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MESSAGE

I am extremely proud to announce Volume IX Issue I of the NLIU Law Review to the legal community. The NLIU Law Review aims to serve as a forum for promoting discourse on contemporary and pressing legal concerns at both the national and international level. Since its inception, this student-helmed publication has sought to cultivate a style of scholarship that explores both the theoretical and the practical concerns of the legal world. To ensure this, it has consistently employed stringent evaluation techniques with emphasis on contemporaneity, critical thinking, originality and lucidity of prose.

In this issue of the Law Review, the authors have delved into topics of legal, commercial and socio-political relevance such as smart contracts and big data analytics in the Indian context, the inviolability of individual dignity and its link to abortion, and the right to die. The authors have attempted to provide a comprehensive background to these issues and proposed solutions for the lacunae in the existing legal framework.

I extend my congratulations to Prof. (Dr.) V. Vijayakumar and Prof (Dr.) Ghayur Alam for another successful publication and commend the student members of this Review for their work and dedication. May the Editorial Committee maintain the same vigour in the coming years, and may students, academicians, lawyers, judges and all other readers find this publication stimulating and beneficial.

(Ajay Kumar Mittal)
CHIEF JUSTICE

MESSAGE FROM THE PATRON

NATIONAL LAW INSTITUTE UNIVERSITY

Ref. No. 1343/NLIUB

Prof. (Dr.) V. Vijayakumar
M.A., M.L., M.Phil., Ph.D.
Vice Chancellor

Date: 16.07.2020

MESSAGE FROM THE PATRON

I am pleased to present Volume IX Issue I of the NLIU Law Review to our readers. Much in the vein of its predecessors, this issue presents several papers that will undoubtedly pique the interest of all legal professionals, students and academicians. Contemporaneous issues having not only a legal impact but also impressive socio-political implications, such as the link between individual dignity and gender identity, the right to die as well as the right to abort are dealt with in great detail by the authors in this issue. It is my earnest desire that the readers find themselves enriched by these articles.

The NLIU Law Review is the flagship publication of National Law Institute University, Bhopal, and serves as a platform for academicians, lawyers and students to contribute to legal discourse. The journal encourages legal research and critical thinking by rigorously evaluating the submissions on grounds such as contribution to existing literature and contemporary relevance.

Any discussion on this issue would be remiss without mentioning the efforts of those who made this endeavour possible. To the Patron-in-Chief of the Law Review, Hon'ble Shri Justice A.K. Mittal, Chief Justice, High Court of Madhya Pradesh, I would like to express my immense gratitude for his guidance and support. I would like to congratulate Prof. (Dr.) Ghayur Alam for successfully supervising the publication of this issue through constant inputs to the student editors. I further commend the editorial team for their meticulous work and hope that their enthusiasm only grows with each upcoming issue. We look forward to the feedback from readers on the contents of this issue and the Law Review's scholarship over the years. It is my hope that, with your feedback, we will be able to improve the quality of the journal.

(V. Vijayakumar)
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NOTE FROM THE FACULTY ADVISOR

This is the First Issue of the Ninth Volume of the NLIU Law Review. Our students have been careful in selecting themes of contemporary legal relevance. Our constant endeavor is to encourage free and meaningful discourse on issues of socio-legal significance.

For this Issue, our students have strived tirelessly to put together research papers ranging from big data analytics and smart contracts in the Indian context to labour regulations and decriminalization of consensual homosexual act. The Issue also contains research papers on important issues such as the challenges faced by the National Green Tribunal, approach of the Supreme Court towards passive euthanasia and consensual sex by false promise of marriage, as well as abortion laws in the USA and India. Research papers on the methodologies in law, issues relating to several debt recovery laws in India and the UNIDROIT Principles of International Commercial Contracts are also included.

The NLIU Law Review has always provided a platform for researchers in law to present their scholarly opinions on legal issues. Our aim is to encourage ethos of academic excellence by building a culture of disruptive thinking and meaningful discussion through research papers that seek to take an untrodden or at least a less trodden path.

I take this opportunity to thank and express our deepest sense of gratitude to the Patron-in-Chief of the NLIU Law Review, the Chief Justice of the Madhya Pradesh High Court, Hon'ble Mr. Justice Ajay Kumar Mittal for his continuous encouragement and guidance. We are immensely grateful to our Patron, Prof. (Dr.) V. Vijayakumar, the Vice-Chancellor of National Law Institute University, Bhopal for his constant support. We hope that under his academic leadership, NLIU will be scaling newer heights of excellence.

We welcome and appreciate comments, suggestions and criticism on the articles published in this Issue. The aim of NLIU Law Review is to strive towards bettering itself and any comment from the legal fraternity will be a step in this direction. Please help us achieve our aim.

Prof. (Dr.) Ghayur Alam
Dean, Undergraduate Studies
Professor in Business and Intellectual Property Laws
National Law Institute University, Bhopal

EDITORIAL NOTE

The NLIU Law Review presents to the readers Volume IX, Issue I, which brings to the forefront a completely unique corpus of legal research, exploring a variety of issues of relevance in both the international and domestic arenas. The issue includes several in-depth analyses of contemporary legal concerns as well as various attempts to provide realistic solutions to such concerns.

In the article "*Evaluating the National Green Tribunal After Nearly a Decade: Ten Challenges to Overcome*", the authors explore the challenges which have a significant bearing on the functioning of the National Green Tribunal as well as issues relating to how the High Courts have responded to the Tribunal's adjudication.

The article "*Smart Contracts in Leasing: Is India Ready?*" explores the legality and validity of smart contracts in India's real estate sector, especially in leasing. The author strives to illustrate the legal obstructions such technologies face in comparison to more traditional forms of lease instruments and the importance of finding cogent solutions to such issues.

In "*Big Data Analytics: A Cause of Concern for Competition?*", the author attempts to analyze the implications a growing digital economy can have on competition and whether the present anti-trust regime is suitable to deal with such consequences. The paper traces the importance of big data, the potential anti-competitive conduct it gives rise to, and finally, the need to find rounded solutions and relieve the burden on traditional anti-trust tools.

In "*Reconceptualising Labour Regulations for Workers in the Gig Economy*", the author highlights the inception of the gig economy and the unpredictable alterations it has brought about in labour relations. The author suggests redefining labour relationships in light of the

prevailing industrial policy in order to preserve socio-economic objectives.

In the work "*Decriminalizing the Act: Projecting Individuals as Kings Without Sceptre to Rule?*", the authors trace the history of Section 377 of the Indian Penal Code up to the landmark verdict of the Supreme Court in the case of Navtej Johar and Ors. v. Union of India. The paper attempts to analyse the rippling socio-political effect this judgment will have on the legal framework.

The article titled "*Deconstructing the Conundrum between IBC, SARFAESI & PMLA*" highlights the pressing need for the Supreme Court to settle with finality the conflict created by the various debt recovery acts. The different legislations, due to their varying scope and application, have long been criticized for creating conflicts in prioritisation of claims.

"*The UNIDRIOT Principles on International Commercial Contracts: An Appropriate Tool to Fill the Gaps in the CISG?*" is an insightful work that explores the possibility of utilizing the UNIDROIT Principles of International Commercial Contracts to fill the gaps in the formulation of the Convention on the International Sale of Goods.

"*The Labyrinth of Rape by False Promise of Marriage: A Critical Analysis*" discusses ideas of crucial social importance, false promise of marriage and deceptive sexual intercourse. The author examines the reasoning adopted by courts in cases of rape and proposes suggestions to make for more sound observations.

In "*Why Do You Care About My Body?" An Analysis of Abortion Laws in the USA and India*", the authors discuss the draconian shift in abortion law that the USA has witnesses in contravention of the landmark judgment Roe v. Wade. The authors also engage in a brief analysis of the right of abortion in the constitutional and legal framework of India.

In "*What is Law? - In Search of Method*", the author poses the question whether jurisprudence has a method that it can call its own. The author systematically traces the evolution of legal theories from well-known luminaries as well as an obscure Indian theorist. The paper dissents against well-accepted ideas of the need for empirical data and validity and application of a theory in relation to a normative system.

In "*'Right to Die vis-a-vis Right to Life' An Analysis of the Supreme Court Approach towards Passive Euthanasia*", the author attempts to analyse the trend of Supreme Court judgments on passive euthanasia in light of the fundamental rights conferred by the Constitution. The article questions the prominence relegated to the sanctity of life as against the individual's choice to die.

Finally, the paper "*Restoration in Rape: A Case for Restorative Justice in Sexual Offences*" proposes redefining rape in the context of power dynamics, rather than consent. It delves into the distinctive nature of rape and explains why it is unjust and unfair to define it as an offence against the State and society.

The student team at NLIU Law Review sincerely hopes that the present issue proves to be an insightful read for all its readers and marks another step forward in the Law Review's pursuit of excellence in legal scholarship. We would like to thank the authors for their contributions and welcome any feedback to improve the quality of our journal.

Editorial Board

EVALUATING THE NATIONAL GREEN TRIBUNAL AFTER NEARLY A DECADE: TEN CHALLENGES TO OVERCOME

RaghuveerNath Dixit[*] *and Dr. Armin Rosencranz*[**]

Abstract

It has been nearly a decade since the National Green Tribunal Act, 2010 was enacted. During this period, the National Green Tribunal has positively changed environmental adjudication in India by adding scientific expertise to the adjudication process. Moreover, disposal of cases has become more expeditious and effective. However, there are still challenges that the NGT needs to overcome.

Through this paper, the authors explore ten such challenges which have a significant bearing on the functioning of the National Green Tribunal and can affect its relevance in the next decade. These involve matters relating to the apathetic attitude of the government with respect to the Tribunal and efforts made to undermine its powers. These include issues such as lack of infrastructure and basic amenities, delays in appointments of

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members, dilution of the independence of the Tribunal through amendments in the Finance Act, 2017, and viewing the Tribunal as an obstacle to development.

Further, the authors explore issues relating to how High Courts have responded to the Tribunal's adjudication. In particular, the frequent appeals being heard by the Madras and Telangana High Courts and the curb on the exercise of suomotu jurisdiction by the Tribunal are discussed. Additionally, the authors highlight issues within the Tribunal such as non-scientific determination of environmental compensation, trend of not penalizing governmental authorities, lack of access to justice, and the non-implementation of orders and awards.

I. INTRODUCTION

It has been nearly a decade since the National Green Tribunal Act, 2010 ("**NGT Act**" or "**Act**") was enacted by the Parliament.[1] The enactment was, however, primarily a result of judicial assertion rather than legislative will. The Supreme Court, throughout the 1980s up till the early 2000s tackled environmental degradation and pollution through the process of public interest litigation.[2] This process allowed the Court to provide wider remedies by way of procedural innovations

[1]The National Green Tribunal Act, 2010 was enacted on 5 May 2010.
[2]This section of the paper contains paraphrases from authors' previous work titled *Determining Environmental Compensation in India: Lessons from a Comparative Perspective* submitted to Environmental Law Reporter.

such as the expansion of locus standi[3] and the introduction of a non-adversarial procedure.[4]While most of the present jurisprudence relating to environment law came from this process, there was no pro-environment consistency in the Court's decisions.[5] The Court often found itself stumped due to increasing scientific and technical complexities involved in environmental cases. In addition, the Court found itself increasingly indulging in fact-finding, weighing evidence, and in effect, conducting a trial.[6]

Accordingly, the Supreme Court, through three major decisions, provided the ground for the creation of the National Green Tribunal ("**NGT**" or "**Tribunal**") by voicing the urgent need for a "green tribunal".[7] Further, the 186th Report of the Law Commission of India recommended the establishment of "environmental courts" in every state, which would be composed of judges as well as experts, and would have both original and appellate jurisdiction.[8] However, the lack of legislative will in this regard is evident from the fact that the predecessor of the NGT – the National Environmental Appellate Authority ("**NEAA**") – was made toothless due to lack of

[3]P. S. R. Sadhanantham v. Arunachalam&Anr., AIR1980 SC 856.

[4]Kannanaikil v. State of Bihar, W.P. No.8136 of 1983; BandhuaMuktiMorcha v. Union of India, AIR 1984 SC 802.

[5]On one hand, cases such as T.N. GodavarmanThirumulkpad v. Union of India (Writ Petition (Civil) No. 202 of 1995) demonstrate a pro-environment stance of the Supreme Court wherein the Supreme Court sought to interpret and define the forest policy for the entire country. On the other hand, cases such as Narmada BachaoAndolan v. Union of India, (2000) 10 SCC 664, reflect a deference to development over strong environmental concerns based on the justification that India is a developing and economically weaker country.

[6]For instance, in T.N. GodavarmanThirumulkpad v. Union of India (Writ Petition (Civil) No. 202 of 1995) the Supreme Court constituted an expert body called Central Empowered Committee (CEC) in May 2002 to investigate and dispose of interim applications based on the directions of the Court.

[7]The three decisions are M.C. Mehta v. Union of India,(1986) 2 SCC 176, Indian Council for Enviro-Legal Action v. Union of India,3 SCC 1996 212, and A.P. Pollution Control Board v. M.V. Nayudu, (1999) 2 SCC 718.

[8]186th Report on 'Proposal to Constitute Environment Courts', Law Commission of India, September 2003.

appointments and funding.[9] In fact, at one point in time, the NEAA had only one member who was also its chairperson.[10] Nevertheless, due to the concern voices by the Supreme Court and the Law Commission, coupled with the need to give effect to India's obligations under the Stockholm[11] and Rio[12] Declarations, the Indian legislature enacted the NGT Act.

Given that the *raison d'etre* of the NGT is to tackle 'substantial questions relating to environment' replete with complex scientific and technical issues in an effective and expeditious manner, the NGT Act, envisages the establishment of an independent statutory panel of both judicial and expert members.[13] This seeks to ensure that adjudication of environmental cases does not disregard the crucial underlying scientific and technical assessments. Accordingly, the NGT Act provides that the tribunal will consist of minimum ten and a maximum of twenty full time judicial as well as expert members.[14] These expert members have expertise in, inter alia, physics, chemistry, botany, zoology, engineering, environmental economics, social sciences and forestry and help advice judges on a regular basis.[15]

In its existence of almost a decade, the establishment of NGT has certainly been a progressive step with respect to the previous

[9]Ramesh Agrawal, *We need compliance, not more environmental laws*, INDIA TIMES, https://economictimes.indiatimes.com/opinion/interviews/environmental-activist-ramesh-agrawal-we-need-compliance-not-more-environmental-laws/articleshow/35855007.cms?from=mdr.
[10]*Id.*
[11]Declaration of the United Nations Conference on the Human Environment, Stockholm, 1972.
[12]The Rio Declaration on Environment and Development, 1992.
[13]The National Green Tribunal Act, 2010 Preamble.
[14]The National Green Tribunal Act, 2010 §4.
[15]Armin Rosencranz and GeentanjoySahu, *Assessing the National Green Tribunal after Four Years*, at p. 193.

environmental adjudication regime. Its expertise has certainly allowed for more expeditious disposal of environmental cases. However, there are certain significant challenges that the NGT still needs to overcome. Through this paper, the authors explore these challenges. While some are more serious than others, they all have the potential to seriously affect the NGT's functioning and its ability to effectively adjudicate on environmental disputes. In the next section, the authors highlight and analyze ten significant challenges that the NGT has faced in the first decade of its existence and which it ought to overcome.

II. ENSURING EFFECTIVE FUNCTIONING OF THE NGT: TEN CHALLENGES TO OVERCOME

In this section of the paper, the authors explore ten significant challenges that the NGT continues to face after nearly a decade of its existence. These primarily stem from governmental apathy towards the Tribunal, certain decisions of High Courts, and trends in the Tribunal's adjudication.

A. Challenge to Suo Motu Jurisdiction

The NGT Act neither accords nor takes away *suo motu* jurisdiction – the jurisdiction to take up a matter on the Tribunal's own motion – from the NGT. Nevertheless, the NGT has, on several important occasions, exercised this jurisdiction to hold persons accountable for environmental degradation.[16] If one views the context in which the

[16]*See* Court on its Own Motion v. Ministry of Environment and Forests & Climate Change & Others, Original Application No. 361/2017 (I.A. No. 89/2019); Tribunal on its Own Motion v. State of Himachal Pradesh, Judgment, 6 February 2014, Original Application No. 237 (THC)/2013; Court on its Own Motion v. State of Himachal Pradesh &Ors., Original Application No. 446 of 2018.

NGT Act was enacted, especially the public interest litigation regime that preceded the Act, this does not seem surprising. Frequently, throughout the 1980s up to the late 2000s, the Supreme Court responded to governmental inaction towards environmental degradation through public interest litigation.[17] A significant feature of this was the expansion of locus standi and the introduction of a non-adversarial procedure. This enabled the Court to take cognizance of cases brought to its attention through newspaper articles and letters addressed to it.[18] In fact, it is not an overstatement that the bulk of Indian environmental jurisprudence was formed during this period and several important cases were taken up by the Court on its own motion.

Of course, the NGT is not the Supreme Court. However, given that one of the main reasons for its creation was to enable effective adjudication of environmental issues coupled with the fact that it is now the foremost adjudicatory authority on environmental matters, the power to take up cases through the exercise of *suomotu* jurisdiction seems only natural. Nevertheless, in restraining the Chennai Bench (Southern Zone) of NGT from exercising its *suomotu* jurisdiction, the Madras High Court has held that:[19]

"*The NGT is not a substitute for the High Courts in all respects… The Tribunal has to function within the parameters laid down by the NGT Act, 2010. It should act within four corners of the statute. There is no indication in the NGT Act or the rules made thereunder with regard*

[17]*Supra* note 4.
[18]For a discussion on epistolary jurisdiction see Marc Galanter, *Snakes and Ladders: SuoMotu Intervention and the Indian Judiciary*, 10 FIU LAW REVIEW 69 (2014).
[19]A. Subramiani, *Green tribunal's wings clipped, Madras High Court halts suomotu proceedings*, INDIA TIMES, https://timesofindia.indiatimes.com/city/chennai/Green-tribunals-wings-clipped-Madras-high-court-halts-suo-motu-proceedings/articleshow/28346066.cms.

to the power of the NGT to initiate suo motu proceedings against anyone, including statutory authorities."

Justice Swatanter Kumar, the then Chairperson of the NGT (also an ex-Supreme Court judge), responded to this by highlighting that the *suomotu* jurisdiction is one of the 'inherent powers' that are 'vital for the effective functioning' of courts, and is required to be an 'integral feature' of the NGT Act.[20] As a corollary, he further stated that the Indian Constitution does not expressly vest High Courts with *suo motu* jurisdiction either. Nevertheless, this has not stopped them from exercising such jurisdiction.

Indeed, the jurisdiction is essential to the functioning of the Tribunal. A look at its use by the Tribunal highlights this. For instance, many landmark cases such as those relating to, *inter alia*, river pollution[21], increased vehicular traffic,[22] illegal dolomite mining,[23] and groundwater contamination[24] have been adjudicated through the exercise of *suomotu* jurisdiction by the Tribunal. The question as to whether the NGT can exercise such *suomotu* jurisdiction is pending before the Supreme Court.[25] Given that the NGT Act does not

[20]*NGT must have suomotu powers, Interview of Justice Swatanter Kumar*, DOWN TO EARTH, https://www.downtoearth.org.in/interviews/environment/ngt-must-have-suo-motu-powers-47542.

[21]SuoMotu proceedings initiated based on the representation received from Justice R. Bhaskaran, Former Judge v. State of Kerala &Ors., Original Application No. 585/2018, earlier Original Application No. 395/2013 (SZ) (THC); Court on its Own Motion v. State of Himachal Pradesh &Ors., Original Application No. 446 of 2018; Court on its Own Motion v. Ministry of Environment and Forests & Climate Change & Others, Original Application No. 361/2017 (I.A. No. 89/2019).

[22]Tribunal on its Own Motion v. State of Himachal Pradesh, Judgment, 6 February 2014, Original Application No. 237 (THC)/2013.

[23]Tribunal on its Own Motion v. Secretary, MoEF, SCC Online 2013 NGT.

[24]Tribunal on its Own Motion v. Government of NCT, Delhi Order, 19 June 2015.

[25]Public Trust of India, *SC to decide if NGT as power to take cognizance of issues on its Own*, BUSINESS STANDARD, https://www.business-standard.com/article/pti-stories/sc-to-decide-if-ngt-has-power-to-take-cognisance-of-issues-on-its-own-119071200971_1.html.

expressly bar the exercise of such jurisdiction, the authors hope that the Court rules in favor of it.

B. Frequent Appeals to High Courts

Section 22 of the NGT Act states that any person aggrieved by any award, decision, or order of the NGT 'may' file an appeal directly to the Supreme Court within ninety days from its communication to the person. The Act does not provide for an appeal to the High Courts. This is understandable given that the preamble of the Act states that the Tribunal is being constituted for the effective and expeditious disposal of cases.[26] Invariably, an appeal to the High Courts is likely to be time consuming and can potentially defeat the aim of providing expeditious disposal of cases by adding another stage of appeals.

Nevertheless, this legislative intention has been disregarded by a few High Courts.[27] For instance, the Madras High Court has held that the NGT Act does not exclude the right to appeal to the High Courts despite expressly providing for an appeal to the Supreme Court.[28] It has opined that the bar on jurisdiction envisaged by the Act, if any, is applicable only to lower courts. It arrived at this conclusion by relying on the Supreme Court's reasoning in *L. Chandra Kumar v. Union of India*("*L. Chandra Kumar*").[29]In this case, the Supreme Court had held that the powers of judicial review under Articles 226 and 227 of the Constitution were a part of the 'basic structure' of the Constitution and could not be ousted or abridged even by a constitutional amendment.[30] However, unlike the NGT Act which expressly provides that the appeal from the Tribunal should lie with the

[26]*Supra* note 13.
[27]For instance, see KollidamAaruPathuk v. Union of India, Writ Petition No. 9265 and 9654 of 2012; State of Telangana v. Md. HayathUddinand, (2007) 2 SCC 1.
[28]KollidamAaruPathuk v. Union of India, Writ Petition No. 9265 and 9654 of 2012.
[29]L. Chandra Kumar v. Union of India, (1997) 3 SCC 261.
[30]*Id*., at ¶76.

Supreme Court, the Administrative Tribunal Act, 1985 in question before the Supreme Court in *L. Chandra Kumar* expressly excluded the jurisdiction of all courts apart from labour courts and the Supreme Court.[31]

In contrast to the Madras High Court, the Bombay High Court, in view of the legislative intent of the NGT Act, has declined to hear appeals from the NGT and has directed appellants to approach the Supreme Court under Section 22 of the Act.[32] While the High Court agreed with *L. Chandra Kumar* to the extent that the jurisdiction of the High Courts could not be excluded, it held that the writ jurisdiction of the High Courts under Articles 226 and 227 of the Constitution has to be sparingly used such as in situations of gross breach of principles of natural justice or issues of jurisdiction.[33] An appeal from the NGT was not one of those rare occasions, because the NGT Act provided for an 'effective alternate remedy'.[34] To this effect, the Bombay High Court relied on the Supreme Court's reasoning in *United Bank of India v. Satyawati Tondon*, wherein it was held that:[35]

Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person… (*Emphasis supplied*)

Thus, the High Court rightly held that the Section 22 of the NGT Act provides an effective alternate remedy, and in line with the legislative

[31] *Id.*, at ¶11.
[32] Shri Anil Hoble v. KashinathJairam, W.P. No. 400 of 2015.
[33] *Id.*, at ¶16.
[34] *Id.*
[35] United Bank of India v. SatyawatiTondon, 8 SCC (2010) 110, ¶43.

intent behind the Act, the appeals from decisions of the Tribunal should ideally be directed to the Supreme Court.[36]

In furtherance of this line of reasoning, the Telangana High Court initially refused to hear an appeal from an order of the NGT on the pretext that the statutory appeals from NGT lie with the Supreme Court.[37] However, it subsequently agreed to hear the appeal as one of the primary contentions was with respect to breach of principles of natural justice.[38] This, in the opinion of the authors is the correct approach to take and is in line with the reasoning of the Supreme Court. Moreover, it is in consonance with the underlying legislative intent to enable expeditious disposal of cases by the Tribunal. It is recommended that all High Courts adopt the Bombay High Court's reasoning and not entertain appeals under Articles 226 and 227 of the Constitution unless issues of jurisdiction or violation of the principles of natural justice are involved. This will ensure that environmental adjudication of the NGT is both effective and expeditious.

C. Non-Scientific Determination of Compensation

The NGT Act does not prescribe any minimum or maximum amount of compensation that may be imposed by the Tribunal. The Act accords wide discretion to the NGT with respect to the amount of compensation and the methodology used to arrive at such an amount. This is evident from the fact that the only guidance with respect to determination of compensation in the Act is under Section 20, which states that the NGT is required to apply the principle of sustainable development, polluter pays principles, and the precautionary principle

[36] *Supra* note 33, ¶22.
[37] *High Court to hear appeal against NGT order*, THE HINDU, https://www.thehindu.com/news/cities/Hyderabad/high-court-to-hear-appeal-against-ngtorder/article26401062.ece.
[38] *Id.*

while passing an award or order.[39] While the Tribunal has this wide discretion, the recent trend in its adjudication highlights the lack of use of any methodology for the calculation of environmental compensation in several cases. The trend in many cases seems to be to award a compensation between 5% and 10% of the project cost.[40] This was started in 2014 when the NGT arbitrarily adopted the Supreme Court's approach to determining compensation in *Goa Foundation v. Union of India* ("*Goa Foundation*").[41]

Goa Foundation dealt with the issue of environmental damage due to illegal mining in Goa. In arriving at the compensation amount, the Court held that the project proponents would have to pay 10% of the sale proceeds.[42] However, this method to compute compensation was not intended to be a precedence for determining compensation in all cases. In fact, it was deemed appropriate in this case only because the Court felt that mining could not be completely banned due to its economic benefits to the State of Goa in terms of revenue and employment generation[43]. Thus, in light of the peculiar considerations in the case, the Court held that determining compensation as a percentage of sale proceeds would be appropriate as it would directly affect the profitability of the project proponent.[44]

Accordingly, at most, the approach to determine compensation can be deemed as a precedent for cases involving an illegal mining in regions

[39]This section of the paper contains paraphrases from authors' previous work titled *Determining Environmental Compensation: The Art of Living Case*, 12 NUJS L. REV. 1 (2019).
[40]*See*S.P. Muthuraman v. Union of India (O.A. 37/2015), and ManojMisra v. Union of India (O.A. 177/2015), KrishanLal Gera v. State of Haryana, Appeal No. 22 of 2015, Sunil Kumar Chugh v. Secretary Environment Department, Appeal No. 66 of 2014. *See also*, Chandra Bhushan, Srestha Banerjee and IkshakuBezbaroa, *Green Tribunal, Green Approach: The Need for Better Implementation of the Polluter Pays Principle*, Centre for Science and Environment, New Delhi 8(2018).
[41]Goa Foundation v. Union of India and Ors., (2014) 6 SCC 590.
[42]*Id.*, ¶63.
[43]*Id.*
[44]*Id.*

such as Goa which are heavily dependent on it for revenue and employment. Thus, in all other cases where such peculiar considerations are absent, the approach taken ought to be different as the impugned approach is not based on the extent of actual environmental damage and is rather based on the profit of the polluter.

Nevertheless, the NGT has disregarded these peculiar considerations in *Goa Foundation* and has co-opted this approach in several cases that have very different considerations.[45] This trend of unduly relying on the Supreme Court's approach in *Goa Foundation* was started in 2014 by the Tribunal in *Forward Foundation v. State of Karnataka* ("***Forward Foundation***").[46] The case dealt with unauthorized construction by two companies, prior to receiving an Environmental Clearance ("EC"). Despite holding that the illegal construction had severely damaged the entire ecosystem of the adjacent lakes, wetlands, and storm water drains, the NGT arbitrarily relied on *Goa Foundation* and awarded an environmental compensation amounting to a mere 5% of the project cost.[47]

While the NGT claimed to rely on the Supreme Court's approach, it differed in two significant ways. First, it arbitrarily reduced the compensation percentage from 10% to 5% by simply stating that, '10 per cent of the project cost may be somewhat on the higher side' (*emphasis supplied*).[48] Second, instead of using a percentage of sale proceeds – as was used by the Supreme Court – the NGT used a percentage of the project cost. The Tribunal did not provide any reason for this departure. Thus, while the NGT overtly relied on *Goa Foundation* for determining compensation, it departed materially in terms of the quantum of compensation and the approach adopted.

[45] *Supra* note 41.
[46] The Forward Foundation v. State of Karnataka, SCC Online 2015 NGT 5.
[47] *Id.*,¶14.
[48] *Id.*,¶84.

Nevertheless, in co-opting this approach the NGT was focused on impacting the profitability of the project proponent instead of primarily being concerned with the quantum of environmental damage. This is evident from the Tribunal's reliance on its earlier decision in *Krishan Kant Singh v. National Ganga River Basin Authority,*[49]wherein the Tribunal was concerned with the 'magnitude, capacity, and prosperity of the unit' (*emphasis added*).[50]

However, these concerns of the Tribunal with respect to the profitability of the project proponent do not translate into action in practice. In several cases, the compensation levied is extremely low in comparison to the project proponent's annual revenue/turnover, as also concluded by a recent study of the Centre for Science and Environment.[51] In fact, the cases analysed with respect to the pollution caused by sugar distilleries highlight that the compensation was between 0.012% and 0.07% of the annual turnover of the project proponents.[52]

In addition to the compensation amount being extremely low, the certainty of the compensation amount is likely to allow potential polluters to do a cost-benefit analysis before undertaking a project. Given that the initial compensation, irrespective of the level of pollution, is likely to be pegged at a mere 5% of the project cost, it is likely to incentivize the potential polluter to proceed with the project if the project can be reasonably profitable after accounting for this amount. Accordingly, this trend is likely to result in the environmental compensation being viewed as a business cost.

[49]Krishan Kant Singh v. National Ganga River Basin Authority, SCC Online 2014 NGT 2364.
[50]*Id*., ¶51.
[51]Chandra Bhushan, Srestha Banerjee and IkshakuBezbaroa, *Green Tribunal, Green Approach: The Need for Better Implementation of the Polluter Pays Principle*, Centre for Science and Environment, New Delhi12 (2018).
[52]*Id*., at page 12.

This trend has led to an embarrassing situation for the NGT, wherein due to non-scientific assessment of the compensation, it has had to retract the penalty initially levied. For instance, in *Ajay Kumar Negi v. Union of India*,[53] the Tribunal had initially levied a compensation of ₹ 5 crore due to the violations of the conditions contained in the EC with respect to clearing forest areas.[54] However, a few months later the Tribunal changed its stance and held that, "*the stage is not yet ready for relief as … damage to environment, if any, arising out of the project activity is yet to be completely assessed*".[55] The reason for this change was that the Expert Committee, which had recommended the levy of the initial compensation, subsequently held that the livelihood of the people was "*least likely to be affected by the project operation*" and that there was no apparent threat of irreversible damage to the forest cover.[56] Thus, the NGT went from levying an initial compensation of Rs. 5 crores to not levying a compensation at all.

Similarly, in *Manoj Mishra v. Delhi Development Authority &Ors.*,[57] popularly known as the "***Art of Living Case***" wherein the NGT dealt with the destruction of the Yamuna Floodplains due to Art of Living's World Cultural Festival, the compensation eventually levied was very different from the initial estimate. The initial estimate of the Expert Committee based on a simple 'visual assessment' was approximately Rs. 120 crores.[58] This estimate was later changed to Rs. 28.73 crores.[59] Finally, the Tribunal asked the Art of Living to deposit Rs. 5

[53]Ajay Kumar Negi v. Union of India (OA No. 183 (THC) of 2013), judgement dated 7 July 2015.
[54]*Id*., ¶22.
[55]*Id*., order dated 4 April 2016, ¶29.
[56]*Id*., ¶25.
[57]*Manoj Mishra v. Delhi Development Authority &Ors.*, Original Application No. 65 of 2016.
[58]*Id*., ¶34.
[59]*Id*., at page 72, ¶39.

crores (not as penalty),[60] out of which only Rs. 25 lakhswere required as a condition precedent for going ahead with the event. This substantial reduction in estimated compensation was a result of non-scientific estimation of the environmental damage. Not only had the Chairperson of the Expert Committee denounced the Report of the Committee for not being "*based on any scientific assessment*",[61] the NGT itself had admitted to not conducting a scientific analysis. To this effect, the Tribunal had held that the primary reason for not quantifying damage was that:[62]

"*Estimate of the costs of restoration requires the preparation of a Detailed Project Report that may take several months to a year besides financial resources.*"

Accordingly, the NGT unscientifically levied a penalty without quantifying the environmental damage, if any.

Therefore, the authors recommend that this trend should be discouraged and the NGT should calculate compensation in each case not only on the basis of estimated environmental damage but also with an aim to deter any further violations. The compensation imposed must truly affect the profitability of the project proponent and dis-incentivize the potential polluter from future violations.

D. Trend of not Penalizing Governmental Authorities

In addition to the lack of methodology followed and the lack of scientific analysis undertaken by the NGT while determining compensation, the NGT has failed to impose significant monetary penalties on governmental authorities. Even in cases where the

[60]In order dated 11 March 2016, the Tribunal clarifies that ₹5 crore is not a penalty in terms of Section 26 of the NGT Act, 2010. *See also,Id*., at page 29, ¶23.
[61]Letter dated 3 March 2016 from Mr.ShashiShekhar to the National Green Tribunal, D.O. No. 5 (UIR, RD 1 GR)/ Misc./2016.
[62]*Id*., at page 57 and 61.

Tribunal has unequivocally held that governmental agencies have completely disregarded the environment and have not performed their duties, the NGT has only awarded negligible sums as compensation, if at all.

For instance, in the aforementioned case of *Ajay Kumar Negi*, the Tribunal had held that the Forest Department had not performed its duties and could not explain the discrepancy between the number of trees allegedly damaged by the project proponent (398 trees) and its estimate (4815 trees).[63] Furthermore, the project proponent in the case had been regularly paying environmental fines as and when required, but the Forest Department failed to utilise the amounts paid as environmental compensation for several years.[64] Despite noting such gross negligence on the part of the Forest Department, the Tribunal did not impose any monetary penalty on it.

Likewise, in the *Art of Living Case*, despite holding that the Delhi Development Authority had wrongfully granted the permission to Art of Living for holding the cultural event and that the Delhi Pollution Control Committee was negligent in performing its duties, the Tribunal did not impose any costs on the former and levied a mere penalty of Rs. 1 lakh (USD 70,000) on the latter.[65]

Additionally, prior to the event, the Art of Living had also taken permissions from, *inter alia*, the Ministry of Environment, Forest and Climate Change ("**MoEF&CC**"), the Uttar Pradesh Irrigation Committee ("**UPIC**"), Delhi Disaster Management Authority ("**DDMA**"), and the Irrigation and Flood Control Department of Delhi ("**IFCD**"). However, despite holding that these departments had wrongly granted the permission, the NGT did not impose any penalty on them and did not hold them accountable in any manner.

[63] *Supra* note 54, ¶17.
[64] *Id.*, ¶15.
[65] *Supra* note 58, ¶21.

However, recently this trend seems to be changing. In January 2019, the Tribunal held the state government of Meghalaya responsible for failing to curb illegal coal mining in the state and imposed a fine of Rs. 100 crores on it.[66] This amount was ordered to be deposited by State Government with the Central Pollution Control Board within two months.[67] This high amount was imposed to act as a 'deterrent' as the State Government had not performed its duties despite data showing that a majority of the 24,000 mines in Meghalaya were being operated illegally i.e. without a license or EC.[68] Similarly, the NGT recently imposed a fine of Rs. 25 crores[69] on the state government of Delhi for failing to curb air pollution and imposed a fine of Rs. 50 crores on the Punjab state government for polluting rivers Sutlej and Beas due to uncontrolled industrial discharge.[70]

Accordingly, it is recommended that this recent trend continues and the NGT continues to not only hold governmental authorities accountable for environmental pollution, but also continues to impose heavy monetary costs on them.

E. Inadequate Implementation of Decisions

In addition to recommending the setting up of environmental courts, the Law Commission of India, in its 186th Report, had further recommended that these courts must have contempt jurisdiction.[71] It

[66]Original Application No. 517 of 2015, order dated 2 January 2019; *Seealso,*Public Trust of India, NGT imposes Rs. 100 crores fine on Meghalaya govt for failing to curb illegal mining, available at: https://economictimes.indiatimes.com/news/politics-and-nation/ngt-imposes-rs-100-crore-fine-on-meghalaya-govt-for-failing-to-curb-illegal-mining/articleshow/67388967.cms.
[67]*Id.*
[68]*Id.*
[69]Satish Kumar v. Union of India &Ors., Original Application No. 56 (THC)/2013, order dated 03.12.2018
[70]MayankManohar&Anr.v. Govt. of NCT of Delhi &Ors., Original Application No. 601 of 2018, order dated 24 January 2019.
[71]*Supra* note 8 at page 151.

noted that trial of ordinary criminal cases was very time consuming and that the proposed environmental courts ought to have contempt jurisdiction to ensure effective and efficient implementation of their orders.[72] However, this recommendation was not accepted and the NGT Act does not have any provision according contempt jurisdiction to the Tribunal. While Section 26 of the Act provides that if a person fails to comply with the orders of the Tribunal, he or she may be punished with imprisonment up to three years or with a fine up to Rs. 10 crores, this offence is triable only by ordinary criminal courts.[73]

Nevertheless, in a case where a petitioner filed contempt applications before the Tribunal, the NGT held that it had the 'inherent powers' to enforce its orders.[74] However, the Tribunal failed to elaborate on the source of such inherent powers. Despite such bold moves on the part of the Tribunal, there exists a serious challenge with respect to the enforcement of directions and orders. In many landmark cases, either the directions of the Tribunal are not implemented on the ground, or the compensation awards are not complied with in time.

For instance, the NGT's order dated 10 November 2016 with respect to air pollution in Delhi – wherein clear directions were given with respect to the next steps to be taken to combat long term and short-term air pollution – remain completely unimplemented.[75] In fact, the

[72]*Id.*

[73]While Section 25 of the NGT Act accords the NGT with execution jurisdiction by vesting in it all powers of a civil court, it is distinct from contempt jurisdiction. Moreover, it remains to be seen how the NGT will interpret the powers under this Section in practice.

[74]The Braj Foundation v. Govt of U.P., Original Application No. 278 of 2013 and M.A. No. 110 of 2014.

[75]VardhamanKaushik v. Union of India &Ors., Original Application No. 21 of 2014; *Seealso,Order of the National Green Tribunal regarding the deteriorating air quality of Delhi NCR, 09/11/2017*, INDIA ENVIRONMENTAL PORTAL, http://www.indiaenvironmentportal.org.in/content/449045/order-of-the-national-green-tribunal-regarding-the-deteriorating-air-quality-of-delhi-ncr-09112017/.

PM 2.5 level (the metric relied on by the Tribunal for measuring the pollution level) was around 600 when the order was given.[76] This pales when compared to the PM 2.5 level during Diwali in 2019 which reached 999+.[77] The NGT, while delivering the impugned order, had categorically reprimanded the government officials and had stated that, "*the right to life has been infringed with impunity by the authorities and other stakeholders who have been mere spectators to such crisis*".[78] However, a year later when the orders were not complied with and the pollution was worse, the Tribunal admitted that the orders remained unimplemented and that it could find "*no plausible explanation*".[79] In fact, most of the significant cases involving illegal mining and solid waste management continue to remain unenforced.[80]

Furthermore, Section 24(1) of the NGT Act requires that any amount of money received as compensation or relief under an award made by the Tribunal for environmental damage shall be credited to the Environmental Relief Fund ("**ERF**"). Further, Rule 35(1) of the National Green Tribunal (Practices and Procedure) Rules, 2011 states that the amount must be credited to the ERF within 30 days of the order or as otherwise directed by the Tribunal. In effect, the ERF is the primary means by which environmental restoration and rejuvenation is enabled. However, despite this provision, the NGT

[76]*Id.*

[77]DipuRai, *Air pollution in Delhi was 16 times worse than prescribed limit on Diwali night*, INDIA TODAY, https://www.indiatoday.in/diu/story/delhi-air-pollution-16-times-worse-prescribed-limit-diwali-night-1613477-2019-10-28.

[78]*Delhi Pollution: NGT bans construction, industrial activities till 14 November*, LIVE MINT, https://www.livemint.com/Politics/MHVjYfmyoaZVnnYKg2mFzK/Delhi-air-pollution-NGT-imposes-ban-on-industrial-construc.html.

[79]*Id.*

[80]GeetanjoySahu, *Wither the National Green Tribunal?*,DOWN TO EARTH, https://www.downtoearth.org.in/blog/environment/whither-the-national-green-tribunal--66879.

does not direct payment to the ERF in all cases.[81] A recent study shows that in nearly 40% of all cases the payments are directed to state pollution control boards, in 17% cases to state forest departments, and only in 12% cases to the ERF.

Moreover, even in the few cases wherein the NGT directs that compensation should be deposited into the ERF, there have only been two deposits actually made till date.[82] Additionally, there is a general tendency, in cases involving high amounts as penalty, to challenge the NGT's decisions in the Supreme Court.[83] In contrast, in case where the payments are relatively negligible when compared to the turnover of the company involved, the payments are usually made.[84] Despite this worrisome trend, the NGT continues to not hold the governmental authorities accountable in several cases. For instance, as previously noted, in *Ajay Kumar Negi*, even though the Tribunal held that the Forest Department had not performed its duties and had not utilized the funds deposited by the project proponent for environmental restoration for several years, it did not penalize the Forest Department.[85]

At present there exists no systematic monitoring of payments made to the ERF. Further, given that the NGT lacks contempt jurisdiction, it is very difficult for it to consistently keep track of whether directions have been complied with. Thus, it is suggested that the Central Government either grants the Tribunal contempt jurisdiction or provides for an effective mechanism which ensures that the directions of the Tribunal are complied with.

[81] *Supra* note 52 at page 18.
[82] *Id*., at page 19.
[83] *Id*.
[84] *Id*.
[85] *Supra* note 54.

F. Dilution of NGT's Independence through Amendments to the Finance Act, 2017

In early 2014, several media reports claimed that a cabinet note had been prepared to dilute the NGT's powers.[86] Mr. PrakashJavadekar – the then Minister of Environment, Forests, and Climate Change – publicly rejected these reports and stated that the MoEF&CC would not dilute the powers of the NGT.[87] However, just three years later, not only were the NGT's powers curtailed, its independence was also significantly reduced in a manner that can cripple its functioning. This happened indirectly by way of legislative amendments in the Finance Act, 2017 ("**Finance Act**").

The amendment[88] inserted Section 10A in the NGT Act which states that the "*qualifications, appointment, term of office, salaries and allowances, registration, removal and other terms and conditions of service*" of the NGT's chairperson, judicial members, and expert members will be governed by Section 184 of the Finance Act. Section 184 of the Finance Act provides that the Central Government can make rules with respect to each of these aspects of the NGT Act. Subsequently, the government notified the Tribunal, Appellate Tribunals and other Authorities (Qualifications, Experiences and other conditions of service of members) Rules, 2017 ("**Rules**").

These Rules diluted the qualification requirements in the NGT Act. Prior to the amendment, the NGT's chairperson was required to have been either a judge of the Supreme Court or a Chief Justice of a High Court. However, the Rules diluted this requirement by providing that,

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[86]AkashVashishtha, *Centre note to curtail powers of National Green Tribunal*, INDIA TODAY, https://www.indiatoday.in/india/north/story/national-green-tribunal-act-environment-ministry-vikrant-tongad-223338-2014-10-16.
[87]*Id.*
[88]Amendment dated 31 March 2017, inserted by the Finance Act 2017.

in addition to the qualification criteria mentioned, the chairperson of the NGT can be a person who is:[89]

"*qualified to be a Supreme Court judge, or has held office for a minimum of three years as an expert or judicial member, or is a person of ability, integrity and standing, and having special knowledge of and professional experience of not less than twenty-five years in law including five years' practical experience in the field of environment and forests.*"

These additions severely curtail the independence that the NGT presently enjoys. For instance, while the first addition allowing persons 'qualified' to be a Supreme Court judge seems neutral, it is, in effect, bestowing the right to appoint the chairperson with the Central Government. The appointment of Supreme Court judges in India, as convention has it, happens through the collegium system wherein, effectively, the appointment of a judge is decided by the Chief Justice of India and four senior-most judges of the Supreme Court. Hence, despite Article 124 (3) of Indian Constitution providing for qualifications such as the person being appointed as a Supreme Court judge can be an advocate who is a distinguished jurist in the opinion of the President, the collegium system insulates the Court from political pressures. However, the same cannot be said for the NGT where there is no collegium system and a person who, in the opinion of the President, is an eminent jurist can become the chairperson of the NGT. In effect, this is likely to be a political appointment made with the influence of the Central Government.

Furthermore, generically worded terms such as 'ability, integrity, and standing' in relation to an eligible person ensure that the MoEF&CC

[89]MayankAggarwal, *Green activists oppose Finance Act 2017, say it curtails NGT's independence*, LIVE MINT, https://www.livemint.com/Politics/X4R0eZMQ5R6i5SlW0oGjoL/Green-activists-oppose-Finance-Act-2017-say-it-curtails-NGT.html.

can appoint the chairperson without providing cogent reasons for the appointment. Additionally, while prior to the amendment the chairperson could only be removed after consultation with the Chief Justice of India, this power has now been accorded to the Central Government which can remove the chairperson or a judicial member of the Tribunal after conducting an enquiry. Moreover, the Rules have shortened the tenure of the chairperson and the members from five years to three years.[90]

These changes have ensured effective control of the MoEF&CC – the very body whose unwarranted acts the NGT has been containing - on the Tribunal. The NGT no longer enjoys the independence that it did before these legislative changes were passed. It is now possible to replace a judicial or expert member of the Tribunal by simply conducting an inquiry if he or she does not act in consonance with the pro-developmental agenda of the government.[91] In fact, this move by the government seems to be in retaliation of NGT stalling several important projects for improper EC, if any, from the MoEF&CC and holding erring government officials accountable on several occasions, among other reasons.[92] While the Supreme Court has questioned this move on part of the government, it is suggested that the central government reverses these changes and restores the NGT Act to its original state.[93]

G. Lack of Basic Amenities and Infrastructure

Since the NGT's inception, it has faced hurdles in its functioning due to lack of basic amenities and infrastructure. In fact, the Principal

[90] *Id.*
[91] *Id.*
[92] This is explained in the section titled Tussle with the MoEF& CC.
[93] *Finance Act diluting powers of tribunals, including NGT: SC seeks Centre's response to plea*, THE HINDUSTAN TIMES, https://www.hindustantimes.com/india-news/finance-act-diluting-powers-of-tribunals-including-ngt-sc-seeks-centre-s-response-to-plea/story-Eavw63OPwyxwgQ5c4t8UUI.html.

Bench started operating in a temporary office and a makeshift courtroom in Delhi's Van VigyanBhavan which is a building used for housing guests of the MoEF.[94] As Shrivastava highlights, these quarters lacked basic amenities such as a kitchen and the members of the Tribunal – who were retired High Court judges – could not afford to rent a house and live with their families due to their meagre salary.[95]

Due to this, three judicial members – Justices C.V. Ramulu, AmitTalukdar, and A.S. Naidu – resigned from their posts in the Tribunal.[96] Furthermore, while ten expert and judicial members were required for the NGT to be functional, due to the poor infrastructure, lack of basic amenities, and the inadequate salary, there were few responses when the positions were initially opened, and the Tribunal was made functional with only three expert members and three judicial members.[97] There was a period when four benches of the NGT were being run by a total of five members, which of course meant that only the Principal Bench was operational.[98]

GopalSubramanium, a senior counsel informed the Supreme Court that the NGT's functioning was in a "*very sorry state of affairs*".[99] He highlighted that even after three years of the enactment of the NGT Act, the government had not sanctioned the Rs. 22 lakhs rent that the NGT had to pay to the government to use its premises.[100] Further, the

[94]Kumar SambhavShrivastava, *Green tribunal gets short shrift*, DOWN TO EARTH, https://www.downtoearth.org.in/news/green-tribunal-gets-short-shrift-38426.
[95]*Id*.
[96]GeetanjoySahu, *Ecocide by Design? Under Modi, Vacancies at National Green Tribunal Reach 70%*, THE WIRE, https://thewire.in/politics/ngt-political-apathy-vacancies.
[97]*Supra* note 95.
[98]*Id*.
[99]UtkarshAnand, *NGT member quits citing lack of facilities*, THE INDIAN EXPRESS, http://archive.indianexpress.com/news/ngt-member-quits-citing-lack-of-facilities/1066585/.
[100]*Id.*

initial budget of Rs. 32 croreswere slashed to Rs. 6 crores. Moreover, he highlighted that the judicial and expert members had to pay from their own pockets for their commute to and from the Tribunal and that they were compelled to eat from food from the canteen.[101]

The lack of governmental will to rectify the issue is evident from the fact that the state government filed an affidavit claiming that the Bhopal Bench was functioning smoothly despite the fact that no infrastructure was provided for it functioning and it had to function out of a basement in a building.[102] Similarly, while the Pune Bench was inaugurated on 17 March 2012, due to lack of governmental support it was made functional only after a year.[103] The case with the Kolkata Bench was worse, and a report submitted by the NGT to the Supreme Court stated that the Chairperson found the accommodation offered to be, "*shabby, uninhabitable and without a toilet"*.[104] The Supreme Court went to the extent to state that it was possible that the Kolkata Bench was set up due to "*political reasons*" and it requested the Central Government to consider shifting the Tribunal to Guwahati or Ranchi, due to the inaction of the West Bengal Government.[105]

Akin to how the push for the enactment of the NGT Act came from the Supreme Court and not the legislature, it was the Supreme Court that had to eventually push for better amenities and infrastructure for the different benches of the NGT. A Supreme Court bench consisting of Justices G.S. Singhvi and S.J. Mukhopadhaya referred to the affidavit filed by the Bhopal state government as "*falseand*

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[101]*Id.*
[102]*SC slams poor facilities for green tribunal*, LEGALLY INDIA, https://www.legalindia.com/news/sc-slams-poor-facilities-for-green-tribunal.
[103]*Id.*
[104]DhananjayMahapatra, *Kolkata may lose green tribunal bench to Guwahati or Ranchi*, INDIA TIMES, https://timesofindia.indiatimes.com/city/kolkata/Kolkata-may-lose-green-tribunal-bench-to-Guwahati-or-Ranchi/articleshow/20996616.cms.
[105]*Id.*

misleading".[106] The bench further held that all members of the NGT "*must function with dignity*" and ordered the state governments to provide adequate facilities and amenities.[107]

While the infrastructure and amenities have improved gradually over the past few years, it is still not adequate to ensure effective adjudication. As of today, all four zonal benches have completely shut down over the past year.[108] The hearing of cases of these zonal benches happen over video conferencing which lasts only for a one or two hours in a day.[109] Ironically, in 2019, while the Environment Ministry's budget was increased by 20.27% from Rs. 2,586 crores to Rs. 3,111 crores, the budgetary allocation for the NGT and pollution abatement were reduced by 44% and 50%, respectively.[110]

These trends highlight the lack of legislative will to effectively deal with the issue of inadequate infrastructural facilities by both the central and state governments. There is a conflict of interest between promoting the NGT and the ambitious developmental projects that the state governments intend on undertaking. The apathetic response of the state governments of West Bengal and Madhya Pradesh stems from this conflict of interest. To retain power in the next elections, the ruling party of these states need to demonstrate developmental work to win votes. Due to this, the NGT and its expanding influence is seen as an impediment as several state projects are often delayed or halted.

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[106] *Supra* note 103.
[107] *Id.*
[108] *Supra* note 81.
[109] *Id.*
[110] Public Trust of India, *Environment Ministry gets Rs. 3,111 crores in budget – a 20 per cent increase*, INDIA TIMES, https://economictimes.indiatimes.com/news/economy/policy/environment-ministry-gets-rs-3111-crore-in-budget-a-20-per-cent-increase/articleshow/67794117.cms?from=mdr;*Seealso,*NityanandJayaraman, *Environmentally, there is no talk to walk in Budget 2019*, THE NEWS MINUTE, https://www.thenewsminute.com/article/environmentally-there-no-talk-walk-budget-2019-104995.

The authors suggest that the Central Government should undertake a study which demonstrates how much expenditure is required to maintain the dignity of the members of the Tribunal as well as to enable the effective functioning of all zonal and circuit benches of the NGT. This will help provide a baseline for the Tribunal's budget, which should be mandatorily maintained. It will ensure that the NGT's functioning is not dependent on the whims of different governments or different political priorities.

H. Lack of Access to Justice

At present, in addition to the principal bench in New Delhi, the NGT has four other zonal benches in metropolitan cities. These are located in Pune (Western Zone Bench), Chennai (Southern Zone Bench), Kolkata (Eastern Zone Bench), and Bhopal (Central Zone Bench). Given that most industries, forests, mines, and ecologically sensitive areas are located away from these cities, access to environmental justice for those affected by environmental damage becomes challenging.

In fact, during the parliamentary debate on the enactment of the NGT Act, concerns relating to access to justice were expressed.[111] It was thought that as the Tribunal would take over the powers of the lower courts with respect to environmental cases, many people would not have local access to justice.[112] Particularly, this would affect the economically weaker sections of the society the most who rely on more than 13,000 district and subordinate courts for environmental litigation and relief.[113] This is exactly what happened. After the enactment of the NGT Act, these lower courts were barred from

[111]YuktiChoudhary, *Tribunal on trial*, DOWN TO EARTH, https://www.downtoearth.org.in/coverage/tribunal-on-trial-47400.
[112]*Id.*
[113]*Id.*

taking up environmental cases.[114] This meant that the economically weaker and most affected communities living in remote parts of the country had to approach their respective zonal bench for seeking justice.[115]

A good example of this is in Jharkhand's Chaibasa district where the Bindrai Institute for Research and Action ("**BIRSA**") along with the Occupation Health and Safety Centre ("**OHSC**") approached the NGT to address environmental damage caused due to abandoned asbestos mines.[116] In doing so, the convener of BIRSA pointed out that:[117]

"*We do not have much knowledge about NGT. For a tribal activist based in a remote location, it is extremely difficult to travel to Kolkata and find accommodation there.*"

This demonstrates how the socio-economic inequalities do not allow tribal activists to access the NGT. Another tribal activist, DayamaniBarla, who has worked to curb illegal mining and displacement has said that she does not know about that NGT and questions why she would be required to travel to Kolkata to address a local environmental issue. She has further opined that:[118]

"*A green tribunal should have been based in a place that has the highest forest cover or large mineral deposit. That is where the extremely poor live.*"

This highlights the lack of access to environmental justice for the poor and the marginalized. In fact, it is contrary to the logical step of establishing environmental tribunals in places which are likely to

[114]Justice D.Y. Chandrachud, *Indian Environmentalism*, 2 NGTI. J. ON ENVIRONMENT 6 (2017).
[115]*Id.*
[116]*Supra* note 112.
[117]*Id.*
[118]*Id.*

have more environmental litigation such as areas with high forest covers and mineral deposits, instead of concentrating them in metropolitan cities. While the NGT has opened further circuit benches in Shimla, Shillong, Jodhpur, and Kochi, these are still inadequate to fill the void cast by the absence of 13,000 local courts for addressing environmental issues locally. Moreover, there remain concerns with respect to the functioning of all zonal and circuit benches apart from the Principal Bench in New Delhi. As noted previously, due to the non-appointment of several judicial and expert members, the four zonal benches have been completely shut over the past one year.[119] In effect, this means that only one bench of the NGT is available to provide environmental justice for the entire country.

The Tribunal has tried to address this by providing 'e-filing' of cases over the internet and has commenced online hearing of cases.[120] However, this still does not remedy the lack of access to people in remote and tribal areas where internet connectivity is a serious issue. Additionally, many lawyers practicing in the Tribunal have expressed their discomfort with respect to video conferencing as it increases the cost of procuring adequate infrastructure to host a prolonged video conference.[121] As Sahu highlights, hearings are often adjourned or listed in an unfashionable manner without adequate notice to the parties to prepare their case.[122] Moreover, lawyers complain about not getting adequate chances to mention new matters *via* video conferencing. Accordingly, majority of cases take longer than the stipulated six-month period for resolving an issue.[123]

[119] *Supra* note 81.
[120] RanuPurohit, *NGT Goes Online: Now you can approach NGT from any part of India without your Physical Presence*, LIVE LAW, https://www.livelaw.in/top-stories/ngt-goes-online-148310.
[121] *Supra* note 81.
[122] *Id.*
[123] *Id.*

Therefore, there is an alarming lack of access to justice faced by the majority of the population in the country. It is the need of the hour that more benches are opened in strategically significant areas involving more environmental issues. While conducting hearings *via* video conferencing is a welcome step, it needs to be augmented by ensuring local infrastructure in remote areas for people to avail it. The authors suggest that in designated local courts, facilities providing video conferencing with the principal and zonal benches should be installed. This will ensure that many people will have access to the NGT.

I. Delays and Conflicts of Interest in Appointments

As noted, despite the enactment of the NGT Act in 2010, political apathy, in terms of providing amenities and facilities towards the Tribunal, resulted in a delay of nearly three years before it became fully functional.[124]As highlighted earlier, this was made possible only after the intervention of the Supreme Court.[125] However, since then, the apathetic attitude of the government has not abated. This has resulted in a situation where although Section 4 of the NGT Act states that, in addition to a chairperson, the Tribunal shall consist of a minimum of ten judicial members and ten expert members, the NGT does not have even ten members in total. In fact, as of today, there are just five members in the NGT.[126] These include three judicial members and two expert members. As highlighted previously, all zonal benches of the Tribunal have shut down and their cases are heard over video conferencing at the Principal Bench in New Delhi.[127] Moreover, given that the NGT has taken away the jurisdiction with respect to environmental cases from more than

[124]*Supra* note 97.
[125]*Supra* note 103.
[126]*Members of the National Green Tribunal*, http://www.greentribunal.gov.in/members.aspx.
[127]*Supra* note 81.

13,000 local courts, in effect, the five members are responsible for the adjudication of all environmental cases in the country.

Due to this, thousands of legal proceedings relating to compensation to victims and the environment on account of illegal deforestation and large projects such as dams, mining, and power plants are pending across the different zonal benches due to lack of quorum.[128] In addition to the non-appointment of expert and judicial members, the litigating parties have to suffer constant shuffling of benches resulting in increased litigation costs as they have to brief the new members and, in some case, repeat arguments resulting in further delays.[129] Moreover, as previously highlighted, the lack of appointments has hurt those living in remote and vulnerable areas the most.

In response to the Tribunal's pleas for filing the vacancies, the MoEF&CC preferred to instead pass an amendment to the National Green Tribunal (Practices and Procedure) Rules on 1 December 2017 allowing the NGT's chairperson to constitute a single-member bench under "*exceptional circumstances*".[130] While the Supreme Court stayed the notification on 31 January 2018, this demonstrates the intention of the government to halt the functioning of the Tribunal.[131] In fact, while hearing a petition with respect to the lack of appointment of members, the Delhi High Court asked the Central Government whether it wanted to wind up the NGT.[132]

Moreover, the Ministry of Personnel, Public Grievances and Pension issued an order dated 2 September 2019 stating that two serving officers of the MoEF&CC had been approved for appointment as

[128] *Supra* note 97.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Do you want to shut down the National Green Tribunal, Delhi High Court asks Centre*, SCROLL, https://scroll.in/latest/848499/do-you-want-to-shut-down-the-national-green-tribunal-delhi-high-court-asks-centre?

expert members of the NGT.[133] This is problematic on two grounds. First, there is a clear conflict of interest. With the inclusion of these two expert members to the existing two expert members, all four expert members of the NGT will be from the Indian Forest Service.[134] The Director General of Forests chairs the Forest Advisory Committee which recommends the diversion of forest land for non-forest uses. Often, the NGT adjudicates petitions involving forest clearances.[135] Therefore, in effect, the personnel of the NGT who were earlier responsible for granting clearances will now be adjudicating its validity and impact.

