Technology* 285 (2016).

[10] J. Jones, "The digital Rembrandt: a new way to mock art, made by fools", *The Guardian,* Apr. 6, 2016, *available at*: https://www.theguardian.com/artanddesign/jonathanjonesblog/2016/apr/06/digital-rembrandt-mock-art-fools (last visited on March 23, 2022)

[11] P. Schjeldahl, "A Few Words about the Faux Rembrandt", *The New Yorker,* Apr. 8, 2016, *available at*: https://www.newyorker.com/culture/culture-desk/a-few-words-about-the-faux-rembrandt (last visited on March 23, 2022)

[12] F. O'Neill and S. P. Corner, "Rembrandt's self-portraits", 18 *Journal of Optics* 6 (2016).

2. A Brief History of Automation

The co-inventor of telegraph, Charles Wheatstone, prompted Lady Ada King, Countess of Lovelace[13] and daughter of British poet Lord Byron to translate Luigi Menabrea's prior research on Babbage's Engines. In this anonymously published translation,[14] she added 7 new appendices proposing that beyond mathematical calculations, "the engine might compose elaborate and scientific pieces of music of any degree of complexity or extent".[15] This ingenuity made her the first computer programmer. Lovelace also possessed a keen forethought on public perception of machine automation:[16]

> It is desirable to guard against the possibility of exaggerated ideas that might arise as to the powers of the Analytical Engine... The Analytical Engine has no pretensions whatever to originate anything. It can do whatever we know how to order it to perform.

Nearly a century later, Alan Turing in his exceptionally celebrated paper[17], disagreed with "Lady Lovelace's Objection". He initiated the thought-process that would evolve into key concepts of AI; beginning with the most pertinent of questions, "Can machines think?" Turing's "thinking machine" does not possess any biological intelligence capabilities. We can map its *appearance* of intelligence through the 'Imitation Game', also known as the 'Turing Test'. If the interrogator who receives typewritten responses for same questions asked to a human and a machine cannot tell them apart for a majority of time, then the machine can be said to think like a human. Several watered-down versions of the test accommodate randomly surveyed public

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[13] Computer History Museum, "A Brief History: Age of Machinery" in C. D. Green and C. Babbage, "The Analytical Engine, and the Possibility of a 19th Century Cognitive Science", in C.D. Green, M. Shore, *et.al.*, (Eds.) *The Transformation of Psychology: Influences of 19th-Century Philosophy, Technology, and Natural Science* (American Psychological Association, Washington, 2001), *available at*: https://www.computerhistory.org/babbage/history/ (last visited on Feb. 6, 2022).

[14] L.F. Menabrea, "Article XXIX: Sketch of the Analytical Engine Invented by Charles Babbage Esquire", 3 *Scientific Memoirs* (1843), *available at*: https://repository.ou.edu/uuid/6235e086-c11a-56f6-b50d-1b1f5aaa3f5e#page/4/mode/2up (last visited on March 16, 2022).

[15] *Ibid.*

[16] *Ibid.* (emphasis in original).

[17] A. M. Turing, "Computing Machinery and Intelligence", 49 *Mind* 433, 460 (1950).

opinion in place of the interrogator.[18] The general consensus is that the Turing Test still remains an elusive standard for AI experts to achieve.[19]

2.1. The Dartmouth Conference

At around the same time as Turing, certain scientists were contemplating a different but related question - can machines be creative? In the summer of 1956, the term "Artificial Intelligence" was officially framed at the 'Dartmouth Summer Research Project on Artificial Intelligence' (Dartmouth Conference). The proverbial 'father of AI', John McCarthy, described it as, "The science and engineering of making intelligent machines."[20] This Conference adopted the central aim, "...to proceed on the basis of the conjecture that every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it."[21]

This formally established AI as an interdisciplinary research area, attracting attention from avenues of psychology, art, computer science and neuroscience. Attention was called to increase computational power, develop natural language processing (NLP) and neural nets, cause computers to practice self-improvement, abstraction, randomness and creativity.

2.2. Neural Networks

Newell, Shaw and Simon;[22] also participants at Dartmouth and later recipients of the Turing Award in 1975 for their contributions to "artificial intelligence and the psychology of human cognition", expounded on new frontiers of neuropsychological 'emergent behaviour'. 'Emergence' is the "behaviour of an adaptive system which is a result of interaction of all its parts but cannot be displayed by any of the parts individually".

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[18] S. Cascone, "AI-Generated Art Now Looks More Convincingly Human Than Work at Art Basel, Study Says", *Artnet,* July 11, 2017, *available at*: https://news.artnet.com/art-world/rutgers-artificial-intelligence-art-1019066 (last visited on Feb. 4, 2022).

[19] "The Loebner Prize", *available at*: https://www.ocf.berkeley.edu/~arihuang/academic/research/loebner.html. (The Loebner Prize was designed to be granted to the first bot that broke the Test. It has since reduced its standards of entry and been analogised to a competition for "newspaper horoscopes and roadside psychics.")

[20] J. McCarthy, "What is Artificial Intelligence?" *Stanford Law,* Nov. 12, 2007, *available at*: http://www-formal. stanford.edu/jmc/whatisai/ (last visited on Feb. 6, 2022).

[21] J. McCarthy, M. Minsky, *et.al.*, "A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence", 27 *AI Magazine* 12–14 (1955).

[22] A. Newell and H. A. Simon, "Computer Science as Emperical Inquiry: Symbols & Research", in M. Boden, *The Philosophy of Artificial Intelligence* (Oxford Press, New York, 1990).

The general notion of emergence is meant to conjoin these twin characteristics of dependence and autonomy.[23] For AI this "describes programs that produce outputs their programmers and users could not predict."[24] This focus on emergent behaviour and reducing areas of human intelligence to formal logic systems led directly to most of AI research for the next fifteen to twenty years.[25]

In the late-90s, following an AI-winter, computer science was prompted by the push of 'knowledge economy'. The next development of AI was influenced by advancements in neurobiology, notably theories of "connectionism"[26] from D.O. Hebb's "Hebbian theory"[27] which proved a directly proportional relation between increase in cognitive powers and number of synchronized neurons. Also influential was J.S. Bruner's work on "cognitivism"[28] that elaborated on adaptive neural models of learning and behavior. Frank Rosenblatt then constructed the first functioning single-layer neural network, "Perceptron"[29] that could classify basic inputs into two categories.

2.3. Machine Learning

Present-day AI research aims to construct "artificial neurons" designed after and to be as competent as their biological counterparts. This is most evident in AI sub-sets of machine learning (ML) and deep learning. ML was popularized in 1959 by Arthur Lee Samuel's brainchild, the 'Samuel Checkers-playing Program', world's first self-learning algorithm. He envisioned a field of study where, "Programming computers to learn from experience should eventually eliminate the need for much of this detailed programming effort."[30]

ML is conducted through multi-layered algorithms that comprise 'Artificial Neural Networks (ANNs)'. These networks are programmed to perform specific

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[23] "Emergent Properties", Stanford Encyclopedia of Philosophy (Aug. 10, 2020), *available at*: https://plato.stanford.edu/entries/properties-emergent/ (last visited on March 16, 2022).

[24] B. Boyden, "Emergent Works", 39 *The Columbia Journal of Law and the Arts* 377 (2016).

[25] "Killer Robots: AI & Ethics", *available at*: https://www.cs.swarthmore.edu/~eroberts/cs91/projects/ethics-of-ai/sec1_2.html (last visited on March 5, 2022).

[26] *Ibid.*

[27] D. Hebb, *The Organization of Behavior: A Neuropsychological Theory* (Wiley, New York, 1949).

[28] M. Boden, *Mind as a Machine: History of Cognitive Science* (Clarendon Press, Sussex, 2006).

[29] M. Leftkowitz, "Professor's perceptron paved the way for AI – 60 years too soon", *Cornell Chronicle* (Sept. 25, 2019), *available at*: https://news.cornell.edu/stories/2019/09/professors-perceptron-paved-way-ai-60-years-too-soon (last visited on Feb. 26, 2022).

[30] A.L. Samuel, "Some studies in machine learning using the game of checkers", 3(3) *IBM Journal of Research and Development*, 210-229 (1959).

functions on a corpus of input data to generate a desired output. Feedback mechanisms enable better predictions with increased use. Once these learning algorithms are fine-tuned for accuracy, they are powerful tools in computer science and artificial intelligence, allowing us to classify and cluster data at a high velocity.[31]

The initially successful models of AI to parameterize human cognitive methodology were knowledge-based systems (KBS) and expert systems. The two components i.e. a knowledge base which is a collection of facts and an inference engine which deduces information through if-then rules, are employed for high-scale problem solving. While expert systems, which are a subset within the broader genus of KBS rely on fetching pre-stored human expertise; KBS have become adept at harnessing Big Data and statistical pattern-finding in raw data.

Tom Mitchell's formula remains instructive to this day, "A computer program is said to learn from experience E with respect to some class of tasks T and performance measure P, if its performance at tasks in T, as measured by P, improves with experience E."[32] This learning occurs via three modes. 'Supervised learning' entails training ML algorithms to recognise patterns among pre-identified/labelled raw data. 'Unsupervised learning' or 'self-learning' occurs when raw data can be categorized without human intervention. 'Reinforcement learning' is initiated through feedback loops that ensure repetition of the learning processes until the required output is transmitted.

2.4. AI Applications

KBS systems have found a vast market in diagnostics, data interpretations, modelling painting methodologies, debugging and repairing computer systems. AI application has become imperative to development of self-driving cars, litigation prediction and legal search, predicting protein folding structures and generating graphics softwares. ML algorithms may also be trained specifically to generate cultural productions and participate in multi-player games. It is this interface that has motivated the conception of creative intelligence as an automated property of advanced algorithms.

When IBM's AI Watson defeated long-time 'Jeopardy!' champion Ken Jennings, many heralded it as AI's entry into advanced NLP. AlphaGo Zero defeated Lee

[31] IBM, Neural Networks, *available at*: https://www.ibm.com/cloud/learn/neural-networks (last visited on Feb. 17, 2022).

[32] T. M. Mitchell, *Machine learning* 870-877 (Burr Ridge, McGraw Hill, 1997).

Sedol, 18-time world champion by four rounds to one.[33] It was as Turing had predicted, "By observing the results of its own behaviour it can modify its own programmes so as to achieve some purpose more effectively."[34]

Motivated by Rosalind Pickard's work on Affective Computing,[35] more scientists are training AI to produce works that require emotional intelligence like poetry,[36] metaphors[37] and jokes.[38] Major attention is now on Open AI's new GPT-3,[39] an unsupervised GAN network which once stated among its hoard of outputs, "This is because I will be programmed by humans to pursue misguided human goals."

3. Mystic Authors and Mere Machines

Generative Adversarial Networks (GAN), developed by Ian Goodfellow *et.al.*,[40] is "a new framework for estimating generative models via an adversarial process, in which we simultaneously train two models: a generative model G that captures the data distribution, and a discriminative model D that estimates the probability that a sample came from the training data rather than G. The training procedure for G is to maximize the probability of D making a mistake." Once D stops making mistakes, it can combine data corpus to make new works.

Auction house Christie's sold GAN-artwork titled 'Portrait of Edmond Belamy' for $432,500.[41] AIVA is an AI music composer assistant trained on works of baroque masters and aids in creating emotional soundtracks.[42] In an unofficial Eurovision spin-off, the AI Song Contest, participants from across EU compete with AI-authored songs.[43]

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33 "AlphaGo", *available at*: https://deepmind.com/research/case-studies/alphago-the-story-so-far#alphago_zero (last visited on March 26, 2022).

34 *Supra* note 17.

35 R. Pickard, *Affective Computing* (MIT, MIT Press, 2000).

36 A. I. Miller, *The Artist in The Machine: The World of AI Powered Creativity* (the MIT Press, London, 2019).

37 *Ibid.*

38 "The Joking Computer", *available at*: http://joking.abdn.ac.uk/home.shtml (last visited on March 6, 2022).

39 "GPT-3 Powers the Next Generation of Apps", Open AI, *available at*: https://openai.com/blog/gpt-3-apps/ (last visited on Feb. 20, 2022).

40 I. Goodfellow, J. Pouget-Abadie, *et al.*, "Generative Adversarial Networks", *Neural Information Processing Systems* 2672 (2014).

41 Auction Review, "Is artificial intelligence set to become art's next medium?" *Christie's*, Dec. 12, 2018, *available at*: https://www.christies.com/features/A-collaboration-between-two-artists-one-human-one-a-machine-9332-1.aspx (last visited on March 14, 2022).

42 "AIVA", *available at*: https://www.aiva.ai/ (last visited on March 6, 2022).

43 "AI Song Contest 2021", *available at*: https://www.aisongcontest.com/ (last visited on March 14, 2022).

Ross Goodwin, former ghost-writer for President Obama, in a project sponsored by Google, fed his Char-RNN AI 20 million words in text corpora composed of fiction and poetry. He then ran the software on his laptop, constantly feeding it with images via webcam on a journey from New York to New Orleans. The AI translated that data into words and produced the first AI novel, '1 The Road'. Later, Goodwin collaborated with BAFTA-nominated filmmaker Oscar Sharp to make experimental sci-fi short films, 'Sunspring' and 'It's no Game'.[44]

Michael Mateas describes this as "expressive AI" which is "a new inter-discipline of AI-based cultural production, combining art practice and AI-research."[45] Philip Galanter has defined it as "generative art" which refers to "any art practice where the artist cedes control to a system that operates with a degree of relative autonomy, and contributes to or results in a completed work of art."[46] He further says, "The key element in generative art is then the system to which the artist cedes partial or total subsequent control."[47]

The element of control is evident in copyright law's conception of authorship which is tightly bound to and often presumes the presence of a subjective authorial intention. Copyright law is concerned that this authoritative control is not too evident in the case of emergent works. This part explores the theoretical justifications for authorship and argues that post-structuralist critique offers ample ground to include emergent works within copyrightable subject-matter. We will also review the events surrounding the auction of 'Portrait of Edmond Bellamy' to highlight romantic-anthropomorphic terminology's negative impact on legal scholarship.

3.1. Romanticism

The skill of an author in the beginning of Augustan literature till the mid-18th century, was to study and emulate semantics proffered by the likes of Ovid, Virgil, Horace, Homer and Socrates. The sentiment is expressed adequately by Alexander Pope, "Be Homer's works your study, and delight; Read them by day, and meditate by night"[48]

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[44] "Ross Goodwin", *available at*: https://rossgoodwin.com/ (last visited on March 14, 2022).

[45] M. Mateas, "Expressive AI: A Hybrid Art and Science Practice", 34 *Leonardo* 147 (2001).

[46] P. Galanter, *Thoughts on Computational Creativity*, 6th Generative Art Conference (2003) *available at*: https://drops.dagstuhl.de/opus/volltexte/2009/2193/pdf/09291.GalanterPhilip.Paper.2193.pdf (last visited on March 18, 2022).

[47] *Ibid.*

[48] A. Pope, *An Essay On Criticism* 7 (W. Lewis, London, 1711).

and further, "Learn hence for ancient rules a just esteem; to copy nature is to copy them." Towards the end of the 18th century, romantics' emphasis on spontaneous personality overtook the systemic order of classical imitation.

For authors such as Keats, Shelley, Lord Byron and Wordsworth an ability to express horror, solitude, loss, melancholy and desire became paramount; not only as syntax but as a reflection of personal anguish with an emphasis on 'divine inspiration'. For creation of works, Wordsworth stressed the importance of imagination, "governed by, a sublime consciousness of *the soul* in her own mighty and almost *divine powers*"[49]. Herder expressed that true understanding of texts could only be gained through a study of the author himself, "The more one knows the author from life and has lived with him, the livelier this intercourse becomes."[50] Authors took on "the natural world as a living mirror to the soul."[51]

Simultaneously, the legal understanding of authorship began to evolve. *Pope* v. *Curll*[52] and *Gay* v. *Read*[53] represent landmark events noting transformation in status of literature as 'property'. Though the Statute of Anne was still "essentially a book seller's bill",[54] the dimension of author's ownership over the written word began to get credence in courts of law in subsequent cases like *Tonson* v. *Collins.*[55]

Mark Rose[56] notes the impact of *Donaldson* v. *Beckett,*[57] on propagation of Martha Woodmansee's[58] "author-genius". Booksellers view this as an opportunity to create a distinction between protections of works under copyright from those under patents. As the "writer" transmogrified into "an *author* (Lat. *Auctor*, originator, founder,

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[49] W. Wordsworth, "Preface to Poems" (1815), Bartleby.com, *available at*: https://www.bartleby.com/39/38.html (last visited on March 14, 2022).

[50] J. G. V. Herder, "On the Cognition and Sensation of the Human Soul", in M. Forster (Ed.), *Herder: Philosophical Writings* (Cambridge University Press, Cambridge, 2002).

[51] M. Drabble, *The Oxford Companion to English Literature* 1228 (OUP, Oxford, 2000).

[52] (1741) 2 Atk. 342.

[53] (1729) NA 351/305.

[54] M. Rose, "The Author in Court: Pope v. Curll (1741)", 10 *Cardozo Arts & Entertainment Law Journal* 475 (1991).

[55] 96 ER 169 (1761).

[56] M. Rose, "The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship", 23 *Representations* 51 (1988).

[57] 1 ER 837 (1774).

[58] M. Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'", 17 *Eighteenth-Century Studies* 425, 429 (1984).

creator),"[59] the claim to property seemed naturally to follow.[60] The new dynamic permitted authors to exercise independence from patrons and sell works directly in open markets. However, this came at the cost of mystification of the true nature of creative processes.

3.2. Post-structuralism

Mark Rose explains how, "The gap between poststructuralist thought and the institution of copyright brings into view the historicity of the seemingly 'solid and fundamental unit of the author and the work.' "[61] Roland Barthes noted the problematic notion that, "The explanation of a work is always sought in the man or woman who produced it, as if it were always in the end, through the more or less transparent allegory of the fiction, the voice of a single person, the author 'confiding' in us."[62] Arguing against *author-ity*, Michel Foucault explains how, "We are used to thinking that the author is so different from all other men, and so transcendent with regard to all languages that, as soon as he speaks, meaning begins to proliferate, to proliferate indefinitely. The truth is quite the contrary..."[63]

For Derrida, signs, and consequently language, structure human consciousness; accordingly, there is no author who can claim to have created something wholly distinctive with the very language that structures his or her consciousness.[64] In his noted work *Limited Inc. a b c*, he forcefully argued how by acknowledging the contribution of others, John Searle as an author had himself become "divided, multiplied, conjugated, shared."[65]

Far from being secluded originations, works are a conglomeration of existing ideas and influences created as well as understood through constant social dialogue. This discourse is the Foucauldian *author-function*. Craig & Kerr expound on it through

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59 *Ibid.*
60 *Supra* note 1.
61 *Supra* note 54.
62 R. Barthes, "The Death of the Author," in S. Burke (ed.), *Authorship: From Plato to Postmodernism: A Reader* 125-130 (Edinburgh University Press, Edinburgh, 1995).
63 M. Foucault, "What Is an Author?", in J. Harari (ed.), *Textual Strategies: Perspectives in Post-Structuralist Criticism* (Cornell University Press, New York, 1979).
64 L.R. Danil, "Deconstructing Copyright", *Critical Legal Thinking*, *available at*: https://criticallegalthinking.com/2013/04/08/deconstructing-copyright/ (last visited on March 26, 2022).
65 J. Derrida, *Limited Inc.* (North Western University Press, Illinois, 1988).

Bakhtin's dialogic theory, "... authorship seeks to encourage precisely this discursive participation in the dialogic process of human interaction and the mutually constitutive creation and exchange of text, meaning, and identity."[66] An AI may regenerate Rene Magrite's pipe, but only social discourse will construct the significance of "*ceci n'est pas une pipe.*"

Barthes' *Death of the Author* eliminates the authoritative influence over the text and opens channels for heteroglossia, "The text is a tissue of quotations drawn from innumerable centres of culture."[67] Deconstruction of the author as monologic and work as his solitary product of genius allows the audience to view all the voices that preceded the work and contributed to its present form, as also the ones that will succeed it and add to it their own contributions.

Prof. Litman's famous critique stands its ground again, this time for emergent works, "The very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea."[68] In a non-technical sense, most works of art are derivative in that they either depict another work of art or an element of nature.[69] Search[70] and Mateas[71] conclude that copyright law should understand "the plasticity of the (AI) medium" and recognize it as a means of "establishing communication between author and audience".

3.3. The Doctrinal Mud[72]

Dr. Bridy[73] says, "... figure of the author as a 'writing machine' is about as radical a deconstruction of the figure of the romantic author as a good post-modernist could wish for, and it is arguably one whose time has come in the discourse on copyright

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66 *Supra* note 1.
67 *Supra* note 62.
68 J. Litman, "The Public Domain", 39 *Emory L.J.* 965 (1990).
69 S. Giry, "An Odd Bird", *Legal Affairs, available at*: https://www.legalaffairs.org/issues/September-October-2002/story_giry_sepoct2002.msp (last visited on Feb. 7, 2022).
70 P. Search, "Electronic Art and the Law: Intellectual Property Rights in Cyberspace", 32 *Leonardo* 191 (1999).
71 *Supra* note 45.
72 P. Samuelson, "Allocating Ownership Rights in Computer Generated Works", 47 *University of Pittsburgh Law Review* 1185, 1197 (1986).
73 A. Bridy, "Coding Creativity: Copyright and the Artificially Intelligent Author" 5 *Stanford Technology Law Review* 12 (2012).

law." Prof. Kaminsky notes, "It is harder to romanticize free expression as an essential output of human autonomy when machines can spew out news, poems, and op-eds." [74]

Yet, the sentiment that Foucault identified as "the privileged moment of individualisation" continues today to demand that either the AI be recognised (via legal fiction) as the new *ex nihilo* creator; or that these works remain unprotected on account of lack of human (emotional) attributes characteristic of romanticised production. The former rationalisation anthropomorphises, the latter overlooks the practical process of creation of emergent works. We argue that both approaches undermine the tedious human effort happening behind the scenes - one that is dispensing Lockean labour, expressing Hegelian personality and deserves utilitarian reward.

The implications of legal literature assuming that "creative robots" are generating works entirely independent of human beings who created the system[75] or that there might be no one holding the proverbial pen,[76] is akin to qualifying "intrinsic qualities and abilities which the software controlling the (output) cannot possibly achieve."[77] Take for instance, the renowned human-computer art collaboration created by artist Harold Cohen using a programed plotter that he named AARON.[78] Dr. Bridy asks, "Is Cohen also properly regarded as the author of AARON's paintings? He doesn't lift a finger to create them, after all."[79] However, as per Harold's son, Paul Cohen, "He had little faith in machine learning... he wanted to retain control of AARON's development."[80] He did lift his fingers to program AARON through McCarthy's first AI programming language, Lisp. He remained in control of the code, altering it periodically to program AARON for different tasks. Cohen's artworks, with and without the use of AARON, comprised a data corpus authored by him, not the plotter.

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[74] M.E. Kaminski, "Authorship, Disrupted: AI Authors in Copyright and First Amendment Law", 51 *U.C. Davis Law Review* 589, 598 (2017).

[75] S.Y. Ravid and L.A.V. Hernandez, "Copyrightability of Artworks Produced by Creative Robots and Originality: The Formality-Objective Model", 19 *Minnesota Journal of Law, Science & Technology* 14 (2018).

[76] *Supra* note 73 at 21.

[77] W.J. King, "Anthropomorphic Agents: Friend, Foe, or Folly", HITL Technology Memo (1995), *available at*: https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.57.3474&rep=rep1&type=pdf. (last visited on March 16, 2022).

[78] H. Cohen, "Aaron", *available at*: http://www.aaronshome.com/aaron/index.html (last visited on March 6, 2022).

[79] A. Bridy, "The Evolution of Authorship: Work Made by Code", 39 *Columbia Journal of Law and the Arts* 395 (2016)

[80] P. Cohen, "Harold Cohen and AARON", 37 *AI Magazine* 63 (2017).

The 'Portrait of Edmond Belamy' is a GAN-based artwork developed by Obvious, a Parisian art collective of three students, Hugo Caselles-Dupré, Pierre Fautrel and Gauthier Vernier. The algorithm was fed with 15,000 portraits dating 14th to 20th century. *Belamy* being the french colloquial to GAN's creator Goodfellow. Christie's noticed Obvious' work on SuperRare, a blockchain market and touted it as a "portrait... not the product of a human mind. It was created by an artificial intelligence." "The giveaway clue as to the origins of the work is the artist's signature at the bottom right - in cursive Gallic script it reads: (min G max D x [log (D(x))] + z [log (1 – D (G(z)))])."[81] Caselles-Dupré proclaimed, "If the artist is the one that creates the image, then that would be the machine."[82]

All is not that obvious. The promotion for auction of *Belamy* was, "some really clumsy communication of what we did, and we just thought it was cool, so we did it like this."[83] Germany-based AI artist, Mario Klingemann, who was cited among Obvious' inspirations told The Post that he believed, "Maybe this is just a practical joke among oligarchs... [The Obvious portrait] is something that everybody can do. You can clone this [code] from GitHub, start your computer and start doing it." [84] The *Belamy* code was indeed lifted from GitHub, originally authored by a then-19 year old Robbie Barrat and Klingemann has stated, "You could argue that probably 90 percent of the actual 'work' was done by [Barrat]".[85] In contrast to Obvious, Barrat provides a truer version of the process, "A human chose the data set. A human designed the network. A human trained the network. A human curated the resulting outputs."[86]

Caselles-Dupré clarified in a subsequent interview to ArtNome, "If I was not part of this and saw the articles that are coming out, I would think it was a scam or not

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81 *Supra* note 41.

82 *Ibid.*

83 J. Bailey, "The AI Art at Christie's Is Not What You Think" *Artnome* Oct. 14, 2018, *available at*: https://www.artnome.com/news/2018/10/13/the-ai-art-at-christies-is-not-what-you-think ((last visited on March 16, 2022).

84 M. Flynn, "A 19-year-old developed the code for the AI portrait that sold for $432,000 at Christie's", *The Washington Post* Oct. 26, 2018, *available at*: https://www.washingtonpost.com/nation/2018/10/26/year-old-developed-code-ai-portrait-that-sold-christies ((last visited on March 16, 2022).

85 J. Vincent, "How three French students used borrowed code to put the first AI portrait in Christie's" *The Verge* Oct. 23, 2018, *available at*: https://www.theverge.com/2018/10/23/18013190/ai-art-portrait-auction-christies-belamy-obvious-robbie-barrat-gans (last visited on March 16, 2022).

86 *Supra* note 83.

right..."[87] Lovelace's critique reasserts its relevance. Post the auction, the issue of "AI Knowledge gap" has assumed interest among AI practitioners, many of whom are now highlighting the divide between actual and perceived scientific progress in the field.

A combined empirical study[88] conducted by scientists from MIT, Harvard and Max Plank Institute found that creating a narrative that repeatedly emphasises on AI as an anthropomorphic technology "may lead to situations wherein individual responsibility and accountability is obfuscated due to a lack of clear understanding of who the relevant actors are and how they interact."[89] They conclude, *inter alia*, that Obvious' code is a 'tool' and not an autonomous 'agent'. This misclassification is prejudicial "to allocating credit and responsibility to human stakeholders"[90] since "increased anthropomorphicity of an AI system may diminish the perceived responsibility of all human actors involved."[91]

In another recent paper, leading AI practitioners clarify, "To date, no system exists that exhibits the intentional autonomy that philosophers such as Boden argue is fundamental for human creative practices, and mechanisms to achieve it remain illusive".[92] Boden views "self-organisation" as synonymous with a specific kind of autonomy where, "the system's independence is especially strong: it is not merely self-controlled, but also self-generating", [93] with the "self" in self-organisation referring to the impersonal components of the system, not the intentional, mental self.[94]

AI experts from Monash University's SensiLab explain succinctly, "...their ability to act autonomously is limited within a very tight statistical framework that is derived from their training data. While a claim such as, 'an AI created this artwork' might be literally true, there is little more autonomy or agency that can be attributed to such an

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87 *Ibid.*

88 Z. Epstein, S. Levine, *et.al.*, "Who Gets Credit for AI Generated Art?" 23 *iScience* 1 (2020).

89 *Id.* at 2.

90 *Ibid.*

91 *Ibid.*

92 Z. Epstein, H. Blakeley H. Payne, *et.al.*, "Closing the AI Knowledge Gap", ArXiv (2018), *available at*: https://arxiv.org/pdf/1803.07233.pdf; S. Colton, A. Pease, *et.al.*, *On the Machine Condition and its Creative Expression*, Proceedings of the International Conference on Computational Creativity (ICCC) (2020), *available at*: https://acris.aalto.fi/ws/portalfiles/portal/51479962/Colton_et_al_Machine_Condition_ICCC20.pdf. (last visited on March 29, 2022).

93 M. A. Boden, *Creativity and Art: Three Roads to Surprise* 180 (OUP, Oxford, 2010).

94 J. Mc. Cormack, T. Gifford, *et.al.*, "Autonomy, authenticity, authorship and intention in computer generated art", 11453 *Lecture Notes in Computer Science* 35 (2017).

act than would be to a situation where 'a word processor created a letter', for example."[95] On whether present stream of AI-assisted works should be categorised as a new kind of cultural production, McCormack *et al.* [96] say, "Probably not in any major way. At least no more than any other kind of computer generated art (which has existed since 50 years)."

Arthur Miller's interviews[97] show that these machines and algorithms may themselves have become the new artist's muse. For her poetry-generating AI, Prof. Allison Parish of NYU-ITP, is of the opinion "I always seize authorship for myself... When I put out a book of poems it's by Allison Parrish, not Allison Parrish and a poetry bot ... in the same way that a Jackson Pollock painting is not by Jackson Pollock and a paint can."[98]

When we as researchers speak of "training" an algorithm, or an algorithm that "learns," it is easy to misinterpret this as being the same thing as human learning - but these words mean quite different things in the two contexts.[99] Some AI practitioners are suggesting new terminologies in order for subsequent AI research to break free from drawing parallels between human and machine intelligence.[100]

Mapping the human condition onto software existence likely serves more the purpose of understanding humanity than increasing our understanding of machines.[101] Accurate attribution not only benefits these authors, but helps establish the authenticity of work produced with AI systems.[102] We need to recognise the value being generated from personal unique decisions of how to use the AI and disseminate emergent works as a continuation of the dialogic system that post-structuralist critique identifies as among the core functions of authorship.

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95 *Ibid.*
96 *Ibid.*
97 *Supra* note 36.
98 *Id.* at 244.
99 A. Hertzman, "Can Computers Create Art?" 7(2) *Arts* 18 (2018).
100 D. Watson, "The Rhetoric and Reality of Anthropomorphism in Artificial Intelligence", 29 *Minds & Machines* 417–440 (2019).
101 *Supra* note 92 [S. Colton].
102 *Supra* note 94 at 10.

4. A New Creative Process

Artbreeder,[103] a collaborative AI platform works on StyleGAN and BigGAN models that allow crowdsourcing of artworks which users can morph and manipulate to create new art through a custom interface. As newer works were constantly added to the website, it became difficult to decide whom, if anyone, could claim sole rights on the images.[104] Alexander Reben, believing that these works were 'created by AI' and thus available for public use, arranged for a gallery show of their prints. After being called out on Twitter by another GAN-artist, Danielle Baskin, he conceded to allegations of substantial similarity. Artbreeder then clarified, "Any shared image can be used, edited or mixed." Now, a unique lineage of each contributing user is stored in the metadata and the website identifies uploads by usernames. The updated Terms of Use[105] require users "...to license any images you create on Artbreeder under the Creative Commons CCo license."

If an author makes incremental additions via a system that continuously builds off of other works, can this work be considered "original"? Is this a process of appropriation resulting in infringement or of inspiration protected and promoted by fair use/fair dealing provisions? This part analyses criticisms against AI in four successive degrees of severity – do these works meet legal requirements for copyrightability? Are they violating existing copyright rights? Will they overtake the market to the detriment of traditional creators? And lastly, will they subvert the entire social space of creative and original effort that copyright law was built to protect?

