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CONTENT

Transgender Persons Act: A Flawed Understanding of Trans Identity

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Introduction

The term transgender, hijras, third gender all are considered to be synonymous of each other and are used interchangeably. However, the one thing which is common among them is their 'othered' status. Transgender is an umbrella term which includes in it an array of multiple and diverse expression of gender identity. Transgender people are commonly defined as someone whose gender identity is different from what they were assigned at the time of birth based on their external genitals. The hijra community in India is a socio-religious expression of gender non-conforming identities, who have historically organised themselves into a distinct community with its own traditions, customs and norms.

Often neglected by both the state and society transgender community is forced to live on the margins with minimal opportunities for upward social mobility. Transgender community have been denied basic citizenship rights- right to identity and expression, access to education, health and livelihood, and so on. In a first every study conducted by Kerala Developed Society on the behalf of National Human Rights Commission titled '*The Study on*

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Human Rights of Transgender as a Third Gender' (2018) reveals the deep-rooted stigma and discrimination against trans people. The study reports that transgenders are facing an identity crisis in 'gender- specific India'. According to the study 92% of transgenders are deprived of the right to participate in any form employment, including the qualified ones forced to choose between sex work or beggary. The study also provides reasons for low literacy rate among transgenders, according to the report, 52% were harassed by their classmates and 15% even by their teachers resulting in high drop-out rates[1]. According to Census 2011, literacy rate among transgender community is only 56.07%[2].

The transgender population in India is about 4.9 lakh (Census, 2011), however the LGBT activist argues the number higher as many people don't reveal their identity due to fear od ostracization. National Legal Services Authority of India (NALSA) vs. Union of India, 2014 was a historic judgment for transgender movement. This is a landmark decision because it is the first to legally recognise non-binary gender identities and uphold the fundamental rights of transgender persons in India. The judgement also directed Central and State governments to take proactive action in securing transgender persons' rights. The Court upheld the right of all persons to self-identify their gender. The Court clarified that gender identity did not refer to biological characteristics but rather referred to it as an innate perception of one's gender. Thus, it held that no third gender persons should be subjected to any medical examination or biological test which would invade their right to privacy[3].

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1 JACOB JOHN, THE STUDY ON HUMAN RIGHTS OF TRANSGENDER AS A THIRD GENDER 23-35 (2018), https://nhrc.nic.in/sites/default/files/Study_HR_transgender_03082018.pdf

2 Bhumika Rajdev, *For Transgender Persons, Discrimination Begins in Schools* THE WIRE 2020(Jan 9,2022,9.30am) https://thewire.in/lgbtqia/cbse-results-transgender-students-education-stigma-discrimination.

3 National Legal Services Authority v. Union of India & Others (AIR 2014 SC 1863)

Trans Identities: Beyond Binary

The prevailing system of gender assumes a completely dimorphic world, divided into men and women, as well as an absolute continuity between sex and gender. This binary works in two ways: one, it demarcates bodies into two sexes, male and female, based on a stereotypical understanding on genitals; and two, it ensures that the genders of all persons, based on a complex process of socialisation, adhere completely to the sex they have been assigned at the birth based on their genitals[4]. However, the gender expression of each individual is different from the other, no two individuals can mimic each other's gender expression, so in a sense there are incomprehensible numbers of gender. In Gender Trouble (1990), Butler points out "that if gender does not follow automatically from sex the there is no reason to believe that there are inevitably only two genders: The presumption of a binary gender system implicitly retains the belief in a mimetic relation of gender to sex whereby gender mimics sex or is otherwise restricted by it"[5].

Expression of gender and sexuality outside the heteronormative structures can serve to dismantle, the pillars of patriarchal society and to reconstructed it in a more egalitarian manner. In fact, even the imagination of an identity which tries to express itself beyond normative gender can create havoc in hierarchical gender systems. The boundaries of proper gender identification and heterosexuality are policed in a variety of ways, that those who step outside these boundaries are stigmatized and often punished. Individuals who do not conform to gender norms, face differing degrees of violence and exclusion, or are forced to live in ways that they do not wish to, often in silence and isolation.

In living their genders people question the binary in many different ways and their thoughts on gender articulated from these varied positions.

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4 CHAYANIKA SHAH et al., NO OUTLAWS IN THE GENDER GALAXY 225-238 (2015).