Second, this trend of appointing erstwhile bureaucrats as expert members has diluted the expertise of the Tribunal. As highlighted earlier, the NGT was created to enable effective adjudication of environmental matters involving complex scientific and technical issues. However, given the ongoing dilution of the Tribunal's membership, the effectiveness of its adjudication is at risk. When the NGT was initially established, the expert members consisted of environmental scientists and professors with domain expertise.[136] Their expertise ensured that the Supreme Court rarely overruled their decisions.[137] However, post 2014 only personnel of the Indian Forest Service have been appointed as expert members. Apart from raising issues of conflict, this is likely to diminish the quality of NGT's decision-making. Environmental issues often require adjudication on issues involving pollution with respect to air, water, noise, mining, and hazardous substances. Effective adjudication on them requires domain expertise in areas other than just forests.

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[133]RitwickDutta, *Woes of the National Green Tribunal: Are the recent appointments unconstitutional?*,BAR AND BENCH, https://barandbench.com/new-appointments-national-green-tribunal-unconstitutional-judicial-independence.
[134]*Id.*
[135]*Id.*
[136]*Id.*
[137]*Id.*

Thus, the present trend with respect to appointments can potentially cripple the NGT's adjudication and independence. It is recommended that instead of bureaucrats, expert members are appointed based on their domain expertise in varied environmental subjects that enable them to not only deal with scientific complexities in a wholesome manner, but also keep the independence of the Tribunal intact.

J. Tussle with the MoEF&CC

While India has consistently been improving its ranking in the global index for ease of doing business due to its economically conducive laws, recently, it was ranked in the bottom five countries worldwide in terms of environmental performance.[138] In fact, last year, as per the global Environmental Performance Index, India ranked 177 out of 180 countries in terms of environmental health.[139] Despite the irreparable environmental harm indicated by this index, the MoEF&CC has dismissed the indicators as "*just rankings*".[140] Given this apathetic attitude of the government coupled with the fact that India leads the word in environmental conflicts, a strong NGT is a necessity.

Nevertheless, as highlighted previously, the Supreme Court – and not the government – had to push for the creation of the Tribunal. Moreover, the Court has been primarily responsible for ensuring the functioning of the Tribunal after the enactment of the NGT Act by ordering the respective state governments to provide the basic

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[138]MalavikaVyawahare, *India among 5 worst countries in terms of environmental health*, THE HINDUSTAN TIMES, https://www.hindustantimes.com/india-news/india-4th-worst-country-in-curbing-environmental-pollution/story-VWjWupzHcy8H5VdNGbp32J.html; *See also,*IshanKukreti, *Ease of doing business comes at an environmental cost*, DOWN TO EARTH, https://www.downtoearth.org.in/news/governance/the-environmental-cost-of-making-business-easy-59001.

[139]*Id.*

[140]*Id.*

amenities and facilities.[141] On the other hand, the MoEF&CC and the government have only diluted the powers of the NGT since its inception.[142]

Several amendments to the Environmental Impact Assessment ("**EIA**") Act, 2006 by the MoEF&CC have severely diluted the process for EC. For instance, in January 2019, the MoEF&CC standardized the procedure for granting an EC for two sectors – infrastructure and construction projects – that presently see the highest investment.[143]The EC was not intended to be standardized as different projects have different complexities and need different assessments of environmental and social costs. Moreover, the time for assessing the environmental cost of a project has been substantially reduced from 600 days to 190 days.[144] In addition, the Environment Minister has recently released a statement that the number of days required for granting an EC will be further reduced to 100 days.[145] These amendments demonstrate that the governmental paradigm with respect to the NGT, and the environment in general, is that the former views the latter as an obstacle towards development.

Despite this, the NGT has, in several cases, challenged decisions of the MoEF&CC with respect to ECs. For instance, in *PrafullaSamantray v. Union of India,*[146] the NGT asked the Environment Ministry to review the EC granted after some local villages refused to consent to the project under the Forest Rights Act,

[141]*Supra* note 103.
[142]For instance, through the dilution of the NGT's powers through the amendments in the Finance Act, 2017.
[143]Digvijay Singh Bisht, *How the Centre is diluting green clearance norms*, DOWN TO EARTH, https://www.downtoearth.org.in/blog/urbanisation/how-the-centre-is-diluting-green-clearance-norms-62828.
[144]*Id.*
[145]*Id.*
[146]PrafullaSamantray v. Union of India, Appeal No. 8 of 2011, judgment dated 30 March 2012.

2006. In *M.P. Patilv. Union of India*,[147] upon examination, the NGT held that the EC had been granted to the National Thermal Power Corporation Ltd. (a governmental public utility undertaking) by misrepresentation of facts. In another case, the NGT held that the public consultation process had not been carried out properly by the project proponent and the executive summary of the EIA report in the vernacular language of the area and the full report had not been made available to the public prior to the public hearing within the stipulated time.[148]Despite the fact that these preconditions had not been fulfilled, the MoEF&CC had granted the EC. The NGT held that as per the precautionary principle, the EC should not have been granted and quashed the EC granted by the MoEF&CC.[149]

Such a position of the NGT *vis-a-vis* infrastructure projects is a significant departure from the earlier decisions of the Supreme Court relating to large scale projects like big dams and power plants.[150] With respect to those large projects, the Supreme Court had followed a more conservative approach and had supported the EC decisions of the government.[151] Thus, the NGT's lack of deference to the government is a welcome change. However, this is not viewed favorably by the MoEF&CC. As demonstrated in the paper, the NGT's growing influence has only met governmental hurdles in the form of lack of funding and infrastructural facilities, lack of appointments of members, and dilution of the Tribunal's independence. Thus, it is unlikely that the NGT will be strengthened through governmental action. Hence, it is time that the Supreme Court, once again, steps in and strengthens the Tribunal.

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[147]M.P. Patil v. Union of India, Appeal No. 12 of 2012 dated 13 March 2014.
[148]Jeet Singh Kanwar v. Union of India, Appeal No. 10 of 2011, judgment dated 16 April 2013.
[149]*Id.*
[150]For instance, the Supreme Court deferred to the government's developmental agenda unequivocally in Narmada BachaoAndolan v. Union of India, (2000) 10 SCC 664.
[151]*Id.*

III. CONCLUSION

In nearly a decade of its existence, the NGT has significantly altered Indian environmental adjudication. It has added the necessary scientific expertise and has yielded more effective and expeditious disposal of cases. In other words, when compared to the earlier environmental regime spearheaded by the Supreme Court, the NGT is a welcome departure. Nevertheless, as highlighted in the paper, there are certain challenges that have the potential to negatively affect the Tribunal's functioning and utility. These challenges primarily stem from governmental efforts to curb the Tribunal's powers and indicate that the NGT is seen as an obstacle to development to the government. This is evident from the amendments to the Finance Act, which seriously dilutes the NGT's independence and ensures that the government has a say in the appointments, resignations, and overall functioning of the Tribunal.

The governmental apathy towards the NGT is further evident from the fact lack of financial and infrastructural support provided to the Tribunal. As noted, it took almost three years for the NGT to become fully operational post the enactment of the NGT Act. The zonal benches, especially in Bhopal and Kolkata, were given abysmal infrastructural support and the NGT had to operate out of a basement of a building. The accommodation provided lacked basic facilities such as a toilet and kitchen. Moreover, the salary of the members of the Tribunal was so low that they could not afford alternative accommodation. Due to this, three members quit the Tribunal citing lack of infrastructural support. Eventually, the Supreme Court had to step in and pass orders requiring the respective state governments to provide basic infrastructure.

However, despite the Supreme Court's intervention, all zonal benches of the NGT remain non-operational. This is due to the non-appointment of members by the government. While Section 4 of the

NGT Act states that the NGT shall consist of a minimum of ten judicial members and ten expert members, at present the NGT (including all zonal benches) has only five active members. Given that the NGT has taken away jurisdiction with respect to environmental matters from 13,000 local courts, in effect, these five members of the Principal Bench are responsible for hearing all environmental cases of the country. Thus, there exists a severe lack of access to environmental justice for people living in remote areas where most of the environmental degradation takes place (for example mines and forest areas). While the NGT has provided the option to do video conferencing from the zonal benches, this is very costly for the average litigant and does not adequately address the problem of lack of access to the NGT.

Furthermore, there exists a conflict of interest between the expert members appointed and the NGT. As highlighted, the NGT was created to deal with scientific uncertainty and technical matters – something the judiciary was not trained to do. Accordingly, in the initial years of the Tribunal, the expert members were scientists and academics with domain expertise. However, recently, the trend has been to appoint bureaucrats who do not have domain expertise. All of them have been appointed from the Forest Department which oversees the forest clearance process. As a result, in addition to there being a lack personnel scientifically trained in a variety of domains (such as air, water, and noise pollution), the expert members presently adjudicate on cases involving forest clearances that erstwhile departments had granted. Thus, there exists a conflict of interest with respect to the expert members.

Other issues pertain to the NGT itself. Frequently, the NGT pegs initial compensation at 5% of the project cost without having regard to the actual amount of environmental damage. The NGT has also admitted to relying on guesswork and has not undertaken a scientific analysis of the extent of environmental damage as it would be costly

and time consuming. This has resulted in a situation wherein the potential polluters are likely to continue with a project if it can be reasonably profitable after accounting for a 5% environmental compensation. Thus, this is likely to lead to a situation where the polluter pays principle will be reversed to become 'pay and pollute'.

Further challenges include frequent appeals to the High Courts from the Tribunal's orders and awards. While Section 22 of the NGT Act unequivocally states that an appeal "*may*" lie to the Supreme Court, the Madras and the Telangana High Courts have entertained appeals from the NGT on the pretext that the NGT Act cannot oust their jurisdiction. Relying on the Supreme Court's verdict in *L Chandra* Kumar, these High Courts have held that their jurisdiction under Articles 226 and 227 of the Constitution is a part of the basic structure and cannot be taken away. This has resulted in further delays to cases decided by the NGT.

On the other hand, while recognizing that it has jurisdiction under Articles 226 and 227, the Bombay High Court has refrained from entertaining appeals from the NGT as there is an "*effective statutory remedy*" to the Supreme Court. The latter is consistent with the Supreme Court's reasoning as well in that the jurisdiction by the High Courts should be exercised sparsely and only in cases where there is an issue of jurisdiction or a violation of principles of natural justice. The Madras High Court has also curbed the Tribunal's *suomotu* jurisdiction. While the NGT Act is silent on whether the NGT has such jurisdiction, the NGT has used it to accord environmental justice in many landmark cases.

Finally, there is a serious lack of implementation of NGT's decisions. As highlighted, many of the landmark cases dealing with air pollution, illegal mining, and solid waste management remain unenforced. Moreover, while Section 24(1) of the NGT Act requires that the compensation amounts be deposited into the ERF, till date this has been done only on two occasions. This is because NGT

frequently sidelines this requirement and required polluters to pay the compensation amount directly to governmental authorities. Significantly, there is no systematic mechanism by which the Tribunal can keep a track of how much of the compensation amount awarded has actually been deposited. Thus, in addition to the compensation amounts being low, there is no mechanism to ensure that they are actually utilized for the purpose for which they were awarded.

In conclusion, while the NGT has significantly altered environmental adjudication, it needs to overcome the issues highlighted above in order to be relevant in the next decade.

SMART CONTRACTS IN LEASING: IS INDIA READY?

Pooja Dhamor[*]

Abstract

With the ever-increasing use of smart contracts and blockchain technology in various fields, the idea of regulating the technology by means of law has gained popularity. However, even so, the questions relating to the legality and validity of these technologies, particularly in India, are replete with complexities. One of the most promising uses of blockchain is in real estate, particularly, smart contracts in leasing. The contemporary technology of smart contracts has effective solutions to offer in response to the multiple difficulties faced due to the traditional form of lease agreements. However, as new is the technology, as absent are the legal strings regulating it, thereby resulting in smart lease contracts meeting with multiple legal questions pertaining to their validity and legality. Additionally, smart lease contracts also pose challenges to the mandatory registration requirements of long-run lease deeds in India.

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This article aims to explain what the technology is, along with its functional aspects. Additionally, it attempts to illustrate the legal considerations which may obstruct the path of its legality in India. Further, it proposes a solution to the problem of the legal legitimacy of the technology, keeping in mind the licit cogency of an arbitration agreement in digital shared ledger-based contracts. The article further engages in an analysis of legislation on smart contracts in jurisdictions across the world. Subsequently, it deals with smart contracts in real estate, particularly in leasing, discussing the laws and requirements of traditional leasing in India and addressing the question of preparedness of India to embrace automated lease based on smart contracts, taking into consideration the stringent regulations on registration of instruments recording lease of immovable property.

I. INTRODUCTION

The real estate industry of India has recently witnessed market unrest. In light of these developments, the measures to strengthen and rebuild the sector gain importance. The advent of blockchain technology, in the form of what is commonly known as a 'smart contract', is widely discussed to be a promising solution to the problems faced by the industry. At the same time, it has opened up a legal lacuna because of the insufficiency of the existing legal framework to regulate anything beyond the conventional contracts. The need to bridge this legal

lacuna makes it essential to study the technology and its associated functions from the legal amplitude.

II. OVERVIEW OF BLOCKCHAIN TECHNOLOGY AND SMART CONTRACTS

"*In wake of Romanie E. Coli Scare, Walmart Deploys Blockchain to Track Leafy Greens*", read the Walmart news headline with respect to tracing back of all the contaminated lettuce, and calling it back with help of IBM's Food Trust.[1] Blockchain technology has been proving itself quite efficient in dealing with practical situations more than ever. Indian giant Tech Mahindra is already establishing its market by taking first mover's advantage of implementing blockchain technology in sectors from diverse fields ranging from updating banks to financial services to upstaging technology in the telecom sector[2] and real estate.[3] Real estate has already seen the advent of smart contracts across the world, not only in the domain of private business players but also by the governments to consolidate the land records on a shared ledger, so as to avoid problems like counterfeit title deeds, benami,etc.

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[1]Matt Smith, *In Wake of Romaine E. coli Scare, Walmart Deploys Blockchain to Track Leafy Greens,* WALMART COMMUNICATIONS, https://news.walmart.com/2018/09/24/in-wake-of-romaine-e-coli-scare-walmart-deploys-blockchain-to-track-leafy-greens.

[2]FE Bureau, *TechM to deploy blockchain solution to curb spam calls*, FINANCIAL EXPRESS (May 3, 2019), https://www.financialexpress.com/industry/techm-to-deploy-blockchain-solution-to-curb-spam-calls/1566356/; *Tech Mahindra to collaborate with TBCA Soft for cross-carrier blockchain platform*, E-TECH, (February 27, 2019), https://tech.economictimes.indiatimes.com/news/technology/tech-mahindra-to-collaborate-with-tbcasoft-for-cross-carrier-blockchain-platform/68183444.

[3]*Tech Mahindra Partners with Blockchain Technology Pioneer Chroma Way to Bring Consortium Databases to the Indian Market,* MAHINDRA RISE, https://www.techmahindra.com/media/press_releases/TechMahindra-Partners-with-Blockchain-Technology-Pioneer-ChromaWay.aspx.

A. Blockchain Technology

Blockchain technology became a popularly used and widely known term when the crypto-currency *Bitcoin* caught the attention of public consciousness.[4]It is no longer a wild prognostication as this technology can be used in a wide range of fields,[5] from finance to shipping.[6] Real estate, obviously, is no exception.[7]

A 'blockchain' is a particular type of data structure used in some distributed ledgers which stores and transmits data in packages called 'blocks' that are connected to each other in a digital 'chain'.[8]Blockchains employ cryptographic and algorithmic methods to record and synchronize data across a network in an immutable manner.[9] In other words, it is a peer-to-peer distributed ledger that is cryptographically secure, append-only, immutable, and updateable

[4]*See* Robby Houben, Alexander Snyers, *Cryptocurrencies and Blockchain*, POLICY DEPARTMENT FOR ECONOMIC, SCIENTIFIC AND QUALITY OF LIFE POLICIEShttp://www.europarl.europa.eu/cmsdata/150761/TAX3%20Study%20on%20cryptocurrencies%20and%20blockchain.pdf.

[5]John Ream et al., *Upgrading Blockchains: Smart Contract Use Cases in Industry*, DELOITTE UNIVERSITY PRESS, https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/innovatie/deloitte-nl-innovatie-upgrading-blockchains-smart-contract-use-cases-in-industry.pdf.

[6]Nishith Desai Associates, *The Blockchain: Industry Applications and Legal Perspectives* at 8, (November 2018), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/The_Blockchain.pdf.

[7]There are multiple websites floating on internet undertaking contracts based on smart contracts in various fields, "smartcontractleasing.io" is one such platform facilitating application of blockchains in multiple fields, like real estate, available at https://smartcontractleasing.io/real-estate-smart-contracts/.

[8]H. Natarajan et al., *Distributed Ledger Technology (DLT) and blockchain*, WORLD BANK DOCUMENTS, REPORT NO. 122140, (1st December 2017), FinTech note, no. 1. Washington, D.C., http://documents.worldbank.org/curated/en/177911513714062215/pdf/122140-WP-PUBLIC-DistributedLedger-Technology-and-Blockchain-Fintech-Notes.pdf.

[9]*Id.*

only via consensus or agreement among peers.[10]Explaining furthermore, this ledger works somewhat like a shared Google document, recording transactions between two or more parties in a permanent way and distributes a copy to all relevant parties, without the need for a third party to authorize the transaction.[11] Every new transaction is recorded in a new block and each new block is built upon previous blocks and contains the data stored on all previous blocks.[12] Since all these blocks are interlinked and are stored on a multitude of nodes, it is virtually impossible to hack it and alter or modify the same.[13]

B. Smart Contracts

Smart contracts, as explained by Nick Szabo, the computer programmer behind the idea of smart contracts, are "*a computerized transaction protocol that executes the terms of a contract. The general objectives of a smart contract design are to satisfy common contractual conditions […], minimize exceptions both malicious and accidental, and minimize the need for trusted intermediaries*."[14] Therefore, a smart contract can be stored on a blockchain, interact with external data feeds, and then self-execute various actions/processes (such as payments, shipment of products or other actions including remedies in the case of breach) based on conditional logic (programmed as traditional "if-then" statements) and agreed

[10]IMRAN BASHIR, MASTERING BLOCKCHAIN: DISTRIBUTED LEDGER TECHNOLOGY, DECENTRALIZATION, AND SMART CONTRACTS EXPLAINED 16 (2nd ed. Packt Publishing Ltd. 2018).
[11]Amlegals, *Blockchain & IP*, MONDAQ, http://www.mondaq.com/india/x/767898/fin+tech/Blockchain+IP.
[12]*Id.*
[13]Emmanuelle Ganne, *Can Blockchain Revolutionize International Trade?*,WORLD TRADE ORGANIZATION 2018, https://www.wto.org/english/res_e/booksp_e/blockchainrev18_e.pdf.
[14]N. Szabo, *Smart Contracts:Building Blocks for Digital Markets*, (1996) www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html.

verifiable proof of performance or other trigger events.[15] Smart contracts are codes which are not readable to humans.[16]For the smart contract, in contrast to other e-contracts or contracts executed by codes, everything beyond the code is just commentary.[17]In case of smart contracts, the code is a necessary part of the agreement itself, whereas other contracts executed by codes are just a tool to execute the human-made contract.[18] Parties sign this agreement using a digital signature, mostly using signature keys.[19]

Having pointed out how lucrative the newly-embraced technology of smart contracts is to the commercial and legal spheres, it is imperative to also draw out the very inescapable drawback of the same in legal terms, as the smart contracts are not short of legal loopholes, which in some jurisdictions also poses serious questions on the validity and legality of smart contracts. In the next part, the article will attempt at analysing the legal limitations to smart contracts and the difference between traditional contract and smart contracts, keeping Indian jurisdiction the focal point.

[15]Oliver Herzfeld, *Smart Contracts May Create Significant Innovative Disruption*, FORBES, https://www.forbes.com/sites/oliverherzfeld/2016/02/22/smart-contracts-may-create-significant-innovative-disruption/#18c80379396a.
[16]Kevin Werbach& Nicolas Cornell, *Contracts Ex Machina*, 67 DUKE L.J. 313 (2017).
[17]*Id*., at 350.
[18]*Supra*note 16, at 350.
[19]Dr. Christian Cachin, *Blockchain, cryptography, and consensus*, ITU WORKSHOP ON "SECURITY ASPECTS OF BLOCKCHAIN", https://www.itu.int/en/ITU-T/Workshops-and-Seminars/201703/Documents/Christian%20Cachin%20blockchain-itu.pdf; Elli Androulaki et al, *Cryptography and Protocols in HyperledgerFabric*,IBM RESEARCH – ZURICH REAL-WORLD CRYPTOGRAPHY CONFERENCE 2017, https://cachin.com/cc/talks/20170106-blockchain-rwc.pdf.

III. LEGAL LIMITATIONS OF SMART CONTRACTS

In order to understand the legality of smart contracts, it is significant to also understand how these contracts are different from the traditional form of contracts, in the course of which we will also unveil the limitations of smart contracts.

A. Self-executing nature of smart contracts- a gift from heaven or a plethora of problems?

The first and foremost difference, which is a technical one and unarguably the most distinctive one as well, is that the contracts based on smart contracts are self-executing in nature; they auto-operate based on some pre-determined conditions as fed into the computer in form of codes.[20] These conditions are mutually agreed upon by the parties and once the conditions are triggered, the smart contracts self-execute by blockchain technology.[21] While in case of a traditional contract, parties may choose to not fulfil the pre-agreed terms even at a cost of litigation and/or payment in terms of judicial remedies; in case of smart contracts, such refrain from obliging the contractual conditions is not possible,even if the party on receiving ends wants to, unless the party which initiated the blockchain terminates it. There is no human role in the execution of smart contracts and they are self-operating, once coded.[22]Due to thelack of human intervention, smart contracts can lack their 'smartness' and prove to be ineffective in

[20]Scott A. McKinney et all, *Smart Contracts, Blockchain, And The Next Frontier Of Transactional Law*, 13 WASH. J.L. TECH. & ARTS 313 (2018).
[21]Max Raskin, *The Law And Legality Of Smart Contracts*, 1 GEO. L. TECH. REV. 305 (2017).
[22]Scott Farrell et al, *Lost and found in smart contract translation – considerations in transitioning to automation in legal architecture*, UNCITRAL PAPERS FOR PROGRAMME,https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/14-FARRELL_and_MACHIN_and_HINCHLIFFE-Smart_Contracts.pdf.

certain cases which are inclusive of circumstances covered under subsequent impossibility, force majeure, etc.

a) Hypothetical case study -

This is a hypothetical example of an automated monthly herbal cosmetic raw ingredients supply agreement governed by the smart contracts wherein the retailer herbal cosmetic engineering company (buyer) drafts and formulates a smart contract. The conditions agreed are that before every 5th day of the month, a certain amount of herbal cosmetic raw ingredients, the geographical location of which is such that they are available only in the country P in the continent, will be delivered by the seller to the buyer operating in the country Q. For this transaction, an advance payment of $150 per unit for a contract of 1000 units will be done on 2nd day of the month, that is, it will be auto debited from accounts of the buyer on the condition being triggered. This advance payment is specifically requested by the supplier because it is of utmost necessity to them for production of the impugned products, and which would otherwise block their funds till payment for the dispatch is done, and in their business, such blockage is almost threatening to their existence. If the goods are not supplied in time, the said amount will be refunded to the buyer. This refund condition was put in because the buyers' machines start producing another set of ingredients on the first day of every month, and it is perishable unless mixed with other ingredients. The perishability of the same was confined to 5 days, exactly the time by which the seller had to deliver the goods; on a delay of which he would suffer loss in terms of perished ingredients produced in its factory, and hence time of delivery was essential to the buyer. Considering the importance of time of payment and time of delivery, automatic execution by the way of smart contracts seemed to be an intelligent choice.

Now, automatic execution in the absence of any human intervention leaves the situation full of limitations.

Instance 1: If country P follows a religious calendar and not the universally followed calendar, and the smart contracts are executed in accordance withthe same, then the course of events which unfolds for the seller is unfavourable and not something he agreed upon. The supplier might have reasonably believed that his day of delivery is a fortnight away, only to realize after a reminder mail preceded by first auto-credit of the agreed payment to its account, that smart contract operates basis some different calendar altogether. He still hurries the production and sets it out for delivery, and it reaches to the buyer, but only 12 hours after the due date. As soon as time envisaged under smart contracts crossed, the blockchain condition got triggered which led to a refund from the seller's account, and the buyer refuses to transfer back the amount saying that time was the essence of the contract. The present set of customised dispatch isn't of any use to them. Also, the buyer mentioned that the contract never talked about remedying the refund, so they are not legally bound to. This puts the seller in a vulnerable condition where his existence in the market is threatened by blockage of funds (owing to the fact that they made it clear in the beginning that they could not possibly operate with such blockage). Similarly, if granted refund, the buyer will be in a devastatingposition, unable to use the shipped products for which he had to pay too. This situation of threatened existence could have easily been avoided, granted the absence of smart contract which led to auto-refund.

Instance 2:Now assuming that the smart contracts are drafted and incorporated by seller and can be cancelled by him only, plus there is no refund condition;, if the dispatch is set for delivery and the subsequent impossibility as envisaged under Section 56 of the Indian Contract Act[23] occurs as and when country Q bans herbal goods from

[23]Indian Contract Act, 1872§ 56; SatyabrataGhosev.MungneeramBangur& Co &Anr, AIR 1954 SC 44; Taylor v. Cardwell, 1863, 3 B.&S. 826; Sushila Devi v. Hari Singh, AIR 1971 SC 1756.

country P, goods are seized at customs for change in regulations, or country Q declares a war against P, then even if the contract stands void under Section 56, auto-debit will continue from buyer's account unless the smart contracts are suspended or terminated.

Takeaway from the case study: Despite the alluring advantages of self-executing nature of smart contracts, they are not always fit in commercial situations which are usually highly complex and require flexibility.

In other words, smart contracts have limitations when it comes to their application in even slightly demanding circumstances,[24] thereby making the efficiency of smart contracts less efficient than traditional semantic contracts when it comes to ex-post uncertainty.[25] Smart contracts are the codes thatknow exactly what to do but only in given conditions, thus, closing the possibilities for "second thoughts" in un-predictable circumstances.[26]The peculiar*per se*defining of smart contractsdefeats flexibility,[27] and such forms of flexibility are vital to the contracting process.[28] This loss of flexibility might put parties in circumventing unpredictable outcomes and bad faith litigation.[29]

B. Non-readability to humans- consent caused by mistake?

[24]Jerry I-H Hsiao, *Smart Contract on the Blockchain-Paradigm Shift for Contract Law*, 14 US-CHINA L. REV. 685, 690, (2017).
[25]Jeremy M. Sklaroff, *Smart Contracts and the Cost of Inflexibility*, 166 U. PA. L. REV. 263, 291, (2017).
[26]Larry D. Wall, *Smart Contracts in a Complex World*, FEDERAL RESERVE BANK OF ATLANTA, https://www.frbatlanta.org/cenfis/publications/notesfromthevault/1607.
[27]Karen E. C. Levy, *Book-Smart, Not Street-Smart: Blockchain-Based Smart Contracts and the Social Workings of Law*, 3 ENGAGING SCI., TECH., SOC'Y 1(2017).
[28]Jerry I-H Hsiao, *Smart Contract on the Blockchain-Paradigm Shift for Contract Law*, 14 US-CHINA L. REV. 685, 690, (2017).
[29]Jeremy M. Sklaroff, *Smart Contracts and the Cost of Inflexibility*, 166 U. PA. L. REV. 263, 279, (2017).

Another distinction creates most of the difference *legally* between a smart contract and a traditional contract. This being that smart contracts are not readable to humans, butonly to the machines.[30] This forms a bone of contention for its non-validity and illegality.

While on one hand the ones backing up smart contracts argue that Indian Contract Act very well allows the contracts which are not written,[31] this is in-fact a contract in written form, just not readable to humans. On the other hand, the problem with non-readability of smart contracts to humans is that parties undertaking to come under smart contracts can challenge consensus-ad-idem by contending that due to the non-readability of the same, they were unable to infer the exact same things as written in the smart contracts and that what is being self-executed by smart contract is not exactly what they meant it to be, rendering the given consent an incomplete and uninformed one. According to Section 13 of the Indian Contract Act, "*two or more persons are said to consent when they agree upon the same thing in the same sense*."[32] It is often argued against the validity of smart contracts that it is hit by Section 13 because, in absence of readability of codes, it cannot be ensured that valid consent is reached. In such a case, it cannot be ensured that whether the mind of the customer accompanies its signature to the contract, hence making smart contracts void.

C. Signature requirement of smart contracts- electronic and cryptic

The last difference between the signing of the contracts, that is, in smart contracts, signing is almost always electronic and mostly in cryptic form, unlike traditional contracts. This though not a limitation in India, might form a limitation in multiple jurisdictions where

[30]*Supra*note 16, at 350.
[31]Alka Bose v. Parmatma Devi &Ors, Civil Appeal No. 6197 of 2000; SheelaGehlot v. SonuKochar&Ors, 2006(92) DRJ 498.
[32]Indian Contract Act, 1872§13.

digital signatures are not recognized. These electronic signatures, including cryptographic signatures, are recognized in India under the Indian Information Technology Act, 2000 under Section 2(ta) of the Act as inserted by the 2008 amendments, which takes inspiration from the UNCITRAL Model Law on Electronic Signatures 2001.[33] Quoting Section 2(ta), an electronic signature means:

"[A]uthentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature; sections explaining dig sign; distinguishing e-sign; etc."[34]

Sincenot all forms of electronic signatures are safe and can be tampered with, only the ones specified in the Second Schedule of the IT Act are allowed.[35] Digital signatures take into account the cryptographic signatures, as are the signature keys mostly used for smart contracts.[36]

IV. LEGAL VALIDITY OF THE SMART CONTRACT

Based on the previous part, the key limitations which can possibly pose a challenge to the legal validity of the smart contract in India are 1) non-fitness of self-execution in some commercially complex circumstances like frustration, force majeure, etc.; and 2) non-readability to humans which makes the consent questionable.

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[33]UNCITRAL Model Law on Electronic Signatures 2001 art. 2(a), defines electronic signatures. Guide to UNCITRAL Model Law on Electronic Signatures 2001 sheds light on digital signature based on cryptography in Chapter III.B.2. at 22, available at https://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf.

[34]Information Technology Act, 2000§ 2(ta).

[35]Indian Information Technology Act, 2000, Sch. II.

[36]RavikantAgrawal, *Digital Signature from Blockchain context*, MEDIUM, https://medium.com/@xragrawal/digital-signature-from-blockchain-context-cedcd563eee5.

Electronic contracts are recognized in India under multiple provisions of the IT Act, specifically Section 10, which states:

"Section 10-A: Validity of contracts formed through electronic means. -

Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose."[37]

Smart contracts are a subset within the broader set of e-contracts. Therefore, their validity is recognized in India. Section 10 of the Indian Contract Act is the touchstone to test the validity of any contract.[38] It lays down essential requirements of a valid contract, which are, free consent, parties competent to contract, lawful consideration and a lawful object.[39] Along with these, any agreement which is expressly declared to be void under the Contract Act isalso not a contract.[40] In the present scenario, it is "*any agreement which is expressly declared to be void*" element, and "*free consent*" element which is in question because of the respective limitations as expressed in the preceding part.

Both these contentions, however, the opinion of the author doesnot hold enough water to stand against the validity of the smart contracts asall the above-mentioned limitations are 'exceptions and not rules'. Firstly, dealing with theargument of non-readability, it must be

[37]Information Technology Act, 2000, § 10-A.
[38]Indian Contract Act, 1872, §10; 1 POLLOCK AND MULLA, THE INDIAN CONTRACT & SPECIFIC RELIEF ACTS, 241 (R YashodVardhan et al. eds., 15th edn., 2017); R. Sudhakar Reddy v. Government of A.P., AIR 2005 (NOC) 553 AP.
[39]1 POLLOCK AND MULLA, THE INDIAN CONTRACT & SPECIFIC RELIEF ACTS, 243 (R YashodVardhan et al. eds., 15th edn., 2017).
[40]*Id.*

pointed out that the initiator of the smart contract, in most cases, lays down the important content of the same in a language readable to humans, this hence facilitates an opportunity of a fair and rational judgment making to the parties when they are made aware of the important particulars of the smart contract in a natural language. Admittedly, it is still highly likely to not beable to cover each and every aspect of the same but any failure to not include a highly relevant and commercially important term shall be treated as an exception, which is possible in a traditional pen-paper contract as well. In the cases of paper contracts too, such circumstances do arise and have arisen in past as well, which are treated as an exception and such contract held to be void and invalid. But this does not make the entire class of contract invalid, and that shall be applicable to smart contracts as well.

Next, the argument of non-suitability of the self-execution trait of smart contract, which is indeed the key trait, in some commercially complex circumstances like frustration, force majeure, etc. also falls short on the same ground that such situations of frustration and impossibilities, subsequent or otherwise, are exceptional situations. In these situations, contracts are held void in traditional contracts and can be held void in case of smart contracts as well. It will be bizarre and without much rationale to hold it against the entire class.

This added with India's willingness to be to open to adopt and accept technologically advanced contracts as is displayed in the IT Act and others by accepting e-contracts and developing a conducive legal environment for the same,[41] opens the door of Indian legal sphere towards the validity of smart contracts.

[41]News article titled *"India's PM Modi touts digitized economy to business leaders",* published on the Thomson Reuters, quoted Indian Prime Minister making remarks like "We are working to adopt and absorb newer technologies, to bring about transparency, and to end discretion,", "Believe me, we are on the threshold of becoming the world's most digitized economy. Most of you wanted this change in

A. Arbitration agreement in smart contracts

It is possible to also include an arbitration clause in the smart contract, as is commonly a preferred method of dispute resolution for corporates these days. The Arbitration and Reconciliation Act, 1996 under Section 7(3) of the Act lays down that such a clause needs to be in 'writing' to constitute a valid arbitration agreement.[42] This condition attracts challenges to validity of the arbitration agreement, if it is not in writing. However, this problem is solved by virtue of Section 7(4)(a) in the Act which statesthat an arbitration agreement is in writing if it is contained in a document signed by the parties.[43] Since smart contracts satisfy this condition of being signed by both the parties, any arbitration clause contained in a smart contract, by the method of reference[44] or otherwise, will constitute to be a valid arbitration agreement.

B. Comparative study of legislations on smart contract in legal spheres across the world

The world has already seen some of the States being quick to act on recognizing and regulating this new technology and acting upon it, trying to capture the new market full of potential and opportunities. Arizona, Tennessee, Delaware, Georgia, Belarus, and Illinois, namely, are some of the governments taking explicit legislative

India. I am proud to say that it is happening before you.", "Creating an enabling environment for business, and attracting investments, is my top priority." Available at https://www.reuters.com/article/us-india-vibrantgujarat-modi/indias-pm-modi-touts-digitized-economy-to-business-leaders-idUSKBN14U213; Along with this, the Government of India has been working on and promoting a full-fledged initiative named "Digital India" aimed to empower economy, education and overall status of nation,*See*https://www.digitalindia.gov.in/.

[42]Arbitration and Reconciliation Act, 1996, § 7(3).

[43]Arbitration and Reconciliation Act, 1996, § 7(4)(a).

[44]Arbitration and Reconciliation Act,1996§7(5); GirirajGargv. Coal India Ltd &Ors., Civil Appeal No.1695 of 2019.

strides towards the same.[45] Arizona has introduced legislative framework regulating smart contract world making changes in laws governing signatures and contracts, making transactions on a blockchain legally valid.[46] States like Delaware have been the fast runners in deciding to update their legal structure to offer a better environment in terms of ease and friendliness to the huge corporates aiming to use the asset blockchain technology is, no doubt, almost 60% of the Forbes top-500 business giants are functional there owing to the State's determination to provide a welcoming policy-framework for functioning.[47] However, apart from being lauded worldwide, these steps have also met with criticisms, primarily voiced by Mike Orcutt, who points out that such legislative steps aim to define that new technology of science (smart contracts) which still has no universal definition in science.[48] Other disparaging factors stem from inconsistency in these domestic law versions which might create chaos, plus, some business lawyers perceive such legislative

[45] *"Georgia to use smart contracts in real estate registrations"*,AGENDA.GE,http://agenda.ge/news/96094/eng; Douglas Heaven,*"A house has been bought on the blockchain for the first time"*,NEWSCIENTIST,https://www.newscientist.com/article/mg23631474-500-a-house-has-been-bought-on-theblockchain-for-the-first-time/; *"Belarusian banks may be allowed to sign smart contracts"*, BELARUSIAN TELEGRAPH AGENCY, http://eng.belta.by/economics/view/belarusian-banks-may-be-allowed-to-sign-smart-contracts-111225-2018/; Craig A. de Ridder, et al.,*"Recognition of Smart Contract"*, PILLSBURY LAW,https://www.pillsburylaw.com/en/news-and-insights/recognition-of-smart-contracts.html.

[46] Madir, Jelena, *Smart Contracts: (How) Do They Fit Under Existing Legal Frameworks?*,SSRN,https://ssrn.com/abstract=3301463.

[47] Luke Parker, *Delaware to 'embrace the emerging blockchain and smart contract technology industry,' with distributed ledger shares,*BRAVE NEW COIN, http://bravenewcoin. com/news/delaware-to-embrace-the-emergingblockchain-and-smart-contract-technologyindustry-with-distributed-ledger-shares/.

[48] Mike Orcutt, *States that are passing laws to govern "smart contracts" have no idea what they're doing,* MIT TECHNOLOGY REVIEW,https://www.technologyreview.com/s/610718/states-that-are-passing-laws-to-govern-smart-contracts-have-no-idea-what-theyre-doing/.

framework as an intrusion in the freedom the smart contract enjoyed till date, and only an additional burden on cost and efforts.[49]

V. LEASE AGREEMENTS IN INDIAN REAL ESTATE

Lease agreements are defined in Section 105 of the Transfer of Property Act, 1882 as:

"*105. Lease defined.—A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Lessor, lessee, premium and rent defined.—The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.*"[50]

A lease can be of movable or immovable property.[51] But for the present article, we are concerned only with the lease of immovable property. A lease can be made by oral or written agreement.[52] However, the lease of immovable property for one year or more can only be made by a registered document.[53] In absence of a local governing law, written contract, or when a contract is silent, a lease of immovable property for agricultural or manufacturing purposes shall

[49]CleanApp, *Against "Smart Contracts",* CRYPTO LAW REVIEW, https://medium.com/cryptolawreview/against-smart-contracts-4a1f43133215.
[50]Transfer of Property Act, 1882, § 105.
[51]NarainSwadeshi Weaving Mills v. CEPT, AIR 1955 SC 176.
[52]Transfer of Property Act, 1882, § 107, para 2.
[53]Transfer of Property Act, 1882, §107, para 1; Registration Act, 1908§ 17; Registration Act, 1908§ 49; Rajendra Prasad Singh v.Rameshwara Prasad, AIR 1999 SC 37.

be deemed to be on yearly basis and terminable on the part of either party by giving 6 months' notice.[54]For any lease other than the aforementioned two, it shall be to be on a monthly basis, terminable by either party by giving a prior notice of 15 days.[55] In absence of any time in the contract, the lease usually begins from the day it was entered into.[56]

There are eight modes of terminating a lease of an immovable property before expiration as given under Section 111, which are the only grounds to get a lease determined.[57] One of the grounds to determine a suit is by forfeiture for non-payment of rent.[58] In a situation where the lessor files a suit for determination on this ground and while the suit has not been decided and the lessee pays to the lessor rent in arrear with interest, full cost of suit or provides sufficient security within 15 days, the court may pass an order to relieve the lessee from forfeiture and allow him to hold on to the property.[59]

In a case where even after the determination of the lease, the relationship between the parties continues as if the lease was still in force, in such a situation, the lease stands renewed year after year or month after month according to the purpose for which the property is leased.[60]

Recently, the real estate industry of India has been subjected to the gripping and critically acclaimed change in legal framework

[54]Transfer of Property Act, 1882, § 106(1).
[55]Park Street Properties (Pvt.) Ltd. v. Dipak Kumar Singh &Ors, AIR 2016 SC 4038.
[56]P. KrishnaiahSettyv. A.V. LakshmanaRao&Anr., AIR 1952 Kant 139.
[57]Niranjan Pal &Anr.v. ChaitanyalalGhosh&Anr., AIR 1964 Pat 401.
[58]Transfer of Property Act, 1882, § 111.
[59]Transfer of Property Act, 1882, § 114; Shah Ambalal Chhotalal&Ors.v. Shah BabaldasDayabhai&Ors., AIR 1964 Guj 9.
[60]Transfer of Property Act, 1882, § 116; *See*The Metal Press Works Ltd. v. Guntur Merchants Cotton Press Co., AIR 1976 AP 205.

regulating the market by introduction of the Real Estate (Regulation and Development) Act, 2016 ("**RERA**").[61] While on one hand, rental agreements and short term lease are not a part of RERA; on the other hand, a recent ruling of Bombay High Court has held that that long run lease agreements which involve an investment of substantial amounts are covered under Maharashtra RERA.[62]

Additionally, for the execution of lease documents, a mandatory requirement for payment of stamp duty under the Stamp Duty Act 1899 under Article 35 is to be fulfilled.[63]A sub-lease or an agreement to let and sublet is also included in this Article.[64]Under Article 35, stamp duty is charged on the average yearly rent which then in accordance with the length of the lease period is multiplied by the number of years.[65]

Therefore, essential provisions to be adhered to while entering into a lease is not confined to the Transfer of Property Act provisions, but also extends to the relevant provisions of the Registration Act, and the Stamp Duty Act.

VI. SMART CONTRACTS IN LEASING

A. Smart contracts in real estate

Blockchain technology has already crept in the real estate sector. The uses and advantages of blockchain in real estate include smart

[61]The Real Estate (Regulation and Development) Act, 2016.
[62]Lavasa Corporation Ltd.v. JitendraJagdishTulsiani,2018 SCC OnLineBom 2074.
[63]Stamp Duty Act 1899 art 35; State of Rajasthan v. Bhilwara Spinners Ltd. And Ors., AIR 2001 Raj 184.
[64]*Id.*
[65]*Id.*

contracts but are not limited to it.[66] Among many others, a few which have caught most highlight are digitising land titles, disintermediation, transfer of property through blockchain, etc.[67]However, for this article, we shall stay confined to smart contracts itself.

Smart contracts are the place to go for transactions which are repetitive, such as, auto-debit of lease installments, etc. The question 'why smart contracts?' stands answered by the ability of smart contracts to reduce risk in a market where trust is hard found; plus, this process ensures that the buyer/lessee has requisite funding, and the seller/lessor has the requisite ownership of the property. In the commercial world of real estate, it provides the players an inordinate advantage of 24/7 liquidity, which is how people want to invest.[68]

One such example of smart contracts in real estate will be Midasium Contract which is a digital representation of the mutual agreements contained in a traditional real estate contract as lines of software code that are self-executing and self-enforcing in nature.[69]Midasium contracts have the power to move funds between bank accounts, transfer property titles and reconcile payments.[70]Other examples would include *Propy, Harbour, ShelterZoom, StreetWire*, etc.[71]

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[66]Subhasish Das,*How Blockchain Will Transform the Indian Real Estate Sector*, PROPSTORY, https://propstory.com/how-blockchain-will-transform-the-indian-real-estate-sector/.

[67]*Id.*

[68]Tom Bill, *Can blockchain and bitcoin really revolutionise the property market?*, KNIGHT FRANK, https://www.knightfrank.com/wealthreport/2018/global-wealth/blockchain-and-real-estate.

[69]Midasium is an enterprise functioning in real estate arena of smart contracts and makes use of blockchain technology based smart contracts to conduct transactions like leasing, sale, etc. *See*http://midasium.herokuapp.com/smart-contracts.

[70]*Id*.

[71]Jacob Dunn, "*4 blockchain real estate startups shaking up property investment"*,ESPEOBLOCKCHAIN,https://espeoblockchain.com/blog/blockchain-real-estate-startups/; *See also* Platform for proptech business of 'Propy' available at

B. Smart contracts in leasing

This sub-part aims at explaining the functioning of smart contracts in case of lease agreements. A smart contract is programmed and coded by the owner of the property/lessor or his agent. These codes contain all the terms and conditions of the lease which would generally be present in a traditional document of lease, such as lease instalments, duration of the lease, duration of instalments, premium, details of property, renewal conditions (if any), etc. This content, since not readable in human language, the lessor is given a version of the content in a language readable by humans. After evaluation of the lease conditions provided to him and once an agreement has been reached, the smart contract is signed digitally by both the parties using a signature key which is indicative of the particular identity of the person/ organisation doing the signature. This walks us into the formation of a valid smart contract digitally regulating lease.

After which, the smart contract self-executes and automatically debits, digitally withdrawing the agreed rent from the lessee's account and gets deposited in lessor's account as and when the conditions fed in the smart contract for payment triggers, that is, at the regular payment period, or otherwise as agreed by the parties with consent. This automatic payment system ensures lesser cost, transparency, complete traceability for audit, reducing chances of errors and frauds to almost nullity. It also ensures a timely and an honest performance of the contracts in a risky market where trust is hard-found, and numerous cases based on non-payment, unfair pre-eviction, etc., are common-place. This is made possible based on data fed into the

https://propy.com/browse/; 'StreetWire' available at http://streetwire.net/; ShelterZoom available at https://www.shelterzoom.com/; Nikhilesh De, *Harbor Launches Tokenized Equity Purchases With Real Estate Offering,* COINDESK (Nov 27, 2018).

blockchain from Internet of Things devices that record energy, utilities, and more, transparently.[72]

When the smart contract expires, protocols for the security deposit can facilitate deductions – for example concerning reinstatement – or return, it to the tenant at the lease-end. Smart contracts can include third-party decision making, such as the independent expert of a surveyor to determine the reinstatement costs that are due.[73]

VII. LEGAL VALIDITY OF AN AUTOMATED LEASE BASED ON SMART CONTRACT

We have already established the validity of smart contracts in India. However, unlike testing the validity of smart contracts on the touchstone of the essentials of a contract laid down in Section 10 of the Indian Contract Act, the yardstick for the validity of 'smart contracts operating a lease' demands satisfaction of additional factors over and above Section 10 of the Contract Act. The reason for the same is that the provisions of IT Act validating e-contracts are not applicable to transactions relating to Transfer of Property.[74] For this reason, we will attempt to satisfy additional criteria for establishing the legal validity of what is not explicitly held to be either valid or invalid. After the satisfaction of essentials of a valid contract, we need to test them on the parameters of the ability to register and stamp smart contracts, which is a pertinent requirement in events of lease.

[72]Robparker, *3 Ways Smart Contracts Will Power Automated Leasing*, https://www.whatsnextcw.com/3-ways-smart-contracts-will-power-automated-leasing/.
[73]*Id.*
[74]Information Technology Act, 2000§ 1(4); 1 S.V. JOGARAO, COMPUTER CONTRACTS & INFORMATION TECHNOLOGY LAW, 54 (1st ed. 2003).

A. Registration of the instrument recording lease of immovable property

The primary additional condition for validity is the mandatory requirement of registration of the instrument recording the lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent.[75] The same is laid down under Section 107 of the Transfer of Property Act, 1882[76] read with Section 17(1)(d)[77] and Section 49 of the India Registration Act, 1908,[78] according to which, it is mandatory to register the lease of an immovable property for a term exceeding one year or system of yearly payment of rent.[79] A lease deed that needs to be mandatorily registered is void if it is not registered.[80] This mandatory requirement of registration is a problem because of the lack of any established e-registration mechanism in India. Another problem that arises is that according to Section 19 of the Registration Act, 1908, it is obligatory for the instrument to be in a language readable to the registrar or a language commonly prevalent in the district.[81] Smart contracts are codes which, as already explained, are not readable to humans.

[75]R. Suresh Babuv. G. Rajalingam, Civil Revision Petition No.4066 of 2016; Usha Ranjan Ray Burmanv. Sova Das, AIR 1990 Cal 1; Ariffv. Jadunath, AIR 1931 PC 79.
[76]Transfer of Property Act, 1882§ 107;MULLA, THE TRANSFER OF PROPERTY ACT, 840 (Dr.PoonamPradhanSaxena, 11thedn., 2013).
[77]Registration Act, 1908, § 17(1)(d).
[78]Registration Act, 1908, § 49.
[79]A SulaikhaBeeviv.KC Mathew, AIR 2001 Ker 177; Shantibaiv. State of Bombay, AIR 1958 SC 532.
[80]Anthony v. KC Ittoop& Sons &Ors., (2000) 6 SCC 394; Paul v. Saleena, 2004 (1) KLT 924; Badal Chandra Sadu Khan v. DebendraNathDey, AIR 1933 Cal 612; Mopurappav. RamaswamiGramani, AIR 1936 Nag 295; Ramayan Saran v. Patna Improvement Trust, AIR 1972 Pat 7; DarbariLalv. RaneeGunj Coal Association, AIR 1944 Pat 7; Bajaj Auto Limited v. BehariLalKohli, AIR 1989 SC 1806.
[81]Registration Act, 1908, § 19.

However, even in the presence of these hurdles, registration of smart contracts can pave a way out. The major hurdle is the language of the instrument to be registered. A possible solution for this could be to provide true translation and a true copy of the original contract. To do this, the source code of the smart contract can be provided which will constitute to be the true copy of the original. Next, a human-readable version of the same can be created by writing down what exactly is done by the source code in the English language or in any other language commonly prevalent in the district in which the instrument is sought to be registered for that matter. This can be considered as the required translated copy. However, a contrary argument can also be presented to rebut this method of providing a translated copy of source code by contending that this kind of translated copy doesn't constitute to be true translation as required under Section 19 because it is merely a description of what codes say and not exactly the translation of the codes.

VIII. SUGGESTIONS AND CONCLUSION

The lack of a proper legislative framework to deal with this new realm of blockchain technology, smart contracts based on this technology, Ricardian contracts, etc. was conspicuous throughout the analysis. This reality does not align with the aim of India's recent economic and other governmental policies like digitization, policies aiming to make India technologically advanced and the country's conducive attempts to attract foreign investments. Legislative and executive steps recognizing validity of smart contracts, and the guidelines regulating these new technologies will offer a steadfast, dependable and lucrative environment to investors in the country, bringing players of a wide-growing market which is only in its nascent stages and promises illustrious efficiency.

Laws related to registration need to be updated to give more and better clarity as to how the registration of smart contracts can be made possible. The e-stamping process which allows paying stamp duty online and cutting short old-school requirements of paper documents is commendable.[82]Additionally, bringing something similar in order to ensure registration without mandating physical paper and wet-ink signatures, as well as better facility and lesser ambiguity in the 'registration policy of smart contracts' is also advisable. Agreeably, India already has e-registration portals in many states,[83] but this facility of e-registration still mandates presenting the hard copy of the documents in a language readable to the Registrar officer. Moving ahead, blockchain technology can be used in this registration process because of its efficiency to protect the data against hacks, frauds, and thereby avoiding the problem of fake title deeds, counterfeits and so on. Governments in the Republic of Georgia, Sweden, Honduras and Cook County in Chicago are already making good use of blockchains in their registry process where a government official updates the distributed land ledger to reflect the change in ownership of property in case of sale of land.[84]

[82]The Government of India has initiated e-stamping, where one needs to visit https://www.shcilestamp.com/ and check whether e-stamping is available for their state or not, if available, there are options as to user registration and e-payment which are provided on the website itself.

[83]A lot of Indian states such as Maharashtra, Rajasthan, Andhra Pradesh, etc. have portals dedicated for e-registration of lease deeds. Refer to the following portal addresses for the respective webpages offering official e-registration and stamping facilities:https://efilingigr.maharashtra.gov.in/ereg/, http://epanjiyan.nic.in/e-search.aspx, http://registration.ap.gov.in/.

[84]Laura Shin, *The First Government To Secure Land Titles On The BitcoinBlockchain Expands Project*, FORBES, https://www.forbes.com/sites/laurashin/2017/02/07/the-first-government-to-secure-land-titles-on-the-bitcoin-blockchain-expands-project/#1adfde844dcd.It is stated in the article that "The Bitfury and Republic of Georgia initiative is just one of several collaborations aimed at creating blockchain-based land-titling services. (Such software is also being created in Sweden, Honduras and Cook County in Chicago with start-ups ChromaWay, Factom and Velox, respectively."

BIG DATA ANALYTICS: A CAUSE OF CONCERN FOR COMPETITION?

Priyadarsini T P[*]

Abstract

The aim of this article is to analyze the implications that big data analytics can have on competition and to assess the suitability of the present anti-trust regime to deal with such consequences. This article assumes importance in the light of antitrust regulators all around the world, including the Competition Commission of India, recognizing consequences of a growing digital economy on competition. While digital markets have affected competition in many ways, this article focuses on the aspects of antitrust law in the background of data collection and analysis. It begins by elucidating on the concept of big data. It aims to firmly establish the utility and relevance of big data in today's times. Then, it goes on to throw some light on the present and potential anti-competitive conduct that data-driven businesses and data-centered markets may give rise to, such as abuse of dominance by refusal to deal, tying, etc., facilitation of concerted practices by price algorithm, new-age data-driven mergers and so on. The

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author also discusses the opinions that argue against the notion that data can lead to anti-competitive practices and attempts to disprove the same. The article then examines some elements of antitrust law such as defining relevant market, assessing dominance, etc. regarded as crucial in an anti-trust inquiry which may need some tweaks in light of anti-competitive practices associated with big data. It concludes by arguing that heavy reliance on traditional antitrust tools may make anti-trust regulators' job difficult when it comes to assessing whether certain data related conduct affects competition or not. The author also incorporates suggestions which the competition authorities may find useful while conducting inquiries into data related competitive abuses.

I. INTRODUCTION

Companies offering free services to consumers acquire valuable data in return which can be used for targeted advertising. Data can also be obtained by observing the consumer behavior in the online world. Further, businesses may obtain data from third-party data providers who sell it. Data, especially consumer data, has been regarded as the new raw material of business.[1]Chairwoman of the Federal Trade

[1]Kenneth Cukier, *Data, Data Everywhere*, THE ECONOMIST (Feb.25, 2010), http://www.economist.com/node/15557443.

Commission ("**FTC**") even commented that data is today's currency.[2] It is viewed as having such importance to businesses that it is said to be the new 'oil'.[3]Although the profits generated from collection of data largely depends on how it is put into use, it is clear that data has, off late, been considered as a significant intangible asset used for the purposes of value creation, so much so that it has been compared to other intellectual property such as copyrights.[4]

Big data refers to a collection of data sets so large and complex that traditional database systems cannot effectively manage or process the information.[5]Some of the common aspects of big data are large amounts of different types of data, produced at high speed from multiple sources, whose handling and analysis require new algorithms, new and more powerful processors, storage and data transport technology. It is characterised by four factors: velocity, volume, variety and value.[6] Velocity refers to the speeds at which new data is generated, can be generated, distributed and analyzed even without a need to store it in databases.[7]One author notes that it

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[2]Edward Wyatt, *Edith Ramirez is Raising the F.T.C.'s Voice,*N.Y.TIMES (Dec. 21, 2014),https://www.nytimes.com/2014/12/22/business/federal-trade-commission-raises-its-voice-under-its-soft-spoken-chairwoman.html (Feb. 10, 2019).

[3]*The World's Most Valuable Resource Is No Longer Oil, but Data,* THE ECONOMIST (May 6,2017), https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.

[4]*Privacy and Competitiveness in the Age of Big Data: The Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Economy*: Preliminary Opinion of the European Data ProtectionSupervisor, 9 (2014),https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf[Hereinafter "*EDPS Preliminary Opinion"*].

[5]James Manyikaet al., Big Data: The Next Frontier for Innovation, Competition, And Productivity 1 (McKinsey Global Inst., June 2011), http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation.

[6]Supporting Investment in Knowledge Capital, Growth and Innovation 12 (Org. For Econ. Co-Operation & Dev. (OECD),2013), [Hereinafter "*OECD Report"*].

[7]Mira Burri, *Understanding the Implications of Big Data and Big Data Analytics for Competition Law:An Attempt for a Primer* in NEW DEVELOPMENTS IN COMPETITION

takes only milliseconds for a trading system to pick up social media signals that trigger decisions to buy or sell shares.[8] Volume refers to the sheer amounts of data that is generated constantly through the Internet. Variety connotes the various kinds of data that are generated ranging from tweets to online purchasing behavior. Value refers to the extent to which the ubiquitous amounts of data can be used to generate profit. For example, analysis of behavior of consumers in online business platforms can help in marketing of other products. It has been observed that big data can be regarded as a game changer because it enables customisation in delivery of services thereby reducing risk and improving performance.[9]

It has increasingly been observed that big data will play a significant role in competition between companies.[10] Organization for Economic Co-operation and Development ("**OECD**") has observed that big data represents a core economic asset that can create significant competitive advantage for firms.[11] The Competition Commission of India ("**CCI**") in In Re: Matrimony.com Limited, has made an observation recognising the value of data for businesses:

'it would not be out of place to equate data in this century to what oil was to the last one. The Commission is not oblivious of the increasing value of data for firms which can be used to target advertising better.

BEHAVIORAL LAW AND ECONOMICS (Klaus Mathis and Avishalom Tor ed., forthcoming in 2018).

[8]Bernard Marr,*Why Only One of the 5 Vs of Big Data Really Matters*,IBM BIG DATA & ANALYTICS HUBS BLOG(Mar. 29, 2015),http://www.ibmbigdatahub.com/blog/why-only-one-5-vs-bigdata-really-matters (Jul.11, 2019).

[9]M.S Gal& D. L. Rubinfeld, *Access Barriers to Big Data*, 59ARIZ. L. REV. 339,381 (2017).

[10]Maniyikaet al,*supra*note 5 at 13 (2011).

[11]OECD Report,*supra* note 6, at 319.

Moreover, the data can be turned into any number of revenue-generating artificial-intelligence (AI) based innovations."[12]

Data can have varied competitive significance depending on whether it is the product, or it is an input for some other product. Whether or not competition concerns may be raised will also largely depend on who is the controller of a particular set of data.[13]The following section attempts to unravel the ways in which big data analytics may bring about the incidence of anti-competitive conduct.

II. DOES BIG DATA RAISE COMPETITION CONCERNS?

The technological changes of the digital economy have revolutionised the possibilities to collect, process and commercially use data in almost every business sector. Collection and analysis of big data has significant benefits to consumers, businesses, and government agencies. Data possess commercial value as a product. Online behavioral data is crucial for targeted advertising because of which businesses buy information about their customers' interests.[14]

Data as an input is significant from the purview of competition because software and online services increasingly rely on machine learning and artificial intelligence to leverage massive data sets.[15]Companies have been able to offer entirely new products and services (e.g. real-time traffic information), enhance existing products and services (e.g. personalised music or video recommendations), and

[12]In re.Matrimony.com Ltd. v. Google LLC,CaseNo. 07 and 30 of 2012 (CCI) ¶86.
[13]G. Sivinski et al., *Is Big Data a Big Deal?* 13,EUROPEAN COMP J. 199, 206 (2017).
[14]U.S. Fed. Trade Comm'n, Data Brokers: A Call for Transparency and Accountability II (May 2014),https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-reportfederal-trade-commission-may-2014/140527databrokerreport.pdf.
[15]Sivinski et al., *supra*note 13, at 209.

better market their products by way of data analytics. Marketing,based on market research, comprises systematic data collection, processing and analysis of customers' interestsso that improved products, personalised services, targeted marketing, etc. may be achieved.[16]They can reduce their advertising costs by addressing only the target audience. Data used to develop products and render services in this way has competitive utility.