4.1. Threshold of Originality

The American *Trade mark cases*[106] stylised 'originality' in a romantic perspective of "fancy or imagination... genius, elaborate thought." Since then, legal threshold has been lowered to expenditure of some 'skill and judgment'. Holmes, J. in *Bleistein* v. *Donaldson Lithographing Co.*, moved away from "evaluation of aesthetics."

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103 "Artbreeder", *available at*: https://www.artbreeder.com (last visited on March 23, 2022).

104 Jason Bailey, "Why is AI Art so Complicated?" *Artnome* March 27, 2019 *available at*: https://www.artnome.com/news/2019/3/27/why-is-ai-art-copyright-so-complicated ((last visited on March 23, 2022); A. Hertzmann, "New AI art has artists, collaborators wondering: Who gets the credit?" *The Conversation* March 7, 2019 *available at*: https://theconversation.com/new-ai-art-has-artists-collaborators-wondering-who-gets-the-credit-112661 (last visited on March 23, 2022)

105 Artbreeder, "Terms of Use" Nov. 20, 2019, *available at*: https://www.artbreeder.com/terms.pdf.

106 Trademark Cases, 100 US 82 (1879).

In *Alfred Bell*[107], Frank, J. held, "A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations." Works are eligible for copyright without too deliberate or specific identification of authorial intent.

In *Feist Publications*, Rural's attempt at copyright failed, as a constitutional matter, because originality also requires "creativity," and its work did not exhibit the requisite degree of that quality.[108] Common-law conception then devalued from "sweat of the brow" to "modicum of creativity". The requirement is not as stringent as novelty demanded by patent law; instead, it is to show as *Burrow-Giles'*[109] prescribed "intellectual production, of thought, and conception." The courts may also consider elements of selections and arrangement to ascertain presence of originality.

The long-standing insistence that American copyright is a protection of economic rather than personal interests[110] is opposed to CJEU's *droit d'auteur* emphasis on personality. In *Infopaq*[111] making short summaries through a data extraction process did not violate right of reproduction since they were products of "authors own intellectual creation" as "evidenced clearly from the form, the manner in which the subject is presented and the linguistic expression."[112] Words as such are not protected and "creativity in an original manner" was expressed "through the choice, sequence and combination of those words."[113] In *Football-Dataco*[114] it also included "subjective choices, thereby imprinting the work with his personal touch" in the 'selection or arrangement of the data' contained therein.

The issue of exercise of "too minor (a) degree of creative freedom" was considered in *Painer*. The court held that an intellectual creation is an author's own if it "reflects the author's personality."[115] That is the case if the author was able to express his creative abilities in the production of the work by making "free and creative choices"[116]

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107 *Alfred Bell* v. *Catalda Fine Arts Inc.*, 191 F.2d 99, 158 (2d Cir. 1951).
108 Dianne Zimmerman, "It's an Original! (?): In Pursuit of Copyright's Elusive Essence", 28 *Columbia Journal of Law and the Arts* 187, 194 (2005).
109 *Burrow-Giles Lithographic* v. *Sarony*, 111 U.S. 53 (1884).
110 *Supra* note 108.
111 *Infopaq International A/S* v. *Danske Dagblades Forening* [2009] ECLI:EU:C: 2009:46.
112 *Id.* at 44.
113 *Id.* at 45.
114 *Football Dataco* v. *Yahoo!UK*, (2012) ECLI:EU:C:2012:115.
115 *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, (2011) ECLI:EU:C:2011:798.
116 *Id.* at 89.

which can be made "several ways and at various points in its production."[117] For instance, the "stamp of personal touch" in photographs can be expressed through choice in lighting, background, pose, framing, view of angles as well as choice of procedure for post-production development.

Importantly, in *Premier League* and *Cofemel,* "the extent of that protection does not depend on the degree of creative freedom exercised by its author."[118] The CJEU does not, however, seem to require that the author's creativity or personality (''personal stamp'') be objectively discernible in the resulting expression (the output).[119] Comparable to common law requirements, EU copyright *acquis* does not require assessment of aesthetic quality and elements of novelty.

In UK, the test of originality is based on Lockean labour theory. In *Walter* v. *Lane*[120], work made from a note-taking process was awarded copyright for expenditure of "an 'industrious collection' effort." Similarly, in *University of London Press*[121], originality in an "independent creation" was found through proof of "skill and labour". Post-amendment of the copyright statute, addition of 'original' was noted in *Interlego A.G.*[122] to mean that the work should "originate from the author".

The Canadian Supreme Court crafted a midway between the creativity and industriousness standards in *CCH Canadian Ltd.*[123] deciding the status of originality at "exercise of skill and judgement" which need not be novel creativity but should be more than mere labour. The Indian Supreme Court adopted the same in *Eastern Book Co.* v. *D.B. Modak*[124], "Copyrighted material... maybe it is a derivative work which gives a flavour of creativity... should be original in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author."

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117 *Id.* at 90.
118 *Cofemel* v. *G-Star Raw CV*, (2019) ECLI:EU:C:2019:721.
119 P. B. Hugenholtz and J.P. Quintais, "Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?", 52 *The International Review of Intellectual Property and Competition Law* 1190 (2021).
120 (1900) AC 539.
121 *Univ. of London Press, Ltd.* v. *Univ. Tutorial Press, Ltd.*, (1916) 2 Ch. 601.
122 *Interlego A.G.* v. *Tyco Industries, Inc.* (1989) A.C. 217 (P.C.).
123 *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, 2004 (1) SCR 339.
124 AIR 2008 SC 809.

It is well known that, because of the different nature of copyright works and the inevitable unpredictability of case law, the originality requirements are not even consistent or harmonised within one copyright jurisdiction, and probably will never be.[125] However, the absolute minimum threshold of originality can be seen to contain elements of conscious expenditure of some skill to make choices, selections or arrangements that render in the work presence of some general authorial contribution. What is essential is that room for making creative decisions must be present and the same should have been exercised and expressed.

Even a combination of fairly obvious choices in the design, execution and editing of an AI-assisted output could suffice.[126] By extension, projects like the Next Rembrandt show adequate potential for creative choices and original expression at all stages of the work's production executed under human-defined objectives. Pre-curation and creation of algorithmic source code requires extensive authoring, the generative model itself is heavily reliant on personal selections and arrangements for data corpus, post-curation requires meticulous redaction and often also post-processing and editing.

Sartor *et.al.* conclude, "Artistic works become inputs for a data-mill, which amalgamates, adapts and develops micro-elements, patterns, styles into new outcome, different from each one the input works, and possibly having some novel artistic meaning."[127] Although, even when creative decision-making is apparent, the use of intermediate copies in large data tropes for upstream modelling seem to push fair use/fair dealing constraints which in effect raises concerns of infringement in downstream generated works.

4.2. Balance of Rights

Any software operation or new technology that reliably reduces existing workload is likely to be very popular, especially when it targets operations that are widely perceived as tedious.[128] This also applies to current bottlenecks, such as image search or

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[125] A. Rahmatian, "Originality in UK Copyright Law: The Old 'Skill and Labour' Doctrine Under Pressure", 44 *The International Review of Intellectual Property and Competition Law* 34 (2013).

[126] *Supra* note 119 at 1199

[127] M. D. Esposti, F. Lagioia, *et.al.*, "The Use of Copyrighted Works by AI Systems: Art Works in the Data Mill", 11 *European Journal of Risk Regulation* 51–69 (2020).

[128] A. Pfiffer, "Creativity and Technology in the Age of AI", *available at* https://www.pfeifferreport.com/essays/creativity-and-technology-in-the-age-of-ai/ (last visited on March 28, 2022).

learning new features, where AI is perceived as potentially useful.[129] This has made some scholars consider AI-output non-copyrightable on grounds of transparently heavy dependence on upstream use of data which they concur should not be made freely accessible.

Existing US case law involving technology companies may help to explain this distinction and could be applied *mutatis mutandis* to AI scenarios.[130] In *Authors Guild* v. *Google, Inc.*[131] Leval, J. opined that since "Google makes an unauthorized digital copy of the entire book, [but] it does not reveal that digital copy to the public",[132] scanning of copyright-protected material was permissible. Similar activities were also permitted in cases like *Hathitrust*[133] and *Perfect 10 Inc.* [134] Notably in *iParadigm,*[135] Traxler, J. held "a highly creative, and thus highly protected, work could nevertheless be used in a way that is unconcerned and uninterested in those creative aspects."

Also in Europe, legal approaches favourable to transformative automated processing of copyrighted works have often been adopted, by using various legal arguments (eg. by assuming non-revocable implied consent when a text is made accessible over the Internet, or by understanding in a broad sense the idea of transiency).[136] Fair dealing imposes conditions on use of copyrighted material without seeking owner's permission. One such exception, fair dealing under defence of 'research and study', seems to be particularly applicable to data mining for ML.

Transitory reproductions essential for technological purposes have been excused in fair dealing jurisdictions, for instance, to permit storage of cached files while web browsing. Cases involving innovative computational technologies regularly feature the wholesale copying of literary and visual works, and courts have consistently held that wholesale copying can be necessary for certain purposes.[137]

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129 *Id.* at 13.

130 E. Bonadio, L. McDonagh, "Artificial Intelligence as Producer and Consumer of Copyright Works: Evaluating the Consequences of Algorithmic Creativity", 2 *International Philosophical Quarterly* 112 (2020).

131 804 F.3d 202 (2d Cir. 2015), cert. denied 136 S. Ct. 1658 (2016).

132 *Id.* at 221.

133 *Authors Guild* v. *Haithitrust*, 755 F.3d 87 (2d Cir. 2014).

134 *Perfect 10, Inc.* v. *Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

135 562 F.3d 630 (4th Cir. 2009).

136 *Supra* note 127 at 66.

137 A. Levendowski, "How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem", 93 *Washington Law Review* 579, 627 (2018).

Both fair use and fair dealing provisions seem to absolve ML processes in Generative AI of infringement, at least theoretically. Japanese copyright law, amended by the National Diet in May, 2018 and entering into force on 1st January, 2019, does the same functionally. New provisions called "flexible limitation provisions" facilitate AI development through use of copyrighted materials in algorithms without any express requirement of seeking consent from those authors. Article 30-4 permits use of protected works for data training so long as it is done "without the purpose of enjoying the thoughts or sentiments expressed."[138] Making of transient electronic copies has been allowed under the new Article 47-4, with the Diet acknowledging that such use will not be considered as causing market harm to prior authors. Finally, compilation of copyrighted works into searchable databases can now be conducted under Article 47-5.

4.3. Market Threat

Some fear that AI training from existing works will outmanoeuvre human-made works when both compete in the same market.[139] The Author's Guild's reply to USPTO's call for comments on AI and Copyright summarises the concern, "The unauthorized (unlicensed) ingestion of copyrighted works to generate new competitive creative works will ultimately cause market harm to the value of human-created copyrighted works that the AI machines essentially mimic in style and essence. Those types of uses should not be permitted without authorization."[140]

Forcing such a demand for authorisation could, in some part, lead us towards a market environment of what Lawrence Lessig identified as the extremism of "permissions culture"—a culture in which creators get to create only with the permission of the powerful, or of creators from the past.[141] In this vein, CJEU's opinion in *Football Association* is noteworthy, "...exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and

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138 WIPO, *Questionnaire on Artificial Intelligence Policies*, *available at*: https://www.wipo.int/export/sites/www/aboutip/en/artificial_intelligence/call_for_comments/submissions_march2020/ms_japan.pdf (last visited on March 28, 2022).

139 J. L. Gillotte, "Copyright Infringement in AI-Generated Artworks", 53 *UC Davis Law Review* 2655 (2020). ("When AI-generated works directly compete with those of human authors, the latter may eventually stop creating as they see the market for their output shrink.")

140 M. Rasenberger, Impact of Artificial Intelligence ("AI") Technologies on Copyright, Docket No. PTO-C-2019-0038 *available at*: https://www.authorsguild.org/wp-content/uploads/2020/01/Authors-Guild-Responses-to-USPTO-AI-NOI1.pdf.

141 Lawrence Lessig, *Free culture* 6 (Mort Homme Books, Pennsylvania, 2015).

interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other."[142]

The Guild's argument is problematic on two counts. First, it wrongfully considers access-restriction as a function of copyright. It cannot be pragmatic to seek individual authorisations from the several hundred works that a deep learning algorithm may need to reference in order to function meaningfully. Retracing the post-structural analysis of creative process, it should also not be legally required. In any case, the scraper does not extract expressive elements from the ML training data set. The intermediary copies are transient and the aim is not to replicate them. The information that would be extracted from semantics and probabilistic patterns like words for NLP and visual proportions in artworks is already in the public domain. Dr. Ahmed Elgammal's AICAN has been "trained on 100,000 of the greatest works in art history, from Rembrandt and Bruegel, to Warhol and Rauschenberg."[143]

Second, the Guild fails to take into account the idea-expression dichotomy. The law can protect the poems Robert Frost wrote, but, it does not function to stop everyone else from studying Frost and attempting to author similar works.[144] The premise of copyright law is to protect against copying of content in works, not to promote monopolies over styles and articulation. Consider a model of GPT-3, 'Verse by Verse'[145] an experimental poetry-writing tool that works on a training corpus of 20 American poets.

Furthermore, copyright's minimal requirement for originality does not subscribe to a protection from an anticipated market failure; unless the works are found to be infringing in a court of law.[146] As held in *Hathitrust*, "transformative work... serves a new and different function from the original work and is not a substitute for it."[147] Such arguments do not substantiate why emergent works should face a higher originality barrier given that likelihood and manner of infringements are similar in both. Such

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142 *Football Association Premier League* v. *QC Leisure*, [2012] EWCA Civ. 1708.
143 "AICAN", *available* at: https://aican.io/ (last visited on Feb. 18, 2022).
144 A. Aggarwal, *Are Machines the New Authors? Situating Copyright in Works of Artificial Intelligence* (2021) (Unpublished LLM Dissertation, NALSAR University of Law).
145 "Verse by Verse", *available at*: https://sites.research.google/versebyverse/ (last visited on Feb. 18, 2022).
146 *Supra* note 144.
147 *Supra* note 133 at 96.

apprehensions are not sufficiently merited to deny copyrightability of AI-based works altogether.

Restricting access to data may also have negative ethical implications. Prof. Levendowski argues, "Most public domain works were published prior to 1923, back when the "literary canon" was wealthier, whiter, and more Western than it is today. A dataset composed exclusively of these works would exclude voices that were never recorded or rarely published."[148] Thus, permitting access to data for transformative uses and development of AI technology could have a positive impact on fairer representation in literary, scientific and artistic domains in the long run.

4.4. New Art Movement

A step beyond purporting market failure, the most extreme of assumptions prophesises mass job displacements and an entire dehumanisation of literature and art through replacement of the present stream of authors by AI technology. This is not a new challenge. Photography, cinematography and software were subjected to romantic critiques and dismissed for being irreconcilable with the domain of copyright; whilst outside legal circles, new methods of artistic experimentation gradually became ubiquitous. Social acceptance forced a legal change. Even though philosophical critiques and legislative drafting issues still persist, they attained official "list-status" in the Berne Convention and other treaties and directives, on the common understanding that new media could satisfy minimum Berne standards.

Despite some obvious differences in the methods of production, it serves well to analogise these technologies with AI. It shows us that the nature of theoretical commentary that AI practitioners might be faced with today runs parallel to what photographers and film-makers have already witnessed. In all such commentary, the founding criticism stems from weakening of the author-work bond, allegedly diminishing the value of control and transposition of personality from authors to their work. The purported reason is mechanical intervention – cameras, computers, several hidden layers in deep learning networks, and perhaps now even a combination of all of the above.

[148] *Supra* note 137 at 615.

Hertzman[149] and Arcas[150] among others have specifically noted the frequent dismay which followed when photography began to replace portraiture. Contrary to the disquietude for an end of painting, however, this catalysed the emergence of new genres. This further led to the Modern Art movement and photography developed simultaneously as a *bona fide* art form in itself. Similar misconceptions were opaque for digital film editing, software coding, animation and recently, procedural content generation (PCG). In the present day, a mix of experience with all of these has led to success of motion capture technology, VFX and CGI (some of which has already become AI reliant) and its pervasive prominence in film-making.

Another argument is that a full claim of authorship and consequent originality is impossible because a part of the process that happens in the hidden layers remains unknown. Here too, our previous analogy with photography is useful. The images we see can only be "beautiful" or "real-looking" because they have been heavily processed, either by neural machinery or by code (in which case, both), operating below our threshold of consciousness.[151] Likewise, a programmer need not understand why a neural network 'learned' a certain set of weights, or the mathematics behind a cost function.[152] Even with the variation in determining originality, it is possible for a programmer to demonstrate they used a machine as a tool in attaining a copyrightable result.

Antithetical to the initial scepticism, these tools did not annihilate older art forms, but, only supplanted cumbersome processes for ease-of-use alternatives. Increasing access to these tools simultaneously increased participation of more people in acts of authorship, creative expression, storytelling and social communication. The same is already steadily underway for AI-based works through platforms like Github and Twitter for those interested in AI coding, and alternatives like Artbreeder and Prof. Elgammal's Playform[153] for those who would rather not code. Before rejecting copyrightability entirely, legal scholarship must stop and consider the real possibility that

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149 *Supra* note 99.

150 B.A. Arcas, "Art in the Age of Machine Intelligence", *Medium* Feb. 24, 2016, *available at*: https://medium.com/artists-and-machine-intelligence/what-is-ami-ccd936394a83 (last visited on March 21, 2022)

151 *Ibid.*

152 J.K. Eshraghian, "Human Ownership of Artificial Creativity", 2 *Nature: Machine Intelligence* 157-160 (2020).

153 "Playform", *available at*: https://www.playform.io/ (last visited on March 4, 2022).

use of AI has begun; if not to usher in a new art movement, then at least certainly augment and revitalise the creative process.

But, what happens when AI is used to generate similar works by design? Which human stakeholder would be the owner of infringing piece? Who is responsible and to what extent? One such case has already reached the courts in Canada. Production of AI-assisted works has increased, not decreased, the involvement of people in the creative process. The next part shows that the real problem is not about pitting machine automation against human authors, but of appropriate identification of human contribution.

5. Ownership Stakeholders

Adam Basanta's two scanners tipped in front of each other produce abstract pictures influenced by the room's changing lighting conditions, randomised settings and an automatically moving mouse. An AI system compares the images to existing works of art. The first part of the process is 'creation' and the second he calls 'validation'. Basanta's objective is to validate machine-generated art's potential for human consumption by establishing likeness with existing human-made works. A claim has been filed by artist Amel Chamandy, against Basanta's exhibition of "85.81%_match: Amel Chamandy: Your World without Paper (2009)". It's on the Quebec Superior Court to decide if her copyright was infringed.[154]

Judge Learned Hand's Grecian Urn analogy comes to mind.[155] On the face of it, 85% seems like substantial similarity in copyright terms. The similarity match percentage was generated by the AI system, not Basanta's artistically trained eye. The two images are actually absolutely distinct. If existing Canadian standards of originality are applied, the case has no merit. Indeed, the entire setup here is defined by the fact that this is a totally independent creation — and the "validation" process only serves to highlight that there is no copying.[156] Nevertheless, assuming for argument's sake that there was infringement, how would the court decide issues of ownership, allocation and

[154] *Galerie NuEdge Fine Arts* v. *Adam Basanta* (decision pending).
[155] *Sheldon* v. *Metro Goldwyn Pictures Corporation*, 81 F.2d 49 (2d Cir. 1936).
[156] T. Geigner, "Art, AI and Infringement: A Copyright Conundrum" *Techdirt* Oct. 16, 2018, *available at*: https://www.techdirt.com/2018/10/16/art-ai-infringement-copyright-conundrum/ (last visited on April 1, 2022).

responsibility? This part first dispenses with arguments against ownership in AI-based works. We then identify possible stakeholders and analyse recent AI-related judgements.

5.1. Some ghosts, the Titanic and a monkey

While authorship and originality are centred on origination and identity, ownership is more deliberately proprietary and concerned with economic exploitation. Consequently, ownership deems on the entity an aggressive locus of control. Exercising ownership in absence of a visible connection to the work raises an ethical and legal dilemma. Thus, proponents of the view that AI-based works belong only to the public domain have argued that sophistication in deep learning hidden layers precludes any human's claim over the generated output.

This view runs contrary to a fringe inside copyright law. The English court in *Cummins* v. *Bond,*[157] held that since the plaintiff, though under a trance, "actively cooperated in translating the spirit's words into a comprehensible language", she had satisfied criteria for authorship. In *Urantia Foundation,*[158] the American court decided that it was irrelevant whether creator of a work was claimed to be a celestial being and copyright law had no specific requirement to prove human effort for authorship.[159] Thankfully, no court commented on extent of presence of spirits/voices as effectively diluting claims for authorship and ownership.

In *RMS Titanic*[160], authorial control was vested by the court in the director for planning and controlling the film's progress. The fact that he had not used the camera himself or dived to see the shipwreck which was the subject of the film were not important considerations. The now infamous *Monkey Selfie* case[161] centred on the question of who pressed the shutter-release button. The fact that David Slater deliberately organised the camera set-up after spending months on establishing trust with and understanding the behaviour of macaques was belittled by those who wished to use the work for free; but

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157 1 Ch. 167 (1927).

158 *Urantia Foundation* v. *Maherra*, 114 F.3d 955, 957 (9th Cir. 1997).

159 A. Kasap, "Copyright and Creative Artificial Intelligence (AI) Systems: A Twenty-First Century Approach to Authorship of AI-Generated Works in the United States", 19 *Wake Forest Journal of Business & Intellectual Property Law* 335 (2019).

160 *Lindsay* v. *The Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248 (HB) (S.D.N.Y. Oct. 13, 1999).

161 *Naruto* v. *Slater*, 888 F. 3d 418, 426 (9th Cir. 2018).

eventually accepted in a large part of legal and expert opinions. Slater's experience stands in stark contrast to that of Sergei Gorshkov.

"The Embrace", Gorshkov's grand-title winning entry for the World Photography Awards 2020[162] was a photograph created using camera traps. Trail cameras or camera traps are cameras rigged with motion sensors that are designed to self-activate and take photos. They are widely used to track animal movements in deep wilderness without human intervention. It was after ten months of failed attempts that Gorshkov found this photograph. Similar to the team that created the Next Rembrandt, Gorshkov had immense control over selection, arrangements and planning, while having very little certainty of what the final output might look like.

Hello Games has created a GAN-based interactive video game called No Man's Sky. A team of programmers has built a self-generating cosmos, and even they don't know what's hiding in its vast reaches.[163] The game presents a traversable cosmos of unimaginable scale: 18 quintillion life-size planets by the studio's latest count.[164] Every single game play is expected to be a unique experience. Again, that is not to say that AI is producing *ex nihilo* – the team has designed highly labour-intensive character drawings, underlying artistic assets and software codes; training and controlling the AI to mix and match to produce coherent forms.

Arguably, Slater, the Next Rembrandt team, Hello Games and Gorshkov expended similar time, effort, creative choices, intervention and judgements to create similar forms of work. Our legal sensibilities should extend to all of them alike. For instance, No Man's Sky's underlying IP assets remain under the uncontested ownership of Hello Games, which the company licenses through an end-user license agreement. Though, in similar situations when multiple interest holders get involved in courts of law, legal opinions get polarised across jurisdictions.

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[162] The Embrace, Wildlife Photographer of the Year, Natural History Museum, *available at:* https://www.nhm.ac.uk/wpy/gallery/2020-the-embrace?tags=ed.current (last visited on May 12, 2022).

[163] R. Morin, "Inside the Artificial Universe That Creates Itself", *The Atlantic* Feb. 18, 2016, *available at:* https://www.theatlantic.com/technology/archive/2016/02/artificial-universe-no-mans-sky/463308 (last visited on Feb. 24, 2022).

[164] S. Parkin, "No Man's Sky: the game where you can explore 18 quintillion planets", *The Guardian* July 12, 2015, *available at:* https://www.theguardian.com/technology/2015/jul/12/no-mans-sky-18-quintillion-planets-hello-games (last visited on May 12, 2022).

5.2. China

In, *Beijing Film Law Firm* v. *Beijing Baidu Netcom Technology Co., Ltd.*[165] ("Baidu"), the first case directly dealing with AI software, the Beijing Internet Court categorically dismissed claims of machine autonomy and attributed authorship to the (human) plaintiff for exercising "supervision and responsibility" over work's production.

Subsequently, in *Tencent*[166], the Shenzhen Court the company Tencent was given authorship over works produced using its AI 'Dreamwriter'. The court elaborated on the requirement of "plaintiff's unique expression of will" that could be noted in arrangements, template-designs and formatting to vest copyright in AI-assisted works. It was also clarified that a software's automated functions did not make it "self-aware" and to consider it to be so would be "unfair".

In *Gao Yang et al.* v. *Golden Vision (Beijing) Film and Television Culture Co. Ltd. et.al.*[167] the court decided for the first time on ownership and infringements of automatically taken photographs. Plaintiffs attached a camera to a hot air balloon and extracted images from the video recording. The court held that choice of balloon, camera, shooting angle, in-camera settings and post-curation from the recordings were all sufficient for claim of ownership.

5.3. Australia

Judicial opinion is in direct contrast in Australia. The High Court emphasised idea-expression dichotomy to allow unrestricted use of databases in *IceTV*[168], affirming that copyright does not protect facts. Later in *Telstra*[169] on the issue of infringement in computer automated telephone directories, it was held that presence of human input should be evident throughout the creation of the work, not just at initial preparations of data. Court remained unwilling to accept Telstra's copyright claims due to a multiplicity of authorial contributions and Telstra not explicitly recognising each author precisely, coupled with the use of Genesis software that initiated a "computerised process of storing, selecting, ordering and arranging the data to produce the directories in the form in which

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165 (2018) Jing 0491 Min Chu No. 239.

166 *Shenzen Tencent* v. *Shanghair Yinxun*, Decision of the People's Court of Nashan District, 24 December 2019 – Case No. (2019) Yue 0305 Min Chu No. 14010.

167 Beijing Intellectual Property Court (2017) Jing 73 Min Zhong No. 797 Civil Judgment. April 2, 2020.

168 *IceTV Pty Limited* v. *Nine Network Australia Pty Limited* [2009] HCA 14.

169 *Telstra Corporation Limited* v. *Phone Directories Company Pty Ltd.*, (2010) FCAFC 149.

they were published." Again, in *Achos Pty Ltd.* v. *UCorp Pty. Ltd.*[170] copyright protection was refused for material safety data sheets produced using computer automated process.

5.4. USA

In *Rearden LLC* v. *Walt Disney*[171] conflict arose over a motion capture software, MOVA which has been used frequently in high-budget Hollywood motion pictures. In a previous lawsuit Rearden had attained favourable ruling against Digital Domain 3, which froze special effects works in big-banner films.[172] This second lawsuit nearly threatened to disrupt Disney's profits. Rearden argued that since it owned MOVA, it should consequently exercise rights over all characters generated from its use; since it was the software that was doing "lion's share" of the work by tracking faces in high-precision and rendering in 3D. Tigar, J. held to contrary, assessing "lion's share of creativity" being exercised by actors and directors of the movies with the software itself being of "marginal" assistance. This test can at best be employed only in a case-to-case inquiry.

Another strain of thought contemplates assigning legal personhood to AI. This could be a quick solution. A self-aware "strong AI" could perhaps be considered an author, with ownership vesting in a human through the work-for-hire doctrine. Yanisky-Ravid deliberates, "AI systems should be seen as the creative employee or self-contractor creators working for or with the user—the firm, human, or other legal entity operating the AI system."[173]

However, the development of such technology is far out of reach. Denicola reasons that, "if computers lack "personhood" for purposes of copyright ownership, it seems wrong to then characterize them as "employees" for purposes of the work made for hire doctrine."[174] With anthropocentrism's potential to absolve participating humans of responsibility, premature creation of legal fiction within copyright and its subsequent transposition to other AI domains can create a detrimental precedent; especially in high-risk areas like automated weapons systems and self-driving automotive industry.

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[170] [2012] FCAFC 16.

[171] 239 F. Supp. 3d 963 (N.D. Cal. 2018).

[172] S. Jhonson, "Digital Domain's New Legal Setback Freezes VFX Tech Used by Major Studio" *The Hollywood Reporter* June 28, 2016 *available at*: https://www.hollywoodreporter.com/news/general-news/digital-domain-mova-tech-banned-906902/ (last visited on March 15, 2022).

[173] *Supra* note 75 at 671.

[174] R.C. Denicola, "Ex Machina: Copyright Protection for Computer-generated Works", 69 *Rutgers University Law Review* 251 (2016) (emphasis in original).

5.5. Common Law Jurisdictions

Section 9 (3) of the UK Copyright Designs and Patents Act, 1988 is analogous to provisions in South Africa, Ireland, India, Hong Kong and New Zealand.[175] It reads, "In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken." The intention was to assimilate into copyright's list of works, those with no apparent human author.

The quantum of "arrangements" required as well as the criteria to deem them "necessary" have not yet been expounded upon. In *Century Communications* v. *Mayfair Entertainment*[176], the court identified that the person who has "initiated the making of the film, organized the activity necessary for making it, and paid for it" was the one responsible for copyright rights. *Nova Production*[177] has been the only case in UK to apply Section 9 (3). Kitchin, J. was of the opinion that merely playing a game did not satisfy the "arrangements necessary" to claim authorship. The author of each frame in arcade games was, thus, the programmer.

One potential consideration of test of "arrangements necessary" could follow the requirements of "supervision and responsibility" elaborated in *Tencent* and *Baidu*. The core rationale behind both appears to be identification of the person most proximate to the work. It also remains to be seen if this proximity shall be in terms of control over dissemination of work or creative decision-making or both. In the event of the former, precedent that "rules or constraints leave no room for creative freedom" found in existing rulings like *Achos* and *Football Dataco* might operate as restrictive criteria.

In India, the provision does not seem to be applicable to cinematography and sound recordings. Incidentally, AI use has already become prevalent in both these arenas. Especially after *Ramesh Sippy* v. *Shaan Ranjeet Uttamsingh*[178] where the Bombay High Court has expanded the meaning of author and first owner, holding that "there is no such prohibition in section 13 (2) (ii) which precludes a Partnership firm or a Company to be an author /first owner of copyright (in films)", this could bear interesting results.

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[175] The Indian Copyright Act, 1957 (Act 14 of 1957), s. 2 (d) (vi); Ireland's Copyright and Related Rights Act, 2000, s.2; South African Copyright Act, 1978, s. 1(h) and New Zealand Copyright Act, 1994, s. 5 (2)(a).

[176] [1993] EMLR 335.

[177] [2007] EWCA Civ. 219.

[178] (2013) (55) PTC 95 Bom.

6. Conclusion

AI artists that are participating in the relational social practice of authorship, and communicating to us as an audience through a new technological process that subverts notions of the lone creator, merit recognition. Referring again to the Next Rembrandt project, it becomes evident that even one of the most advanced and complicated AI outputs thus far has been crucially dependent on human creativity, decision-making, selection, skill and cultural dominion.

Legal scholarship with its conflicted perception of romantic authorial experience, has either accepted or rejected machine authorship for presence or absence of a solitary genius behind the work. However, as soon as an exhaustive undertaking to delineate the new creative process is initiated, it becomes clear that wanting or imagining anthropocentric insights in AI systems is not required.

AI is not the first technology to strain the human-work bond. Recourse to copyright's treatment of previous technologies holds valuable insights to interpret current reactions for and against AI as well as to demarcate probable policy solutions. Chinese courts and Japanese public policy are taking the smart approach of permitting some uses that are essential to the proliferation of AI technology, with a larger aim of assisting further AI development and simultaneously gaining first-mover advantage in an emerging and well-funded market.

In case Professor Grimmelman[179] is wrong and the day of complete machine autonomy dawns on us with copyright still being a concern, then perhaps, tools of legal fiction shall become ever more useful. AI is helping professionals amplify their creative expression and steadily becoming more accessible for common use. Enforcing unseemly restrictions heightens the AI knowledge gap and has no theoretical or legal grounding.

[179] J. Grimmelmann, "There's No Such Thing as a Computer-Authored Work", 39 *Columbia Journal of Law and the Arts* 403 (2016).