5 Stevi Jackson, *Theorising Gender and Sexuality*, *in* CONTEMPORARY FEMINIST THEORIES 136 (Stevi Jackson & Jackie Jones 1998).

There is no uniformity to these articulations or these identities. Just as there are multiple gender identities, there appear to be a multitude of ways by which different people arrive at the gender location or name that seems most appropriate and comfortable for them. Such a process of naming and of arriving at a language that helps people speak of their lives so as to resist the terms dictated by the binary makes it clear that gender identities make sense only when these are self-chosen and self-assigned. To be assigned such a personal identity at birth by someone else, long before one has the chance to discover or understand anything about oneself, is therefore patently absurd[4].

India has a long standing past which not only accommodated but, in a sense, also celebrated gender fluidity. Traditionally, the hijra community has served as a gateway for people who do not conform to rigid gender identities. There are many other traditional transgender communities like *'shiv-shakthis'* (Andhra Pradesh), *'aravani'* (Tamil Nadu) '*Jogti hijras'* (Maharashtra and Karnataka)[6]. Hijras are perhaps the most vocal manifestation of queerness in India, refuses to stay invisible. "Ignored by the mainstream, often rejected by their own family, reduced to a joke in popular entertainment, they clap in the crowded streets demanding to be seen. The hijras challenge not just the boundaries of gender, but also the boundaries of religion for it is not uncommon to find a hijra with a Muslim name, worshipping a Sufi *pir*, alongside a Hindu goddess"[7]. The Hijra community is the only visible gender minority but successful attempts by state and society have transformed them into a unique 'visible-invisible' community.

Transgender community is not a homogenous group, therefore, there is no singular lens to understand their experiences. For instance, if a trans-

6 Aarefa Johari, *Hijra, kothi, aravani: a quick guide to transgender terminology*, SCROLL.IN, 2014(Jan 25 ,2021,9.30 PM))https://scroll.in/article/662023/hijra-kothi-aravani-a-quick-guide-to-transgender-terminology

7 DEVDUTT PATTNAIK, SHIKHANDI AND OTHER TALES THEY DON'T TELL YOU 31-32 (2014).

man can 'pass' as a cisgender-man he could enjoy patriarchalprivileges prescribed to masculine gender but even a little suspicion or doubt can result in violence ranging from ridicule and bullying to death threats. Moreover, the interaction of gender identity with other forms of identity such as race, caste, class, ability, religion etc. together constitute the life-chances of transgender or non-binary individual. A trans person belonging to Dalit community and/or with disability has very minimal chances of upward social mobility due to multiple level of exclusion.

Transgender Persons Act, 2019: A Critical Analysis

Transgender Persons (Right to Protection) Act, 2019 received the assent of the President on the 5th December, 2019 and came into force[8]. it is a product of years of activism and sensitisation carried out by transgender activist to attain full citizenship rights as promised by the Constitution of India. However, the act in its present form, failed to comprehend the concerns and aspirations of trans people. There are many flaws in the act, that shows theapathy of government towards diverse trans people lived experiences and grass-root activism by transgender and lgbt activist.

Section 2(k) of the act defines '"transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta'.The clubbing of two identities i.e., transgender person and intersex person together is appalling, it not only displays state ignorance about multiple gender identities but also conflates all complexities regarding gender identity and expression. The United Nations Free and Equal Campaignby the Office of the United Nations High Commissioner for Human Rights (OHCHR) defines "Intersex people as people who are born

8 The Transgender Persons (Right to Protection) Act, 2019 (No. 40 of 2019)

with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies."[9] Intersex people are can identify themselves with any gender identity be it man, woman, transgender or any other gender identity.

The most problematic part of the act is that it denies the constitutional right of self - identification granted by the Supreme Court of India in NALSA judgement. Section 4 of the act, deals with the recognition of identity of a transgender person, though Section 4(2) recognize the right to 'self-perceived gender identity' but the act contravene itself as Section 5, authorized the District Magistrate to issue, gender identity certificate to transgender person. However, there is no room for redress in case an appeal for such certificate is rejected. Section 7(1) laid down the procedure for issuance of a revised certificatein case a transgender person undergoes Sex-Reassignment Surgery or SRS to change their respective gender to either as a male or female. Here the act differentiates between a transgender person prior and to sex-reassignment surgery. The act only allows a trans person to change their identity to male or female if they underwent a surgical operation.This essentializing of bodily characteristics, allows for pathologizing of trans person lived experiences and also violates the spirit of MALSA judgement. At the same time, act does not declare forced, unnecessary and non-consensual sex reassignment surgery perform on Intersex people as illegal.