III. POTENTIAL ANTI-COMPETITIVE PRACTICES ASSOCIATED WITH BIG DATA

One major concern of competition authorities with regard to the anti-competitive concerns raised by big data is whether the present anti-trust law is a sufficient tool to regulate such practices. In this section, some traditional regulatory approaches have been looked at from this point of view:

A. Data as an entry barrier

Extracting value from big data has become a significant source of power for the biggest playersin internet markets.[17] The OECD has noted that the economics of big data favors market dominance.[18]In some markets such as social media platform services and search engines, few entities enjoy significantly high market share and consequently has access to a large database of information of its

[16]D. S. Tucker & H. B. Wellford, *Big Mistakes Regarding Big Data*,THE ANTI-TRUST SOURCE (Dec. 2014),
https://www.morganlewis.com/-
/media/antitrustsource_bigmistakesregardingbigdata_december2014.ashx.
[17]EDPS Preliminary Opinion, *supra*note 4, at 9.
[18]Data-Driven Innovation for Growth and Well-Being: Interim Synthesis Report 7(OECD,2014),
http://www.oecd.org/sti/inno/data-driven-innovation-interim-synthesis.pdf.

customers. It is not possible for a new entrant or a third party to have access to the same volume of data. In these cases, data can constitute a barrier if access to data is a pre-requisite to compete in that market.[19]

A counter-vailing opinion is that just because some entities have a large database by virtue of being in the market for a long period, new entrants are not precluded from offering services. For example, Tinder was not precluded from competing with other dating services by data barriers. However, this cannot hold true for all markets. In the search engine market, Google enjoys a clear dominant position because of how effectively it can utilise its technology to match the large volumes of personal data to the consumers' queries. This data is difficult to replicate. Additionally, in these markets, access to larger amount of data would result in better quality of services which in turn attracts more customers. Smaller entities attract fewer consumers and hence the gap between the market share further increases.[20]

B. Refusal to deal/ to grant access and Exclusive dealings

When companies incur significant costs to acquire and analyze data, the tendency to limit competitors' access to that data is higher. They may devise anti-competitive strategies such as exclusivity provisions with third-party providers, foreclosing competitors from procuring similar data, etc.[21]Section 3(4) of the Competition Act, 2002 provides that agreements such as refusal to deal and exclusive supply agreements will be void if it causes or is likely to cause an adverse effect on competition in India.

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[19]B. Lasserre& A. Mundt, *Competition Law and Big Data: The Enforcers View*,1 ITAL. ANTITRUST REV. 90 no. 1(2017).
[20]*Id.*at 91.
[21]A.P. Grunes& M.E. Stucke, *No Mistake about it: The Important Role of Antitrust in the Era of Big Data*, 3 (University of Tennessee Legal Studies Research Paper No. 269, 2015),
http://ssrn.com/abstract =2600051.

When access is refused to data, such conduct can be regarded as anti-competitive only if the data is so unique that it is not possible for the requesting entity to obtain it otherwise. An entity with valuable data may refuse to grant access to the same to other competitors. Such refusal is anti-competitive if the data is an 'essential input' for the business of the requesting entity. The scope of this is very limited and there are certain conditions which have to be satisfied before such refusal can be termed anti-competitive. These are: (1) the facility requested for is an indispensable input for carrying on the business (2) the refusal prevents the emergence of a new product (3) there is no objective justification for the refusal (4) such refusal is likely to wipe out competition in the secondary market.[22]

Refusal to deal may be anti-competitive if it is discriminatory. A French decision is illustrative of this point. Cegedim, a leading provider of medical information databases in France, refused to sell its main database (called OneKey) to customers using the software of Euris, a competitor of Cegedim on the adjacent market for customer relationship management (CRM) software in the health sector, but would sell it to other customers.[23] This conduct was held to be discriminatory. The French Competition Authority concluded that that OneKey was the leading dataset on the market for medical information databases and that Cegedim was a dominant player on the market for medical information databases, therefore such a discriminatory practice unduly restricted competition between Euris and Cegedim in the 2008-12 period.[24]

Further, dominant entities having access to third-party data may enter into exclusive dealing agreements with third-party providers hence

[22]C-418/01 *IMS Health* GmbH & Co. OHG v NDC Health GmbH & Co. KG 2004 ECJ CELEX LEXIS 192 (Apr. 29, 2004), § 37; Case 7/97, Oscar Bronner v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH Co. KG 1998 ECR I-7791.
[23]French Competition Authority, Decision No. 14-D-06, Jul.8, 2014 (Fr.).
[24]COMPETITION LAW AND DATA 9 (Bundeskartellamt, May 10, 2016) [Hereinafter "*French Competition Authority Report"*].

making it difficult for competitors to access such data.[25] European Commission recently launched an anti-trust investigation against Google in which it has proposed to look into Google's exclusivity obligations on advertising partners that prevented them from placing competing ads in their websites.[26]

C. Tie-in Arrangement

Tie-in arrangements are recognised as causing or likely to cause appreciable adverse effect on competition under Section 3(4) of the Competition Act. A company may tie access to its data with its data analytics services.[27]This has the potential to reduce competition in data analytics market. This is one way of using data acquired in one market for gaining market power in a secondary market. A long-time data collecting entity certainly has an upper hand when it ventures out to data analytics market, compared to its competitors. In a 2010 opinion, the French Competition Authority, observed that such cross-usage of data can have anti-competitive effects.[28] In this case, the Authority ordered GDF-Suez, a gas-supplier to provide access to some of its consumption data so that all suppliers can have the same relevant information required to make offers to consumers, in light of the fact that no other information related to households subscribing to gas services exist elsewhere.

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[25]A.P. Grunes& M.E. Stucke,*supra*note 21, at 3.

[26] Press Release, European Commission, Commission Probes Allegations of Antitrust Violations by Google(Oct. 30, 2010), http://europa.eu/rapid/press-release_IP-10-1624_en.htm?locale=en.

[27]Commercial Use of Consumer data 90 (Competition and Markets Authority, 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use_of_consumer_data.pdf.

[28]French Competition Authority, Opinion No. 10-A-13 on the cross-usage of customer databases Jun. 14, 2010 (Fr.).

D. Price Discrimination

Data can facilitate price discrimination.[29] Companies can set different prices for different customers on the basis of data of their willingness to pay, purchasing habits etc. Discriminatory pricing has its pros and cons. It is viewed as an 'unfair breach of consumer equality'.[30]However, some consumers do receive goods and services at affordable prices while some consumers may end up paying more than before. However, such conduct cannot be regarded as anti-competitive unless coupled with an abuse of dominant position or imposition of vertical restraint.[31]

Price discrimination can increase the information asymmetry between consumers and suppliers, resulting in higher search costs for consumers.[32] It can lead to non-rational consumers paying higher prices while rational consumers are more or less not harmed by price discrimination.[33]

E. Data driven Mergers and Acquisitions

The OECD has reported that the number of "big data related" mergers and acquisitions more than doubled between 2008 and 2012-15.[34] The European Commission has reviewed mergers between firms

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[29]N. Newman, *The Costs of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google*, 40 WM. MITCHELL L. REV. 850,863 (2014), http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1568&context=wmlr.
[30]French Competition Authority Report,*supra*note 24, at 21.
[31]*Id at 22.*
[32]Lasserre&Mundt, *supra*note 19, at 94.
[33]P. Heidhus& B. Köszegi, *Using Information About Naivete To Price Discriminate*, 18(Working Paper, Mar. 27,2014), https://www.esmt.org/sites/default/files/digital-measures/price_discrimination-1.pdf (Jul. 15,2019).
[34] Report of Workshop on Privacy, Consumers, Competition and Big Data, 1 (Eur. Data Prot. Supervisor 2014), https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Big%20data/14-07-11_EDPS_Report_Workshop_Big_data_EN.pdf.

providing data or data-related services such as Thomson/Reuters,[35] Oracle/Sun,[36] etc.

a) Horizontal Mergers

Horizontal merger between two undertakings may lessen competition in a market where data is the input especially when the product market is concentrated and there are no effective substitutes for the data. For example, in data related markets, merger between an established entity and a newcomer may result in differentiated data access and increase in concentration of data if the latter has access to a large database collected in another market. This is one way in which undertakings can use data-based market power to attain a prominent position in adjacent markets.[37]

The Department of Justice's ("**DOJ**") action against the merger of Bazaarvoice and Power-Reviews established that data can be an entry barrier in markets where the quality of services rendered is dependent on access to, volume and quality of data.[38] It was of the opinion that competition in 'rating and review platforms' would be greatly reduced and there was potential for creation of a monopoly by this merger.[39]In another case, the FTC alleged that the parties were the only significant U.S. suppliers of educational marketing data.[40] The

[35]Case COMP/M.4726, Thomson Corp./Reuters Group, EU-LEX CELEX LEXIS 223 (Feb. 19, 2008) ¶¶117,179.
[36]Case COMP/M.5529, Oracle/Sun Microsystems, Eur-LEX CELEX LEXIS (Jan. 21, 2010).
[37]Competition Policy: The Challenge of Digital Markets: Special Report No. 68 109, 478 (German Monopolies Commission, 2015), http://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf.
[38]United States v. Bazaarvoice, Inc, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014) ¶50.
[39]United States of America v. BaazarVoice Inc. (Cal. Dist. Ct.,Competitive Impact Statement2014) ¶5,
http://www.justice.gov/atr/case-document/file/488826/download.
[40]Federal Trade Commission, In the Matter of The Dun & Bradstreet Corporation: Analysis of Agreement Containing Consent Order to Aid Public Comment, Dun & Bradstreet Corp., Dkt. No. 9342 (Sept. 10, 2010)

customers of the merging entities used the data which included demographic, contact and other details of school personnel to market their products and services. The FTC concluded that the customers did not regard other sources of marketing data as close substitutes.[41]

In case of the Thomson/Reuters merger, both the DOJ and the European Commission found that the combination raised competition concerns with respect to specific types of data of which they were the leading providers. For example, the DOJ alleged that new entrants will have to overcome significant barriers in the fundamentals data market. These include difficulties of arranging for collection of data on tens of thousands of companies on a global basis, constructing a reliable historical database, the need to develop local expertise in each country's accounting norms, and the ability to develop data normalisation and standardisation process.[42] Raw materials required to create the databases were observed unavailable for any price.[43]In the end, the merger was cleared upon the condition that the merging entities have to disclose databases required to allow its purchasers to establish themselves as competitors in the market.[44]

b) Vertical Mergers

Merger between two companies that hold strong positions in different markets can lead to foreclosure. The European Commission takes the

¶1,https://www.ftc.gov/sites/default/files/documents/cases/2010/09/100910dunbradstreetanal.pdf.

[41]Edith Ramirez, *Deconstructing the Antitrust Implications of Big Data*, in Keynote Remarks of FTC Chairwoman Ramirez 4 (Fordham Competition Law Institute, Sept. 22, 2016).

[42]U.S. v.The Thomson Corp. and Reuters Group PLC, (Department of Justice-Antitrust Case Filings Feb. 19, 2008) http://www.justice.gov/atr/cases/f230200/230281.htm.¶37.

[43]*Id* at ¶365.

[44]Press Release, European Commission, Commission clears acquisition of Reuters Subject to Conditions (Feb. 19, 2008) http://europa.eu/rapid/press-release_IP-08-260_en.htm.

following approach while deciding if the merger would lead to foreclosure: [i]Would the merged firm have the ability to foreclose its actual or potential competitors/ [ii]would it have the economic incentive to do so? And [iii] would a foreclosure strategy have a significant detrimental effect on competition?[45]

One example of a data-related vertical merger was the Facebook/ WhatsApp Merger in which the European Commission conducted an inquiry into whether a merger between a social networking platform and consumer communication application may affect competition by virtue of Facebook having access to additional data. The Commission found that even if Facebook were to use the data from WhatsApp users for advertising, there still existed a large amount of data outside Facebook's control. Hence, substitutes were available.[46]Another illustrative case is Google/ITA in which Google proposed to acquire ITA, a supplier of airline schedule database to online travel intermediaries. The DOJ observed that the merger involved Google purchasing a significant input supplier and hence remedies were imposed to ensure the supply of inputs to Google's competitors.[47]

c) Efficiency Defense

Efficiency defense has been used by the merging parties in data related mergers such as *Microsoft/Yahoo!*,[48] *United States v.*

[45]Case Com./M.8124, Microsoft/LinkedIn [2016] 8404 OJ L 1, (Mar. 1, 1994) ¶186.
[46]Case No COMP/M.7217 - Facebook/ Whatsapp 2014 EUR-Lex CELEX LEXIS 99 (Mar.10,2014) ¶99 http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.
[47]U.S. v. Google Inc. and ITA Software, Inc., No. 1:11-cv-688 (D.D.C., Competitive Impact Statement Apr. 8,2011),https://www.justice.gov/atr/case-document/file/497671/download.
[48]Case No COMP/M.5727 - MICROSOFT / YAHOO! SEARCH BUSINESS EU-Lex(Feb. 18,2010), http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf, ¶184.

Bazaarvoice and *Tomtom/Tele Atlas*[49] to claim that better products can be produced with more data. In the Microsoft/Yahoo merger, the DOJ found that the merger would result in an efficient competitor to Google and that the merger would enable Microsoft to improve its search and search advertising.[50] In the *Baazarvoice* merger, however, the efficiency defense was rejected citing lack of evidence that the merger, if completed, would result in improved product as a result of more data and lower prices.[51]In the *Microsoft/LinkedIn* merger, the European Commission examined whether the merger would increase entry barriers to competitors that require date to compete in online advertising. One of the oppositions against the merger was the need for a level-playing field which required LinkedIn to share its data. The Commission concluded that the merger would result in increased efficiency by combining complementary data sets and hence would be pro-competitive.[52]

F. Facilitation of Concerted Practices

Competition Laws generally frown upon cartels. Section 3(3) of the Competition Act presumes that cartel agreements cause an appreciable adverse effect on competition. One of the major hurdles faced by competition authorities is proving the existence of concerted practice or cartel agreement between the competitors. With the advent of data-based algorithms to fix prices and hence implement the cartel agreement, it has become increasingly difficult to establish the

[49]Comp/M. 4854, Tomtom/Teleatlas EU Lex (May 14, 2008), http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf. ¶¶238-250.

[50]Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc. (Feb. 18, 2010), http://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation-internet.

[51]United States v. Bazaarvoice Inc., (N.D. Cal. Jan. 8, 2014) ¶62–64.

[52]Microsoft/LinkedIn (Case Com./M.8124 [2016] 8404 OJ L 1, 3.1.1994 ¶254.

existence of a cartel because parallel behavior is not prohibited under competition law. The Canadian Competition Bureau has recognised that that big data may facilitate innovative ways of implementing and verifying compliance with a cartel agreement.[53] The European Union Competition Commissioner has warned businesses on using pricing algorithms because it may facilitate tacit collusion.[54]

In concentrated markets, data collection can lead to increased transparency which makes it easier to detect deviations from the agreement and hence can limit competition.[55]

G. Leveraging of Dominance

Big data can facilitate leveraging of dominance in an online market to attain market power in an adjacent market. This was recognized by the CCI in the Matrimony.com decision. Google was found to have leveraged its dominance in the search and search advertising markets to enter into the market of online search intermediation services, amounting to violation of Sections 4(2)(a)(i) and 4(2)(e) of the Competition Act.[56] The CCI found that Google prevented its partners in negotiated search agreements from implementing search services on any other websites which are similar to that offered by Google and hence denied its competitors access to search business.[57] This can be replicated by other platforms that have access to large amounts of data. For example, a restaurant listing service, having access to the data on which types of food preferred by which sections of the

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[53]*Big Data and Innovation: Key Themes for Competition Policy in Canada*,CANADA COMPETITION BUREAU(2018), http://publications.gc.ca/collections/collection_2018/isde-ised/Iu54-66-2018-eng.pdf.

[54]Nicholas Hirst, *Confronting the Future of AI: When MargretheVestager takes Anti-Trust Battle to Robots*,POLITICO (Feb.28, 2018, 12:00 PM CET), https://www.politico.eu/article/trust-busting-in-the-age-of-ai/.

[55]Lasserre&Mundt,*supra*note 19, at 91.

[56]Matrimony.com Case, ¶397.

[57]*Id.*at ¶394.

society, the amount that each section is ready to pay, etc. can enter the restaurant business easily and deliver services which are ten times more efficient compared to existing competitors who do not have access to such critical data. The CCI will have to watch out for such violations carefully by examining whether the other market participants are unfairly disadvantaged by the new entrant's access to data.

IV. COUNTER-ARGUMENTS: BIG DATA POSES NO THREAT TO COMPETITION

A. Data is available everywhere and hence does not give rise to any competition concerns

Collection and use of big data have often been considered to be of relevance with regard to data protection enforcement. However, there is skepticism regarding the implications of big data, if any on competition. Many are of the opinion that the benefits that consumers can avail through optimised services trump the alleged anti-competitive effects. It has been argued that big data monetisation, must be regarded as an 'economically rational, profit-maximising behaviour that results in obvious consumer benefits'.[58] Consumers are more interested in getting personalised services from Google, YouTube, Amazon, etc. than being concerned about their privacy.[59] This is evidenced, for example, by the lack of any serious effect on Facebook's customer base even in the wake of the Cambridge Analytica scandal.[60] Corroborating this statement further is the fact

[58]R. Camerford& D. Sokol, *Antitrust and Regulating Big Data,* 23 GEO. MASON L. REV.1129, 1134 (2016).
[59]EDPS Preliminary Opinion,*supra*note 12, at 11.
[60]Urs Gasser, *Perspectives on the Future of Digital Privacy,* 135 ZEITSCHRIFTFÜRSCHWEIZERISCHESRECHT335, 392(2015).

that few companies have had competitive advantages by enhancing the privacy of consumers.[61]

Big data is viewed as an entry barrier because some data is difficult to collect, and difficult to replicate if it is unique.[62] But some are of the opinion that data being an entry-barrier is simply a myth.[63] Data is ubiquitous, free and widely available and hence cannot raise competition concerns. Cost of collecting data is very low.[64] Collection costs of data generated as an exhaust product after the usual activities involving interaction with consumers is zero.[65] Further, data acquired by one entity continues to be available for others to purchase as long as they can access it.[66] In other words, it is non-rivalrous.

Arguments against data giving rise to anti-competitive effects may sound true on paper. However, competition authorities all over the world are steadily realising and evaluating the potential anti-competitive practices which can be facilitated by access to and ownership of big data.[67] Data being non-rivalrous in nature does not

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[61]EDPS Preliminary Opinion,*supra*note 12, at 11.
[62]R. Mahnke, *Big Data as a Barrier to Entry CPI*, ANTITRUST CHRONICLE (May 2015),
https://www.competitionpolicyinternational.com/assets/Uploads/Mahnke2May-152.pdf.
[63]G. Manne & B. Sperry, *Debunking the Myth of a Data Barrier to Entry for Online Services*, TRUTH ON THE MARKET(Mar., 2015),
http://truthonthemarket.com/2015/03/26/debunking-the-myth-of-a-databarrier-to-entry-for-online-services/.
[64]EXEC. OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES (2014),
https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.
[65]MANYIKA, *supra* note 5, at 1.
[66]Nils-Peter Schepp & A. Wambach, *On Big Data and its Relevance for Market Power Assessment*, 7. J. EUROPEAN COMP. L& PRACTICE 121 no.2(2016).
[67]COMP/M. 4731,Google/ Doubleclick, EU-Lex (Mar. 11,2008),
www.ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_de.pdf, §§ 359-366; European Commission, Facebook/WhatsApp COMP/M. 7217 (Oct. 3, 2014).

mean that everyone has equal access to it. As explained above, competitive advantage is often gained by the uniqueness of the data owned which is seldom easy to find elsewhere and which the owners have no incentive to share. Data-dependent businesses operate in two-sided markets or multi-sided markets.[68] For instance, Facebook, provides services of social media networking to one set of users while it sells the data collected therein to other businesses such as advertisers and other interested parties. By virtue of having a large number of consumers, it enjoys strong market power in the market of selling data to advertisers and other interested parties.[69] It is extremely difficult for a new entrant to gain similar market power even if it employs a better technology on its platform unless Facebook's consumers collectively coordinate a switch to its network, the likelihood of which is very less.[70] A new entrant will have to amass a substantial number of users both in the communication platform and in the data selling platform to become a significant competitor.

Further, data sold by a third-party may be of less value than the data generated by continued interaction with consumers and consequential inference.[71] Data-driven mergers can bring efficiencies which cannot be substituted by third-party generated data.[72] It has to be kept in mind that if data is something that is available everywhere for everyone, it is irrational for large businesses such as Facebook and

[68]Jean-Charles Roche & J. Tirole, *Platform Competition in Two-Sided Markets*,1 J.E.E.A.990, 1023 (2003).
[69]NICHOLAS L. JOHNSON & ALEX MOAZED, MODERN MONOPOLIES: WHAT IT TAKES TO DOMINATE THE 21ST CENTURY ECONOMY 95 (New York: St. Martin's Press 2016).
[70]K.A. Bamberger & O. Lobel, *Market Power*,32 BERK. TECH, L. JOUR. 1052, 1068 (2018).
[71]Lasserre & Mundt, *supra* note 19, at 91.
[72]Comp/M. 4854, Tomtom/ Teleatlas EU Lex (May 14, 2008), http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf. ¶179.

LinkedIn to offer their services for free in return for data from their consumers.

B. Advantages conferred by data are short-lived

Another view is that possession of data alone cannot confer competitive advantages and if at all, not for very long. The example of, Tinder, an online dating platform that successfully displaced older players that had access to data through non-data related innovation is often cited to argue that data has very little utility in terms of conferring competitive advantage.[73] Value of data is also viewed as short-lived.[74] There is a constant need for new and differentiated data, so even if a company holds a large volume of data, competitors can challenge its position by gathering more relevant data.[75] Along these lines, the European Commission in its Facebook/WhatsApp decision concluded that it is very easy for consumers to switch to other services in light of the dynamic nature of these markets.[76] The Commission found that in such a market 'high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition'.[77] Post-merger, there will continue to be a sufficient number of other actual and potential competitors who are equally well placed as Facebook to offer targeted advertising.[78] This argument may hold true in markets where there is no dominance by any entity. However, in markets such as social-media networking

[73]Tucker & Wellford, s*upra* note 16 at 6-9.
[74]Camerford & Sokol, *supra* note 56, at 1138.
[75]*Id* at 1138.
[76]European Commission Press Release, *Commission Approves Acquisition of WhatsApp by Facebook*(Oct. 3, 2014), https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1088.
[77]Case COMP/M.7217— *Facebook/WhatsApp*, COMMISSION DECISION (Mar.10,2014) http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf¶99.
[78]*Id* at ¶179.

where one entity enjoys a clear dominance, has a very large number of consumers, and where competition is very less, it may not be true.

C. Competition authorities need not be concerned about privacy

Firstly, it is regarded that due to the anonymised nature of big data, there are no threats posed to consumers' privacy. However, with the advent of new technologies, it is indeed possible for re-identification of data, thus leading many technologists to opine that de-identification of data cannot be a means to ensure individual privacy[79]Further, it has been remarked that big data is capable of challenging the very basic tenets of privacy laws. Rubinstein suggests that big data can make the concept of informed consent, futile in three ways: (i) Adequate notice by firms having the data is impossible as it cannot be predicted when a certain conclusion may be arrived at; (ii) Users cannot meaningfully consent to their data being used for big data analysis at every stage; and (iii) It is not clear whether the concepts of consent, portability, access, etc. apply to knowledge gained as a result of data analysis, particularly when it has been anonymised, as there is no violation of any individual obligation.[80]

Competition law majorly focuses on competitive pricing for consumers in its regulation while other non-price factors such as data and privacy are only slowly gaining recognition. The CCI held in the case of *Vinod Kumar Gupta v. WhatsApp Inc*.[81] that any privacy concern was outside of its purview and had to be dealt with exclusively under the Information Technology Act, 2000. This approach reflects a view of competition law which does not consider either data as an asset or privacy as a factor that can affect

[79]EXEC. OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES(2014); P. Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*,57 UCLA L. REV. 1701, 1777 (2010).
[80]I. Rubinstein, *Big Data: The End of Privacy or a New Beginning?,* 3 INTL. DATA PRIVACY LAW74,78 (2013).
[81]Vinod Kumar Gupta v. WhatsApp Inc, 2017 COMP L. R. 495 (CCI).

competition which is not a welcome approach in the digital economy. How consumers' privacy must be regarded by the competition authority as a factor affecting consumers' interests is dealt with in the forthcoming section.

V. IS THE PRESENT ANTI-TRUST REGIME WELL-EQUIPPED TO DEAL WITH BIG DATA RELATED COMPETITION CONCERNS?

From the above discussion, it is clear that there is disagreement among scholars as to whether big data is capable of detrimentally affecting competition. However, it has to be concluded that it does have potential to give rise to anti-competitive conduct, at least in certain concentrated markets at present.

There is indeed difficulty in proving foreclosure of competition/adverse effect on competition through ownership of data because of certain characteristics of digital markets specifically multi-sided nature of online markets, multi-homing and market dynamics. In this section, the author puts forth certain suggestions which may have to be incorporated by the CCI to be better equipped to deal with such anti-competitive practices.

A. Defining relevant market

Online markets are multi-sided, meaning that an undertaking caters to more than one group of customers, as explained earlier. Hence it can be difficult to define relevant market.

Anti-trust tools such as the Hypothetical Monopolist test may be rendered useless with the invasion of data. Hypothetical Monopolist Test or SSNIP test is a test used to define relevant market.According to this test, the question is if a producer were to introduce a small but

significant non-transitory increase in price in the range of 5%-10% would it be enough for the customers to switch their purchases to other products. If the answer is yes, it could be inferred that the market is wide enough to include such other products as well.[82]As most of the services that obtain data are offered for free, it is futile to determine substitutability in terms of price in abuse of data-conferred dominant position. In such a scenario, other factors such as consumer preferences, end-use of goods and services, price etc. may be regarded by the CCI to determine the relevant product market.[83]

B. Assessing dominance

Market dynamics are often cited as demystifying the anti-competitive concerns raised by data-created market power. It is this dynamic nature of market that is said to have facilitated the replacement of Yahoo by Google, MySpace by Facebook, etc. even though these new entrants did not have access to the databases initially.[84]Temporary dominance is the prize for which firms in dynamic markets compete, so enforcement that limits the ability to achieve this dominance may be counter-productive and slow innovation to the detriment of economic growth and consumer welfare.[85]Again, undue reliance should not be made on this and a case-by-case analysis is required to see whether there exists any data-related anti-competitive practice in the market at present. Competition authorities should carefully analyse where there is an abuse of dominance gained through data, in a way that survival of new entrants and other competitors is deterred because merely enjoying a dominant position is no violation. Enquiry

[82]A. ROY & J. KUMAR, COMPETITION LAW IN INDIA 178 (2 ed. Eastern Law House2014).
[83]The Competition Act, 2002, Acts of Parliament, No. 12 of 2003, § 19(7).
[84]French Competition Authority Report, *supra* note 24, at 29.
[85]H.A. Shelanski, *Information, Innovation, and Competition Policy for the Internet,*161 UPLA REV. 1663, 1670-71(2013).

must also be made into the whether the data concerned is substitutable or not.

Another characteristic of online markets is that consumers tend to use several providers to get the same service i.e., multi-homing. This may lead to several service providers collecting similar data. It is seen as a factor likely to reduce market power.[86] Level of multi-homing is a crucial factor which has to be looked into while deciding whether data-driven strategies have resulted in anti-competitive effects.

Therefore, the inquiry as to whether there is an abuse of dominance must be threefold: [i] Whether the data held by the entity accused of abuse of dominance is substitutable? [ii] If no, whether it confers a dominant position to the entity i.e., the ability to operate independently of the competitive forces?[87] [iii] Whether the said dominant position has been abused with regard to the factors mentioned in Section 19(4) of the Competition Act such as entry barriers, dependence of consumers, size and resources of the enterprise, etc.?

The CCI had an opportunity to define the relevant market and assess dominance in the context of online platforms while inquiring into the alleged anti-competitive practices by Google in Matrimony.com case. The relevant market was defined to be: (1) the market for online web search services in India and (2) the market for online search advertising in India. A pro-active approach was taken by the CCI by dismissing Google's argument that its search services being provided for no consideration, did not come under the definition of service in the Competition Act. The CCI recognized the advantages conferred by data by opining that the data collected from the users on every search contributed to big data analysis which was instrumental in

[86]D.S. Evans & R. Schmalensee, *The Industrial Organisation of Markets with Two-Sided Platforms*, 3 COMPETITION POLICY INTERNATIONAL 151, 169 no.1 (2007).
[87]The Competition Act, 2002, Acts of Parliament, No. 12 of 2003, Explanation (a) to §4.

targeted advertising that generated a significant portion of revenue. Further, Google was found to be dominant in the relevant market after an analysis that consisted of factors under Section 19(4) such as volume of business, market share, revenue, high entry barriers in the form of unavailability of large-scale data and technological prowess that Google exclusively possessed, etc.

The CCI also noted that by virtue of access to large amounts of personal data, large online platforms may be in a position to deter new innovation or even restrain consumer welfare.[88]

While this approach is indeed commendable, the decisional practice of CCI concerning digital markets has been inconsistent otherwise. The CCI has maintained the view that online and offline markets have to be defined as separate relevant markets,[89] which can no longer be entertained in view of the obvious advantages conferred by big data to online players, detrimentally affecting the offline players who might very well be driven out of the market due to factors other than but including big data as well. Thankfully, CCI has ordered a probe against the e-commerce giants which might hopefully examine the competitive advantages conferred by data.[90]

C. Accrual of benefits to consumers

Further, Section 19(3) of the Competition Act lists accrual of benefits to consumers, among other factors as a factor that the CCI has to regard during its enquiry as to whether there is a violation of Section

[88]Dissent Note, Matrimony Case, ¶33.
[89]Ashish Ahuja v. Snapdeal.com, Case No. 17 of 2014:JusticketsPvt. Ltd. v. Big Tree Entertainment Ltd., Case No. 08 of 2016 (CCI).
[90]*CCI orders probe against Amazon, Flipkart over discount practices,* THE ECONOMIC TIMES (Last visited on Jan. 14, 2020 07:57 AM IST) https://economictimes.indiatimes.com/industry/services/retail/cci-orders-antitrust-probe-against-amazon-flipkart/articleshow/73232447.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Jan. 19, 2020).

3. The efficiency defence may be used by data holding platforms to argue that more data will result in enhanced innovation and improved products to the benefit of customers etc. Though this may be true to some extent, it still has to be scrutinised carefully by the competition regulators. They should be in a position to understand whether the data involved is unique, whether there are reasonable substitutes available, etc. Unduly focusing on benefits to consumers may result in forgiving practices which are harmful to competition in the market.

D. Privacy as a non-price competition factor

While enquiring into whether there is anti-competitive conduct fueled by possession of data [Violations of Section 3(4)], privacy, as a non-price factor assumes importance. Competition authorities must give regard to whether or not there is breach of consumers' privacy by enterprises even if it results in delivery of personalised services so that an otherwise anti-competitive practice is not condoned in light of Section 19(3). The CCI in the Matrimony.com order noted that an antitrust intervention can no longer be restricted to analysis of market power but also should focus on the implications on consumers. This might be a signal that in the future, the CCI will not hesitate to look into privacy -breaching actions as detrimental to consumer welfare.

E. Evaluating the need for sharing data to facilitate competition

As discussed in the earlier section, companies like Facebook holding large amounts of data may make competition difficult in certain markets. As was decided in the cases concerning abuse of dominance by such platforms being required to share data, otherwise called data openness may have to be resorted to enable the entry of new players in the market. Although a highly interventionist remedy that involves a company to disclose legitimately acquired data, it may be a necessary tool requiring careful assessment on the part of antitrust

regulators to determine which datasets of which platforms in which markets have to be disclosed.[91] A balanced approach to this would be sharing data on FRAND (fair, reasonable, non-discriminatory) terms. The concept, though popular in the context of Standard Essential Patents, can be put to good use to achieve the balance between promoting competition and intruding into databases of tech giants.

F. Merger control thresholds

Lastly, efforts must be made by the regulatory authority to assess the value of data during competition inquiries. In India, a combination which meets certain asset and turnover based thresholds are required to be notified to the CCI before it can take effect. However, such 'purely turnover-based jurisdictional threshold' may not capture all transactions which can potentially have an impact in the market such as data driven mergers. This may cause certain combinations to escape the scrutiny of the CCI because the assets and turnover of the acquirer and the target enterprise may be less than the prescribed threshold. Some competition authorities such as Germany and Austria have taken cognizance of this lacuna and have introduced an additional 'value of transaction' threshold. An acquisition of value exceeding a prescribed limit can be reviewed even if the assets and turnover thresholds are not met. Such a threshold already exists under the Hart-Scott Radino Act of the United States. While the Competition Act has no such thresholds presently, the CCI also does not have any sort of residuary powers to otherwise enquire into combinations which might threaten competition. The Chinese Competition Authority has such powers to inquire into mergers not covered under the thresholds, yet have, in its opinion, the potential to threaten competition upon taking effect. It is recommended to bestow

[91]H.M. TREASURY, UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL(Mar. 2019), https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel (Jul.11,2019).

the CCI with such powers or introduce new threshold and amend the Competition Act accordingly.

VI. CONCLUSION

Big data is neither inherently good nor is it evil, nor neutral. Its advent and takeover can no longer be ignored. Foundations of competition law and policy based competitive pricing for consumers rather than a broad and diverse set of social and economic issues are being shaken by the advent of big data. The potentially harmful implications on competition are too significant to be downplayed. Competition authorities need to tweak their strategies and methods to remain effective regulators. Otherwise, they stand the risk of falling prey to the ignorance of market realities and obsolete methods of enquiry.

Therefore, it is necessary for the antitrust agencies to understand the developments in the big data era, although a complete overhaul of the anti-trust regime for enquiries involving data may not be necessary. Assumptions based on the supposed ubiquity of data should not be a barrier to comprehensive enquiry. Phenomena such as multi-homing should not prevent competition regulators from individually assessing every market situation on a case-by-case basis. The CCI should be prepared to respond to these new developments efficiently when the situation arises keeping in mind all the new challenges posed by data.

RECONCEPTUALISING LABOUR REGULATIONS FOR WORKERS IN THE GIG ECONOMY

Karan Sangani[*]

Abstract

The prevailing labour jurisprudence categorises a worker as either an 'employee' or an 'independent contractor' on the basis of the degree of control and supervision exercised by the enterprise. The inception of the gig or sharing economy—characterised by the prevalence of digital platforms, who avail the services of workers categorised as business partners or self-employed—has substantially altered labour relations. Given the nature of labour relations in the gig economy, it becomes difficult to systematically sort workers in the gig economy into any one of these employment categories. As a result, it has led to unpredictability regarding the applicability of labour laws to workers in the gig economy.

This paper uses the case study of Ola and Uber drivers, who constitute an important element of the labour force, to highlight that the business model employed by entities in the gig economy has the potential to undermine

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the welfare goals of different labour regulations. In this paper, the Labour Market Regulations perspective, as propounded by Professor John Howe, has been utilised to demonstrate that the prevailing labour regulations fail to cater to workers in the gig industry and there is a need to redefine labour relationships in light of the prevailing industrial policy. In this regard, this paper envisages the creation of a separate employment status of 'dependent contractors' for workers in the gig economy in order to ensure that the new industrial policy does not erode the socio-economic objectives of various labour regulations in India.

I. INTRODUCTION

The legal notion of what constitutes an 'employee' has its roots in the pre-digital period. The advancement of the digital economy has not only resulted in a drastic transformation of labour relations but also led to legal unpredictability regarding the applicability of labour laws in the digital realm.[1]The emergence of new models of businesses in the digital era—that hinge on linking customers directly with sellers or service providers— has resulted in the relegation of employees to the status of temporary workers, and thereby, making them dispensable.[2] Enterprises in this new form of economy avail the services of workers on short-term contract basis and classify them as

[1]Adrián Todolí-Signes, *The 'gig economy': employee, self-employed or the need for a special employment regulation?*, 20 (10) TRANSFER: EUR. REV. OF LAB. AND RES. 1-13.
[2]*Id.*

'self-employed.' It is commonly known as the 'gig economy.'[3] The gig economy, which derives its name from the jargon of musicians, comprises workers that carry out their work at will and are compensated on a piece-rate basis, similar to an individual 'gig.'[4] This form of economy is alternatively referred to as the 'sharing economy' or 'platform-based economy.'[5]

This form of economy is premised on the model of peer-to-peer or open-source community-based sharing of access to products and services.[6] The wide-spread growth of this form of economy in the past few years is evident from the number of individuals engaged in such type of work across the globe. The population of independent workers in the United States and the European Union is roughly 162 million, which corresponds to around 20-30% of the working population. The internet-based platforms already encompass 15% of the global working population, and it is growing day-by-day. It is ceaselessly making inroads into India, as app-based services have captured the Indian markets.[7] As per a report, in 2018, roughly 70% of Indian business entities engaged the services of gig workers for crucial organisational matters.[8]

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[3]*Id; See* also Priyambada Datta, *Labour laws in the age of the gig economy*, THE INDIAN ECONOMIST, (June 1, 2019) 2018, https://m.dailyhunt.in/news/india/english/the+indian+economist-epaper-indecono/labour+laws+in+the+age+of+the+gig+economy-newsid-72961139.

[4]*Id.*

[5]*The rise of the platform economy*, DELOITTE, (June 1, 2019), https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/humancapital/deloitte-nl-hc-reshaping-work-conference.pdf.

[6]Juho Hamari, Mimmi Sjöklint & Antti Ukkonen, *The Sharing Economy: Why People Participate in Collaborative Consumption*, 67 (9) JOURNAL OF THE ASSOC. FOR INFO. SCI. & TECH. 2047–2059.

[7]Datta, *supra* note 3.

[8]*Gig economy on rise; 70% firms used gig workers in 2018*, THE ECONOMIC TIMES,(June 2, 2019), https://economictimes.indiatimes.com/news/company/corporate-trends/gig-economy-on-rise-70-firms-used-gig-workers-in-2018/articleshow/68221921.cms.

The exponential growth of the platform-based economy has brought in the limelight the pertinent issue of deterioration of social and economic conditions of workers.[9]Though the gig economy is characterised by work-time flexibility and labour mobility between different digital platforms, the enterprises in the gig economy exercise considerable influence over the working conditions of the workers. The prevailing labour jurisprudence categorises a worker as either an 'employee' or an 'independent contractor' on the basis of the degree of control and supervision exercised by the enterprise.[10] Given the nature of labour relations in the gig economy, it becomes difficult to systematically sort workers in the gig economy into any one of these employment categories.

This paper aims to demonstrate that the prevailing labour regulations fail to cater to workers in a growing segment of the industry, and there is a need to redefine labour relationships in light of the prevailing industrial policy. The paper uses the case study of Ola and Uber drivers, who constitute an important element of the labour force, to highlight the same. The second segment explains the prevailing industrial policy and industrial conditions in India. The third segment analyses the existing regulatory environment in India and demonstrates how workers in the sharing or gig economy do not fall either into the traditional category of employee or independent contractor. The fourth segment utilises the theoretical framework of Labour Market Regulations ("**LMR**") perspective, as propounded by Professor John Howe, to highlight the significance of industrial policy in determining the scope and objectives of labour law. The fifth segment sets out the ambit of the Decent Work program by the

[9]*Gig economy: Why there is a need to balance employment opportunities with basic rights*, FINANCIAL EXPRESS, (June 2, 2019), https://www.financialexpress.com/opinion/gig-economy-why-there-is-a-need-to-balance-employment-opportunities-with-basic-rights/1415840/.

[10]The Industrial Disputes Act, 1947; Balwant Rai Saluja v. Air India Ltd., (2014) 9 SCC 407.

International Labour Organisation (ILO) that can be incorporated in the labour regulations to ensure social and economic welfare of workers in the sharing economy. The sixth segment envisages the creation of a separate employment status of 'dependent contractors' for workers in the gig economy in order to achieve the objectives of the Decent Work program.

II. EMERGING INDUSTRIAL POLICY

The most notable example of the gig economy is the application-based cab aggregators based out of India, such as Uber and Ola. Uber and Ola, employing the 'sharing economy' model, have changed the demographics of the Indian transportation market. The monumental growth of Ola in the past few years bears testimony to the fact that it has revolutionised the Indian transportation market. Ola has more than 2,50,000 cabs listed on its platform and registers around 7, 50,000 rides daily.[11]

The operation of the platforms is straightforward. In essence, the cab aggregators allow passengers in need of vehicular transportation to request a cab ride via their software application. The application, in turn, connects the individual with an available driver. The driver, with the location provided by the application, picks up the rider and ferries him/her to his/her final destination. Either the driver or the platform collects a payment from the passenger at the end of the cab ride. The platform keeps or receives a part of the payment as commission for

[11] MP Jaiswal, Parul Gupta, Prageet Aeron and Rajat Gupta, *Policy Recommendations for Application Based Cab Aggregators (ABCA) in India*, MANAGEMENT DEVELOPMENT INSTITUTE, (June 2, 2019),https://www.mdi.ac.in/pdf/research/ABCA_Report_MDI-old.pdf.

facilitating the transaction.[12] The drivers are not employed by the platforms nor do the platforms own any cars. In contrast, the participating drivers are expected to ferry passengers in their own cars.[13]

Notably, these platforms assert to be a technology-based enterprise and not a vehicular transportation company. For example, Uber claims to be a facilitating digital platform, which enables drivers and riders to execute the transaction for transportation. Uber specifies that its digital platform is merely a facilitator between drivers looking to provide cab services and passengers seeking to reach their destination.[14] Uber has explicitly stated that the product it provides is the phone application software utilised to link drivers and passengers.[15] Uber deftly mentions in its legal contract that the agreement creates a business relationship between Uber and the participating driver. It describes itself as 'a technology services provider that does not provide transportation services.'[16]

Uber is one of the numerous business enterprises deploying the business structure of sharing economy. The model resembles a two-sided market form, which in itself does not represent a new economic model. However, the widespread use of virtual platforms has resulted in the inception of a networked information culture.[17] Commentators

[12]*How does Uber work?*, UBER HELP, (June 2, 2019), https://help.uber.com/riders/article/how-does-uber-work?nodeId=738d1ff7-5fe0-4383-b34c-4a2480efd71e.
[13]*Driver Requirements*, UBER, (June 3, 2019), https://www.uber.com/en-IN/drive/requirements/.
[14]*Id.*
[15]*Technology Services Agreement*, UBER, (June 3, 2019), https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/RASIER%20Technology%20Services%20Agreement%20December%2010%202015.pdf?_ga=1.59528685.1558445318.1453903306.
[16]*Id.*
[17]AditiSurie, *Are Ola and Uber Drivers Entrepreneurs or Exploited Workers?*, ECONOMIC & POLITICAL WEEKLY, (June 3, 2019) https://www.epw.in/engage/article/are-ola-and-uber-drivers-entrepreneurs-

have stated that the emergence of the gig economy has resulted in formidable structural alterations of 'formation of markets, economic organisation, and social practices of production.'[18]

The model has certain distinct characteristics that are generating a huge impact on labour relations. Some of the distinguishing features are as follows:

1) Diminished labour dependency: One of the defining characteristics of this form of economy is that the business organisations are not required to supervise and manage work. The platforms take into consideration the evaluation or feedback provided by the passengers while determining dismissal of a driver from its platform and making decisions regarding the nature of control to be exercised. As a result, there is no incentive for these companies to offer training to drivers, as they only allow those workers that are sufficiently trained and equipped to provide services on their virtual platforms. This new form of work allows autonomy to the workers while performing their job and entails diminished labour dependency. Nonetheless, these platforms maintain partial control over their workers and at times, prescribe the manner in which they are supposed to carry out their job. Given the high stakes involved in maintaining value image in this digital economy, these platforms employ additional resources to ensure superior and standardised services.[19]

2) The need for a critical mass or economies of scale: The business model is premised on building a large userbase as well as a driver base. Given the ample supply of labour, these platforms believe that they will always manage to connect a client with an available worker.

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exploited-
workers?0=ip_login_no_cache%3D386794e4e7b9ba739e21d89aa33eebd3.
workers?0=ip_login_no_cache%3D386794e4e7b9ba739e21d89aa33eebd3 (June 3, 2019).

[18] *Id.*

[19] Signes, *supra* note 1.

As a result, these platforms do not require to issue specific instructions or schedules to workers, and thereby, provide flexibility to drivers in terms of working hours. Thus, these companies need critical mass for their efficient functioning.[20]

3) Nature of services: There prevails ambiguity as to the nature of services provided by these new companies. There is a lack of consensus on whether these platforms only act as a database or whether they are offering their product in a particular segment of the industry. In the first instance, if the enterprise controlling the virtual platform is deemed to be a technology company that only acts as a database to assist in matching the sellers and the buyers, it will not be liable for any loss incurred during the course of work. It will, thus, imply that the company is not required to adhere to any sectorial regulations. Furthermore, it complicates the process of establishing the relationship of an employer-employee between a company owning the virtual platform and a worker who is listed on this platform to gain any work.[21]

The business model employed by these platforms raises certain serious questions. Whether workers in the gig economy can be brought under the traditional definition of 'employee'? If not, then is the sharing economy undermining the socio-economic goals of different labour regulations? Is state intervention warranted in this matter in order to provide a social security net to workers in the gig economy? These questions have no simplistic and common answer. However, while articulating the concerns of workers in the gig industry in order to answer these questions, it becomes pertinent to include the nature of the labour market created by the sharing or gig economy.

[20]Signes, *supra* note 1.
[21]Signes, *supra* note 1.

III. DIFFICULTY IN EXTENDING THE LEGAL CONCEPT OF AN 'EMPLOYEE' TO THE WORKERS

This segment attempts to answer the fundamental question of whether the customary legal notion of an 'employee' can be applied to workers in this new form of economy. For the same, it becomes pertinent to analyse the issue of whether the drivers will come within the ambit of 'workman' under section 2(s)of the Industrial Disputes Act, 1947.[22]

In *Dharangadhara Chemical Works v. State of Saurashtra*("***Dharangadhara***"),[23] the Supreme Court delved into the question of the characteristics of a 'workman.' The court stated that "*the broad distinction between a workman and an independent contractor lies in the fact that while the former agrees to do the work himself, the latter agrees to get other persons to do the work.*" The Supreme Court, in *DC Dewan Mohideen Sahib v. The Industrial Tribunal, Madras,* ("***DC Dewan***"),[24] held that the categorisation of a worker as an independent contractor by the employer should not be taken at face value. The court highlighted the need to establish the autonomy of the independent contractor.[25]

In the case of *Balwant Rai Saluja v. Air India Ltd.,*[26] the Supreme Court, after reviewing a string of authorities, held that "*the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia, (i) who appoints the workers; (ii) who pays the salary/remuneration; (iii) who has the authority to dismiss; (iv) who can take disciplinary action; (v)*

[22]The Industrial Disputes Act, 1947 § 2(s).
[23]Dharangadhara Chemical Works v. State of Saurashtra, AIR 1957 SC 264.
[24]DC Dewan Mohideen Sahib v. The Industrial Tribunal, Madras, AIR 1966 SC 370.
[25]*Id.*
[26]Balwant Rai Saluja v. Air India Ltd., (2014) 9 SCC 407.

whether there is continuity of service; and (vi) extent of control and supervision, i.e. whether there exists complete control and supervision."

The *Dharangadhara* judgment hinges the classification between an employee and an independent contractor on the question of whether the worker has agreed to render 'personal services'. In the case of workers in the gig economy, there is no determined answer, and it will vary from case to case—as, at times, cab-fleet providers are enlisted on the platform, who, in turn, avail the services of individual cab drivers.[27] Further, the *DC Dewan* ruling requires an evaluation of the driver's independence, in terms of whether the independence exists in reality. Though the functioning of the drivers is regulated by the platforms to a certain extent, by imposing numerous constraints including predetermined fares and enforced rating system, the drivers are still provided with a substantial amount of autonomy as they have no imposed working hours and they can join and leave the platform at will.[28] Further, most of the Uber drivers are also listed on Ola platform, and vice versa.[29]

An evaluation of the working conditions of the drivers under the six-factor test laid down by the Supreme Court in *Balwant Rai Saluja* will throw light on the extremely ambivalent position of workers in the sharing economy, as the drivers do not meet three out of the six enumerated conditions. Uber is only entitled to receive a commission out of the fare earned by the driver. There is also no continuity of service, as the drivers have the option to provide their services at will

[27]*Driver Requirements*, UBER, (June 3, 2019), https://www.uber.com/en-IN/drive/requirements/.
[28]*Ola and Uber cab drivers strike again to demand fare revision*, TN LABOUR, (June 3, 2019), https://tnlabour.in/news/6926.
[29]Athira Nair, *Ola and Uber drivers can now operate simultaneously on both platforms*, YOURSTORY, (June 6, 2019), https://yourstory.com/2016/04/karnataka-transport-regulation-ola-uber-allow/.

and opt-out of the platform.[30] This indicates that Uber and Ola exercise a limited amount of control over the drivers, and there does not exist 'complete control and supervision.'

IV. NEED FOR INCORPORATING LABOUR MARKET REGULATIONS ("LMR") PERSPECTIVE

The concerns of the labour force in any industry are closely correlated with the conditions prevailing in the social and political economy of that industry. A number of factors such as altering labour market norms, rise in non-standard employment agreements, changing technology, globalisation of capital and growing currency of neo-liberal perspectives of the labour market have rendered the traditional discourse on labour law redundant and have divested labour law of its 'descriptive normative capacity.'[31]

The fact that the gig economy has taken centre stage in the industrial relations prevailing in India has been acknowledged by various governmental functionaries and institutions. In January 2019, in response to the problem of record surge in unemployment rate highlighted by the National Sample Survey Office ("**NSSO**"), NitiAayog, a government think-tank, claimed that the application-based cab aggregators of Ola and Uber alone generated over two million employment opportunities since 2014.[32] NitiAayog is also

[30]*Driver Requirements*, UBER, (June 3, 2019), https://www.uber.com/en-IN/drive/requirements/.

[31]J. HOWE, THE BROAD IDEA OF LABOUR LAW: INDUSTRIAL POLICY, LABOUR MARKET REGULATION, AND DECENT WORK IN THE IDEA OF LABOUR LAW, 295, Oxford University Press (2011).

[32]*NitiAayog tries to counter bleak unemployment data, says Ola &Uber helped create over 2 million jobs*, CNBC, (June 3, 2019), https://www.cnbctv18.com/economy/niti-aayog-says-ola-and-uber-helped-create-over-2-million-new-jobs-pegs-total-new-jobs-at-8-million-2142841.htm.

devising a new approach for collating job data in order to factor in the number of persons associated with cab-based aggregators and similar technologies.[33]In March 2019, former Finance Minister, Arun Jaitley, mentioned in his blog that emerging players in the e-commerce and technology segment, such as OYO, Uber et al, have created a significant number of direct and indirect jobs.[34]

The traditional labour market has been upended by the emergence of the gig or on-demand economy. However, there has been no change in the conception of labour relations in terms of extending protection to workers, who are dependent upon these peer-to-peer platforms for their livelihood. The labour relations between the platforms and their workers are being articulated in terms of definitions set by the platforms, which state that drivers are business partners and not employees of the platforms. Further, the legal discourse pertaining to workers in the intricate, dynamic gig economy is limited to the debate of 'independent contractor versus employee.'[35] The prevailing regulatory landscape demonstrates that comprehending labour relations in the binary of 'employee' and 'independent contractor' has resulted in a misalignment between workers' rights and modern labour relations, and thus, it has become pertinent to inculcate industrial policy in the subject-matter of labour law.

[33]Yogima Seth Sharma &Prachi Verma, *Ola, Uber drivers and CAs to help Modi government solve its job math for India*, THE ECONOMIC TIMES, (June 3, 2019), https://economictimes.indiatimes.com/news/economy/indicators/cabbiescas-doctors-lawyers-delivery-persons-may-be-added-to-government-job-data/articleshow/63051927.cms?from=mdr.
data/articleshow/63051927.cms?from=mdr (June 3, 2019).
[34]*Arun Jaitley compares NDA govt's economy report card with UPA's in blog, refutes Opposition's 'fake' campaign on economic data*, FIRST POST, (June 3, 2019), https://www.firstpost.com/india/arun-jaitley-compares-nda-govts-economy-report-card-with-upas-in-blog-refutes-oppositions-fake-campaign-on-economic-data-6294501.html.
[35]Surie, *supra* note 17.

Labour regulations are under tremendous stress to deal with the new economic structures and labour conditions. To this end, economic policies including industrial policy become critical in safeguarding the interests of the labour force in any nation. Labour Market Regulations ("**LMR**") perspective, as propounded by Professor John Howe of the University of Melbourne School of Government, envisages providing a wider interpretation to the contents and objectives of labour regulations with an aim to incorporate the modalities of the industrial policy within the larger framework.[36]

The LMR perspective emphasises on enlarging the scope of labour law to inculcate not only employees but also those workers, who rely on labour for their livelihood, irrespective of the fact of whether those workers are employed, involved in any other form of working arrangement or merely present in the labour market to seek work opportunities.[37] John Howe states that, "*the new subject of labour law is the 'worker' or 'active labour market participant': not the full-time employee pursuing a specific job for life, but a person moving between periods of employment and unemployment, other forms of paid work, unpaid work, training and so on over the course of a lifetime*."[38]

The LMR perspective is premised on a pluralist notion of regulations, as it acknowledges that a different range of regulations might be in operation to achieve substantive objectives of the labour policy. The LMR perspective takes into account regulations that shape and form labour markets including regulations that influence demand and supply of labour in the external as well as internal (firm-level) labour market. It further incorporates the role and effects of a variety of industrial policies that include government support schemes, tariffs,

[36]Howe, *supra* note 31.
[37]*Id.*
[38]Howe, *supra* note 31.

distribution of labour between different segments and industries of the economy.[39]

As the Indian experience indicates that the prevailing labour policy has failed to encapsulate the modalities of the emerging industrial policy of gig or on-demand economy, applying the LMR perspective to the labour regulations in India will best help protect the interests of workers while ensuring that the labour regulations capture different forms of employment arrangements appearing in the industry.

V. ENSURING DECENT WORK PROGRAM TO WORKERS IN THE GIG ECONOMY

The purpose of including the industrial policy within the framework of the LMR perspective is to ensure generation and retention of quality jobs. Decent Work program developed by the International Labour Organisation ("**ILO**") can be availed to ensure the attainment of the goal of creation of quality jobs.[40]The Decent Work program of the ILO is not concerned with the generation of any kind of employment opportunities but with the generation of employment opportunities of acceptable quality.[41] The program entails generation of opportunities for workers that ensure social integration, workplace safety, scope for personality development, social security, ability to participate in the decision-making process that has a direct impact on their livelihood. The program has resulted in a shift in focus of regulatory agencies from goals to outcomes and has highlighted the

[39]*Id.*
[40]*Decent Work*, INTERNATIONAL LABOUR ORGANISATION, (June 3, 2019), https://www.ilo.org/global/topics/decent-work/lang--en/index.htm.
[41]G. S. Fields, *Decent Work and Development Policies*, 142 INT'L LAB. REV.239-40.

importance of social and economic policies in uplifting the quality of life of the labour force.[42]

In order to understand the nature of safeguards that should be provided to workers in the gig economy by the government, it becomes pertinent to analyse the treatment of workers by the platforms.

A perusal of the contract between Uber and its participating driver helps uncover all aspects of the relationship. There are numerous onerous terms in the contract. The contract mentions that the payment or fare that the drivers will receive upon the successful completion of each ride, will be determined by Uber on the basis of the distance travelled by the passenger and the period of the ride.[43] Uber takes a commission from the cab drivers for facilitating this transaction. This rate of commission is predetermined by Uber, and the drivers do not possess any bargaining power to negotiate the same. Uber normally charges approximately 20 percent of the total payment as its 'fee per ride.'[44]

Users are permitted to evaluate the work of the drivers, and the evaluations are also made available for other riders. Uber reserves the right to prohibit the driver's access to the virtual platform if the driver fails to maintain the average rating. In addition, Uber can deny access to the platform on other grounds such as criticising the company. The contract further states that the driver has to bear the cost of the car, fuel, data services used for the application and insurance. Furthermore, the driver is expected to assume all the risks of an accident or untoward incident. However, it is important to note here

[42]*Id.*
[43]Partha Pati, *Ajudicial caution for Aggregator based E-commerce business like UBER*, LEGALLY INDIA, (June 3, 2019), https://www.legallyindia.com/views/entry/a-judicial-caution-for-aggregator-based-e-commerce-business-like-uber.
[44]*Id.*

that drivers possess absolute autonomy to choose their working hours. Drivers also have the right to deny rides. However, once a ride is accepted, the driver has to complete it.[45]

The 'Master Service Agreement' between Ola and its drivers highlights a similar trend of inequality in bargaining power between the platform and its participants.[46] It states that the agreement will remain in force for a term of three years. It allows Ola to unilaterally set the fares. Further, Ola has been granted the right to provide discounts to customers without consulting any participating driver. The agreement also states that Ola does not owe any responsibility to the participating driver for the functioning of the application and is not liable for any failure in the application.[47] Thus, Ola has carefully limited its liability for any failure, and at the same time, it has imposed a host of conditions on the drivers.

On the back of numerous incentives, drivers were enticed into getting registered on these platforms in large numbers in 2014-15.The drivers joined the platforms in the expectation of earning close to ₹90,000-1, 00,000 per month.[48] As the platforms do not provide the drivers with the supporting infrastructure, the drivers made large investments into cabs and numerous mobile phones to facilitate their participation on the platforms. Most of the drivers took loans for the same. The level and size of the investment and the ensuing loan have ensured that the drivers remain on these virtual platforms in order to recoup their

[45]*Technology Services Agreement*, UBER, (June 3, 2019), https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/RASIER%20Technology%20Services%20Agreement%20December%2010%202015.pdf?_ga=1.59528685.1558445318.1453903306.

[46]Alok Prasanna Kumar, *Analysis: Ola's contract with drivers shows they've got a raw deal*, FACTOR DAILY, (June 4, 2019), https://factordaily.com/ola-contract-driver-analysis/.

[47]*Id.*

[48]S Prabhakaran, *Ola, Uber drivers don't earn as much as you think they do*, FACTOR DAILY, (June 4, 2019), https://factordaily.com/ola-uber-drivers-earnings-reduce/.

investments, and thereby, permitting these platforms to create a large base of cab drivers.[49] At the same time, this has permitted the platforms to reduce the incentives for the drivers.[50] In the past few years, it has been witnessed that the income of the drivers is rapidly declining. Post the payment of a commission, the drivers only earn around ₹20,000-30,000 per month.[51] This has mobilised the drivers to seek better wages and working conditions.[52] They have organised wide-scale protests against the policies of the cab aggregators. In October 2018, an estimate of forty thousand drivers registered with Ola and Uber went on a strike for more than a week in order to seek an increase in earnings and improved working conditions.[53] The drivers have also held protests in the cities of Delhi, Bangalore and Hyderabad.[54]

These protests have arisen due to the inconsistency between initially proposed earnings and actual earnings, as these platforms have gradually withdrawn the incentives promised to the drivers initially. An evaluation of the contracts also reveals that these platform-based companies have prioritised the need to maintain Indian consumer behaviour and low fare trends over ensuring workers' ability to earn fair and decent wages.[55]

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[49]Surie, *supra* note 17; Shatakshi Gwade, *falling incentives, rising costs push Ola, Uber drivers on a one-way road to debt*, FIRST POST, (June 4, 2019), https://www.firstpost.com/business/falling-incentives-rising-costs-push-ola-uber-drivers-on-a-one-way-road-to-debt-4459945.html.
[50]Surie, *supra* note 17.
[51]S Prabhakaran, *supra* note 48.
[52]Surie, *supra* note 17.
[53]Neha Kulkarni, *Explained: Why Ola, Uber are off the roads and its drivers have hit Mumbai streets*, THE INDIAN EXPRESS, (June 4, 2019), https://indianexpress.com/article/explained/why-app-based-cabs-are-off-the-roads-and-drivers-have-hit-mumbai-streets-5424407/.
[54]*Ola, Uber Drivers to Begin Indefinite Strike from Tomorrow in Big Cities*, NEWS 18, (June 4, 2019), https://www.news18.com/news/india/ola-uber-drivers-to-begin-indefinite-strike-from-tomorrow-in-big-cities-1691145.html.
[55]Surie, *supra* note 17.