136, 137

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The piracy paradox: protecting creativity without IP protection

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*E.I.P.R. 678 Abstract

Some recent scholarship has targeted certain creative industries which are believed to be existing in the 'negative space of IP law'. These industries either have no access to IP protection or have opted to relinquish it, and still, they are thriving. These findings are constantly pushing scholars to reconsider the conventional fundamentals of IP law. The traditional IP system regards IP protection as a tool to spur innovation and its absence will inhibit the creative activities. If this conventional narrative is applied to these industries, then it would be expected that they will collapse, but substantial copying is accelerating innovation in some industries, which has been referred to as the 'piracy paradox'. This article attempts to explore the existing literature on the selective industries in this negative space of IP law and outline the factors which contribute to them prevailing outside the legal framework. Further, it seeks to gain insight into the practices of some creative communities which have developed social norms to encourage innovation and regulate appropriability. Thereon, these practices adopted will be analysed to understand whether it poses a challenge to the predominant justification of IP law namely Utilitarian theory. Additionally, with a focus on the limitation of social norms, it will be explored whether social norms can act as a viable alternative to the current popular IP system in use.

Introduction

Since inception, the widely accepted role and justification of intellectual property (IP) is to incentivise creativity and innovation by conferring an exclusive right on the creator wherein there can be control on copying by either disallowing it or managing who can use the work. Particularly, it has been commonly believed that in the absence of IP protection creativity will not thrive due to unbridled copying. However, there were a few empirical studies conducted by some scholars wherein they have explored the creative industries that are beyond the coverage of IP law termed as *'IP's negative space'* and highlighted the practices of industries thriving in that negative space. The term *'negative space of IP'* is formulated to describe those creative industries where either formal law cannot reach or there cannot be effective protection and as a result creators choose to forego legal protection. These empirical studies gave the surprising findings that creativity has not diminished even in the presence of rampant copying. For some industries, copying is the primary reason for the innovation, which has been given the term '*piracy paradox* ',[1] and some of them have devised social norms to keep thriving by regulating the industry via specific practices.

Previously, the fact that these social norms could also play as an incentive to innovate was seldom explored by the scholars. As a result, the findings of these empirical studies made everyone reconsider their perspectives towards IP law and ask questions that, probably, have not been asked before: like whether IP rights are important for all areas of creative and innovative production? Will any sector, in the absence of formal law, wither?

This paper aims to look deeper into the negative space of IP primarily by understanding the landscape of IP's negative space and the concept of social norms. Then, the next section will examine the empirical studies which have investigated the industries in

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negative IP spaces: namely magicians, tattooing, culinary, stand-up comedy, and TV formats, where IP protection is either not opted for or does not exist, and hence, there is no legal mechanism to control copying. This empirical evidence demonstrates that social norms have taken the role of IP to some extent and are regulating the practices in these industries. Thereafter, this article will look into the factors which influence certain industries to opt out of formal legal protection and what is the common situation of industries following a norm-based system. Pursuant to this, there will be an attempt to analyse whether the practice of using social norms to mirror IP laws is a viable alternative to IP law. Lastly, the conclusion can be drawn that social norms seems to be beneficial in promoting innovation and creativity in certain sectors but cannot be expected to be same for every other industry as well. ***E.I.P.R. 679***

Meaning of negative space in the realm of IP law and notion of social norms

The terminology "IP's negative space" was coined by Kal Raustiala and Christopher Sprigman to mean those creative areas where IP law cannot penetrate or offer narrow propertisation.[2] There have been different studies undertaken to target certain creative industries which are deemed to exist in the 'negative space' of the IP or in low-IP equilibrium space, meaning the space where either there exists no intellectual property protection or the existing intellectual protection is not effective. These studies suggest that in converse to the conventional understanding about the IP law, industries are still flourishing in this set-up of IP's negative space.[3] The example of such industries include "fashion,[4] cuisine,[5] magic tricks,[6] stand-up comedy,[7] typefaces,[8] open-source software, sports, wikis, academic science and even roller derby[9] pseudonyms".[10]

To get the understanding on the landscape of the IP's negative space, it has been mapped into the following categories:[11] *Firstly,* 'doctrinal no-man's land' indicates about those industries which fall beyond the protectable subject matter, and as a result IP protection cannot be extended to those works. Correspondingly, in the absence of the formal law, creators of these industries have to comply with the norms set by their community in respect to the copying;[12] *Secondly*, 'IP forbearance' refers to those industries wherein the whole community of creators prefers to not claim any formal IP protection; and *Thirdly*, 'use-based carve-outs' specifies those areas which fall under the statutory exceptions and as a result, certain activities are allowed. However, under this heading, there is no automatic creation of the negative space, instead it is created when there is influence of use-based carve outs on the complete nature of work. This can be understood from the fact that copyright fair use creates no negative space per se, but it does have potential to create negative space in academic writing. Mostly, the use of academic writing falls under fair use and despite the high scope of copying, academicians keep creating works. It means negative space created due to these carve outs may depend on the nature of industry.

The emerging question with reference to the above context is how, in the absence of legal protection or effective protection, these industries regulate their intellectual property. As already mentioned, the findings of several studies highlight how some of these creative industries rely on extra-legal framework, in other words, social norms. Social norms are regarded as "manners and etiquette" of any particular community to which people abide, or aspire to do so.[13] They have a propensity to adhere to community-set norms in order to have a sense of belonging. Many empirical studies targeting close-knit communities are consistent with this statement. These norms vary from community to community based on the requirement, regulating the behaviour of those belonging to that community and sanctions can be imposed on the occasion of any deviance from accepted norms. It is because of these norms that it is attainable for certain industries to operate in the absence of IP protection or choose not to proceed with the same, resultantly this has enforced a sort of "IP without IP".[14] Technological shift is also one of the factors which contributes into the development of the norm-based system, for example, it has been suggested that this has "increased the value of property rights in jokes and decreased the cost of monitoring and enforcing such rights".[15]

In the next section, the social norms regulating the creative works of different industries will be discussed in detail. The reasoning of these creators to prefer extra-legal framework over the formal law framework will be discussed, and how social norms have played an important role in keeping these industries thriving despite the on-going imitation. It should be noted that for this article the focus will be on a selected few industries which have developed social norms and not just the industries which are in the negative space of the IP law.

Social norms: taking-up the role of IP law?

As previously mentioned, there were empirical studies conducted to evaluate the industries existing in the negative space of IP, the result of these studies shows that some of the creative communities, present in the negative area of the IP Law, have formulated social norms. In this section, the nature and facets of the social norms adopted by the selected creative communities will be looked into to understand how it regulates its creative behaviours and aid them. ***E.I.P.R. 680***

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Haute cuisine

Time and again the scholars have reiterated the views of many chefs about their preference for an open-source model of the culinary industry over copyright protection for their recipes. Instead of utilising the existing copyright protection, they choose to rely on norms followed in their community. [16] In the empirical study conducted by Fauchart and Hippel, who interviewed French chefs with the objective of understanding the norms system in culinary world, it was revealed that there are three social norms present which are important in protecting a chef's intellectual property interest. These are: *firstly*, there should not be complete copying of one chef's recipe innovation by another; *secondly*, on disclosing any recipe related secret information by a chef to a colleague, that chef should not pass the same information to another chef; *thirdly*, there must be sufficient credit given by the colleagues to the "developers of significant recipes (or techniques) as the authors of that information". [17] The fact that there exists doctrinal barriers in extending IP law protection in the culinary world has led the culinary community to develop this extra-legal framework.

In the United States (US), the Federal Circuit has been of the opinion that the bestowing of copyright protection on recipes will lead to a monopoly. Primarily, in 1924, in *Fargo Mercantile Co v Brechet & Richter Co*, [18] the court had allowed copyright protection to a bottle label on which the recipes were shown, on the ground that it indicates the essential element of artistic originality requisite for copyright protection. However, after this ruling, Melville Nimmer's treatise on copyright law had opined that copyrighting recipes seems questionable because the ingredients of any recipe are influenced by functional consideration and as a result, there is absence of originality, regardless of the fact that the "combination of ingredients contained in the recipes may be original in a non-copyright sense". [19] Thereafter, in *Publications International Ltd v Meredith Corp*, [20] the court also reiterated this view, that the recipes are solely the statements of the already existing fact regarding the essential requisite ingredients or comprises of the procedure or process, which are exempted from the copyright protection. Further, in *Lambing v Godiva Chocolatier*, [21] ruled on similar lines that recipes are functional instructions which cannot be given copyright protection. Hence, the shift of the US approach toward non-protection of haute cuisine can be seen.

The above analysis of the court and opinion of Nimmer has been disregarded by Buccafusco on the ground that they have not focused on novel creations, but only on dishes already in existence while talking about the 'dictated by functional considerations'. [22] The other gap as highlighted by him is that the scholars have confused the work of authorship with the specifications regarding the manner of performance it. In reality, this is a way to fix the work in a tangible medium of expressions. He has also interviewed chefs who stated that dishes prepared by the chefs "express various ideas and emotions taken from both the purely culinary world and the chef's wider experiences". [23] However, based on interviews with chefs, he has concluded that while doctrinally it is feasible to extend the copyright protection to dishes, in spite of that, the same is not suitable for innovation in the culinary realm.

There exists a strong denial amongst the chefs to seek protection from the traditional IP framework. The famous chef Keller in his interview with Buccafusco had shown his reluctance towards the formal legal protection, saying that if his recipes get copyright protection and are published, then it could mean that every time he used them, he would be required to seek permission from the publisher. [24] Another famous American chef, Thomas Keller, says that "culinary traditions are collective, cumulative inventions, a heritage created by hundreds of generations of cooks". [25] The study has further revealed that chefs like Chef Van Aken and Chef Dufresne are comfortable with the fact that the other chefs are borrowing their recipes unless and until they are getting acknowledged for their work. According to these chefs, this is their contribution to the profession and they are happy to see their work in circulation.

There also seems to be a lack of evidence to support the notion that culinary innovation needs formal protection in order to enhance creativity, as it has been seen that even in its absence, creativity is still thriving. Some scholars argue further by correctly pointing out that extending copyright protection to this sector might lead to a chilling effect on creativity, because some chefs might hesitate to create new work, apprehending that it might lead them into litigation. [26] Therefore, it is difficult to come to the conclusion that culinary innovation will be benefited from extending copyright protection to the dishes. Moreover, copyrighting the dishes will not improve the status of the individual chefs, as it has been ***E.I.P.R. 681*** pointed out by scholars that it is highly unlikely that they will enforce their rights given the costs and time involved and would lead them to be distracted from their work.

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Tattooing

The tattooist community has "a deep scepticism of the legal system" [27] and believe that formal law protection will not assist them in their growth. Through the study conducted by Aaron Perzanowski, it has been revealed that legal framework has been historically harsh towards the tattoo community, and as a result tattooists have turned hostile towards the legal system. In addition to this, and further motivated to safeguard the interests of the consumer, they have developed social norms to regulate their creative activity. In one of the interviews by Aaron Perzanowski, it was revealed by a tattooist that a fellow tattooist had once opted for the formal legal route to enforce his rights, but he was advised to dismiss the lawyer, as the tattooist community govern themselves. They are also apprehensive about the fact that if the formal law is brought into the industry, then it could lead to other undesired consequences, like signing contracts before tattooing every person, which would be undesirable. [28]

It has been seen that amongst tattooists as well there are mainly self-imposed regulations existing which are adopted to safeguard the "reputational and economic interests of the profession as a whole". [29] The tattoo industry has a resemblance to "informal guilds", whereby they keep trade secrets, monitor new entrants into the profession and create a barrier for potential competitors so as to reduce the competition. [30] These are the exclusionary practices adopted by them which offer a supplemental explanation for tattoo industry norms, "particularly the norm against copying custom designs". [31] The norm of secrecy has been prevalent for a long time, so much so that the tattooists even withheld information from their colleagues. [32]

Aaron Perzanowski had conducted interviews of the tattooists based in the US and according to which, tattooists have established five core norms to regulate their community activity, these norms are: [33]

- The customer's autonomy interest in regard to the design of custom tattoos and their subsequent display and use has been recognised.
- When the tattooists have custom designed any design for their customers, then they abstain from employing the same again for another client. As the design of the tattoo is finalised with the input received from the client, the limited control over the tattoo is endowed on the client.
- When any tattooists have designed any custom tattoo, then other tattooists are obligated not to copy the same tattoo, even if the client is asking for the same. The underlying reason to this is that the tattooists intend to have varieties in their artistic work and that their clients expect to have unique tattoos.
- Literal and close copying is something which is frowned upon in the tattoo industry. But there are mixed reactions to the instances where tattoo designs share common elements; some accept the conscious or subconscious influences from fellow tattooists, while other state that this needs to be avoided. However, with the technological advancement and widespread sharing of tattoo images, now it is easy to copy the designs. And the same is facilitating the enforcement mechanism as well. They resort to copyright in the following ways: inaction, direct communication or negative gossip. It has been seen that the regulation in street shops is difficult and as a result there is rampant copying.

Magicians

The magic community has evolved through "invention, sharing and gradual refinement" which has led to the advancement in the magic tricks. However, there is constant apprehension of stealing and exposing in the community. IP law does not suit the needs of the protection of magic to extend the protection. Under the copyright law, it is difficult to protect a magic trick or the modus operandi behind the magic trick, only a magic act could be claimed protection, as a result there is no effective protection. The requirement of public disclosure in patent law makes it not well-suited for the magician's interest, as their secrecy will be removed. [34] Further, if they try to seek protection under trade secrets then their work is vulnerable infringement, because they have to perform at various venues, and other magicians may de-code the methods easily. Also, it is impossible to make everyone sign a non-disclosure agreement. ***E.I.P.R. 682***

As a result, due to insufficient protection granted by the IP law to magicians, they have also built an alternative system in the form of informal norms. Within the magician community there are some norms which "govern how secrets, techniques and presentations are to be treated". [35] There are three categories of norms being adopted which address the attribution: [36]

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where *firstly*, the person who is the first one to publish or perform a trick will be regarded as inventor of the same. There is no prohibition in making derivate work which are improvements of the originally shared work, which is allowed on the condition that there should be proper acknowledgement and credit to the inventor. And *secondly*, how new ideas can be exploited upon creation, like nobody should use a secret method or dramatic presentation, if the same has not been shared; one can use a secret method freely if the same has been shared, but using the dramatic presentation will not be appreciated, even if the same has been circulated; and lastly, a trick which was published but never or rarely has it been in use and someone discovers it, then the said person will be regarded as the inventor. This has been formulated keeping in mind innovation; inventors are given either the choice of exclusivity in performing the invention or sharing the same with the public and acquiring money and prestige. Finally, there is a strict no-exposure norm as per which magicians are not allowed to share their secrets. In order to enforce these norms, the code of ethics is relied upon. Any person who violates these norms will lose the respect of their fellow community members and will be shunned from being invited to any future events, which could affect their career.

Here, it is worth pointing out that in the culinary, tattooing and magician space, it can be seen that a secrecy norm is the common norm, and the creators are also refrained from literal copying of the existing work.

Stand-up comedy

Due to the relative ineffectiveness of the IP law framework in protecting the work of the comics, social norms in this realm have emerged. Even though the jokes and comedic routines, if they are original and fixed in tangible medium, can enjoy copyright protection, stand-up comedy does not enjoy significant protection. In addition to this, the application of doctrinal principles is the other reason which proves to be a hurdle when it comes to successful protection in stand-up comedy. There lies much uncertainty in winning copyright protection as a result of a successful law suit if filed by the comic, which makes them highly resistant to resorting to legal protection.

The paradigm of doctrinal barriers occurring when it comes to stand-up comedy claiming copyright protection are following:

- *Fixation:* For the copyright protection, the primary requirement is that the work must be in a tangible form. Though the jokes are usually in written form, stand-up acts are not completely scripted, as to some extent it relies on the audience interaction. Comedians make alterations to their scripts as per the response of the audience and as a result it is difficult to completely rely on the script. Hence, it could be seen that fulfilling the fixation requirement is difficult.
- *Idea/Expression Dichotomy:* As the joke mainly demonstrates the idea which can be expressed in numerous expressions, it becomes difficult to obtain protection by the comics because the copyright law protects the expressions and not the idea.
- *Independent Creation:* When it comes to the enforcement of the right, it is complex to prove that the joke has been copied, because as mentioned above the jokes are mainly based on particular ideas/themes, which can be conveyed in multiple ways. Comedians themselves have stated during the interview that "it is often difficult to disprove independent creation, and that this difficulty makes many copyright lawsuits unlikely to succeed". [37]

When it comes to the other types of IP Law, it is believed that it is not so easy to claim legal protection under trade mark law as well, though there have been instances where protection was sought against a t-shirt company. For example, in *Foxworthy v Custom Tees Inc*, [38] the plaintiff, comedian Jeff Foxworthy, filed a law suit to enforce his rights against the defendant who were customising the t-shirts based on the jokes of the plaintiff. The court had granted the preliminary injunction in favour of the plaintiff, stating that the joke told by the plaintiff is his stock-in-trade. Due to the 'persistent repetition' of the plaintiff's joke "you might be a redneck if ..." had gained secondary meaning through which the plaintiff was famous. Therefore, the use of the plaintiff's joke would lead to the consumer confusion regarding the source of origin. From this decision, it would seem that another comedian might also be able to prohibit someone from replicating their joke if it could be proven that their joke is also their 'stock-in-trade'. In addition to this, no protection can be claimed under the patent law, as stand-up comedy doesn't fall under any subject matter of patent law. Though there has been an attempt made to ***E.I.P.R. 683*** file patents for "business method protecting jokes" [39] and "process of relaying a story having a unique plot", [40] in both these cases the application was abandoned.

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Dotan Oliar and Christopher Sprigman have conducted a series of lengthy interviews of diverse working comics who were working at the different levels of the comic industry. [41] As discussed above regarding legal uncertainty, along with the high cost of the enforcement and time involved, means many comics refrain from seeking legal remedy. The study has highlighted that the members of the stand-up community have an understanding/awareness about the copyright law, but they were not inclined to seek protection because they found it to be unhelpful in countering the infringement of their work. [42] It is often believed by them that the cost involved can be higher than the return which they expect to receive.

Consequently, the comic community created a set of social norms to regulate the appropriation of the work of the other comics. One of the essential norms governing the conduct of the stand-up comedians is the '*norm against appropriation* '. According to this, appropriating others' jokes is totally prohibited and is regarded as a "taboo". [43] Interviewees revealed that "comedians' norms system is less receptive than formal copyright law to the appropriation of even relatively high-level comedic ideas" [44] as the appropriation of very general comedic premises are being objected. Hence, it can be seen that the comic community follows a very strong anti-plagiarism norm. The way in which the mechanism of the norm-based system functions is that detection of joke-stealing is done by a comedian, who when watching a performance, realises that the joke has been stolen, meaning that the detection is usually a community project. Thereafter, they confront the comedian who is believed to have stolen the work, then the aggrieved comedian will put up his claims regarding the details of the jokes followed by the accused party responding to the accusation. Most of the time, this is settled amicably or in other words there is a cooperative dispute resolution.

However, there are instances when the parties fail to resolve the dispute and in the norms-based system, there are two types of informal sanctions i.e., attack on reputation by bad mouthing, and refusals to deal. In the former, the comics who have stolen the joke face 'significant social sanction', as a result they receive psychological set backs when they are being ostracised by the community. The accusation of joke stealing gravely impacts the reputation of the comedians, which is an asset for them, and hence, it affects their career. And in the latter case, there is a denial to participate along with someone who has been given the tag of joke stealing. In addition to this, intermediaries like booking agents, club owners etc. also refuse to engage joke thieves. Apart from these sanctions, there are also a few incidents where the comedians have adopted violence as the retaliatory mechanism. Although the resort to the violence happens rarely.

TV-formats

There were two landmark cases in this industry, namely *Green v NZ Broadcasting Corp* [45] and *Norowzian v Arks*, [46] where the formats were not extended legal protection. Following these decisions, it was apprehended that as the television formats can be redeveloped without inviting any legal sanction, the commercial value for the format would decline. However, it has been seen in the study on TV formats that despite having no legal protection, format industry has grown to become a major industry. [47] To overcome the legal uncertainty, they have developed the strategies which are aligned to their commercial needs. Here, the difference should be noted that instead of formulating the norms which the creators of this industry have to comply with, they have developed three strategies, legal and non-legal means of preventing copying, so as to be able to exploit the TV formats in the international platform and protect their interest. [48]

Their first strategy is that knowledge, like methods of bringing contestants, manner of audience participation and production details, which cannot be comprehended from watching, will be formalised and sold. The next strategy included legal strategy, whereby they focus on well planned strong branding of the image. This can be done by registering trademarks, and localising brand or merchandising; by these efforts it won't be easy for a third party to copy the format. And lastly, a focus on the "distribution networks and international production" which helps in gaining the advantage of being first in the market in a particular genre and this reduces the scope for another to enter. If there is any copying activity, then they face reputational sanction and difficulties in accessing desirable content. ***E.I.P.R. 684***

Analysis

In this section, the social norms regulating the creative works of different industries have been dealt with in detail. Throughout the discussion, it has been ascertained that the underlying features of these social norms to some extent reiterate IP principles—like the attribution principle, wherein the creators are to be credited for their work—which mirrors the moral rights as present in copyright law. For example, in the culinary world, there are norms for the regulation of plagiarism and attribution which efficaciously function by bringing the "esteem of one's peers and the opinions of diners" that in turn discourage the unchecked copying, and encourage innovation. [49] It also has been noticed that the attribution norm is absent amongst tattooists and stand-

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up comedians. As the copyright law has the provision for fair use doctrine which allows certain activities, similarly often young comedians are forgiven within the stand-up comedy community. [50]

In some cases, norms even transcend the IP principles, like there are stricter norms in stand-up comedy where not only copying of expression is prohibited but also of ideas. [51] There is a norm for the transfer of rights as well among comedians, according to which, once the right has been transferred by the originator then he himself retains no right to either perform it or use it, even for the derivative purpose. [52] The attribution norms present among industries reflecting the legal provision of moral rights [53] is also very rigorous. Moral rights can be waived in some instances while transferring the intellectual property, but in norms-based system the same cannot be done.

Some deviance of norms from the copyright law can be seen as well, for example in stand-up comedy there is no concept of joint-authorship as it "is incompatible with the norms-based system", and whosoever first comes up with the joke will own the joke. [54] Further, there is no provision for licensing in the norms-based system. [55]

It is against this background that some interesting questions are raised regarding the interrelation of copying and creativity. Freedom of copying work in many industries like movie, music etc. are disapproved for the reason that it will affect the creativity of those industries. But it seems that copying is not killing the creativity in other industries, as discussed above. These practices are defying the understanding that the copying is not suitable for innovation to take place. IP law motivates creators to create or innovate a completely new work sufficiently distinct from the existing work. However, social norms allow the creativity or build upon the existing work. The positive space of IP which prohibits copying and the negative space of IP where the copying exists both face the same issue: that either innovation will stop, or it will be encouraged. The most important point that should be considered is to analyse how various IP rules are required for different industries along with the context in which industries are completely excluded from the IP system. And having industry specific laws is not a feasible option. The norms based system has given potentially more effective space to those industries which fail to "fit well within copyright law's one-size-fits-all regime". [56] It has been rightly pointed out that the "social norms are capable of regulating culturally and economically significant creative industries". [57] There seems to be a "symbiotic relationship between negative space and productive infringement", [58] meaning an infringing activity that enhances the value of the infringed work or results into a new creation without destroying the worth of the original work.

When non-protection gets preference over protection in IP realm?

In the previous section, the social norms present in certain industries were explored in detail. Now, in order to gain the clear understanding of IP's negative space, it is essential to look into the commonalities present amongst these industries that influence them to opt out of the formal legal framework or to switch to the extra-legal system of social norms. After going through a few industries in the previous section, we can say that there are at least four common elements: [59]

(a) Exclusivity is not a driving factor for the creativity

Sometimes creators create work not with the objective of gaining monetary benefit, but to achieve recognition or a feeling of association within a particular community. In that case, the creator does not intend to have exclusivity in the market as provided by the formal law due to the **E.I.P.R. 685* fact that the "value may be created or enhanced through name recognition, network effects or other first mover advantages that are more likely to be undermined by exclusivity than enhanced by it". [60] Following are the key points:

(i) Value of Recognition: In certain industries, creators believes that the IP protection available for them will fail to give sufficient attribution for their work and as a result, they shift to the social norms, wherein they are able to get a strong attribution-driven system. In certain studies, this factor seems to be prevailing, like amongst chefs and tattooists where there exist norms of attribution.

(ii) Community Building: Sometimes the strong desire of the creator to have a sense of belonging to a particular community makes them follow the social norms, rather the intellectual property protection.

(iii) First Mover Advantage: When any creator is the first to launch the product in the market and generates substantial profit out of it, then there can be two scenarios, *first* as a result any copying of that creator's work won't harm him; or *second*, maybe if he has acquired such a reputation that even though there are imitating products circulating in

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the market, the consumer will always look for the original. For example, in the culinary realm, it is often stated that the copying of one's work will "enhance the reputation of the originator by stamping him/her as a pioneer worthy of imitation—and spurring food fans to seek out the original". [61]

(b) Grant of exclusivity can hamper the further creation

As referred to in the studies of creative sectors that have demonstrated that in the culinary realm, chefs are of the belief that no copyright protection should be claimed for recipes because when a monopoly is bestowed by copyright law, then there is very little scope left for knowledge advancement or to thrive in the public domain, consequently, there will be no substantial reward for innovative chefs. [62] Further, it is widely believed amongst chefs that while extending copyright protection to the performance of dishes may benefit that particular chef, it would hinder creativity in the culinary world as it might deter other chefs from experimenting on the pretext and fear that they might be in violation of the law. [63]

Even in the culinary realm, there seems to be no reason existing which substantiates the notion that copyrighting dishes could be a "boon for either culinary innovation or the restaurant industry's economic success". [64] Amongst chefs, there is a '*culture of hospitality* ' which is based on the principle of sharing of ideas, rather than owning them as an intellectual property, given there is appropriate norms of attribution. [65]

(c) There is need of free access of the work for the public which can be done without destroying the creativity

This suggests that sectors are being left out from the statutory protection because it is in the interests of the wider public and leads to use-based carve outs.

(d) There is preference amongst creators in putting their resources in further creation rather on the enforcement of the IP

The cost involved in the enforcement of IP rights could be expensive, which is a major cause of deterrence for many creators to claim intellectual property protection. For example, in the stand-up comedy case study, it has been seen that comedians feel that the major barrier to pursuing a suit against any infringement of work is the high cost of enforcing formal law. [66] They feel that instead of investing their scarce resources in the protection of the existing work, they would prefer to spend the same in further creation. [67] Even people belonging to the culinary world prefer to rely on the norms-based system, which is more cost effective and speedy than the formal law. [68] As pointed by Christopher, in spite of having the option of pursuing legal rights, chefs will not opt for it because of the substantial requirement of time and money which can deviate them from their work that can otherwise be utilised in innovating. [69] Tattooists have also indicated the cost of enforcement as the largest hurdle from seeking legal protection. ***E.I.P.R. 686*** [70]

Interface of IP justifications and social norms

IP's negative space seems to deviate from the basic theoretical framework of intellectual property. There are some underpinnings of the intellectual property like Utilitarian Theory, Locke's Labour Theory and Personality Theory, which justifies the current IP system. It is interesting to note that all the theories seem to lay down the significance of the protection, but negative space happens to defy them. But it should be taken into account that "negative spaces do not undermine the justifications for formal IP protection but they do shed light on when such protection is or is not called for". [71]

For the purpose of this article, the focus is on utilitarian theory, which talks about incentives as a goal for creation and innovation. It propounds that IP rights are significant for the promotion of creativity and innovation, without which "adequate incentives for the creation of a socially optimal output of intellectual products would not exist". [72] From the economic perspective, intellectual property assists in maximising social welfare. [73] The exclusivity which is bestowed on an individual for their creation enables

them to gain from it and hence, gives incentive to create further. In the absence of such protection, anyone would be able to copy the creator's work, which would deprive them of the resources for future creation.

The findings of the studies discussed above seem to undermine the utilitarian justification as they believe a "low IP system may be paradoxically seen to serve the industry's interests better than a high IP system". [74] There are certain practices or norms which help these industries flourish; they either allow copying or have anti-copying norms. It has been noted that the absence of IP protection in some of these industries better triggers creativity compared to what exclusivity would have done.

However, upon looking at the matter through a different lens, then it might be argued that "negative spaces are not quite as inconsistent with incentive theory as they might seem". [75] This statement can be substantiated by the view that lack of protection can be held to be more beneficial than exclusivity for some industries, which in turn can be an incentive for the creator. There are certain norms prevailing as well, which implies that creators might aim to create alternative incentives for themselves which can be more beneficial for them. Therefore, for creators of a different industry, where there is no protection or they choose not to go for it, "copying carried out according to the norms would, in turn, act as an incentive to creators through non-exclusivity-based benefits such as first mover advantages, network effects, reputational boosts, community recognition or reduced costs for further creation". [76]

Is a norms based system a suitable alternative?

From the preceding section, we have a brief understanding about IP's negative space, which runs diverse to the conventional IP framework and the factors influencing the creative process. It has been discerned that even in the absence of effective legal protection, there are industries where creativity is thriving and has not been killed. In light of this, there could emanate a question of whether social norms can be regarded as a suitable alternative for innovation and creativity in the absence of IP law, or when there is no effective IP law protection.

For some industries, like cuisine, copying proves to be beneficial as it gives a platform to the creators to acquire knowledge from their peers, and develop upon already existing work. It has been observed that certain industries create a new work with the aim to share ideas with the community or with the intent to only gain fame. Therefore, if the formal law protection is introduced in these industries, then there are chances that it could inhibit creativity. Further, one of the essential factors which discourages the creator from seeking legal protection is the time and cost involved. While on the other hand, a norms-based system proves to be more effective due to the fact that it is speedier and more cost-effective.

However, this norms-based system entails potential perils. Informal protection can bestow overprotection to the work, as has been seen in the comic industry, where the creator has control over their work for their lifetime, which creates an absolute monopoly. On the other hand, statutory protection is provided for limited duration only. In addition to this, as the formal law is written, it is easy to comprehend the contour by anyone, unlike norms-based system which is mostly unwritten and passed on from time to time. Further, even though social norms to some extent mirror the principles of IP law, it is completely different when it comes to the enforcement of social norms. The informal enforcement mechanism which some industries discussed above have adopted appears to be very harmful. In the legal system, there are checks and balances which seem to be absent in the norms-based system. Similarly, there appears to be no observance of due procedure while imposing sanctions and moreover, the system of appeal is missing from the norms-based system. It has been seen above that these sanctions are very harsh, ranging from reputational harm to refusal to work, which can be damaging to anyone's career. Most importantly, there can be no denial of the situation where the accused party could have honestly created the work and is getting punished for no fault committed. There could also be a probability wherein reputational harm could not be proportional to the infringement done and hence, the sanctions would be long lasting. These norms ***E.I.P.R. 687*** seem to be not balancing the interest of everyone involved very well; they bestow perpetual ownership on the creator as can be seen from different studies. [77] For comics, it has been seen that there are some occasions when people have resorted to violence. Hence, if social norms were to be introduced in every industry, then there is a high chance that it might bring mob justice into play.

For the effective enforcement of these norms, there are certain sanctions among these industries. Despite that there can be failure of norms-based system if the "social enforcement mechanisms underlying the systems go stale". [78] When the creator has to see himself as part of the community in order to abide by the social norms and police ones behaviour, there is always a possibility for the erosion of the norms-based system. Because when the community grows, this feeling of belonging might weaken and hence, affect the norm enforcement. In addition to this, there cannot be dependence on the norms-based system's enforcement with an increase in community size, their detection cost may also increase, hence, erosion of informal enforcement techniques. [79] The

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non-adherence of the community norms is sometimes also witnessed in some instances, like in case of stand-up comedy, if the accused comic has public support, then the intermediaries may choose to deviate from the norms. [80] Likewise, in the culinary world, the consequence of not following the social norms in the form of reputational harm is not effective when it comes for the lower end chefs, it is helpful only for the higher end chefs. [81]

It is pertinent to take into consideration the point of whether we have sufficient empirical studies to make a definitive comment on the matter. Furthermore, the existing studies have methodological limitations to a certain extent, which should also be taken into account to make a sound judgment on the role of social norms in innovation and creativity. One of the drawbacks of the studies referred to is that the study targeting cuisine is country specific (France). Although this seems justified because of their famous culinary practices, it is unclear whether the same findings can be extended to other jurisdictions. Another is that the study by Buccafusco regarding the culinary industry only interviewed nine Michelin-starred chefs, so as a result it might be difficult to apply the result across the cuisine industry. Likewise, in the case of stand-up comedy, the target was only comedians, but to get a holistic perspective, other aspects, like audience, stage workers should have also been explored.