The act protects the right of a child to reside in his parents' house. However, in patriarchal cultures like ours, "where the desire to have sons is so over-abiding that doctors will perform illegal ultrasound tests on mothers to determine a foetus' gender, the thought of a son voluntarily becoming a hijra is bewildering to parents. Filled with shame and ridicule from their own families, a hijra person thus has no option but to leave the

9 Office of the High Commissioner for Human Rights, "Free & Equal Campaign Fact Sheet: Intersex" (2015)(Jan 21,2022,2.30 PM) https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.

house to join hijra *gharanas,* each with its own *naiks, gurus* and *chelas*[10]." Transgender activist questioned the failure of government to recognize the historical family system developed by hijra communities in India. "It is this alternative familial structure that the Transgender Persons (Protection of Rights) Act, categorically fails to recognize. Instead, it advocates rehabilitation centres for those disowned by their family, says Abhina Aher, a transgender rights activist based in Delhi. A family is not only blood relations, says Aher".[11] The act provides for the rehabilitation of transgender person, if their family is unable to take care of them. In accordance with the act, *Garima Greh Yojana* for transgender persons was started by government, which provide them basic amenities like shelter, food, medical care, and counselling. It was latter extended to whole LGBTQIA community.[12]However, "such a program of protection and 'rehabilitation' reconstitutes transgender identity and experience away from its more liberatory possibilities and towards a new order of integration into a social structure that is still heterosexist and patriarchal, on the condition of granting certain partial privileges and recognition"[13].

The act protects transgender person from any form of physical abuse, sexual abuse, verbal and emotional abuse and economic abuse and penalize it with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine. However, one could find the

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10 R. RAJ ROA, CRIMINAL LOVE? QUEER THEORY, CULTURE, AND POLITICS IN INDIA 30-33 (2017).

11 Chinki Sinha, *We can't erase our hijra culture*, INDIA TODAY, 2019,(Dec 26,2021,9 PM) https://www.indiatoday.in/india-today-insight/story/cant-erase-hijra-culture-transgender-persons-bill-1581247-2019-08-16

12 Mohamed Imranullah, *Extend Garima Greh scheme to entire LGBTQIA+ community: HC*, THE HINDU, 2021,(Dec 22,2021,10AM) https://www.thehindu.com/news/national/tamil-nadu/extend-garima-greh-scheme-to-entire-lgbtqia-community-hc/article38051413.ece

13 PADMA GOVINDAN &ANIRUDHHAN VASUDEVAN, *The Razor's Edge Oppositionality: Exploring the Politics of Rights-based Activism by Transgender Women in Tamil Nadu*, *in* LAW LIKE LOVE 104 (Arvind Narrain& Alok Gupta ed. 2011).

value attached to transgender bodies are far less than that of a "respectable" cis-gender women, as violating her body is punishable for not less than seven years but which may be extended to life imprisonment under Section 376, of Indian Penal Code, 1860. The state adopts a similar attitudes towards sex-workers who may or may not identify as cis-gender women but are seen to be willing engaging in work that is inherently risky and non-respectable and are therefore seen to be outside the purview of protection available to other women.

The language of the act is disempowering, it considers trans people as ward of the state who cannot take independent and autonomous decisions on their own. The Transgender Person Act also fails to keep up with the progressive and liberatory spirit NALSA judgement which not only recognize the agency of transgender people but at the same at made provisions to undo the historical stigma and discriminations faced by transgender community. The Supreme Court in NALSA judgement extended the reservation policy in public sector to transgender people also, to uplift them both socially and economically. However, government half heartily invested in affirmative actions for trans people and cleverly omits reservation provision from the act, leaving members of transgender community with a fractured social security net. The Act is also successfully maintaining the sanctity of heterosexual marriage structure by ignoring the transgender peoples' right to form matrimonial relationships, and denying them adoptions rights.