These protests highlight the need for immediate state intervention in order to remedy the prevailing structural oppression of workers in the gig economy. They provide impetus to the demand of the workers that the government should introduce new guidelines for such platform-based entities in order to ensure improved working conditions to the drivers.[56] These demands ought to be articulated in terms of the Decent Work program of the ILO.

VI. A NEW CATEGORY OF EMPLOYMENT STATUS FOR WORKERS IN THE GIG ECONOMY

Most of these platforms deny their status as employers by asserting that they do not have direct control over the workers. Though peer-to-peer platforms do not exercise complete control over the workers as the traditional employers do, they still exercise substantial influence over the manner and means of work. In order to account for workers in the gig economy, the labour regulations should be extended to include within its scope peer-to-peer platforms that exercise material influence over the working conditions of workers.

At the same time, it should also be taken into consideration that the platform-based entities provide opportunities that significantly vary from opportunities provided by traditional employment—as it allows the workers the autonomy in customising their work schedule. Work-time flexibility forms the most distinct feature of the gig economy.[57] The existing labour law regulations cannot encapsulate the

[56]*About 8,000 Ola, Uber drivers go on strike in Mumbai against low incentives*, BUSINESS TODAY, (June 4, 2019), https://www.businesstoday.in/current/corporate/ola-uber-drivers-on-one-day-strike-in-mumbai-today/story/247754.html.

[57]Signes, *supra* note 1; M Chen, J Chevalier, P Rossi et al, *The Value of Flexible Work: Evidence from Uber Drivers, Working Paper No. 23296*, NATIONAL BUREAU OF ECONOMIC RESEARCH, (June 4, 2019), https://www.nber.org/papers/w23296.pdf.

opportunities provided by the gig economy model. The workers can decide their own working hours—a conception that is quite different from conventional rules on schedules, holidays, working hours and mandatory rest periods.[58]

By providing a purposive interpretation to employment agreements, numerous courts and scholars have attempted to extend protection to all workers, whose independence has reduced in this new form of economy, irrespective of whether there exists dependency or subordination.[59] However, classifying gig workers as employees can result in serious legal implications—as it will entail extending all forms of onerous labour regulations to workers, which will, thereby, limit the work-time flexibility of workers in the gig economy.

In order to resolve the situation at hand, the legislature should formulate a new category of worker called as 'dependent contractor', which will, in essence, be an intermediate category between independent contractor and employee, to bolster the labour law rights of workers in the gig economy. The creation of this new form of employment status has been mooted by the 'Taylor Review of Modern Working Practices'("**Taylor Review**") commissioned by the United Kingdom government.[60] The Taylor Review, which recommends a string of measures to cater to the requirements of the gig economy, suggests that the meaning of 'worker' should be widened in order to extend the statutory employment guarantees to a wide range of workers in the gig economy that have been recognised as 'dependent contractors'.[61]

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[58]Signes, *supra* note 1.
[59]Guy Davidov, *The Status of Uber Drivers: A Purposive Approach*, 6 SPANISH LAB. L. & EMP. REL. J. 6-15.
[60]*Good work: the Taylor review of modern working practices*, GOVT. OF UK, (June 4, 2019), https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices.
[61]*Id.*

Workers in the gig economy are subject to different categories of challenges and risks as opposed to those employed in traditional business enterprises. As a result, the dynamics and complexities of the gig economy dictate the need to formulate special, tailormade legislation for workers in the gig economy. Developing an intermediate category of workers will ensure socio-economic security and stability to workers in the gig economy.[62] Many commentators are of the view that a third category will extend some sorts of benefits that accrue to employees without affecting the autonomy provided to workers in the gig model.[63] Furthermore, an intermediate category will also help settle the existing legal disputes over misclassification of workers in the sharing economy, as the gig workers will be automatically classified as 'dependent contractors'.[64]

The special legislation for this new form of labour relations should guarantee certain basic socio-economic rights to the workers. The legislation should include the following minimum guarantees:

Minimum wages: The most pertinent issue will be extending the protection of minimum wages to the gig workers.[65] Given the workers are completely reliant on the platforms in the gig economy to generate their income, they should be extended certain benefits of progressive legislations to secure their socio-economic interests. The government should ensure that these peer-to-peer platforms are listed as a 'scheduled industry' under the Minimum Wages Act, 1948 so that the workers can avail the benefit of minimum wages. Minimum wages can be determined on an hourly basis for workers in the gig economy to ensure that work time flexibility ensured by the gig economy is not compromised. Further, the applications developed by the platform-

[62]Miriam A. Cherry & Antonio Aloisi, "*Dependent Contractors" In the Gig Economy: A Comparative Approach*, 66(3) AM. UNIV. L. REV. 635-85.
[63]*Id.*
[64]*Id.*
[65]Signes, *supra* note 1.

based entities can assist these entities in precisely calculating the working hours of a worker.

Collective Bargaining: As the prices of services are determined by the platforms and workers in the gig economy have little or no say in it,[66] the right to organise and bargain collectively under the Industrial Disputes Act, 1947 should be extended to dependent contractors in order to better safeguard their interests and provide a level playing field.

Flexibility in selecting working hours: The new legislation should not undermine the autonomy of the workers to choose their schedule and workhours, as this forms the most notable aspect of the sharing economy. The companies can, however, determine the maximum or the minimum number of workhours per worker in order to help the company manage the demand and supply constraints.[67]

Freedom to switch between platforms: To avoid monopolisation of the market and foster the entry of new participants, the legislation should forbid exclusive agreements that will limit the ability of the workers to move from one platform to another. In the absence of this regulation, it will be conducive for the incumbent platforms to monopolise the existing workers in a particular segment, and thereby, denying access to the market to new platforms.[68]

Imposing a ceiling on commission chargeable: In order to prevent the digital platforms from extracting a large chunk of the profits earned from the workers in the gig economy, the government should impose a ceiling on the commission chargeable by the digital platforms. To

[66] *Id.*
[67] *Id.*
[68] *Id.*

this end, the Indian government is considering placing a cap of 10% on the commission charged by cab aggregators.[69]

Extending these safeguards will ensure that workers in the gig economy, who are gradually becoming a major part of the labour force, are provided with decent work as envisaged by the ILO.

VII. CONCLUSION

India is expected to grow into a $1 trillion digital economy by 2025.[70] However, concerns regarding the viability of the jobs generated and the larger socio-economic consequences of the gig economy have not featured prominently in the regulatory as well as legal discourse regarding the digital or gig economy. This tendency can gravely impair the social structure of the labour force in India. It, thus, becomes imperative that any discourse regarding the gig economy should focus on filling the existing lacunae in the labour regulations and steering the regulatory structure of the gig economy towards social welfare. As a result, the structure of the gig economy should be designed to create viable and sustainable employment opportunities.

The emergence of the gig economy has exposed the limitations in some of the bedrock doctrines of labour regulations. This doctrinal crisis presents the regulatory authorities with an opportunity to re-examine and reassess some of its foremost doctrines. However, any new change cannot be effectuated without initiating a regulatory

[69]Alnoor Peermohamed & Naveen Menezes, *Ola,Uber fees may be capped at 10% of total fare*, THE ECONOMIC TIMES, (Dec. 12, 2019), https://economictimes.indiatimes.com/news/economy/policy/ola-uber-fees-may-be-capped-at-10-of-total-fare/articleshow/72269085.cms.

[70]Shelley Singh, *India's way to $1 trillion digital economy*, THE ECONOMIC TIMES, (June 5, 2019), https://economictimes.indiatimes.com/news/economy/indicators/indias-way-to-1-trillion-digital-economy/articleshow/63561270.cms?from=mdr.

dialogue. In this regard, this paper attempts to bridge the divide between labour regulations and the evolving digital economy.

DECRIMINALIZING THE ACT: PROJECTING INDIVIDUALS AS KINGS WITHOUT SCEPTRE TO RULE?

Yashdeep Chahal and Smridhi Sharma[*]

Abstract

Through the landmark verdict pronounced in the case of Navtej Johar and Ors. v. Union of India[1] ("***Navtej Johar***"), *on 6th September, 2018, the Hon'ble Supreme Court read down Section 377 of the Indian Penal Code, 1860 to the extent that it criminalised consensual sexual acts between adults. In the process, the court overruled the judgment in Suresh Kumar Kaushal and Another v. Naz Foundation and Others*[2] ("***Suresh Kaushal***") *and upheld the judgment rendered by the Delhi High Court in Naz Foundation v. Government of NCT of Delhi and Others*[3] *("**Naz**"). The judgment assumes great significance in the light of the principles of constitutional jurisprudence relied upon by the judges and the analysis of fundamental rights.*[4] *An even more important aspect of the*

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[1]AIR 2018 SC 4321.

[2]AIR 2014 SC 563.

[3](2009) 160 DLT 277.

[4]The Constitution of India, 1950.

judgment is the scope and extent of its application in the peculiar socio-legal scenario of India and its consequences thereof. This paper examines the judgment from a critical perspective by looking into the historical developments of Section 377, the applicability of various doctrines invoked in the judgment, the cascading effect of the judgment on the laws in force and the intense role of the legislature.

I. INTRODUCTION

For a comprehensive understanding of the 5-judge bench's judgment, it is important to produce the relevant extract of Section 377:

"*377. Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished.*"[5]

It is important to note that the following ingredients of Section 377 were examined in the challenge:

Voluntarily - The provision, in its original form, criminalised the acts of carnal intercourse against the order of nature even if they were committed by two adults with free consent i.e. voluntarily.

Against the order of nature- The challenge was regarding the determination of what is natural and unnatural for the purposes of this provision. This challenge was neutralised by Chief Justice Dipak Mishra a statement of wide ambit, that an individual's sexual orientation is a natural attribute.

[5]The Indian Penal Code, 1860, § 377.

The distinction between 'natural' and 'unnatural' is blurred and it strengthened the challenge to this provision as it led to the direct invocation of the tool of intelligible differentia in checking constitutional adherence of a legal provision with Article 14. Justice Chandrachud throws light on this challenge and says in Para 29:

"If it is difficult to locate any intelligible differentia between indeterminate terms such as 'natural' and 'unnatural', then it is even more problematic to say that a classification between individuals who supposedly engage in 'natural' intercourse and those who engage in 'carnal intercourse against the order of nature' can be legally valid," (Chandrachud J., Paragraph 29).[6]

Carnal - Justice Chandrachud summarises this ingredient of the provision and gives a legal definition of carnal and explains it as follows:

"29. ….The expression 'carnal' is susceptible to a wide range of meanings. The word incorporates meanings such as: "physical, bodily, corporeal and corporeal and of the flesh."

II. CRITICAL ANALYSIS OF THE VARIOUS DOCTRINES AND CONCEPTS APPLIED IN NAVTEJ JOHAR

The judgment in the *Johar* case is not only important for widening the ambit of fundamental rights, but is also important for providing a substantial progression in the academic-legal development on the subject matter. In order to understand the scope and extent, it is important to briefly understand the doctrines and concepts of constitutional law evolved and applied by the Hon'ble court in this

[6]AIR 2018 SC 4321.

case. The court mainly relied upon the following doctrines and concepts:

Doctrine of Progressive Realization of Rights- The rationale behind the doctrine of progressive realization of rights is the dynamic and ever-growing nature of the Constitution under which the rights have been conferred to the citizenry. His lordship emphasized the application of this doctrine by relying upon *Manoj Narula v. Union of India*("***Manoj Narula***")[7] and *Government of NCT of Delhi v. Union of India* ("***Govt. of NCT Delhi***").[8] He also referred to the classic statement made by Chief Justice Marshall in *McCulloch v. Maryland*[9] which was also followed by Justice Brennan in *Kazenbach v. Morgan.*[10] The said observation reads thus- "*Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.*"(Dipak Mishra C.J., Paragraph 178, 183)

Concept of Transformative Constitutionalism-Relying upon *State of Kerala & Anr. v. N.M. Thomas and Ors.* ("***N.M. Thomas***"),[11] Chief Justice Dipak Mishra asserted that the concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. The expression 'transformative constitutionalism' can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day. Succinctly put, the concept of transformative Constitution is not alien to the Constitution of India and in its essence, refers to the potential of

[7]Manoj Narula v. Union of India, (2014) 9 SCC 1.
[8]Government of NCT of Delhi v. Union of India, (2018) SCC 661.
[9]17 US 316(1816).
[10]384 US 641(1966).
[11]State of Kerala and another v. N.M. Thomas and Others, AIR 1976 SC 490.

the Constitution to behave in a fluidic and adoptive manner in accordance with the changing circumstances in the society. It is a manifestation of the organic nature of the Constitution and is an integral characteristic of all comprehensive constitutions.

The sacred concept of transformative constitutionalism finds its origin in the transformative nature of the society itself. John Rawls' theory of basic structure finds relevance at this point, which states that the basic structure of the society is the first subject of justice.[12] The application of transformative constitutionalism in justifying the challenge to Section 377 is based on the presumption (which in the humble opinion of the author is 'flawed') that the basic spirit and essence of the Indian society has so transformed from *Suresh Kaushal*[13] to *Navtej Johar,*[14] that new expressions could be infused into the rights. There seems to be no qualitative analysis behind imputing the label of transformation to the society.

Concept of Facial Neutrality-Justice Chandrachud referred to the *Naz* judgment for building upon his argument on facial neutrality or indirect discrimination through the provision.

In para 94, the *Naz* judgment reads: *"Section 377 IPC is facially neutral and it apparently targets not identities but acts, but in its operation, it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class".* Justice Chandrachud also relied on the

[12]Reidy, D., *Basic structure of society*. In J. MANDLE& D. REIDY (EDS.), THE CAMBRIDGE RAWLS LEXICON 55-58,(Cambridge: Cambridge University Press, 2014.
[13]*Id.*
[14]*Id.*

South African case of *City Council of Pretoria v. Walker*[15] to advance his argument on indirect discrimination and stated thus:

"The concept of indirect discrimination … was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria."

III. IS IT SOUND TO APPLY THIS CONCEPT TO SECTION 377?

One could argue that the theory of facial neutrality or indirect discrimination to Section 377 does not fall in line with the historical basis of the provision. The provision was enacted in a time when the proportion of individuals indulging in homosexual acts was miniscule and the object was not to create a framework of discrimination for future purposes. Rather, the clear object was to prevent the commission of certain acts in the society, irrespective of whether they come from heterosexuals (in the form of oral sex) or homosexuals (in the form of MSMs) or bisexuals (in either of the preceding forms). Therefore, the author finds the application of this concept troublesome in the light of the fact that the intention of the legislature at the time of its inclusion was completely different from the presumption undertaken by His Lordship while applying the concept to the *Navtej Johar* case.

Bentham's Utilitarian Theory- Justice Chandrachud, in Para 129, relied upon Bentham's theory of utilitarianism and stated that homosexuality, if viewed outside the realms of morality and religion, is neutral behaviour which gives the participants pleasure and does

[15](1998) 3 BCLR 257.

not cause pain to anyone else.[16] He placed further reliance on Bentham's tests of sodomy laws. Bentham tested such laws on three main principles: (i) whether they produce any primary mischief, i.e., direct harm to another person; (ii) whether they produce any secondary mischief, i.e., harm to the stability and security of society; and (iii) whether they cause any danger to society.[17] He argued that sodomy laws do not satisfy any of the above tests, and hence, should be repealed.

The application of Bentham's theory in *Navtej Johar* case is problematic on at least two counts:

Firstly, Bentham's rationale for the failure of the second limb of the test propounded above was devoid of practical considerations and was largely influenced by his presumptions with regards to the society. He was placed in a different set-up when he gave his theory and based his argument on the idea that 'since two individuals are deriving pleasure out of an act, why should the society be apprehended by the same?' This theory is devoid of an understanding of the nature of criminal law. In criminal jurisprudence, mere conspiracy without any overt act of harm to another person or society is considered as an offence because of the principle of inchoate offences, whereby the ultimate to the society is not necessary in its physical form. Contrary to Bentham's opinion, not every act wherein two parties derive personal pleasure can be said to be incapable of harm to the society. Thus, this theory runs contrary to the theme of inchoate offences and thus, does not provide a safe guideline for the purposes of this case.

Secondly, Bentham based his entire philosophy on the theory of pleasure and pain. According to this theory, any act which leads to pleasure ought to be validated by law and that which leads to pain

[16]JEREMY BENTHAM, OFFENCES AGAINST ONE'S SELF (Louis Crompton Ed.), Columbia University.
[17]*Id.*

ought to be invalidated accordingly. This theory has been criticised on various fronts; however, such criticism would be beyond the scope of this work.

Application of the Harm Principle-Justice Chandrachud also placed reliance on the harm principle propounded by John Stuart Mill.[18] In Para 131 of the judgment, he applies Mill's theory to Section 377 which needs reproduction:

"Mill created a dichotomy between "self-regarding" actions (those which affect the individual himself and have no significant effect on society at large) and "other-regarding" actions (those which affect the society). Mill proposed that "all that portion of a person's life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation" should be free from state interference."

The harm theory also poses an equally blurred picture when it is applied to practical jurisprudence of the criminal law as it stands in India. The distinction between self-regarding actions and others-regarding actions finds some ground in the fundamental right to privacy and right to live with dignity. However, a blanket protection to each and every self-regarding action goes against the reasonable restrictions found in Part III of the Constitution.

[18]JOHN STUART MILL, ON LIBERTY, (Elizabeth Rapaported, Hackett Publishing Co, Inc, 1978).

IV. SURVIVAL OF CONSTITUTIONAL MORALITY WITHOUT SOCIAL MORALITY

Justice V.R. Krishna Iyer, in *NM Thomas*,[19] has rightly said - "*Law, including constitutional law, can no longer go it alone' but must be illumined in the interpretative process by sociology and allied fields of knowledge*." Constitutional rights, though high sounding, suffer from an inherent overdose of abstractness when they are exercised in a tangible sense. One could understand this by an isolated perusal of the fundamental right to life and personal liberty under Article 21 without the legislative safeguards incorporated under the Code of Criminal Procedure to make that right meaningful, in a tangible sense. Similarly, merely removing the tag of 'illegality' from a certain act does not provide an express legitimacy or guarantee the exercise of that act in a smooth manner. The broader question to be asked here is: Is there a distinction between socially accepted behaviour and legally accepted behaviour?

What could be legally acceptable in a society might not be socially acceptable. This is where the pragmatic aspect comes in. The author believes that constitutional morality holds a limited ground in front of social morality in the Indian society because the ultimate exercise of any right is tested on at the stage of the society. Post the judgments in *Justice K. S. Puttaswamy (retd.) and Anr. v. Union of India and Ors.* ("***Justice Puttaswamy***")[20] on the right to privacy and *National Legal Services Authority vs Union Of India &Ors.* ("***NALSA***")[21] on gender identity, the outcome in *Navtej Johar* was mechanical and a necessary corollary and therefore, it fails to appear as historic if looked beyond the academic value that it holds. Contrary to the public perception of

[19]State of Kerala &Anr.v. N. M. Thomas &Ors, AIR 1976 SC 490.
[20](2017) 10 SCC 1.
[21](2014) 5 SCC 438.

the verdict, the constitutionality of a legislative provision is tested on the anvil of settled principles and the courts are usually unconcerned with the societal norms on the same subject matter. For instance, the verdict may not render a certain section of the populace as criminals but at the same time, it does not guarantee societal legitimacy of those acts either. Therefore, it is absolutely incorrect to state that the court has provided legitimacy to a certain set of acts. At this juncture, we need to understand and draw a fine line between bare rights and meaningful rights. It is the latter which finds its origin in the conscience of the society.

V. UNDERSTANDING THE VERDICT AND ITS CASCADING EFFECT

The operative part of the judgment merely removes the label of criminality from certain acts and does not provide an express recognition to any act. Moreover, it does not utter a word, in line with the affidavit submitted by the Union of India, on allied rights like marriage, adoption, employment, special provisions etc. to provide any meaning to such rights in the real sense. More succinctly put, the apex court has merely stated that homosexuality is natural and anything which is natural ought not to be criminalised. Nothing more, nothing less. Moreover, in Paragraph 253(i), the Hon'ble Chief Justice has also emphasized that protection is granted only for such behaviour that is in accordance with constitutional norms and values or principles. Therefore, any act which is devoid of consent, flouted in public, performed with an animal, performed with a non-competent individual (example- minors) or which goes against the laws related to obscenity[22] and public nuisance would not be 'constitutionally

[22]The Indian Penal Code, 1860, § 292.

permissible' and shall call for punishment under the municipal law.It is a clear reflection of how the ultimate purpose of the law is to balance societal interests with individual interests by putting restrictions on the unregulated flow of impermissible human conscience.[23] At this step, the legislature comes into the picture.

VI. NEED FOR ACT OF BALANCING BY LEGISLATURE

In our constitutional scheme, the ultimate authority to legislate vests with the legislature, which essentially comprises of the *'representatives of the people'* and is rightly influenced by the larger public thought. The verdict, in complete fairness, can at best be described as a 'delicate solution'. But as in Graham Bell's words, "*when one door closes, it opens another*", this verdict has rather opened a Pandora's box handling which would require a great deal of social transformation, and not just constitutional transformation. Today, for this judgment to produce any tangible effect on the ground, we need a chain of laws including extension of rape laws to males, applicability of sexual harassment laws in case of adult males, questions of free consent etc.

VII. LEGAL ANALYSIS OF THE CASCADING EFFECT OF THE VERDICT

The judgment, though it did not venture into the arena of substantive rights for members of the LGBTQ community, would have a wide impact on the efficacy of existing laws in the form of a cascading

[23]BAUJARD, ANTOINETTE (2010), Collective interest v. individual interest in Bentham's Felicific Calculus, Questioning welfarism and fairness, European Journal of the History of Economic Thought.

effect. In order to understand the true scope and extent of the judgment, it is important to analyse such effect:

A. Marriage

In light of the *Johar* case, homosexuals are now free to choose their sexual partners, and consequently, one fails to see any reason as to why they wouldn't wish to get married to each other subsequently. Let us look at various laws which are currently operative in India relating to the solemnisation of marriages

Hindu Marriage Act, 1955- According to the relevant part of Section 5, HMA:

"*5. Condition for a Hindu Marriage- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:*

(iii) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage;"

Section 5(iii) contemplates the minimum ages of both, the bridegroom and the bride which implicatively conveys that both the Hindus must be of opposite genders in order to solemnise their marriage under the HMA, 1955. Therefore, the law does not recognize any prospect of marriage between two adults of the same sex under the Hindu law. In a recent development in *Arunkumar v. The Inspector General of Registration, Chennai*,[24] the Madras High Court has permitted the registration of marriage of a trans-couple under the Hindu marriage Act by expanding the meaning of the expression "bridegroom". Observing that "*time has come when they are brought back from the margins into the mainstream. This is because even though the transgender community is having its own social institutions, the stories we hear are horrendous*", Justice Swaminathan recognised the

[24]AIR 2019 Mad. 265.

need for the pressing need for the corresponding change in matrimonial laws after the *Johar case*.

Moreover, another question that has arisen before the lawmakers is the setting of minimum age for the LGBTQ+ to get married. As Section 5(iii) provides two different ages for the bridegroom and bride respectively as the minimum age to get married, being a third gender, the age of LGBTQ+ members will have to be decided after a rigorous research which encompasses different aspects relating to this class, be it physiological, social, mental or marital.

Special Marriage Act, 1954

The Special Marriage Act also falls short of addressing the matrimonial concerns of homosexual couples. Section 4 of the Act reads thus:

"*Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:--*

(a) neither party has a spouse living;

(b) neither party--

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(iii) has been subject to recurrent attacks of insanity

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and

(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.

Explanation.-- In this section, "custom", in relation to a person belonging to any tribe, community, group or family, means any rule which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family:

Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied--

(i) that such rule has been continuously and uniformly observed for a long time among those members;"

In the main paragraph of the section, the expression used is "*a marriage may be solemnized between two persons*" and not between a male and a female. However, in clause (c) dealing with the age of the parties to the marriage, the words "male" and "female" are expressly used. One could interpret it in a manner that the specification of male and female does not mean a marriage has to be between a male and female, as age could also be specified for two males or two females marrying each other. But this interpretation falls flat on a perusal of Section 15 of the Act. Clause (a) of Section15, the expression used is:

"*(a) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since;*"

The above expression also conveys the idea that the subjects of the Special Marriage Act are also male and female and a wedding

between two homosexuals has not been contemplated in this Act. Therefore, the lacunae being manifestly clear, the need for corresponding changes in law is imperative for infusing life into this judgment.

B. Rape

The offence of rape is incorporated in Section 375 of the Indian Penal Code, 1860, the relevant extract of which unequivocally states:

"*375. Rape- A man is said to commit "rape" if he—*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

Firstly, against her will.

Secondly, without her consent.

Thirdly, with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is

another man to whom she is or believes herself to be lawfully married.

Fifthly, with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly, with or without her consent, when she is under eighteen years of age.

Seventhly, when she is unable to communicate consent.

Explanation 1.For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.A medical procedure or intervention shall not constitute rape.

Exception 2.Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

It can be observed that the provision envisages only the possibility of rape against a woman and is not gender neutral in nature. This conveys the meaning that in India, rape laws are not gender-neutral yet, unlike USA where the word used is "person" and not man or woman, as produced below:

"*10 U.S. Code § 920 - Art. 120.*

Rape and sexual assault generally-

"(a)Rape- Any person subject to this chapter who commits a sexual act upon another person by—

(1) using unlawful force against that other person..."

By establishing the feature of *progressive realization of rights* in the Indian society, the Hon'ble Court has laid onus upon the state to keep the laws dynamic and abreast to repeal the old archaic laws and replace them with ones that can stand the test of time. It becomes crucial in the light of the abovementioned offence of rape as the underlying notion of rape is based on the conventional idea of intercourse without the presence of consent. Section 376, as it stands today, only covers with situations wherein the intercourse is forced upon a woman. Even the meaning of consent is explained with respect to women, thereby conveying a bizarre meaning that a forced intercourse performed upon a man or on any individual of a self-perceived identity, without his consent, shall not afford him any remedy in the law except under Section 377, which again, is not rape and does not provide similar punishment.

C. Adoption

Under Indian law, adoption is a legal coalition between the party willing to adopt and the child. It forms the subject matter of 'personal law' where Hindus, Jains, Sikhs or Buddhists, by religion, can opt for a legal adoption. In India there are no separate adoption laws for Muslims, Christians and Parsis, so they have to adopt under the Guardians and Wards Act, 1890 for legal adoption. Post *Shabnam Hashmi v. Union of India*[25] judgment, a person of any religion,

[25]AIR 2014 SC 1281.

including Muslims, can adopt a child under the secular provisions of the Juvenile Justice (Care and Protection of Children) Act.

Under the Juvenile Justice Act, a transgender cannot walk into an adoption centre or orphanage seeking to adopt a child. The Central Adoption Resource Agency (CARA), however, in its affidavit filed in the Bombay High Court on 2nd December' 2015, has refuted the allegation that gays, lesbians and the transgenders cannot adopt children as per the new adoption guidelines. The CARA deputy director Binod Kumar Sahum, in his affidavit has stated: "*Prospective parents should be physically, emotionally and mentally stable, financially capable, motivated to adopt a child and should not have a life-threatening medical condition. Adoption, in general, is hard for any single man or woman, so considering the social norms in the country; one can only imagine how painstaking this task could be for a member of the third gender.*"[26]

D. Maintenance

The concept of 'maintenance' in India is covered under both under Section 125 of the Criminal Procedure Code, 1973 as well as the personal laws. This provision originally stems from Article 15(3), reinforced by Article 39, of the Constitution of India, 1950 (the 'Constitution').

As per Indian law, the term 'maintenance' includes an entitlement to food, clothing and shelter, being typically available to the wife, children and parents as these marginalized groups are believed to be the ones that need support from the earning members of the family. The idea of dependency of one individual on another for sustenance

[26]Ahona Pal, *Fundamental right to adopt a critical analysis of competency of persons in adoption process*, IPLEADERS (Last visited on Feb. 26,2020,7:00 PM), https://blog.ipleaders.in/fundamental-right-to-adopt-a-critical-analysis-of-competency-of-persons-in-adoption-process/.

can emanate in homosexual couples also who can naturally co-habit after the decriminalisation of homosexuality now. But, in the absence of corresponding changes in ancillary laws like maintenance, wouldn't the status of a homosexual couple be on a different footing in the eyes of law as compared to heterosexual couples?

The relevant extract of Section 125 of the Criminal Procedure Code, 1973 states:

"Order for maintenance of wives, children and parents— (1) If any person having sufficient means neglects or refuses to maintain—

(a) his wife, unable to maintain herself

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife..."

In the light of the *Navtej Johar* judgment, the conventional nomenclature of 'husband' and 'wife' would pose legal challenges in the coming times. When two homosexuals marry (assuming that a law to legally solemnise their marriage comes into existence), who would be called a husband and who would be called a wife, and in line with the same argument, in case of any disruption in the domestic environment of such homosexual couple, would the dependent partner ever find a resort in law to sustain his/her livelihood?

E. Domestic Violence

There are 2 major laws against domestic violence currently applicable in India:

The Protection of Women from Domestic Violence Act, 2005

Section 3 of this act defines domestic violence as:

"*Definition of domestic violence— For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—*

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security;"

The aforementioned Section 3(b) and 3(c) by using the word 'her' for an aggrieved person impliedly suggest that only a woman and any person by way of relation to her can be subjected to domestic violence. This is one major lacuna in this law in force as according to this, only women can approach the court as victims of domestic violence. One major shortcoming that would prevent even a woman from getting her case registered is the preliminary requirement that the accused and victim must be married to each other for domestic violence to be inflicted upon the victim. This could work in cases of lesbian couples when both the partners are women (provided they get the right to marry), but the cases involving gay men and transgenders fall beyond the purview of this act and the recent Supreme Court judgement hasn't addressed this aspect of their relationship.

Indian Penal Code, 1860

Section 498A deals with cruelty against a woman by her husband. The relevant extract of the provision states:

"498. Husband or relative of husband of a woman subjecting her to cruelty— Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine."

Section 498A also falls short in redressing the grievances of those victims who do not identify themselves as females. The above

analysis reveals that at each point, one gets to see terminologies like 'woman', or 'her', which defeat the claim of any other person who is not a woman. Therefore, if a true effect has to be given to the judgment in the *Navtej Johar* case, the law needs to undergo drastic changes in multiple spheres to accommodate all the rights of homosexual couples which straight couples enjoy. However, as the author argued above, the likelihood of such changes is dependent upon the will of the legislature, which is influenced by the will of the people in a democratic setup.

With the decriminalization of Section 377, members of the LGBTQ+ community have become direct stakeholders in this domain of law. Therefore, need would arise to protect the LGBTQ+ community from social ostracism prevailing at workplaces. Creation of an environment that is conducive to their participation would be a foundational step for the community to become a part of the mainstream. It would also play a pivotal role in getting the members of this community out of menial works including begging, dancing on streets to fetch money, etc.

VIII. LAW BEYOND THE LAW: THE CONCLUSION

Ehrlich, a noted jurist of the Sociological school, draws a distinction between the written law and law as perceived by the society. He refers to the former as the formal law and to the latter as the 'living law'. According to him, the institutions of marriage, domestic life, inheritance, contract etc. govern the society through 'living law' which dominates human life.[27] He further provides that the centre of gravity of legal development in the present time or the past, lies

[27]DR. N. V. PARANJAPE, STUDIES IN JURISPRUDENCE AND LEGAL THEORY at 99(Central Law Agency, 8th ed. 2016).

neither in juristic science nor in judicial decisions, but in society itself.[28]

It is this distinction which poses the biggest challenge to this verdict. The formal law, as laid down by the Hon'ble Court, varies significantly from the 'living law', as practised in the Indian society. As far as decriminalisation is concerned, it is well within the domain of a constitutional court for securing the fundamental rights of each citizen without looking into their sexual orientation. But when it comes to giving them substantial rights, it cannot be done by the mere framing of guidelines by the Court. Any such act of laying down guidelines of general application would be a purely legislative act which shall remain incomplete till the representatives find sufficient backing of the society that they represent. Strictly speaking, the gap between the prevailing sense of constitutional morality and social morality looms large in this issue and this gap shall continue to delay the conferment of substantive rights upon the LGBTQ+ community. It is only the legislative body of any country which can sense the 'living law' of the society through social behaviour and then formulate a formal law on that basis so that it may not only be better implemented but also better internalised in the society.

The biggest challenge, now, is to establish harmony between the two. The Hon'ble Supreme Court, in its constituent powers, can merely interpret the law as per constitutional standards. In its constituent powers, the apex court has removed the label of criminality from same sex consensual adults. Consequently, are we to say that, as a society, we have legitimised homosexuality?

The legal development in *Navtej Johar* has raised fresh concerns with respect to the rights of homosexuals. The judgment removes the taint of criminality from their sexual acts and provides them certain rights.

[28]C.K.ALLEN, LAW IN THE MAKINGat 28(7th ed.1964).

However, the judgment falls short of providing them substantive rights in the matters of marriage, maintenance, adoptions, domestic violence etc. In the scheme of the Constitution, such rights can be granted through material amendments to be undertaken by the legislature. The legislature responds to the wishes of the society as a whole, therefore, it remains to be whether the legislature waits for the command of social morality, or responds to the constitutional morality as vested in this judgment. Experience tells us that we can't make an effective law by forcing it onto the society. If we are really concerned to give substantive rights to the LGBTQ+ community with full social acceptance then it is only possible through legislative means and consensus building with thorough regard to the sociological school of jurisprudence. It would be better if we let our legislature decide on these things so that meaningful substantive rights can be rendered to our LGBTQ+ members and the law, as it stands today, finds the life and force of a 'living law'.

This judgment has opened doors for enormous challenges, including challenges to the existing gender-specific laws in force like marriage, divorce, adoption, maintenance, sexual harassment, rape etc. As discussed in the paper above, constitutional challenges depend to a great extent on the stand taken by the government of the time. Conscience of the government played a crucial role in this outcome as this challenge could have been comfortably averted had the National Democratic Alliance ("**NDA**") government also taken a stand as that taken by the then United Progressive Alliance ("**UPA**") government in *Suresh Kaushal* case.

In the words of Chief Justice himself, what comes naturally to an individual is natural. In complete conformity with the aforementioned remark, we must not forget that what comes naturally to a society is also natural for the society.

It is this nature of the society which differs heavily from the nature attributed by this judgment. The judgment is a welcome progression

in the development of fundamental rights jurisprudence. However, attributing a greater meaning to the same would not only be wrong in law, but wrong in fact also. Moreover, one must also question the extent to which the Hon'ble Court can apply the doctrines and concepts of foreign jurisprudence to subject matters that are society-specific in nature and cannot be looked from a universal perspective. Lastly, the ultimate onus to make the rights recognized in *Navtej Johar* case meaningful, lies upon the legislature comprising the voices of the public at large.

DECONSTRUCTING THE CONUNDRUM BETWEEN IBC, SARFAESI & PMLA

Bhavisha Sharma and Siddharth Kothari[*]

Abstract

The legislative intent behind the enactment of the Insolvency and Bankruptcy Code, 2016 was to remove the ambiguity in features of the insolvency resolution process existing in earlier legislations. It also aimed to prevent unnecessary delays in the resolution process and the deterioration of properties that occurred because of the same. However, in the past two decades, many other acts like the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Recovery of Debt due to Banks and Financial Institutions Act, 1993 were also passed to provide creditors with alternative and efficient remedies. These legislations coupled with the enactment of the Prevention of Money Laundering Act, 2002 create conflicts in prioritisation of claims of different creditors on the assets of an insolvent debtor. Presence of non-obstante clauses in all these "special" enactments further increases difficulty. The case of Union of India v Punjab National Bank is one of the

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cases where these legislations clash and the issue of attachment of property comes into play. This case comment discusses the opaque nature of the phrase "proceeds of crime" contained in the Prevention of Money Laundering Act, 2002 in context of the civil/ criminal nature of different acts. It also considers the question of non-obstante clauses and other prioritisation clauses in the enactments. Further, the authors question the consistency of application of the aforesaid clauses in multiple cases, highlighting the need for the Supreme Court to settle this question with finality, in order to prevent unnecessary.

I. INTRODUCTION

In the last two decades, the Indian parliament passed several legislations to provide various remedies to creditors in case the borrower defaults on repayment of the loan amount. The Recovery of Debts due to Banks and Financial Institutions, 1993 ("**DRT**") established Debt Recovery Tribunals as a one-stop adjudicatory body for banks and financial institutions struggling with non-performing assets.[1] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**") empowered secured creditors to recover their dues from the defaulting

[1]Recovery of Debts due to Bank and Financial Institutions Act, 1993, § 3.

borrowers by sale of secured assets without any requirement of judicial intervention.[2]

However, by enacting the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), the legislature intended to consolidate claims of all creditors with other pending liabilities of an insolvent entity for a timely wrap-up of the resolution process.[3] This ensured that assets of the corporate debtor are efficiently managed and do not deteriorate due to stretched proceedings, while also aiming to keep the debtor company as a going concern.[4]To reach this end, Section 25(2)(a) of the IBC empowered the resolution professional to take possession of all assets of the corporate debtor. This provision must also be noted as it ensures that these assets are not disposed of by the debtor hurriedly to escape liability.

At this juncture, IBC has often been at odds with the Prevention of Money Laundering Act, 2002 ("**PMLA**"). This act was passed by the parliament to prevent money laundering in India and to provide adequate remedy in case such illegal gratifications occur.[5] The scheme of the act envisaged attachment of assets as an interim measure before adjudicating on the merits of the case.[6] This ensured that the properties which might have been acquired by the accused person illegally are not disposed of, preventing the final remedy of

[2]The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, § 13(1).

[3]Trilegal, *The Insolvency and Bankruptcy Code, 2016 - Key Highlights*, MONDAQ, http://www.mondaq.com/india/insolvencybankruptcy/492318/the-insolvency-and-bankruptcy-code-2016--key-highlights.

[4]*Id.*

[5]SamudraSarangi, *It's time to revisit and revise India's money laundering laws*, REUTERS,https://in.reuters.com/article/india-money-laundering-laws/its-time-to-revisit-and-revise-indias-money-laundering-laws-idINKCN1MB2LJ.

[6]Vijay Pal Dalmia, *Confirmation of The Attachment by The Adjudicating Authority and Right Of 3rd Parties Under PMLA (AML Laws India)*, MONDAQ, http://www.mondaq.com/india/money-laundering/798446/confirmation-of-the-attachment-by-the-adjudicating-authority-and-right-of-3rd-parties-under-pmla-aml-laws-india.

confiscation. But as proceedings under IBC and PMLA have been initiated against the same entity in an overlapping timeline, conflict arose due to the inherently different nature of PMLA from other legislations like the DRT Act, SARFAESI Act and IBC. This is because all three legislations prioritised dues owed to creditors over any other outstanding amounts but there is a moral dilemma in allowing the alleged offender to use money illegally obtained through an offence under PMLA to pay-off its debts. Thus, the ends of the remedies under these legislations are opposite and the jurisdiction of appellate courts has often been sought to reconcile the conflict.

In the case of *Union of India v Punjab National Bank*,[7] a single judge bench of the Delhi High Court ruled on a similar conundrum. This case was one of the five cases which were heard together by the Court and decided by a common judgment. The present article will review the judgement in light of other judgements rendered on this issue by other courts, analysing and critiquing the interpretation and conclusions of the court in the matter at hand.

In the present case, six properties of the borrower company were mortgaged with the Punjab National Bank ("**PNB**") to avail credit facilities. PNB's inquiries revealed that supply orders, which were the bases of the withdrawals from the credit facility, were forged and the amount received against them was diverted to dummy accounts set up in the name of employees of the borrower company. PNB took possession of the properties through Section 13(2) of SARFAESI Act.[8] In a simultaneous development, relying on CBI inquiries, the Enforcement Directorate filed a case against the borrowers under PMLA and provisionally attached all the properties on 29/03/2017. The attachment order was confirmed by the Adjudicating Authority

[7]Union of India v. Punjab National Bank, CRL.A.764/2018.
[8]The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

on 4/08/2017. PNB's appeal against the attachment order before the appellate tribunal of PMLA was allowed and the orders were cancelled. Next, PNB filed a claim under the IBC against the borrowers and a Corporate Insolvency Resolution Process was initiated against the borrower on 27/09/2018. The present appeal has been filed by the Union of India against the order of the appellate tribunal. The Resolution Professional has sought audience in the appeal. Thus, the court considered the interplay of SARFAESI Act, IBC and PMLA in detail. The court laid down the following observations regarding the question of law –

DRT Act, SARFAESI Act or IBC shall not prevail over PMLA as the objects of all three are very different from what PMLA seeks to achieve. The three statutes must be construed in harmony with each other but whenever a proceed of crime, i.e. tainted property is concerned, proceedings under the PMLA shall prevail.

The enforcement officer, after assessing the approximate value of proceeds of crime, has the power to attach property of similar value as alternative attachable property or deemed tainted property if the exact property which can be termed as proceeds of crime cannot be traced. The onus is on the accused person to prove that such deemed tainted property was not obtained directly or indirectly from a criminal activity.

In case of a tainted property, PMLA shall prevail over the provisions of any other act by the virtue of Section 71 of the Act.

In case of a deemed tainted property, the secured creditor or a third party with interest in the property shall prove bona fide to claim that interest. An added liability of due diligence lies on the third party if it acquired such interest after the commission of the offence of money laundering.

Further, the court set aside the order passed by the appellate tribunal. Returning the case back to the appellate tribunal, it directed it to

examine the facts of the case in light of the above principles and then come to a conclusion regarding the status of attachment of the properties.

II. DECONSTRUCTING THE NON-OBSTANTE

Parliament includes an overriding clause in an Act if it is perceived that it may conflict with other statutes and it is intended that its provisions are prioritised over any other enactment. However, sometimes both the laws conflicting with each other have a non-obstante clause. The Supreme Court settled the position of law on such cases in *Solidaire India Ltd v. Fairgrowth Financial Services Pvt. Ltd.*("***Solidaire***").[9] In this case, it was held that in case two enactments with a similar non-obstante clause are in conflict with each other, the statute that was enacted later in time shall prevail over the one which was enacted earlier. The court explained its verdict by observing that the non-obstante clause signifies the intention of the legislature regarding any laws enacted by it till that time. If it passes a different law later, it is implied that the lawmakers were aware of the presence of non-obstante clause in earlier legislations and still chose that the current one should prevail over all others.

IBC, which contains a non-obstante clause in Section 238, came into force in 2016. However, Section 71 of the PMLA[10] which contains the non-obstante clause was enacted along with the rest of the PMLA in 2005. Thus, using the ratio laid down by the Supreme Court in the case of *Solidaire*, IBC should have been held to prevail over PMLA.

However, the court in the present case digressed from such a conclusion by hinting at two vague reasons. *Firstly,* it observed that

[9]Solidaire India Ltd. v. Fairgrowth Financial Services Ltd., (2001) 3 SCC 71.
[10]Prevention of Money Laundering Act, 2002.

the ratio of *Solidaire* was for cases involving two special statutes. However, according to the bench, the two legislations cannot be considered as a 'special law' owing to the manner in which they have been invoked in the present case. Referring to the principle of contextual interpretation as discussed in *Ksl & Industries Ltd.v. M/S. Arihant Threads Ltd. &Ors*,[11] the Court observed that the special or general nature of a statute is not absolute and is relative to each other. It concluded that PMLA is a special legislation to the extent of its dealing with proceeds of crime as it was specifically enacted to prevent and deal with matters of money laundering. However, neither did the court elaborate on this line of reasoning any further nor was any reason given to show how IBC cannot be construed as a special legislation. The important nature of the duty envisaged at the behest of the resolution professional to take control of the assets of the corporate debtor was not taken into account either. To that extent, the judgement failed to explain the distinction between special and general statutes, an issue which the court itself created while deciding the case. The court's holding that PMLA should prevail in cases involving *proceeds of crime* is in vacuum as its real-time conflict with other legislations was not considered.

Secondly, it held that the objectives of all four concerned legislations are distinct and they do not overlap. Simply noting that, the court switched into its analysis of a different clause of the SARFAESI Act and no reasons or case-law were provided to substantiate this observation or highlight its relevance.

After analysing the non-obstante, the court also discussed in detail the effect of a special clause which was added in SARFAESI Act as well as the DRT Act by an Amendment in 2016. Section 26-E of the SARFAESI Act provides that:

[11] *Supra* note 9.

"26E. Priority to secured creditors - Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

Explanation: For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

The intent of the amendment adding Section 26E was to create a priority of secured creditor over any other governmental claim. It was in line with other parliamentary initiatives like the enactment of IBC to create a creditor friendly regime in India to ensure healthy circulation of public money. As this clause has been brought into force in 2016, much later than the enactment of PMLA, it should have been given effect to by the court.

However, in *Union of India v PNB,* the court narrowly read this Section by holding that the proceedings under PMLA and the Enforcement Directorate's power to attach assets cannot be considered as "*all other debts and all revenues, taxes, cesses and other rates payable to the Central Government*." Section 9 of PMLA provides that any property confiscated under the scheme of the act shall vest in the central government. Any proceeds obtained by the auction of the same go to the central government free of all encumbrances that property might have. In the context of this explanation, it is difficult to see why the court held that the same is not within the ambit of the Section. Such strict reading defeats the legislative intent behind the enactment of that Section. A broad interpretation in favour of the creditor has been used by the Madras

High Court[12] as well as Appellate Tribunal, Mumbai[13] to hold that Section 26E and Section 31B of SARFAESI Act and DRT Act respectively will prevail over the operation of PMLA. The judgement in *Union of India v PNB* goes against the creditor-friendly regime that the Indian parliament has been trying to build.

III. THE CIVIL NATURE OF PMLA

Additionally, the court rightly rejected the argument by the counsel for Appellants wherein it was contended that PMLA will prevail over the SARFAESI Act as well as the DRT Act because the former is criminal in nature, whereas the latter two are civil laws. It has been duly noted by the National Company Law Tribunal that proceedings under PMLA are civil in nature, and therefore cannot escape the moratorium under Section 14 of IBC.[14]In the present case, the court noted that the procedure for preliminary attachment before a final decision on merits is merely a preventive measure and not a punishment under the act. It also differentiated 'attachment of property' from the ultimate remedy of 'confiscation' of the property. As the attachment proceedings are civil in nature, PMLA cannot be applied to the detriment of the third party who is nowhere involved in the offence of money laundering and is an innocent creditor.

IV. INTERPRETATION OF PROCEEDS OF CRIME

Proceeds of Crime are defined in Section 2(1)(u) of the PMLA as –

[12]The Assistant Commissioner (Ct) v. The Indian Overseas Bank, 2014 SCC OnLine Del 555.
[13]Bank of India v. The Deputy Director Directorate of Enforcement Mumbai, FPA-PMLA-2173 & 2155/MUM/2018.
[14]Punjab National Bank v. The Deputy Director, Directorate of Enforcement Raipur, FPA-PMLA-2633/RP/2018.

"*any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad*."

The Delhi High Court, in the present case,[15] interpreted the said definition to include two kinds of properties

Tainted property – property which has been directly or indirectly obtained from such criminal activity

Deemed Tainted property – in case tainted property is not available, not traceable or of a lesser value than the case made of money laundering, any other property of similar value can be attached

Making this distinction, the court held that proceedings under PMLA will override those under any other legislation or any other encumbrances created in favour of third parties in case of a tainted property. But if deemed tainted property is in question, the adjudicating authority will have to enquire into the bona fide of the third party and the burden to prove such bona fide lies on the third party.

The observations of the court must be critiqued for reading words into the act which are not otherwise present. The language of the legislation is clear as to the type of property which can be attached as proceeds of crime. It provides only for attachment of property directly or indirectly obtained from the proscribed scheduled criminal offence and the alternative of attaching some other property is provided only for properties that are located outside the country. This was provided to account for the possibility that the attachment of such property may be outside the jurisdiction of the Enforcement Directorate and the

[15]Union of India v. Punjab National Bank, CRL.A.764/2018.

proceedings under the act must not be frustrated for jurisdictional reasons.[16]

However, the Delhi High Court took the liberty to interpret the rider to include even those cases wherein no such case of a property existing outside India has been made. It held that the Enforcement Directorate is empowered to attach any other property as well. But this observation has neither been substantiated by any other judgments nor is it well-reasoned to back the same. Such an interpretation gives the Enforcement Directorate the unmatched power and further shifts the burden on the accused person to prove that the said property is not tainted, even though the Enforcement Directorate lacks a prima facie case for the involvement of the property.

A similar situation was also considered by the Appellate Authority under PMLA in a 2018 case.[17] In this case, it was held that the Adjudicating Authority cannot confirm the provisional attachment of any property if the Enforcement Directorate itself believes that the property is innocent and has been attached only because the tainted property is untraceable. The scheme of the Act does not envisage that the onus to prove innocence is shifted onto a third party against whom a prima facie case is itself absent.

The High Court gave such a reasoning to ensure that an accused person under PMLA does not have an escape route to use the money illegally gained by money laundering to set off its claims against the creditors. However, this intention of the court must be considered in two different cases.

[16]The Deputy Directorate of Enforcement, Delhi v. Axis Bank &Ors, CRL.A.210/2018 &Crl.M.A.3233/2018.
[17]Punjab National Bank v. The Deputy Director, Directorate of Enforcement Raipur, FPA-PMLA-2633/RP/2018.

First situation arises when a secured creditor is not involved in an act of money laundering and has a bona fide claim against the debtor with a rightful interest in its property/ properties. If such property is attached by the Enforcement Directorate claiming it to be deemed tainted property, the rightful claim of the creditor fails. This goes against the legislative scheme of the last five years wherein the intention was to make the Indian market a creditor friendly regime to ensure greater circulation of public money. Further, such authorisations by the courts of law will also demotivate the average creditor from lending money fearing such exceptional circumstances.

The second situation is a bit more complicated than the first one. Suppose the property attached as deemed tainted property does not have any encumbrances, it is concluded that the property is not anyhow a proceed of crime but is still confiscated as no other property of the alleged offender is traceable. An issue arises when the accused person either goes into the insolvency process under IBC or a case is filed with the DRT for any unsatisfied but unsecured claims. In case the remaining assets of the accused person are enough to meet all its financial and operational liabilities, the attachment under PMLA will be prioritised as the accused is an offender under the act. But in more cases than not, resources with the accused person are insufficient to meet all liabilities and one out of the multiple claims need to be prioritised. In such scenarios, the legislative intent must be prioritised over the moral sentiment against unjust enrichment. As observed in the aforementioned cases with the PMLA Appellate Authority,[18] prioritisation of secured creditors' right must be undertaken in light of Section 26 E and Section 31B of SARFAESI Act and DRT Act respectively.

[18] *Supra* note 13; 14.

V. CONCLUSION

The judgment of Delhi High Court in the present case puts a pause on the otherwise creditor-friendly regime envisaged by the legislature. In 2016, amendments were made to SARFAESI as well as DRT Act to make it creditor friendly. The enactment of IBC was a move to bring the Indian insolvency paradigm at par with the international insolvency paradigm. The number of such cases is likely to increase given that IBC proceedings have been initiated against many reputed companies due to non-payment of dues. Therefore, it is necessary that the question is answered by the Supreme Court to reinforce finality in the ordeal.

THE UNIDROIT PRINCIPLES ON INTERNATIONAL COMMERCIAL CONTRACTS: AN APPROPRIATE TOOL TO FILL THE GAPS IN THE CISG?

Saara Mehta[*]

Abstract

*The Convention on the International Sale of Goods ("**CISG**") is widely used as the substantive law in international commercial contracts. Its relevance today is only increasing, due to the growing incidence of commercial transactions in the modern world. It found its genesis in the need to promote uniformity in sale of goods transactions across the world, a sentiment which has been expressed in its Article 7. However, like all treaties, it was the result of multilateral negotiations and saw heavy disagreements among those negotiating it. The consequent consensus was by way of a compromise, and there remained gaps and ambiguities in the treaty's text. This essay examines the viability of using the UNIDROIT Principles of International Commercial Contracts to fill these gaps. In the first section, the author introduces the Convention and the Principles,*

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and their immense but distinct utilities. In the second section, the author has compared the two, highlighting their similarities and differences, with a view to examine whether it makes sense to approach gap-filling in the Convention using the Principles. In the third section, a legal justification for using the Principles in this manner is looked for. The fourth section comprises two examples of problem areas within the CISG which could be effectively supplemented using the Principles. In the fifth section, the author has examined the various approaches of courts and tribunals while using the Principles for gap-filling, and critically determined which of these approaches is optimum. The last section concludes.

I. INTRODUCTION

The United Nations Convention on International Sale of Goods ("**CISG**" or "**Convention**") found its genesis in 1980, with a goal to promote the efficiency of international commercial transactions and the development of international trade.[1] It has been widely applied as the substantive law in a plethora of arbitral proceedings and has been extremely successful in the international unification of private law.[2] However, on account of the CISG being a multilateral treaty entered into by sovereign states - all of which had different socio-economic

[1]United Nations Convention on Contracts for the International Sale of Goods, Apr. 1, 1980, 1489 U.N.T.S. 3, pmbl [Hereinafter "*CISG*"].

[2]PETER HUBER & ALASTAIR MULLIS, THE CISG 1 (1 ed. Sellier, European Law Publishers 2007).

structures and legal traditions - some issues were left out at the very outset from the scope of the Convention.[3] A number of other issues evoked conflicting views at the time of negotiations, and the logjam could only be overcome through compromise solutions, which in effect left those issues undecided.[4] This inevitably created gaps in the interpretation of the CISG. Increasingly, and controversially, courts and tribunals have sought to employ the UNIDROIT Principles of International Commercial Contracts ("**UNIDROIT Principles**" or "**Principles**") for the purpose of gap-filling vis-à-vis the CISG.

The Principles, brought into existence in 1994 by the International Institute for the Unification of Private Law, were drafted with lofty goals. Their goal "is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied."[5] Self-described as 'general', these Principles may be applied to a broad range of contract law-related issues.[6] They seek to present the best solutions to problems in the field of international commercial contracts, even if these may not be the generally adopted solutions to such problems.[7] Therefore, they do not merely retell the law found in other Conventions or legal systems; they do more than that by being an aspirational[8] set of rules.

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[3]M.J. Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law*, 36 REV. JUR. THEMIS 340 (2002).
[4]*Id.*, at 341.
[5]*International Institute for the Unification of Private Law, Principles of International Commercial Contracts (1994)* [Hereinafter "UNIDROIT PRINCIPLES"], UNIDROIThttps://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016.
[6]UNIDROIT PRINCIPLES, pmbl.
[7]*Id.*
[8]Klaus Berger, *The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Contract Law*, 28 LAW AND POLICY IN INTERNATIONAL BUSINESS 946 (1997).

According to the UNCITRAL website, as of February, 89 countries have adopted this Convention, the noteworthy ones being major economies like the US, China, Canada, France, Germany, Russia, Brazil, Italy, Spain, Australia and the Netherlands.[9] The relevance and utility of these principles in the present time can be denied only by a few. They are a neutral, preferred substantive law in cases involving parties of different nationalities entering into sale of goods transactions with each other.

In a 2018 decision, an American circuit court observed that the interpretation of an international sale of goods contract should be governed by the CISG, not by New York law.[10] There cannot be found a more emphatic exaltation of this Convention in recent times than this example, where a domestic court was willing to forego the application of even its own law in favour of the CISG. A Convention as prolifically brought into relevance (due to how increasingly globalised the world has become) as the CISG is necessarily required to be interpreted most accurately and efficiently, and finding this manner is the author's endeavour.

II. A COMPARISON BETWEEN THE CISG AND THE UNIDROIT PRINCIPLES

It is imperative to note the differences between the CISG and the UNIDROIT Principles because this sheds light on the utility and flexibility of the Principles. *First*, the drafters of the Principles were legal scholars from around the world, whose opinions did not represent any state in particular. For this reason, the opinions of the

[9]UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, https://uncitral.un.org/.

[10]Transmar Commodity Group Ltd. v. Cooperativa Agraria Industrial Naranjillo Ltda., No. 16-3532-cv (2d Cir.: 2018).

drafters of the Principles were not blinkered by national considerations or the need to reach a compromise, thus obviating the need for diplomatic solutions. This led to inclusion of fairer provisions, such as those related to gross disparity[11] and hardship,[12] which could not find a place in the CISG due to deep-rooted conflicts of opinion. Another consequence flowing from the Principles not having the official imprimatur of an international treaty was that they could be amended more easily, to deal with new problems arising after the first edition of the Principles. They were last amended in 2016 and are best adapted to suit the needs of parties in international commercial contracts. In contrast, the CISG was drafted by official representatives of states, who could not concur on a number of issues. For the very same reason, amending the CISG is difficult.

Second, the Principles are soft law, and cannot be enforced through public force.[13] They shall only be applied if they are expressly incorporated as the substantive law governing the contract, or if the Principles are seen amenable to fill gaps found in the regulation of the contract by the arbitrator or the judge. In contrast, the CISG is an international Convention which binds contracting states.

Last, the UNIDROIT Principles have a broader scope and deal with all kinds of transactions arising out of international commercial contracts, while the CISG specifically deals with contracts for the international sale of goods.

There are notable similarities between the CISG and the UNIDROIT Principles as well. By and large, the two are complements of each other. Both instruments put stock in the principles of good

[11]UNIDROIT PRINCIPLES, Art 3.10.
[12]UNIDROIT PRINCIPLES, arts 6.2.1-.3.
[13]Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 284 (2010).

faith,[14]party autonomy,[15] and freedom of form.[16] The concept of communication becoming effective when it reaches the intended recipient is also found in both instruments.[17] Other points of convergence include survival of a contract against unilateral and premature termination[18] and the bar on the contradiction of a representation that has been relied on by another party.[19]

III. THE SEARCH FOR A LEGAL JUSTIFICATION TO FILL THE GAPS IN THE CISG WITH THE UNIDROIT PRINCIPLES: EXPERT OPINIONS AND THE AUTHOR'S SUGGESTIONS

The legality of using the UNIDROIT Principles to fill the gaps in the CISG shall be subsequently discussed. However, at this juncture, it is vital to highlight the numerous logical justifications of doing so. First, it is amply clear that the CISG is, in places, fragmentary. Its supplementation using the Principles will only bolster fairness, equity and consistency in the application of the Convention to international commercial dispute resolution. Second, in preventing the tribunal or court from taking recourse to domestic law for gap-filling, the use of the UNIDROIT Principles will level the playing field for parties, who will be equally familiar with these Principles. This would prevent an unfair advantage accruing to the party whose domestic laws would otherwise be applied. Third, gap-filling using the Principles will help further the mandate of Article 7(1) of the CISG, which provides that

[14]CISG, Art 7(1); UNIDROIT PRINCIPLES, art 1.7(1).
[15]CISG, art 6; UNIDROIT PRINCIPLES, arts 1.1, 1.5.
[16]CISG, arts 11, 29(1);UNIDROIT PRINCIPLES, art 1.2.
[17]CISG, art 24; UNIDROIT PRINCIPLES, art 1.9.
[18]CISG, arts 19(2), 25-26, 34, 37, 49(2), 51(1), 64(2), 71-72; UNIDROIT PRINCIPLES, arts 2.11(2), 2.12, 2.14, 2.22, 3.3, 5.7, 6.2.1-.3.
[19]CISG, arts 16(2), 29(2); UNIDROIT PRINCIPLES, arts 2.4(2).

in the Convention's interpretation, regard must be had to its 'international character' and 'the need to promote uniformity in its application'. As mentioned initially, the UNIDROIT Principles are balanced and may be used throughout the world since they are not heavily influenced by any particular legal tradition. Their application has an obvious advantage over that of the domestic laws of states since the latter would be detrimental to applying the CISG in a uniform and consistent manner. Besides, Article 7(2) permits recourse to domestic law only in cases where no other suitable alternative is available. In no way does the author purport to suggest that the UNIDROIT Principles should be used to interpret questions which are outside of the scope of the CISG; the only suggested use is for supplementing the interpretation of the existing provisions.