Conclusion

From the above discussion, it can be established that when either IP protections are unavailable or less effective IP safeguards are subsisting, then communities tend to gravitate towards creating extra-legal rules, which to some extinct mimic IP law. Though this practice in certain industries raises questions on the justification of IP law and the importance of IP protection to promote creativity, nonetheless, it would be wrong to declare that intellectual property holds no value and discard the importance of IP law.

There have been significant questions posed regarding the current framework of the IP system. The industries existing in the low-IP equilibrium seems to underline the other side of the picture by demonstrating how some creative industries flourish amidst rampant copying. Through this, the lesson can be inferred that no blanket rule should be applied across the creative industries by stating that innovation cannot co-exist with the imitation. It has been discerned that sometimes copying acts as a tool of encouragement in enhancing creative efforts for certain industries, which on the other hand will not be true for many other industries. These industries in IP's negative space propound that the innovation and creativity in a particular sector does not depend merely on endowment of exclusivity, but can take place on a community sharing basis as well. This outcome of several studies of industries falling in IP's negative space should be a lesson for policy makers, and consequently, the interaction of social norms and formal law should be taken into account during policy making. Further, there should be some careful consideration done regarding whether new legal provisions are able to add value beyond norm-based systems or not.

After critically analysing the various aspects of social norms, it is reasonable to conclude that norms cannot and should never substitute formal enactments. Sometimes it might appear that norms are more effective in regulating the behaviour than formal laws, but it will be absolutely incorrect to assume that these norm-based systems will be desirable tools to adopt for regulating intellectual property in all circumstances. They have significant flaws and the threat, if extended universally to all sectors, could be damaging. Most importantly, it has to be understood that in order to have an ideal IP system, norms should be regarded as augmenting and not supplanting the formal law, this will give better understanding of the requirements of protection. There should be a way to blend the traditional IP framework with the extra-legal mechanism depending on the nature of the industry.

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Does 'big data' provide a competitive advantage to firms: an antitrust analysis

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Abstract

Today's economy has transitioned from the traditional brick and mortar structure of doing business to that of digitalized economy. The latter functions with the aid of technological tools with 'data' being the most significant tool in today's context. The issue has become even more critical with the advent of 'big data'. It is argued that accumulation, analysis and usage of 'big data' enable creation of varied forms of entry barriers for new entrants and information asymmetries for customers which in turn affect 'market competition' adversely (Santesteban& Longpre *The Antitrust Bulletin, 65*(3), 459-485, 2020; Fast et al., 2021). Consequently, it is pertinent to revisit the traditional understanding of 'market competition' as stipulated in the antitrust laws across jurisdictions and specifically the Indian Competition Act, 2002. The existing regime being centred around neo-classical price theory is not equipped to comprehend the various dimensions of the digitalised world where 'data' is the new form of currency having effects on market power and, consequently, on market competition. Digital markets are multi-sided and non-linear in nature where 'big data' acts as a lubricant for their smooth functioning. Whether access to data provides any form of competitive advantage is the central question. A resource to provide any form of competitive advantage must be distinct, rare, inimitable, non-substitutable and valuable (Barney, 1991). If data carries such characteristics, the continuous percolation and usage of technology powered by 'big data' into the markets will affect the understanding of the basic competitive wrongs. Potential interdependencies between technology, data and market power also affect the understanding of 'dominance' as stipulated under the existing law. The unique challenges which 'big data' poses are not only restricted to competition policy but also extended to enforcement as they trigger overlapping constitutional concerns in relation to privacy. This demands for looking at the existing gap between competition law/policy and the 'data'-driven challenges being faced in this ever-evolving digital economy.

Keywords Market competition · Technology · Digitalized economy · Data · Big data · Market power · Dominance · Anticompetitive behaviour · Entry barriers

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Introduction

Quite recently, 'big data' has gained significant importance and myriad discourses are being put forth concerning its implications on competition laws. Traditionally, data has been available but stark differences between the nature of 'big data' and 'traditional data' have changed the rules of the game altogether leading to the ever-growing market control by big tech giants such as *Google*, *Amazon*, *Facebook*, *Apple* and *Microsoft*. The *Organization for Economic Co-operation and Development* (OECD) in 2016 defined 'big data' as large volume and dimensions of data sets which further require sophisticated computer techniques and software to extract value out of them within a reasonable span of time (Organization for Economic Co-operation & Development, 2016). Big data, being characterized by the 3 Vs, i.e. volume, velocity and variety, is able to undergo exploratory research in a creative and real time manner (De Mauro et al., 2016). For example, the purchase history (Yao & Mela, 2011) and live location of a customer coupled with clickable actions of the same customer help the big giants such as *Flipkart* and *Amazon* to make predictive analysis for future behaviour, eventually filling up customers' e-mails with personalized advertisements, technically referred to as 'behavioural advertising' (Adomavicius & Tuzhilin, 2015). Corporations across the world are extensively using 'big data' to enhance their products and services at a rapid scale leading to apprehended possibility of anticompetitive conducts in the marketplace. In a way, the process is cyclic wherein more customers mean more data and more data means more chiselled products/services which in turn leads to more customers (Hagiu & Wright, 2022). The 3 Vs combined together differentiate 'big data' from 'traditional data' (Hu et al., 2014). Unlike the latter, the former actively mines information from unstructured data sets which are a combination of image, audio, video, number of clicks, etc. being acquired at a high frequency on a real time basis (Kubina et al., 2015). The *French and German Authority* of competition law in 2016 rightly identified that extensive usage of Internet by humans for every next need is enabling the technology giants to record actions of a large population in a detailed fashion (Autorité de la concurrence and Bundeskartellamt, 2016). This in turn is leading them to make individualized conclusions as to how a particular person will be receptive to a given sale message[1]

In today's global economy wherein extraction of relevant information from chunks of data spearheads every business strategy, access to 'big data' is pertinent to have an advantage. In the most recent debates, it has been argued that the firms possessing 'big data' naturally have a competitive advantage over others and hence such retention of data as a resource needs to be brought under the radar of competition laws (Grunes & Stucke, 2015; Gambaro, 2018; Sokol & Comerford, 2016).[2] A natural competitive advantage in this regard is presumed as data is a valid input for business or advertising strategies all across firms which operate in the digital space. The recommendations' systems, targeted advertisements, tailored products,

[1] *Ibid.*

[2] *Supra* note 1

etc. being offered by big firms are based on predictive analysis with 'big data' as a central resource. Such kind of data-oriented strategies further leads to customer/seller retention and increased revenue, attracting further sellers to platforms which act as intermediaries, making it difficult for new entrants to leapfrog such benefits (Fast et al., 2021).

This work is an attempt to further substantiate on the issue with a nuanced analysis of 'big data' as a valuable resource in the age of digital markets. The central argument of the work is that access to 'big data' significantly affects the level of competitive advantage that a firm may have in a market which in turn may change the dynamics of market competition. Part 1 is a brief introduction about the research work carried by way of this paper. Part 2 of this work, while acknowledging that market power is an essential ingredient to determine if a firm has a competitive advantage in the relevant market, argues that the traditional tests to establish market power fail in a data-driven economy. It argues that a resource-based understanding of 'big data' and not merely market shares and profitability is needed, which should not be restricted to characteristics of 'big data' but its potential usage as well. Part 3 goes on to substantiate that a standalone analysis of 'big data's' characteristics ignores the fact that the value of 'big data' significantly enhances due to certain data-specific market strategies such as data-driven lock-in effects, barriers to entry, price discrimination and other exclusionary practices. It further argues that the contours of 'market power' are changing and a resource-based understanding of 'big data' also apprises us of novel concerns in relation to privacy. Part 4 critiques the heavy influence of the theories of Chicago school of thought in the existing application of competition laws. It argues that novel concerns centred around 'big data' in the digital economy call for curbing the exclusive emphasis on lower prices and rather pre-empting possibilities where despite prices being low, consumer welfare is at a loss. It also argues that the vision of competition laws needs to be widened as instead of focussing on short-term benefits, competition should be seen as an infinite process, and it is the process that needs to be protected. Part 5 concludes by emphasising that competition laws should be serving multiple objectives which are consistent with consumer welfare, here 'consumer' being a relative term.

'Competitive advantage' in the age of 'big data'

Any firm has a competitive advantage over the other if it is able to influence the demand and supply of goods/services in a given economy. In pure competition law terms, some level of sustained 'market power' must exist for a firm to have an advantage over others.[3] However, in the age of digitalized economy, the restricted 'market power assessment' for ascertaining existence of a competitive advantage is insufficient. This claim owes to the fact that in digitized markets, 'big data' has become a central input for all business strategies.

[3] *Supra* note 2.

The term 'big data' originally was used to refer to massive data sets (Diebold et al., 2012). Since then, the definition evolved which led to the above-mentioned 3Vs of volume, velocity and variety becoming the often-used adjectives in its reference.[4] However, over a period of time, various scholars have attributed other characteristics to it such as value, veracity, versatility and relationality (Kitchin & McArdles, 2016). Needless to say, 'big data' in context of competition laws cannot be just restricted to these theoretical sets of definitions and rather calls for a more dynamic and real-life understanding of the term if at all the same is to be analysed as a source of competitive advantage for the possessor. The following paragraphs deliberate upon the general claims about the characteristics of 'big data' while also arguing in favour of an approach which is more suited for the antitrust understanding of the term.

Understanding 'big data' as a resource

In the age of 'big data', a resource-based understanding of the assets held by firms is inevitable to assess the level of competitive advantage that it experiences (Baum & Dobbin, 1991). It has been argued by scholars that in accordance with the resource-based view of a firm, a resource can provide a strategic advantage if it exhibits certain peculiar characteristics such as rarity, inimitability, inherent value and non-substitutability (Barney, 2001).[5] This test when applied to the resource in question, i.e. 'big data', leads to the following conclusions (Lambrecht & Tucker, 2015):

Rarity

In order to provide a strategic competitive advantage, the concerned resource needs to be rare i.e., difficult to accumulate. However, in the age of technology where customers have almost entirely shifted to web-based services, humongous footprints and data sets are available which can easily be acquired and stored in cloud-based servers with almost negligible costs. Also, the fact that customers more often than not resort to multi-homing where they use multiple digital platforms for goods and services increases the possibility of overlaps in data which is possessed by various firms.

Replication

Impossibility or difficulty of replication is also not a concern when it comes to data because of its non-rivalrous nature which basically means that its value does not decrease with the increase in number of its holders. Furthermore, it can be easily transferred and distributed across borders with almost nil costs.

[4] *Supra* note 4.
[5] *Supra* note 2

Substitutability

It is often claimed that 'big data' is a non-substitutable resource, and hence, the firms not having access to the same fail to excel in a particular field. But there are various substitutes to data depending on specific industries. For example, WhatsApp became a widely used application not because of novel data that it possessed as such data was always available with applications such as Skype or Facebook. The factor that provided WhatsApp an edge was the user-friendly interface and low-cost solution that it provided to the customers. Depending upon the nature of service being offered one needs to determine the substitutability of the relevant resource, hence a blanket claim about the non-substitutability of data cannot be justified.

Inherent value

The most important factor is the claim that data is inherently valuable and hence provides a strategic and operational advantage to firms possessing it. However, this claim is legitimately rebutted by the argument that data is by nature unstructured due to the varied frequency and place of origin. Hence, it is unlikely that data in itself will create any value unless the same is coupled with intelligent mechanisms and algorithms to interpret it making it suitable for experiments and business strategies.

All these conclusions almost negate the possibility of creation of concentrated markets with high entry barriers merely by possession of such resource.[6]

Need for a resource-based understanding

However, the above-mentioned conclusions result out of a fairly limited analysis as it analyses the characteristics of 'big data' on a standalone basis. Consider the *Google/Double Click merger* (2022), for instance, although the Federal Trade Commission (FTC), USA, approved the deal stating that use of data was not an essential input for fairly competing in the online advertising market, the claim is highly debatable. The fact that Google is constantly providing new services being offered at zero prices to customers in exchange of their personal data questions the assumptions made by FTC. Notably, Google charges a higher cost-per-click to its advertisers as compared to the charges offered by Google's competitors such as Microsoft (Hoy, 2019; Klishina, 2011). Advertisers are comfortable in paying this higher charge due to the higher probability of conversion of a viewer into a potential customer due to Google's strong targeting techniques and sophisticated mining of data coupled with network effects. This briefly explains why we should be concerned if large firms do possess 'big data' and why do firms invest in acquiring and processing data, in acquiring and developing technological tools and are unwilling to share such resources with their competitors.

[6] *Supra* note 10, p. 12–13.

The beauty of an ideal resource-based understanding of a firm is that in opposition to the finite lens of 'profitability' or 'market shares', it is not just restricted to the present characteristics of the resources that a firm possesses. It rather makes a parallel claim that the resources can be transformed into capabilities which strengthen market position and promise sustained competitive advantage (Shan et al., 2019). It aims at fathoming the potential usage of such resources in a manner which ensures competitive advantage to the ones possessing them over other players (Peteraf & Barney, 2003). Today, firms instead of merely focussing on 'profits' are aiming at remaining relevant and creating value at a continuous level and at a level better than their competitors (Mazzeo and McDevitt, 2014). Hence, a myopic view of market power based on shares and profits might not aid in determining the level of competitive advantage that a firm possesses (Sadowski, 2019). New age big-tech giants are steered by a 'data imperative' wherein data extraction, collection and analysis have become a *sine qua non* for staying relevant in the market (Fourcade & Healy, 2017). Staying relevant often centres around building up a customer base which only is a euphemistic expression of 'creating extreme dependencies' where a customer either does not wish or has significant costs in switching to other players. There is even a willingness to forgo short-term profits in order to establish dominance (Khan, 2017). Naturally, 'big data' needs to be equipped with instruments, self-learning machines and complex algorithms to make them useful for their strategic use. This calls for assessing the existing and potential capabilities that 'big data', as a resource, promises to one having access to it.

In the following part of this work, I argue that an isolated understanding of 'big data' is not sufficient and rather a resource-based understanding of existing and potential usage of 'big data' reveals certain glaring concerns.

Identifying the problem

The difficulty with 'big data' is not its mere possession as to make data co-relational and operational; one needs to develop technological tools to churn it in relevant form. The competition law concern in this context is more advanced. To understand this concern, one needs to take a step back and, instead of first looking at the characteristics of the resource (in this case 'big data'), one needs to look at the potential usage and ripple effects such usage will have in market dynamics.

Lock-in effects due to switching costs

Locking in customers is a tactic which is often used by firms to retain the customers from shifting to any other goods/service provider (Candeub, 2014). This lock-in effect can be legitimate especially when superior products/services are being offered, or it can be illegitimate when there are switching costs which are attracted in case the customer intends to shift (Chen & Hitt, 2005). It might appear that one can switch to any other firm with a mere click, but in effect, there are multiple costs in the nature of compatibility costs, uncertainty costs and learning costs (Cheng,

2021). The data extracted from customers helps the firms to provide more personalized services which initially seems to provide ease but in the long run forecloses both the exit of customers and the entry of new market players (Zuboff, 2020). In the *Google/Android case* (2018), the issue pertained to the requirement of pre-installing Google's android applications by the mobile manufacturers in order to get license to Google's Play Store. The European Commission while imposing a huge fine on Google inter alia held that such a business strategy handicaps customers from switching to other operating systems due to switching costs in the nature of losing data, contacts and future investments in case after switching to other service provider, the concerned customer intends to download Google's applications. Google via its various applications such as Google Maps and YouTube on a real-time basis collects user information/data,[7] i.e. big data. This information which includes but is not restricted to live location, work place, residence, search history, etc. is further invested in enhancing its search and advertising business enabling it to offer personalized services to customers. Tying of certain applications with Google Play Store helps Google to strengthen its dominance in the market for general search services and creates barriers for other players to receive search queries and user data, the latter being a pre-requisite for enhancing the former.[8] As a result, the cycle of switching costs gets reinforced with every such data that is gathered by the pre-installed applications of Google in android users' smart devices.

Barriers to entry

Switching costs coupled with feedback loops, network effects and economies of scale strengthen the competitive advantage that an incumbent has in the market (Zettelmeyer, 2018). Feedback loops pose significant barriers to new entrants as companies with a large user base are able to capitalize on 'data'. The existing users' data aids the company to enhance quality of its services, there by attracting more customers and hence leads to more data, i.e. 'user feedback loop'.[9] This constant stream of data also leads to 'monetization feedback loop' where the company is able to utilize the data for innovative strategies such as personalized advertising and recommendation system. Network effects basically refer to the increase in the value of products and services with the increased number of users, for example social networking or telecommunications sector. Economies of scale refer to situations where large volume of products/ services can be provided with common or minimum cost of production. Data-driven markets augment network effects, economies of scale as well as switching costs which create high entry barriers for a new market player (Katz, 2019). This is because although data is imitable and is not rare as discussed above,[10] in order to pierce a relevant market, it needs to be in a specific form and from specific sources (Stucke & Grunes, 2015). Since there is restricted access to

[7] *Supra* note 34 at p. 29.
[8] *Supra* note 34 at p. 197.
[9] *Supra* note 3.
[10] *Supra* note 20.

data due to network effects, any new entrant will always face a data deficit rendering it difficult for it to reduce the gap considering the relatively nascent history of data that it possesses. Further and continued access to data which leads to tipping of the market has a foreclosure effect on various new entrants (ICN, 2020). In the famous *PayU/Wibmo case* (2019), the acquisition of Wibmo by PayU was challenged as among other things PayU denied its competitors the access of Wibmo, thereby successfully capturing the downstream market and creating entry barriers for new market players. The acquisition also made the already structured customer base data of Wibmo available to PayU comprising of account details of buyers/sellers and commission rates charged by other payment gateways. Such information in all possibility gives PayU the leverage to offer lower commission rates to onboard merchants in opposition to PayU's competitors. This raises a critical point of indirect benefits that access to a data-set might provide even in cases where such data is not a basic input for the player, but can be used for other benefits. However, the Competition Commission of India applying the existing law in an ex post fashion held that for a conduct to be declared anticompetitive under Sect. 4 of the Indian Competition Act, 2002, evidence for abuse must exist.

Price discrimination

Price discrimination can take three forms. *First degree* discrimination when a firm exactly knows the preferences of an individual and tailors the prices according to the customer's willingness to pay. *Second degree* discrimination majorly relates to discounts provided certain sale quota is achieved. *Third degree* discrimination occurs when different prices are charged by the firm to different groups of individuals such as senior citizens and women. While the second and third forms have always existed in economy and are often justified by legitimate objectives or business strategies, the first form for the longest time was considered to be practically impossible to achieve (Geradin & Petit, 2006). However, with the advent of 'big data' and data analytics, the first-degree price discrimination has not only become a possible reality but is also unfair in some cases where different individuals are being charged different prices for the same product or services. Some of the strategies such as steering, drip pricing, fake offers and decoying are also used to exploit the customers' willingness to avail a specific service or product (Botta & Wiedemann, 2020). In the year 2017, an executive of *Uber* explained how the 'surge pricing' and 'route-based pricing' algorithm works (Longman, 2019). While the former raised prices in accordance with the increase in the demand in a particular location, the latter while assessing the nature of destinations of users decides the willingness of a user to pay a certain amount. For example, a rider going to a posh location will generally be willing to pay a higher amount.

Exclusionary practices

Various forms of exclusionary conduct can reduce competition in the market especially in a data driven space. *Refusal to provide access to data* can be a red flag

especially when data is an essential facility for a firm's business. Also, *discriminatory access to data* is another issue which has cropped up with respect to data sensitive businesses. In the case of *Cegedim* (2014), a set of medical databases was in question as Cegedim refused to provide it to Euris which was its competitor but was making it available to other market players. This was found to be anticompetitive by the French authority as such conduct by a dominant player was limiting development of products. Another form of exclusionary conduct is entering into *exclusive contracts* for closing opportunities for the rivals with respect to accessing data (Grunes & Stucke, 2015). Such contracts are entered by firms with third parties. When there are networks of such contracts, the issue becomes even more severe. Self-preferencing by far being the crudest form of exclusionary practise has been questioned in the Google Shopping Case (2017), where a ranking algorithm which favoured Google's own services in display results was seen to have reduced the visibility of competitors' shopping service.

Harm to privacy

Although privacy issues traditionally are considered to have no nexus with pricing and economic factors, the consumers are harmed in a situation where the firm does not have stringent privacy protections in place and also has no incentive to invest in such protections considering smaller or absent competitors (Harbour & Koslov, 2010). In the age of data, the raw material for the Internet giants is no other than humans themselves. Extensive collection of data and consequent manipulation is a growing concern (Ohlhausen & Okuliar, 2015). Even the free services which are provided by various online platforms are not free at all, and the data that we provide to them is the actual cost. There is no service as an ideal 'zero price service' which ironically is often used for branding and advertising ones' products and services. Undoubtedly, certain applications' usage of data seems harmless, for example Netflix uses the review and watch-list of users in order to make recommendations for future. But there is always a possibility where the data fed by users is used to assess one's religious, political, or purchasing conduct. This is precisely the case with Facebook as unlike Google, Facebook has information which is personal in nature which in turn is later sold to advertisers in order to influence the users into buying/availing of goods/services.

I argue that efficiency and competitive markets are undoubtedly the central goals of antitrust policy but not the exclusive ones. Efficiency is marked by maximization of total output with heightened consumer preferences and minimized production costs, while all other socio-political objectives are categorised as non-efficiency objectives, hence related to 'equity' (Elzinga, 1977). Privacy concerns on consumers' end can be brought within the ambit of quality of a particular service or design of a product; more particularly in the digital space, competition and privacy have multi-facet connections (Douglas, 2021). Another privacy-related competitive concern is that market players lately, in response of alleged exclusionary conduct, have claimed data privacy of customers as a pro-competitive benefit. This plea was invoked by *LinkedIn* against *HiQ* for denying data access to the latter while being

aware that data-scraping is the core business activity of HiQ. On similar lines, in 2012, *Twitter* denied continued access to its data/tweets to *PeopleBrowsr*, the latter being a player in the Twitter Big Data Analytics Market (PeopleBrowsr Inc, And PeopleBrowsr Pty. Ltd, v. Twitter,Inc., n.d). Though later the parties reached a settlement, the sudden move by Twitter had no valid business justification and was rather an attempt to enter the analytics market and drive out strong players such as PeopleBrowsr.[11] These examples demonstrate that externalities such as privacy need to be considered while determining efficiency as what might seem efficient overall may not be the objective truth. Certain other non-quantifiable factors are also considered important by consumers such as service, choice, privacy and quality (Foer and Durst, 2018).

Changing dimensions of 'market power'

The above-mentioned conducts apprise us of the fact that in the age of digitalized economy, the dimensions of 'market power' have changed exceedingly. When competition laws across various jurisdictions were at their nascent stage, 'market power' used to be assessed purely on the anvil of market concentration. The Indian Competition Act, 2002, under Sect. 19(4) (Competition Act, 2002) provides that in order to assess an enterprise's dominance in the market, the regulator shall refer to its market share, its size and resources, its competitors' size and importance, economic power, vertical integration, dependence of consumers, monopoly or dominant position, entry barriers, countervailing buying power, market structure and size, social obligations and cost, relative advantage and any other factor. While the term 'resources' seems wide enough to include 'big data' and technological advancements within its ambit, the practice of it is the real issue. The glaring example in this context is the case of *Samir Agrawal v. Competition Commission of India & Ors* (2018). Irrespective of the existing 'surge pricing' concern as discussed above with respect to Ola's and Uber's pricing strategies, the regulator did not condemn the act as dominance could not be proved as per traditional standards, more so because the legislation does not recognize 'collective dominance', which can be understood as dominance exerted by two or more independent undertakings over other market players via conduit of certain economic links (Vallabhaneni & Geetha, 2019). The predicament of discounting novel concerns such as real-time big data–dependent algorithms, which determine prices as well as collective control which a handful of operators have over the continuous stream of data, led to the mechanical application of law in the case. In today's era, market power cannot merely be assessed as per the traditional rules and factors such as network effects, multi-homing, switching costs and collective control need to be considered in order to analyse if an entity does exercise market power in a relevant market.

I argue that a resource-based understanding of 'market power' is needed with a conviction to fathom the possible usage of such resources. I further argue that the

[11] *Ibid.*

competition authorities need to exhibit some level of trepidation with respect to creeping strategies, wherein short-term goals seem counterproductive to power but when the same is looked from a lens of long-term effects, the possible consequences may reverse. The best example in this context is that of *Amazon* which is the titan in the online market as of today. If we look at the history of *Amazon*, we will be appalled with its business strategies as they were concentrated with conscious business losses and aggressive investments while jeopardizing profits and putting foot in multiple business strands (Streitfeld, 2013). Although losses were being reported by *Amazon*, its investors backed it up by pouring funds which only strengthened its share price (Dini, 2000). If we glance through the letter which Jeffrey Bezos wrote to his shareholders, in the beginning, we will find a categorical mention of the intention to create shareholder value which has a long-term effect (Bezos, 1997). He further wrote that *Amazon* is comfortable in investing aggressively to strengthen the customer base and only then we will move on to establish an enduring franchise. The beauty is that the investors and the shareholders had faith with this vision, and hence even if losses were incurred in the initial stages by offering prices which were predatory in nature, in the long-term, it was worth taking a chance. The clear intention was to dominate, and it is precisely what *Amazon* has achieved.[12]

Need for a fundamental shift

Unlike the early common law applications of rules relating to restraints of trade on matters pertaining to anticompetitive conduct in market places, modern competition law has shifted to an economic analysis guided by neo-classical price theory, the dominant narrative in this backdrop being promotion of 'consumer welfare', which is basically a euphemism for 'economic efficiency' (Bork, 1967). Any claim to include social or political concerns within the domain of competition laws is considered to adulterate 'economic efficiency' which in the long run threatens the interest of consumers as it politicizes competition law. Presently, application of competition law rules is heavily influenced by the theories of the Chicago school of thought which aimed at achieving minimum state intervention as markets correct themselves (Posner, 1979). The only two factors which competition laws aim to achieve are economic efficiency and consumer welfare, which basically means 'prices' become central to any understanding of the possible anticompetitiveness of a market conduct (Bork, 1967).

Over-emphasis on prices

Any act which does not adversely affect prices is considered to be efficient. This is the principal cause for the regulators failing to give due weightage to concerns which are not price specific. The present approach places emphasis on short-term

[12] *Supra* note 29.

effects on prices and output and hence massively underestimates the possibilities of achieving market power through innovative strategies especially in the age of digitalization. Considering the quantum and quality of user data which online platforms such as Amazon have collected, it is very difficult to fathom any possible innovative anticompetitive conduct. Customers have a tendency to get locked-in once they experience lower prices, and since browsing has become the new normal, customers keep on providing data about their tastes and preferences to such platforms. Application of analytics enables the platform to indulge in targeted advertising which is not just restricted to type of products/services but also customized prices (Khan, 2014). Thereafter, a locked-in customer experiences high prices as compared to a new user for whom prices which are predatory in nature are being offered in lieu of the user's personal data (Ferdman, 2013). Such a scenario explains how the notion of a uniform pricing policy has actually become a misnomer in digital economies.

The present economically motivated understanding of competition laws considers market players as rational beings which will only aim at maximizing profits due to the fear of being pushed out of the market (Posner, 1979). There are two major difficulties with this approach. Firstly, assuming that heightened prices are the only costs which consumers pay due to lessened competition in the market is a very narrow understanding of today's markets. There are other costs which consumers as well as other market players pay which include but are not limited to lowered quality, loss of choice, entry barriers, diminished innovation and reduced variety in products and services (United States Department of Justice & Federal Trade Commission, n.d). In the case of *Matrimony.com Limited v. Google LLC* and others (2012), the issue was around big data where Google was alleged to have abused its dominant position in the online search advertising market by invoking search biases and thereby promoting its own sites. This case is a clear demonstration of the fact that 'prices' are not the only costs which are incurred by customers in case a market is tampered with. The fact that customers are incurring switching costs and are ever stuck with a particular market player due to network effects and the difficulty of providing all information to another service provider again demonstrates the fact that an ecosystem is being built by the online players which significantly curtails the choices that a customer used to have.

The second difficulty is the underestimation of the potential to attain market power with entities possessing resources such as data and technology. If we give a thought to the *Amazon case* described above, the fact that 'predatory pricing' is considered to be an irrational strategy as per the dominant view as no firm would willingly incur losses seems a little ill-founded. In the case of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation* (1993), the famous 'recoupment test' was introduced. This test basically means that evidence of low-cost pricing is not sufficient evidence and instead the aggrieved must prove that there is a possibility that the predatory scheme would later cause an increase in prices above the competitive level to make good the losses which the alleged entity has made due to giving up profits. The problem with such a premise is that it assumes that profit maximization is the sole intent of firms and they will only work towards it. Additionally, this approach places an unjustified burden on the aggrieved to assess the future conduct of the alleged infringer considering the aggrieved might not even have that much of technical know-how to do the same. The case of *Amazon* is a clear example of

existence of predatory pricing with larger and long-term intent of gaining market power and creating an ecosystem which disallows first a consumer to avoid its services and secondly disallows any entrant to make a mark in the existing system.

Furthermore, in the context of multi-sided markets, it must be noted that such markets run on the principle that bringing together two or more different groups can lead to certain gains due to the interconnectivity, either direct or indirect, of the demand and supply of each group. Take for example the case of 'search engines'; they onboard users by providing the so-called zero-priced services such as search and media content while seeking the users' data which is subsequently sold to advertisers.[13] These advertisers getting hold of the user traffic information in turn bid for placing their product specific advertisements on the search engine's portal which not only generates revenues for the search engine, but also generates post-conversion revenues for the advertising entity. Here, even if the data so collected by the search engine is not always used as a direct input for its own business, it can be sold to other entities, in this case advertisers, to acquire benefits. Such cases call for a detailed analysis of the terms of exchange between the parties as well as the divide between the public data (data which are not personal) and personal data (example: data provided to social networking sites). At the heart of this premise lies the claim that the vision of competition laws needs to be revisited, as it cannot be purely price-oriented.

Shrinking vision of competition laws

The application of consumer welfare and efficiency standard especially in the digital sector has certain limits. It does not take care of issues such as choice, data privacy, reduction in the variety of goods and services due to rapid acquisitions, zero-price products leading to no loss in the short term but may actually prove to be predatory in nature in the long run and barriers to entry caused by massive data accumulation. These barriers to entry can also be faced by complementors, i.e. trading partners as they may face exclusionary as well as exploitative abuses. All these factors basically direct us towards the concern that 'competition as a process' may get deteriorated (Marty, 2020). This is because the present application of competition law is solely centred around consumer welfare wherein competition is assumed as an immediate and short-term goal. I argue that such finite understanding may lead to short-term benefits such as lower prices and ease of transactions via online mode, but it does fail to focus on the infinite process of competition. The legislative history of the pioneer antitrust laws substantially establish that it was the process of competition that was focussed on which definitely did not comprise of only one particular factor of efficiency on monetary terms (Pitofsky, 1979). Other factors such as political goals, equal opportunities to smaller players and equitable concerns such as privacy and choice were also considered to be a significant part of the competitive process which needed to be protected (Lande, 1989).

The limited vision of the Competition Commission of India while applying the law is evident in various case laws. In the case of *Vinod Kumar Gupta v. WhatsApp*

[13] *Supra* note 49.