The Transgender Persons Act is not disheartening altogether, there are many provisions in the act to eradicate stigma and discrimination against transgender community. Section 9 of the act states 'no establishment shall discriminate against any transgender person in any matte relating to employment including, but not limited to, recruitment, promotion and other related issues.'Section 13 prohibits discrimination in matters of education. Section 15 allows the state to take measures to improve health status of transgender individual like 'review of medical curriculum and research for

doctors to address their specific health issues', provision for coverage of medical expenses by a comprehensive insurance scheme for Sex Reassignment Surgery, hormonal therapy, laser therapy or any other health issues of transgender persons. Section 16 provides a machinery for the constitution of 'National Council for Transgender Persons' with transgender representation from different parts of the country.

Conclusion

The Transgender Person Act instead of destigmatising transgender community, fixates itself upon a body of myths that surrounds the members of transgender community. Transgender Persons Act adds another layer of historical silencing, by ignoring the voices of trans people and trivialising their concerns. It further strengthens an insensitive bureaucratic machinery by giving the power to an unknown stranger, who has the right to legitimise an individual sense of self, leaving trans people with no measure to redress. Central government adopted the paternalistic approach and forcefully handed down the Transgender Act to the community, even after the continuous criticism the bill received by transgender activists.

Inclusion should be accompanied with assimilation .Transgender Person Act under name of including transgender people, actually imposes hierarchical gender system on transgender community. Transgender Person Act is a manifestation of social hierarchies in our society, it is not an attempt to include the 'othered' and 'social outcastes' into society but to define and limit that inclusion. By rejecting the 'norm' Transgender persons, persons with intersex variations, genderqueer people and other gender non-conforming people, try to create a society which is more fluid and flexible in nature, which allows individuals to construct and reconstruct themselves according to their understanding of a sense of self. We need a law that not only acknowledges these differences but liberates the individuals from gender binary.

Death Penalty: Examining the Abolition Debate from a Constitutional Rights Perspective

Merrin Muhammed Ashraf*

Introduction

The debate surrounding retention or abolition of death penalty has been going on for a long time now. International human rights instruments like ICCPR calls for the States to do away with cruel and inhuman forms of punishment.[11] Today,more than 70% of the world's countries have abolished capital punishment in law or practice..[22] India is a retentionist country and despite the 262nd Report of the Law Commission of India recommending the abolition of death penalty[3],[3] the courts continue to sentence convicts to death and the law making bodies continue to prescribe death penalty for more and more offences. Many studies have revealed the inherent arbitrariness and bias involved in death sentencing,withthe people who are executed being mostly from poor and marginalized sections of the

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1 International Covenant on Civil and Political Rights, art 6, Dec. 16, 1966, 999 U.N.T.S. 171; Second Additional Protocol to ICCPR, 1989, art 1.

2 (Jan 1,2022,4.30 PM) https://deathpenaltyinfo.org/policy-issues/international .

3 LAW COMMISSION OF INDIA, 262ND REPORT ON THE DEATH PENALTY (August, 2015)(Jan 23,2022,4.30PM) https://lawcommissionofindia.nic.in/reports/report262.pdf

society.[4] It is said that death sentencing largely depends on the 'hunch of the bench' and therefore, it has been rightly termed as 'lethal lottery' by the Amnesty International.[5]The Law Commission of India observed that death penalty was being arbitrarily and freakishly imposed by the courts in India and that it does not serve any valid penological goals.[6]

The penological arguments for and against death penalty and the arbitrariness that pervades the sentencing process often takes center-stage in any discussion on death penalty. In other words, the focus of most death penalty discussions is the purpose/object behind such a punishment and the institutional prejudices that mire its imposition. But a crucial question remains - whether a State has the authority to deliberately and systematically kill a person? Can death penalty be a constitutionally valid value choice that the legislature can make in a country that is ruled by a Constitution that guarantees right to life and liberty to its citizens?

In India, the constitutional validity of death penalty has been upheld on the ground that it is carried out by complying with the procedure established by law under Article 21.[7] This reasoning presupposes that the State has the right to take the life of the person, as long as the procedure involved is fair, just and reasonable. The US Supreme Court has also upheld the validity of death penalty by taking into account the procedural safeguards inbuilt in the death sentencing regime.[8] On the other hand, the Constitutional Court of South Africa held death penalty to be violative of the fundamental

4 NATIONAL LAW UNIVERSITY DELHI (NLUD), DEATH PENALTY INDIA REPORT (2016), (Jan 23,2022,5.15PM)https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5b4ced7b1ae6cfe4db494040/1531768280079/Death+Penalty+India+Report_Summary.pdf.