From the above discussion, it seems clear that the legal justification for applying the UNIDROIT Principles in such a manner should be looked for in the aforementioned Article 7 of the CISG. Article 7(2) provides that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". Some scholars have suggested that the UNIDROIT Principles set forth the general principles forming the backbone of the CISG, and thus Article 7(2) permits reliance on the Principles to fill gaps in the CISG.[20] However, this interpretation has been criticised[21] on the account that the UNIDROIT Principles are not merely principles governing the international sale of goods; they pertain to many kinds of commercial

[20]M.J. BONELL, *General Report*, *in* A NEW APPROACH TO INTERNATIONAL COMMERCIAL CONTRACTS: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, 12-13 (1999).

[21]PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 103 (2d ed. Oxford University Press 2005) [Hereinafter "Schlechtriem & Schwenzer"].

transactions. Article 7(2) does not state that the CISG must be interpreted in light of principles governing international commercial contracts in general; it specifically points to the general principles on which the CISG, a Convention dealing with the international sale of goods, is based.[22]

Another approach to gap-filling using the UNIDROIT Principles is to use the Principles as an indicator of emerging trends and practices in international contract law,[23] with which the CISG has not kept pace due to its rather inflexible nature. Those who favour this approach state that the phrase "*general principles*" in Article 7(2) of the Convention should be interpreted as 'evolving with and following changes and transitions in international commerce', and to use the UNIDROIT Principles as a supplement in places where the CISG is incapable of giving an answer would help in the unification of international contract law.[24] In essence, these scholars seem to believe that to construe the phrase "*general principles*" in a manner which restricts these principles to those flowing from the Convention would be too narrow an approach. Article 7(2), in their opinion, has been drafted loosely enough to even include those principles which have not expressly been included in its ambit. However, the idea of approaching gap-filling in this manner falls flat due to the very nature of the UNIDROIT Principles. They have not been drafted merely to reflect prevailing practices across the world; they also purport to provide what is perceived as the 'best' solution to a particular problem, even if such a solution has not been generally adopted so far.[25] Therefore, to use the UNIDROIT Principles as an indicator of

[22]JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 667-91(3d ed. Wolters Kluwer 1999).
[23]Ulrich Magnus, *Die allgemeinen Grundsätzeim UN-Kaufrecht,* 59 RABELSZ 492-93 (1995).
[24]Shani Salama, *Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, An Inter-American Application*, 28 U. MIAMI INTER-AM. L. REV. 241 (2006).
[25]UNIDROIT PRINCIPLES, pmbl.

what the law is, as opposed to what it should be, would be a fundamental error in their application.

A much more sensible method of using the UNIDROIT Principles for the gap-filling purpose would be to restrict their use to matters where the context allows such reliance. It has been suggested, and in the author's opinion, quite rightly so, that the Principles must only be used for interpreting the CISG when a particular provision of the CISG is fundamentally similar to a particular principle in the UNIDROIT Principles in both text and context.[26] Thus, the limited function of the Principles in such a scenario, according to Professor Kritzer, would be to provide "*meat on the bare bones*" of the CISG.[27] Kritzer, a strong proponent of this interpretative approach, opines that the CISG is by nature a minimalistic document, with no official commentary to elucidate its often fragmentary provisions; to use instruments such as the UNIDROIT Principles, which have an official commentary, to understand the CISG in situations where the texts are 'similar or identical', would put flesh on the CISG's bones and plug the gaps in it to some extent.[28] The utility of this approach is self-evident: it effectively minimises over-reliance on a soft-law instrument, while at the same time succeeding in tapping on the benefits of a well-explained model law, which certainly has much in common with the law which needs to be interpreted.

The author wishes to propose a solution to the problem of when it is amenable to fall back on the UNIDROIT Principles in the process of interpreting the CISG. The ideal method to fill in the gaps in the CISG would be to, first and foremost, look to the bare provision which has to be interpreted. This is in consonance with Article 31 of

[26]CHENGWEI LIU, REMEDIES IN INTERNATIONAL SALES: PERSPECTIVES FROM CISG, UNIDROIT PRINCIPLES AND PECL 240 (1 ed. Juris Publishing 2007).
[27]*Id.* ,at 241.
[28]*Id.*, at 240.

the Vienna Convention on the Law of Treaties,[29] a treaty that governs the interpretation of all other international treaties. The Vienna Convention mandates that preponderance should be given to the ordinary meaning of a treaty's provisions while one is interpreting it.[30] After this, if the plain reading of the CISG is unsuccessful in giving a clear result to the arbitrator or judge, it must be determined by the arbitrator or judge as to whether a particular issue was left to be dealt with by a country's domestic law on purpose.[31] However, it is the view of the author that such reliance on national laws must be minimised, to respect the international nature of the Convention, as well as to ensure that it is applied uniformly. Subsequently, if the application of the second step yields a negative answer, Article 7(2) of the Convention would mandate the judge or arbitrator to look at the general principles on which the CISG is based, and as has been discussed previously, these need not be the UNIDROIT Principles in all cases. At this point, the adjudicator must necessarily look at provisions within the CISG that bear contextual similarity to the principles that are being relied on, for an answer.[32] The author suggests that at this juncture, Kritzer's approach should be taken into consideration, and the arbitrator or judge should, if the context permits, look at analogous principles contained in the UNIDROIT Principles. The UNIDROIT Principles may be used with a moderate degree of liberty in an interpretative capacity; however, they are not,

[29]Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, art 31.

[30]Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art 31.

[31]CESARE BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA SALES CONVENTION 75 (Fred B Rothman & Co 1987); Honnold, at 108.

[32]John Gotanda, *Awarding Damages under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation*, 37 GEO. J. INT'L L.121 (2005).

and should not be used as primary legal authority.[33] If all the above steps fail in giving a result, only then should the principles of private international law be applied, as is mandated by Article 7(2) of the Convention.

To sum up the UNIDROIT Principles should play a supporting role to the general principles on which the CISG is based, and should facilitate a cogent and comprehensive understanding of these general principles, in the process of interpreting the CISG, as well as in the process of filling gaps in the CISG.

IV. GAP-FILLING BY THE UNIDROIT PRINCIPLES IN ACTION

In this section, the author has examined two areas within the CISG which could benefit from gap-filling, on account of the incompleteness and ambiguity of the bare text of the Convention. The author has also clarified as to how the UNIDROIT Principles would help in creating a comprehensive legal framework by overcoming the inherent deficiencies of the CISG in these areas.

The first example of a situation where the UNIDROIT Principles could play a vital role in filling the inherent gaps in the CISG is the regime governing damages under the CISG. Article 74 of the CISG provides the framework governing damages in international sale of goods contracts. It reads as under:

"*Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss*

[33]Michael Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 784-85 (1998).

which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."[34]

Here, the method of calculation of damages is not provided.[35] According to this article, the tribunal looks at the particular circumstances of the case, and is to put the aggrieved party in the same economic position as it was before the breach; such an aggrieved party receives the benefit of the bargain.[36] This provision remains incomplete on at least three counts – first, it does not specify explicitly as to whether the gains made by the aggrieved party are to be accounted for in the process of calculation of damages; second, it does not provide as to what extent such a party must show that it has suffered a loss, so as to be awarded damages; third, it does not provide for the currency in which damages are to be calculated.

The UNIDROIT Principles can help fill the gap here. They specifically provide that the gains made as a result of the breach by the aggrieved party in the case are to be accounted for;[37] additionally, they state that only that harm which is proved with a reasonable degree of certainty is to be compensated.[38] They state that the currency to calculate damages in is the one "in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate."[39]

The second example relates to a notably litigious area in the sale of goods jurisprudence – the law governing interest. Article 78 of the

[34]CISG, art. 74.
[35]JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 449 (1 ed. Kluwer Law and Taxation Publishers 1989).
[36]Schlechtriem & Schwenzer, 746; GUENTER TREITEL, REMEDIES FOR BREACH OF CONTRACT – A COMPARATIVE ACCOUNT 82 (Oxford University Press 1988).
[37]UNIDROIT PRINCIPLES, art 7.4.2.
[38]UNIDROIT PRINCIPLES, art 7.4.3.
[39]UNIDROIT PRINCIPLES, art 7.4.12.

CISG provides for the payment of interest when a sum due is in arrears; however, it fails to provide a method to calculate the amount of interest that is to be paid in such a situation.[40] The UNIDROIT Principles efficiently supplement the CISG on this account, and state that the applicable rate of interest is "the average short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment."[41] In the absence of such an interest rate, the interest accrues at the average prime rate in the state of the currency of payment, and, if such rate does not exist, the rate of interest is to be fixed by the law of the State of the currency of payment.[42] Another gap is filled by the UNIDROIT Principles in the Convention, in that they provide that interest is payable from the time when payment is due,[43] while such a stipulation is notably absent from the CISG.

V. RELIANCE ON THE PRINCIPLES BY COURTS AND TRIBUNALS

Despite the many criticisms (as earlier highlighted by the author) of relying on the UNIDROIT Principles as a predominant gap-filler for the CISG, there is an ample body of cases and arbitral awards in which the courts and tribunals have recognised and applied the UNIDROIT Principles as the general principles governing the CISG. Some forums have taken unique and novel routes to justify the use of the UNIDROIT Principles as contextual gap-fillers for the Convention. The author has briefly discussed the efficacy and aptness of each of these approaches, and at the end, a streamlined approach

[40]CISG, art 78.
[41]UNIDROIT Principles, art 7.4.9.
[42]*Id.*
[43]*Id.*

has been sought, which combines the best of judicial practice in the area.

The International Court of Arbitration of the Chamber of Industry and Commerce of the Russian Federation has been proactive in using the UNIDROIT Principles to interpret the CISG. In a 1997 case,[44] there was a dispute related to a penalty clause in a contract governed by the CISG. The court applied the Principles as "a means to interpret and supplement the CISG". Additionally, it also held that these Principles could be applied because they reflected international usages under Article 9(2) of this CISG. Since the CISG did not provide a solution on the matter of penalty related to default in the payment of a price, Article 7.4.13 of the UNIDROIT Principles (which concisely dealt with this matter) was applied to the case. In a 2007 decision[45] related to the interpretation of Articles 78 and 79 of the Convention, the same court took into account Article 7.4.9 of the UNIDROIT Principles, which deals with similar situations of default. The court held that the UNIDROIT Principles reflect an "understanding generally accepted in international commercial practice." A case from 2008[46] before this court related to the transfer of the obligation to pay the price from the original buyer to a third party to the transaction. To supplement and fill the gap found in the CISG, the court relied on Article 9.2.1of the Principles, which was, according to the court, reflective of international commercial practice. This court's approach is a need-based and practicable one; it has justified using the UNIDROIT Principles very consistently on the ground of them reflecting international commercial practice and usage. This is a functional approach because it abandons straitjacket requirements of legality and

[44]Case No. 229 (Int'l Arb. Ct. Chamb. Comm. Ind. Russ. Fed., 1996), http://www.unilex.info/case.cfm?id=731.
[45]Case No. 13 (Int'l Arb. Ct. Chamb. Comm. Ind. Russ. Fed., 2007), http://www.unilex.info/case.cfm?id=1492.
[46]Case No. 14 (Int'l Arb. Ct. Chamb. Comm. Ind. Russ. Fed., 2008), http://www.unilex.info/case.cfm?id=1493.

instead focuses on the unique utility of the UNIDROIT Principles, a point that the author has discussed previously.

French courts have, in contrast, used specific provisions of the UNIDROIT Principles to supplement the interpretation of the CISG, while not making sweeping assertions about the universal applicability of the former. In a 1996 case decided by the Court of Appeal at Grenoble,[47] a UNIDROIT principle in Article 6.1.6, to the effect that the obligation to pay must be performed at the buyer's place, was found to be a general principle underlying the CISG. More recently, in 2015, the Court of Cassation allowed the invocation of hardship and the right to request a renegotiation of price by the seller, based on Articles 6.2.2 and 6.2.3, which cover matters not expressly dealt with in the CISG.[48] In contrast to the previously discussed approach, this one is cautious and based on a case by case analysis of the Principles and the Convention.

Arbitral tribunals have, in a number of awards, employed the UNIDROIT Principles to both fill gaps in the CISG, as well as to bolster the idea that certain articles of the CISG reflect universal practices, in case they are echoed in the Principles. In a 2007 arbitral award[49] made between an Estonian seller and a Kazakhstani buyer, the law governing the transaction as per the contract was Russian; however, since both parties were from states that had contracted to the CISG, the Convention was applied by the tribunal. Article 81 was the law of pertinence in the matter. To establish that this Article reflected a 'universally applied approach', Articles 7.2.1, 7.2.2, and 1.3 of the

[47]SCEA GAEC Des Beauches Bernard Bruno v. Societé Teso Ten Elsen GmbH & Co. KG (Cour D'Appel de Grenoble, 1996), http://www.unilex.info/case.cfm?id=222.
[48]Dupiré Invicta Industrie v. Gabo, Case No. 12-29.550 13-18.956 13-20.230 (Cour de Cassation, 2015), http://www.unilex.info/case.cfm?id=1999.
[49]Unknown (Int'l Arb. Ct. of the Chamb. of Comm. and Ind. of the Russ. Fed., 2007), http://www.unilex.info/case.cfm?id=1332.

UNIDROIT Principles were pointed to, since they reiterate the law in the Convention. Another arbitral tribunal, in the text of an award dating back to 2004,[50] stated that in order to fulfil the mandate of gap-filling in accordance with Article 7(2) of the Convention, recourse should be taken to the UNIDROIT Principles, seeing as they contain and have further developed the general principles underlying the CISG. In a notable case of application of UNIDROIT Principles over domestic law to supplement the CISG, the arbitral tribunal chose to corroborate CISG provisions with the Principles, seemingly to not let the matter be decided by domestic law.[51] The tribunal observed that *"although the UNIDROIT Principles of International Commercial Contracts shall [not] directly be applied, it is nevertheless informative to refer to them because they are said to reflect a world-wide consensus in most of the basic matters of contract law*".[52]

The author believes that it is wise to earmark certain specific provisions of the UNIDROIT Principles as reflecting international consensus and general trade practices. However, for courts and tribunals to hold that the Principles in their entirety reflect international commercial practice would be erroneous, due to their aspirational nature. The UNIDROIT Principles do not always reflect prevailing practices, and often envisage 'best' practices which may not have become the norm.[53]

Therefore, while the approach of the International Court of Arbitration of the Chamber of Industry and Commerce of the Russian Federation is utilitarian and offers a simple solution to the problem, a nuanced approach is probably for the best. The French courts, in this

[50]Award No. 12460 (ICC Int'l Ct. Arb., 2004), http://www.unilex.info/case.cfm?id=1433.
[51]Award No. 9117 (ICC Ct. Arb. Zur., 1998), http://www.unilex.info/case.cfm?id=399.
[52]*Id.*
[53]*Supra* note 6.

regard, exhibit a restraint that should more preferably be emulated to yield the most legally and logically sound solution in every case.

VI. CONCLUSION

It has been established that the UNIDROIT Principles, as a whole, do not represent the general principles on which the CISG is based. At the same time, however, it is unwise to completely disregard them, due to their utility – they are demonstrably effective in that they have overarching similarities to the CISG, and also they reflect a constantly updated, current understanding of international commercial law. The author strongly suggests that courts and tribunals must use specific provisions of the UNIDROIT Principles to understand analogous provisions of the CISG, but this should be done only when the context permits such use. Moreover, the Principles should only be applied in an interpretative capacity, and not as a substantive law in themselves. As far as the attitude of courts and tribunals is concerned, the author believes that a more nuanced and controlled use of the Principles will uphold the intentions of the CISG's drafters to apply it uniformly, as well as help in understanding the Convention itself more completely. Restraint must be exercised while relying on the Principles; however, when it is salutary to use them, they must not be ignored, because that would be an unnecessary application of restraint.

The incidence of international commercial transactions is only increasing, leading to a greater utility of the CISG in the second decade of the 21st century. This, in turn, requires that the somewhat rigid CISG become more pliable and have the ability to adapt itself in a manner it previously has not been able to, due to it being a treaty negotiated by (often dogged) sovereign states. The use of the UNIDROIT Principles can help ensure this to an extent, due to them being a more contemporary and up-to-date set of rules. The author

hopes that the Principles are used judiciously – and yet, adequately – in future adjudications.

THE LABYRINTH OF RAPE BY FALSE PROMISE OF MARRIAGE: A CRITICAL ANALYSIS

Shubh Arora[*]

Abstract

For decades now, the Indian judiciary has recognized that sex obtained by deception amounts to rape. The focus of deceptive sex, however, is concentrated on false promise of marriage. The significance of the institution of marriage in India and its ability to grant legitimacy to sexual relationships in our social context, rightly justify the special focus. The courts need to be appreciated for correctly acknowledging the complexities that surround the cases of rape by false promise of marriage. However, the judgments on the offence are marked by several flaws. These flaws are reflected in the form of unsound reasoning and unpalatable observations. These errors have not been rectified by the Supreme Court in its judgments. Consequently, decisions of various High Courts are replete with markers of unfairness. This paper attempts to highlight the factors courts account for while deciding such cases. These factors are critically analyzed to bring to the fore the need of urgent correction,

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especially due to changes in the Indian social terrain. It is proposed that the considerations reflecting legitimate concerns need to be preserved whereas the flawed logic and opinions need to be weeded out. This will ensure that the law on intercourse obtained by false promise of marriage meets the touchstones of justice and fairness.

I. INTRODUCTION

Sex obtained without consent is rape and consent obtained by fraud or deception is no consent. Therefore, sexual intercourse for which a woman's consent is obtained by deception should be rape.[1] Scholars from around the world combine these two basic tenets of law to advocate for more stringent penal provisions for those guilty of rape-by-deception, as they prefer to call it. In India, the focus is on rape by false promise of marriage, an indigenous species belonging to the genus of rape-by-deception. The special position of the institution of marriage in India and the air of awkwardness that surrounds matters like pre-marital sex in the Indian society result in tougher dealings for the courts.

The Indian judiciary has encountered cases of rape by fraud of marriage for decades now. *Anurag Soni v. State of Chhattisgarh* ("***Anurag Soni***"),[2] a very recent case, sparked the need for more intensive research on the issue. This article is an attempt to address such need. The press conveniently reported that the apex court held

[1]Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 THE YALE LAW JOURNAL1372, 1376 (2013).
[2]2019 SCC OnLine SC 509.

that sex on false promise of marriage is rape.[3] An analysis of the offence reveals that the matter is much more complex, and this generic statement highlights a miniscule figment of the germane legal context.

This article seeks to throw light on various aspects of rape by false promise of marriage. Part II discusses the status quo of the offence and extracts the key considerations for the courts to decide the guilt or innocence of the accused. The research relies on judgments of the Supreme Court and of various High Courts that are either very recent or have been relied or cited in decisions of the apex court. A critical analysis of the flaws in the reasoning of the courts follows in Part III. The courts may not have based their judgment solely on these flaws, but these errors have indeed unfairly favoured the accused. Unpalatable observations have downgraded the quality of judgments that would have otherwise set the right standards for similar cases. This part does not question the correctness of the judgments regarding either conviction or acquittal as that would require accounting for many more aspects of law. There is, rather, a simple extraction and critical analysis of some key problems in the decisions. The criticism majorly targets, *inter alia*, three errors: consideration of age and education of the prosecutrix, equation of desire with consent and, strict adherence to Section 90 of the Indian Penal Code. Part IV covers the proper course for better dissemination of justice in the future. An urgent need to rectify the errors emerges from the gradual acknowledgement of live-in relationships and recognition of casual sex in the Indian society, which complicates the matter to another level. A brief conclusion, in Part V, sums up the gist of the article.

[3]*Sex on false promise of marriage is rape: Supreme Court*, THE HINDU, (Last visited on Apr. 13, 2019,11.40 PM), https://www.thehindu.com/news/national/sex-on-false-promise-of-marriage-is-rape-supreme court/article26831183.ece; *Sex on False Promise of Marriage Is Rape: Supreme Court*, NDTV, (Last visited on Apr. 15, 2019,11.40 PM), https://www.ndtv.com/india-news/sex-on-false-promise-of-marriage-is-rape-supreme-court-2023409.

II. THE FACTORS CONSIDERED BY COURTS IN DECIDING CASES OF RAPE BY FALSE PROMISE OF MARRIAGE

Anurag Soni is a case with an uncomplicated factual nexus. The accused proposed to marry the prosecutrix and had sexual intercourse with her. She initially objected to intercourse but consented on the assurance of marriage. It was revealed later that he already had plans to marry another girl, and this was known to his family as well. He kept the prosecutrix in dark about his intention of marrying another girl. The apex court held that consent was given under misconception of fact and does not amount to a valid consent under Section 90 of the Indian Penal Code. The accused had no intention to marry the prosecutrix right from the inception. He only had mala fide motives of using her to satisfy his lust. But for the promise, she would not have consented. This is a clear case of cheating and deception. The accused was proven to have had sexual intercourse without her consent and, hence, was convicted of rape under clause secondly of Section 375.[4]

The judgment call was relatively easier for the court. It was a lucid case of luring a woman into bed by giving her false assurance of marriage. Sufficient evidence was on record to show that the accused had already planned his marriage with another girl. This made it, prima facie, evident that there was no intention to marry the prosecutrix from the initial stage. This judgment, however, reflects only a small part of the rape-by-deception law in India. The current position of law on these cases is a product of multiple rationales that emanate from decisions of the Supreme Court and various High Courts on similar, but more complex cases.

A number of factors have been accounted by courts that are of major importance while deciding cases of the kind. These have shaped the reasoning of judgments of the Supreme Court and the High Courts

[4] *Anurag Soni*, *supra* note 2.

over the years. These subjective considerations make the matter far more complex than other cases of rape. Proving the guilt of the accused beyond reasonable doubt becomes an unrealistic task for the prosecution owing to massive scope of defences available to the accused. There exists a labyrinth of subjective considerations, that are, more often than not, beyond evidentiary bound.

A. Intention of the Accused from the Initial Stage

The offence is complete only when the accused had no intention or inclination to marry the prosecutrix right from the beginning.[5] Promise being a hoax from the very starting point of interaction with the prosecutrix is a sine qua non of the offence. Guilt cannot be established when the accused actually intended to marry but could not do so because of factors beyond his control.[6] These factors can range right from opposition against marriage by his family members[7] to lack of monetary resources for the ceremony of marriage.[8] The falsity of the promise can be established only when proved that the idea of not keeping it was firmly rooted in the accused's mind.

The law does not take into account breach of promise at a later date when the evidence does not suggest beyond reasonable doubt that the promise was not intended to be fulfilled from the beginning.[9] Subsequent failure to marry is not taken to imply that the assurance was made with the knowledge of it being false.

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[5]*Id.*,¶39; State of Uttar Pradesh v. Naushad, (2013) 16 SCC 651, ¶19; Deelip Singh v. State of Bihar, (2005) 1 SCC 88, ¶42; Uday v. State of Karnataka, (2003) 4 SCC 46, ¶24; Jayanti Rani Panda v. State of West Bengal, 1984 Cri LJ 1535, ¶7.
[6]Deepak Gulati v. State of Haryana, (2013) 7 SCC 675, ¶21.
[7]Uday, *supra* note 5, ¶25; Abhoy Pradhan v. State of West Bengal, 1999 SCC OnLine Cal 99, ¶16.
[8]Titun Kumar Banik v. State of Tripura, 2014 SCC OnLine Tri 647, ¶7.
[9]Dhruvaram Murlidhar Sonar v. State of Maharashtra, 2018 SCC OnLine SC 3100, ¶23; Deepak, *supra* note 6, ¶21; Deelip, *supra* note 5, ¶46; Abhoy, *supra* note 7, ¶16.

Conviction for rape is the simple end result when the promise was made only to obtain sex. The consent obtained for such act(s) of sexual intercourse is vitiated by fraud and is considered to be no consent at all.[10] When the hope of marriage is used as a trap to lure a woman into bed for satisfaction of lust, the accused is not allowed to escape unpunished. The dishonesty in his intentions is often reflected by his behavior subsequent to him being confronted by the prosecutrix to fulfil his promise. Often the accused either outrightly refuses to marry or absconds after giving further assurances.[11] Disowning the woman right after getting the knowledge of her pregnancy is also not very uncommon.[12]

Certain legitimate and pragmatic issues also contribute in ascertaining whether the intentions of the accused were malicious. The issue of compatibility is of most significance. It is quite probable in such cases that the promise was initially made with true intentions of fulfilling it but the accused in the course of his relationship realizes that the marriage may fail sooner or later due to incompatibility between the two. This concern was discussed very recently by the Telangana High Court in *Safdar Abbas Zaidi v. State of Telangana*.[13] The court observed that a party may choose to withdraw from a relationship due to physical, emotional or psychological incompatibility. Under such circumstances, they cannot be compelled to marry just because they have had a sexual relationship.[14] A sexual relationship may gradually dry out because of lack of physical or psychological comfort between the couple. In such situations, marriage cannot be imposed on either of the parties as it is a matter of choice based on an individual's

[10]Tekan v. State of Madhya Pradesh, (2016) 4 SCC 461, ¶4; Naushad, *supra* note 5, ¶22; Yedla Srinivasa Rao v. State of Andhra Pradesh, (2006) 11 SCC 615, ¶17.
[11]Yedla, *supra* note 10, ¶2.
[12]Naushad, *supra* note 5, ¶2; Yedla, *supra* note 10, ¶2.
[13]2018 SCC OnLine Hid 179, ¶11.
[14]*Id.*

notions of suitability.[15] The courts have, therefore, an extra burden of being wary about not construing such withdrawal from a sexual relationship as a false promise of marriage.

The issue of incompatibility was not addressed in earlier related cases of the offence but raises a genuine issue. It becomes all the more relevant when the law today acknowledges live in relationships[16] that may be devoid of any long-term commitments. This brings into picture another challenge for cases of rape by false promise of marriage. It provides an unchecked defence to the accused to plead that he backed out of his promise because of the realization of unsuitability between them. This leaves very little scope for the prosecution to proceed with the charges of cheating, let alone rape. The victim may become an easy target for the accused to prove his incompatibility, on either physical or psychological bases.

Caution is also practised in cases where the frustration of a break-up vents out as allegations of rape by false promise of marriage. It has been held that if a man refuses to marry after a break-up, the frustration of the broken relationship, where sexual intercourse was also involved, cannot be converted into the offence of rape.[17] The prosecution is again hamstrung in such cases as the law has neither the means nor the authority to delve into the real reasons behind the relationship failure. This failure may very well be induced by the accused after his purpose of obtaining intercourse by deceit had materialized. This gives him the power to guise his malicious exit from the sexual relationship as a result of natural course of events that tore the relationship apart. The victim may be rendered helpless and may become a mere spectator of the accused's concocted story.

[15]Mahesh Balkrishna Dandane v. State of Maharashtra, 2014 SCC OnLineBom 348, ¶8.
[16]Mahesh, *supra* note 15, ¶6.
[17]Tejas Udaykumar Sarvaiya v. State of Maharashtra, 2016 SCC OnLineBom 6347, ¶10.

A case may also track its origin to the fallout of a mutual plan of marriage getting frustrated.[18] The frustration may be brought about by harsh conditions for marriage being imposed by either of the parties that may not at all be amenable to the other party. The courts have to be very careful to avoid misconstruction of the consequent allegations as fitting case of false promise of marriage.

B. The Personality of the Prosecutrix

The age and education of a woman are held to be very relevant in deciding not only the culpability of the accused but also the voluntariness of the prosecutrix in such acts.[19] A major and educated woman is supposed to know the nature and quality of the act and hence her participation in sexual intercourse is not to be taken to be completely obtained by fraud.[20] She should know the consequences of having pre-marital sex.[21] She is presumed to possess sufficient intelligence to ascertain the moral quality of the act and the consent given by her on a promise of marriage is given only after due deliberation on the pros and cons of indulgence in sexual intercourse before marriage.[22] Her age and education status make her capable of understanding the implications of the act and, hence, play a vital role in condoning the act of the accused. The law does not consider a major girl studying in college or pursuing her profession vulnerable to

[18]Nandan Sadanand Bendarkar v. State of Maharashtra, 2015 SCC OnLineBom 2044, ¶17.

[19]Tilak Raj v. State of Himachal Pradesh, (2016) 4 SCC 140, ¶16; Deepak, *supra* note 6, ¶26; Yedla, *supra* note 10, ¶10; Kunal Mandaliya v. State of Maharashtra, 2016 SCC OnLineBom 10600, ¶6; Hemant Choubey v. State of M.P., 2014 SCC OnLine MP 8193; State v. Ashish Kumar, 2013 SCC OnLine Del 5182, ¶12; Sujit Ranjan v. State, 2011 SCC OnLine Del 429, ¶17.

[20]Deepak, *supra* note 6, ¶26; Tejas, *supra* note 17, ¶7; Hemant, *supra* note 19.

[21]Kunal, *supra* note 19, ¶6; Mahesh, *supra* note 15, ¶6; Sujit Ranjan, *supra* note 19, ¶17.

[22]Diptesh Roy v. State of West Bengal, 2015 SCC OnLine Cal 8375, ¶8; Ashish, *supra* note 19, ¶24.

rape by false promise of marriage. If in such cases the offence has to madeout, then special circumstances may have to be proved.[23]

The social background of the prosecutrix and the accused are also considered before concluding the guilt.[24] If the partners belonged to different religions or castes, then the improbability of their marriage is presumed to have been in the knowledge of the prosecutrix. If she, nevertheless, engages in sex with the accused then it is considered a reprehensible act on her part.[25] The very idea of unfavourable prospects of marriage being in the imagination of the prosecutrix tend to weaken the credibility of her allegations of rape in such cases. So, if she was aware of the differences between the communities of the two or the heavy resistance she may receive from her parents for the marriage, the prosecutrix cannot be said to be deceived into having intercourse on pretext of marriage.[26]

Courts across India have also observed that if a fully grown-up woman consents to sex before marriage and engages in it on a regular basis then it proves promiscuity on her part and the promise has no significant impact on her consent.[27] She willingly and voluntarily consents to sexual intercourse as it was desired by her. She seeks pleasure as much as the accused and, therefore, plays an equal role in the act.[28]

[23]Tejas, *supra* note 17, ¶9.
[24]Yedla, *supra* note 10, ¶10.
[25]Deelip, *supra* note 5, ¶41; Uday, *supra* note 5, ¶25; Angad v. State of Maharashtra, 2018 SCC OnLineBom 277, ¶35; Hemant, *supra* note 19; P. Govindan v. State, 2008 SCC OnLine Mad 470, ¶19.
[26]*Id.*
[27]Shyamapada Tewari v. State of West Bengal, 2009 (1) CCLR (Cal) 266, ¶14; Govindan, *supra* note 25, ¶20; Jayanti, *supra* note 5, ¶7.
[28]Yedla, *supra* note 10, ¶10.

C. The Materiality of the Promise in her Consent

After a multitude of wide-ranging impediments arises another complexity that intensifies the labyrinth of rape by false promise of marriage. If at all the prosecution succeeds in proving beyond reasonable doubt all the above-mentioned factors against the accused, the court may put another burden on its shoulders, i.e., to prove that the consent for sexual intercourse was given solely on the basis of the promise made or assurance given by the accused and so did the accused know or believe.[29]

The consent for intercourse may arise out of natural love and affection. The promise may not at all be material to her consent. The existence of evidence to prove that had there been no promise of marriage, she had not consented, becomes a requisite to establish the offence.[30] In some cases the accused may not have knowledge or reason to believe that the consent was only a consequence of her belief in his promise. He may firmly hold that consent was a result of her deep love for him. In such a case, courts negate the establishment of rape.[31]

The net resultant of a successful prosecution, achieved after the establishment of the three requisites, is conviction underclause secondly of Section 375 read with Section 90 of the Indian Penal Code. Relevant part of Section 90 reads as –

"90. Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or

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[29]Dhruvaram, *supra* note 9, ¶23; Deepak, *supra* note 6, ¶21; Uday, *supra* note 5, ¶25; Kunal, *supra* note 19, ¶6; Hemant, *supra*note 19; S. Albert v. State, 2009 SCC OnLine Mad 382, ¶22; Govindan, *supra* note 25, ¶21.

[30]*Id.*

[31]Deepak, *supra* note 6, ¶21; Hemant, *supra* note 19; Sujit Ranjan, *supra* note 19, ¶17.

under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;"[32]

Consent obtained for sexual intercourse by deception is tainted by misconception of fact and has no value or meaning in the eyes of law. Such act of intercourse is deemed to be without the consent of the prosecutrix and is termed as rape under clause secondly of Section 375. But what amounts to misconception of fact under Section 90 is far from settled.[33]

In *Re: N. Jaladuand Anr.*,[34]it was held that the expression 'under the misconception of fact' is broad enough to include all cases where consent is obtained by misrepresentation. The court further clarified that though in the law of contracts the consent obtained by fraud has only the effect of being voidable, in criminal law it cannot be effected to justify what would otherwise be an offence.[35] In *Jayanti Rani Panda v. State of West Bengal*, the scope of Section 90 was narrowed to cases where from the very inception the accused had no intention to marry.[36] In subsequent cases, the Supreme Court has rightly acknowledged the two limbs of the Section; consent obtained by misconception of fact and the knowledge or reason to believe that such is the nature of consent. The prosecution faces the heavy burden of not only proving that consent was a result of misconception of fact

[32]Penal Code, 1860 § 90.
[33]*See* Surya Bala & Rahul Saha, *Make No Promises and Tell Me No Lies: A Critique of Deelip Singh v. State of Bihar AIR 2005 SC 203*, 1 NUJS L. REV. 149 (2008).
[34]1911 SCC OnLine Mad 3.
[35]*Id.*,¶5.
[36]Jayanti, *supra* note 5, ¶7.

but also that the accused knew or had reason to believe that so was the case.[37]

III. FLAWED REASONING AND DEMEANING OBSERVATIONS: A CRITICAL ANALYSIS

By not letting deceptive sex go unpunished and taking cognizance of it as the offence of rape, the Indian courts acknowledge the seriousness of the harm caused to the victims in such cases. Sex-by-deception causes grave trauma to the victim and may cause a lifelong disability to become intimate ever again. The victim faces long term psychological damage after discovering the truth which may engender a fear of men in her.[38] The breach of trust and the consequent violation of body and dignity may cause deep depression, sleeplessness, loss of appetite and frequent panic attacks.[39] The trail of misery and ignominy may adversely affect her mental health on a constant basis.[40] Loss of self-esteem and a tortured conscience also aggravate the situation.[41]

Indian law has evolved to focus on rape by false promise of marriage among a long list of offences falling under the category of rape-by-deception. This is partly because of the culture and psyche of the Indian society and partly because adherence to antiquated notions of a woman's sexuality. In a country where marriage even today seems to

[37]Pradeep Kumar v. State of Bihar and Anr., (2007) 7 SCC 413, ¶9; Deelip, *supra* note 5, ¶39; Uday, *supra* note 5, ¶25.
[38]Jennifer Temkin, *Towards a Modern Law of Rape*, 45 THE MODERN LAW REVIEW 399, 403 (1982).
[39]Patricia J. Falk, *Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking about the Riddle of Rape-by-Fraud*, 123 THE YALE LAW JOURNAL 353, 361 (2013).
[40]Deelip, *supra* note 5, ¶46.
[41]Joel Feinberg, *Victims' Excuses: The Case of Fraudulently Procured Consent*, 96(2) ETHICS 330, 337 (1986).

grant legitimacy to sexual relationships, a promise of marriage proves to be extremely material to a woman's consent for intercourse. Pre-marital sex is still a matter of censure in our society. Our society still carries a baggage of different notions of morality where sex before marriage is still a hush-hush issue.[42] The rumors of pre-marital sex very much carry the force to mar the virtue of a woman. Women deposing that they had not consented to sex but for the promise of marriage, is not rare in these cases.[43] Accused may convince the woman of the moral correctness of the act by highlighting their future as husband and wife.

Undoubtedly, marriage is central to rape-by-deception in India. The courts' conservative notions about a woman's sexuality have a major role in this significance and further explain their aloofness to other categories of deceptive sex. A woman who consents to pre-marital sex on a false promise of marriage is presumed to value her sexuality more than those who may agree to it on other considerations. A woman trading sex for any less a consideration is held not to be a possessor of virtue that the law of rape intends to protect.[44] Marriage is a considerably huge inducement and a woman falling prey to such a trap is worthier of judicial safeguards. Such anachronistic conservative notions are unfortunately still a part the sphere of rape law despite legislative reforms.

Nevertheless, the Indian law has to be appreciated for accurately recognizing the need to have penal provisions for deceptive sex with special emphasis on marriage. But the end results are case laws that are a mire of flawed reasoning and derogatory observations. Such

[42]Safdar, *supra* note 13, ¶11.
[43]Karthi v. State, (2013) 12 SCC 710, ¶3; Sujit Kumar Pati v. Smt. Atasi Singha Mahapatra, 2008 SCC OnLine Cal 274, ¶2.
[44]*Cf.* Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 19 (2014) (quotes Jeffrie Murphy, who states that rape-by-fraud is considered less worthy of social intervention based on the way a woman values her sexuality).

deviation is in discord with the high standards that the Indian judiciary has set in the context of rape law. The Courts have failed to either acknowledge or rectify the grave errors of law made by their earlier decisions. The High Courts, even after correctly acquitting the accused based on discrepancies in evidence, have gone on to produce illogical and unpalatable observations. The overall process of establishing the innocence of the accused is founded on unsound grounds. The immense burden on the prosecution is a perverse product of considerations that originate from little reason.

A. Focus on Age and Education and Difference in Castes of the Prosecutrix and the accused

The most prominent flaw is the illogical focus on the age and education of the prosecutrix.[45] As discussed above, a major and educated girl is presumed to understand the moral quality and implications of pre-marital sex. What flows from this presumption is that a fully-grown educated woman is hardly susceptible to fraud of false promise of marriage and the subsequent acts of deceptive sexual intercourse. The consent of such a woman, in the eyes of law, cannot be tampered by simply a promise or an assurance of marriage. The reasoning of courts behind what age and education bring to the table in such cases needs to be analyzed.

It is correct that a minor or an illiterate woman is much more vulnerable to getting lured into bed on the pretext of marriage on a future date. They become easy targets for the perpetrators owing to lesser exposure to the harsh reality of deception being a common weapon for executing both body and property offences. Their beliefs are easier to mold as per the malicious intentions of the perpetrator. On the other hand, the mental and psychological resources possessed by a major or an educated girl are likely to diminish malleability of

[45] *Supra* note 19.

her beliefs. Her knowledge and exposure are advantageous in reinforcing her defences against like deceptions but to hold it as a canon gives the impression that these women are impervious to such false promises. The courts, unfortunately, do hold it as a standard rule, a rule that comes to no terms with the reality.

May it be a 19-year old high school student[46] or 28-year old doctor,[47] marriage will be perceived by both to legitimize their sexual relationship. May it be a 19-year old college student[48] or a 20-year old employee in a multinational[49] or a 25-year old lecturer,[50] it cannot be conclusively held as a fact that their consent is not likely to be vitiated by a false promise of marriage. Age and status of education are indeed markers of a fortified understanding of the intricacies of human interaction, but it cannot be denied that offences deploying deception are rife even against the better qualified and experienced people. Fraud is well-equipped to penetrate the psychological fortifications of even the modern pragmatic person. Therefore, a major and educated woman should not be taken to be protected from fraud that uses her body for satisfaction of lust. A promise of marriage is capable of tainting her consent. Age and education may help little when she is maliciously trapped in a dexterously woven web of sugar-coated lies.

One should always be cautious in drawing comparisons or analogies between offences against property and those against human body, especially that of rape.[51] But in confronting the logically depleted observations of courts regarding the age and education of the

[46]Deepak, *supra* note 6.
[47]Tejas, *supra* note 17.
[48]Uday, *supra* note 5.
[49]Ashish, *supra* note 19.
[50]Kunal, *supra* note 19.
[51]Victor Tadros, *Rape without Consent*, 26Oxford Journal of Legal Studies 515, 538 (2006); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 146 (1998).

prosecutrix, some comparison may be extremely relevant. In criminal law, deception is the crux of the offence of cheating. In the law of contracts, the parallel is the provision regarding fraud. Even a superficial analysis of the provisions reveals that the focus in deciding the guilt or liability of a party is on their acts and not on the personal status of the complainant. There exists no presupposition that a better experienced or qualified person is less vulnerable to the harms of deception. 'What was done' is more important than 'who was affected' in these cases. Drawing a comparison, there is no justification whatsoever to have a different stance when it comes to cases of rape by false promise of marriage.[52] To hold that a major and educated girl is capable of understanding the nature and implication of pre-marital sex is not convincing at all to hold that fraud of marriage cannot vitiate her consent given for that very act of intercourse.[53]Concentrating attention on other factors related to conduct of the accused is likely to result in decisions founded on sounder grounds.

The knowledge of difference between the caste or community of the two is also taken as a pointer of voluntariness of the prosecutrix.[54] Courts have held on ample occasions that if the woman had a belief of the prospects of marriage not materializing then deception cannot be said to be alter her consent for sex.[55] There exists a presumption that marriage between such a couple is improbable because of social sanctions and therefore the consent for intercourse cannot be based on promise of marriage. But this presumption is in stark contradiction with other judgments of the courts that emphasize on an individual's

[52]*Cf.*Falk, *supra* note 51, at 147-48 (draws analogy to property offences to argue that rape law must be extended to cases of deceptive sex).
[53]*Cf.*Falk, *supra* note 51, at 163 ("The third category, false promises, affects voluntariness because the victim does not assume the risk of default; these should be actionable as rape or gross sexual imposition if they are coercive enough.").
[54]*Supra* note 25.
[55]*Id.*

autonomy to choose her life partner irrespective of barriers of religion, caste or class.[56] The law today gives the individual the liberty to fearlessly choose her partner in the aegis of special statutes for this purpose.[57] On the contrary, to hold that differences in caste must deter a woman to believe in her marriage with another, is an assault on a woman's freedom to make her own decisions. This is just another example of the law unjustly providing the accused the opportunity to avail the benefit of doubt.

B. Desire of the Prosecutrix to have Sex

The desire of the prosecutrix to have sexual intercourse condones the act of fraud by the accused.[58] If the girl is equally keen on engaging in a sexual relationship before marriage and does so on a false promise of marriage, the offence is held to lose its gravity.[59] The participation in such cases is voluntary. This conclusion is based on the premise that deceptive sex is wanted sex. The courts hold that women in such cases, nevertheless, desire sex as against cases of violent rape where sex is imposed on them. Equating desire with consent leads to a number of perverse outcomes.[60]

Without any hint of doubt, violent rapes where intercourse is imposed on the victim against her will are a notch ahead not only in their seriousness but also the threat, they pose to the society at large. The quantum of harm caused to the victim is more devastating and the chances of recovery are lesser than that in cases of rape-by-deception.[61] The *actusreus* in such scenarios is not only limited to sexual gratification but accompanies violence of a dehumanizing

[56]Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368; Shakti Vahini v. Union of India, (2018) 7 SCC 192.
[57]Special Marriage Act, 1954.
[58]Yedla, *supra* note 10, ¶10; Uday, *supra* note 5, ¶25.
[59]*Id*.
[60]Rubenfeld, *supra* note 1, at 1404-05.
[61]Falk, *supra* note 51, at 144.

magnitude. However, violence and deceit both violate a woman's voluntariness for the act.[62] Force is used in the former whereas lies are used in the latter to make a mockery of consent.[63] On the face of it, a case where sex is welcome by the woman may not seem to be able to match the gravity of forceful sex. After all, the woman desired sex and the only wrong done is just some tampering with her consent. Her needs are fulfilled by only giving a false promise.[64] The difference between violent rape and rape by false promise of marriage may seem to be that of one between harm and non-benefit.

The major flaw in this argument lies in the equation of consent with physical desirability of sex.[65] It is erroneous to hold that consent can be presumed if a woman desires physical pleasure derived from sex.[66] It leads to the absurdity that when a woman desires the pleasure of sex and it is duly provided by the accused, she consents to the act. The existence or showcase of desire cannot avail the accused of the license to satisfy the desire by deceit. The accused cannot be allowed to deploy false promise of marriage to obtain consent solely because the woman was equally interested in having sex. The consent put forth is based on the hope of marriage in the near future and not because an opportunity for having intercourse was sensed. The act of sexual intercourse not being forced on the prosecutrix against her will, coupled with desire on her part that stems from tainted consent, cannot give a court the liberty to mark it as an act of promiscuity on her part.[67]

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[62]Feinberg, *supra* note 41, at 339.
[63]Falk, *supra* note 39, at 360.
[64]*See* Temkin, *supra* note 38, at 405 ("However reprehensible his conduct, it is sexual intercourse with him that he offers her. He has not deprived her of the right to choose whether to have intercourse with him or not.").
[65]Rubenfeld, *supra* note 1, at 1404-05.
[66]*Id.*
[67]But see Shyamapada, *supra* note 27, ¶14.

Furthermore, violation of consent in rape by fraud cases, because of presence of desire, cannot be allowed to be pigeonholed to the offence of cheating.[68] There is a simultaneous violation of dignity,[69] bodily integrity[70] and, most importantly, sexual autonomy[71] of the victim. Sexual autonomy gives a person, *inter alia*, the freedom to decide when, where and with whom she wants to have intercourse with, if she desires it in the first place.[72] Undermining sexual autonomy need not require violence or threat of violence.[73] A promise of marriage is, in most cases, extremely material to her consent. It plays a vital role in the exercise of her sexual autonomy. So, when a woman consents to sexual intercourse on being lied about her future as the perpetrator's wife, it is probable that the false promise was the only propeller of her seemingly free consent. There is a strong chance that she had not consented had she known that her partner is not her husband to be. Her keenness on having sex may very well be a product of the lies and even if not so, the violation of her sexual autonomy is inevitable. Equating consent with desire to condone the acts of the accused also belittles the concept of sexual autonomy, which is indispensable to rape law across the globe.

The acts of the accused are condoned also when the consent for intercourse arose out of love or passion of the prosecutrix and not solely from the promise of marriage.[74] But the aspect that has been neglected by the judiciary is that this very love or passion may be a product of clever lies used to manufacture such emotions on part of

[68]*Contra* Bala & Saha, *supra* note 33, at 150, 151.
[69]McJunkin, *supra* note 44.
[70]Temkin, *supra* note 38, at 400; Falk, *supra* note 51, at 144.
[71]Stephen J. Schullhofer, *Taking Sexual Autonomy Seriously: Rape Law and beyond*, 11 LAW AND PHILOSOPHY 35, (1992).
[72]Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 639 (2005); Temkin, *supra* note 38, at 401.
[73]Tadros, *supra* note 51, at 516.
[74]*Supra* note 31.

the prosecutrix, the promise of marriage being one of them. The accused may have been weaving a web from the beginning the culmination of which might be the promise of marriage. The consent that may prima facie seem to be a result of genuine feelings may be a product of a calculated deceptive plan. It is conceded that the law has neither the authority nor the resources to look so deep into emotions to reach any meaningful conclusion However, there are cases where the behavior and conduct of the accused starkly show that there could not have been any other motive but satisfaction of lust. This may be reflected in his conduct when he completely disowns or abandons the prosecutrix after pregnancy.[75] In such cases, the courts should reject the defence of consent arising out of feelings of the prosecutrix.

C. Strict Adherence to Section 90

Another obstacle hindering cogent reasoning to back the decision is undue adherence to Section 90 for concluding the guilt or innocence. The dearth of a lucid explanation of the expression 'misconception of fact' should not be allowed to thwart the process of securing justice. The different pre-requisites attached to 'misconception of fact' are marked by insufficient support by sound reason. The current picture is painted by a mélange of definitions that suited the fancies of the courts.[76]

The central issue of contention is whether a promise can be a fact under Section 90, or likewise, whether a false promise can be a misconception of fact.[77] Most judgments hold that simply a promise

[75]*See* Naushad, *supra* note 5, ¶19 (The court held that the accused abandoning the prosecutrix after her pregnancy shows that he had no intention of marrying her).
[76]*SeeIn re* N. Jaladu, all cases of misrepresentation were included in misconception of fact. In Jayanti, it was held that for misconception, the fact must be of immediate relevance. In Uday, it was held that the promise must be hoax from the beginning to come under misconception of fact. In Pradeep, it was held that a promise to marry without anything more cannot amount to misconception of fact.
[77]Bala &Saha, *supra* note 33, at 150.

without anything more does not amount a misconception of fact. More recent cases reflect on the two limbs of the Section. Here again, to establish whether the prosecutrix was tricked by the promise, factors like the age and education of the prosecutrix and desire on her part are given prime importance. To support the application of the second limb, courts try to ascertain whether the accused had knowledge or reason to believe that the consent for sex was given solely on the basis of the promise of marriage and was not a result of love and affection between the couple.[78]

While factors like age, education and desire are wrong considerations, ascertaining knowledge or belief on the accused's part is unrealistically difficult too. The accused always gets the option to plead that he believed the consent was out of love between the two. But here again, in concord with the mindset of our society, a girl may put love and pre-marital sex on very different pedestals. While she may have a love affair, the very promise of marriage may very well turn out to be a deal maker for giving consent for sexual intercourse. It gets practically very difficult to find if consent was a result of love affair or solely the promise of marriage. A construction of meaningful consent with flimsy foundations as these makes the perfect recipe for delivery of gross injustice.

Section 90 does not define consent but defines in a limited sense what is not a valid consent.[79] Consent, being a term having a broad spectrum of meaning, needs to be looked at expansively in rape cases. It is not necessary to narrowly construct the contours of a valid consent around this section only. In *Deelip Singh v. State of Bihar*, the Supreme Court observed that Section 90 cannot be construed as providing an exhaustive definition of consent for matters of criminal law. It further stated that many decisions of courts have gone past the

[78] *Supra* note 37.
[79] Kaini Rajan v. State of Kerala, (2013) 9 SCC 113, ¶12.

language of Section 90 and are based on the wider meaning guided by the etymology of the word 'consent'.[80] This observation, unfortunately, was not adopted by courts in their reasoning with the only exception of *Karthi v. State* where no reference, whatsoever, was made to Section 90 and the judgment was based on common notions of a valid consent.[81]

A reasonable distance from the section will allow courts to embark on a more expansive construction of the requisites of a valid consent. Such interpretations will suit the cases of rape by false promise of marriage where subjective considerations are fairly dominant. To earmark valid consent only for the test of Section 90, especially in cases with paucity of objective evidence, is unsuitable for the factual nexus of cases of rape by false promise of marriage. The complexities that surround valid consent in cases of deceptive sex cannot be addressed by strict adherence to the simple formula incorporated in Section 90.

IV. THE CHALLENGES AND THE COURSE AHEAD

The layers of subjectivity that surround issues like emotions, feelings, marriage, promises, sex and, most importantly, consent, demand the courts to be cautious while proceeding in the sphere of deceptive sex. Evidence to prove guilt beyond reasonable doubt is rare and circumstantial evidence is heavily relied on. Very correctly, there exist a number of checks in place to minimize the scope of frivolous litigation but there is a lot more to account for and even more to dump out of the judicial understanding of rape-by-fraud.

[80]Deelip, *supra*note 5, ¶23.
[81]Karthi, *supra* note 43.

The mechanism to negate guilt unless nefarious intention of the accused is proven, is founded on sound justifications. If the accused intended to use the prosecutrix only as an object for satisfaction of his lust, then there remains no doubt about his conviction for rape. However, to prove such guilt is a gargantuan task. A chain of defences is rightly available to the accused which is necessary to ensure the meaningful exercise of freedom of choice on his part.

There exist numerous possibilities. The accused might have really intended to marry but could not really execute his plans because of stern opposition by his family, a change in plans regarding his career, or any other factors beyond his control. This change of events is what demarcates false promise from a breach of promise. This demarcation is fundamental in establishing guilt. As rightly identified in more recent cases, marriage is matter of personal choice. During the course of the relationship a person may find his partner physically, mentally or psychologically incompatible and, hence, unsuitable as a partner for the rest of his life. In these cases, too, the breach of promise of marriage given at the initial stage should and does not attract criminal sanctions.

Cases of malicious prosecution emanating from the fallout of a break-up are also not very uncommon. Cases where false allegations of rape are deployed after a mutual cessation of sexual relationship frequently come to court.[82] The plans of marriage may also get frustrated by imposition of unreasonable condition by side of the prosecutrix.[83] In all these cases, marriage cannot be imposed on the accused. The acts of sexual intercourse by mutual consent do not, by any stretch of imagination, amount to rape.

[82]Tejas, *supra* note 17, ¶8.
[83]Nandan, *supra* note 18, ¶17.

Apart from all the checks in place, more complexities are introduced as the Indian society opens up on and recognizes the trend of live-in relationships. These relationships are often devoid of long-term commitments and casual sex may be frequently engaged in. It is to be further realized that lies are becoming more common in the modern-day social exchange process. The promise of marriage may be casually hurled at to enhance one's prospects of sexual intercourse without attaching any significance to it.[84] The nature of the relationship and the delivery and frequency of promise may become relevant is such situations. Criminalizing such a lie as rape may have destructive consequences.

A further dive into the materiality of the promise in altering the consent for sexual intercourse raises multiple other technicalities. All these concerns combined hold firm roots in reason. But the unsound reasoning of the courts coupled with appalling observations regarding age and education of the prosecutrix, desire on her part and the use of Section 90 need to be gradually trashed. These elements make more cumbersome the already uphill task of the prosecution. The wariness of the courts is justified in cases of rape by false promise of marriage, but this caution should not result in iniquitous burden on prosecution's shoulders. The victims should not be denied justice by favouring the accused massively in the garb of presence of reasonable doubt. The courts themselves are observed of creating doubt by their own notions of pre-marital sex and a woman's virtue. There remains a big responsibility on the judiciary to shed off these remnants of ancient conservative thinking that are vehemently rebutted by the relatively modern concepts of sexual autonomy and the like. The violation of a woman's consent by false promise of marriage and consequent infringement of her sexual autonomy, need to be taken

[84] *See* William D. Marelich, Jessica Lundquist, Kimberly Painter and Mindy B. Mechanic, *Sexual Deception as a Social-Exchange Process: Development of a Behavior-Based Sexual Deception Scale*, 45 THE JOURNAL OF SEX RESEARCH 27, (2008).

more seriously. Such acts of obtaining sex by manipulating her consent by deception fall nothing short of being called rape under the Indian penal provisions. The duty of the judiciary to grapple with the intricacies of such cases without its preconceived notions, if fulfilled, will better secure the ends of justice.

Rape is a serious offence. It cannot be denied that the layman perceives it to be a violent act. He believes use of force to be an indispensable element of the offence. Though neither Section 375 nor the judiciary now attribute use of force to the offence of rape, there exists a general concern that extending the contours of rape to the sphere of deceptive sex may diminish the seriousness of the offence.[85] Further, there is a general belief that deceptive sex is not as dehumanizing and harmful as violent rape. There may therefore arise a suggestion to put the cases of rape by false promise of marriage under the umbrella of a minor or relatively less severe sexual offence.[86] This may be in comparison with the penal provisions of other jurisdictions around the globe. A number of factors should prevent such a change in the Indian context.

The institution of marriage holds position of a different level in the Indian society. As already discussed, pre-marital sex is not considered appropriate by a significant number. The people who do not consider it as a taboo also preclude it from being a part of their social conversations. Above all, the majority considers marriage to give legitimacy to pre-marital sex and sex in general. Incidents of elders of a village or the panchayats suggesting and even imposing marriage to

[85]Falk, *supra* note 51, at 143. ("A second potential cost of expanding rape law to encompass fraud and coercion cases is the trivialization of violent rape by comparison. Many commentators argue that an experiential or qualitative difference exists between violent and nonviolent rape, one that may be invalidated or obscured by expansion of rape law to include both forms.").
[86]Tadros, *supra* note 51, at 540; Schullhofer, *supra* note 71, at 36; Bala & Saha, *supra* note 33.

reduce the ignominy of pre-marital sex, are not unheard of.[87] These segments of reality do play a big role in deciding a woman's consent for sexual intercourse before marriage. This social reality makes much easier for a man to manufacture consent by using false promises or assurances of marriage. The materiality of marriage in a woman's consent and their vulnerability as easy targets for satisfaction of lust, directly oppose the proposal for a minor sexual offence.

The scope of rape-by-deception expands even to cases of deception relating to identity of the perpetrator in some other jurisdictions,[88] in addition to the universally penalized cases of rape by impersonation as husband and false medical treatment.[89] Rape-by-fraud cases in India are concentrated on false promise of marriage. With other cases of rape-by-deception not holding relevance in India, the idea of introducing another sexual offence does not seem pragmatic. Also, the seriousness of rape by false promise of marriage should not be downplayed. The acts of intercourse are as much without the consent of the victim as in cases where force is used. The consent obtained is as good as no consent. The quantum of harm may be, as conceded, lesser than that in violent rapes. The court may tackle this by lowering the quantum of punishment is such cases, if it feels the need, but naming these acts as anything other than rape will weaken the cause that seeks to protect women from being played with as objects used for sexual gratification. Narrowing the scope of rape law will protect a host of behaviours that are equally blameworthy and intolerable.[90] For necessary reiteration, sex obtained by false promise of marriage is

[87]Yedla, *supra* note 10, ¶2; Naushad, *supra* note 5, ¶8.
[88]*See* Falk, *supra* note 51; Rubenfeld, *supra* note 1. (Deception may be regarding the accused's nationality, religion, sex, age etc.).*See also* Aeyal Gross, *Rape by Deception and the Policing of Gender and Nationality Borders*, 24Tul. J. L. & Sexuality 1, (2015).
[89]Rubenfeld, *supra* note 1, at 1397; Corey Rayburn Young, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 13 (2015).
[90]Falk, *supra* note 51, at 359.

without valid consent and sex without a woman's valid consent is rape.

V. CONCLUSION

The substantive rape law in our criminal statute books is ill equipped to cater to the many cases of rape-by-deception and much is left to the judiciary to decide, based on the facts and circumstances of each case. Section 375 contemplates deceptive sex only to the extent of rape by impersonation as husband, which is an impractical and unlikely mode of deploying deception in the modern world. It is time that the rape law is upgraded to account for the many forms of rape that result from nefarious non-violent tactics. Such an upgrade should not strictly confine itself to rape by false promise of marriage but must also cater to the more nuanced deceptions that are likely to become as deprave and blameworthy with the fusion of western ideas in our society.

Till the legislature adds to the law of rape to make it wholesome, the courts need to alter the rape-by-deception jurisprudence and fill in the void meaningfully. The judgments delivered by the courts become all the more important because of the subjectivity that surrounds the various components of rape-by-deception. Much depends on the way the judiciary grapples with issues like a woman's sexuality, her consent and her psychology. The antiquated notions of morality that have crept into the jurisprudence need to be discarded. It is absolutely essential to incorporate the concept of sexual autonomy, in its truest sense, in the rationales that circumscribe the meaning of a valid consent. The harms of rape by false promise of marriage must not be undervalued and its repercussions on the micro and macro level must be further examined. There is an urgent need to begin a more detailed legal and social discourse on different aspects of deceptive sex and their interaction with the social conditions in India. Ignorance to this

pertinent issue may normalize a range of conduct that assails the dignity of a woman.

"WHY DO YOU CARE ABOUT MY BODY?"- AN ANALYSIS OF ABORTION LAWS IN THE USA AND INDIA

*Prakhar Raghuvanshi and Chaaru Gupta**

Abstract

In May 2019, the State of Alabama passed an anti-abortion law imposing almost a complete ban on abortions across the State. States in the USA are shifting towards the conservative ideology concerning abortion laws in the country. The Alabama law makes no exception for rape and incest, thus being considered to be the most severe and inflexible ban on abortion in history. The autonomy of a woman to have a child or not is completely disregarded. However, this law is against the federal law of the USA, based on the landmark decision of Roe v. Wade. This paper examines the grounds of contravention of the two laws, the probable reasons for enacting such a draconian law and comments upon which law shall prevail and why. In addition to this, it comes up with a few changes that are required to be made to the existing legal framework. Furthermore, the abortion law in India is described with a brief overview of its

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application. The major case laws in India concerning abortion and the constitutional parameters in India related to such legislations are discussed. The 2017 judgment of Justice K.S. Puttaswamy v. Union of India has increased the threshold of bodily autonomy which attaches itself to reproductive autonomy. The authors finally attempt to explain the best approach to be adopted towards the Medical Termination of Pregnancy Act, 1971, discussing how the medical advancements and the changes in society now demand for amendment in the law.