Inc., (2016) while the issue was access to user data by Facebook due to WhatsApp making it mandatory for users to link their accounts with Facebook, the Competition Commission of India held that matters of data security and privacy do not fall within the domain of competition law and hence must be dealt with other specific legislations. Here, the regulator failed on two fronts: First, recognizing that privacy is a concern which has its genesis in fairness and hence falls within the objectives of every legislation which includes the competition laws; second, it failed to identify the loss of 'consumer choice' which customers face when forced with such business strategies. Here, a parallel in this context can be drawn with the US case of hiQ v. LinkedIn (2019). LinkedIn being an online network of professionals provides for sharing of professional data and histories while hiQ uses the technique of 'people analytics' through its automated bots/algorithms to predict the behaviour of the employees of Fortune 500 clients by analysing the data available on the platform of LinkedIn. In this context, the courts at the district as well as appeal level sided with the plea of fair competition which was taken by hiQ claiming that LinkedIn's justification of non-sharing of data based on the privacy rights of its users was a relatively weaker claim. I argue that the factor of fair competition again was seen from a very narrow lens where the subject matter was 'data' being the property of owners. The fact that sharing was mandated was in clear derogation of customer's right to privacy as well as choice. Even if such data-sharing is allowed, then express permissions must be taken from the users and there needs to be a system of data security which would inhibit third party players from capitalizing on user data.

Although there is an accepted trend of divorcing efficiency from the so-called equitable goals, a study of various antitrust laws does not endorse such a clear distinction (Elzinga, 1977). If we look at the history of competition laws across jurisdictions, economic analysis of such laws has only become prevalent in the 1970s with the advent of the Chicago school of thought. Before that, concerns such as market integration, regulating private power, protecting competition as a process, fairness, consumer welfare, protecting choices, efficiency and innovations all fell within the domain of competition laws (Ezrachi, 2018).

With the modern competition laws, we are facing the 'efficiency paradox' where reliance on leading firms in the name of efficiency is actually directing the economy towards monopoly, oligopoly, reduced innovative outlook and consequently to reduced efficiency itself. Leading market players in the data-driven economy are unabashedly capitalizing on this paradox as access to data confers significant competitive advantage which can eventually be transformed to sustained market power. Digital economies due to characteristics such as network effects, switching costs and feedback loops exhibit economies of scale and scope. Economies of scale occur as level production becomes directly proportional to the increase in quality and quantity of user data with no additional costs (Nuccio & Guerzoni, 2019). On the other hand, economies of scope enable them to use such user data to widen the portfolio of goods and services being offered (Santesteban & Longpre, 2020). The fact that Google is able to offer various services other than search services, such as YouTube, Gmail and shopping services is a manifestation of the quantum of power that access to a continuous stream of big data provides.

In competition law parlance, efficiency is in fact measured in terms of allocative efficiency, productive efficiency and innovative efficiency. However, it cannot be said that competition laws 'produce' efficiency; they can only 'promote' efficiency as they are proscriptive in nature and not prescriptive. Limiting the assessment of anticompetitive conduct only via the 'output approach', i.e. condemning only those actions which reduce efficiency is a clear demarcation from the original intent, the original intent of competition being preservation of the fair competitive process and promoting rivalry and openness in the market. Efficiency can although not be engineered but can always be enhanced by realising this objective and providing congenial environments to new entrants. European Union in the Microsoft case (2007) has made use of the alternative in place of the output paradigm which very well takes care of the original intent of antitrust laws. In that case, a process and access approach to consumer welfare and efficiency was used while charging Microsoft for withholding necessary inter-operability function. Here, again efficiency did not guide the Court but non-conservative economics did which can be one of the aspects that the Indian regulatory body should give importance to. In a nutshell, the efficiency paradox can be toppled by appreciating the fact that the output paradigm is not the only means to identify anticompetitive conduct. Conservative economics is no more appropriate for changing market conditions, and dynamic rivalry must be promoted while providing open markets (Fox, 2008).

I argue that India is struggling to understand the gravity of the issue because although the law, i.e. Competition Act, 2002, aims at preventing anticompetitive wrongs, it is actually ex post in its application. One classic example is the *suo motto* action initiated by the Competition Commission of India against *WhatsApp Inc. LLC and Facebook Inc* (2021). in 2021 with respect to the anticompetitive effects of the updated privacy policy of WhatsApp. We have already noted that similar issue was highlighted in the 2016 case, but at that time, the regulator refused from indulging into the matter. It appears that the regulator's trend of ex post application of law stems from a finite lens as it does not focus on importance of competition as a process i.e. something infinite. If the regulator looks at competition as an ongoing process, any red flag (*take for example surge pricing by cab aggregators or degraded privacy policies of social media giants,* etc.) would enable it to pre-empt possible violations. It would further enable the regulator to prevent the possible violation at its very roots by an ex ante application of the law. In this light, the recent Report of Competition Law Review Committee, 2019 (India), becomes pertinent. Although the committee acknowledged the use of data as the new form of currency which has a bearing upon the market power of entities having access to data, the committee refused to include words such as 'control over data' or 'specialised assets' as factors under Sect. 19(4) of the Competition Act, 2002 (Ministry of Corporate Affairs, 2019). The committee's view is that Sect. 19(4)(b) uses the term 'resources of the enterprise' which is inclusive in nature enough to bring 'big data' within its ambit. But the question is that such language has been there since the legislation's inception but the regulator failed to apply it in a data-specific scenario. Another example can

be the earlier discussed *Samir Agrawal case*,[14] where Uber's conduct with respect to surge pricing was not considered to be anticompetitive. However, in the year 2020, the Ministry of Road Transport and Highways issued the Motor Vehicles Aggregator Guidelines, 2020 (Ministry of Road Transport and Highways, Government of India, 2020), which capped surge prices to a maximum of 1.5 times[15] the base fare. While the objective of the guidelines inter alia included ease of doing business (Ministry of Road Transport and Highways, 2020), an underlying competition law concern can very well be read into it. The irony of the matter is that despite of explicit guidelines, riders are still facing heightened prices (Chadha, 2022). This demonstrates the limited and narrow vision of Competition Commission of India with respect to the objectives of competition law especially when an existing concern is there, but the same is not considered to be a red flag as per the traditional understanding of the law.

Conclusion

Competition law is situated somewhere between economic regulation and social regulation, and a one-dimensional analysis and interpretation of the same is not advisable (Lianos, 2018). The Competition Commission of India and other regulators across the world need to realize and acknowledge that competition laws have never been restricted to consumer welfare and there are multiple objectives which are consistent with the consumer welfare standard. These multiple objectives include consumer well-being, effective competition structure, efficiency, innovation, fairness, economic freedom, plurality, democracy and market integration. However, in light of digitalization, all these already existing goals and objectives need to be relooked in order to encompass the challenges posited by multi-sided markets and other concerns emerging from digitalization. More specifically with respect to 'data', possibility of anticompetitive conduct can be understood only if instead of doing a stand-alone analysis of the resource, we place it in the process of competition and then tend to study the possible strategies that can be adopted to abuse the market. Most importantly, 'choice' needs to be understood in broader light which is not restricted to prices only and encompass other factors such as forced dependence, privacy concerns, manipulation and influencing strategies. Furthermore, it needs to be realised that competition laws are for customers, market players and the ecosystem in general as 'consumer' is a relative concept and even a supplier can be a consumer.

Declarations

There are no competing interests to declare. I confirm that the citations in the attached manuscript are accurate. I confirm that I have read the submission policy and that my manuscript complies with the

[14] *Supra* note 58.

[15] *Ibid*, Regulation 13(4).

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Language rights of Indigenous Tribal Minorities (ITM) and their protection under the ambit of human rights law

Importância dos direitos linguísticos das minorias tribais nativas e sua proteção no âmbito do Direito dos Direitos Humanos

Sheikh Sultan Aadil Huqu

Chimirala Uma Maheshwa

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Language rights of Indigenous Tribal Minorities (ITM) and their protection under the ambit of human rights law*

Importância dos direitos linguísticos das minorias tribais nativas e sua proteção no âmbito do Direito dos Direitos Humanos

Sheikh Sultan Aadil Huque**
Chimirala Uma Maheshwari***

Abstract

This paper argues that lack of due recognition to the role that language plays in accessing health care services and in crucial health care communications manifests not just in negligent legislative action but also as systemic discriminatory practices that denies the Indigenous Tribal Minorities[1] communities (ITM) their human right to life. Therefore, this paper begins by examining whether Language Rights (LR) are integral to Human Rights under various International Treaties & Conventions and the extent to which they are substantive in protecting the Linguistic Rights of Indigenous Tribal Minorities (ITM[2]) communities in general but with specific reference to case studies and case-laws from India. Given the articulation of language being 'basic' of basic human rights when it comes to health care and accessing health care[3], this paper examines whether non-recognition of LR of Indigenous Tribal Minorities, results in injustice and violation of their human rights. To address the questions raised, this study reviews relevant literature and then examines doctrinally several key judgments that have engaged with questions pertaining to LR as such, its connection with human rights and finally with specific reference to health spaces. This study concludes that language rights are first and foremost the rights of individuals; states do have a constitutionally built-in obligation to protect the linguistic rights of ITM as a basic human right to protect and promote justice, human dignity and ones right to life with respect. Following our findings, the paper studies various

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[1] ITM stands for Indigenous, Tribal, Minority and Minoritized communities. In this study, we adopt the understanding of ITM as conceptualized by Tove Skutnabb-Kangas, Robert Phillipson and Robert Dunbar in their writings but specifically in the Nunavut Report (2019). The authors argue that naming, recognizing and perpetuating a community as ITM in itself involves violence and is a manifestation of power-wielding institutional structures of the supra-national organizations and nations. In this paper, we are working with the tribes of Odisha, Telangan and Chhattisgarh, India. The term Minority is vaguely defined in law and is inclusive of ethnic, religious, immigrant and linguistic minorities. In LL research, minority is understood as a minoritized language, non-official language or as revitalised language. In this study minority languages will refer to the languages recognized as tribal languages or non-schedule 8 languages or as languages spoken by ITM communities.

[2] MOHANTY, A. K. *The multilingual reality*: living with languages. UK: Multilingual Matters, 2018.

[3] MANN, J. *et al* (1994). Health and Human Rights. Health and Human Rights review, 1, p. 1-25.

best practices followed in Linguistic Rights for Health spaces from which jurisdictions with ITM communities (irrespective of their numbers) can possibly adopt in order to ensure their right to health care.

Keywords: Indigenous Tribal Minorities (ITM); language rights; indigenous rights; access to health; human rights; linguistic discrimination.

Resumo

Este artigo começa com o argumento de que os direitos linguísticos são considerados como parte dos Direitos Humanos sob vários Tratados e Convenções Internacionais. Em caso afirmativo, até que ponto o reconhecimento é substantivo na proteção dos direitos linguísticos, especialmente com referência às comunidades de minorias tribais indígenas (ITM) em todo o mundo e com estudos de caso envolvendo a Índia. Além disso, esta pesquisa examina se a proteção do idioma ou dos direitos linguísticos abrange a importância do idioma no acesso à saúde, considerado um dos direitos humanos mais fundamentais, e como, devido ao não reconhecimento dos direitos linguísticos das minorias tribais indígenas, há é um grave erro judiciário e violação de seus direitos humanos. Este artigo também envolverá uma análise legal crítica de vários julgamentos sob várias jurisdições e como a questão dos direitos linguísticos foi considerada e até que ponto foi considerada instrumental na ligação com os direitos humanos, como o acesso a serviços de saúde. Este artigo, tomando como exemplo a não acessibilidade ao acesso à saúde devido à falta de reconhecimento linguístico, tenta desvendar como a linguagem desempenha um papel crucial, especialmente nas comunidades de minorias linguísticas, especialmente a de Tribal Indígena e resulta em discriminação devido à comunicação lacuna que foi criada devido à abordagem legislativa negligente. Por fim, o artigo estuda várias boas práticas seguidas por alguns dos países com as quais outros países podem aprender e implementar em suas respectivas legislações para proteger os direitos humanos das comunidades indígenas minoritárias tribais.

Palavras chave: Minorias tribais nativas, Direitos Linguísticos, direitos dos povos nativos, Acesso à saúde, Direitos Humanos, discriminação linguística.

1 Introduction

A single all-inclusive understanding for 'language' is elusive. Yet within the domain of language Policy and Planning (LPP) language is recognized a marker of identity, as a tool for emancipation/oppression/essentialist interests, as a right, as a problem, as a resources, as a neural faculty and as a potential trigger for conflict as well as peace. It is this enigmatic multi-dimensional nature of human capability called language that has been the subject of modalities of dominance through legislative actions vis-a-vis language policies (of nations and nation-states). With respect to demographics with ITM populations' language then becomes the 'good' for special accommodations and affirmative action's citing either the argument of access and inclusion or preservation politics or linguistic activism but often merging more than one. For example , India has ample instances of all three and hence language, as stated above is both a site for accommodation (in schools for ITM children in Chattisgarh/Odisha) and affirmative action (Tulu language reservations in higher education)[4].

Within the niche but crucial area of public policy on language, there is a consensus that a State can claim to be secular, but no State can claim to be language--less simply because of the need to communicate and the need for the communication to percolate up-down the channels of institutional mechanisms. Therefore, the choice of language for the purpose then becomes a natural advantage for its speakers and a matter of 'learning' for the non-speakers. It is the matter of language--related access for the second group of citizens who then are categorized as ITM communities that is the focus of this paper. Kymlika [5] points out that in demographic locations where ITM are in considerable numbers either a *territorial* or a *personality* principle is said to be operational, yet, not necessarily substantively operational for an advantage. For instance, it is possible that an ITM child will access primary education in her language in school yet, in the hospital, she may not have a translator/interpreter for language concordant communications with the medical practitioner. So, would this ins-

[4] CHIMIRALA, U. M. When teachers take notice of the schoolscape: a Q method study of teacher perception of schoolscape of Indigenous Tribal Minority (ITM) Schools of Chhattisgarh, India. *Journal of Multilingualism and Multilingual Development*, 2022.

[5] KYMLICKA, Will; PATTEN, Alan. Language rights and political theory. *Law and Politics Book Review*, v. 14, n. 8, p. 630–633, 2004.

tance then count as valuing the LR of the ITM person (as well as the child's right to language concordant communications)? Language then can be a source of power, social mobility, and opportunities [6] and equally the reason as to why the ITM communities are constantly denied their right of equality in every sphere of social and political life simply since their language rights are not recognized. Williams and Snipper[7] emphasize that "in some quarters, language is a form of power. The linguistic situation of a country's society usually reflects its power structure, as language is an effective instrument of societal control". According to Makoni and Trudell 'it is undeniably true that communities of speakers of smaller languages tend also to be the less politically empowered communities. May[8] contends that

> Language loss is not only, perhaps not even primarily, a linguistic issue – it has much more to do with power, prejudice, (unequal) competition and, in many cases, overt discrimination and subordination... Language death seldom occurs in communities of wealth and privilege, but rather to the dispossessed and disempowered.

Language Rights are often described as the right to speak one's own language in legal, administrative, and judicial spaces, the right to receive education in one's own language, and the right for media to be broadcast in one's own language - at par with the dominant language-speakers. Language policy in ITM dominant geographies often posits the need for ITM peoples to know the 'dominant' language at the cost of their own identity, capabilities, and control of their livelihood conditions[9]. The argument that Mohanty makes is that the language policy then creates a double divide between the 'natural' opportunity to access and the 'struggled' to access the very same state service. Linguistic rights protect the individual and collective right to choose one's language or languages for communication both within the private and the public spheres. Specifically, for ITM Communities the opportunity to use one's own language can be of crucial importance since it protects individual and collective identity and culture as well as participation in public life and which essentially engulfs the crucial development of human capabilities not just for democratic participation but for the fulfillment and attainment of well-being and freedoms (Nussbaum)[10]. It is with this conviction that the State must take legislative, judicial, and law enforcement steps to prevent egregious abuses of the linguistic rights of ITMs to protect, advance, and actualize their basic human rights of which we deem health is primary. Thus, with this proposition, that non-recognition of language rights for ITM communities impacts access to state services especially in health spaces and that such contexts operationalize systemic discriminatory standards towards their right to life, this paper is divided into the following subsections. The first section attempts to understand linguistic inequality as a systemic-institutional and agential mechanism rather than a case of 'natural death' of languages and hence presents the geopolitical context in which this paper is set in. The second section explains the role of language in accessing health space to underscore the place of language Rights as an integral part of human rights. The third section discusses how 'languages' are addressed in human rights discourses within the frame of International Law. The fourth segment examines the state obligations to language rights where we discuss the case of India. Finally, we examine judicial engagement with the question of access to health space with specific reference to ITM peoples and how language is implicated in these cases.

1.1 Understanding Linguistic Inequality: the case of India

Linguistic inequality is understood as a specific form of language contact which is a consequence of the unequal social valuation of languages, varieties, or dialects (by region, age, class and so on)[11]. For better understanding of this concept, reliance can be placed on Jonathan Pool's paper "Thinking about Linguistic Discrimination[12]". According to Pool, at least five language-associated inequalities appear in political discourse. They are:

[6] VAN DIJIK T. A. Social cognition and discourse. *Handbook of language and social psychology*, n. 163, 1990. p.183.

[7] WILLIAMS, James D.; SNIPPER, Grace Capizzi. *Literacy and bilingualism*. [S.l]: Longman, 1990.

[8] MAY, Stephen. Uncommon languages: The challenges and possibilities of minority language rights. *Journal of Multilingual and Multicultural Development*, v. 21, n. 5, p. 366-385, 2000.

[9] MOHANTY, A. K. *The multilingual reality*: living with languages. UK: Multilingual Matters, 2018.

[10] NUSSBAUM, M.; SEN, A. (ed.). *The quality of life*. Oxford: Clarendon Press, 1993.

[11] BONNIN, Juan Eduardo. New dimensions of linguistic inequality: an overview. *Language & Linguistic Compass*, v. 7, 2013.

[12] POOL, Jonathan. Thinking about linguistic discrimination. *Language Problems and Language Planning*, v. 11, p. 03–21, 1987.

1. unequal attributes of different languages,
2. unequal privileges granted to the users of different languages,
3. unequal linguistic skills of different persons,
4. unequal statuses conferred on different persons by linguistic rules and customs, and
5. Inequalities covered with language but not caused or motivated by language.

When a linguistic inequality is alleged, however, it is often unclear which kind it is and how it is defined. Discourses about linguistic inequality are discursively constructed in talk, but again it is not clear which kind of inequality a given action responds to. In complex situations there are many plausible ways to measure linguistic inequality, and one can modify or even reverse conclusions by changing measurement methods. Even when inequality derives from a single linguistic resource, a change in its allocation can be measured as both an increase and a decrease in linguistic inequality. However, when we define inequality in legal terms basically it is absence of rule of law or presence of arbitrariness and discrimination.

In case of India, tribal peoples are construed as minority in most Indian States, except in some States of the North East, where absolute majorities or relative majorities of the population belong to the tribal population. It has to be mentioned that many of the 623 Scheduled Tribes have shifted their traditional native language by adopting one of the major languages spoken in their area, district or State of residence. It is estimated by that about 50% of people in the ethnic groups do not claim an ethnic mother tongue, but normally have the dominant culture and language of the area or the language of another dominant group as their mother tongue[13]. Several small and relatively lesser-known tribal languages spoken in remote corners of India have shown a decline, as per the findings of the 2011 Language Census released by the government recently. These include the

> Sema language of the Naga tribe of the same name, which showed a decadal growth increase (between 2001-2011) of -89.57, the Monpa language of Arunachal Pradesh (-75.48), Nagaland's Phom (-55.58), Odisha's Jatapu (-49.08), Himachal Pradesh's Lahauli (-48.89) and Bhumij of Eastern India (-42.02).[14]

We can see the status of declination of various ITM languages as per the census in the following table:

LANGUAGE	STATUS	DECADAL PERCENTAGE INCREASE (2001-2011)	SPOKEN IN
Santali	Scheduled	13.81	Eastern India
Bodo	Scheduled	9.81	Assam
Sema	Non-Scheduled	-89.57	Nagaland
Monpa	Non-Scheduled	-75.48	Arunachal Pradesh
Phom	Non-Scheduled	-55.58	Nagaland
Jatapu	Non-Scheduled	-49.08	Odisha
Lahauli	Non-Scheduled	-48.89	Himachal Pradesh
Bhumij	Non-Scheduled	-42.02	Eastern India
Korwa	Non-Scheduled	-17.73	Chhattisgarh
Rabha	Non-Scheduled	-15.04	Assam
Maram	Non-Scheduled	-13.07	Manipur
Sangtam	Non-Scheduled	-9.82	Nagaland
Yimchungre	Non-Scheduled	-9.64	Nagaland
Lepcha	Non-Scheduled	-6.51	Sikkim
Nocte	Non-Scheduled	-6.43	North-eastern India
Tangsa	Non-Scheduled	-3.65	Arunachal Pradesh
Konyak	Non-Scheduled	-1.46	Nagaland
Ao	Non-Scheduled	-0.53	Nagaland

Further if we go by the definition given by the World Bank that terms, 'indigenous peoples', 'indigenous ethnic minorities', 'tribal groups', and 'scheduled tribes', describe social groups with a social and cultural

[13] PATTANAYAK, D. P. *Multilingualism and mother tongue education.* Oxford and Delhi: Oxford, University Press, 1981. p. 83

[14] DOWN TO EARTH. *Language census*: many tribal tongues now have fewer takers. Available at: https://www.downtoearth.org.in/news/environment/language-census-many-tribal-tongues-now-have-fewer-takers-61044 Accessed on: 8 out. 2022.

identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process[15]. Similarly if we refer to the district of Dantewada in the state of Chhattisgarh which has got comparatively a higher percentage of ITM community in terms of use of their language, as per 2011 census 64.16% of the population in the district spoke Gondi, 14.88% Halbi, 3.81% Duruwa, indicates that the majority of the population speaks all these Tribal languages but neither the same is recognized under the 8th schedule Tribal-language[16]. Further, the demographic majority is construed as an ideological minority by a demographic minority that acts like an ideological majority. The Constitution of India includes no definition of linguistic minorities. The Supreme Court of India has defined minority languages as separate spoken languages, even if the language does not have a separate script or has no script at all. Thus, although the Constitution does not mention the 'non-scheduled languages' and thus does not explicitly recognize them as minority languages; it does contain a general form of safeguard of the smaller languages to protect them from discrimination.

Within the Indian constitution, there are several provisions which even though do not explicitly prohibit discrimination based on language, they do ensure various safeguards and protection against linguistic discrimination in its various forms. Like, Article 14 embodies the general principles of equality before law and prohibits unreasonable discrimination between persons. It embodies the idea of equality expressed in the preamble. Similarly, Article 15(1) prohibits discrimination on grounds of religion, race, sex, caste, or place of birth. Further, Article 19(1)(a) of the Indian Constitution guarantees to all citizens the *right to free speech and expression.* Across scholarship and comparative law, a fair amount of consensus exists with respect to one proposition: the freedom of language is central to the freedom of speech. In other words, the right to free speech is meaningless without a concomitant right to speak in one's own language, for speech is impossible without language. Further if we refer to Article 21 of the Constitution of India guarantees a fundamental right to life & personal liberty. The expression 'life' in this article means a life with human dignity & not mere survival or animal existence. It has a much wider meaning which includes right to livelihood, better standard of life, hygienic condition in workplace & leisure. So, as we have discussed earlier that how non-recognition of language rights directly leads to discrimination and creates a barrier in accessing the various public spaces like health care center. Which, therefore, also results in violation of Article 21 of the Indian constitution i. e. fundamental right to life and liberty. In Article 29 the Constitution provides explicit guarantees for the protection of minorities. But the same is yet to be used for providing linguistic protection to the ITM language.[17] Lastly, in the chapter of the Constitution relating to Directive Principles of State Policy, Article 46 mandates the State to "promote with special care the educational and economic interests of the weaker sections of the people [...] and shall protect them from social injustice and all forms of exploitation".

As, it can be observed from the above that the demographic distribution of ITM people along with the constitutional provisions expects individual states to create ITM specific accommodation wrt language. Yet Koos Malan[18] points that despite the substantive and statutory provisions in the language policy the use of *discretionary yet aspirational clauses such as* 'as far as practicable', 'as feasible as possible' or 'as much as possible' render any substantive benefit for the ITM community a myth since

> any provision for ITM languages in the living space is an affirmative action left to the state's discretion as mentioned in the *discretionary clause* requiring The President of India to issue such directions to any

[15] WORLD BANK. *The World Bank Operational Manual Operational Directive (OD) 4.20:* indigenous peoples. Available at: https://www.ifc.org/wps/wcm/connect/4da94701-07cc-4df3-9798-947704a738d4/OD420_IndigenousPeoples.pdf?MOD=AJPERES&CVID=jqewORB. Accessed on: 8 out. 2022.

[16] INDIA. *Census by Mother Tongue.* 2011. Available at: http://www.censusindia.gov.in/2011census/C-16.html. Accessed on: 8 out. 2022.

[17] Article 29(1) provides that, "Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them." INDIA. [Constituicion (1950)]. *Constitución de India.* Available at: https://www.bcn.cl/procesoconstituyente/comparadordeconstituciones/constitucion/ind. Accessed on: 8 out. 2022.

[18] MALAN, K. Observations on the use of official languages for the recording of court proceedings: aantekeninge. *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg*, n. 1, p. 141-155, 2009.

State *as he considers necessary or proper* for securing the provision of such facilities.[19]

If we refer to the above discussion where we cited Jonathan Pool and moved on to discuss the Indian constitutional provisions for languages, the notion of linguistic inequalities look different with reference to the ITM communities. And the same when applied to health care facilities then it becomes more evident, since there are no doctors who are trained with such language, no translators, not even the sign boards in the health care centers exist in any ITM language, rather it seems by imposition of bilingual approach by using only Hindi and English in public sphere, forcing the ITM communities to inequalities and thereby falling prey to unjust policy and endangering their basic right to health.

1.2 Conceptions of linguistic disadvantage

Speakers of different languages can be advantaged i.e., naturally privileged or disadvantaged depending on how their language repertoire 'fits' with their linguistic environment. On this ground, Andrew Shorten in his article "Four Conceptions of Linguistic Disadvantage"[20] points to how people could be disadvantaged:

1. To treat a person's language repertoire as a resource, whose value depends on the language skills of others
2. To know how satisfied people are with their linguistic environments whether they can avail the necessary services which demand linguistic proficiency
3. To equate linguistic disadvantage with diminished access to resources, and recommends comparing different language repertoires according to the share of external resources their holders have access to
4. To what a language repertoire equips a person *to be and do* within a given linguistic environment and equates linguistic disadvantage with capability deprivation.

Using Andrew Shorten's notion of '*Verbal independence*' & '*Q-Value*', all four versions can be seen to work in tandem In the case of ITM people in India. *Verbal independence* is basically defined as 'the functioning of being able to communicate, including being able to speak and understand the local language'. Not being verbally independent is frequently a source of disadvantage and may undermine a person's ability to live in a fully human way, it is unnecessary to treat it as a separate functioning. The case of instating (and then later dismantling) 'translators' in several key spaces within the hospital for language concordant conversations with medical professionals and caregivers[21]. Though the arrangement recognizes a major gap in the policy-wheel for ITM people (speakers of Gondi language, of Adilabad, Telangana, India), it was a policy initiative to plug the case of low *Q-value* in the language repertoire of the parties involved. The concept of *Q-value* has been provided by De Swaan[22], is understood as the ability to communicate in a language. The basis of De Swaan's model relies on economic concepts, as languages are perceived as hyper collective goods. Choosing to learn a language is an investment, the more users, the greater the investment. De Swaan estimates the worth or value of a language in terms of its Q-value. This gives an indication of its prevalence (the number of people within a language community who speak it) and its centrality (the number of people knowing another language who can use it to communicate). So, further referring to the Adilabad case, ITM people's disadvantage could be addressed in two ways: one by altering the ITM people's linguistic repertoires by way of bilingual educational opportunities and thus increasing the communicative value in her environment or by simply the public provision of translation services in the State health services. Yet when the need to formulate either of the above possibilities, we find that the discourses that use 'language' and ideologies that are couched in 'language' create conditions that discursively construct versions that favor negative differential treat-

[19] Official Languages Act INDIA, Art 350a,1963/1967. See also; CHIMIRALA, U. M. When teachers take notice of the schoolscape: a Q method study of teacher perception of schoolscape of Indigenous Tribal Minority (ITM) Schools of Chhattisgarh, India. *Journal of Multilingualism and Multilingual Development*, 2022. Towards a convivial tool for narrative assessment: Adapting MAIN to Gondi (Dantewada, India), Halbi and Hindi for Gondi- and Halbi-Hindi speaking bilinguals. ZAS Papers in Linguistics 64, 77-99.

[20] SHORTEN, A. Four conceptions of linguistic disadvantage. *Journal of Multilingual and Multicultural Development*, v. 38, n. 7, p. 607-621, 2017.

[21] THE BETTER INDIA. This Dynamic IAS Officer Has a Village Named in Her Honour. Here's Why. Available at: https://www.thebetterindia.com/228620/ias-officer-hero-gondi-divya-devarajan-adilabad-village-named-after-collector-inspiring-vid01/ Accessed on: 9 out. 2022.

[22] SWAAN, Abram de. *Words of the world*: the global language system. Cambridge: Polity Press and Blackwell, 2001.

ments which then construe discriminatory practices as legitimate and favorable to all while necessarily pushing the ITM peoples to verbal and participatory dependency that fringes on their human rights in addition to their privacy.

1.3 Language discrimination and its forms

1.3.1 Discursive discrimination

According to Kristina Boreus,[23] "discrimination is a violation of the ideal of a fair and equal society, a minimum requirement of which is that groups of people are not directly treated as inferior to the rest of the population". Further, Kristina Boreus describes *'Discursive discrimination'* which is vital from language perspective, which she states that appears when such treatment takes linguistic expressions (and not, for instance, the expression of physical violence). A group 'membership' might be alleged, the discriminating part might find similarities between people that these persons do not themselves consider as similarities, or not as similarities important enough to make them belong to the same group. The main types of discursive discrimination:

1. exclusion,
2. negative other-presentation,
3. discriminatory objectification,
4. arguing for unfavorable treatment of group members

So, if we go by the definition of *discursive discrimination* and the criteria provided under it completely fulfills the status of ITM speakers in India, due to their language they are excluded from availing public services like in health care spaces, further due to imposition of bilingualism in most of the health care spaces it results in an unfavorable treatment of ITM group members. In order to have in depth understanding of Linguistic Discrimination.

[23] BORÉUS, Kristina. Discursive discrimination a typology. *European Journal of Social Theory*, v. 9, n. 3, p. 405–424, 2006.

1.3.2 Systemic Discrimination

Reference can be made to Pavi Ganther's article on "*The Doctrine of Systemic Discrimination* and its Usability in the Field of Education"[24], Ganther states that the Discrimination can be defined as the sum of denial of these alternatives. According to the Ganther, 4Rs:

1. Rights
2. Recognition
3. Resources
4. Representation

Above four R's are essential in order to help professionals in minority education and their communities move from the margins towards the center, and to become subjects of their own lives. Päivi Günther concludes that discrimination can be structural, without any conscious intent on the part of the perpetrator. When discrimination has been built into a system, those who manage the system i.e. the 'perpetrators' need not themselves have discriminatory e.g., linguists ideologies or intentions, the system does the discrimination for them. Ganther distinguish between *systemic and structural discrimination* on criteria as intention or public authorities' involvement in discrimination. If these Rs' are not recognized and enforced then the education system itself continues to promote the segregation of ethnic minorities to the vicious circle of double divide that reinforces the self-perpetuating cycle of advantage, accelerated gains and privilege for the dominant while the opposite becomes a structural manifestation of discriminatory practices for the ITM people. If we apply the above theoretical concept to the linguistic discrimination faced by ITM, we can state that this form of Linguistic Discrimination has become structural in nature. Considering the fact that, the State is focusing mainly on promoting and using the majority or popular language in an universal manner, without accommodating the linguistic recognition of minority tribal communities, thereby endangering their right to access to health & welfare.