I. INTRODUCTION

On 22nd January, 1973, every woman in the USA truly realised her dream of the 'land of the free' as the Supreme Court handed down its long awaited opinion in *Roe v. Wade* ("***Roe***"),[1] which was followed by *Doe v. Bolton* ("***Doe***").[2] The upshot of the decisions was that the women of America could not be denied abortion before foetal viability. The court favoured the argument that prioritized the woman's reproductive autonomy over the protection of 'life' argument, which includes prenatal life as well.[3] Consequently, infringement of that right by the government should pass strict judicial scrutiny.[4] The American courts apply the 'strict scrutiny test' when a fundamental constitutional right is infringed, particularly

[1]Roe v. Wade, 410 U.S. 113, 133 (1973).
[2]Doe v. Bolton, 410 U.S. 179 (1973).
[3]Roe, *supra* note 1.
[4]United States v. Carolene Products Company, 323 U.S. 18, 21 (1944).

those contained in the Bill of Rights or those the court has deemed a fundamental right.[5] Under this test, the impugned statute shall be pronounced unconstitutional unless it is 'necessary' or 'narrowly tailored' to serve a 'compelling' government's interest.[6] However, these judgments did not come overnight and must be read in light of their background, discussed hereafter.

II. FEDERAL LAW OF THE USA REGARDING ABORTION

The first anti-abortion legislation in the USA was enacted by the State of Connecticut in 1821.[7] New York's (the first State to include an exception)[8] legislation on the subject stood out for its exception that it was not illegal to proceed with abortion if the mother's life is in danger.[9] Colorado and New Mexico included a 'serious or permanent bodily injury' exception.[10] The beginning of change in the federal law came with the Model Penal Code in 1960. This Code's provisions decriminalized abortions in cases where there was a threat to the life of the mother, or where the child resulting from such a pregnancy would be deformed, or the pregnancy had resulted from rape or incest.[11] There were diverse judicial opinions on this point, which exist till date. Such legislations led to the slow and steady development of questions regarding bodily autonomy of a woman. The California Supreme Court in 1969 accepted that a woman's right

[5] *Id.*
[6] Johnson v. California, 543 U.S. 499, 505 (2005); Miller v. Johnson, 515 U.S. 900, 920 (1995);Richard H. Jr. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1274 (2007).
[7] CONN. STAT. tit.20, § 14 (1821).
[8] N.Y. Rev. Stat. (1829), Pt. IV, Ch. 1, tit. 6, § 21.
[9] *Id.*
[10] Edward Veitch& R.R.S. Tracey, *Abortion in the Common Law World*, 22 AM. J. COMP. L. 652, 663-64 (1974).
[11] American Law Institute, Model Penal Code, s. 230.3 (1962).

to abortion was an absolute one.[12] It was followed by the courts in Wisconsin[13]and New Jersey.[14] This idea was not uniform, it found detractors in the courts of Ohio and Louisiana, which held that the woman's right to abortion was in no way superior to the unborn child's right to life.[15]The presumption that the collective conscience of the people did not allow a woman to abort her foetus led to the decision by the Federal Court in 1970 that the woman had no right to choose abortion.[16] This was, however, outdistanced by legislatures of Hawaii,[17] New York[18] and Washington[19] which enacted legislations granting abortions on demand. Slowly, there was a growing acceptance of the constitutional right to privacy, which respects reproductive autonomy.

Apart from the legal events, there were some social events too which led to the change in the attitude of people. In the years 1964 and 1965, a rubella epidemic resulted in the births of some 30,000 deformed children; 100 were partly due to the restrictive abortion statutes in the majority of the States at the time.[20]

Then, finally, in 1973, two very important judgments were delivered. In *Roe*,[21] a Texas statute, which forbade all abortions except the ones necessary to save the life of the mother, was challenged. In *Doe*,[22] the Georgia legislation was the impugned legislation, which mandated the abortion be performed only in accredited hospitals. In addition to this,

[12]People v. Belous, 71 Cal. 2d 954, 458 P.2d 194 (1969).
[13]Babbitz v. McCann, 310 F. Supp. 293 (1970).
[14]YWCA v. Kugler, 342 F. Supp. 1048 (1972).
[15]Edward Veitch, *supra*note 10 at 664-665.
[16]Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (1970).
[17]Hawaii Rev. Stat. § 453-16 (a) (3) (Supp. 1972).
[18]New York Penal Law § 125.05.3 (McKinney Supp. 1972).
[19]Washington Rev. Code Ann. § 9.02.060 (Supp. 1971).
[20]Quay, *"Justifiable Abortion-Medical and Legal Foundations,"* 49 GEO.L.J. 173, 238-41 (1960).
[21]Roe, *supra* note 1.
[22]Doe, *supra*note 2.

two physicians had to confirm the opinion of the surgeon, followed by confirmation from the hospital abortion committee. The Supreme Court of the USA struck down both the legislations which infringed the woman's fundamental right to choose whether or not to terminate her pregnancy and gave a test which is widely known as the 'trimester test'. The Texas statute was struck down on the ground that it was overly broad in its language and in this way, discouraged abortions[23] and the Georgia legislation was struck down because the requirements were unreasonable and posed to be restrictions.[24] The judges accepted the autonomy arguments supported by the Fourteenth Amendment's concept of personal liberty[25]but also balanced it with the State's compelling interest in the foetus.[26]It was held that the State's interest in the health of the mother and the potential human being may be sufficiently compelling to demand that the woman's right be less than absolute during the later stages of the pregnancy.[27] The court decided that:[28]

- in the first trimester (1 to 12 weeks), solely the woman has the right to terminate, in consultation with her doctor;
- in the second trimester (13 to 28 weeks), the State can make regulations to protect the maternal life; and
- in the third trimester (28 weeks onwards), when the foetus is viable, the State can regulate or even prohibit abortion except when it is necessary for the protection of the mother's life or health.

[23]*Roe*, *supra* note 1.
[24]*Doe*, *supra* note 2.
[25]*Roe*, *supra* note 1.
[26]*Roe*, *supra* note 1.
[27]*Roe*, *supra* note 1.
[28]Kerry Petersen, *Abortion Laws: Comparative and Feminist Perspectives in Australia, England and the United States*, 2 MED. L. INT'L 77, 92 (1996).

The court refused to accept that the foetus is a person within the meaning of the Fourteenth Amendment and other sections of the Constitution but recognized that the state has an important interest in protecting the potential human life. This interest becomes compelling at the end of the second trimester,[29] as it endangers the mother's life.[30] Since medicalization of abortion was a crucial element of the reasoning, Justice Blackmun, while suggesting that the woman's right to abortion is qualified not only by state interests but also by clinical autonomy, said that the holding in Roe:[31]

"Vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with physician" (emphasis supplied).

The fundamental right to abortion as recognized in *Roe* has been upheld in many subsequent cases.[32] However, the courts have restricted access to abortion by amending the nature of state regulation. *Webster v. Reproductive Health Services* and *Planned Parenthood of South-Eastern Pennsylvania v. Casey* were the two cases where the court reviewed restrictive statutes which went to the essence of *Roe*: the trimester construction and viability.[33] In the 1989 Webster decision, the court upheld a Missouri statute that prohibited

[29]Roe, *supra* note 1 at 128.
[30]Jody Steinauer et al., *Second Trimester Abortion,* PRACTICE BULLETIN OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNAECOLOGISTS (June 2013), https://www.acog.org/Clinical-Guidance-and-Publications/Practice-Bulletins/Committee-on-Practice-Bulletins-Gynecology/Second-Trimester-Abortion?IsMobileSet=false.
[31]Kerry Petersen, *supra* note 28 at 93.
[32]Stenberg v. Carhart, 530 U.S. 914 (2000); Whole Woman's Health v. Hellersted, 136 S. Ct. 2292 (2016).
[33]Webster v. Reproductive Health Services, 492 US 490 (1989); Planned Parenthood of Southeastern Pennsylvania v. Casey, 120 L. ed 2nd 674 (1992).

the use of public facilities and public personnel to perform abortions.[34] The Supreme Court upheld a foetal-viability regulation which required physicians to test for foetal viability if they believed a woman seeking an abortion was at least 20 weeks pregnant and the regulation was upheld on the ground that it furthered the state's interest in protecting potential life.[35] The plurality viewed the trimester construction as rigid and unsound in principle; and unworkable in practice.[36] Striking down that part of the *Roe* ruling they stated that they did not agree that the state's interest in human life should come into existence only at viability.[37] Three years later, in *Casey*, the court reemphasized that the right to an abortion is a part of the constitutionally protected right to privacy, but simultaneously upheld a state's ability to pass restrictive abortion laws, shifting the standard of review of laws restricting abortion from strict scrutiny to 'unduly burdensome'. *Casey* upheld the Pennsylvania statute that required:

- physicians to show anti-abortion materials to patients, including pictures of fetuses, to discourage the patient from having an abortion;
- a mandatory twenty-four- hour waiting period after the materials are viewed;
- the filing of detailed reports on any abortions performed with public funds, including the name and address of the facility to be made available in public records; and
- a one parent consent requirement, with a judicial by-pass.[38]

[34]Webster v. Reproductive Health Services, 492 U.S. 490, 510-11 (1989).
[35]*Id.*
[36]*Id.*
[37]*Id.*
[38]Planned Parenthood, *supra* note 33.

III. THE OVERBREADTH IN STATES

The State laws in the USA, which have to align with the federal law, vary from very restrictive to very liberal as far as abortion is concerned. Recently, nine States in the USA enacted strict abortion laws. The strictest law has been passed by the State of Alabama which shall be discussed in detail in the next section. The Governor of Mississippi recently signed a bill which prohibits abortion when a foetal heartbeat can be detected.[39] The law makes exceptions if a pregnancy threatens a woman's life or one of her major bodily functions but does not make exceptions for cases of rape or incest.[40] It also says a physician who performs an abortion after a foetal heartbeat is found could have his or her state medical license revoked.[41] Such bills are called 'Foetal Heartbeat' bills.[42] Similar bills were signed in Georgia[43]and Louisiana.[44] Georgia's bill even talked about alimony, child support and income tax deductions for foetuses, declaring that "*the full value of a child begins at the point when a detectable human heartbeat exists*".[45]

Utah has an extreme example of outright opposition to abortion which is its recent act.[46]The Utah law lays down that denying abortion decision is for the woman concerned and her physician along with

[39]Miss.B.2116, Leg.http://index.ls.state.ms.us/isysnative/UzpcRG9jdW1lbnRzXDIwMTlcbm90ZGVhZFxoYW1cYW1lbmRtZW50X3JlcG9ydF9mb3Jfc2IyMTE2LnBkZg==/amendment_report_for_sb2116.pdf#xml=http://10.240.72.35/isysquery/irlc595/1/hilite.
[40]*Id.*
[41]*Id.*
[42]K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html.
[43]Living Infants Fairness and Equality (LIFE) Act, H.B. 481, 154th Gen. Assemb., Reg. Sess. (GA. 2019) http://www.legis.ga.gov/Legislation/20192020/187013.pdf.
[44]S.B. 184, H.R., http://senate.la.gov/senators/senpage.asp?SenID=38.
[45]Living Infants Fairness and Equality (LIFE) Act, H.B. 481, 154th Gen. Assemb., Reg. Sess. (GA. 2019) http://www.legis.ga.gov/Legislation/20192020/187013.pdf.
[46]UTAH CODE Ann. tit. 76, ch. 7, § 302(3)-319.

various consent requirements including that of the father of the unborn child.[47] Another provision mandated that the abortion decision be made only after a judicial hearing and interested parties were granted right to present their views-the father, the paternal grandparents of the foetus, the mother's parents (if she was unmarried) and the county attorney.[48] The act contained many such restrictive provisions, very few of which were declared unconstitutional by the court in *Doe v. Rampton*[49]and many of which still stand.

On the contrary, many States including Florida, Nevada, California, etc. have liberal laws related to abortion.[50] The New York State Assembly in January of2019 enacted the Reproductive Health Act, 2019 which allows a health care practitioner who is licensed, certified, or authorized under title eight of the education law, acting within his or her lawful scope of practice, to perform an abortion.[51] It considers abortion as a part of reproductive healthcare and allows women to make the appropriate health care decision based on the medical circumstances.[52] It removes, *inter alia*, abortion from the State's criminal code and moves it into the realm of public health, as well as legalizes abortions after 24 weeks if the mother's life is in danger or the foetus is not viable.[53] Thus, making it one of the most liberal abortion laws. Another state under this is Virginia which recently removed abortion restrictions such as the 24-hour waiting period undergo counselling before having an abortion, and a mandate that required women in their second-trimester to have abortions in a

[47]UTAH CODE, § 304.
[48]UTAH CODE, § 305.
[49]Doe v. Rampton, 366 F. Supp. 189 (1973).
[50]K.K. Rebecca, *supra* note 42.
[51]Reproductive Health Act, 2019, (N.Y. 2019), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00021&term=2019&Text=Y
[52]*Id.*
[53]*Id.*

hospital. Besides, the bill changed the law which required people seeking an abortion to be evaluated by three doctors to confirm that the pregnancy is life-threatening before an abortion is permitted.[54]

IV. ALABAMA – REPRODUCTIVE AUTONOMY OR COMPELLING STATE INTEREST?

The Republican controlled State of Alabama on 14th May 2019 passed a near total abortion ban legislation. Following this event, the state of Louisiana also passed an anti-abortion legislation after a fort-night.[55] A total of seven States, viz Alabama, Georgia, Kentucky, Louisiana, Mississippi, Ohio, Missouri have banned abortion in the first trimester.[56] Out of these, Alabama has the most uncompromising and illiberal ban.

The State introduced an abortion ban in 1975, which was against the standards provided in *Roe*. Section 13A-13-7, Code of Alabama, 1975[57] says –

"*Any person who wilfully administers to any pregnant woman any drug or substance or uses or employs any instrument or other means to induce an abortion, miscarriage or premature delivery or aids, abets or prescribes for the same, unless the same is necessary to preserve her life or health and done for that purpose, shall on conviction be fined not less than $100.00 nor more than $1,000.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months.*"

[54]H.B. 2491 Gen. Assemb.(VA. 2019), https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+HB2491+pdf.
[55]*Louisiana passes law banning abortions after heartbeat is detected*, BBC (May 31, 2019), https://www.bbc.com/news/world-us-canada-48468962.
[56]K.K. Rebecca Lai, *supra* note 42.
[57]ALA. CODE § 13A-13-7 (1975).

The rationale for this section lies in the same legislation, which for homicide considers an unborn child as a person regardless of its viability.[58] This has been the stand of the State and to further strengthen this stand and challenge the constitutional validity of *Roe*, the legislation in question, viz, Alabama Human Life Protection Act (AHLPA),[59] was passed.

A. An overview of the AHLPA

i) The act provides that it is unlawful to intentionally perform abortion[60] and gives three ingredients of abortion –

- Use or prescription of any substance or device;
- Intent to terminate pregnancy;
- With the knowledge that the termination in reasonable likelihood would kill the unborn child.[61]

ii) There a few exceptions in relation with unborn child, if the act was done –

- with the intention to save life of unborn child, remove dead child.
- to avoid health risk to mother due to premature delivery.
- because child had lethal anomaly.
- because of ectopic pregnancy.[62]

iii) Exceptions in relation with the mother,[63] if –

[58] ALA. CODE § 13A-6-1 (1975).
[59] Alabama Human Life Protection Act, § 1 https://legiscan.com/AL/text/HB314/id/2018876.
[60] *Id.*, § 4(a).
[61] *Id.*, § 3(1).
[62] *Id.*
[63] *Id.*, § 3(6).

- the condition is such that mother's life is at risk.[64]
- two physicians, one being a psychiatrist, specify that mother is suffering from mental illness that may result in her or unborn child's death.

iv) For the act, a person is a human being including unborn child regardless of viability[65] and woman means a female human being notwithstanding her age.[66]

v) If abortion is performed or attempted to be performed in violation of this act it is a class A and class C felony respectively.[67]

vi) Section 8 of the act is a non-obstante clause, which provides that any law in contravention of this act shall be repealed as null and void.[68]

B. Why such a draconian law

i) The State of Alabama came up with various reasons for enacting the legislation. The lawmakers have dedicated an entire section to 'legislative findings'.[69] From a bare perusal of the said section, one can easily argue that these findings are nothing but the reasons for enacting the law. A few findings worth mentioning are-

- The state claims to recognize the rights and sanctity of the unborn child, thereby does not recognize the right to abortion. Alabama passed a constitutional amendment on 6th November 2018 to achieve this aim. In an aim to

[64] *Id.*, § 3(6) and 4(b).
[65] *Id.*, § 3(7).
[66] *Id.*, § 3(8).
[67] *Id.*, § 6.
[68] *Id.*, § 8.
[69] *Id.*, § 2.

recognize unborn child's rights they have completely disregarded mother's rights, beyond all proportionality.

- The rationale behind imposing ban even in the first trimester is that the heart starts to beat around 6 weeks, i.e., in the first trimester and fetal photography shows a clear development of a human being. It relies on the United State Declaration of Independence and implies that all human beings are equal *'*from creation*'*.
- The lawmakers disagree with the decision in *Roe*, and do not recognize abortion rights. *Pro*, the lawmakers believe that *Roe* has opened floodgates to litigation in the reign of so called 'abortion rights'.

ii) Another reason in the opinion of authors could be the low population of Alabama. The state has a population of around 47 Lac, it stands out of the top 20 states.[70]The change in population was less than 0.5% between 2017 and 2018.[71] If a state has a low population and the population increase is also low, society-oriented laws are made. Increase in population is required, so curbing the abortion rights might have appealed to the lawmakers. Even if this is the reason for AHLPA, the lawmakers must realize that only reasonable restrictions can be placed on rights and they cannot be

[70]United States Census Bureau, *2018 National and State Population Estimates, Annual Population Estimates, Estimated Components of Resident Population Change, and Rates of the Components of Resident Population Change for the United States, States, and Puerto Rico: April 1, 2010 to July 1, 2018,* (December 19, 2018),
https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html.

[71]United States Census Bureau, *State Population Change: 2017 to 2018*, December 19, 2018,
https://www.census.gov/library/visualizations/2018/comm/population-change-2017-2018.html.

disregarded in their entirety. It must be made clear at this stage only, that this is the possible reason suggested by the authors after considering the demography of Alabama.

C. Why the law is facing criticism

i) Abortion is permitted on request in countries like, China,[72] Tunisia,[73] South Africa,[74] Singapore,[75] Hungary,[76] etc., whereas this act imposes almost a complete ban on abortion.

ii) The law provides exception only in cases of medical emergency as discussed above, but not in cases of rape and incest unlike many countries.[77] A woman should not be forced to have a child out of rape or incest, it should be left to her choice to decide whether she wants to have that child or not, it is her right to privacy.

iii) The law imposes a ban immediately after the last menstrual cycle, i.e., since week one.

iv) Apart from these general issues, the law is directly in contravention of the federal law, which lays down the general principles.

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[72]Nie, Jing-Bao,*Limits of State Intervention in Sex-Selective Abortion: The Case of China*, 12 CULTURE, HEALTH & SEXUALITY,205–219 (2010).
[73]IsamNazer, *The Tunisian Experience in Legal Abortion,*17INT'L. J. GYNAE. OBSTET. 488-492 (1980).
[74]Choice on Termination of Pregnancy Act 92 of 1996 (S. Afr.).
[75]Termination of Pregnancy Act, ch. 120, 1974 (Sing.).
[76]1992. Act LXXIX. Law on the Protection of the Foetus (Act LXXIX of 1992 of the Parliament) (Hung.).
[77]*See* Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971 (India); Canada Health Act, S.C. 1984 (Can.); *Crimes (Abolition of Offence of Abortion) Act 2002* (Austl.); Choice on Termination of Pregnancy Act 92 of 1996 (S. Afr.).

D. The fate of Alabama Law

To understand the fate of the AHLPA, it is necessary to understand the structure of the USA federal system. Unlike India, the USA has several Constitutions. Article 4 of the Constitution of the USA contains a guarantee clause.[78] It lays down that the USA must guarantee a republican form of government to every State.[79] The federal[80] and State governments have their respective designated fields to make laws. The supremacy clause in the federal Constitution lays down that the States and their courts are bound by it.[81] In the words of Alexander Hamilton,[82]

"*A law, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.*"(emphasis supplied)

Another noted author James Madison connoted the importance of supremacy clause, and verbalized why the federal government shouldn't be subservient to the state Constitutions,[83]

[78]U.S. CONST. art. 4.
[79]*Id.*
[80]*Id.*,art.1 § 8.
[81]*Id.*,art. 6.
[82]ALEXANDER HAMILTON ET AL., THE FEDERALIST PAPERS, 157 (Lawrence Goldman, 1st ed. 2008).
[83]*Id.*, at 227.

"*It would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.*"

This implies that any law in contravention of the federal constitution, federal laws or decisions of the Supreme Court of the USA would be unconstitutional, thus null and void. SCOTUS has struck down state laws time and again by applying the supremacy clause, starting with *Ware v. Hylton*[84] also known as British Debt Case. One the most celebrated cases in this regard is *Marbury v. Madison*,[85] where Section 13 of the Judiciary Act of 1789 was challenged on the ground that it enlarged the Supreme Court's original jurisdiction beyond the permitted ambit. The Supreme Court held that the Congress cannot pass a legislation contrary to the Constitution. In the year 2000, Supreme Court enlarged the area of operation of supremacy clause when it went on to declare that even if the impugned law is not in direct conflict with the federal law but merely stands as an obstacle in fulfilment of full purposes or objectives of the federal law, it is liable to be struck down.[86]

To escape this, States, while enacting a law in contravention of the federal law make it inoperative, ineffective or unenforceable or in a nutshell the laws enacted are trigger laws, i.e. a statute, a substantive part of which would be held unconstitutional if challenged, but cannot be challenged as it contains a trigger provision making it ineffective until a change in constitutional law would allow them to be upheld by the courts.[87]It is a way by which the States express disapproval of the Supreme Court's interpretation of the law on abortion.[88] When the constitutional right to terminate a pregnancy was recognised in *Roe*,

[84]Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).
[85]Marbury v. Madison, 5 U.S. 137, 177-179 (1803) (federal law); Fletcher v. Peck 10 U.S. (6 Cranch) 87, 139 (1810).
[86]Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000).
[87]Berns, Matt, *Trigger Laws*, 97 GEO. L.J.1639, 1641 (2009).
[88]*Id.*

many States like South Dakota treated it with hostility and many codified this reaction by enacting anti-*Roe* laws.[89]

As discussed before, the decision in *Roe* had two prongs, viz., i) a woman has the right to abortion and ii) the trimester test. This is the federal law of the US and all the other state laws must conform to the general principles of *Roe*, the supremacy clause makes this binding. The AHLPA is in direct contravention of *Roe* standards. Though there was diversion in this law in 2007 when Supreme Court handed down a 5:4 decision in *Gonzales v. Carhart*,[90] whereby it held that the Congress was well within its power to 'generally' ban abortion, but it did not overrule *Roe* or any other precedent which followed *Roe*. The decision in *Gonzales* can be questioned on the grounds of autonomy; the Ninth[91] and Fourteenth[92] Amendment read together giving a woman the right to privacy with regard to abortion. In addition to this, reading Section 1 and Section 3(8) of AHLPA together the trimester test is also absolutely disregarded in the AHLPA as it bans abortion from the first week itself. Thus, the Alabama abortion ban has no future, it is destined to be struck down.

V. THE INDIAN PERSPECTIVE

Abortion in India is governed by the Medical Termination of Pregnancy Act, 1971 ("**MTP Act**" or "**Act**").[93] It gives the medical practitioners wide discretion for deciding whether an abortion is

[89]*Id.*
[90]Gonzales v. Carhart, 550 U.S. 124 (2007).
[91]U.S. CONST. amend. IX.
[92]U.S. CONST. amend. XIV.
[93]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971.

justified.[94] Such decisions are made under broad auspices of health or humanitarian reasons.[95] This 8-section long Act provides grounds for termination of pregnancy.[96] But just like the USA, in India too this position of law has a background.

Section 312[97] of the Indian Penal Code along with Code of Criminal Procedure, 1973,[98] with their origins in the British Offences Against the Person Act 1861 criminalized inducement of an abortion except when the woman's life is in danger. This provision increased the quantum of safe abortions in India.[99] Thus, the Parliament felt the need for an exhaustive dedicated legislation and enacted the MTP Act according to which abortions are no longer illegal if,[100]

i) they are performed for one of the several specified reasons;

ii) within a limited period;

iii) after conception by a specially designated specialist and under prescribed conditions.

The most important provision of the Act is Section 3[101] which states that a pregnancy can be terminated on two grounds-

[94]VineetChander, "*It's (Still) a Boy...": Making the Pre-Natal Diagnostic Techniques Act an Effective Weapon in India's Struggle to Stamp Out Female Feticide*, 36 GEO. WASH. INT'L L. REV. 453, 453, 457 (2004).
[95]*Id*.
[96]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971.
[97]PEN. CODE NO. 45 OF 1860, § 312.
[98]CODE CRIM. PROC. NO. 2 OF 1974.
[99]SaumyaMaheshwari, *Reproductive Autonomy in India*, 11 NSLR 27 (2007).
[100]John M. Thomas et al., *Indian Abortion Law Revision and Population Policy: An Overview*, JOURNAL OF THE INDIAN LAW INSTITUTE, Vol. 16, No. 4, SYMPOSIUM ON POPULATION CONTROL AND THE LAW (October-December 1974), pp. 513-534.
[101]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971.

"*(i) The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or*

(ii) There is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped."

One of the most striking and progressive points about this law is that, it presumes that the anguish caused to a woman because of being raped constitutes a grave injury to the mental health of the pregnant woman.[102] Abortion can be performed only by a registered medical practitioner and when the length of pregnancy has not exceeded 12 weeks with one medical practitioner certifying the application on the above mentioned grounds or 20 weeks with two medical practitioners certifying the application on the above mentioned grounds.[103]

Registered medical practitioner, for the purposes of the Act, means a 'medical practitioner who possesses any recognized medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956, (102 of 1956),[104] whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules made under this Act.'[105]

This position of law has been upheld by the courts in India since then. One of the most important cases is *Justice K. S. Puttaswamy v. Union of India*,[106] where the court while upholding the decision in *Suchita*

[102]Ramalinggam Rajamanickamet al., *Termination of Pregnancy by Rape Victim: The Dilemma in Malaysian Criminal Law*, 7 INT'L. J. ENG. TECH. 159-162 (2018).
[103]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971.
[104]Medical Council Act, 1956, No. 102 of 1956, Acts of Parliament, 1956 (India).
[105]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament, 1971.
[106]Justice K. S. Puttaswamy (retd.) and Another v. Union of India and Others, (2017) 10 SCC 1, ¶82.

Srivastava v. Chandigarh Administration[107]provided the justification for providing limited grounds for medical termination of pregnancy. It opined that -

"*There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a `compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled.*"*(emphasis supplied)*

In another recent case,[108] the Supreme Court dismissed a civil appeal sought to identify and fortify the husband's consent to terminate a pregnancy and opined that abortion is an exclusive right for women. The Supreme Court upheld the decision of the Punjab and Haryana High Court according to which "*the husband cannot compel her to conceive and give birth to his child. Mere consent to conjugal rights does not mean consent to give birth to a child for her husband. It is held that no express or implied consent of the husband is required for*

[107]*Suchita Srivastava and Another v. Chandigarh Administration,* (2009) 9 SCC 1, ¶11.
[108]Ajay Kumar Pasricha v. Anil Kumar Malhotra, Review Petition No. 2939/2017.

getting the pregnancy terminated under the Act." The High Court also stated that an unwanted pregnancy would negatively affect the mental health of a woman: "*the woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to give birth to a child.*"

Even though the maximum limit within which the foetus can be aborted according to the MTP Act is 20 weeks, the courts in India have been allowing the termination beyond the limit for the well-being of the pregnant woman or when the foetus would develop serious ailments if born. The Himachal Pradesh High Court allowed abortion of a 32 weeks old foetus of a 19yearold girl having mild to moderate mental retardation on the ground that it is risky for her to complete the normal period of pregnancy and delivery of the child on the due date.[109] In another recent judgment, the Bombay High Court allowed a surrogate mother to abort her 24week foetus, as the foetus had numerous heart abnormalities and was expected to require multiple surgeries if born.[110] It was to be done with the intended parents' consent.[111] The Delhi High Court in a recent judgment allowed abortion of a 22weeks old foetus of a 16yearold rape survivor owing to the distress that she was going through and the risks the unwanted pregnancy was posing to the well-being of the petitioner.[112]

However, many courts, on the other hand, have applied the Act *strictissimi juris* like the Calcutta High Court which recently rejected a woman's petition to terminate her 26weekold pregnancy even when there was a high risk of Down Syndrome, along with problems in the

[109]Geeta Devi v. State of H.P. and others, 2017 SCC OnLine H.P. 1497 ¶6 (India).
[110]Kiran Kailas Gavhande and others v. Union of India, 2018 SCC OnLineBom 7463 ¶7.
[111]*Id.*
[112]Minor X (Through Guardian Raj Kumar) v. State (NCT) of Delhi, W.P. 12795/2018 ¶7.

oesophagus, heart and abdomen.[113] The court held that at an advanced stage like 26 weeks, the right of the foetus to live outweighs the mental trauma that may be suffered by the mother in giving birth to the child.[114] This way, this once progressive law needs to move with the time and according to medical advancements. We shall discuss why this 48-year-old Act has to be amended according to the need of the hour in the next section.

A. Why the 48-year-law needs to be amended

A recent case made headlines when the Madhya Pradesh High Court, following the letter of law, rejected a plea for abortion of a 12-year-old rape survivor who was above 20 weeks pregnant. The Supreme Court, in a judgment, denied a 20-year-old woman permission to terminate her over25-week pregnancy, suggesting that aborting a foetus amounted to murder. These cases are an example of cases like the Calcutta High Court judgment[115] mentioned above.

a) Restrictive nature of the Act

The Act, instead of recognizing a woman's right to make her own reproductive choices, gives limited restrictive grounds for terminating a pregnancy. The Supreme Court, in a judgment, denied a 20-year-old woman permission to terminate her over-25-week pregnancy, suggesting that aborting a foetus amounted to murder and the grounds provided by the woman are outside the scope of MTP. The petitioner was reportedly a victim of domestic violence and wanted to abort the child on the grounds of marital discord and desire to initiate divorce proceedings. This is where the Act needs to be amended to include abortion-on-request recognizing the woman's reproductive autonomy. Reproductive autonomy can be defined as the right of the woman to

[113]In re: Suparna Debnath v. State of W.B., AST No. 3 of 2019.
[114]*Id.*
[115]In re: Suparna Debnath v. State of W.B., AST No. 3 of 2019.

have children or not, and if so, the right to determine the number of children they want, when and with whom; and the freedom to choose the means and methods to exercise their choices regarding fertility management.[116] Whether male reproductive autonomy has a similar threshold or not still remains a question.[117]

b) Disregard for the reproductive autonomy guaranteed under Article 21

The Supreme Court had recognized a woman's right to reproductive choices as a part of 'personal freedom' under Article 21 in *Suchita Srivastava v. Chandigarh Admn.*[118] The principle was reiterated in another case where the court allowed a woman to abort her 24-weeks foetus because of a risk to her health.[119] The court therein observed that the woman has a right to protect and preserve her life and her exercise of that right is well within the limits of her reproductive autonomy.[120] The MTP Act does not technically allow the woman to choose abortion. Rather, the decision is left to the doctor who decides for the woman on medical grounds contained in Section 3.[121] Furthermore, a woman cannot choose to terminate her pregnancy on any ground except those mentioned in the MTP Act.

c) Increase in the time period

The period for abortion should be increased from 20 to 24 weeks at least- this is the standard determined by *Roe.* In addition to this, there

[116]Saumya, *supra* note 103 at 31.
[117]Preston D. Mitchum, *Male Reproductive Autonomy: Unplanned Fatherhood and the Victory of Child Support*, 7 THE MODERN AMERICAN 10, 12 (2011).
[118]*Suchita Srivastava and Another v. Chandigarh Administration,* (2009) 9 S.C.C. 1, ¶11; Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶82.
[119]Meera Santosh Pal v. Union of India (2017) 3 SCC 467, ¶12.
[120]*Id.*
[121]Medical Termination of Pregnancy Act, 1971, No. 47, Acts of Parliament § 3, 1971.

must be a clause to permit abortion in special circumstances beyond 24 weeks and where the life of the mother is not endangered. The government also aims to increase this limit,[122] but this proposed increase is only when there is a substantial risk to the mother's health. A woman should have the right to choose whether to opt for abortion or not as reproduction choices are a part of decisional autonomy under the right to privacy.[123]Though the State can impose reasonable restrictions on this, under the MTP Act, women do not have a choice to abort the child on request until and unless her life is in danger or there exist other medical grounds. It is unreasonable to have only these two grounds for termination of pregnancy and not consider grounds like financial incapability, unwanted pregnancy due to rape, incest and so on.[124] A woman must be granted this choice, and the MTP Act must be amended accordingly to give woman decisional autonomy in this case.

d) Safeguards for single women

If a sexually active single woman gets pregnant due to contraceptive failure or any other reason, she cannot abort her child under the MTP Act because she is single and do not intend to raise the child. The Ministry of Health and Family Welfare has recommended this change in 2016, which is yet to be accepted.[125] If accepted, a woman whether married or unmarried can abort her child in case of contraceptive

[122]Medical Termination of Pregnancy (Amendment) Bill, 2017.
[123]Justice K. S. Puttaswamy (retd.) and Another v. Union of India and Others, (2017) 10 SCC 1, ¶248.
[124]NushaibaIqbal, *Medical Termination of Pregnancy Act Failing Women Who Need It the Most*, INDIA SPEND (Oct. 22, 2019), https://www.indiaspend.com/medical-termination-of-pregnancy-act-failing-women-who-need-it-the-most/.
[125]Press Trust of India, *Health Ministry proposes allowing abortion for unmarried woman in case of contraceptive failure*, INDIAN EXPRESS(June 3, 2019), https://indianexpress.com/article/india/health-ministry-proposes-allowing-abortion-for-unmarried-woman-in-case-of-contraceptive-failure-4423698/.

failure. *In vicem*, the law should be made to grant every woman decisional autonomy,[126] irrespective of her marital status.

VI. CONCLUSION

"*Roe v. Wade was not the beginning of abortions for women, it was the end of woman dying from abortions.*" -Jan Schakowsky.

The position of the federal law in the USA is extremely balanced; it achieves a nexus between the deprivation of right and the aim of the law, which is the basic rationale behind the principle of proportionality. This law should be applied in individual States mutatis mutandis, without contravening the general principles of the federal law. The law laid down in Roe can even be applied *sicut est* by the States. There is a growing tendency among States to impose disproportionate restrictions which directly and explicitly contravene the federal law. It is for the courts to interpret the rights of an individual, balance it with State aim and adopt the best society-oriented approach. The Alabama law is among the most unbending laws regarding abortion in the world. Such laws must be criticized and declared null and void; a better legislation must be passed conforming to the general principles of standard law. Any law interfering with the first trimester is unacceptable as it directly interferes with the reproductive autonomy of a woman, which is fundamental to personal liberty.

As far as the law in India is concerned, the MTP Act deserves appreciation. Considering the Indian society, the law ex tempore was ahead of the society. However, with time and medical advancements, the law requires change. There is a need to recognize reproductive autonomy and the law must go beyond the stereotypes to accept that

[126] *See* Justice K. S. Puttaswamy, *supra* note 110.

even a single woman can be sexually active. Not giving the right to abort the unborn child to a single woman or even a married woman on her choice is nothing but the deep-seated patriarchy in Indian society.

WHAT IS LAW?- IN SEARCH OF METHOD

Shankar Narayanan[*]

Abstract

In Part II, the paper discusses three aspects of methodology. The paper briefly deals with the major points of tension between various methodological claims in the theories discussed in Part I. The paper goes on to suggest that rather than construct grand theories of law attempting to explain all that is associated with law, we might be better off attempting to uncover the mysteries of law, little by little. Second, the paper questions the claim that a theory of law if successful must be true of all legal systems. The paper argues that the claims that a theory makes should ordinarily be thought of as valid only for the normative systems that it has considered. Last, the paper comments on the extent to which empirical inputs must be considered necessary in building a theory of law. It is suggested that imposing a condition that theories must be empirically justified does not necessarily mean theorising has to be preceded by some act of scientific data gathering.

"Natural science does not simply describe and explain nature; it describes nature as

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exposed to our method of questioning."- Werner Heisenberg.[1]

I. INTRODUCTION

Early theorists of law such as Austin and Bentham were moved by the object of recasting law as a science by producing universally valid propositions. As we have found out over the last two hundred years, every discipline cannot and need not be transformed into a scientific enterprise by adopting some kind of scientific method.[2] However, in the matter of theorizing, there is still much to learn from science. Science's privileged position as the cornerstone of modernity has much to do with its emphasis on method. At its heart, science demands that we subject every hypothesis that we build about the world to the test of experience.[3] And science has managed to make this search for knowledge about nature a collective pursuit. Bit by bit, vast bodies of knowledge have been built which display a kind of universal validity. This is possible because of a culture where new propositions are verifiable and can be confirmed by epistemic standards accepted as valid within the scientific community.

By analogy, is there such a thing as a jurisprudential method? This is the question that I pose in this paper. In Part I of this article, I analyze the modes in which well-known legal theories have navigated methodological issues over the last two hundred years. Regrettably, (for someone writing in India) the elite category of notable theories does not include an Indian theory. Not that India has not produced a theory of law. Chhatrapati Singh's work, which is perhaps the

[1]WERNER HEISENBERG, PHYSICS AND PHILOSOPHY 43 (Penguin Reprint 2000) (1958).
[2]Susan Haack, *Six Signs of scientism,* 3 (1), LOGOS AND EPISTEME 75 (2012), https://philpapers.org/archive/HAASSO.pdf.
[3]PETER GODFREY-SMITH, THEORY AND REALITY 224 (2003).

onlymodern example of an Indian theory of law, has almost been completely forgotten even within India.[4] Amongst prominent theories discussed in Part-1, I include Chhatrapati Singh's work drawing from his book 'Law from Anarchy to Utopia'.[5] In reductively summarizing the methodology of theories (and some of their substantive claims), I stand open to the charge that I have been unfair with these grand theories.

In Part II, I discuss some of the learnings from this summary tour. It is almost evident that methodology can be seen only as a broad set of aims and methods displaying wide divergences. Theories are aimed at widely differing ends; some aiming to describe, while others aiming to evaluate. Equally, there are clear disagreements on the methods that legal theories must adopt. In the course of identifying some of these issues, I offer the suggestion that legal theory may be better off attempting to uncover the workings of the law through more modest insights rather than through grand theories attempting to describe all that is associated with law. I also claim that it would help if theories identified the normative systems that form the subject matter of the theory and that such a limitation does little damage to aims of legal theory. Last, I discuss briefly the troubled relationship between theory and fact and suggest that while theories cannot hope to uncover the mysteries of law by light of reason alone, empirical inputs necessary for the erization may widely vary. It is not necessary that every act of theorization be preceded by some scientific data gathering.

[4]UpendraBaxi, *Chattrapati Singh and the Idea of Legal Theory*, 56(1) JILI 1 (2014).
[5]CHATTRAPATI SINGH, LAW FROM ANARCHY TO UTOPIA (1985).

II. FROM AUSTIN TO RAZ

Western philosophy has a strong tradition of reflecting on the law going as far back as Plato.[6] But what sets the modern legal philosopher apart is the exclusive focus on theorizing the law. Bentham and Austin were the first philosophers to devote themselves largely to this task in their attempts to come up with scientific accounts of law. Though Bentham's ideas (which continue to be influential) predated Austin, it is the latter's work which is often thought of as the starting point for modern analytical jurisprudence.[7]

III. AUSTIN AND KELSEN: IDENTIFYING COMMON FEATURES

As was characteristic of his times, Austin's work reveals an urge to cast law as a science.[8] General and particular jurisprudence, he believed, are sciences aimed at differing ends.[9] The rules or laws of a particular community which is a self-contained system are the subject matter of particular jurisprudence. However, general jurisprudence aims higher. Amongst differing systems of law, Austin thought, common principles can be located.[10] Not all commonalties are to be analyzed. Only those analogies of refined systems are to be analyzed, which may involve understanding various notions such as duties, rights, natures of rights and obligations etc.[11] However, jurisprudence

[6]BRIAN TAMANAHA, A REALISTIC THEORY OF LAW 38 (2017).
[7]Bix, Brian, *"John Austin"*, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed. Spring 2018 Edition), https://plato.stanford.edu/archives/spr2018/entries/austin-john. (Feb. 25, 2019)
[8]JOHN AUSTIN, PROVINCE OF JURISPRUDENCE DETERMINED 365 (Indian Reprint 2012); JOHN AUSTIN, LECTURES IN JURISPRUDENCE 147 (1875).
[9]JOHN AUSTIN, LECTURES at 148.
[10]*Id.*
[11]JOHN AUSTIN, PROVINCE, *supra* note 8, at 370.

has a different function as well, to accurately determine certain basic terms involved in the science.[12] Central amongst this is the term 'law' which he believed must be carefully analyzed to separate those that must be the subject of the science of law from those that resemble positive law, and are bracketed under the common name law.[13] To determine this province of jurisprudence he sets out his method:

"*But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by resemblance, and with objects to which it is related by way of analogy: with objects which are also signified, properly and improperly, by the language and vague expression law.*"[14]

Three features of the jurisprudential method are clearly visible from Austin's position. First is an attempt to identify uses of the term law in different fields. Second, is the attempt to confine the field of jurisprudence to a particular subset of the usage by identifying certain features of the subset as the essence of law. The third strand in the method of Austin relates to the choice of legal systems, which is also pertinent. Only analogies or resemblances across mature legal systems are to be the subject matter of general jurisprudence. These three ideas continue to resonate in different forms to this day.

Austin's conclusion based on this exercise is well known. From his work, we can cull out a crisp definition that laws are commands backed by sanctions that emanate from a determinate sovereign.[15]However, the reduction of the whole of his work into this

[12]*Id.*, at 371.
[13]*Id.*, at 2.
[14]*Id.*, at 10.
[15]Bix, Brian, *"John Austin", The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Spring 2018 Edition), https://plato.stanford.edu/archives/spr2018/entries/austin-john/(Feb. 25, 2019).

slogan like definition[16] (particularly popular in our country) is unfair to Austin who anticipated and dealt with quite a few objections to his views.[17]

Much like Austin, Kelsen also begins theorizing by suggesting that the analysis of the concept of law must take for its starting point the common usage of the term.[18] However, unlike Austin's stipulation that certain usages are proper and others improper, Kelsen wonders whether the social phenomena generally called law exhibits any common characteristic in comparison with other social phenomena of a similar kind.[19]

While he may have had only legal systems in mind, this linguistic approach, if applied to the broadest possible use of law, can be immensely problematic. A number of unrelated fields employ rules and laws. Would we be justified in including those in our enquiry into the concept of law? To accommodate such extreme cases, Kelsen conjectures that "*the actual usage may be so loose that the phenomena called 'law' do not exhibit any common characteristic of real importance*".[20] On the range of legal systems, he is much clearer in his choice. Any attempt must aim at coinciding with actual usage with the result that one must not construct a theory of law which excludes legal orders on the basis of some political bias.[21] Thus, excluding Stalinist Russia, Nazi Germany or Fascist Italy is not a choice open to his pure theory of law.[22]

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[16]Lon L Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 (4) HARV. L. REV. 630 (1958).
[17]Brian Bix, *John Austin and Constructing Theories of Law* in MINDUS, THE LEGACY OF JOHN AUSTIN'S JURISPRUDENCE 3 (Freeman ed., 2013).
[18]HANS KELSEN, GENERAL THEORY OF LAW AND STATE 4 (1945).
[19]*Id.*
[20]KELSEN, *supra*note18, at 4.
[21]*Id.*, at 5.
[22]*Id.*

Like Austin, Kelsen's theory is also understood in a minimalist form in India. Indeed, as is widely believed, the core of the theory is the hierarchy of norms which takes us back to the grund-norm, the basic presupposition which lends normativity (in the Kelsenian sense) to other norms. However, some of the complexity of Kelsen's ideas has clearly been lost in creating a Kelsen-lite which has attained wide popularity.[23]

IV. HART AND RAZ: FROM THE EXTERNAL TO THE INTERNAL

The publication of Hart's 'Concept of Law' changed the landscape of jurisprudence both substantively and methodologically. In the introduction to the Concept of Law, he outlines the questions he thinks a theory of law must answer. For Hart, these are: the relationship between law and sanctions, distinguishing a legal obligation from a moral obligation and third, the nature of a rule.[24] For answering these questions, Hart relies on methods of linguistic philosophy that were particularly influential at that time.[25] The concept of law, he believed, could be unraveled by an analysis of language associated with the law. For instance, in Hart's view, there is a world of a difference between being 'obliged' and having an 'obligation'.[26] The former implies a situation akin to when one is under the threat of a gunman whereas the latter is an accurate description of the sense of duty that a rule creates.

In constructing his theory (while dismantling Austin's) through such devices, Hart attributes a central role to the nature of a rule. And by a

[23] *SeeGovt. of A.P. v. P. Laxmi Devi*, (2008) 4 SCC 720.
[24] H.L.A.HART, THE CONCEPT OF LAW 7(3rd ed. 2012).
[25] *Id.*, at 14.
[26] *Id.*, at 82.

rule, Hart does not refer to a legal rule alone. Rules within the legal system are not very different from rules of games say chess or cricket for that matter.[27] All these rules, Hart says, in a big advance in jurisprudence, have an external aspect and an internal aspect. Apart from regularities of behavior which result from rule-following, rules have an internal dimension. In following a rule, one recognizes the rule as a standard, deviation from which could lead to justified criticism or disapproval in some form.[28]

Hart's explanation of rule-following conceivably addresses rules generally. But Hart's theory is not expressed at this level of generality. At least not all of it. The superstructure built on this understanding of rules, classifies rules into primary rules and secondary rules.[29] Primary rules are duty bearing (such as criminal laws), while secondary rules allow for persons within the legal system to alter their position vis-à-vis others. Examples of the latter include the law of contracts or a law regulating the making of wills. Such laws are power conferring. An important secondary rule in Hart's scheme is the rule of recognition which serves the function of identifying other rules or laws in a legal system – a kind of foundational norm.[30] Now, Hart believed this entire structure that he had described to be the scheme of a legal system. For evidence that such a system exists, he prescribed two conditions- first, that the people at large must obey the primary rules, and second, officials who are in charge of the legal system accept, from the internal perspective described above, the rule of recognition as a common standard of official behavior.[31]

[27] *Id.*, at p.89.
[28] *Id.*, at 90.
[29] *Id.*, 91-99.
[30] *Id.*, at 100.
[31] *Id.*, at 116.

This reduction of Hart's theory is necessary to bring out how detailed and specific the theory is at various points in its prescription of the elements of a legal system. However, this led Hart to some odd conclusions. Societies without an explicit rule of recognition or complex secondary rules, surviving happily with duty bearing primary rules alone do not, in Hart's view, have full-fledged legal systems.[32] Similarly, Hart advanced the claim that international law is only a set of rules, and not a legal system displaying the complete union of primary and secondary rules with a rule of recognition.[33]

Hart's position raises interesting questions. A theory whose aim is to uncover the concept of law, implies that some systems which appear to be legal systems are not full-fledged legal systems.[34] It is hardly surprising that this idea that international law[35] or legal systems branded primitive are not really complete legal systems may not be readily acceptable to those intimately familiar with these systems.[36] Now, the troubling feature is that Hart's work was not based on any detailed study of legal systems across the world. Yet, it has conclusions which unmistakably imply that some systems are incomplete legal systems when judged on his yardstick of a union of primary and secondary rules. Can a theory based on a few legal systems, contain truth propositions by which all legal systems are to be judged by?

[32]*Id.,* at p.92.
[33]*Id.,* at 116-137.
[34]*Id.*
[35]Waldron, Jeremy, *International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?*,NYU SCHOOL OF LAW, Public Law Research Paper No. 13-56 (October 2013), https://ssrn.com/abstract=2326758, http://dx.doi.org/10.2139/ssrn.2326758 (March 4th, 2019); TAMANAHA, A REALISTIC THEORY OF LAW, 181(2017).
[36]TAMANAHA, *supra* note 6, 89.

Raz has articulated interesting arguments on these methodological issues.[37]Hisreflections, while interesting, are far from straightforward. Raz sets out clear indicia for a theory of law; it must set out propositions about law that are necessarily true, and these propositions must explain the nature of law.[38] Drawing from Hart's idea of an internal attitude towards law, Raz notes that only an account of law that explains the binding nature of law as it occurs to a participant in the social institution can be successful. This exercise, therefore, relies on some parochial concept of law. To this extent, his theory is agreeable. Where the claim turns problematic is when Raz asserts that while a concept of law may indeed be parochial, a theory of law which derives from this concept can nonetheless be universal.[39] Legal theory may grow only in cultures which have a concept of law, however if any theory is valid, it contains a claim to truth that is universal, Raz's argument goes.[40] Quite obviously, this viciously complicated argument has its set of doubters.[41] It is not immediately clear from Raz's argument how one can arrive at a necessary feature of the law true of all legal systems from an (admittedly) parochial concept of law.

Irrespective of the merit of this claim, in many ways it exemplifies the bind in which legal theory, at least the analytical tradition, finds itself in. It employs a method of reflection where philosophers attempt to elicit necessarily true claims about the law. Ordinarily, no part of this task involves any data gathering or any other form of empirical study. Most theorists arrive at the core of their theory through conceptual analysis - by reflecting about the legal system that they find themselves in and a few other legal systems that they are familiar

[37]Joseph Raz, *Can there be a theory of law* in BETWEEN AUTHORITY AND INTERPRETATION 17 (2009).
[38]*Id.*,at 17.
[39]*Id.*,at 36.
[40]*Id.*, at 41.
[41]TAMANAHA, *supra* note 6, at 67.

with.[42] By its very nature, the method is unlikely to yield necessary truths about all legal systems or law in its entirety. Not all influential theories, however, traverse this route. In the next section, I consider two theories that are explicitly evaluative and do not seek to be universal in the sense that theories considered thus far aspired.

V. FINNIS AND DWORKIN: NORMATIVE JURISPRUDENCE

In 'Natural law and Natural Rights', Finnis begins his rediscovery of the classical natural law tradition with an account of methodology where he argues that any useful theory of law must necessarily be explicitly evaluative. Finnis regards the methodology of Austin and Kelsen as naïve, in particular, the attempt to find a common factor in a pre-theoretical set of legal systems, the choice of which is inadequately justified, to explain the entire subject matter of law.[43] To Finnis, the choice of some legal systems, as relevant to legal theory while banishing those that appear primitive or underdeveloped to some other discipline is unnecessary.[44] Instead, invoking Aristotle, Finnis argues that the theorist must focus on the focal meaning by studying a central case of what constitutes a legal system. Once this choice is made, there appears no reason to be restrictive in the study of this central case. A complete picture of the central case can illuminate the peripheral or watered-down cases through analogies and differences.[45]

Finnis then builds on Hart's internal point of view to take the claim in an interesting direction. Hart suggested that mere regularity in conduct is not a sufficient explanation of rules, one must pay attention

[42]Kenneth Einar Himma, *Conceptual Jurisprudence*, 26 REVUS 65 (2015).
[43]JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 6 (2d ed. 2011).
[44]*Id.*, at 11.
[45]*Id.*, at 11.

to the internal aspect. This internal aspect, Finnis notes, distinguishes between a person who obeys rules out of fear of sanctions and those who accept rules as a standard. Now there may several viewpoints, including that of an unthinking participant, who accepts rules as a standard. To Finnis, amongst these, the only viewpoint that can be the central case of value to a theorist is that of a person who treats the law as a morally good guide for conduct, or in other words imposing a moral obligation.[46] It is that viewpoint that a legal theorist must build on. Now, Finnis recognizes that this might lead to subjectivity, but in his view, this subjectivity is inescapable if jurisprudence is to be more than a rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies.[47]

This shift attempts to break down the wall erected between natural lawyers and positivists. The claim of the relevant viewpoint makes all the difference in Finnis's theory, as from the morally neutral 'descriptive sociology'[48] that Hart thought he was undertaking, Finnis moves to a legal theory which focuses explicitly on a viewpoint that makes law morally valuable. This method, once again, has its fair share of critics.[49]To understand the criticism, it necessary to return to the internal point of view. In directing the attention of theorists to the internal point of view, Hart required a theorist to take the role of a participant in a legal practice. This requirement brings an element of evaluation into the act of theorizing: a theorist can theorize validly only about a legal system where she grasps the internal point of view. Now, Finnis's point is that any useful legal theory should not stop there. If legal theory can be evaluative to the extent that Hart has suggested, the stable solution is to go the whole way with an

[46]*Id.*, at 15.
[47]*Id.*
[48]HART, *supra* note 24,at vi.
[49]JULIE DICKSON, EVALUATION AND LEGAL THEORY, 75 (2001); Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS 17 at 29.

evaluative theory that investigates the requirements of practical reasonableness.[50] However, it is not clear from Finnis's account that it is impossible for legal theory to investigate legal systems in way that does not involve moral evaluation of the sort he suggest. For instance, Hart was content with describing rules as having an internal aspect and showing that they are not sanction-based threats. This has some explanatory value in itself having uncovered an important feature of rules. There is no real reason as to why it is necessary then that a theorist must choose amongst various internal viewpoints except where she wishes to explicate a particular viewpoint (as Finnis does) or in other words, produce a normative theory of law. But that was not what theorists such as Hart or others in the analytical tradition were after. They merely intend to sufficiently describe the concept of law. Finnis's position does not make clear why they must undertake the task of identifying what makes law a morally valuable practice.

The most influential objections to Hart come not from Finnis, but Dworkin. Dworkin's work, in a sense, suggests that all of positivism has fundamentally misidentified the nature of law. In Dworkin, methodology and substantive theory form one coherent narrative as he thought should be the case with legal theory and the practice of law that it intends to study. In a famous claim called the semantic sting, Dworkin contends that positivists who build semantic theories around the meaning of law do not have an adequate explanation of disagreements about the law, particularly disagreements evident in adjudication.[51] In particular, he focuses on cases where despite there being clarity in the ordinary sources of the law, lawyers disagree on what the law is a sort of theoretical disagreement about the law.[52] This, according to Dworkin, reveals something fundamental about the nature of law and how we must understand it. What it reveals, per

[50]FINNIS, *supra* note 43, at 15.
[51]BRIAN BIX, JURISPRUDENCE, THEORY AND CONTEXT 87 (4th ed. 2006) George C. Christie, *Dworkin's "Empire*", 36 DUKE.L.J. 157-189 (1987).
[52]RONALD DWORKIN, LAW'S EMPIRE 5 (1986).

Dworkin, is the fact that we cannot hope to understand law through some set of criteria which participants in the practice use to identify it.[53] Rather, the theorist must also be a participant in the practice, adopting an interpretive attitude to the practice.[54] An important point in the methodology of Dworkin is the blurring of the line between legal theory and any practice of the law. The theorist, lawyer, legislator, a citizen and a judge, Dworkin's paradigm example, are all involved in the constructive interpretation of law.[55]

An interpretive practice of this nature always has a function or a purpose, asserts Dworkin. The purpose of law is limiting the use of collective force or coercion by the State as required by rights or past political decisions.[56] Constructive interpretation requires that legal materials are interpreted in a manner that shows them in their best light having regard to this purpose of law. It is interesting to note that in doing so, Dworkin is making a claim about the nature of law and not merely advocating some method of deciding cases or following rules. The nature of law as an interpretive practice aimed at a particular purpose, that is, justifying state coercion necessitates normative jurisprudence showing it in its best light.[57]

Dworkin's theory has been immensely successful. In particular, his claims about adjudication are taken to be true of constitutional adjudication in legal systems with liberal constitutional frameworks. Interestingly, Dworkin's theory has travelled far and wide, well in excess of the local limits he set for it. Dworkin's view was that legal theory is necessarily local and belongs to the interpretive culture of the author of the theory.[58]

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[53] *Id.*, at 31.
[54] *Id.*, at 45, 87.
[55] *Id.*, at 90.
[56] *Id.*, at 93.
[57] JULIE DICKSON, *supra* note 49, at 102.
[58] *Id.*

Despite the success of Dworkin's theory, substantial doubts have been raised regarding his claims on methodology. This was inevitable given that Dworkin disagrees with almost the entire canon of western jurisprudence. Some of the criticism can be quickly noted. First, the characterization of all positivist theories as semantic has been questioned widely.[59] There is a difference between identifying the meaning of a term and an enquiry aimed at understanding a phenomenon. For example, a scientific enquiry to discover the true nature of a physical force may yield a theory. This theory may also inform what we come to understand as the meaning of 'force.' However, one would not make the argument that the scientific enquiry was directed at some semantic goal. Of course, the position with respect to Hart and other positivists is not as clear cut as the example above.[60] Second, Dworkin's claim that the purpose of law is to limit coercion of the state is an appealing notion. However, there is no argument or reason for this assumption, and it is not an uncontroversial pre-interpretive identification as Dworkin suggests. It is a substantive claim for which there is no real argument that Dworkin offers.[61] Third, the view that we must view legal theory, jurisprudence and any other activity involving the identification of law as intrinsically the same activity is needlessly broad. This blurs a useful practical distinction,[62] even if one might concede that legal theory and the practice of law need not be seen as separate domains marked by clear boundaries.[63]

[59]HART, *supra* note 24 at 244; Joseph Raz, *Two views of the Nature of the Theory of law* in BETWEEN AUTHORITY AND INTERPRETATION 53 (2009).
[60]*See* Nicos Stavropoulos, *Hart's semantics* in HART'S POSTSCRIPT 59 (Coleman ed. 2005) (for the complex relationship between semantics and the concept of law in Hart's theory).
[61]Leiter, *supra* note 49 at 9,10; DICKSON, *supra* note 49 at 108.
[62]RUTH GAVISON, ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF HLA HART, (1987).
[63]Raz, *supra*note 59, at 81.

VI. SINGH'S ANARCHY TO UTOPIA - AN INDIAN THEORY

Chattrapati Singh is the author of an interesting theory of law which has been, sadly, almost completely overlooked.[64] As the only Indian legal philosopher to have made such an ambitious attempt, his work deserves more attention than it has received. One should not be surprised that an Indian contribution to the field has received scant attention. The world of jurisprudence is dominated by thinkers from the West and even within that space, there are complaints that it has been unfairly dominated by select faculties.[65]

Singh clearly sets out the predicament that an Indian theorist faces. In any attempt to create an Indian theory of law, one has to be ready to face up to the entire western tradition of philosophical thought.[66] This is what Singh attempts to do, travelling beyond legal theory well into the world of analytical philosophy. It is not unfair to say that he did not fully succeed in his aim of outgrowing the epistemic dominance of the West. Singh befriends Kant and Leibniz, and his theory has a Kantian soul.

Singh's method, in his quest, is one of exposition and not of discovery. He starts with a premise about the nature of law and attempts to identify essential properties of the law that the premise entails. Law, Singh asserts, is a normative system created to sustain just conditions for society.[67]This gives him various openings into the concept of law: first that it is a system, second that it is normative in nature and last, the substantive properties that the law must possess to

[64]CHATTRAPATI SINGH, *supra* note 5.
[65]Brian Leiter, *Naturalizing Jurisprudence: Three Approaches* in THE FUTURE OF NATURALISM, J. Shook & P. Kurtz eds.2009) https://ssrn.com/abstract=1288643. (March 30th, 2019).
[66]SINGH, *supra* note 5 at v.
[67]*Id.*, at 9.

be just.[68] Based on these, he builds an entire system explicating the qualities and properties law must possess.