[24] GYNTER, Paivi. On the doctrine of systemic discrimination and its usability in the field of education. *International Journal on Minority and Group Rights*, v. 10, n. 1, p. 45-54, 2003.

1.3.3 Structural discrimination

Further, to understand how the linguistic inequality results into discrimination. We have to refer to the doctrine of *linguistic discrimination* as discussed by Van Dyke, which provides two major tenets, and these also constitute its two major weaknesses. According to Van Dyke first this doctrine presumes that discretion is the key to justice. Second, it presumes that inefficiency is a legitimate reason to deny all person's equal treatment by a state. Further Douglas[25] Rae provides the following criteria to categorize linguistic discrimination:

1. *Identical treatment of languages* would require that whatever the authorities do to one language they do to the others. For example, if English, Twi, and Ukrainian are treated identically, any traffic sign posted in English must be posted in Twi and Ukrainian
2. *Equal treatment of languages* would require that each language be treated as well as each other relevant language. Any inferior treatment of a language must be offset with some other kind of superior treatment of that language.
3. *Equal treatment of speakers* is a yet more comprehensive standard of linguistic non-discrimination.

2 Understanding the role of language in accessing health space

While much of the health care debate is being guided by how the arguments for or against reform are "framed," policymakers are paying scant attention to a more basic linguistic issue: many persons are deprived of adequate care because they are unable to communicate with their providers. Language barriers are very real and affect how care is provided and received. Communicating across language barriers is a challenge for clinicians and health systems as well as patients and when it comes to the speakers of ITM communities, then it becomes more critical. The greater the differences, the more likely the frames of reference drawn on will be different. Therein lies the potential for misunderstanding. Thus, in this section we will be discussing various types of linguistic barriers & its impact. As well as how there is a need for a change of approach from the side of Government in addressing this issue & how it can be addressed from a linguistic as well as legal perspective.

2.1 Language barriers in health space

Improving the health of the world's 370 million indigenous people is a crucial global health priority. Indigenous groups worldwide tend to have worse health outcomes than corresponding non-indigenous populations[26]. These disparities stem from structural forces of colonization, poverty, and marginalization, as well as from barriers to accessing health care. In this section, we discuss language as an example of a barrier to health care and advocate for greater consideration of indigenous languages when it comes to access to health. While healthcare systems often struggle to deliver quality care across a language barrier, in fact the fundamentals of providing linguistic access are simple. The first step is to identify who needs the service and in which language. Languages of lesser diffusion or languages spoken by relatively small populations in a given area pose a unique challenge to healthcare systems around the world. Language is considered as the key to communication, in case of India where we have a very rich and varied linguistic diversity, sometimes it is acting as a bane to linguistic minorities and acts as a barrier for them in order to access different facilities and benefits. There is compelling evidence that language barriers have an adverse effect on initial access to health services. These barriers are not limited to encounters with physician and hospital care. Patients face significant barriers to health promotion/prevention programs; there is also evidence that they face significant barriers to first contact with a variety of providers. In spite of a growing recognition of the importance of doctor-patient communication, the issue of language barriers to healthcare has received very little attention in India. The Indian population speaks over 22 major languages with English used as the lingua franca for biomedicine. Addressing language barriers to healthcare in India requires a stronger political commitment to providing non-discriminatory health

[25] RAE, Douglas. *Equalities*. Cambridge: Harvard University Press, 1981.

[26] UNITED NATIONS. *State of the world's indigenous peoples*: indigenous peoples' access to health services. New York: United Nations Department of Economic and Social Affairs, 2015.

services, especially to vulnerable groups such as ITM population.

As Kymlicka and Patten have pointed out, "not even liberal states have been neutral towards language"[27]. While Kymlicka argues that a liberal state cannot be neutral, Patten suggests that this is an achievable goal. The history of nation-building has traditionally involved the promotion of the official language and the repression of others, even in liberal states.[28] States have explicitly or implicitly assumed that the linguistic minorities should accommodate to the majority language. In general, one of the main factors influencing language policy decisions and their linguistic and social outcomes is that these decisions are often complicated by local political concerns and often overlooked when it comes to ITM languages if we consider our Indian context. Language acclimatizes the individual and the community to the surrounding environment by equipping them with the necessary knowledge, which has been accumulating and evolving together for centuries. As stated by Pattnayak[29], in India, linguistic diversity is taken as 'a fact of life' and, by extension, is considered not only unproblematic but as integral to the rich texture of living. Which further he has epitomized in the following remark:

> In the developed world [...] two languages are considered a nuisance, three languages uneconomic and many languages absurd. In multilingual countries, many languages are facts of life; any restriction in the choice of language is a nuisance; and one language is not only uneconomic, but also absurd.

2.2 Impact of linguistic barriers on right to access health spaces

Conversation is central to nearly every human endeavor, yet few people have a full appreciation of the complex intricacies associated with linguistic behavior, or potential sources of miscommunication when people from different linguistic backgrounds speak with one another. Some of the most basic and central tenets of linguistic science are taken for granted by nearly every normal speaker because their use of language in day-to-day life is ubiquitous. For example, every normal child learns their first language without the aid of formal instruction, and they have no memory of the enormity of this magnificent accomplishment. This is a universal fact pertaining to all normally developing children anywhere on earth, regardless of the society into which they are born.[30]

2.3 Linguistic marginalization and health disparities

As in the above section of this paper we have discussed about how language inequality and disadvantage leads to linguistic discrimination. We can say that this linguistic discrimination results into a *snow-ball effect* which can be equated with the types of discursive discrimination as provided by Kristina Boureus. Basically, the *snowball effect* is a function of complexity. It happens when an issue of minor significance builds up and grows larger. As the minor issue continues to grow, it becomes more and more serious until it snowballs out of control forming a vicious circle of chaos and confusion created by the parties who encouraged it in the first place. In systems language, the vicious circle created by the snowball effect is a reinforcing loop that tightly wraps around itself and negatively drives behavior in one direction, usually a bad one. So, with this another important snowfall effect caused due to linguistic discrimination is Linguistic marginalization, (also referred to as *linguistic minoritization*), is commonly recognized as a major barrier to access to health services and health information, yet its contribution to health disparities remains largely under-theorized and under-researched. In clinical practice, the 'LEP' (Limited English Proficiency) marker is frequently tied to global assumptions about proficiency and deficit views of language that position minority language speakers as deficient. For example, during patient intake processes, the default measure of English proficiency is spoken English proficiency, and literacy level is regarded as literacy in English[31].

[27] KYMLICKA, Will; PATTEN, Alan. Language rights and political theory. *Law and Politics Book Review*, v. 14, n. 8, p. 630–633, 2004.

[28] ARCHIBUGI, Daniele. The language of democracy: vernacular or esperanto?: a comparison between the multiculturalist and cosmopolitan perspectives. *Political Studies*, v. 53, n. 3, p. 537-555, out. 2005. p. 4.

[29] PATTANAYAK, Debi Prasanna. Multilingualism in India. *Language in Society*, v. 24, n. 4, p. 608-611, 1995.

[30] MEUTER, Renata F. I. Overcoming language barriers in healthcare: a protocol for investigating safe and effective communication when patients or clinicians use a second language. *BMC Health Serv Res.*, v. 15, n. 371, 2015.

[31] SHOWSTACK, Rachel *et al.* Language as a social determinant of health: an applied linguistics perspective on health equity. *American Association for Applied Linguistics*, 2019. Available at: https://www.aaal.org/news/language-as-a-social-determinant-of-health-an-applied-

Interdisciplinary research collaborations between applied linguists and public health researchers demonstrate the ways that a patient's language interacts with her health and health care, as well as other aspects of her life and background, to lead to particular health outcomes. Wide-ranging studies on language concordance, or the provider's use of the patient's preferred language, have uncovered that a shared language shapes health care encounters on multiple levels. It has been shown that language concordant providers ask more questions and are less concerned about medical malpractice complaints than providers who work through an interpreter. Patients with language concordant providers display greater trust, show more agreement and are more likely to follow doctor recommendations, although research has shown that this depends on clinician proficiency. As per a research, Patients with type 2 diabetes, moreover, have been found to have better health outcomes when their provider speaks their language.[32]

Martínez argues for a '*syndemic sensibility*' when considering the relationship between language and healthcare. This sensibility accounts for the complex interactions between proficiency in the dominant language and other social factors embedded within multiple health conditions; he points out that language researchers, who understand communication as a process of inter subjectivity, or shared experience in interaction that leads to understanding, are needed to better understand this relationship. To determine how implementation practices function in specific communities, there is a need to include community voices in the conversation. Language is as basic as food & shelter but the same has often been ignored and the plight of ITM because of linguistic barriers is the major reason for their under development. We try to impose a foreign language in the name of integration, thereby endangering their basic identity and their fundamental rights. We can frame it as '*Linguistic Colonisation of Tribals*', as it has been researched and been proved whenever it comes to protection of an endangered entity, it may be an animal, plant, human or here in our study ITM, then the best way to protect is by providing them with a familiar scenario without any external imposition or influence. But the action of the state & policies especially in terms of Language is rather highly arbitrary and acting as an eraser instead of being a protector or retainer.

3 Understanding 'language rights' as an integral part of 'human rights'

Language rights have a more disputed character than what some seem to suggest, as there is no universal understanding of language rights. They are not essentially given and do not exist prior to positive enactment. Further the misrepresentation of the actual status and significance of language rights in the context of human rights law, international law and constitutional law. The claim to linguistic human rights sharply contrasts with the demands of positive law, both international and domestic.[33] The linguistic human rights approach oscillates between, on the one hand, considering linguistic human rights as international law norms and, on the other, considering them as abstract ideals or claims; between, the one hand, sweeping affirmations of massive violation and deprivation of linguistic human rights and even linguistic genocide and, the other, the quest for what should be regarded as inalienable, fundamental linguistic human rights.

Language rights are local, historically rooted claims, not fixed universals. In fact, this does not differ very much from the actual status of many human rights: for instance, property rights are the object of extensive restriction and regulation everywhere. International law does not offer credible and working models or a set of unambiguous principles and rules to accommodate linguistic diversity. Human rights with a linguistic dimension apply to the individual, as the language is merely the medium through which individuals enjoy their rights. On the other hand, linguistic rights as such imply a notion of *collectivity* since they are exercised with other members of a minority; in this sense, they should be regarded as group rights, that is rights which apply to a community.

In terms of combining language rights and human rights, the United Nations Special Rapporteur on minority issues defined linguistic human rights as:

> Obligations on state authorities to either use certain languages in some contexts, not interfere with the

linguistics-perspective-on-health-equity. Accessed on: 10 out. 2022.

[32] MARTÍNEZ, G. *Engaging language professionals for patient-centered outcomes research for latino communities*. Ohio and Kansas: Patient-Centered Outcomes Research Institute, 2018.

[33] ARZOZ, Xabier. The nature of language rights. *Jemie*, n. 6, jul. 2007.

> linguistic choices and expressions of private parties and may extend to an obligation to recognize or support the use of languages of minorities or indigenous peoples. Human rights involving language are a combination of legal requirements based on human rights treaties and guidelines to state authorities on how to address languages or minority issues, and potential impacts associated with linguistic diversity within a state. Language rights are to be found in various human rights and freedoms provisions, such as the prohibition of discrimination, freedom of expression, the right to private life, the right to education, and the right of linguistic minorities to use their own language with others in their group.[34]

The fundamental link between individuals, their language and their identity can be explained by the fact that each language has its own distinct way of conceptualizing the world. To clarify the linkage between language and identity, it is necessary to mention the hypothesis of linguistic relativity by Edward Sapir and Benjamin Lee Whorf. The main idea in this hypothesis is that every person views the world in her/his own native language. This hypothesis suggests that there exists a relationship between language and thought. Moreover, it suggests that the language "determines and resolves the thought and perception of its speakers"[35]. Consequently, the languages, which are entirely different in their vocabulary and structure, "convey different cultural significances and meanings." Therefore, it may be concluded that "the way people view the world is determined wholly or partly by the structure of their native language" and that a language is a manifestation of the minority's "spirit or mind". In some cases, speakers of minority languages have a certain degree of knowledge of the official language.[36] For them the use of the minority language is therefore not a practical necessity. It is more a voluntary exercise which can be explained by the satisfaction a person feels in speaking his/her language and the desire to make room for it in dealings with public bodies. For example, in the case of *State v. Tinno37* provides a textbook example of how linguistics has been used to interpret treaties.

The Idaho Supreme Court in *Tinno* was considering the meaning of Article IV of the Treaty of Fort Bridger with the Shoshone Bannock Tribes. That treaty included the promise that the Tribes "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." The question posed was whether 'to hunt' includes fishing. The court turned to the "expert testimony of Dr. Sven S. Liljeblad, a professor of anthropology and linguistics at Idaho State University, relating to the term 'to hunt' as the term was generically used in the languages of the signatory Indians." The expert testified that neither the Shoshone Tribe nor the Bannock Tribe separated hunting and fishing in their language; instead, the Shoshone verb, tygi, and the Bannock verb, *hoawai*, both refer to the process of obtaining wild food, whether fish, game, or plants. This shows how important language is for minority tribes and their most of the human rights are linked to it.

3.1 Analyzing 'language' in human rights frameworks

The evolution of international jurisprudence also allows us to make the connection between human rights and language rights. The recognition and status accorded to language rights is a political matter. Language rights are primarily constructed at the national level. The slippage between the lofty ideals of language rights and the concrete, judicially developed meanings of these rights confuse the real impact of our international language protection regime. In practice, case law has consistently favored linguistic assimilation rather than the robust protection of linguistic diversity that is espoused. Instead of strong language guarantees, only transitional accommodations are offered in the public realm for those individuals or groups yet unable to speak the majority language. For, example under institutional bilingualism, public services are offered in two different languages and public services can be conducted in either language whereas the minority languages are hardly accommodated, even if they are accommodated like in the form of translation services, they don't cover all the basic public services and are very limited in their scope. Thus, jurisprudence and state policies treat indi-

[34] SKUTNABB-KANGAS, T. Linguistic human rights. *In:* TIERSMA, Peter M.; SOLAN, Lawrence M. (ed.). *The oxford handbook of language and law*. Oxford: Oxford University Press, 2012.

[35] WHORF, Benjamin Lee. *Language, thought, and reality*: selected writings of Benjamin Lee Whorf. Cambridge: MIT Press, 2012.

[36] ULASIUK, Iryna; LAURENTIU, Hadirca. OSCE High Commissioner on national minorities on the use of languages in relations with the public administration, and on the supervision and enforcement of linguistic requirements. *International Journal on Minority and Group Rights*, v. 23, n. 2, p. 237-249, 2016.

[37] State v. Tinno, 497 P.2d 1386 (Idaho 1972).

genous language not as a valuable cultural asset worthy of perpetual legal protection, but as a temporary obstacle or disadvantage that individuals must overcome to participate in society.[38] The legal decisions take a narrowly utilitarian approach to language. Even, our international linguistic rights regime leans in the direction of assimilation on fair terms, not accommodation, and indigenous languages are structured as a disability, not an asset for cultural and social diversity.

3.2 Language in United Nations Conventions

Although a great number of international human rights instruments have come to light since the Universal Declaration of Human Rights (UDHR) in 1948, the nature and extent of language rights granted by them all proves to be very limited. International human rights instruments provide a basic regime of linguistic tolerance, that is, protection against discrimination and various forms of assimilation (compulsory, degrading, etc.). This protection is not granted through specific language rights, but through general human rights such as a right to anti-discrimination measures, freedom of expression, of assembly and association and rights to respect for private and family life.[39] These protections are granted to any individual, whether she is a member of indigenous or not. The Human Rights Committee (HRC) is the treaty body assigned with the supervision of the state-parties' compliance with the International Covenant on Civil and Political Rights (CCPR). In a case dealing with the right to commercial advertising in English language in Francophone Quebec, the HRC declared: "A state may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one 's choice."

For the HRC, English speaking citizens of Canada could not be considered linguistic indigenous as they constitute a majority in the state. However, this does not mean that their linguistic behavior is not protected by general human rights. The legal situation absolutely changes when we move from the area of tolerance to the area of use and promotion by public Shelties. Here, legal obligations imposed on states are scarce and lack legal bite. As a matter of fact, there is no cogent obligation to positively support indigenous language maintenance or revitalization. The key and isolated provision in this regard is Article 27 of CCPR, which states

> those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Those few words constitute the only specific provision of binding international law about the protection of speakers of indigenous languages.[40]

It is obvious that this clause leaves many issues unresolved. For instance, there is some controversy on the extent of the rights granted by Article 27 CCPR: "Whether they are exclusively of a negative character (protection against interference)?" or include a state obligation to take positive measures on behalf of the members of indigenous groups. It clearly shows that states are not obliged to give effect to any specific activity or measure. Article 27 of the Covenant on Civil and Political Rights is a weak article. Its lack of specificity means that, even though it may impose positive obligations on states to support indigenous or minority identity, the article leaves a wide discretion to states on the modalities of its applications.[41] Article 27 protects individual rather than collective rights, even though these rights are rights held by individuals by virtue of their minority group memberships. So, at this point, the pressing question is how membership is interpreted, but article 27 does not appear to offer any guidance. According to Thornberry, "there is no indication as to how 'membership' of a group is to be defined." Additionally, as Thio points out, "the question whether an individual belongs to a group also raises the problem of the identifier, whether this is the individual, the group in question or the state".[42]

[38] PAZ, Moria. The failed promise of language rights: a critique of the international language rights regime. *Harv. Int'l LJ*, v. 54, n. 157, 2013.

[39] PATTEN, Alan; KYMLICKA, Will. Introduction: language rights and political theory: context, issues, and approaches. *In:* PATTEN, Alan; KYMLICKA, Will (ed.). *Language rights and political theory*. Oxford: Oxford University Press, 2003. p. 1-51.

[40] UNITED NATIONS. *Language rights of linguistic minorities*: a practical guide for implementation. 2017. Available at: https://www.ohchr.org/en/special-procedures/sr-minority-issues/language-rights-linguistic-minorities Accessed on: 20 mar. 2022.

[41] DUNBAR, Robert. Minority language rights in international law. *International & Comparative Law Quarterly*, v. 50, n. 1, p. 90-120, 2001.

[42] THORNBERRY, Patrick. *The UN Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities*: background, analysis and observations. London: Minority Rights Group, 1993.

In many human rights instruments language is mentioned as one of the characteristics based on which discrimination is forbidden, together with race, color, sex, religion, political or other opinion, national or social origin, property, birth, disability, age or sexual orientation. For instance, Articles 2 and 7 of the Universal Declaration of Human Rights, Article 1.3 of the Charter of the United Nations, Article 2.2 of the International Covenants on Economic, Social and Cultural Rights, Articles 2.1 and 26 of the International Covenant on Civil and Political Rights, Article 2 of the Convention on the Rights of the Child, Article 1.1 of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms,[43] Analogous commitments appear in non-binding documents, such as paragraphs 5.9 and 25.4 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. The right to freedom of expression includes the right to freely choose the language of speech. It is the right to use one 's own language both in speech and writing, and to be "free of interference in one's linguistic affairs and identity." The freedom of language is "one of the most basic and immutable human rights that everyone should be able to have".

Sometimes, international organizations contribute to creating a false image of an extended level of protection of language rights. For instance, if one visits a United Nations Educational, Scientific and Cultural Organization (UNESCO) webpage and consults the international legal instruments dealing with linguistic rights listed there, one gets the impression that "linguistic human rights 'are a consolidated category with a sound basis in contemporary international law". Forty-four documents relevant for linguistic rights are gathered there, including UN and UNESCO Declarations and Conventions, UN and UNESCO Recommendations, European Declarations and Conventions, Inter-American Declarations and Conventions and African Conventions. But a review of the content of these instruments reveals that the set of linguistic human rights is less abundant, and their scope of protection less extensive, than what appears at its surface.

[43] FERRARO, Giulia. *Linguistic rights of minorities*: a comparative analysis of the existing instruments for the protection of the linguistic rights of minorities at international and european levels. 2018. Thesis (Doctorate in Modern Languages for Communication and International Cooperation) – Università degli Studi di Padova, Padova, 2018.

3.3 Language rights as measures of linguistic tolerance: the principle of non-discrimination

Language rights as expressions of a regime of linguistic tolerance are most closely associated with instruments such as the ICCPR and the ECHR. The most basic means of protection for speakers of minority languages is the principle of non-discrimination. This principle is expressed in Article 2 of the Universal Declaration[44]Essentially the same guarantee is provided in Article 14 of the ECHR and in Article 2(1) of the ICCPR. Article 26 of the ICCPR contains a wider guarantee of non-discrimination; unlike Article 14 of the ECHR, it applies not only in respect of the rights set out in the instrument itself but for all purposes and has therefore been described as a "stand-alone" guarantee of non--discrimination. The principle of non-discrimination has been reiterated and reinforced in the various instruments relating to minorities which have been developed in the 1990s. Article 4(1) of the Framework Convention is typical.[45]

While the term "national minority" is not defined in the Framework Convention, it should certainly include linguistic minorities. Similar provisions are contained in Articles 31 and 32 (especially 32.6) of the Copenhagen Declaration, Articles 3(1) and 4(1) of the UNGA Minorities Declaration, and in Article 2(1) and 2(2) of an Additional Protocol to the ECHR on the Rights of Minorities (the Minorities Protocol).[46] While the principle of non-discrimination seeks to ensure that speakers of minority languages are not subject to discrimination at the hands of the State, it does not ensure that such persons obtain governmental services through the medium of their language-measures which provide 'difference aware' equality. Furthermore, the principle of non-discrimination may give rise to difficult questions where

[44] Article 2, which read as "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". UNITED NATIONS. *Universal Declaration of Human Rights*. Available at: https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf Accessed on: 20 mar. 2022.

[45] EUROPEAN UNION. *Framework Convention for the Protection of National Minorities*. 1995. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cdac. Accessed on: 20 mar. 2022.

[46] DUNBAR, Robert. Minority language rights in international law. *International & Comparative Law Quarterly*, v. 50, n. 1, p. 90-120, 2001.

such measures of 'difference aware' equality are offered to one group only.

There is a strong argument in favor of legislative intervention where speakers of minority languages suffer discrimination based on their language, or, where their language is closely associated with ethnicity or national origins, discrimination based on ethnicity or national origins. For example, in the United Kingdom there is evidence of prejudice towards Gaelic and the other autochthonous languages. In the case of *Mandla v. Dowell Lee*,[47] the House of Lords set out several factors to be considered in determining whether an ethnic group within the meaning of section 3(1) of the RRA exists, one of the `relevant characteristics' (though not an `essential' characteristic) of which is a common language. While speakers of minority languages in the United Kingdom will generally be members of ethnic groups within the meaning of the RRA, this is not necessarily the case. Further, the decision in *Gwynedd County Council v. Jones*,[48] speakers of autochthonous minority languages cannot assume that they will benefit from the RRA's protection. The appellants were refused employment because they did not speak Welsh, and hence claimed to have suffered discrimination. However, the EAT ruled against them on the basis that,

> although the Welsh may have constituted a racial group based on nationality, English- and Welsh--speaking Welsh people were not separate ethnic groups, and therefore not separate racial groups, because differences in language alone were not sufficient to create separate ethnic groups within the meaning of the RRA.

The above discussion evidence that despite United Kingdom being a party to ECHR and RRA, an explicit reference to language-based discrimination is not made but indirectly refers to it and is decided on case-to-case basis.

3.4 Ensuring freedom of expression to linguistic minorities

For the individual to be an individual, to be a unique human being with dignity and with rights and freedoms, the right to freedom of expression is an essential right. Our identities, in significant part, arise from having the right to express our ideas and opinions, and to be able to do so in the language of our choice and by means of the form of expression which we choose - to be able to communicate this information to others by the medium of our choice. When the United Nations developed the Universal Declaration of Human Rights in 1948, it stressed the importance of freedom of expression. In the preamble to the Declaration, we find enumerated four rights of particular importance: "freedom of speech and belief and freedom from fear and want". The right to freedom of speech was elaborated in Article 19 of the Universal Declaration of Human Rights. This in turn led to Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights. The same that is true for any individual is true for minority groups: to have an identity means to be able to express that identity through the medium of one's choice. However, the international instruments weigh heavily in favor of individual rights over group rights. They do nevertheless recognize language rights and the right is not discriminated against.

Freedom of expression extends to the right of persons belonging to minorities (as to all other persons) to use their own language in *private* activities, including in the private display of signs, posters etcetera, of a commercial nature. This does not, however, exclude the possibility for the State to require some use of an official language in private commercial enterprises where a legitimate public interest may be invoked such as the furtherance of workplace health and safety or consumer protection or in dealings with the public authorities in accounting, taxation, or other processes. However, such a requirement may only ever stipulate the additional use of an official language: it may never expressly or in effect prohibit the use of another language(s). Thus requirements must be both pursuant to a legitimate public interest and be proportionate to the specific aim sought such that, for example, a requirement would be in violation of international standards should it require all employees (without distinction, or without specific justification) of a private enterprise to speak an official language.

For example, the Constitution of India does not specifically define the term linguistic minority. However, Articles 29 and 30 of the Constitution treat linguistic minorities to be collectivities of individuals residing in the territory of India or any part thereof having a distinct language or script of their own and under ar-

[47] Mandla v Dowell-Lee [1982] UKHL 7

[48] Gwynedd County Council v Jones [1986] ICR 833

ticle 19 provides the fundamental right of freedom of speech & expression. Giving the most progressive interpretation of Article 27 of the ICCPR, the UN Human Rights Committee (HRC) observed thus:

> The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant [ICCPR]. In particular, it should be distinguished from the general right to freedom of expression protected under article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not. Further, the right protected under article 27 should be distinguished from the particular right which article 14.3 (f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts.[49]

Also, the HRC made it clear that,

> Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

Accordingly, the Government of India and also the Governments of States/UTs have an obligation to adopt all necessary measures not only for the promotion and protection of minority languages but also against all possible governmental and nongovernmental violations of minority language right which also includes freedom of speech & expression which is being violated cause of ignorance of ITM languages in public sphere where they are restricted to express their grievances like in Health Space their health related aspects .

3.5 Language as right to development and self determination

When governments make policies and laws or undertake projects that could affect indigenous peoples (such as the use of sacred sites for road construction or national park delineation, or the promulgation of a new constitution or state-language policy), they have an obligation to obtain free, prior, and informed consent (FPIC) from indigenous peoples, through their chosen representatives. More than just an obligation to simply provide information or consult, this right entails an honest, open negotiation with indigenous peoples in good faith, without pressure (free), before the activity begins or the policy is implemented (prior), with all up-to-date information available (informed). 'Consent' means that all parties involved in this negotiation process will be equal and that the indigenous groups' traditional decision-making processes must be allowed to be used.[50] The requirement that consent from concerned indigenous peoples is obtained prior to the use of ancestral land and natural resources is provided for by ILO Convention 169[51]and in UNDRIP[52]. FPIC also applies to use and copyright of traditional knowledge and skills (International IDEA 2014: 48), and to the use of traditional indigenous medicines and knowledge. FPIC also means that indigenous peoples should be involved in the design, development, implementation, monitoring and evaluation of all programmes, policies and legislation that affect them, importantly; this extends to constitutions and any constitutional reform.[53]

3.6 Language Rights and Right to self-determination

A fundamental principle of international law and the central right in UNDRIP, self-determination can be defined as:

[49] UNITED NATIONS. *General Comment No. 23, UN Doc. A/2929.* July 1, 1955.

[50] Working Group on Indigenous Populations 2005, para. 56

[51] INTERNATIONAL LABOR ORGANISATION. ILO Convention 169 ILO 1989, Article 6 which read as:

1. In applying the provisions of this Convention, governments shall:
(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

[52] UNDRIP (United Nations 2007: articles 10, 11, 19, 28, 29, 32)

[53] AUSTRALIAN HUMAN RIGHTS COMMISSION. *The Community Guide to the UN Declaration on the Right of Indigenous Peoples.* Sydney: Australian Human Rights Commission, 2010.

1. The act or power of making one's own decisions and determining one's own political status; or
2. The state of being free from the control or power of another.

The right to self-determination is a fundamental tenet of international law, influencing relationships between states and amongst the subunits and peoples who make up those states' The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, in their common article 1 (para. 1), provide that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[54]"

The International Court of Justice, "has defined self--determination as the need to pay regard to the freely expressed will of peoples."[55] The internationally recognized right to self-determination has two dimensions:

1. Internal
2. External

Internal refers to the exercise of self-determination within an existing state; external refers to the right of peoples to define their place within the international community. The UN Committee on the Elimination of Racial Discrimination's General Recommendation No. 21, on the right to self-determination, is critical in defining these two dimensions. It defines internal self--determination as the rights: "of all peoples to pursue freely their economic, social and cultural development without outside interference; linked with the right of every citizen to take part in the conduct of public affairs at any level".

In 2007, a specific right to internal self-determination for indigenous peoples was codified in article 3 of the UN Declaration on the Rights of Indigenous Peoples. 'Practices for implementing this right are still evolving but have included autonomy arrangements, the recognition of collective rights to language and culture, and the right to free prior informed consent and consultation'. Exercise of the indigenous right to self-determination is constrained by the national constitution and usually limited insofar as the exercise should not contravene the rights of other communities. Self-determination is a collective right for indigenous peoples that protect their autonomy to govern their affairs and to participate meaningfully in the decisions affecting them. An explicit link between indigenous peoples' right to self-determination and autonomy is made in UNDRIP Article 4: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions".

This does not equate to a right to independent statehood but, at a minimum, represents a right to devolved autonomy and self-government arrangements, as well as the entitlement to meaningful representation in decisions and processes that affect indigenous peoples and their rights. Governments, in recognizing this right, must recognize the collective and group identities of indigenous peoples (nations, language groups, clans, family alliances, etc.) and enter into relationships with them in good faith and on the basis of equality, respect and dignity. Exercising the right to self-determination means, for example, local self-government through community-controlled councils, having ownership over traditional lands and territories and choosing how to use and develop them, control of the provision of basic services such as health services, and the legal recognition of group identities and rights including through constitutional recognition. Importantly, these rights mean little unless indigenous peoples are guaranteed resources and funding from governments to effectively exercise self-government.[56] Hence, based on this important international law requirement even special provisions for linguistic access can be formulated in order to meet the need of self-determination of ITMs and language being one of the most important constituents of the same.

[54] UNITED NATIONS. These provisions affirm that: 'Indigenous peoples have the right to self-determination' and '. . . in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs' (United Nations 2007: articles 3 and 4).

[55] Western Sahara, Advisory Opinion 1975 I.C.J. 12 (Oct. 16)

[56] United Nations General Assembly 2011: Para. 78

4 Operationalizing the UN Framework for Language Rights

The purpose of linguistic rights is to enable speakers of the minorities to use their language rather than the language of the majority. The fact that minorities' rights form an integral part of the international protection of human rights[57] and the fact that linguistic rights are part of minorities' rights raise the question about whether linguistic rights can be considered as an integral part of human rights. The recognition of linguistic rights as human rights is based on some of the international legal obligations found in international and human rights treaties, such as the right to anti-discrimination, the right to freedom of expression and the right to a fair trial.[58]The right to anti-discrimination raises when speakers of a given language are discriminated because of their language preferences. The prohibition of discrimination prevents states from "unreasonably disadvantaging or excluding individuals through language preferences in the provision of any of their activities, services, support or privileges."

The 'Universal Declaration of Linguistic Rights[59]' is a document framed in line with the 'Universal Declaration of Human rights' and signed by UNESCO, the PEN clubs, and several non-governmental organizations in 1996 particularly to protect linguistic rights of the indigenous people to save endangered languages. Universal declaration of Linguistic Rights, which came into being as a consequence of imposition of the alien tongues on the natives by the colonial powers, to check linguistic discriminations, to save and develop endangered languages from the hegemony of standard languages, to remove linguistic inequalities, to preserve linguistic and cultural diversity, to allow indigenous people to use their mother tongues in education, offices, media and other domains which have been monopolized by the users of the dominant languages, recommends the linguistic rights to be regarded among the fundamental rights of all the individuals and communities.