How does this elaborate theory then conform to reality? Singh does not expect it to do so. The idea of law in his work, he says plainly, is not as it exists in any particular legal system.[69] Yet, Singh believes his work to be a definition of elements which apply universally to all legal systems and on which all jurisprudence must eventually be based.[70] And where reality does not accord with his theory, it is the law that must change, claims Singh. His theory must be taken to be reformative and normative in these situations.

It is difficult to summarize Singh's ideas or tersely state objections to the theory. Singh's theory has been neglected and there is hardly any secondary literature on the theory.[71] Nevertheless, if one were to point out Singh's important ideas, it would have to begin with his view that the legal system is a normative system that is 'systemizable', complete and consistent.[72] Singh derives an array of features of a normative system from these three requirements. However, the set of features are not exhausted by those derivations. A legal theory must additionally identify those features of law that set it apart from other normative systems as all normative systems are not legal systems. It is here that Singh presents his core idea, the epistemological foundation of law as a normative system. He puts forward the suggestion that basic legal propositions are *synthetic a priori* propositions, heavily influenced by Kant's classification of propositions as *analytic/synthetic* and *a priori/a posteriori*. Singh does not hesitate to challenge some Kantian assumptions, say, for instance the possibility of *analytic a posteriori* propositions (which Kant ruled out). Neither

[68] *Id.*, at10.
[69] *Id.*, at 12.
[70] *Id.*, at 12.
[71] Baxi, *supra* note 4.
[72] SINGH, *supra* note 5, at 12.

does Singh dither while questioning and rejecting (though not persuasively) the influential argument of Quine that the analytic/synthetic distinction is a meaningless dogma. In fact, Singh goes further and divides propositions into *factual synthetic a priori* and *normative synthetic a priori* propositions. This distinction is necessitated by Singh's belief that legal propositions do not exist in nature; rather they are created by us, in the creation of normative worlds.

Such normative worlds could include associations, clubs or even the mafia, Singh says.[73] Singh argues that as agents with free will, humans are charged with the duty to create the best normatively possible world.[74] Singh does not bind or chain every individual to a common vision of a perfect world. Rather as creative agents with free will and dignity, each individual is entitled to chart her own path by creating her own best possible world. If all creative agents with free will and dignity were to create the best possible worlds that appeal to them, would there be harmony in the world? This gives rise to a transcendental argument (as Singh puts it) that makes a legal order absolutely necessary, so that a cooperative social system can be put in place. The legal order is the only normative system that can enable humans to function as creative agents in building their own best possible worlds: making the world metaphysically richer and pushing it towards utopia. Singh marries this picture with ideas from Indian philosophy with the result that the legal system which promotes cooperative social activity becomes *dharma,* the finite human agent who creates her own best possible world, the *ataman* and the law's task is to ensure that *karma* of the human does not stray from the *dharmic* path.[75]

[73] *Id.*, at 124.
[74] *Id.*, at 140.
[75] *Id.*, at 229.

Singh's theory is impressive for the sheer range of ideas it propounds. It paints a picture of a system that helps human beings realize their freedom in a harmonious way while not insisting that they must all pursue the same goals. Of course, the system as such may have its own goals, but it must create a cooperative world where each individual is free to essay and create her own best world. As the name of the work suggests, this is a utopian picture. It is here that doubts creep in as to what extent Singh's work succeeds in its aim of uncovering the workings of the law. The system that Singh expounds is some kind of ideal legal system with no parallel in the real world that we inhabit.

Consider for instance, Singh's insistence that coercion is not part of the law. Singh's conclusion that the law is a voluntary system of cooperation, leads him, in turn, to propose that coercion has no proper place in the legal system. The role of coercion in the enforcement of law, Singh believes, is attributable to the political system with which the law intersects.[76] Singh's position, evidently, is (by design) in stark contrast to Austin. While Austin claimed that coercion was essential to any law, in Singh's theory, we find coercion is not a part of law at all.

Singh's claim is, no doubt, a result of his methodology. Expounding the concept of law, Singh enumerates a set of necessary properties of law. The necessary properties are derived through a set of logical arguments.[77] Resultantly, it appears that it makes no difference to the theory whether any legal system in the world possesses the features. If so, on what basis do are we to assess whether the claim of the theory is right or wrong? This is not unlike the problems posed by various theories considered above in this whirlwind tour of theories of law. In

[76] *Id.*, at 162
[77] *Id.*, at 12.

the next section, I build on the analysis in this section to outline a framework for thinking about these issues.

VII. THE METHODOLOGY OF LEGAL THEORY

Can we sketch the outlines of a methodology from the theories and works that we have rifled through in the previous section? Theorists, as we have seen, have investigated the law from diverse perspectives. These diverse perspectives raise a number of questions. What should the aim of theorizing be, should it be to identify the essential features of law in the form of necessarily true propositions? Or should it be an explicitly normative theory? Another kind of question that arises is the class of things that should be theorized about. If a theorist begins from linguistic usage, the class of things called law or rules is pretty vast. Should a theorist then focus on laws which originate from the state or should the theory account for other systems which bear the name law and exhibit similar features? This would include any activity which has a codified set of rules or any other prescription which is normative, that is, in the sense it prescribes a course or courses of conduct. For instance, the rules of a University may contain several features in common with a legal system.

The choice of jurisdictions is equally fascinating. Should a theory of law provide an insight into the legal system of the theorist alone, or should it be a theory of all law, whichever jurisdiction one can find it in. This could have a temporal dimension. Should the theory then meet the requirement of all such legal systems that have ever existed and may exist in the future?

Then comes the question of method. What material should a theorist rely on: will her intuitions about legal systems suffice or should she embark on a data gathering quest?

These are weighty questions that have no easy answers even in the theories that we have considered. Instead, what we are left with are varying approaches to methodology, none of which is conclusive. It would be more fruitful to construct a space that accommodates these diverse views rather than pitting one against another to pick a winner.

A. The aims of theorizing:

The first aspect that stands out is that legal theories can be aimed at widely differing tasks. What should a theory do: should it explain the concept of law, or should it embark on an evaluation of law? As we have seen above, a theory is explicitly normative, where it adopts a clear moral position and evaluates law from that standpoint.[78] A theory, by contrast, is said to be descriptive where the theorist aims to describe the law and does not intend any evaluation of the moral ends of the law.[79] There is also the argument that there are spaces in between that are occupied both consciously or otherwise. Even a theorist such as Hart, the exemplar of a descriptive approach, may be indirectly evaluative.[80] Description involves focusing on significant features of a concept, and determining what is an important feature of our concept of law involves an evaluation, as Raz puts it.[81] This is but one way in which evaluation creeps into jurisprudence that otherwise seeks to be morally neutral. This begs the question why evaluation of this sort should be seen as distinct from moral evaluation of the law. Quite possibly, this is a result of the significance that modern jurisprudence attributes to the separation between positivism and natural law. Moral evaluation of the law done explicitly is thought to belong a school of thought distinct from those who evaluate the law

[78]Himma, *supra* note 42, at 66.
[79]Andrei Marmor, *Legal Positivism, Still Descriptive and Morally Neutral* 26 (4) OXFORD JOURNAL OF LEGAL STUDIES 783 (2006).
[80]Dickson, *supra* note 49.
[81]Joseph Raz, *Authority, Law and Morality* in ETHICS IN THE PUBLIC DOMAIN 237 (1994).

from other standpoints. Given the success of both descriptive and normative theories, there should be room to explore whether these can co-exist. There is fundamentally no reason why an attempt to expound the essential features of law cannot stand alongside enquiries that are, by design, not morally inert. However, normative and descriptive jurisprudence are pitted against each other, often, as a result of a further claim that only one of these properly belongs to the province of jurisprudence. Normative theorists can be heard asserting that all jurisprudence is normative while those on the analytical side continue to emphasize the value-neutral purity of their enquiries.[82] This tension cannot be resolved completely here.

However, it might help to think of these issues in terms of explanatory adequacy of insights. It seems jurisprudence values both normative and descriptive insights into the workings of the law provided these insights are explanatorily adequate. Hart's discovery of an internal aspect to the law or Dworkin's revelations on constitutional adjudication (in the US) are paradigms of successful insights. Imagining theories in terms of insights also helps scale down unrealistic ambitions which have been a feature of jurisprudential theories since the time of Austin. Can one theory hope to explain the entire subject of law? Hart, in his introduction to the Concept of law wondered why questions such as 'what is chemistry' are not asked so often as the question 'what is law'?[83] Maybe, it is because, questions as wide as what chemistry is or what is law cover vast expanses of human activity. Only some kind of theory of everything can hope to completely answer and explain the phenomenon of law in its entirety. But we can uncover large parts of it, bit by bit. And possibly, we already have, as the quick tour in Part I indicates. Though large parts of these ambitious attempts to uncover the entirety of law through one single theory have been falsified, strands that are significant or

[82]Marmor, *supra* note 79. (For a consideration of arguments of this nature.)
[83]HART, *supra* note 24, at 1.

successful survive. And through the diverse insights that survive, we know more about the law than we did before.

B. The choice of normative systems

Rules and laws are ubiquitous. Every jurisdiction, even 'primitive' communities, has laws. And most spaces where human activity occurs have rules that govern them. Universities, games, music-it is not difficult to think of fields where rule bound activity is expected. And some of these figures prominently in legal theory. It is hard to miss the references to chess or cricket while reading the Concept of Law.[84]Hart thought this to be a novel feature of his theory.[85] The fact that rules and laws find such widespread use poses a problem for legal theorists. What part of this vast expanse must one tread? As Raz notes, though theorists have always focused on State-law, they are aware of the existence of other laws including categories such as canon law, Sharia law, Scottish law, laws of voluntary organizations and even neighborhood crime gangs.[86] Why omit these?

This problem has two dimensions. Should one choose only State-law as the subject of theorization and if State-law, what are the jurisdictions one should focus on? We have no definitive answers. Austin decided that only some categories of rules are to be the subject of his theory. Some categories he thought were based on analogies and others simply improperly so called.[87] Kelsen, too similarly, focused on a narrow set. However, he left it open for the possibility of discovering something common across vastly dissimilar usages of the

[84]*Id.,* at 89.
[85]NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM, 527 (2006).
[86]Raz, Joseph, *Why the State?* (October 12, 2013) KING'S COLLEGE LONDON LAW SCHOOl Research Paper No. 2014-38; Columbia Public Law Research Paper No. 14-427; Oxford Legal Studies Research Paper No. 73/2014. https://ssrn.com/abstract=2339522http://dx.doi.org/10.2139/ssrn.2339522 (April 10th, 2019).
[87]*See*S ection 1.A above.

term law.[88]This method of thinking that all laws belonged to a genus soon fell out of favor. Hart's take on this wide use of the word law was that the term had an open texture resulting in extensions of a great variety. So, any sort of definitional attempt, Hart thought, would not answer the problematic questions that the concept of law poses.[89] Despite Kelsen and Austin thinking that linguistic use was a good place to begin, the acknowledgment of the widespread use of law was almost tokenistic. The focus has really always been on law emanating from the state. It is only really late in the day that theorists such as Raz have suggested that legal theory must move beyond the exclusive concentration on state law which was never justified and even less so today.[90]

The second aspect of focus on select jurisdictions has puzzling results for jurisprudence. The jurisdictions that Austin's theory accounted for were not too many. Maine, while critiquing Austin, noted that analytical jurists had observed only legal systems of their civilization and age and those for which they had some intellectual sympathy. Other systems remote from their civilization and epoch had been ignored, he lamented.[91] This position continues even today where writers within the western tradition are primarily concerned with explaining features of the law as found in select jurisdictions in the West. Having said that, there is something odd about expecting philosophers in the West to account for Indian law. That task rightly belongs to Indian theorists.

However, legal theory continues to labour in the mistaken belief that an analytical theory can be successful only if its findings are valid for all legal systems. The sequitur, often, is that a successful theory is taken to be true of all legal systems. But the simple fact is that there

[88]KELSEN, *supra*note 18, at 4.
[89]HART, *supra* note 24, at 15.
[90]Raz, *supra*note 87.
[91]MAINE, ANCIENT LAW, 115 (1906).

is no warrant for such an assumption. It is not clear why a theory that surveys a limited set of rule systems should even claim validity beyond that. Is it true that for a theory of law to be objectively successful it must make a universal statement about all laws? Not necessarily. A proposition can be universally valid and yet be about a particular phenomenon, process or object. A claim that the population of a country Y demonstrates heightened susceptibility to X disease is evidently not about all human beings. It is not universal in that sense. Yet, if the study is otherwise scientifically valid, it is a universally valid claim. It is not as if it is open to a researcher in India to dispute the claim or disregard the finding in the paper vis-a-vis the population of Y except by questioning the validity of the study. In many ways, this example gives us the limits of theorising. A theory should ideally identify the normative systems that it studies, and the reach of a theory should ordinarily be limited to that set.

Limiting a theory in this manner does very little damage to the ambitions of legal theory. There is no reason to think that Indian law, for instance, crossed Hart's mind while authoring the Concept of Law. So, from an Indian perspective, while we need not discount the theory entirely, it is possible to view it as a set of theoretical statements about the legal systems that primarily influenced Hart. Where one sees analogies, a mediating argument can then be made as to why the theory apples to some aspect of Indian law.

C. Facts and Theory

The most serious criticisms of the methodology of analytical jurisprudence in recent years relate to its non-empirical character. At the heart of this criticism is the charge that conceptual analysis, the chief method of analytical theorists, is epistemologically bankrupt.[92] From the perspective of a critic, conceptual analysis seems to rely on

[92]Brian Leiter, *supra*note 49, at 38.

intuitions to seek out what are essential properties of law. Two lines of attack are worth noting. First, following Quine's challenge to the understanding of an analytical statement, the claim that the term law itself somehow entails some necessary truths is doubtful.[93] Second, conceptual analysishas a complex relationship with language and meaning. Linguistic methods have long fallen out of favor and invoking meaning in trying to identify the essential features of the law leaves one vulnerable to challenges such as the semantic sting.[94]

Whatever one may make of these arguments, it seems fairly clear now that a theory cannot hope to succeed by *a priori* reasoning alone. Even defenders of conceptual analysis point to the empirical component which may be latent in the intuitions of theorists who are participants in legal systems and members of linguistic communities.[95] But this empirical content will not meet the standard expected by those who suggest that jurisprudence should now take a naturalistic turn. However, it would be wrong to think that theorising relying on limited empirical resources is of no value and only propositions proved through some kind of experiment are of some worth. In the previous section, I have set out, almost as a continuous narrative, some of the more successful insights about law that we have from legal theory. Most of these evidently have been arrived at with almost no direct empirical enquiry.

Yet, in the course of argument and counter-argument, legal theory has the resources to test and falsify propositions that are not empirically justified. Austin made the claim that all laws are necessarily linked to sanctions. This claim has not survived Hart's critique (amongst others) because of counter-examples in the form of power-conferring rules. Hart's account on adjudication has similarly been challenged by

[93]Himma, *supra* note 42.
[94]JULES COLEMAN ET AL., METHODOLOGY IN THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 2 (2004).
[95]Himma, *supra* note 42 at 75.

Dworkin by citing decided cases involving kinds of disagreements between that lawyers and judges that Hart's theory cannot account for. Raz questions Hart's postulation of a single rule of recognition by pointing to cases where such a stipulation could be problematic, for example, a case that involves conflict of laws.[96] Baxi questions Singh's insistence that legal propositions are *synthetic a priori* statements by pointing to changes in attitudes towards human rights post 9/11.[97]

Now, does that mean that theories in the first place, are mere hypotheses which are to be tested thereafter? Not necessarily. It is a mistake to believe that empirical inputs for theorization can only be obtained through some data gathering exercise. That would be too a narrow a view. Close observation of phenomena need not always take a mathematical form or be structured or organized in a scientific way. That scientific study yields empirically valid theories must not lead one to conclude that is the only way of arriving at empirically valid claims. A theorist is, after all, a participant in a legal system, very often with privileged access to the intricate workings of the law. Close observations of the legislative process or the judicial process can yield insights that don't need further empirical justification if all that such conclusions rely on are assumptions undoubtedly shared by participants in the legal system. But in doing so, conceptual analysis has to proceed with a level of modesty.

It would be helpful to integrate two thoughts expressed earlier with the present claim. I have already suggested theories cannot or should not aspire to explain the entirety of the law. It is unlikely that any theorist has access to empirical inputs (even in the indirect fashion suggested above) that can justify theories which purport to cover and

[96]Scott Shapiro, *What is the Rule of Recognition (and Does it Exist)?,*THE RULE OF RECOGNITION AND THE US CONSTITUTION, (Adler et al eds. 2009), https://ssrn.com/abstract=1304645 (March 30th, 2019).
[97]Baxi,*supra*note 4 at 22.

explain every aspect of the legal system. Second, I have claimed that theories must identify rule systems and jurisdictions that they are investigating. Identifying legal systems or rule systems that are the subject of a theory would certainly aid subsequent conversations as to whether the theory holds within the stated field and whether they can be extended to other jurisdictions or rule systems. These limitations would serve well to ensure that a theorist does not stray beyond assumptions that underpin her theory.

An attempt to defend theorisation of this nature is not to suggest that it is better or superior to other methods. If an empirical study of rule-following drawing from mathematical methods can contribute to the theoretical understanding of law, there is no reason to be apprehensive of such a project. In fact, in most such cases, it is the more traditional jurisprudence of the kind described above that furnishes the propositions to be tested. For instance, conventional jurisprudence postulates a link between sanctions and rule-following. It is this link that then becomes the hypothesis for any study which seeks to research this relationship empirically. Such connections between widely differing methods assure us that there is no reason to assume that one kind of enquiry into the nature of law necessarily forecloses an investigation of another kind.

VIII. CONCLUSION

All this points to a different conclusion. Given the diversity in aims and methods within legal theory, an explicit and clear position on methodology is undoubtedly the first task in theorising. Should one aim to describe or evaluate? Should one target to explain all laws or a subset? And what kind of empirical inputs does one have regarding the chosen subset? What are the assumptions that underlie the connections or inferences drawn? The importance of clarity on these issues cannot be overstated.

Explicit statements on these issues can help in building clear and meaningful conversations in which the results of theories can be debated and questioned. It is immensely important that such conversations account for the diversity of legal systems and rule systems that we have. Most relevant to our immediate context is that we should not shy away from such conversations. Legal theory is of no relevance to us, if it cannot explain facts about the law as it exists around us. After all, if facts do not fit the theory, we must let the theory go.

'RIGHT TO DIE VIS-À-VIS RIGHT TO LIFE'-AN ANALYSIS OF THE SUPREME COURT APPROACH TOWARDS PASSIVE EUTHANASIA

Rohitesh Tak[*]

Abstract

The present article is an attempt to critically analyse the Supreme Court judgements on passive euthanasia. It argues that even though the Supreme Court has recognised that under Article 21 of the Constitution, a terminally ill patient with no hope of recovery has the 'right to die with dignity' through smoothening the process of dying. The position upheld by it, strictly in relation to legalising passive euthanasia, is imbalanced as it has given more prominence to the principle of 'sanctity of life' rather than, to the right of 'autonomy and self-determination' of the incurable and terminally ill patients.

I. INTRODUCTION

Death has always meant to be an inevitable extinction of human life. However, as medical technology has become more advanced, it has achieved the capability both to prolong human life beyond its natural

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endpoint and to better define when that endpoint will occur.[1] Therefore, in this light the present debate of euthanasia seeks to find an answer to the issue regarding, whether individual patient shall be allowed to die peacefully when the process of natural death has already commenced or that by use of artificial means the life of the patients shall be prolonged due to compelling state interest and theological considerations.

Hence, taking into consideration the aforementioned issue of the debate this article seeks to critically analyse the approach of the Indian judiciary while dealing with the concept of passive euthanasia. For achieving the said purpose, this article is mainly divided into five sections. Part I of the article seeks to define the concept of euthanasia and traces the historical background to the concept. Part II sets out the present debate with regard to euthanasia and analyses the argument for and against euthanasia. Part III then examines the key Supreme Court judgments on passive euthanasia, and Part IV seeks to draw the various intricacies and conclusion from the judgments of the Supreme Court, with special reference to the decision in *Common Cause v. Union of India*.[2] Lastly, Part V provides the conclusion.

II. EUTHANASIA - DEFINED

The Oxford English Dictionary defines 'euthanasia' as "*a gentle and easy death*".[3] Black's Law Dictionary defines it as "*the act or practice of killing or bringing about the death of person who suffers from an incurable disease or condition especially a painful one for*

[1]Christopher N. Manning, *Live and Let Die: Physician-Assisted Suicide and the Right to Die*, 9 HARV. J. L. & TECH. 513, 513 (1996).
[2]Common Cause v. Union of India, (2018) 5 SCC 1 ('*Common Cause*').
[3]OXFORD ENGLISH DICTIONARY [7] 444 (2d ed. 1989).

reasons of mercy."[4] Out of these two definitions, Oxford's definition is of a wider connotation whereas Black's definition is more precise and relevant to the present debate of euthanasia.[5]

The term 'euthanasia' can be classified as voluntary, involuntary, non-voluntary. Voluntary euthanasia occurs when the patient's death is brought about at his or her own request. Non-voluntary euthanasia may be used to describe the killing of a patient who does not have the capacity to understand what euthanasia means and, therefore, cannot form a request or withhold consent. Involuntary euthanasia has been used to describe the killing of a patient who is competent to request or consent to the act but does not do so.[6]

In legal parlance, an act of euthanasia is mainly referred to as either active or passive. In active euthanasia, death is caused by the administration of a lethal injection or drugs. Active euthanasia also includes physician-assisted suicide, where the injection or drugs are supplied by the physician, but the act of administration is undertaken by the patient himself.[7] Passive euthanasia occurs when medical practitioners do not provide life-sustaining treatment (that is, treatment necessary to keep a patient alive) or remove patients from life-sustaining treatment.[8]

For the purpose of this article, the term 'euthanasia' shall mean the same as construed by Black's Law Dictionary and all the other terms such as active euthanasia and passive euthanasia, physician-assisted suicide, shall also bear the same meaning as referred above.

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[4]BLACK'S LAW DICTIONARY554 (8th ed. 2004).
[5]Thane Josef Messinger, *A Gentle and Easy Death: From Ancient Greece to beyond Cruzan toward a Reasoned Legal Response to the Societal Dilemma of Euthanasia*, 71 DENV. U. L. REV. 175, 178-179 (1993) ("**Messinger**").
[6]SELECT COMMITTEE, MEDICAL ETHICS, 1994, HL 21-I, ¶23 (UK).
[7]Common Cause, *supra* note 2, at 219.
[8]*Id.*

III. BRIEF HISTORICAL BACKGROUND BEHIND 'EUTHANASIA'

Euthanasia is not only a word of Greek origin – literally meaning a "*good (eu) death (thanatos*)" –but the term itself was already used, albeit rather sparsely, in Greek and Roman antiquity.[9]

In Ancient Greece, euthanasia seemed to have been an accepted and prevalent practice.[10] In some Greek city-states, including Athens, people could request government help in killing themselves.[11] It was believed that suicide could be acceptable or even honourable under certain conditions, one of which was escaping the pain of an untreatable illness.[12] Plato, though condemned suicide on the notion that it "imposes an unjust judgement of death on oneself in the spirit of slothful and cowardice.[13] He argued, in *Republic*, that patients unable due to their suffering to live a normal life, should not receive treatment for the prolongation of life.[14] Aristotle also supported the concept of euthanasia for terminally incurable diseases but rejected the notion of suicide, because according to him man owed a civil duty to the state.[15]

After the Roman conquest of Greece, the stoic philosophy of death eventually dominated.[16] The Stoics favoured suicide when life was no longer in accordance with nature, because of pain, grave illnesses, or

[9]BERT BROECKAERT, *Euthanasia: History,* ENCYCLOPEDIA OF GLOBAL BIOETHICS, 1188 (H. Ten Have, 2016).
[10]Messinger, *supra* note 5, at 182.
[11]LISA YOUNT, RIGHT TO DIE AND EUTHANASIA, 6 (2007) ("**Lisa Yount**").
[12]*Id.*
[13]THE DIALOGUES OF PLATO, 317-318 (*translated by* B. Jowett, 3rd ed. 1999).
[14]PLATO, THE REPUBLIC, 90-97 (1992).
[15]JENNIFER M. SCHERER & RITA JAMES SIMON, EUTHANASIA AND THE RIGHT TO DIE: A COMPARATIVE VIEW, 2 (1999) ("**Scherer**").
[16]*Id.*

physical abnormalities.[17] Suicide was punishable only if it was irrational.[18] However, for terminal illness, it was considered to be a good cause. The idea of dying well was a *summum bonum* or extreme good.[19] The Stoic philosophy prevailed nearly for about two centuries after the death of Jesus.[20]

Commentators have noted, that even during the early Christian era, condemnations of suicide were comparatively rare and hardly unequivocal.[21] It was only in the second and third centuries, when Christianity began to dominate religious thought and practice in Western culture that resistance to euthanasia became almost imbedded in the collective consciousness.[22] In the fifth century, St. Augustine declared that suicide violated the function of the Church and State and that it was against the Sixth Commandment, "*Thou shall not kill*."[23] He compared suicide to homicide[24]which, later shaped the attitude of the Church regarding its sinfulness.[25] Augustine's position became the mediaeval Catholic position, later amplified in the thirteen century by Thomas Aquinas[26] who suggested three additional arguments- that suicide was contrary to natural law

[17]John Cooper, *Greek Philosophers on Euthanasia and Suicide* in SUICIDE AND EUTHANASIA HISTORICAL AND CONTEMPORARY THEMES, 25 (Baruch A. Brody, 1989).
[18]Messinger, *supra* note 5, at 182.
[19]EREK HUMPHRY & ANN WICKETT, THE RIGHT TO DIE: UNDERSTANDING EUTHANASIA, 2 (1990).
[20]Scherer, *supra* note 15, at 3.
[21]Darrel W. Amundsen, *Suicide and Early Christian Valves* in SUICIDE AND EUTHANASIA HISTORICAL AND CONTEMPORARY THEMES, 78 (Baruch A. Brody ed., 1989).
[22]Margaret M. Funk, *A Tale of Two Statutes: Development of Euthanasia Legislation in Australia's Northern Territory and the State of Oregon*, 14 TEMP. INT'L & COMP. L.J. 149, 150 (2000).
[23]Scherer, *supra* note 15, at 3.
[24]AUGUSTINUS AURELIUS, DE CIVITATE DEI, I, 20.
[25]LOUIS I. DUBLIN, SUICIDE: A SOCIOLOGICAL AND STATISTICAL STUDY, 116 (1963).
[26]Messinger, *supra* note 5, at 187.

and self-love; that it deprived society of the contribution and activity of an individual; and that it usurped the function of God.[27]

The dominance of the Christian view on suicide came to a halt when the period of Renaissance began and led to some enlightened views in the 16th century. In 1516, Thomas More, in his work *Utopia*, argued that those who are incurables are a burden to both themselves and others and should either put an end to life or allow others to release them.[28] The French philosopher Montaigne, also expressed his view that, when God reduces us to the state in which it is far worse to live than to die, he grants us permission to die.[29] Therefore, since the 16th century, singular voices started to consider suicide as morally legitimate and justifiable in cases of serious illness.[30]

In the 17th century, Francis Bacon, further extended his belief that science should help relieve man's estate by arguing that the physician's duty was to "*not only restore the health, but to mitigate pain and dolour; and not only when such mitigation may conduce to recovery, but when it may serve a fair and easy passage*".[31] In an essay published in 1777, Scottish philosopher David Hume stated that suicide "*is no transgression of our duty to God*", especially in the case of people who are already dying.[32] Hume also discredited the Aquinas notion of God's established order on the notion that human lives are governed by general casual laws, as is all matter in the

[27]GARY B. FERNGREN, *The Ethics of Suicide in The Renaissance and Reformation* in SUICIDE AND EUTHANASIA HISTORICAL AND CONTEMPORARY THEMES, 155 (Baruch A. Brody ed., 1989).
[28]*Id*., at 158.
[29]*Id*., at 160.
[30]JOSEF KUŘE, EUTHANASIA – THE "GOOD DEATH" CONTROVERSY IN HUMANS AND ANIMALS, 17 (2011) ("**Kuře**").
[31]Ezekiel J. Emanuel, *The History of Euthanasia Debates in the United States and Britain*, 121 ANN INTERN MED. 793, 793-794 (1994).
[32]Lisa Yount, *supra* note 11, at 7.

universe.[33] He further stated that, because persons die of natural causes - as in the cases of being poisoned or swept away by a flood– it is gratuitous to maintain that there is a divine cause.[34] Hence, during the eighteenth and nineteenth centuries, the belief that a physician should relieve a patient from pain and suffering by means of euthanasia gained wider acceptance.[35]

In the early 1900s, several pieces of legislation were introduced to legalize and regulate euthanasia in the United States and England. However, they were ultimately defeated.[36] But the efforts to legalize it continued, as many private societies were established for the same cause.[37] However, all such efforts to legalise euthanasia suffered a serious setback in 1939 when Adolf Hitler signed a decree that enabled Nazi Germany to forcefully euthanize patients whom they deemed were "*unworthy of life*".[38] As a result, children and adults with physical and mental disabilities became victims of the euthanasia program.[39] It is estimated that about 200,000 handicapped people were murdered between 1940 and 1945 because of the programme.[40] Therefore, later with the decline of Nazi Germany, German doctors

[33]Scherer, *supra*note15, at 4.
[34]Tom L. Beauchamp, *Suicide in the Age of Reason*, *in* SUICIDE AND EUTHANASIA HISTORICAL AND CONTEMPORARY THEMES, 203 (Baruch A. Brody, 1989) ('Beauchamp').
[35]Mark C. Siegel, *Lethal Pity: The Oregon Death with Dignity Act, Its Implications for the Disabled, and the Struggle for Equality in an Able-Bodied World*, 16 LAW & INEQ. 259, 268 (1998).
[36]Lisa W. Bradbury, *Euthanasia in the Netherlands: Recognizing Mature Minors in Euthanasia Legislation*, 9 NEW ENG. J. INT'L & COMP. L. 209, 218 (2003).
[37]Scherer, *supra* note 15, at 9.
[38]Nikola Budanovic, *Action T4 – Nazi 'Euthanasia' Programme that Murdered the Disabled and the Mentally Ill*, WAR HISTORY ONLINE (Jan. 29, 2018), https://www.warhistoryonline.com/world-war-ii/action-t4-nazi-euthanasia-programme.html (September 18, 2018).
[39]Karl Brandt, Philipp Bouhler, Viktor Brack, & Leonardo Conti Zacharey Crawford, *The Administration of Death*, 7 W.I.H.R. 59, 60 (2015).
[40]*The Murder of the Handicapped*, https://www.ushmm.org/outreach/en/article.php?ModuleId=10007683, (May 10, 2018).

resolved to condemn the practice of euthanasia under any circumstances.[41]

However, at present, the worldwide debate regarding legalizing euthanasia continues, because technology has become able to prolong the natural process of death.[42]

IV. THE EUTHANASIA DEBATE

Euthanasia is a controversial subject which inevitably provokes intense emotional debate and gives rise to strong convictions which do not readily lend themselves to consensus.[43] The debate about euthanasia and assisted suicide is both international and interdisciplinary, engaging experts and laypeople across the globe.[44] The debate pits arguments about autonomy and about relief from pain and suffering on the 'for' side, versus arguments about the intrinsic wrongness of killing, threats to the integrity of the medical profession, and potentially damaging social effects on the 'against' side.[45] Therefore, while determining the sanctity of euthanasia, the Courts need to balance the interest in preserving human life against the desire to die peacefully and with dignity.[46]

[41]Margaret M. Funk, *A Tale of Two Statutes: Development of Euthanasia Legislation in Australia's Northern Territory and the State of Oregon*, 14 TEMP. INT'L & COMP. L.J. 149, 150 (2000).
[42]Lisa Yount, *supra* note 11, at 11.
[43]MARGARET OTLOWSKI, VOLUNTARY EUTHANASIA AND THE COMMON LAW, 187 (1997) ("**Otlowski**").
[44]JOHN KEOWN, *Introduction to* EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES, 2 (John Keown, 1995).
[45]MARGARET PABST BATTIN, ENDING LIFE: ETHICS AND THE WAY WE DIE, 18 (2005) ("**Battin**").
[46]Compassion in Dying et al. v. State of Washington, 79 F3d 790 (9th Cir 1996).

A. For euthanasia

a) The Utilitarian Argument

The most common argument for the moral justification of euthanasia is based on the 'rule of utilitarianism.' According to this rule, the right action is the one that if generally followed would have consequences that are better than, or at least no worse than, any other action that might be generally followed in the relevant situation.[47] Also, according to utilitarianism, an action is morally right if it serves to increase the amount of happiness in the world and decrease the amount of misery. Conversely, an action is morally wrong if it serves to decrease happiness and increase misery.[48]

Therefore, according to the utilitarian approach, when a terminally ill patient is kept alive only to die slowly and painfully, suffering is greatly increased for everyone involved.[49] Hence, the killing of a patient may be contrary to the principle of 'sanctity of life' but is morally good because the consequence of such an action is good: suffering has been eliminated and the death has been achieved in a desirable way (painless and peaceful).[50] Moreover, euthanasia can also be morally acceptable because it decreases the misery of everyone involved: the patient, the caretakers, and the family and friends of the patient.[51]

[47]Peter Singer, *Voluntary Euthanasia: A Utilitarian Perspective*, 17 BIOETHICS 526, 526-527 (2003).
[48]JAMES RACHELS, THE END OF LIFE, EUTHANASIA AND MORALITY, 151 (1997)('Rachels').
[49]Kelly Crocker, *Why Euthanasia and Physician-Assisted Suicide are Morally Permissible*, http://purl.flvc.org/fsu/fd/FSU_migr_phi2630-0010 (May 11, 2018) ('Crocker').
[50]Kuře, *supra* note 30, at 149.
[51]Crocker, *supra* note 49.

b) The Mercy Argument

As noted by Kohl and Kurtz, no rational morality can categorically forbid the termination of life if it has been blighted by some horrible malady for which all known remedial measures are unavailing.[52] In this light, the argument from mercy holds that if someone is in unbearable pain and is hopelessly ill or injured, then mercy dictates that inflicting death may be morally justified.[53] The argument presupposes that no person should be obliged to endure interminable suffering perceived as pointless, and supposes that the intolerable suffering cannot be relieved by medical tools and the only way to avoid such suffering is by the death of the patient, then such a death may be brought about as an act of mercy.[54] The rationale behind such presupposition may be that, sometimes terminable ill patients suffer pain so horrible that it can hardly be comprehended by those who have not experienced it. The sufferings are so terrible that we do not even like to read about it or even think about it; we recoil even from its description.[55] Hence, the 'argument from mercy' seeks to justify euthanasia as it puts an end to the cruelty caused suffered by the incurable patient.[56]

c) The Autonomy and Self Determination Argument

Individual rights of autonomy and self-determination are the most important grounds for legalizing assisted dying.[57] Though autonomy

[52]MARVIN KOHL AND PAUL KURTZ, *A Plea for Beneficent Euthanasia*in BENEFICENT EUTHANASIA, 234 (Marvin Kohl, 2nd ed., 1975).
[53]Sarah Bachelard, *On Euthanasia: Blindspots in the Argument from Mercy*, 19 JOURNAL OF APPLIED PHILOSOPHY 131, 131 (2002).
[54]Kuře, *supra* note 30, at 149.
[55]Rachels, *supra* note 48, at 151.
[56]Otlowski, *supra* note 43, at 203.
[57]Alexandra Mullock, *End-Of-Life Law and Assisted Dying in The 21st Century: Time for Cautious Revolution?*

and self-determination seem to be interrelated there exists a difference. According to Katz, self-determination refers to the right of individuals to make decisions without the interference of others, whereas autonomy refers to the extent and limits of a person's capacity to reflect and to make choices in the inherent psychological nature of human beings.[58]

As per Hoffman, "*Autonomy means that every individual is sovereign over himself and cannot be denied the right to certain kinds of behaviour, even if intended to cause his own death*".[59] According to Lawrence, autonomy is undoubtedly a central and important human good – an essential part of human flourishing – and to be deprived of it is to suffer a moral and psychological disaster.[60] In George's view, autonomy is important because it enables us to create good and fulfilling lives.[61]

The requirement to respect a person's autonomy implies that a person is capable of being rational and has the sole right to decide whether to live or die.[62] Therefore, it is imperative that if a terminally ill person freely and rationally seeks assistance in suicide from a physician, the physician ought to be permitted to provide it.[63] Making someone die in a way that others approve, but he believes a horrifying contradiction of his life, is a devastating, odious form of tyranny.[64] Hence, a ban on euthanasia imposes a considerable restriction on the

https://www.research.manchester.ac.uk/portal/files/54517980/FULL_TEXT.PDF, (September 23, 2018).

[58]JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT, 110-111 (2002).

[59]Reeves v. Commissioner of Police of the Metropolis [2000] 1 AC 360 at 379.

[60]LAWRENCE HAWORTH, AUTONOMY: AN ESSAY IN PHILOSOPHICAL PSYCHOLOGY AND ETHICS, (1986).

[61]Alexander McCall Smith, *Beyond Autonomy*, 14 J. CONTEMP. HEALTH L. & POL'Y 23, 31 (1997).

[62]BERTRAM & ELSIE BANDMAN, *Rights, Justice, And Euthanasia*, in BENEFICENT EUTHANASIA,81-82 (Marvin Kohl, 1975).

[63]Battin, *supra* note 45, at 20.

[64]R DWORKIN, LIFES DOMINION, 217 (1993) ('Dworkin').

options of an individual to govern his/her life, denying a competent individual's ability to shape his/her own death.[65]

With regard to the right of self-determination, it is argued that intellectual self-determination, which is concerned with choices and decisions, is largely protected by the right of the individual to determine, by whatever means, whether or not to consent to medical intervention.[66] The manner, timing and circumstances of a person's death are held deeply intimate to a person's conception of what constitutes his or her well-being.[67] By unduly restricting choice concerning the manner, timing and circumstances of death, the state is said to impose paternalistic restraint by coercion, depriving people of a profound sense of their own self-worth.[68]

Proponents for euthanasia have also centred their arguments on autonomy and self-determination by following the philosophy of John Stuart Mill and his arguments on liberty and individuality. Mill has refereed to individuality as "*the right of each individual to act, in things indifferent, as seems good to his own judgment and inclinations*".[69] He argues that the highest pleasures are those acquired in the attainment of individuality, involving the exercise of the distinctive human faculties in making a choice for oneself about one's own plan of life.[70]

According to Mill, liberty of thought and discussion, and liberty of conduct both are required for the flourishing of

[65]Kuře, *supra* note 30, at 132.
[66]Re T (Adult: Refusal of Medical Treatment) [1992] 4 All ER 649 at 652–3.
[67]DAN W. BROCK, LIFE AND DEATH: PHILOSOPHICAL ESSAYS IN BIOMEDICAL ETHICS, 206 (1993).
[68]JOHN HARRIS, *Euthanasia and the value of life, in* EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES, 11 (John Keown, 1999).
[69]C. L. TEN, *Introduction* to MILL'S ON LIBERTY: A CRITICAL GUIDE, 8 (C. L. Ten, 2008).
[70]*Id.*

individuality.[71]However, Mill also argues that the liberty of an individual can be curtailed only in limited circumstances. In this regard he observes that:

"*The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.*"[72]

Clarke has argued that deciding when to die is a matter of individuality. Since, at the end of a life during which a person has developed his talents and capacities, it is that person who is in the best position of being able to judge whether further self-development is possible or if his individuality has reached its fullest potential.[73]

d) The Dignity Argument

Human dignity is a descriptive and value-laden quality encompassing self-determination and the ability to make autonomous choices and implies a quality of life consistent with the ability to exercise self-determined choices.[74] According to Dworkin, "*A person's right to be treated with dignity, is the right that others acknowledge his genuine critical interests: that they acknowledge that he is the kind of creature, and has the moral standing, such that it is intrinsically,*

[71]*Id.*, at 2.
[72]*Id.*, at 9.
[73]Dr Simon Clarke, *Mill, Liberty & Euthanasia*, 110 PHILOSOPHY NOW 1, 4 (2015), https://philosophynow.org/issues/110/Mill_Liberty_and_Euthanasia, (September 23, 2018).
[74]HAZEL BIGGS, EUTHANASIA, DEATH WITH DIGNITY AND THE LAW, 29 (2001) ('Hazel Biggs').

objectively important how his life goes".[75] As per Kant, the person's dignity – indeed, 'sublimity', comes not from subjection to the law but rather from the lawmaker, that is, from being autonomous.[76]

It is argued that the unique and essential feature distinguishing humans from other animals is rationality, the ability to reason and to act upon reasons. Human dignity would, therefore, arise from this feature. We would affront such dignity by failing to acknowledge this in an individual instead of treating them as an object or an animal.[77] Therefore, the notions of human dignity demand that the individuals should have control over significant life decisions, including the choice to die, and that this control is acknowledged and respected by others.[78]

Today, since advances in medical knowledge and technology have made it possible to extend the span of full life and, paradoxically, to extend the dying process beyond what most people think is sensible.[79] The proponents argue, that in such situations, the state should not force people to remain dependent upon others, to helplessly witness their own loss of control, or to otherwise endure conditions that unacceptably compromise human dignity.[80] According to the proponents of this argument, one should note that the focus is not on

[75]Dworkin, *supra* note 64, at 236.
[76]Beauchamp, *supra* note 34, at 213.
[77]Peter Allmark, *Death with Dignity*, 28 J Med Ethics 255, 256 (2002).
[78]Otowasiki, *supra* note 43, at 204.
[79]JEAN DAVIES, *The Case for Legalising Voluntary Euthanasia*, *in* EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES, 88 (John Keown, 1999).
[80]Melanie Walthour, *Competently, Knowingly, and Voluntarily Dying with Dignity: Why States That Allow Defendants to Volunteer for Execution Should Allow Terminally Ill Patients to Die in a Dignified and Humane Manner*, 9 ARIZ. SUMMIT L. REV. 437, 445 (2016).

pain suffered by the patient, it is a loss of mastery over one's own life and destiny, which can be experienced as suffering.[81]

B. Against euthanasia

a) The Sanctity or Inviolability of Life Argument

The sanctity of life, in its simplest form, argues that all life has a value and status that should be recognized before any measures are deliberated to extinct or terminate life.[82] The argument regarding the sanctity or inviolability of life has religious backgrounds. In Western thought, the development of the principle has owed much to the Judaeo-Christian tradition[83] whereas in Eastern thought it owes much to Buddhism.[84]

According to Christian philosophy, human life is sacred before God because man was made in the image of God.[85] Hence, to regard life as sacred means that it should not be violated, opposed, or destroyed, and, positively, that it should be protected, defended, and preserved.[86] Further, the principle of 'thou shalt not kill'[87] seeks to contemplate that, when one decides to take his life, he is simply rejecting God's sovereignty over his life and also attacking the sanctity of human life. Whether it is voluntary or involuntary, active or passive euthanasia or

[81]H. TRISTRAM ENGELHARDT, Physician-Assisted Suicide and Euthanasia: Another Battle in the Culture Wars, in PHYSICIAN –ASSISTED SUICIDE: WHAT ARE THE ISSUES? 33 (Loretta M. Kopelman& Kenneth A. De Ville, 1st ed., 2001).
[82]Bhakta David Nollmeyer, *The Sanctity of Life: A Refutation of Euthanasia*, http://www.powereality.net/euthanasia.htm, (May 10, 2018).
[83]JOHN KEOWN, EUTHANASIA, ETHICS AND PUBLIC POLICY, AN ARGUMENT AGAINST LEGALISATION, 40 (2004)('J. Keown').
[84]Damien Keown, Suicide, Assisted Suicide and Euthanasia: A Buddhist Perspective, 13 J. L. & RELIGION 385, 387 (1998)(Keown).
[85]Genesis 1:27.
[86]Leon R. Crass, *Death with Dignity & Sanctity of Life*, COMMENTARY (Mar 1. 1990), https://www.commentarymagazine.com/articles/death-with-dignity-the-sanctity-of-life/ (September 18, 2018).
[87]Exodus 20:13 KJV.

assisted suicide; human life is sacred and should not be taken by anybody under any guise.[88]

It has been argued that in Judaism the person who requests suicide is an innocent victim of the crime he or she is requesting be committed against him or her, even when that person thinks that being killed is for his or her own benefit or the benefit of others—or even when this person thinks he or she deserves to die. No one is authorized to instigate his or her own death at the hands of another, even if that other is society.[89] Further, in Buddhism, intentionally to destroy (or harm or injure) life is to synthesize one's will with death. To seek death or to make death one's aim (even when the motive is compassionate, directed toward reducing suffering) is to negate in the most fundamental way the values and final goal of Buddhism by destroying what the traditional sources call the precious human life we have had the rare good fortune to obtain.[90]

Therefore, according to this school of thought, the 'right to life' is essentially a right not to be intentionally killed.[91] It has been argued that this right is enjoyed regardless of inability or disability. Our dignity does not depend on our having a particular intellectual ability or having it to a particular degree. Any such distinctions are fundamentally arbitrary and inconsistent with a sound concept of justice.[92]

[88]Emeka C. Ekeke&Ephraim A. Ikegbu, *The Sanctity of Human Life in the Twenty First Century: The Challenge of Euthanasia and Assisted Suicide*, 1 Educ. Res. 312, 316 (2010).
[89]DAVID NOVAK, THE SANCTITY OF HUMAN LIFE, 116 (2007).
[90]Keown, *supra* note84, at 387.
[91]JOHN KEOWN, *supra* note 83, at 40.
[92]JOHN KEWON, THE LAW AND ETHICS OF MEDICINE: ESSAYS ON THE INVIOLABILITY OF HUMAN LIFE, 5 (1st ed., 2012).

b) The Slippery Slope Argument

The slippery slope argument holds that if a proposal is made to accept A, which is not agreed to be morally objectionable, it should nevertheless be rejected because it would lead to B, which is agreed to be morally objectionable.[93] The logical and psychological reason behind such an argument has been aptly described by James Rachels. According to him, the logical reason behind such argument is that once a certain practice is accepted, then from a logical point of view we are committed to accepting certain other practices as well, since there are no good reasons for not going on to accept the additional practices once we have taken the all-important first step.[94] Whereas, the empirical or psychological form of the argument claims that once certain practices are accepted, people shall, in fact, go on to accept other, more questionable practices.[95]

With regard to present debate of euthanasia, the slippery slope argument makes the claim that if some specific kind of action (such as euthanasia) is permitted, then society will be inexorably led ('down the slippery slope') to permitting other actions that are morally wrong.[96] In particular, the practise of voluntary euthanasia would lead to the practice of non-voluntary or involuntary euthanasia, where at least involuntary euthanasia is morally impermissible.[97] It is feared that legalising euthanasia for those who ask for it will inevitably lead us to allow doctors to put suffering patients who have not asked for it out of their misery.[98]Moreover, if physician-assisted suicide and

[93]*Id*., at 71.
[94]Rachels, *supra* note 48, at 172.
[95]*Id.*, at 172-173.
[96]D. Benatar, *A Legal Right to Die: Responding to Slippery Slope and Abuse Arguments*, 18 CURR ONCOL 206, 206 (2011).
[97]Hallvard Lillehammer, *Voluntary Euthanasia and the Logical Slippery Slope Argument*, 61 CAMBRIDGE L.J. 545, 545 (2002).
[98]JOHN GRIFFITHS, HELEEN WEYERS& MAURICE ADAMS, EUTHANASIA AND LAW IN EUROPE, 513 (2008).

euthanasia are only offered to the terminally ill or the severely disabled and not offered to all competent adults, society will only further devalue these vulnerable groups.[99]

c) The Hippocratic Oath

The Hippocratic Oath is an ancient Greek document that is simply entitled Oath, its age is debated; 400 BCE is a reasonable estimate of when it was written.[100] This oath, traditionally considered the cornerstone of medical ethics, includes the statement, "*I will [not] give a deadly drug to anybody if asked for it, nor will I make a suggestion to that effect*."[101] This statement has been customarily interpreted to mean, as an ancient medical disavowal of euthanasia or physician-assisted suicide.[102] For some opponents of assisted dying, this statement also reflects a religiously based moral judgment about the intrinsic wrongness of killing; and for others, it is the underlying axiom of medical practice to which the Hippocratic Oath alludes in stipulating that the physician shall give no deadly drug, not even when asked for it.[103]

It is argued that, if physicians are obligated by law to provide their patients with a lethal prescription or injection upon request, physicians will no longer be viewed as healers but those who take life.[104] Further since, patients trust their physicians more when they know that their physicians will help them, not desert them as they

[99]Kelly Green, Physician-Assisted Suicide and Euthanasia: Safeguarding against the Slippery Slope - The Netherlands versus the United States, 13 IND. INT'L & COMP. L. REV. 639, 648 (2003).
[100]T STEVEN H. MILES, THE HIPPOCRATIC OATH AND THE ETHICS OF MEDICINE, 3 (2005) ('MILES').
[101]Lisa Yount, *supra* note 11, at 132.
[102]Miles, *supra* note 100, at 66.
[103]Battin, *supra* note 45, at 24-25.
[104]Williard Gaylin, Leon R. Kass, Edmund D. Pellegrino, & Mark Siegler, *Doctors Must Not Kill*, 259 JAMA 2139, 2140 (1988).

die.[105] It is insisted that if a physician is permitted to assist some patients in dying, this practice will reduce the public's trust in doctors and in the health care system[106] which is invariably essential for good care.[107] Moreover, if physician-assisted suicide and euthanasia are legalized and physicians are obligated to assist in death, the consequence will be that physicians become the principal decision-makers regarding who will receive this treatment.[108] Thus, the floodgates will open and euthanasia will be provided to those who have not made their desires known because the physicians will subjectively decide who is unbearably suffering.[109]

V. THE APPROACH OF THE SUPREME COURT ON THE ISSUE OF EUTHANASIA

In India the debate to legalise euthanasia, though not directly, but under the guise of amending the Indian Penal Code, 1860 ("**IPC**") to repeal Section 309, began in the early 1970s. The 42nd report of the Law Commission in 1971 was the first attempt in this regard. The report suggested that the attempt to commit suicide was harsh and unjustifiable and should be repealed.[110] In this regard, a bill was introduced in the parliament but failed due to procedural lapses.[111] However, later the issue came before the High Court of Bombay in

[105]Battin, *supra* note 45, at 24.
[106]Kelly Green, *Physician-Assisted Suicide and Euthanasia: Safeguarding against the Slippery Slope – The Netherlands versus the United States*, 13 IND. INT'L & COMP. L. REV. 639, 650 (2003).
[107]Melvin I. Urofsky, *Do Go Gentle into That Good Night: Thoughts on Death, Suicide, Morality and the Law*, 59 ARK. L. REV. 819, 832 (2007).
[108]HERBERT HENDIN, SEDUCED BY DEATH: DOCTORS, PATIENTS, AND ASSISTED SUICIDE, 164 (1997).
[109]*Id.*
[110]Law Commission of India, *Indian Penal Code*, Report No. 42, 243 (June 1971).
[111]Rathinam v. Union of India (1994) 3 SCC 394, ¶104.

the case of *Marut iShripati Dubalv. State of Maharashtra,*[112]whereby the constitutionality of Section 309 was itself challenged. The Court, in this case, held that Section 309 was ultra vires the Constitution being violative of Arts. 14 and 21.[113] It was of the view that there was nothing unnatural with the 'right to die,'[114] Article 21 will include also a right not to live or not to be forced to live. It would include a right to die, or to terminate one's life.[115] The viewpoint in Maruti's case was also supported by the Delhi High Court in the case of *State v. Sanjay Kumar Bhatia,*[116] by which it held that "the continuance of Section 309 Indian Penal Code is an anachronism unworthy of a humane society like ours."

However, later in the case of *Chenna Jagadeeswar and Anr.v. State of Andhra Pradesh*[117] the High Court of Andhra Pradesh held that Section 309 was not violative of the fundamental rights under Article 19 and 21 of the Constitution. The Court was of the view that "*To confer a right to destroy one-self and to take it away from the purview of the Courts to enquire into the act would be one step down in the scene of human distress and motivation. It may lead to several incongruities and it is not desirable to permit them*".[118]

Hence, the contradiction with regard to, the decriminalizing attempt to suicide and content of Article 21, continued till 1994, when it was finally settled by the Supreme Court in Rathinam's case.

[112]MarutiShripatiDubal v. State of Maharashtra, 1986 SCC OnLineBom 278; 1987 Cri.L J 743.
[113]*Id.*, ¶20.
[114]*Id.*, ¶12.
[115]*Id.*, ¶11.
[116]State v. Sanjay Kumar Bhatia, 1986 (10) DRJ 31.
[117]ChennaJagadeeswar and Anr.v. State of Andhra Pradesh, 1987 SCC OnLine AP 263; 1987 (1) APLJ (HC) 340.
[118]*Id.*, ¶37.

A. Phase I – (Rathinam)

In *P. Rathinam v. Union of India* ("***Rathinam***"),[119] the issue before the Supreme Court was whether Section 309 of the IPC was violative of the Articles 14 and 21 of the Constitution. The Court in this held that Section 309 of the IPC, though not in violation of Article 14, was in violation of Article 21. In this regard, the Court observed that:

"*One may refuse to live, if his life be not according to the person concerned worth living or if the richness and fullness of life were not to demand living further. One may rightly think that having achieved all worldly pleasures or happiness, he has something to achieve beyond this life. This desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather choose not to live. In any case, a person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking*."[120]

The Court also held that a right under Article 21 of the constitution can be waived[121] and that the Right under Article 21 includes right not to live a forced life.[122]

It is argued that, that the decision in *Rathinam* was significant as it upheld the autonomous choice of an individual, who after achieving all the worldly desires, wanted to die peacefully with dignity. Further from the statement made by the Court that, *"Desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather choose not to live."* It could be inferred that the approach of the Court to decriminalize suicide was to open the avenues for 'active euthanasia' so that autonomous choices with regard to 'ending one's life' were not only

[119]P. Rathinam v. Union of India, 1994 AIR 1844.
[120]*Id.*, ¶33.
[121]*Id.*, ¶34.
[122]*Id.*, ¶35.

limited to individuals, who were suffering from incurable illness and were in permanent vegetative state, but to other individuals who did not consider the life worth living or those who desired salvation.

Therefore, the judicial dialect in *Rathinam* was a clarion call to humanize the law of suicide in a manner befitting the era of globalization.[123]

B. Phase II – (GianKaur)

Owing to the decision in *Rathinam* which declared Section 309 of the IPC to be in violation of Article 21. The issue that came before the Hon'ble Supreme Court in *GianKaur v. State of Punjab*,[124] was whether penalising 'abetment to suicide' under Article 306 was also in violation of Article 21 of the Constitution. The Court by overruling the dictum in *Rathinam* held that under Article 21, 'right to life' does not include 'right to die' and that Section 309 was not unconstitutional. In this regard, it observed that:

"*Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the 'right to die' as a part of the fundamental right guaranteed therein. 'Right to life' is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of 'right to life'. With respect and in all humility, we find no similarity in the nature of the other rights, such as the right to freedom of speech' etc. to provide a comparable basis to hold that the 'right to life' also includes the 'right to die'*."[125]

[123]V.R. Jayadevan, *Right of the "Alive [Who] But Has No Life at All" - Crossing the Rubicon from Suicide to Active Euthanasia*, 53 JILI 437, 443 (2011).
[124]GianKaur v. State of Punjab, 1996 SCC (2) 648 ('GianKaur').
[125]*Id*., ¶22.

It is argued that the Court, in this case, was conscious of the overarching effect of *Rathinam* by which, it gave an open license to the individuals to end their lives, by decriminalizing Section 309 and interpreting Article 21 to also include 'right to die'. Therefore, the Court, in this case, intended to curtail the autonomy of the individual to make a free 'choice to die', by putting forth arguments that human life is sacred and natural and one cannot put an end to it by a positive act.[126] However, it can be safely assumed that the Court never intended to subvert the concept of 'passive euthanasia' for the individuals who were in a permanent vegetative state. Since the Court was of the view that:

"*this category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced*."[127]

Furthermore, it can also be discerned that, by shifting focus from 'right to die' a facet of Article 21, to 'right to die with dignity' as a part of 'right to live with dignity', the Court asserted to keep intact the negative aspect of Article 21 and at the same time to balance it with the right of incurable to patients to die.

Thus, Phase II, witnessed a massive curtailment of the freedom of an individual to make a 'choice to die' by limiting it only to those patients who were in a permanent vegetative state and for whom the process of natural death has already commenced.

[126] *Id.*
[127] *Id.*, ¶25.

C. Phase III - (ArunaShanbaug and Common Cause)

a) Aruna Shanbaug Case

Although the controversy relating to an attempt to suicide or abetment of suicide was put to rest, yet the issue of euthanasia remained alive. It again came before the Supreme Court in *Aruna Ramchandra Shanbaug v. Union of India & Ors.* ("***Aruna Shanbaug***").[128] In this case, a writ petition was filed by the petitioner's friend before the Court to direct the respondent to stop feeding the petitioner and to allow her to die peacefully. The Court held that the permission to stop feeding the petitioner could not be granted since the petitioner could not be termed as "dead" within medical terminology.[129]

The Court observed that while an act of passive euthanasia is permissible, active euthanasia which requires a positive to end the life of the patient will be an offence under either Section 302, Section 304, or Section306 of the IPC.[130] In this regard, it observed that:

"*The difference between 'active' and 'passive' euthanasia is that in active euthanasia, something is done to end the patient's life while in passive euthanasia, something is not done that would have preserved the patient's life.*[131] *An important idea behind this distinction is that in 'passive euthanasia' the doctors are not actively killing anyone; they are simply not saving him*."[132]

The Court also dictated that terminating the life of the patient can only be done, when he is only kept alive mechanically and there is no plausible possibility for being able to come out of from such stage.[133]

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[128]Aruna Ramchandra Shanbaug v. Union of India & Ors., (2011) 4 SCC 454.
[129]*Id.*, ¶121.
[130]*Id.*,¶41.
[131]*Id.*,¶44.
[132]*Id.*,¶45.
[133]*Id.*,¶117.

The Court was also of the view that in case where the incurable patient is not able to give consent to terminate his/her own life. The act which is in the 'best interest' of the patient needs to be committed as was held in the *Airedale NHS Trust v. Bland*.[134]Further, it held that in ascertaining the 'best interest' of the patient, the Court as *parens patriae*, must ultimately take this decision under Article 226 of the Constitution.

Therefore, in *Aruna Shanbaug* the position that clearly emanated from the decision was that in the Indian legal system, only passive euthanasia was permissible, and thus the possibility of committing active euthanasia was completely ruled out. However, it is also pertinent to mention that the Court was of the view that Section 309 of the IPC should be deleted by Parliament as it had become anachronistic.[135] Hence, it is needless to say that the Court never ruled the possibility of physician-assisted suicide for those incurable patients for whom life had become a misery.

b) The Common Cause Case

In *Common Cause v. Union of India*, ("*Common Cause*")[136] a writ petition was filed before the Supreme Court seeking a declaration that right to die with dignity be declared a fundamental right within the right to live with dignity under Article 21 of Constitution. The Court held in affirmative that the 'right to live with dignity' includes the smoothening of the process of dying in case of a terminally ill patient or a person in Permanent Vegetative State ("**PVS**") with no hope of recovery.[137] The Court's underlying rationale behind such a decision was that individual patients have the autonomy and right of self-determination to refuse medical treatment when they become

[134]Airedale NHS Trust v. Bland, (1993) All E.R. 82('Bland').
[135]Aruna Shaunbag, *supra* note 128, ¶100.
[136]Common Cause, *supra* note 2.
[137]*Id.*, ¶202.10.

incurable. Therefore, forcefully feeding the incurable patients against their wishes and prolonging their life's through artificial means of medical technology undermines their dignity and violates their privacy by virtue of Article 21, which has been broadly interpreted time and again to include both these concepts as part of the 'right to life and liberty.'[138] Further, in order to strengthen the right to 'die with dignity', the Court sanctified the use of Advance Medical Directives, by which incompetent patients can beforehand communicate their choices by executing living wills, when competent.[139]

The Court reiterated the law declared in *Aruna Shanbaug* intending to merge the concept of passive euthanasia with the Constitutional provisions by enhancing the right to 'live with dignity' under Article 21 to also include the right of smoothening the process of dying. It has further envisaged to strengthen such right by way legalising the usage of Advanced Medical Directives ("**AMD**"). It is also pertinent to mention that, by recognising the right to passive euthanasia as a facet of Article 21, the Court has given rise to various intricacies and conclusions. These are being dealt with in the next section.