In many states, there are significant numbers of people who have no or only a limited command of the language or languages of wider communication of the state. This typically excludes them from full participation in economic, political, and social life. Thus, state language policy can have an impact on equality of opportunity and access to services. However, international law is not particularly clear about states' obligations in this regard. There is a significant difference between protection of minority languages and promotion of minority languages, the former being a negative restriction and the latter being a positive obligation. There are hardly any legally binding obligations for promotion of languages, but its importance is undoubted. For example, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in its preamble, states:

> [T]he constant promotion and realization of the rights of persons belonging to [...] linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States.

While language promotion puts a strain on the infrastructure to set up a separate system of translation,

[57] SAUSSURE, Ferdinand de. *Course in general linguistics*. New York: Philosophical Library, 1959. p. 116.

[58] UNITED NATIONS. *Language rights of linguistic minorities*: a practical guide for implementation. 2017. Available at: https://www.ohchr.org/en/special-procedures/sr-minority-issues/language-rights-linguistic-minorities Accessed on: 20 mar. 2022. p. 6.

[59] UDLR comprises of 52 articles. It takes into cognizance violation of linguistic human rights in different situations and areas. Some of the important provisions of UDLR are as follows:

All language communities have equal rights.

Everyone has the right to learn any language.

Everyone has the right to acquire more than one language.

Everyone has the right to be recognized as a member of a language community.

Everyone has the right to use one's language both in private and in public.

Everyone has the right to maintain and develop one's own culture.

All the language communities have the right for their own language and culture to be taught.

Everyone has the right to use one's language in the personal and family sphere.

All language communities have the right to codify, standardize, preserve, develop and promote their linguistic system, without induced or forced interference.

All language communities are entitled to the official use of their language within their territory.

All language communities have the right to obtain in their own language all the official records and documents.

All language communities have the right to receive education through their mother tongues.

All language communities have the right to preserve their linguistic and cultural heritage.

All language communities have the right to use their language in all types of socio-economic activities within the territory.

All language communities have the right to use, maintain and foster their language in all forms of cultural expression.

All language communities have the right to obtain documents – forms, cheques, contracts, receipts etc. in their own language.

lack of infrastructure has seldom been a justification at all for protection and promotion of human rights. Linguistic inclusivity enables outreach to a large number of people who are comfortable reading in their own language. Article 1 of the Universal Declaration of Human Rights famously states, "All human beings are born free and equal in dignity and rights". The Oslo Recommendations Regarding the Linguistic Rights of National Minorities interprets this as including linguistic rights through the following passage:

> [E]quality in dignity and rights presupposes respect for the individual's identity as a human being. Hence, respect for a person's dignity is intimately connected with respect for the person's identity and consequently for the person's language.

An example is *Diergaardt v. Namibia*[60]. Under the constitution, English was the only official language. Staff members in local public offices were instructed by the government not to communicate with the public in any language other than English, notwithstanding that public servants could speak the minority language in question a form of Afrikaans and that at least some members of the community allegedly could not speak English. The United Nations Human Rights Committee (UNHRC) found this to be, "a violation of Article 26 of the ICCPR. As the grounds for this conclusion were not spelled out, its basis is not clear." This shows that the denial of minority-language public services to members of a linguistic minority who cannot speak the language of the state constitutes a violation of the right to the equal protection of the law. Similarly, in the case of *Cyprus v. Turkey*[61] the Court found that, "the discontinuance of Greek-medium education and the denial of minority language education could now arguably constitute a violation of Article 2 of Protocol One in those circumstances as it restricts access and equality".

In continuation of the above discussion, the next section will examine how through judicial intervention the state obligations under national and international legal instruments to ensure linguistic justice has been granted and how the same can be adopted for ITM people by linking language within the sphere of human rights.

[60] Diergaardt v. Namibia Judgment of 23 July 1968, Series A, no. 6

[61] Cyprus v. Turkey Judgment of 10 May 2001, application no. 25781/94.

5 Judicial engagement with question of access to health space for ITM community

In this section the concept of right to access to health care and how health qualifies to be a fundamental right, through various international legal instruments and judicial pronouncements will be discussed. The approach taken by various international jurisdictions in defining access to health care as a fundamental right and how the state is under an obligation to ensure the same will be studied in synchrony with the states language policy and provisions for language rights for the ITM community. In addition, judicial engagement with questions of health access in a global and an Indian jurisdiction is attempted. The objective in this section is to attempt linking the status of right to access to health and health care under Indian legal context specifically for the ITM communities and how the same is denied to the ITM communities due to language barriers. Essentially the two-prong attempt in the section is to highlight the missing link of language as an intrinsic part of the right to access health that we have discussed in the last section and then to articulate how it can be recognized and implemented as a legal obligation by the state through Judicial Engagement. Thus, to discuss these propositions this section is divided into the following sub-parts for more critical understanding of the issue in hand:

1. Judicial engagement with Access to Health Space (significant case laws)

2. Judicial engagement with the question of Access to Health Space: Indian context

5.1 Judicial engagement with Access to Health Space (significant case laws)

In this part, a qualitative comparative analysis of judicial approach taken in various jurisdictions has been analyzed about:

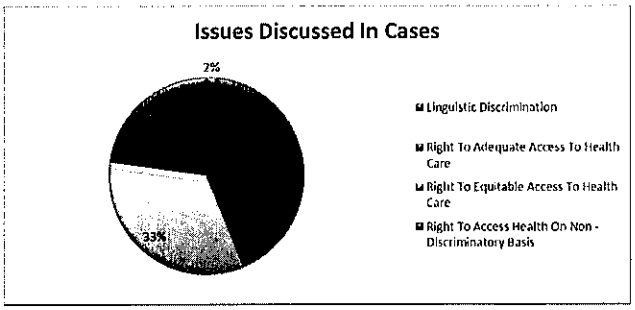
1. Judicial engagement with Linguistic Discrimination
2. Right to equal access to health care
3. The right to equitable access to health care
4. The right to access to health care on a non-discriminatory basis

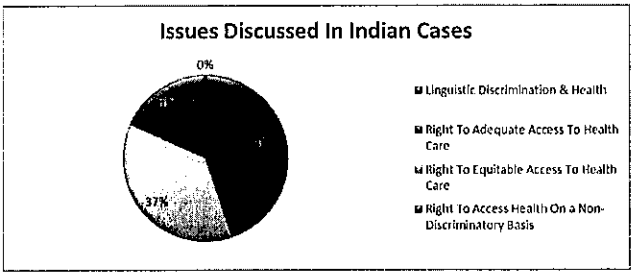
In identifying the relevant case laws, we adopted the following procedures. "Pearl Searching" method has been applied for identifying the cases from relevant literatures i.e., UN Documents, International Organizations & Country Specific Reports relating to "Health Rights" & "Language Rights". Further Cases have been divided based on various jurisdictions to have a representative analysis. It is to be noted that no direct case with respect to health space access and language was found during the identification process, but majority of the cases covered here are exclusive to indigenous tribal communities including in some cases with respect to ITM communities. Aim of analysis of the cases is to identify how the various jurisdiction have addressed concerns with access to health rights based on various parameters; further what relevant legislative regulations have been referred by them along with that what has been the impact of the judicial decisions on policy of Government i.e., whether the respective Governments have adopted the necessary changes as pointed out by the courts? This analysis will be helpful in identifying aspects when comparing the stand of India with respect to access to health space especially by ITM and the same can work as a model for positive policy approach by the Government in formulating policies for ITM communities to accommodate their linguistic needs in ensuring complete access to health space. A brief overview of the cases analyzed is given below in the table.

Table 1 - Brief Overview of Cases Analysed

Sl.No	Jurisdiction	Total Number of cases	Linguistic Discrimination	Right To Adequate Access To Health Care	Right To Equitable Access To Health Care	Right To Access Health Care On Non-Discriminatory Basis
1.	European Court of Human Rights	7	1	5	2	2
2.	European Committee of Social Rights	2	0	2	1	1
3.	Inter-American Commission of Human Rights (IACHR)	1	0	1	1	1
4.	Argentina	4	0	4	2	3
5.	Canada	3	1	1	2	2
6.	Bolivia	1	1	1	0	0
7.	Colombia	1	1	1	1	1
8.	Costa Rica	1	0	0	1	1
9.	UNHRC	1	0	0	1	1
10.	India	22	0	22	18	9
11.	Ireland	1	0	1	1	0
12.	Egypt	1	0	1	1	1
13.	Chile	1	0	1	1	0
14.	Italy	1	0	1	1	1
15	Hungary	1	0	1	0	1
16.	Ukraine	1	0	1	1	0
17.	Brazil	2	0	1	1	0
18.	Peru	1	0	1	1	0
19.	Mexico	1	0	1	1	1
20.	Uganda	2	0	2	1	1
TOTAL		55	2	48	38	26

Fig 1 - Judicial Engagement with Respect to the issue of Discrimination, Access To Health Space & Equality





The international understanding of discrimination maps closely with the domestic, including concepts of direct and indirect discrimination as well as affirmative action.[62] International human rights law strives for equality broadly, but antidiscrimination law plays out differently depending on the jurisdiction and the court. Indirect discrimination happens when there is a policy that applies in the same way for everybody but disadvantages a group of people who share a protected characteristic, and you are disadvantaged as part of this group. If this happens, the person or organization applying the policy must show that there is a good reason for it. A 'policy' can include a practice, a rule or an arrangement. It makes no difference whether anyone intended the policy to disadvantage you or not.

To prove that indirect discrimination is happening or has happened:

1. There must be a policy which an organization is applying equally to everyone (or to everyone in a group that includes you)
2. The policy must disadvantage people with your protected characteristic when compared with people without it
3. You must be able to show that it has disadvantaged you personally or that it will disadvantage you
4. The organization cannot show that there is a good reason for applying the policy despite the level of disadvantage to people with your protected characteristic

As, our core issue i.e. denial of access to health care facilities due to language barrier some -what falls under the scenario of indirect discrimination due to bilingual state policy. Moreover, the most vital aspect is the protected characteristics of the ITM community. Thus, by adapting a bilingual policy which is acting as a disadvantage for the ITM community. It is important to see how different jurisdictions have approached in the cases of indirect discrimination, how they have defined it and demarcated the state obligations in ensuring preventing indirect discrimination related to basic core rights. Now let us investigate the judicial approach taken by various jurisdictions while analyzing the issue of indirect discrimination and how the right to health have been recognized along with a constructive judicial methodology. In the previous section we have mentioned the case of *Mandla (Sewa Singh) and another v Dowell Lee*[63] while discussing the issue of discrimination. In this case, the *Mandla* complained to the Commission for Racial Equality that they had been racially discriminated against. The Commission adopted the case and sought a declaration that the defendants had acted contrary to the Race Relations Act 1976 (the Act) by unlawfully discriminating against Gurinder Singh. The main question in this appeal is whether Sikhs are a 'racial group' for the purposes of the Race Relations Act 1976 ('the Act of 1976'). For reasons that will appear, the answer to this question depends on whether they are a group defined by reference to 'ethnic origins'. The discrimination was only contrary to the Race Relations Act 1976 if the *Mandla's* could be considered members of a "racial group" "defined by reference to ethnic origins as provided by s. 3 (1) of the Act". In defining the term Lord Fraser took inspiration from the definitions offered by Richardson J. in the New Zealand case of *King-Ansell v Police64, Richardson J.*

[62] FREDMAN, Sandra. Emerging from the shadows: substantive equality and article 14 of the European Convention on Human Rights. *Human Rights Law Review*, v. 16, n. 2, p. 273–301, jun. 2016.

[63] Mandla (Sewa Singh) and another v Dowell Lee and others [1983] 2 AC 548

[64] King-Ansell v Police [1979] 2 N.Z.L.R. 531, The conditions which were laid down are:
"long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive;
" cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious ob-

in setting out criteria for establishing member of a racial group has observed that a common language is also an essential criterion for defining a racial group. Court categorically held that,

> Parliament intended to exclude the Sikhs from the benefit of the Race Relations Act and to allow discrimination to be practiced against the Sikhs in those fields of activity where, as the present case illustrates, discrimination is likely to occur.

This case is important with the aspect of Language being a vital part of identifying a racial group and when discuss ITM they indeed belong to a distinct racial group and if they are facing discrimination by denial of any form of access due to a distinct language, it can be constructed to be a form of discrimination against.

In the case *Viceconte, Mariela Cecilia vs State of Argentina (Health Department)*[65], Argentine inhabitants in certain areas of the country are exposed to *Argentine hemorrhagic* fever, an infectious disease for which a vaccine named "Candid 1" has been shown to be effective. Nevertheless, the quantity of vaccine doses stocked within and outside the country was limited (approximately 400,000 doses). The plaintiff filed a public interest litigation seeking protection of the right to health of people threatened by this fever. The applicant sought to compel the Government to produce (as this disease only exists in Argentina), and to provide Candid 1 vaccine to all inhabitants threatened by the fever, and also to improve the ecological system that was facilitating the spread of the disease.

Considering the petition court issued a declaratory order that required the State to fulfill its duty to protect the health of its population by manufacturing and providing this vaccine. Regarding the justifiability of this right in Argentina, the Court noted that any individual could bring complaints concerning the right to health due to the constitutional incorporation of international treaties referring to it. The Court delivered a consistent interpretation of the Constitution with its preamble objectives of social justice and collective welfare. Hence, in this case we can see how the court asked the government to fulfill its obligation by producing the vaccine even if it's required by a certain group of population. Thus, this decision is quite remarkable in the sense of widening the obligation of the state when it comes to the health rights of citizens. Even if it's for a minority small group of inhabitants, the state does have the obligation to formulate policies and take necessary steps to ensure the health & hygiene of the citizens. The need for exclusive measures for vulnerable groups is highlighted by this decision, which in our scenario of ITM population can also be adopted by the state by ensuring exclusive health care services in ITM language, which can ensure them full access to their health care facilities.

Further, in the case of *Eldridge v British Columbia (AG)* the appellants, Robin Eldridge and John and Linda Warren were deaf residents of British Columbia. They had experienced problems within the provincial health care system because of their inability to communicate with health care providers in the absence of sign language interpretation services. In an application commenced by the appellants in the British Columbia Supreme Court, the appellants claimed that the failure to provide sign language interpretation services under the province's Medical and Health Services Act and Hospital Insurance Act violated their rights to equality based on disability under section 15 of the Charter of Rights and Freedom. In the context where access to health care has been perceived as a fundamental human right in Canada, the inability to access medically necessary services have constituted the bulk of Canadian case law in health care related litigation under the Charter of Rights and Freedom. In most of these cases, the courts have invoked sections 15(1)[66] of the Charter of Rights and Freedoms to determine whether health care is an entitlement under the right to equality under section and the right to "life, liberty and security of the person" respectively. Deciding on this application, the equality rights claim, which had been rejected at trial by the British Columbia Court of Appeal, was granted in a unanimous decision by the Supreme Court of Canada. The Supreme Court therefore held that failure to provi-

servance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant:
either a common geographical origin, or descent from a small number of common ancestors; a common language;
a common literature peculiar to the group;
a common religion different from that of neighboring groups or from the general community surrounding it;
being a minority or being an oppressed or a dominant group within a larger community;

[65] Viceconte, Mariela Cecilia vs State of Argentina (Health Department) Federal Administrative Court, File No31.777/96, 2 June 1998.

[66] CHARTER OF RIGHTS AND FREEDOM. 15 (1) states that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"

de the appellants with sign language interpretation where this was necessary to ensure equal access to health care was in breach of the equality provisions in section 15 (1) of the Charter of Rights and Freedom.

As we can see from this decision, the importance of language and its importance in health care service has been discussed and how denial of a particular language to the patients led to breach in equal access to health care and which is further in breach of the equality. This provision of section 15(1) is even quite similar to our Constitutional provision of Article 14[67] which provides for equality, if we go by the ratio of this judgment, it clearly establishes that denial of health care service especially in the case of vulnerable groups in their own language results in denial of equal access to health care and in breach of the right to equality.

In the case of Indigenous Community *Yakye Axa v. Paraguay*[68], the Yakye Axa community, a Paraguayan indigenous community belonging to the Lengua Enxet Sur people, filed a complaint with the Inter-American Commission of Human Rights (IACHR) alleging Paraguay had failed to acknowledge its right to property over ancestral land. The Court considered Paraguay had failed to adopt adequate measures to ensure its domestic law guaranteed the community's effective use and enjoyment of their traditional land, thus threatening the free development and transmission of its culture and traditional practices. Furthermore, the Court understood that the State had failed to adopt necessary positive measures to ensure the community lived under dignified conditions during the period they had to do without their land. While they stayed on the side of a road across from the land they claimed, the community lacked adequate access to food, health services and education. Sixteen persons died due to the said living conditions.

The Court concluded, "the State had the obligation to adopt positive measures towards a dignified life, particularly when high risk, vulnerable groups were at stake, whose protection became a priority." In this case also we can see how, the Inter-American Court has given a wide interpretation of the right to life taking into account health, education and food standards set forth in the Protocol of San Salvador.[69] In its interpretation, the Court also considered General Comments by the Committee on Economic, Social and Cultural Rights, the supervisory body of the International Convention on Economic, Social and Cultural Rights and gave a very constructive interpretation of right to health of vulnerable communities and obligated the state to come up with positive measures in order to ensure the rights of the vulnerable tribal community.

The European Committee of Social Rights decision as it is mainly known for its cases on indirect discrimination. In one of its early cases, Autism Europe v. France,[70] (Refer Annexure Sl.no.8) the European Committee of Social Rights set out that it considered Article E[71] to not only prohibit direct discrimination but also all forms of indirect discrimination. Also, here it referred to the ECtHR and cited the ECtHR's approach in the case of *Thlimmenos v. Greece*[72]:

> The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated if States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

Thus, by failing to take due and positive account of all relevant differences or by failing to take adequate

[67] Article 14 of the states that: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." INDIA. [Constituicion (1950)]. *Constitución de India.* Available at: https://www.bcn.cl/procesoconstituyente/comparadordeconstituciones/constitucion/ind. Accessed on: 8 out. 2022.

[68] Indigenous Community Yakye Axa v. Paraguay, IACHR Series C no 125, IHRL 1509 (IACHR 2005), 17th June 2005

[69] Protocol of San Salvador under Article 10 provides that:

1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.

2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:

a. Primary health care, that is, essential health care made available to all individuals and families in the community;

b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction;

c. Universal immunization against the principal infectious diseases;

d. Prevention and treatment of endemic, occupational and other diseases;

e. Education of the population on the prevention and treatment of health problems, and

f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

[70] Autism Europe v. France. Case No. 13/2002

[71] Article E of European Social Charter provides that: The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

[72] Thlimmenos v Greece (Application no. 34369/97)

steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all', indirect discrimination may arise. Consequently, court also stated that merely guaranteeing identical treatment as a means of protection against discrimination is not sufficient. For example, in the case of ITM community it is true that, government is providing identical medical treatment which is also provided to other general masses but when it comes to the means of availing those medical treatment i.e., by language, the same is not ensured under the Bilingual policy.

In *Powell v. the United Kingdom*[73] the ECtHR recognized that acts and omissions of the authorities in the field of health care policy may in certain circumstances fall under their responsibilities under Article 2 ECHR.[74] Consequently, Article 2 ECHR enjoins Member States to refrain from intentional and unlawful taking of life. Moreover, it also imposes on States to take appropriate steps, i.e., positive measures to safeguard the lives of those within its jurisdiction. Similarly in the case of *Calvelli and Ciglio v. Italy*,[75] was also discussed and stated that, this positive obligation requires States to e.g., make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives.

Similarly, in the case of *Cyprus v. Turkey*[76] the applicant Cyprian Government claimed that the restrictions the enclave Greek Cypriots and Maronites living in the northern part of Cyprus encountered when seeking medical treatment in the southern part of Cyprus gave rise to a violation of Article 2 ECHR. In reaction to the claim of the Cyprian Government, the ECtHR noted that a case may be brought under Article 2 of the Convention, "if the authorities of a Contracting State are shown to put an individual's life at risk by denying him health care that is available to the population in general".

In many of its cases on equal treatment and non--discrimination, the European Committee of Social Rights dealt with the circumstances of vulnerable and marginalized groups. Most of these cases concerned the systematically disadvantaged Roma communities. The substantive equality that is emphasized and aimed at by the recognition and application of the prohibition of indirect discrimination serves as an important protection for this vulnerable group. The corresponding positive obligations of the Member States are important for an effective enjoyment of their economic, social, and cultural rights guaranteed by the ESC and RESC.[77] In many of these cases on the affected Roma communities, the European Committee of Social Rights found that their specific differences and needs were not or not sufficiently considered, which resulted in indirect discrimination. For example, in *European Roma Rights Centre (ERRC) v. Bulgaria*[78], the complainant organization alleged that Bulgaria discriminated against Roma as regards housing, with the result that Roma families were segregated in housing matters, were living in substandard housing conditions with inadequate infrastructure, lacked legal security of tenure, and were subject to forced evictions. In this case, the European Committee of Social Rights found that, "the simple guarantee of equal treatment as the means of protection against any discrimination did not suffice." It was reiterated that Article E RESC[79] imposes an obligation of considering the relevant differences and to act accordingly. Therefore, positive measures were needed to secure the integration of an ethnic minority such as the Roma into mainstream society.

In another case of, *European Roma Rights Centre (ERRC) v. Bulgaria*[80], constituted a case relating to the right to access to health care for the Roma community

[73] Powell v. the United Kingdom, [2000] ECHR 703

[74] Article 2, ECHR states that: Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

[75] Ciglio v. Italy, [2002] ECHR 3

[76] Cyprus v. Turkey, [2001] (No. 25781/94)

[77] UNITED NATIONS. Article 2 (1) the International Covenant on Economic, Social and Cultural Rights that States "to take steps" to the maximum of their available resources to achieve progressively the full realization of economic, social and cultural rights.

[78] European Roma Rights Centre (ERRC) v. Bulgaria. Complaint No 48/2008

[79] EUROPEAN SOCIAL CHARTER. Article E of European Social Charter provides that : "The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status."

[80] European Roma Rights Centre (ERRC) v. Bulgaria, Complaint No 48/2008

in Bulgaria under Articles 11[81] and 13[82] and Article E RESC. The ERRC claimed that the State did not ensure universal access to health insurance coverage and that the existing Bulgarian health insurance legislation discriminated against the most vulnerable individuals, amongst which the Roma community. It set out that although Bulgarian legislation provided State-subsidized health insurance for socially vulnerable individuals, this was made conditional on being eligible for the right to social assistance or being registered as unemployed. As the majority of the large number of Roma did not receive social assistance nor were registered as unemployed, they could not benefit from this type of public health insurance coverage. Moreover, it was also held that government policies did not adequately address the specific health risks and living conditions of the Roma communities.

Subsequently, the European Committee of Social Rights dealt with the allegation of unequal access for Roma to health care services which resulted in their specific health risks not being adequately addressed, thus amounting to indirect discrimination. In reference to its own Conclusions, the European Committee of Social Rights reiterated that Article 11 RESC *'imposes a range of positive obligations to ensure an effective exercise of the right to health'*. In addition, it set out that it *'assesses compliance with this provision paying particular attention to the situation of disadvantaged and vulnerable groups.* Thereby it indicated to focus on substantive equality and indirect discrimination in case of a lack of compliance with the positive obligations a Member State has. Moreover, the European Committee of Social Rights considered that there was sufficient evidence that showed that Roma communities did not live in healthy environments and that their health status was inferior to that of the general population. It based its findings on various studies referred to by the ERRC and other sources such as a report on Bulgaria of the European Commission against Racism. This situation was in part attributed to the failure of prevention policies by the Bulgarian State. The European Committee of Social Rights stated that:

> Bulgaria failed to meet its positive obligations to ensure that Roma enjoyed adequate access to health care, especially as it did not take reasonable steps to address the specific problems faced by Roma communities. Consequently, as they did not benefit from appropriate responses to their health care needs.

Article 11 to ERESC was found to be violated. From this case of the Roma community, we can see how the ECtHR sensitively dealt with the issue of a vulnerable community and directed the state to implement positive measures and ensure access to health care. The gravity with which the judicial consideration has been made considering various provisions and the interpretation that has been provided by court is indeed quite a landmark approach that something which can be squarely apply to the scenario of ITM community in our country and their plight of discrimination in health care access can be curbed by making state to bring in positive measures.

In the *Belgian Linguistics case*[83], the ECtHR set out several criteria for the assessment of a complaint under Article 14 ECHR[84]. It stated that 'the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regarding the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim, Article 14 is likewise violated

[81] Article 11 of RESC provides that: With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:
1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

[82] Article 13 of RESC provides that: With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:
1 to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2 to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3 to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;

[83] The Belgian Linguistic case (No. 2) (1968) 1 EHRR 252

[84] Article 14 of ECHR states that , The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

if it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.' These criteria formed the basis of the assessment model, which was later completed with another assessment criterion.

In the case of Marckx[85] the ECtHR included, as a first phase, the assessment of whether individuals are placed in similar situations. The use of these criteria in the assessment of alleged violations of Article 14 ECHR is now well-established case law. Its assessment model can be formulated as follows:

1. Phase 1: Are the individuals concerned placed in similar situations?
2. Phase 2: Does the distinction have an objective and reasonable justification by assessing whether:
3. 2a: the difference in treatment pursues a legitimate aim;
4. 2b: there is a clearly established reasonable relationship of proportionality between the means employed and the aim sought to be realized.

Further, in the case of *Thlimmenos v. Greece*[86], the ECtHR expressly recognised that substantive inequalities also fall within the scope of Article 14 ECHR: 'The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated if States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated if States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

Moreover, as set out in *Kelly and others v. the United Kingdom*[87] judgement: 'Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group'. Consequently, a claim of indirect discrimination can also be brought under Article 14 ECHR. Now, that we have discussed the approach taken by European Human Rights court while dealing with methods of indirect discrimination , we will discuss it further in the next section when we discuss the concept of " intelligible differentia" under article 14[88] of Indian constitution and try to establish the link how situating the ITM communities denial of linguistic rights in health care access results in discrimination and the same can be recognized under Article 14 of Indian constitution and the judicial approach taken by European Human Rights Court can be referred for a constructive approach.

5.2 Judicial engagement with the question of access to health space: Indian Case-laws

Now, that we have seen how the courts in International scenario especially the European Committee of Social Rights played a vital role in defining forms of indirect discrimination against the vulnerable people and directed states for a constructive approach to rectify and prevent various forms of indirect discrimination which also included right to access health care facilities. If we refer to our Indian Constitution, first of all it does not expressly recognize the fundamental right to health. However, Article 21[89], of the Constitution of India guarantees a fundamental right to life & personal liberty. The expression 'life' in this article means a life with human dignity & not mere survival or animal existence. It has a much wider meaning which includes right to livelihood, better standard of life, hygienic conditions in workplace & leisure. The right to health is inherent to a life with dignity, and Article 2 should be read with

[85] Marckx v. Belgium [ECHR](application No. 6833/74)

[86] Thlimmenos v Greece (Application no. 34369/97)

[87] Kelly and Others v. United Kingdom (Application no. 30054/96)

[88] Article 14 states that: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." INDIA. [Constituicion (1950)]. *Constitución de India.* Available at: https://www.bcn.cl/procesoconstituyente/comparadordeconstituciones/constitucion/ind. Accessed on: 8 out. 2022.

[89] Article 21 provides for "protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law. "The Article prohibits the deprivation of the above rights except according to a procedure established by law. INDIA. [Constituicion (1950)]. *Constitución de India.* Available at: https://www.bcn.cl/procesoconstituyente/comparadordeconstituciones/constitucion/ind. Accessed on: 8 out. 2022.

Articles 38,[90] 42,[91] 43,[92] &47[93] to understand the nature of the obligation of the state in order to ensure the effective realization of this right.

There are numerous contributing factors and causes for the poor health condition of the tribes in India. The inadequate health personnel, inaccessibility to healthcare, and poor health infrastructure are among the few reasons for the poor health status of tribes in the country. The right to healthcare is one of the essential aspects of the broad framework of the right to health. The scope of the right to healthcare includes various entitlements, including the right to healthcare services, screening, hospitalization, if necessary, care for elderly, family planning services, including maternal and child healthcare, and provision of essential drugs. The core content of the right to healthcare includes primary healthcare and the provision of essential drugs. Moreover, an important criterion for the provision of this core content is that these elements have to be ensured on a non-discriminatory basis. Access to healthcare on a non-discriminatory basis is a recurring element of the right to health care and it is part of the right to equal access to health care.

The Supreme Court has in various judicial pronouncements enshrined the right to health as envisaged under the Indian constitution. Some of the initial judicial pronouncements are related to public interest litigation. Compared to some of the other social rights, the Right to Health has been articulated and recognized as an integral part of the right to life only from the mid-nineties by the Indian Supreme Court. The recognition of the right to health has emerged out of a gamut of different petitions and public interest litigations in the Supreme Court, ranging from PILs concerning workers health hazards to petitions filed by individuals seeking rights of public health.

5.2.1 Indian judicial approach to right to health

In 1987 a very important decision of the Supreme Court came out in public interest in the case of *Vincent Panikurlangara vs. Union of India & Ors*[94],in this case it was held that in a welfare State, it is the obligation of the State to ensure the creation and maintaining of conditions congenial to good health. The right to enjoy life as a serene experience, in quality far more than animal existence is thus recognized. Personal autonomy, free from intrusion and appropriation is, thus a constitutional reality. The right to live in peace, to sleep in peace and the right to repose and health are part of the right to live. Thus, this judgment signifies the importance of the right to health and how the state is under an obligation to create such a scenario which can help in ensuring good health to the citizens.

Further, if we refer to another landmark judgment of *Paschim Bangal Khet Mazdoor Samity & Others V State of West Bengal & Others*[95], it was held that in a welfare state, the primary duty of the government is to secure the welfare of the people and moreover it is the obligation of the government to provide adequate medical facilities for its people. The government discharges this obligation by providing medical care to the persons seeking to avail those facilities. Hence, this judgment

[90] Article 38 provides that: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." INDIA. [Constituicion (1950)]. *Constitución de India.* Available at: https://www.bcn.cl/procesoconstituyente/comparadordeconstituciones/constitucion/ind. Accessed on: 8 out. 2022.

[91] The objective of Article 42 of the Constitution is to significantly contribute to the formation of the rule of law that will be based on the principles of supremacy of the law, where protection of human rights will be guaranteed. It states that: Provision for just and humane conditions of work and maternity relief The State shall make provision for securing just and humane conditions of work and for maternity relief

[92] Article 43 provides that:The State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavor to promote cottage industries on an individual or co operative basis in rural áreas. INDIA. [Constituicion (1950)]. *Constitución de India.* Available at: https://www.bcn.cl/procesoconstituyente/comparadordeconstituciones/constitucion/ind. Accessed on: 8 out. 2022.

[93] Article 47 provides that: Duty of the State to raise the level of nutrition and the standard of living and to improve public health The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. INDIA. [Constituicion (1950)]. *Constitución de India.* Available at: https://www.bcn.cl/procesoconstituyente/comparadordeconstituciones/constitucion/ind. Accessed on: 8 out. 2022.

[94] Vincent Panikurlangara vs. Union of India & Ors, AIR 1987 SC 990

[95] Paschim Banga Khet Mazdoorsamity v. State of West Bengal and Anr. 1996 SCC (4) 37

clarifies that Article 21 imposes an obligation on the state to safeguard the right to life of every person, preservation of human life and is thus of paramount importance. The government hospitals run by the state are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment, results in violation of his right to life guaranteed under art 21. Again, the position of obligation on the state at ensuring medical facilities to the citizens was very well highlighted in this case.

Similarly, in the case of *Pramand Katara V Union of India & others*[96], it was ruled that every sector whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protection life. No law or state action can intervene to avoid or delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute, and paramount, laws or procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained, and must, therefore give way. This case is also vital in defining and expanding the horizons of state obligation when it comes to ensuring health care facilities.