[138]K.S. Puttaswamy and Anr. v. Union of India and Ors., (2017) 10 SCC 1; M. Nagaraj, Mehmood Nayyar Azam v. State of Chhattisgarh and others, (2012) 8 SCC 1;VikasYadav v. State of Uttar Pradesh and others, (2016) 9 SCC 541; Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) 1 SCC 608; National Legal Services Authority v. Union of India and others, (2014) 5 SCC 438; Shabnam v. Union of India and another, (2015) 6 SCC 702.
[139]Common Cause, *supra* note 2, ¶184.

VI. INTRICACIES OF THE SUPREME COURT'S STAND ON PASSIVE EUTHANASIA

A. 'Right to life'- whether a 'negative right' anymore?

According to Salmond, a positive right corresponds to a positive duty and is a right that he on whom the duty lies shall do some positive act on behalf of the person entitled. A negative right corresponds to a negative duty and is a right that the person bound shall refrain from an act which would operate to the prejudice of the person entitled.[140] Also, a negative right entitles the owner of it to the present position of things, whereas a positive entitles him to an alteration of this position for his advantage.[141] Since in *Common Cause*,[142] the Court has laid down that 'right to live with dignity' includes the smoothening of the process of dying in case of a terminally ill patient or a person in PVS with no hope of recovery. It could be argued that Article 21 of the Constitution does not continue to be negative in nature and can be said to have some positive content. The rationale behind such argument is that by declaring right to die with dignity as a fundamental right and by giving legal sanctity to Advance Medical Directives, the Court has given a positive right to the individuals to die, when incurable and terminally ill and at the same time it has imposed a positive duty on the physicians to observe such right.

For instance, if 'A' through Advance Medical Directive states that, if he suffers from 'Cancer' and becomes incurable and terminally ill, treatment shall not be given to him anymore by the physician. In such a situation the physician if, satisfied that the patient is incurable and terminally ill, would be under a positive obligation to not to

[140]GLANVILLE WILLIAMS, SALMOND ON JURISPRUDENCE, 283 (11th ed., 1957).
[141]C.A.W. MANNING, JURISPRUDENCE BY SIR JOHN SALMOND, 257 (8th ed., 1930).
[142]Common Cause, *supra* note 2.

administer such treatment against the will of the individual patient. Because the patient when suffering from such disease, would want to actually alter his/ her present position, by dying peacefully. Therefore, the omission on part of the physician by non-alternation of the incurable position of the patient would be the breach of his positive duty.

Thus, it can be reasonably stated that, the law that was laid down in *Gian Kaur v. Union of India*,[143] with regard to the content of Article 21, by which it held that 'right to life' does not include 'right to die' has been partly overruled in *Common Cause* to the extent that the patients suffering from incurable disease would now have a right to die with dignity under Article 21.

B. Sanctity of 'advanced medical directives' as expression of 'autonomy & self-determination'.

Kant understood autonomy as a rational person's rights to self-determination and self-governance. Mill interpreted autonomy as an expression of our preferences.[144] Fusing both interpretations, we now define autonomy as 'the expression of informed preferences'.[145] It has been argued that an advance directive[146] is such an expression and therefore represents the autonomous choice of a competent individual.[147] The reason being that advance directives provide a

[143]Gian Kaur, *supra* note 124.
[144]Sarah Walker, *Autonomy or Preservation of Life - Advance Directives and Patients with Dementia,*17 UCL JURISPRUDENCE REV. 100, 112-113 (2011).
[145]D Smith, 'The Person Behind the Choices: Anthropological Assumptions in Bioethics Debate' [1997] MEDICO-LEGAL JOURNAL OF IRELAND 61, 62.
[146]ALEXANDER MORGAN CAPRON, ADVANCE DIRECTIVES, IN A COMPANION TO BIOETHICS, 299 (Helga Kuhse and Peter Singer, 2nd ed., 2009) ["An advance directive is a statement made in advance of an illness about the type and extent of treatment one would want, on the assumption that one may be incapable of participating in decision-making about treatment when the need arises"].
[147]Sarah Walker, *Autonomy or Preservation of Life - Advance Directives and Patients with Dementia,*17 UCL JURISPRUDENCE REV. 100, 112-113 (2011).

means to express wishes of any sort, for example, that particular treatments be used or not used, or that all possible treatment is to be provided,[148]especially where a person anticipates that he will become incapable of any form of medical decision-making.[149] Further, it also facilitates surrogates understanding of patients wishes regarding life-sustaining treatment.[150] Furthermore, by executing an AMD, a person could lift the burden of decision-making off the shoulders of anxious relatives and hesitant physicians.[151]

At common law, a competent patient cannot be forced to receive unwanted treatment in order to sustain life, and a decision to refuse such treatment that is made in advance must be complied with.[152] The patient's right to refuse treatment is recognized even if that treatment is necessary to keep him or her alive.[153] For instance, in the case of *Airedale NHS Trust* v. *Bland*, it observed by J. Goff that;

"*First, it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so. To this extent, the principle of the sanctity of human life must yield to the principle of self-determination and, for present*

[148]ALEXANDER MORGAN CAPRON, Advance Directives, *A Companion to Bioethics*, 299 (Helga Kuhse and Peter Singer eds., 2nd ed., 2009) ('Capron').
[149]Hazel Biggs, *supra* note 74, at 115.
[150]Stavroula Tsinorema, The Principle of Autonomy and the Ethics of Advance Directives, 59 SYNTHESIS PHILOSOPHICA 73, 73 (2015).
[151]Capron, *supra* note 148, at 309.
[152]Lindy Willmott, *Advance Directives Refusing Treatment as an Expression of Autonomy: Do the Courts Practise What They Preach*, 38 COMM. L. WORLD REV. 295, 296 (2009).
[153]Re B (Adult: Refusal of Medical Treatment), [2002] 2 All ER 449; HE v. A Hospital NHS Trust, [2003] 2 FLR 408 at 414; Brightwater Care Group (Inc) v. Rossiter, [2009] WASC 229 at 26.

purposes perhaps more important, the doctor's duty to act in the best interests of his patient must likewise be qualified. Moreover, the same principle applies where the patient's refusal to give his consent has been expressed at an earlier date, before he became unconscious or otherwise incapable of communicating it."[154]

Therefore, it can be reasonably assumed that in common law autonomy of the patient overrides the principle of sanctity of life.

It is argued that the decision of the Supreme Court in *Common Cause* has even though given legal sanctity to AMD, it has failed to foresee the dynamic approach with regard to individual autonomy, that the Common Law Courts have upheld. For instance, the Court has clearly stipulated that the AMD executed by the patient would only be given due weight by the doctors:

"*After being fully satisfied that the executor is terminally ill and is undergoing prolonged treatment or is surviving on life support and that the illness of the executor is incurable or there is no hope of him/her being cured.*"[155]

It is to be noted, the Court by imposing a precondition that individual shall be undergoing a 'prolonged treatment,' has levied an obligation on the patient to undergo treatment at the first instance. Therefore, the right of autonomy and self-determination, to refuse the treatment, which has been upheld by the common law Courts, has not been recognized.

It can also be ascertained that individual autonomy would be subjected to the opinion of the physician, and it is the physician who will ultimately decide, as to whether the AMD shall be given effect to or not. It is argued that, rather than imposing an obligation on the physicians to respect individual autonomy of the patient by way of

[154]Bland, *supra* note 134, at 864.
[155]Common Cause, *supra* note 2, ¶198.4.2.

AMD, the Court has given discretion to the physician to contemplate as to whether the autonomous decision of the patient shall be respected or not. Moreover, taking into consideration, the Hippocratic Oath, the advances in medical technology & medicine and also the penal laws such Section 306, Section302, Section344, of the IPC, it is implausible to believe that the physicians would ever want to declare a patient incurable. Hence, it reasonable to assert that the Court in *Common Cause* has given much emphasis to the sanctity of life principle rather than individual autonomy, thereby making the whole exercise of AMD futile.

C. Reviving the 'santhara' debate- whether it could be legalised?

Unlike a Christian believer who looks upon the human body as a God-given 'temple of the human soul', a devout Jain views that same body as a 'prison of the human soul.'[156] According to the Jain Philosophy, so long as the body serves the soul, it has its usefulness. The moment the body, because of old age or terminal sickness, ceases to help the soul, a person may totally get detached to the body to the extent that he does not feed it.[157] In Jainism, an individual practising the ritual of Santhārā /Sallekhanā voluntarily gives up food and water and awaits a slow death. The belief is that the individual who undertakes Santhara is either extremely ill or about to die.[158]

In the case of *Nikhil Soni*v. *Union of India*,[159] it was held by the High Court of Rajasthan, that the practice of Santhārā amounts to a

[156]Shekhar Hattangadi, *Santhara in the eyes of the law*, THE HINDU, Aug. 15, 2015, http://www.thehindu.com/todays-paper/tp-opinion/santhara-in-the-eyes-of-the-law/article7542700.ece., (June 19, 2018).
[157]Dr. D. R. Mehta et. al., *Santhārā / Sallekhanā*, https://www.isjs.in/sites/isjs.in/files/docs/Santhara%20by%20Shri%20D.R.%20Mehta_0.pdf (Last visited June 19, 2018).
[158]*Santhara: Right to Profess Religion or an Offence?The Human Rights Communiqué*, September 2015, at 1, https://www.rgnul.ac.in/PDF/c28a8953-68b4-469b-b9c8-b8e9bf0cbff1.pdf., (June 19, 2018).
[159]Nikhil Soni v. Union of India, 2015 Cri. L.J. 4951.

punishable offence under Sections 309 and 306 of the IPC and does not form part of the essential religious practice of Jainism under Article 25 of the Constitution. However, later the Supreme Court stayed the ruling of the High Court and as of now the matter is pending for final disposal.[160] It is to be noted that, the recent decision of the Supreme Court in *Common Cause* can lead the proponents of Santhārā /Sallekhanā to argue that the practice falls under Article 21 as a 'right to die with dignity.' The proponents may argue, that nobody can take Santhārā or Sallekhanā at a young age.[161]That, a person is allowed to take Santhārā /Sallekhanā only in case of old age or if he is suffering from an incurable illness.[162]

However, with due regards to the arguments put forth by the proponents, it is argued that the practice of Santhārā /Sallekhanā could not be legalised vis-à-vis the decision of the Supreme Court in *Common Cause*. It is to be noted that the Supreme Court in *Common Cause* has given more emphasis to the sanctity of life principle, by limiting the right under Article 21 for smoothening of the process of dying, to only terminally ill patients or a person in PVS with no hope of recovery. Furthermore, since the practice of Santhārā /Sallekhanā is not only limited to circumstances where the person is incurable but extends to situations where the person is facing unavoidable calamity, severe drought, old age etc.[163] It could be argued from a 'slippery slope' point of view that the decision to legalise Santhārā /Sallekhanā

[160]Christopher Key Chappel, *Aid to Dying: What Jainism – One of India's Oldest Religions – Teaches Us*, June 18, 2016, https://thewire.in/religion/aid-to-dying-what-jainism-one-of-indias-oldest-religions-teaches-us (June 19, 2018).

[161]Dr. D. R. Mehta et. al., *Santhārā / Sallekhanā*, https://www.isjs.in/sites/isjs.in/files/docs/Santhara%20by%20Shri%20D.R.%20Mehta_0.pdf (June 19, 2018).

[162]Arefa Johri, *Fasting unto death for religion is not suicide or euthanasia, say outraged Jains*, August 13, 2005, https://scroll.in/article/748119/fasting-unto-death-for-religion-is-not-suicide-or-euthanasia-say-outraged-jains (June 19, 2018).

[163]Lewis Rice, *Jain Inscriptions at Sravana Beloga*, THE INDIAN ANTIQUARY: A JOURNAL OF ORIENTAL RESEARCH 323-324 (1874).

for incurable patients, would inevitably lead to, individuals, 'fasting until death' for other issues such as unavoidable calamity, severe drought, old age etc, thereby adversely effecting state interest in preserving life. Hence, it is asserted that the decision in *Common Cause* would not lead to validation of, the practice of Santhārā /Sallekhanā.

VII. THE WAY FORWARD

The present study reveals that the debate with regard to euthanasia is just not limited to the criminal law concept of suicide, but has constitutional, moral and theological dimensions. Traditionally, death was presumed to be a natural process of human life. However, today with the advancement in medical technology, it has become possible to manipulate the natural process of death by the use of artificial means, which could prolong human life for an indefinite period of time. Therefore, it becomes pertinent to lay emphasis on the agony and pain suffered by the incurable patients who are in a permanent vegetative state, for whom death has become an uncertain event.

Today, many jurisdictions such as the USA and the UK recognize the right of the individual to refuse treatment and to die with dignity. The position in these jurisdictions depicts the predominance of the autonomy of the individual patient rather than state interest and other theological considerations. However, in contrast to such dynamic position with regard to individual autonomy, the Indian judiciary has laid more emphasis on the sanctity of life principle, by limiting the right of passive euthanasia to a limited sect of patients. Hence, it is proposed that since the judiciary has recognised the right to die with dignity as a fundamental right under Article 21, it should look to amplify such right by placing greater importance on the autonomous choice of the patients.

RESTORATION IN RAPE: A CASE FOR RESTORATIVE JUSTICE IN SEXUAL OFFENCES

Varunavi Bangia[*]

Abstract

With the #MeToo movement shaping up and victims from across the globe coming together on a common platform to call out their abusers, there is an increasing scepticism about the justice process and a growing alienation from it. The movement has not only served as a painful reminder of how pervasive sexual abuse is, but also how the due process fails most of these victims. Drawing from feminist theories of power inequalities and sexualisation of gender, the paper proposes redefining rape in the context of power dynamics rather than consent. It also delves on the inadequacies of the current model of defining crimes as against the State, the distinctive nature of rape, and why it is unjust and unfair to define it as an offense against the State and society. Establishing the psychological and social implications of sexual abuse, the paper focuses on the need to implement changes in the justice system by implementing restorative practices in cases of rape and making the justice process more victim-oriented. It also emphasizes on the

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need of victims to reclaim not just justice but also the agency to decide the course of action to pursue that justice.

I. INTRODUCTION

Rape, as it is generally defined, is an untoward, unwanted and non-consensual sexual act or behaviour of a man towards a woman or another man.[1] A major problem with this definition and the prevalent attitude in the criminal justice system is the over-reliance on consent as the determinant of whether there has been a commission of the offense or not. More than a sexual crime, rape is a gendered crime[2] which emanates from a sense of entitlement that men feel.[3] Defining it in terms of consent, which pre-supposes equality of power among the two people engaged in the act, can get very problematic. Another reason why consent is a problematic determinant is because the law starts attaching value to the behaviour, conduct and character of the woman rather than the culpability of the man.[4] This paper argues that the definition of these offences must be such that the undue reliance placed on consent must be reduced.

Another limitation in the definition of rape is that, like all other crimes, it is defined as a crime against the society. A crime in which the bodily autonomy of a person is being so grossly undermined and

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[1]DONALD A. ANDREWS & JAMES BONTA, THE PSYCHOLOGY OF CRIMINAL CONDUCT (2010).

[2]Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997); *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

[3]Susan Estrich, *Rape*, 95 YALE L. J. 6 (1987); Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997).

[4]Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 3 (2006); *See* Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL'Y REV. 2 (2016).

violated, should be defined as a crime against the victim. This paper argues for the redefining of such offences in terms of crimes against the specific individual.

In the Indian jurisprudence on rape, the discourse has largely been influenced by the brutal gang rape and homicide of Jyoti Singh. The case led to nationwide protest for the need to reform our rape laws. On the basis of Justice Verma Committee's Report, our laws underwent a transformation both in terms of substantive law, in criminalising certain offences that were not earlier recognised, like expanding the scope of Section 376 of the Indian Penal Code, 1860 beyond forceful penetrative sex, assaulting a woman with an intention to disrobe, voyeurism and stalking, and making the provisions pertaining to sexual harassment gender-neutral and stricter.[5] Punishments for these offences were also made harsher, reflecting the reaffirmation of the retributive and deterrent theory of justice in the Indian criminal justice system.

The two primary stakeholders in the offense are the offender and the victim. This paper analyses the psychology of both these stakeholders before the commission of the offense and in the aftermath that follows the offence. Psychological as well as sociological studies have revealed that these offences have a distinctive nature.[6] However, one stakeholder has been consistently ignored in most of the scholarly work, that is, the family members of the offender. The family members of the victim also undergo the trauma[7] and shock of having someone close to them violated. This paper analyses the psychological impacts these offences have on the family members of both the victim and the offender as well as the real or perceived

[5]Criminal Law (Amendment) Act 2013.
[6]Craig T. Palmer, *Twelve Reasons Why Rape is not Sexually Motivated: A Sceptical Examination*, 25 J. SEX RES. 4 (1998).
[7]Priscilla N. White & Judith C. Rollins, *Rape: A Family Crisis*, 30 FAM. REL. 1 (1981).

contribution the offender's parents might have had in him committing the offense.

Emerging trends of criminal jurisprudence show a shift towards re-integrative and restorative justice systems,[8] especially for minor offences and juvenile offenders. This paper analyses the possible implementation of the restorative justice model in cases of rape as well as the problems that may arise. This paper is divided into four parts. Part I of the paper focuses primarily on the conventional psycho-analytical theory of rape and its criticisms. Part II of the paper moves on to modern theories of rape, analysing it from the standpoint of the offender, what his psychological drives and motivations were for committing the crime, the psychological impact of the offense on the victim as well as the impact of the punishment, and the accompanying shame it has on the offender. Part III of the paper analyses the impact that the act and the aftermath it has on the families of the victim and the offender. Part IV of the paper deals with the recommendations to incorporate practices of the restorative justice model to better cater to the needs of the victim, offender and the community in cases of sexual assault as well as to understand and respond better to the psyche of an offender, thus reducing recidivism.

II. CONVENTIONAL PSYCHO-ANALYTICAL THEORIES OF RAPE

Traditionally psychology has been written from a predominantly male lens.[9] The theories propounded, and the research conducted were

[8]John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 3 (2002); Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005).

[9]Rochelle Semmel Albin, *Psychological Studies of Rape,* 3 SIGNS, U. CHI. PRESS 2 (1997).

skewed because, from the nature of the hypothesis to the kind of questions asked, and the conclusions arrived at, the process was masked by a biased gender binary.[10]

Classical psycho-analytical theory relied on a singular and flawed premise. For them, the act of forceful sexual intercourse was a victim-precipitated act.[11] Freud[12] and Deutsh,[13] among others opined that masochism is one of the dominant feminine traits and thus concluded that women are responsible for their own rape. Horney, on the other hand, viewed this passive submission of women as a product of their cultural upbringing.[14] According to her, women have been conditioned socially for so long to believe that a man's wishes are paramount and she must submit to them, that she has internalized this submission and adapted this in her 'true nature'.[15]

Another proposition expounded by Freud was that men have some sort of 'exclusive possession' over women and in every case of traditional rape,[16] it is not just the consent of the woman that has been violated but also the sole ownership of the man with which there has been interference.[17] This view of women as property was normalized for a long time and remnants of this can still be seen today, when

[10]*See* CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS (2007).
[11]David J. Giacopassi & Karen R. Wilkinson, *Rape and the Devalued Victim*, 9 L. AND HUM.BEHAV.4 (1985).
[12]SIGMUND FREUD, SOME PSYCHOLOGICAL CONSEQUENCES OF THE ANATOMICAL DISTINCTION BETWEEN THE SEXES (1925).
[13]HELENE DEUTSCHE, THE PSYCHOLOGY OF WOMEN (1944).
[14] Karen Horney, *The Flight of Motherhood: The Masculinity Concept in Women as Viewed by men and Women*, 7 INTL. J. PSYCHOANALYSIS 324 (1926).
[15]Rochelle Semmel Albin, *Psychological Studies of Rape*, 3 SIGNS, U. CHI. PRESS 2 (1997);*See* Karpman, *Perversion as Neuroses (The Paraphiliac Neuroses): Their Relation to Psychopathology and Criminality*, 3 JOURNAL OF CRIMINAL PSYCHOPATHOLOGY (1941).
[16]Traditional rapes are those where the offender is not known to the victim and there is some element of violence involved.
[17]*See* SIGMUND FREUD, COLLECTED PAPERS VOL. 4 (1959).

courts assume silence and passive submission as consent in cases of non-traditional rape.[18]

The most dominant and often used analysis of rape, which is used till date to blame the victim, is the 'just world' hypothesis. The just world hypothesis entailed that people will get what they deserve and they in fact deserve what they get.[19] This shifts the focus from the culpability of the man to the offence being victim precipitated.

Some of the scholars tried to explain rape as an act of sexual deviance.[20] They characterized the rapist as someone with a psychopathological disorder and attributed biological and psychological reasons for why some men rape. However, many feminist scholars have argued that rape is not a socially deviant sexual act, but rather a socially conforming phenomenon[21] in so much as it plays out in the form of inequality of power and gendering of sexuality, which is culturally endorsed.

Thus, the conventional psycho-analytical theories of rape began with and are mainly focused on victim blaming and later progressed into blaming the acts on psychological disorders. They failed to address the inherent inequality in the sexual process out of which this desire to control and dominate the woman or anyone vulnerable arises.

[18]Non-traditional rapes are usually those where the offender is known to the victim and is there is a fiduciary relationship or otherwise the existence of a power inequality.

[19] Lerner & Simmons, *Observers Reaction to the Innocent Victim*, 4 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY (1966).

[20]*See* Giannell, *Psychological Needs Characteristic of Four Criminal Groups*, 69 JOURNAL OF SOCIAL PSYCHOLOGY (1966).

[21]Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997); *See* CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE (1989).

III. A MOTIVATION AND IMPACT ANALYSIS: MODERN THEORIES OF RAPE

A. Criminological Perspective

One of the pertinent contributions of feminist jurisprudence on rape is that it is "*culturally dictated, (and) not culturally deviant*."[22]The psycho-analytical theories have been rejected by the current scholarship and the feminists need to be applauded for their efforts in changing the discourse on rape from being understood as a victim precipitated act to acts of sexual violence committed as an exercise to display masculine power and domination.[23] The modern theory of rape analyses four major psychological drives that cause a man to rape, namely, power, male entitlement and commoditisation of sex, status, and prior victimization.

Feminist theories of rape are centered around the power differential that exists between a man and a woman in a sexual act. Sexuality has been gendered[24] with men being taught to be tough, aggressive and dominant, and women conditioned to be tender, weak and submissive and this power dynamic plays out most prominently during the activity of sex.[25] "*Males and females are created through the erotization of dominance and submission*".[26] More than a sexual act motivated by lust, rape is an act of violence motivated by a desire to dominate and establish superiority. Most victims are vulnerable and are those who can be subjugated. The age-old defense of rapists being

[22]Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997).
[23]Susan Estrich, *Rape*, 95 YALE L. J. 6 (1987).
[24]Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).
[25]Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL'Y REV. 2 (2016).
[26]CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE (1989).

morally depraved and psychopaths has no empirical evidence to support it.[27]

Masculinity and femininity are culturally defined and involve the attribution of certain traits to a male body[28] which later manifest themselves in an attempt to overpower a woman. Many a times, the aspiration and social pressure to ascribe to this standard of 'masculinity' and prove it to others, acts as the motivation. Thus, power interaction happens on two levels. On the primary level, it manifests in the domination of the vulnerable. On the secondary level, however, the power dynamic plays out between those who hold this position of power and are unstable.[29] Thus, men sexually violate the vulnerable not to just to assert their superiority over the victim but also to prove that they are superior to other men. This plays out the worst in gang rapes[30] where men who would not have otherwise committed any such act, are compelled by the circumstances to show to the other men how 'manly' they are. This also derives from the theory that women 'belong to men', wherein some men rape to deprive another man of his honour.[31] In these cases, women are just instruments men use to showcase their power to other men. In cases where there is a differential status,[32] and that drives the act, there is a

[27]*See* Rochelle Semmel Albin, *Psychological Studies of Rape,* 3 SIGNS, U. CHI. PRESS 2 (1997).
[28]Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).
[29]Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997); Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL'Y REV. 2 (2016);*See* Susan Estrich, *Rape,* 95 YALE L. J. 6 (1987).
[30]Susan Estrich, *Rape,* 95 YALE L. J. 6 (1987); Catharine A. MacKinnon, *Rape Redefined*, Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL'Y REV. 2 (2016).
[31]*See* Rochelle Semmel Albin, *Psychological Studies of Rape,* 3 SIGNS, U. CHI. PRESS 2 (1997).
[32]Susan Estrich, *Rape,* 95 YALE L. J. 6 (1987); Catharine A. MacKinnon, *Rape Redefined*, Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL'Y REV. 2 (2016).

need to maintain that status inequality and a desire to remind others of it. By means of example, soldiers of one country in a war, usually rape women of the other country to insult the enemy, exploit their vulnerabilities and establish superiority of status.

Apart from this power dynamics, men feel a sort of entitlement over women. This flows from the flawed Freudian analysis of men having 'exclusive possession' over women.[33] Although, the view of women as property has changed to a large extent, men often feel entitled to sex, especially from their wives.[34] This is also one of the leading causes of under-reporting of rape cases. Not only do men feel entitled over women, but women also internalize this entitlement in a sense of duty. Although, they do not willfully consent in the strictest sense, they might passively submit. This is a direct result of the normalization of sexual roles and stereotypes.[35] This submission is often viewed as amounting to tacit consent[36] which is why the meaning of consent must be redefined and restricted to active and participative consent.

Men also feel entitled over women due to the commoditisation of sex.[37]There is a "*culture that sexualizes commodities and commodifies women's sexuality*".[38] Due to a culture where men can 'purchase' sex, they feel more entitled to it. Since women are objectified, violating their consent is viewed analogically closer to

[33]SIGMUND FREUD, COLLECTED PAPERS VOL. 4 (1959).
[34]L. F. Lowenstein, *Rape: Recent Psychological Research into Victims and Perpetrators*, 74 POLICE JOURNAL 3 (2001).
[35]*See* Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).
[36]Mahmood Farooqui v. State (Govt. of NCT) Criminal Appeal 944/2016.
[37]Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997); Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).
[38]Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997).

shoplifting, rather than a crime against the human body. There is a reason why an offence that completely vilifies bodily autonomy is so often and so conveniently delegitimized; because if women are objects and sex is a commodity, then it is less morally reprehensible to just steal it if it is not given to you.[39]

The power and entitlement that men feel over women can also be a result of prior victimization.[40] There are various studies to show that victims of child sexual abuse carry a lot of trauma and emotional baggage into their adult years. This damage to their personality manifests in various forms. Sexually abused male children are more likely to become sex offenders than female children[41] because of the nature in which sexualities are gendered and how the victims and the society around them react to their sexual abuse. Children are usually chosen as victims because of their vulnerability and the ability to dominate their will. The offenders in these cases, usually share a relationship with their victims which makes the trauma worse. In cases where the victim shares a relationship of dependency with the offender(father-son),[42] the transition from a victim to an offender is more likely. When the son grows up to have someone depend on him, he disregards their lack of consent to show his dominance. This leads

[39]*Id.*

[40]Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016); L. F. Lowenstein, *Rape: Recent Psychological Research into Victims and Perpetrators*, 74 POLICE JOURNAL 3 (2001); Tara Cossel, *Child Sexual Abuse Victims and their Families Receiving Services at Child Advocacy Center: Mental Health and Support needs*, THE MCNAIR SCHOLARS RES. J. (2010).

[41]Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016); Vandana Choudhary et al., *Review of Randomised Controlled Trials on Psychological Interventions in Child Sexual Abuse: Current Status and Emerging Needs in the Indian Context*, 38 INDIAN J. PSYCHOL. MED. 4 (2016).

[42]Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016); *See* Merab Kambamu Kiremire, *Rape of Prostitutes: A Tool of Male Power and Control?* 21 AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY 74 (2007).

to the normalization of disrespecting the bodily autonomy of someone to assert one's masculinity.

Cultural endorsement of child pornography has also commoditised the sexuality of children and normalized this abuse in the minds of the offenders. As a society, we may condemn child sexual abuse but have normalized the sexualisation of their bodies.[43] This commoditisation further entrenches the male entitlement over sex.

In cases of male victims of child sexual abuse, at a time in their development when they are being socialized into masculinity and the accompanying traits of emotional stoicism, power, domination and aggressiveness, they find themselves in a confused state.[44] Therefore, they become vulnerable when they are expected to be strong. These victims experience additional shame because they are supposed to repel sexual abuse with emotional indifference and develop sexual practices manifesting their masculine power.[45]Each victimization is a blot on their masculinity which, they as adults transmit onto their victims. Some children are thus socialized into offenders, owing to their prior victimization.

The stigmatization and shame that surrounds the offence of rape also impacts the offender.[46] On being convicted, most jurisdictions practice disintegrative shaming for the offender in order to reduce recidivism. This flawed analysis, however, falls through in every

[43]Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).
[44]*See* Carol Coohey, *Gender Differences in Internalising Problems among Sexually Abused Early Adolescents*, 34 INTL. J. CHILD ABUSE AND NEGLECT 11 (2010).
[45]Vandana Choudhary et al., *Review of Randomised Controlled Trials on Psychological Interventions in Child Sexual Abuse: Current Status and Emerging Needs in the Indian Context*, 38 INDIAN J. PSYCHOL. MED. 4 (2016).
[46]Danielle J.S. Bailey & Jennifer L. Klien, *Ashamed and Alone: Comparing Offender and Family Member Experiences with the Sex Offender Registry*, 43CRIM. JUST. REV. 4 (2018)*;* Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005).

empirical study.[47] Offenders are named and shamed in some societies by means of a sex-offender list. Media trials, public shaming and humiliation are often counter-productive measures. In a bid to reduce recidivism, they create offenders who now feel further isolated from the society they live in with no respect for social norms.[48] Deviancy thus is heightened and not controlled. Specifically, in cases of rape, disintegrative shaming has potential to do more harm than good. In an attempt to show domination and masculinity, which also entails a disregard for any form of inhibition, offenders have shown recidivist tendencies and an attempt to violate the same woman again.[49] Another problem with shaming sexual offenders is that the same amount of shame is attached to a man who rapes as a result of misunderstanding consent and one who blatantly disregards it.[50] While there existed some scope in the earlier paradigm to reform the offender and restore justice to the victim, shaming both of these classes of offenders equally creates a feeling of injustice in him and he starts normalizing disrespect of consent.

Thus, among the various psychological factors that drive a man to disrespect the consent and will of a woman, his desire to portray culturally defined masculinity plays the most major role.

B. Victimological Perspective

The victim, on the other hand, undergoes an unimaginable level of trauma which is often aggravated by a lack of recognition by the law and society that she has been violated. This is sometimes due to the proximity of the relationship the victim shares with the offender,

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[47]Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005).
[48]*Id.*
[49]L. F. Lowenstein, *Rape: Recent Psychological Research into Victims and Perpetrators*, 74 POLICE JOURNAL 3 (2001).
[50]Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005).

which is why consent, which is used as the major determinant, is often contextualized. Contextualization of consent is often a means that the courts use to presume consent or deny non-consent based on an absence of clear resistance. The victim thus suffers from self-blame, self-hate and shame.[51] There is deep seated fear and apprehension of being violated again, and resentment and frustration from the formal processes as well as the community's reception. Rape trials often operate as means of secondary victimization because courts, in an attempt to determine whether the act was consensual or not, begin with blaming the character and actions of the victim.[52] As power dynamics play out in the society, there is also a denial that she has been raped because she internalizes his dominance over her and thus does not see it as an aberration. Gas-lighting is another psychological impact that victims of sexual abuse and rape generally experience during rape trials as they begin doubting not only the veracity of their own testimonies but also their sanity.[53] Thus, victims, not only suffer at the hands of the offender, but are also consistently failed by the community in which they live and survive everyday with now a marred morality as the justice system re-victimizes them.

Every rape trial begins with and ends at either blaming the victim for complicity in the act, leading on the man, motivating him, or just a blatant denial that the woman has been raped. Courts have, in their reliance on consent, often placed high standards on resistance by the woman to constitute a lack of consent.[54] This negates any possibility of the woman denying consent on the basis of fear or apprehension of

[51]Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 3 (2006).
[52]Courtney E. Ahrens & Rebecca Campbell, *Assisting Rape Victims as They Recover from Rape*, 15 J. INTERPERSONAL VIOLENCE 9 (2000).
[53]Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical and Mental Health Systems*, 12 VIOLENCE AGAINST WOMEN 1 (2006).
[54]Susan Estrich, *Rape*, 95 YALE L. J. 6 (1987); Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994).

being further physically harmed. The criminal justice system, as it exists, always gives the benefit of the doubt to the accused.

While proving a lack of consent, courts investigate into the behaviour, actions and sexual history of a woman, casting aspersions on her morality and character. Instead of proving the culpability of the offender, the victim is made to prove her innocence.[55] They are made to live through the experience a second time over when they report to the police and are cross questioned in the courts. Among the many other reasons for under-reporting, they generally prefer to not report rape to avoid being victimized again at the hands of the insensitive police and the judicial system.

As a result of this secondary victimization, a victim begins co-opting the society's denial of her rape and begins to think she is crazy. Since everyone around her cannot be wrong, she falls in the trap of self-hate and mistrust[56] for having put her family and the offender through a needless frenzy.

Studies have shown that most victims fall into a trap of mistrust[57] wherein they not only start distrusting the system, feeling a sense of resentment and frustration because of the structural inadequacies failing to be sensitive towards them, but also start distrusting themselves. This phenomenon is known as gas-lighting[58] and is

[55]*See* Priscilla N. White & Judith C. Rollins, *Rape: A Family Crisis*, 30 FAM. REL. 1 (1981).

[56]Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994); *See* LEE MADIGAN, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM (1991).

[57]Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape,* 38 AM. J. COMMUNITY PSYCHOL. 3 (2006); Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994).

[58]COUNSEL TO SECURE JUSTICE & NATIONAL LAW UNIVERSITY DELHI, PERSPECTIVES OF JUSTICE: RESTORATIVE JUSTICE AND CHILD SEXUAL ABUSE IN INDIA (2018); *See* Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994).

usually a product of manipulation. The manipulation, as it plays out in these situations is through the society and the justice system.

The denial that she has been raped is also a consequence of her internalizing and normalizing culturally defined sexual roles of power and violence and is an outcome of her trying to avoid the ostracization of having lost her honour. The shame that the woman has to live with is not helped by the label of being a 'victim'. She is painted as this woman who has been harmed, her dignity snatched, and her honour pilfered.

Non-disclosure of rapes and silencing of victims, however, comes at a huge price. Victims don't just deny rape, but also don't report it as they are usually afraid of the repercussions that ensue. An inability to emotionally express the pain and trauma they are going through further pushes them into depression and severely impacts their psychological and physical well-being.[59]

The stigmatization and shame[60] that accompanies the act often alienates the victim from her own body. She loses agency over her own activities and often falls prey to disintegration from the society. Rape affects children, in a worse manner, insomuch as they are robbed of their innocence. Often times not understanding the wrongs that have happened to them, they start normalizing the vitiation of consent and the blatant disrespect of any person's bodily autonomy. They are generally accused of lying and concocting stories. Their impressionable and vulnerable minds undergo deep emotional

[59]Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 3 (2006).
[60]MerabKambamuKiremire, *Rape of Prostitutes: A Tool of Male Power and Control?* 21 AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY 74 (2007); *See* L. F. Lowenstein, *Rape: Recent Psychological Research into Victims and Perpetrators*, 74 POLICE JOURNAL 3 (2001).

upheaval on not only being violated but also being denied a voice and accused of lying.[61]

Therefore, both the victim and offender are impacted on a psychological level and every act of rape causes a sense of insecurity and anxiety in the society about falling moral and safety standards.

IV. IMPACT ANALYSIS OF RAPE ON THE FAMILIES OF THE VICTIM AND THE OFFENDER

Crime is often seen as an act of social deviance. Rape, however, is a distinctive crime by nature. As argued before in the paper, rape is a socially conforming act and not a deviant act.[62] Although recognized by the criminal justice system as an offence, in reality it is often justified as an act of entitlement or victim precipitation. Acts leading men to commit such offences and exercise this power and entitlement is a product of the gender socialization, and cultural endorsement and perpetuation of sexual stereotypes of masculinity.[63] This makes the interaction that the victim and offender have with the society very unique. The way the victims' family members and friends react to the instance of rape plays an important role in their recovery. The accusation and trial for rape as well as the aftermath of conviction also has an impact on the family members of the accused. This is often an ignored stakeholder in the analysis of rape.[64] Since the author

[61]Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 3 (2006).
[62]Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997).
[63]Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).
[64]Danielle J.S. Bailey & Jennifer L. Klien, *Ashamed and Alone: Comparing Offender and Family Member Experiences with the Sex Offender Registry*, 43CRIM. JUST. REV. 4 (2018).

argues for an adoption of restorative practices in delivering justice to victims, all these stakeholders, especially the community become very important. There is limited literature on the impact on and reaction of the family members of rape victims and how they contribute to the healing process but it is highly important for the understanding of the operation of restorative justice practices in cases of sexual abuse.

A. Psychological and Social Impact on the Victims' Families

a) Cases of Traditional Rape

The traumatic impact of rape is not limited to the victim, but the stigma that is attached to the victim often also mars the family members.[65] Victim blaming extends to questioning the upbringing of the girl, thus directly attacking the parents. Parents and husbands are blamed for not being 'capable' of keeping the girl safe.[66] Thus, the family members of the victim are not untouched by the shame that surrounds the victim. They are in fact burdened by an extra responsibility, because they are victims of shame but must keep a brave front and emotionally express only in such a way that the victim is not further victimized by even her family members.

In the way family dynamics pan out, male entitlement plays out differently in a 'traditional' and 'non-traditional rape'.[67] In cases of traditional rape, men are initially blamed for not doing enough to protect their women; they begin internalizing this guilt and develop anger. This anger and feeling of vengeance towards the offender can turn out to be more harmful than beneficial. This is because it takes

[65]Priscilla N. White & Judith C. Rollins, *Rape: A Family Crisis*, 30 FAM. REL. 1 (1981); *See* Courtney E. Ahrens & Rebecca Campbell, *Assisting Rape Victims as They Recover from Rape*, 15 J. INTERPERSONAL VIOLENCE 9 (2000).
[66]Priscilla N. White & Judith C. Rollins, *Rape: A Family Crisis*, 30 FAM. REL. 1 (1981).
[67]Margo I. Wilson & Martin Daly, *Male Sexual Proprietariness and Violence against Wives*, CRIMINAL PSYCHOLOGY VOL. 1 (2014).

away from the healing process and support to the victim and all energies and expression of emotion are directed towards the offender. This is deeply problematic on a secondary level, wherein it normalizes the sense of entitlement that men feel over women and reinforces culturally defined stereotypes of hapless women being protected by their masculine saviours. It is often this confidence and dependence that blurs lines of consent.

There are other negative reactions by the family members which may prove to be detrimental. These include pitying the victim or blaming them.[68] Both of these negatively impact the healing process. Expression of anger and its channelization also becomes problematic in these kinds of situations. This is because when the family members feel a sense of retribution towards the offender and he is someone known to the victim, she is often caught between addressing her own needs of care and sensitivity and placating their anger in order to avoid backlash. Even in situations where the offender is not known to the victim, she has been socialized into internalizing guilt and anger, and thus instead of helping her, this further pushes her into self-blame and self-hate. Family members should help victims to externalize this anger, acknowledge their fury in a constructive way and to vent their emotions in healthy manner.

b) Cases of Non-Traditional Rape

In non-traditional rapes, however, this becomes even more complicated because a member from the 'supportive family' system is the offender. Most of these cases are a product of male entitlement over their wives or attempts by uncles, fathers, and brothers to assert their power over powerless, naïve and vulnerable children. These

[68]Courtney E. Ahrens & Rebecca Campbell, *Assisting Rape Victims as They Recover from Rape*, 15 J. INTERPERSONAL VIOLENCE 9 (2000).

violations of consent are generally normalized by the victims themselves leading to denial of having been raped. These have an adverse impact on young boys, especially, who are unable to reconcile their vulnerability as a victim and indoctrinated ideas of masculinity, resulting in transitioning them from victims to offenders.[69] Mothers usually deny that their children have been sexually abused by their fathers, uncles or other relatives. At times, even when they don't deny it, they refuse to support their children in confronting the offender. This is because these women are in a precarious position themselves. Often dependent on the man, and culturally taught to be submissive, they don't stand up for their children for the fear of being violated, or worse, left by their husbands, with no shelter. Thus, even when they know that their children are being violated, mothers are generally helpless. Similarly, when husbands rape their wives, initially these women deny that they have been raped. Sometimes due to non-recognition of marital rape by the law or rejection of its occurrence by the society, the victim feels further trauma of having no form of formal or informal recourse. In such a situation, friends, counsellors and self-support groups can be of great assistance to women.

B. Psychological and Social Impact on the Family Members of the Accused

The psychological impact of a rape is however not limited to the victim's family members. The family members of the offender are often an ignored stakeholder because there is hardly any acknowledgement of harm. They interact with the society post the accusation and conviction of the offender and face the same amount of shame, start internalizing the blame for improper socialization and

[69]Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).

are sometimes left helpless and often childless (post incarceration), with no one to provide for them.

Many jurisdictions practicing disintegrative shaming,[70] often employ methods like publishing sex-offender lists, public notices naming sex-offenders and other such methods which make the population aware of the identities and stigmatizing them in the community in which they live. Arguably, this is a form of double punishment not only because of the permanency of these lists but also the stigma attached to their personality usually remains in the memories of the general population. In doing so, these offenders are generally demonized. This gets problematic because a lot of attention is taken away from the human aspect of the offender, defeating any scope of reformation and reintegration within the society. The family members of the offender are also subjected to this shaming to an equal measure. They are blamed for 'raising a rapist'. Accompanying this shame is social isolation[71] that the family members face and a deep sense of injustice of facing repercussions of an offence they never committed. Their socialization that is blamed is not a burden for them to bear alone. The media, the market and every institution with a voice and power to generate a narrative sell and propagates the same idea of masculinity and entitlement. A convenient scapegoat in this process is the family of the offender.

An important role that family members play is being a part of an informal social network of support for the offender to help him re-

[70]Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005); *See* John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 3 (2002).

[71]Danielle J.S. Bailey & Jennifer L. Klien, *Ashamed and Alone: Comparing Offender and Family Member Experiences with the Sex Offender Registry,* 43CRIM. JUST. REV. 4 (2018).

integrate with the society and reduce recidivism.[72] Family members generally tend to isolate themselves from the offender in an attempt to escape the shame that accompanies any association with him. This ostracization of the offender, not just by the formal structures in the society but also by severance of all social relations constituting his informal safety net, do little to prevent recidivism, and in fact encourages it.[73]

Another consequence of this shaming is that the family members start internalizing it and fall into a trap of self-blame. This further defeats the whole purpose that the inflicted shame had sought to achieve. Shaming of family members follows as an implication of shaming the offender. As soon as this blame is shifted back to the family members and by implication, socialization, the offender never internalizes the guilt. This further ensconces his belief of entitlement as socially justified. This shaming and shifting of blame take away from the moral culpability of the offender of having vilified a woman's consent.[74] The family members, instead of providing support to the offender start blaming themselves and in the process of self-doubt, defeat all chances of reintegration of the offender back in the society.

Another, more serious consequence follows from the conviction and incarceration of the offender. This usually plays out in cases where the offender is from a poor background. Once he is put in jail, his parents are often left with no means of sustenance if he was their only child.[75] Although it is true that this risk exists with all forms of crime,

[72]Biance Bersani et al., *Marriage and Desistence from Crime in Netherlands: Do Gender and Socio-Economic Context Matter?*25 J. QUANTITATIVE CRIMINOLOGY 1 (2009).
[73]DAVID W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE ED. 5 (2015);LAWRENCE W SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE (2007).
[74]Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005).
[75]Annie Cossins& Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).

the distinctive nature of the offence he has been convicted for means that any form of community support that they may have gotten otherwise, would be denied to them. Sometimes the offender leaves behind his wife and children who grow up with the shame that was associated with him. Those children are deprived of an opportunity of a normal life and the wife is robbed of her honour, because no one will accept the wife of a 'rapist'.[76] These people live with these labels and the shame associated with it despite being innocent by all means.

Thus, there are a lot of socio-cultural factors also that influence the kind of impact rape has on the families of the offender and the victim. A shame society will ostracize the family and the offender to social exclusion whereas a guilt society will hold the offender responsible and encourage him to acknowledge the harm he has caused and make him internalize the blame. Thus, there should be a shift towards restorative practices and establishing guilt cultures to better deal with crimes of sexual violence.

V. RECOMMENDATIONS

A. Implementation of Restorative Justice in Cases of Rape

There is a global trend for making justice more meaningful and victim-centric, focusing on the needs of the victim, acknowledging the harm caused by the offender, and reintegrating both of them within the community through restorative practices.[77]

While in most jurisdictions where this has been implemented, it has remained limited to first time juvenile offenders or cases of minor offences, this section seeks to analyze the interaction of gender with

[76] *Id.*
[77] HOWARD ZEHR & ALI GOHAR, LITTLE BOOK ON RESTORATIVE JUSTICE (2003).

the restorative justice model and the feasibility of initiating restorative justice practices in cases of rape.

Restorative practices are premised on certain foundational principles and emphasize on certain core values.[78] It recognizes crime as a harm to interpersonal relations and social bonds, creating certain liabilities to repair that damage. It is not just the offender who owes a duty to 'set things right' but also the community to become a support structure for the victim. The uniqueness of the restorative model is that it focuses on the motivations of individual offenders.[79] This serves two purposes. It helps personalize the conferencing processes in order to make them more effective. It also leads to a recognition that it is possible that the offenders might be victims themselves who have been harmed and need social integration and healing. The values that restorative practices emphasize on are empathy, respect, and an acknowledgement of guilt.[80]

The focus is shifted from the crime as being an offence against the State to an act that causes harm to an individual. The victims' and community's needs are prioritized over the often misunderstood and paternalistic conceptions of justice. It thus extends the role that victims play in the justice process from mere informants of crimes to members of the society who deserve true justice.[81] It changes the definition of what justice means, whether it is justice for the victims to address their needs or justice in the form of punishment to the offender.

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[78]HOWARD ZEHR & ALI GOHAR, LITTLE BOOK ON RESTORATIVE JUSTICE (2003); *See* U.N. Office on Drugs and Crime, Handbook on Restorative Justice Programmes (2006), https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf.

[79]Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 1 (2006).

[80]*See* John Braithwaite, *Setting Standards for Restorative Justice*, 42 THE BRITISH JOURNAL OF CRIMINOLOGY (2002).

[81]HOWARD ZEHR & ALI GOHAR, LITTLE BOOK ON RESTORATIVE JUSTICE (2003).

Restorative justice can lead to an emotional closure. The victim is not just physically harmed, but psychologically scarred and emotionally broken after a rape. In a controlled setting with people they can trust and those who support them, they can reclaim justice in a more meaningful way. In restorative setting, the length of the victim's skirt or the colour of her lipstick is not blamed as being the reasons for the actions and behaviour of the offender. She is taken as a victim who has been harmed and who deserves justice. She has full control over how she seeks that justice. She can choose to forgive and move on, but she is not forced to.[82] Thus, forgiveness by the victim doesn't depict success of the restorative process. Acknowledgement of the guilt and handing out of the apology, however, form a critical part of the process.[83] In cases where there is a true recognition of guilt, the offenders take direct responsibility and accountability for their actions instead of blaming the society and moral depravity. More than any other measure, this helps in reducing recidivism.[84]

Thus, in restorative practices, forgiveness is never forced. Although in principle this is sound yet when it plays out in the reality of rape cases, it might be a problem. The involvement of the community in this process also means that the values that the community holds in high esteem are represented in the justice process. While all efforts may be made to not blame victims, it might be that a woman who rejects an apology may be passively coerced by her society and

[82]Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice, in* RESTORATIVE JUSTICE: CRITICAL CONCEPTS IN CRIMINOLOGY VOL. 2 (2009).

[83]U.N. Office on Drugs and Crime, Handbook on Restorative Justice Programmes (2006), https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf.

[84]DAVID W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE ED. 5 (2015);LAWRENCE W SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE (2007).

community to accept it. The inequality of power thus continues to pervade the process, which is a cogent argument that many scholars use for excluding the application of restorative processes in sexual offences.[85] However, since every restorative process does not mandate community participation, to a certain extent, this concern can be contained by following a victim-offender conferencing model.

Another element in any restorative justice process is the acknowledgement of guilt.[86] Although, implementing restorative practices in rape cases can be beneficial in some cases, there are several structural shortcomings with applying this model. While it might be helpful in the sense that the trauma of secondary victimization that the criminal justice system is plagued with in rape trials can be avoided, it is difficult at times to ensure effective participation of the offenders in the process. The reason for this is male entitlement, and them finding justifications in stereotypical sexual roles. It is an essential pre-requisite that the offender must feel a certain amount of guilt and must take responsibility of the harm he has caused. In cases of rape, this acknowledgement of guilt becomes complicated when offenders start externalizing the blame.[87] They often blame the culture for generating stereotypes of sexual roles and commoditising sex. If there is no sense of guilt in the offender, any form of reconciliatory measure is bound to fail. Thus, the process will never be set in motion. This will be more common in cases where the offender is known to the victim. This is also what makes rape a distinctive crime. Most cases are such where the victim and offender know each other and, in such situations, it is not just the offender who

[85]Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice, in* RESTORATIVE JUSTICE: CRITICAL CONCEPTS IN CRIMINOLOGY VOL. 2 (2009); Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 1 (2006).
[86]HOWARD ZEHR & ALI GOHAR, LITTLE BOOK ON RESTORATIVE JUSTICE(2003).
[87]Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 1 (2006).

justifies his actions and externalizes the blame but also the society which fails to recognize the act as morally reprehensible owing to the familiarity.

An often-ignored area in the existing literature on restorative justice is the interaction of gender and restorative justice. Since it is usually not applied to more serious offences like rape, there hasn't been much research on how the victim, offender and community will react to restorative processes in those cases. Rape is a gendered crime and thus to apply restorative practices to rape, it is important to understand the implications that a differential access to power may have.[88]

In any restorative process, the offender who has harmed is often made to feel a sense of freedom and pride in his/her vulnerabilities.[89] They are encouraged to be open about their fears and weaknesses and vulnerabilities. This becomes extremely beneficial in cases of rape where the man can see beyond the smokescreen of his masculinity and the woman can find solace. His need to violate her may be a product of his prior victimization. These things are never revealed in a conventional criminal justice procedure. They not only provide a closure to the victim but also a vent to the offender.[90] Men are also many a times burdened to conform to high standards of masculinity. The harms that this leads to can only be addressed by processes such as these.

Thus, although not free of limitations, the application of restorative justice practices in rape cases can be very beneficial for solving certain problems that the criminal justice system does not even recognize. Thus, it is suggested that these practices can be used as

[88]Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice, in* RESTORATIVE JUSTICE: CRITICAL CONCEPTS IN CRIMINOLOGY VOL. 2 (2009).
[89]HOWARD ZEHR & ALI GOHAR, LITTLE BOOK ON RESTORATIVE JUSTICE(2003).
[90]*Id.*

supplemental tools in post sentencing stages of the judicial process more effectively.

It is pertinent to note the recent Criminal Law (Amendment) Act, 2018 which reflects precisely a growing retributive trend in the sentencing policy of the legislature for sexual offences. The major change introduced in this amendment was to increase the punishment of individuals convicted for committing rape of a girl under the age of 12 years and 16 years. It introduced the death penalty for gang rape of a girl under 12 years of age at a time when most countries are trying to abolish capital punishment by moving towards a more reformative model of justice. The amendment also made changes to procedural law to disallow the accused to apply for anticipatory bail in cases of rape of minor girls under the age of 16, and to expedite the appeal and trial processes.

Thus, it is evident that the road to a restorative justice system seems long and daunting, especially in the Indian legal context.

B. Redefining the Contours of Consent and Agency

"*The victim may come to court seeking vindication and redress; he is likely in fact to experience a long and lonely wait in a public place, in fear of being further abused.*"[91]

a) Reclamation of Victims' Agency

Just as every other crime, rape is defined as an offence against the State. This section of the paper analyses the various problems associated with this conception of rape being an offense against the State.

[91]Antonia Cretney et al., *Criminalizing Assault - The Failure of the Offence against Society Model*, 34 BRIT. J. CRIMINOLOGY 1 (1994).

In cases of rape, this usurpation of the criminal justice system by the State has three problems. Firstly, in some cases, the State has a share in the blame and defining it in such a way takes away from the State's need to acknowledge any responsibility. Secondly, the process as it operates, leads to secondary victimization[92]of the victim at the hands of the police officials and in the court during trial where she is made to recount the horrors of the incident and is questioned, and cross questioned to no end. Thirdly, it takes away the agency from her to decide the course of justice she seeks. Rape is a distinctive crime because of the trauma that ensues as a result of it, and so it is possible that no sort of retributive or reformative model of meting out justice addresses the needs of the victim or lessens the trauma she goes through.[93] Defining the offense against the State and allowing it to decide the course of justice often results in limiting the focus on the offender's motives and tendencies and not the victim's need for justice.

Every time a woman feels unsafe on the streets of a city, it is a failure of the State machinery to maintain safety on the roads. Thus, for masking its own inadequacies, the State successfully shifts the entire blame onto the offender. Apart from taking moral responsibility, the State also owes a justification to the victim and a share in the blame. Many scholars have also referred to these acts by the State as usurpation of conflicts.[94]

The way in which a trial shapes, prosecutors are not only blind to the needs of the victim but sometimes, in their insensitivity, they start

[92]Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical and Mental Health Systems*, 12 VIOLENCE AGAINST WOMEN 1 (2006); *See* Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994).
[93]Nils Christie, *Conflict as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977); *See* Antonia Cretney et al., *Criminalizing Assault - The Failure of the Offence against Society Model*, 34 BRIT. J. CRIMINOLOGY 1 (1994).
[94]*Id.*

picking easy options.[95] Plea bargaining is one of the various procedures by which the victim loses all sorts of agency in the process. A 'deal' is struck with the offender and the prosecution. All relevant 'mitigating' factors, but justice to the victim, are accounted for. Another common practice is that in situations where a woman is kidnapped and raped or is robbed after her rape, the prosecution tries to make a case of armed robbery or an act of violence.[96] This de-recognition of the offense by the system is often detrimental to the woman because it delegitimizes the trauma she is facing by portraying her as an extra-sensitive victim.

Another problem is reductionist attitude of the courts and the police who see the victims as mere informants of crime who will assist them in getting a conviction. Prioritizing that as a goal of the process, they make every effort in knowing every exact detail, making her revisit the ordeal.[97] For a woman to heal, it is important that she vent her emotions in a healthy manner and seek lasting justice that addresses her needs. The current adversarial justice system not only ignores her needs but also disallows her any opportunity within the system to advocate for her needs. Thus, this usurpation by the State is often unwarranted.

b) Redefining Consent

Another pertinent concern in rape jurisprudence is the over-reliance on consent in determining whether the offence has been committed. The focus shifts from the culpability of the man to acts of the victim. The victim thus undergoes the same trauma a second time over trying to prove the absence of consent and therefore, innocence.

[95]Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994).
[96]Susan Estrich, *Rape*, 95 YALE L. J. 6 (1987).
[97]Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical and Mental Health Systems*, 12 VIOLENCE AGAINST WOMEN 1 (2006).

Even in seemingly progressive jurisdictions where 'no means no' has been widely recognized and the requirement of resistance to prove non consent has been done away with, the approach taken by the courts to determine whether rape has been committed is to contextualize this absence of consent in the absence of resistance.[98] Reliance is placed on the past behaviour of the victim, familiarity with the offender, sexual activity of the victim, and her character.

The second problem with defining rape in terms of consent is that the woman is often in no position to effectively exercise her choice in giving the consent. This is because of the inherent power inequality that exists in certain social situations.[99] Especially in cases of intimate partner violence and child sexual abuse, the victims are either too subjugated to choose whether they consent or not or have not internalized the concept of consent.[100] They could have consented only if they had the agency and power to. In the absence of that, if the law fails to recognize her abuse because of the consent approach, the law has failed her. Similarly, in cases of child sexual abuse, the victims are generally unaware of the concept of consent.[101] They share a relation of trust, intimacy and dependence with their abuser. They cannot conceive that they would do anything wrong to them. This makes them vulnerable. If this vulnerability is not recognized by the law, the child is left unprotected, and most cases end in denial of the act.

Thus, this over-reliance in most cases proves to be detrimental as it derecognizes the most traumatic experiences of victims. There is an increasing need for the law to progress with the time, for rape to be

[98]Mahmood Farooqui v. State (Govt. of NCT) Criminal Appeal 944/2016.
[99]Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL'Y REV. 2 (2016); LEAH E. DAIGLE, VICTIMOLOGY VOL. 2 (2015).
[100]LEAH E. DAIGLE, VICTIMOLOGY VOL. 2 (2015).
[101]Vandana Choudhary et al., *Review of Randomised Controlled Trials on Psychological Interventions in Child Sexual Abuse: Current Status and Emerging Needs in the Indian Context,* 38 INDIAN J. PSYCHOL. MED. 4 (2016).

defined as an offense against the individual person and not have consent as the determinant.

VI. CONCLUSION

Rape is a complicated and often misunderstood offense. This paper has argued that it is not merely a sexual crime but more an act of violence and a means to assert power and dominance. While understanding the deep psychological trauma the victim undergoes after being raped as well as recognizing the various motivations that actual and potential offenders have or might have, the paper has analysed the impact the act and conviction has on the family members and the community. It is only with the recognition that a crime emanates from societal prejudices that a restorative model of justice delivery can be envisioned.

It is argued that restorative practices are best suited to meet the ends of justice for the victims and for balancing the needs of the offender. When a convict experiences guilt, there is room for introspection and self-improvement allowing for their reintegration into society. When they are made to feel ashamed about who they are, by assigning labels, they start equating their act to their identity.[102] This demonization of the person rather than condemnation of the act is precisely the reason the criminal justice system has been failing in its end. Restorative justice recognizes that the abuser and abused don't exist in the binary that the criminal justice system paints them to be. By understanding the motives of the abuser, and thus his needs, reintegrating him in the community becomes effective, thus also ensuring reduction in recidivism. In this way, by changing the focus

[102]Everyday Feminism, *9 ways to be accountable when you've been abusive, February* 1, 2016, available at https://everydayfeminism.com/2016/02/be-accountable-when-abusive/ (May 10th, 2018).

from the actor to the act, normalcy can be restored in a better manner. This is especially true for cases of rape where it is important to demonize the act more than the individual for the offender to understand that what he has is done is condemnable. This is because till the time the discourse changes to openly condemning the acts of rape and intimate partner violence, the offenders will keep hiding behind excuses of societal endorsement of entitlement.

This process may prove to be more useful in cases of child sexual abuse where the vulnerable, confused and often broken children are dealt with in an environment that is conducive and healthy. This also helps in them understanding that the act is not just wrong but also highly condemnable in the society. This curbs the victim to offender transition which is often seen as sexually abused boys grow up, enter into adult relationships and breach the same trust that was snatched from them in their childhood and exploit the same dependence and vulnerability which made them victims in the first place.

Thus, active efforts must be taken by legislatures across the world to change the way justice is meted out in cases of rape and intimate partner violence by focusing more on the needs of the victims, changing notions of consent, and letting them have agency over the course of proceedings.

There is, however, scope for further empirical research on the impact that re-integrative shaming and acknowledgement of guilt will have on rape convicts' family members. Further doctrinal research also needs to be conducted on how gender and restorative practices interact in order to build models of restorative justice that can suit the needs of victims of gendered crimes like rape.