It was in 1995 in the case of *Consumer Education and Research Centre vs. Union of India*[97], that the Supreme Court for the first time explicitly held that 'the right to health is an integral fact of a meaningful right to life.' Reading Article 21 with the relevant directive principles guaranteed in articles 39 (e)[98], 41[99] and 43, the Supreme Court held that the right to health and medical care is a fundamental right, and it makes the life of the workman meaningful and purposeful with the dignity of person. This recognition established a framework for addressing health concerns within the area of public interest litigation and in a series of subsequent cases, the Court held that it is the obligation of the State not only to provide emergency medical services but also to ensure the creation of conditions necessary for good health, including provisions for basic curative and preventive health services and the assurance of healthy living and working conditions. Very significantly, while adjudicating on the social right to health, the Supreme Court has specifically considered the issue of availability of resources and has rejected the argument that social rights are non-enforceable due to shortage of resources. This, case somewhat also relevant when we discuss the principle of indirect discrimination, especially this case very well establishes that the state is under a serious obligation in ensuring health services and shortage of resources can't be considered as a justification for non-availability. Even this case raises the importance of Article 41 which provides that the state shall ensure public assistance and language being a vital part of ensuring the public assistance which may be in the form of health care service which is also a public assistance. Therefore, when we apply the principle laid down in this case law to our core issue of non-availability of health facilities to ITM communities in their mother tongue resulting in a form of indirect discrimination, since language is very vital in health care and state can't take the defense of shortage of language proficiency or resources and just because we have a bilingual policy we can't deny the right to health of ITMs.

In all the above judgments, we see the Supreme Court carving out a Right to Health from the various judicial pronouncements which came before the court and thus incorporated this right within Article 21 of the Indian Constitution. The scope of the right has also been very broad encompassing several different aspects of health care and services. With the recognition that both the Preamble of the Constitution and the fundamental right to life in Article 21 emphasize the value of human dignity, the Supreme Court began to address the importance of health as a fundamental right to Indian citizens. In the Directive Principles in Part IV of the Constitution, Article 47 declares that the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of

[96] PramandKatara V Union of India & others, 1989 AIR 2039

[97] *Consumer Education and Research Centre vs. Union of India, 1995 AIR 922*

[98] Article 39(e) states that: that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. INDIA. [Constituicion (1950)]. *Constitución de India.* Available at: https://www.bcn.cl/procesoconstituyente/comparadordeconstituciones/constitucion/ind. Accessed on: 8 out. 2022.

[99] Article 41 provides that: Right to work, to education and to public assistance in certain cases The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. INDIA. [Constituicion (1950)]. *Constitución de India.* Available at: https://www.bcn.cl/procesoconstituyente/comparadordeconstituciones/constitucion/ind. Accessed on: 8 out. 2022.

public health as among its primary duties. In addition to Article 47, the right to health also has its genesis in Articles 38 (social order to promote the welfare of the people), 39(e) (health of workers, men, women, and children must be protected against abuse), 41(right to public assistance in certain cases, including sickness and disability), and 48A (the state's duty to protect the environment) of the Directive Principles. In a series of cases dealing with the substantive content of the right to life the Court has found that the right to live with human dignity includes the right to good health.

The movement of judicial view from the early discussions on health to the late nineties clearly shows that the right to health and access to medical treatment has become part of Article 21. A corollary of this development is that while so long the negative language of Article 21 was supposed to impose upon the State only the negative duty not to interfere with the life or liberty of an individual without the sanction of law, judges have now imposed a positive obligation upon the State to take steps for ensuring to the individual a better enjoyment of his life and dignity. In the Paschim *Banga case*, the State has been placed, despite financial constraints, under an obligation to provide better-equipped hospitals with modernized medical technological facilities. The substantive recognition of the right to health as essential to living with human dignity has thus allowed the judiciary to directly address human suffering by guaranteeing the social entitlements and conditions necessary for good health, now when we say conditions necessary for good health, there is another very important judgment and which is somewhat directly related to our study i.e., *Mahendra Pratap Singh v. State of Orissa.*[100]

In *Mahendra Pratap Singh v. State of Orissa*, The Government of Orissa had failed to open a health facility in a rural tribal village, despite meeting several prescribed conditions. The first condition concerned the minimum provision of land by the local people, within a prescribed timeframe. The second requirement was the provision of adequate buildings for the facility and staff. The Petitioner claimed that though the necessary staff had been appointed, and a piece of land for constructing the building had been purchased, the primary health center was not functioning, and the Government was not taking the necessary steps to run the center. The Petitioner filed a petition in the Orissa High Court under Article 226[101] of the Constitution of India claiming there was an infringement of the right to health as derived from Article 21 of the Constitution of India.

The Court held that the Government is required to assist people and its "endeavor should be to see that the people get treatment and lead a healthy life." Primary health centers should thus be of principal concern, and it would be at odds with public health if a government caused hindrance to the establishment of such centers. The Court ordered the Government of Orissa to comply with the established requirements and procedures by the end of December 1996. Court also stated that, "great achievements and accomplishments in life are possible if one is permitted to lead an acceptably healthy life". Thereby, there is an implication that the enforcing of the right to life is a duty of the state, and that this duty covers the providing of right to healthcare. This would then imply that the right to life includes the right to health care.

6 Interim findings: towards a way forward

International law asserts that the protection of linguistic rights is based on two basic principles, the prohibition of discrimination on the one hand and measures intended to protect and promote the separate identity of the minority groups on the other hand. The former is termed as *tolerance rights* and are needed to ensure that a minority is placed on a footing of perfect equality with the majority; while the latter are called as *promotion rights* and are needed to respect the cultural and linguistic diversity of the minority. On this matter, case law is particularly important. In 1953, the Permanent Court of International Justice in its Advisory Opinion No. 64 regarding the minority schools of Albania expounded this double approach to minority protection for the first. The Court stated that minority protection consists of these two main components, these words:

> The first is to ensure that nationals belonging to racial, religious, or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second

[100] Mahendra Pratap Singh v. State of Orissa, AIR 1997 Ori 37

[101] Article 226, empowers the high courts to issue, to any person or authority, including the government (in appropriate cases), directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, certiorari or any of them.

> is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions, and their national characteristics. These two requirements are indeed closely interlocked[102].

The first principle requires that minorities be granted all rights set forth by legislation without regard to the language they use. However, the application of the non-discrimination measures merely guarantees formal equality, which is not sufficient to achieve real equality. To realize real equality, states are required to take special measures so that minorities are in an equal footing with the majority. According to the principle of equality, indeed, different situations must be treated differently. It may also be regarded as discrimination against the minority to treat a minority and a majority alike.[103] Promotion oriented rights are not intended to confer a privileged status on minorities; they should rather be considered as special rights aimed at guaranteeing equal conditions. Issues surrounding language rights can be highly charged since they link up with matters of identity, sovereignty, and public life. Until quite recently, there was not much attention paid by international law to language rights. The entry into force of the Council of Europe's Charter for Regional or Indigenous Languages on 1st March in 1998 marked the first international human rights instrument "directed solely at the question of language".

The second justification for the increased interest in language rights is connected to the fear of the depletion of linguistic diversity. Concerns have been raised about language endangerment. In view of this threat, some scholars like Skutnabb-Kangas, Phillipson, and Dunbar[104] are of the view that language rights have the capacity to check the depletion of linguistic diversity. Thirdly, language rights have become very prominent in countries where the democratization process is gaining ground. For example, The Sámi Language Act, passed in Finland in 1992, gave Sámi people the right "[...] to use the Sami language before authorities, orally and in writing, and to receive a reply in the same language".[105]The Sámi thus have the right to interact with authorities in their native tongue, meaning it is expected that non-Sámi have sufficient knowledge of the language. The rights, including those of language, the Sámi Act have given in the Finnish constitution are an effort to raise the status of the Sámi language to that of Finnish.

Further, language rights and other human rights have now become part of the criteria for assessing entry into regional blocs such as the European Union (EU) and the North Atlantic Treaty Organization. Certain standards in the observance of language rights are demanded before a state can be accepted into the European Union. Fifthly, it has been argued that the enjoyment of certain human rights is dependent on language rights. de Varennes has argued that language is linked to the enjoyment or the non-enjoyment of a number of rights, for example, the right to non-discrimination, the right to fair trial, the right to access to information, and the right to freedom of expression, right to public utility which also involves right to health.[106] As ,the right to non-discrimination in access to public services such as health care is dependent on language policies and practices that can ensure that linguistic barriers are broken down. These barriers can be broken down by the provision of appropriate language services.

The question of whether language rights are an integral part of human rights is crucial. As de Varennes observes, "it is sometimes mistakenly believed that the rights of minorities or language rights in general, are part of a new generation of rights, or are collective in nature." For de Varennes, such a view is both unfortunate and erroneous. It is unfortunate since it considers language rights as less deserving than the so-called real human rights. It is wrong since it fails to understand the actual sources of these rights. de Varennes' argument is that language rights are not an exception to, or a weaker type of human rights. That language rights are sometimes treated as a weaker form of human rights is linked

[102] Permanent Court of International Justice, Greece vs. Albania, Advisory Opinion No. 64 regarding minority schools in Albania, Series A/B, 6 April 1935.

[103] Thlimmenos v. Greece, Application no. 34369/97, ECHR, Judgment of 6 April 2000.

[104] SKUTNABB-KANGAS, T.; PHILLIPSON, R.; DUNBAR, R. *Is nunavut education criminally inadequate?*: an analysis of current policies for inuktut and english in education, international and national law, linguistic and cultural genocide and crimes against humanity? 2019. Available at: https://research.cbs.dk/en/publications/is-nunavut-education-criminally-inadequate-an-analysis-of-current. Accessed on: 10 out. 2022.

[105] THE FINNISH SAMI PARLIAMENT. Land rights, linguistic rights, and cultural autonomy for the finnish sami people. *Indigenous Affairs*, n. 33/4, jul./dez., 1997.

[106] VARENNES, Fernand de. The linguistic rights of minorities in Europe. *In:* TRIFUNOVSKA, Snezana. *Minority rightsin Europe:* European minorities and languages. Netherlands: T.M.C. Asser Press, 2001.

to the tendency to create a hierarchy of international human rights.[107] According to Meron, "the quest for a hierarchy of international human rights continues unabated." Meron further observes that

> claims of hierarchical status are also raised as to the relationship among rights belonging to the so-called first generation (civil and political rights), second generation (economic, social and cultural rights, e.g., the rights to peace, development and protected environment).[108]

Also observes that it would appear that some human rights are more important than others. But except in a few cases (e.g. the right to life or to freedom from torture), to choose which rights are more important than other rights is exceedingly difficult. It is fraught with personal, cultural, and political bias.

This choice of a human rights vocabulary to regulate matters bearing on languages serves a specific function; it endows a language claim with unconditional normative value and immediate applicability irrespective of local distributional consequences. Louis Henkin, widely considered one of the most influential human rights scholars of the twentieth century, writes that "human rights enjoy prima facie, presumptive inviolability, and will often 'trump' other public goods." The "trumping" power of language rights lies in their universal and factoid (i. e. fact-like) properties. According to Henkin, human rights are universal, in the dual sense that they are:[109]

1. Widely recognized and the only political-moral idea that has received universal acceptance
2. That they impose external standards on states that apply to all to whom they are relevant across geography or history, culture, or ideology, political or economic system, or stages of societal development.

Human rights are, moreover, also fact-like in the sense that both their application and its consequences are self-evidently good. This means that "once you acknowledge the existence of the right, then you have to agree that its observance requires x, y and z."Judge Rosalyn Higgins, the former President of the International Court of Justice, describes this property of human rights:

> It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world [...], but I believe, profoundly, in the universality of the human spirit. Individuals everywhere want the same essential things [...][110]

Philip Alston, another leading human rights scholar, writes:

> the characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity.[111]

Our existing international rhetoric makes sense of language claims by analogizing linguistic identity to cultural identity and speaks about a legalistic structure of language rights. International law is underdeveloped and misdirected in the field of linguistic human rights. The view of language in international law is as a dependent right rather than as an independent one. The right to speak one's own language is miscast as a cultural, collective, and/or minority right, whereas linguistic rights should be viewed independently, individually, and globally. Worse than a narrow or partial view of linguistic human rights is a view of such rights that remains merely idealistic. At the present, international law contains some idea of linguistic human rights within its broad covenants and non-binding declarations. Therefore, a regime of mere linguistic *tolerance*, namely the rights that protect the speakers of a minority from discrimination and assimilation, is not enough. What has to be granted by law is a regime of linguistic promotion, which includes positive rights. Positive measures by states which require institutional use of the minority languages in spaces pertinent to their human rights, participation in democratic processes, state services and other insti-

[107] KAMWENDO, Gregory Hankoni. *Language policy in health services*: a sociolinguistic study of a malawian referral hospital. Helsinki: University Printing House, 2004. Available at: https://helda.helsinki.fi/bitstream/handle/10138/19198/language.pdf.txt;jsessionid=A18C1594B61121BBC1F09AA8D42BE10D?sequence=4. Accessed on: 10 out. 2022.

[108] MERON, Theodor. *Human rights in international law*: legal and policy issues. Oxford: Clarendon Press, 1984.

[109] HENKIN, Louis. Human rights and state "Sovereignty". *Georgia Journal of International & Comparative Law*, v. 25, n. 1, 1996.

[110] LAPAYESE, Yvette V. *Language as human right chapter*: a humanizing dual language immersion education. Leiden: Brill Publication, 2019.

[111] STOKKE, Hugo; TOSTENSEN, Arne. *Human rights in development*: yearbook 1999/2000. The Hague: Kluwer Law International/ Nordic Human Rights Publications, 2001.

tutional mechanisms is the need of the hour[112]. Given below are some recommendations.

7 Recommendations: towards safeguarding ITM linguistic rights

7.1 Restructuring the concept of linguistic rights under the ambit of human rights

The major problem lies with the danger of misrepresenting the actual status and significance of language rights in the context of human rights law, international law and constitutional law. This is an area where excessive expectations lead to disappointment. The claim to linguistic human rights 'sharply contrasts with the demands of positive law, both international and domestic.[113] The linguistic human rights approach oscillates between, on the one hand, considering linguistic human rights as international law norms and, on the other, considering them as abstract ideals or claims, between, the one hand, sweeping affirmations of massive violation and deprivation of linguistic human rights and even linguistic genocide and, the other, the quest for what should be regarded as inalienable, fundamental linguistic human rights. For sure, the approach is well-intentioned: it aims to secure intergenerational continuity of indigenous languages and to redress part of the existing inequalities. However, it should be clarified that linguistic human rights must be interpreted along these lines as, above all, ideals and aspirations, and not as entitlements already recognized by international binding rules and whose effective implementation can be demanded of states.[114]

Skutnabb-Kangas through her perspective of Language as a Human Right, claims that "an individual's right to use and learn his or her native language is as basic a human right as that to the free exercise of religion, or the right of ethnic groups to maintain their cultures and beliefs" for instance, "the right to use one's mother tongue happens to be a fundamental, socially expressed human right". According to Skutnabb-Kangas,

> Linguistic Human Rights should be respected at two levels, namely: the individual and the collective. At the first level, what it entails is an individual's positive identification with his/her mother tongue, and the acceptance and respect on the part of others.[115]

In her view, "it means the right to learn the mother tongue, orally and in writing and to receive at least basic education through the medium of the mother tongue, and the right to use it in many (official) contexts". On the other hand, Skutnabb-Kangas claims that respect for Linguistic Human Rights at a collective level implies, among others, the indigenous groups right to exist, to be different, to enjoy and develop their languages.

Hence, LHR have emerged as an influential paradigm in resisting language shift and language death. The notion of linguistic human rights arises from a marriage of language rights with human rights such that language rights are so fundamental and so inalienable that no state or any other person is allowed to violate them. Human rights are supposed to be the rights that every individual has, simply by being human. In a similar view, Phillipson has also argued that: "Universal rights represent a normative standard, an inherent right which the state cannot be justified in restricting. In this sense they do not need arguments to legitimate them. They are absolute or inalienable rights."

Further, Skutnabb-Kangas advocates for the marriage of language rights with human rights to obtain binding, codified, enforceable LHRs (Linguistic Human Rights) support from the human rights system and international law. Skutnabb-Kangas, makes an important distinction between language rights and LHRs.

> Language rights are a much broader concept that includes individual and collective enrichment-oriented rights that: have to do with 'extras' for a good life, above basic needs. LHRs, on the other hand, are concerned with the needs of speakers of dominated indigenous languages for protection to ensure their survival and basic justice.

For Skutnabb-Kangas LHRs are necessary rights which fulfil basic needs and are a prerequisite for living a dignified life and necessary for linguistic, psychologi-

[112] Paragraph 5.2 states: "the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria." UNITED NATIONS. Human Rights Committee. *General Comment 23 on Article 27* (Rights of Minorities). 8 April 1994.

[113] GREEN, Leslie. Are language rights fundamental? *Osgoode Hall Law Journal*, v. 25, n. 4, p. 639-669, 1987.

[114] PAZ, Moria. The tower of babel: human rights and the paradox of language. *European Journal of International Law*, v. 25, n. 2, p. 473–496, 2014.

[115] SKUTNABB-KANGAS, Tove; PHILLIPSON, Robert. Language in human rights. *Gazette*, Leiden, v. 60, n. 1, p. 27-46, fev. 1998.

cal, cultural, social, and economic survival for minorities and for basic democracy and justice. Phillipson, Rannaut and Skutnabb-Kangas, observe that in as much as individuals can have their human rights violated through arbitrary imprisonment and torture, individuals and groups are unjustly treated and suppressed by means of language. They argue that individuals and groups

> who are deprived of LHRs may thereby be prevented from enjoying other human rights, including fair political representation, a fair trial, access to education, access to information and freedom of speech, and maintenance of their culture which also include the right to access Health Care. Where such LHRs deprivations occur, Phillipson, Rannut and Skutnabb-Kangas identify language and ethnic conflict as the ultimate result.

7.2 Proposed legal approach for safeguarding ITM linguistic rights

7.2.1 Proportional approach for safeguarding ITM linguistic rights

The UN Human Rights Committee has indicated in its decision in *Ballantyne, Davidson, and McIntyre v. Canada*[116] that the guarantee of freedom of expression in Article 19 of the ICCPR[117] protects not only the content of the communication, but also the linguistic form which it takes, with the result that prohibition on the use of a particular language in advertisements aimed at the public offends the ICCPR. The issue of the extent to which measures taken to promote linguistic minorities should be permitted to encroach on the right to freedom of expression (or other freedoms) of speakers of majority languages is a challenging one. For example, in the Ballantyne, the Human Rights Committee used the concept of proportionality to resolve this issue; it considered whether the sign provisions in dispute were necessary to achieve a legitimate purpose. While, for example, the protection of the vulnerable position of the franco-phone minority in Canada was legitimate, the Committee found that it was not necessary to prohibit commercial advertising in English to accomplish this objective. Protection of French could be achieved in other ways that do not limit freedom of expression in fields such as trade; the law could, for example, have required the advertising to be in both French and English. The recent minority instruments contain provisions which generally guarantee to persons belonging to linguistic minorities the right to enjoy their own culture and to use their own language in private and public life, freely and without interference.

So, with the above judicial decisions in hand we can say that the prohibition of discrimination on the ground of language and similar equality-based provisions lead to an obligation for the state to have in place reasonable and non-arbitrary language preferences. This does not affect a state's ability to determine its own official language, but entails that any language policy, preference or prohibition must conform with international human rights obligations. This human rights approach focuses on the differences in treatment between individuals, not languages. It is therefore the potential negative impacts, such as disadvantage or exclusion, on individuals rather than languages that are considered in assessing the reasonableness of any language preference in the policies, support or services provided at all levels by state authorities and actions. A basic approach to determining reasonableness is to use as a starting point the Principle of Proportionality, as far as is practicable given local circumstances, in all language matters related to public services.

Issues of disadvantage, exclusion and reasonableness are central to the basis for a proportional approach to the use of minority languages in a state's public services and other activities. Using a minority language results in better, more efficient, and more inclusive communication and exchange of information by public authorities. Employment and economic opportunities are also increased by making a minority language a language of public service to a fair and proportionate degree, and service delivery including in critical areas such as public health reaches individuals more directly and effectively in their own language. Individuals understand better information provided to them in their own language.

Within the linguistic human rights paradigm, there is the general assumption that mother tongue education

[116] BALLANTYNE, Davidson and McIntyre v Canada. Communications Nos. 359/1989 and 385/1989. 18 October 1990.UNHRC.

[117] Article 19 Provides that, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." INDIA. [Constituicion (1950)]. *Constitución de India.* Available at: https://www.bcn.cl/procesoconstituyente/comparadordeconstituciones/constitucion/ind. Accessed on: 8 out. 2022.

is an empowering process. Yet history has evidence that mother tongue education can be used for disempowering certain people. For example, the apartheid regime in South Africa used the mother tongue education policy in the black homelands to restrict Africans' access to the socio-economically and politically empowering English language. Brookes and Heath give an example of economic exploitation that can be assisted by the use of the right to mother tongue: Economic rights and land tenure issues, as well as mineral and oil rights, may lead nations to grant linguistic rights and even encourage education in indigenous languages in order to ensure lack of access to information and legal rights by particular groups.[118] Therefore, there is nothing inherently empowering or disempowering in any language - it all depends on what one intends to achieve with the use of a language. In his critique of the linguistic human rights paradigm, Blommaert provides, about the importance of looking not only at inter-language inequalities but also intra-language inequalities. The latter become very conspicuous when the process of standardization is conducted. Standardization is obviously a way of giving power and prestige to one language variant amongst many. It thus creates inequalities and hierarchies amongst variants of language. By granting a group the right to function in their mother tongue in public domains, one has not only to think about the language but the variant that goes with that public recognition. Inability to use that variant of power and prestige can be disempowering. Thus, it has been argued that lack of linguistic rights can prevent equality, but full linguistic rights cannot lead to full equality either. Like here in our study, since more emphasis is given on English and Hindi at Public places resulting in inability to access the health services by ITM. Proponents of linguistic human rights call for the revitalization of indigenous languages to check the depletion of linguistic diversity. They, therefore, call on states to ensure that all languages are maintained.

[118] RAMLAN. Language standardization in general point of view. *Budapest International Research and Critics Institute-Journal*, v. 1, n. 1, p. 27-33, fev. 2018.

7.2.2 Importance of constructive approach in including language as a basic constituent of human rights

7.2.2.1 Access to health care with respect to ITM communities

Now, it is very clear from the judicial pronouncements and constitutional obligations that, indeed, the Government is under an obligation to ensure the right to health care. Further the question arises then why such a vital issue of language, which has been recognised as a part of accessibility to health care, is being ignored. Discrimination on the basis of language does qualify as a substantive inequality. If we refer to the case of Thlimmenos v. Greece, in which ECtHR expressly recognized that substantive inequalities also fall within the scope of Article 14 ECHR and stated that

> the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated if States treat differently persons in analogous situations without providing an objective and reasonable justification.

Even though India is not a party to ECtHR but we are party to many international treaties and which clearly states that there should not be any discrimination on the basis of language. Since, the gravity of issues further deepens when we consider the case of a minority vulnerable group i.e. in our study ITM communities, who are already deprived due to many discriminatory policies and considering the fact that health being a very fundamental aspect of life and the same due to language barriers is denied to them and the Government is failing in fulfilling its obligation by turning a blind eye to such a fundamental aspect of the community.

7.2.2.2 Learning from best Legislative practices from around the World With respect to Indigenous Linguistic & Health Rights

According to international standards, states should take active measures to protect indigenous languages, and associated rights to use languages or access interpretation, as a part of indigenous peoples' rights. Providing constitutional recognition to indigenous languages should be part of those measures. Recognition of the multilingual nature of the state can go far in symbolizing a state's recognition of diversity and the existence of indigenous peoples. In addition, recognition of the equal value of languages can be a way of showing

respect for indigenous cultures and indigenous peoples' dignity. For example, Norway's Sami Act explicitly states: 'Sami and Norwegian are languages of equal worth. They shall be accorded equal status'[119]. Countries can also establish institutions to protect and promote indigenous languages efforts which should always engage indigenous communities themselves and respect the right of these communities to govern the study, use and representations of their own languages. In New Zealand, the Maori Language Act establishes a Maori Language Commission.

If we consider the case of Nunavut of Canada. On June 4, 2008, Nunavut's new Official Languages Act (OLA) was approved by Nunavut's Legislative Assembly and received concurrence from the Federal Parliament on June 11, 2009. The new Act established the Inuit Language ("Inuktitut"), English and French as Nunavut's Official Languages. NOLA's preamble recalls that, under Article 32 of the Nunavut Land Claims Agreement, there is an obligation for territorial institutions "to design and deliver programs and services that are responsive to the linguistic goals and objectives of Inuit." Besides embedding the official status of the Inuit language, English, and French there are a few interesting points concerning the advancement of linguistic rights for the Inuit, like:[120]

- Section 1 states that the purpose of NOLA is "to advocate for and to achieve the national recognition and constitutional entrenchment of the Inuit Language as a founding and official language (ILPA) of Canada within Nunavut. ILPA can be regarded as consolidating rights which had been enacted in NOLA, nevertheless ILPA specifically focuses on the importance of the Inuit language at all levels of Nunavut's society.
- In its preamble, ILPA recalls that the Inuit language is "foundation necessary to a sustainable future for the Inuit of Nunavut as a people of distinct cultural and linguistic identity within Canada." Rights to use Inuktitut and Inuinnaqtun in communications and services to and from Nunavut's government and public agencies are ensured through ILPA. The wording of the Act could not be clearer; services shall be provided in the Inuit language.
- Furthermore, there are translation requirements for the Government of Nunavut to meet; under section 7, "documents, including notices or guidelines, directed to a municipality by the Government of Nunavut for public circulation, review or comment at the municipal level, shall be provided with Inuit Language translations."

States are major actors in the context of international law. Many states deny the existence of minorities within their jurisdiction or oppose the notion of indigenous protection in so far as the protection of language minorities is considered to adversely affect, or to risk, the state 's internal cohesion and national unity.[121] For many states (as well as for supporters of nation--state ideology), indigenous rights contribute to maintenance and to perpetration of indigenous groups as distinct groups. Prohibiting discrimination and intolerance against linguistic minorities corresponds with most states 'interest, in so far as it helps to avoid the outbreak of internal conflicts that can affect other states 'and international security. Therefore, states can agree on a regime of linguistic tolerance, but a regime of linguistic promotion does not correspond with most states' interest; at least, it can legitimately be doubted whether international peace and security can be better safeguarded by far-reaching indigenous language rights in international law.[122] The question arises as to whether, beyond the animosity or the lack of political will on the part of states, there is any reason inherent to the nature of language rights as rights. First, the number of languages in the world is around 6,000, the world population around 6 billion and the number of states almost 200, most states have many languages within their boundaries. These figures give a first impression

[119] GOVERNMENT OF NORWAY. The Sami Act 1987, section 1(5) read as: Sami and Norwegian are languages of equal worth. They shall be accorded equal status pursuant to the provisions of Chapter 3.

[120] OFFICIAL LANGUAGES ACT. *SNu 2008, c 10*. Available at: https://canlii.ca/t/535vj. Accessed on: 14 mar. 2022.

[121] UNIVERSITY OF MINNESOTA HUMAN RIGHTS CENTER. *The rights of indigenous peoples*. 2003. Available at: http://hrlibrary.umn.edu/edumat/studyguides/indigenous.html. Accessed on: 20 mar. 2022.

[122] UNESCO. The Human rights of linguistic minorities and language policies. *International Journal on Multicultural Societies*, v. 3, n. 2, 2000. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000145796 Accessed on: 20 mar. 2022.

of the difficulty of state management of linguistic diversity. Kibbee has rightly reminded us that, "a human rights approach is inherently universalistic and assumes a uniform set of circumstances which trigger application of corrective measures, but that circumstances are hardly universal."[123] Thus, the problems of establishing universal rules of fairness in the interaction of people from different linguistic communities call into question the extent to which a human rights approach offers a solution to the inevitable problems faced by minority or indigenous linguistic groups.

8 Conclusion

According to the research presented in this paper, the right to be treated equally regardless of one's language is an integral part of the law against discrimination and, as such, should be recognized as a fundamental human right. First and foremost, the right of non-discrimination based on language concerns the private and public linguistic rights of members of linguistic minorities. The former is universally recognized, whereas the latter must be granted by each individual state under the appropriate conditions. To protect minority languages effectively, the United Nations Human Rights Committee and the European Court of Human Rights have adopted a minimalist approach. Neither the UNHRC nor the ECtHR's rulings on linguistic issues can be grounded on a human rights framework. Finally, the linguistic dimensions of the rights to a fair trial, to liberty and security, to non-discrimination, and to access public services are all part of language rights, which are universal human rights.

The research also demonstrated the importance of examining violations of the linguistic dimension of freedom of expression as a form of discrimination and the connection between the right to freedom of expression and the right to receive public services like health care institutions etc.

Insight into the essence of linguistic rights reveals that they are, first and foremost, personal liberties. In the context of protections afforded members of linguistic minorities, language rights can be understood as collective rights. The question of whether or not linguistic rights should be recognized as universal human rights under international law remains open. There is currently an ongoing scholarly discussion on the topic of whether or not language rights should be recognized as human rights (May, Philipson, SkutnabbKangas, De Varennes). Whereas, t he critics (Paz, Arzoz) argue that human rights cannot be universally addressed in international law. They offer rules at the regional and state levels to determine whether or not a specific right is fundamental.

In addition, research into the status of ITMs' linguistic rights in India has revealed that these rights remain in jeopardy despite the existence of constitutional and judicial safeguards. However, the state has not accorded the language rights of ITMs the respect they deserve. It has always been government policy not to interfere with the cultural lifestyle of the indigenous communities, but very little has been done to reform the language policy to create a conducive environment to respect their linguistic rights, especially in countries like India where there is a considerable population of ITMs reside. Therefore, the state has not fulfilled its responsibility, which is indicative of weak democratic leadership. In this context, Foucault's discussion of the "art of governance" in Governmentality is relevant. The issue of Governmentality, he says, centres on questions such as how rigorously to be regulated, by whom, for what purpose, and using what techniques. According to Foucault, the art of governance is analogous to the job of the family patriarch in controlling the household. He argues that the government's responsibility to care for its citizens is analogous to that of a father or other senior family member. Upward continuity and Downward continuity are two of the most essential ideas in Governmentality, both of which he has explored in his discussion. According to the theory of Upward Continuity, a person who aspires to be a good state leader must first master the art of leading himself, his possessions, and his legacy. Whereas Downward continuity holds that when a state is well-run, the head of the family will know how to care for his family, his property, and his patrimony, and therefore people will act responsibly. Importantly, Foucault argues that the Government should only govern in a way that they think and behave as though they were in service of people who are governed. This line of reasoning proves that the State's method of governing the ITMs, in particular with regard to protecting

[123] KIBBEE, Douglas A. *For to speke frenche trewely*: the French language in England, 1000 1600: its status, description and instruction. Amsterdã: John Benjamins Publishing, 1991.

and promoting their language rights, has been a dismal failure, negatively impacting a number of fundamental rights and making it difficult for them to access necessary services.

Finally, the ITM community is so large and varied that an unbiased conclusion on the research's findings is impossible. To develop a complete picture of the linguistic rights scenario of ITMs as a whole, a study based on the limited doctrinal research will not be adequate. Further, the expectations that the debate raises could not be fully examined in the current work. The research does shed light on the trend, but it does not provide any definitive conclusions. As a result, the study's findings are circumstantial and within its own confines and could be termed as suggestive. As such, there is need for further empirical research, as well as doctrinal legislative and judicial evaluation, to provide greater weight to the argument for ITMs' linguistic rights.

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ABSTRACT

The article attempts a quantitative as well as a qualitative analysis of the National Capital Territory ("**NCT**") of Delhi's legislative productivity in the year 2020. The Legislative Assembly of Delhi produced only one piece of substantive legislation throughout the year, sitting for one of its fewest number of sessions. However, the business of the Government continued to run apace through several subordinate legislations. While most of these pertained to routine matters of day-to-day administration, two primary regulations embodied the entirety of the State's pandemic response on the back of a colonial-era skeleton legislation. The article discusses the constitutional questions of concern raised by such promulgation of subordinate

legislations, while acknowledging the backdrop of the emergency nature of the pandemic and the unique power-sharing arrangement in the Constitution of India regarding the National Capital Territory of Delhi.

KEYWORDS: National Capital Territory of Delhi COVID-19 delegated legislation excessive delegation

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