5 AMNESTY INTERNATIONAL, LETHAL LOTTERY: THE DEATH PENALTY IN INDIA (2008),https://www.amnesty.org/download/Documents/52000/asa200072008eng.pdf(last visitedJan. 23, 2022).

6 *Supra* note 4, at 213-214.

7 Bachan Singh v. State of Punjab, (1980) 2 SCC 684.

8 Gregg v. Georgia, 428 U.S. 153 (1976).

right to life, dignity and prohibition of cruel and inhuman punishment. [9]What sets apart South Africa from India and US is that the former court rules death penalty to be unconstitutional under all circumstances, no matter what procedural safeguards are incorporated.

Inspired from the South African court ruling, I argue that in India, apart from the fairness in procedure, death penalty should also be tested for its substantive due process or substantive legality. This article examines the possibility for a substantive due process challenge against death penalty within the scheme our Constitution and the standard of review to be adopted for the same.

Part II engages in a jurisprudential discussion centered on the social contract theory to understand whether State has the right to deprive its citizens of their life. This part also contains a discussion of the penological arguments in favour of and against death penalty with an eye to see if there is any justification for the State to deliberately and systematically kill its citizens.In Part III, a comparative study of the landmark decisions that dealt with the constitutionality of death penalty in US, South Africa and India is undertaken. The aim is to cull out the judicial reasoning and standard of scrutiny employed by the courts in upholding/rejecting its constitutionality. Part IV contains my observations regarding the judicial approach in the three countries, particularly focusing on the difference in approach ofthe US and the Indian courts on one hand, and South African court on the other hand.In Part V,I argue for a change in the judicial approach and standard of review adopted by the Indian courts in testing the constitutionality of death penalty. Drawing from the South African court ruling and an article written by Kevin M Barry[10] about the possibility of a substantive due process challenge against death penalty in US, I argue fora similar challenge against death penalty in India and also for the adoption of a strict scrutiny standard of review for the same. Since the concepts of substantive due process and

9 State v. Makwanyane and another, (CCT3/94) [1995] ZACC 3.

10 Barry, s*upra* note 2, at 1572.

strict scrutiny standard are not well-accepted in the constitutional rights adjudication scenario in India, I argue, with the help of previous court rulings, that it is not totally misplaced to recognize these concepts atleast in certain exceptional case, where the life and liberty of citizens are in peril from state action.

Locating the State's Authority to Kill

The modern practice of capital punishment presupposes a State that has the authority to make, administer, and enforce criminal law and procedures and then, if merited, impose death penalty to address serious misconduct. On what basis does the state possess the authority to punish by death? This question is usually answered by referring to the social contract theory.[11]

According to this theory, the authority of the State is derived from or constructed out of the authority granted to it by individuals who have "contracted" to create it. Thus construed, any authority of the State to punish by death is, then, consent-based.[12] John Locke, one of the three main proponents of the social contract theory, noted in his Second Treatise on Government that the purpose of the State is to protect individuals' basic rights, and individuals grant the state the authority to protect rights through laws and punishments that are effective and that comply with natural law principles.[13] In fact, regarding the offence of murder, citing the great law of nature Locke says 'Whoso sheddeth man's blood, by man shall his blood be shed.'[14]

The other classical proponents of the social contract theory, Hobbes and Rousseau also justify the State authority to punish by death on the

11 *Capital Punishment*, Internet Encyclopedia of Philosophy, https://iep.utm.edu/cap-puni/#H6 (last visited Jan. 23, 2022).

12 *Id.*

13 *See,*JOHN LOCKE, SECOND TREATISE ON GOVERNMENT (1689).

14 *Id.*

ground of individuals' consent.[15] Hobbes, in his treatise Leviathan, characterizes the pre-political state of nature as a life "solitary, poor, nasty, brutish, and short".[16] This life in the state of nature was so insecure that each person, as a means of self-preservation, authorized the created sovereign power—the state—to punish criminal misconduct by death.[17] Rousseau, in *The Social Contract*, holds that 'the social treaty has as its purpose the conservation of the contracting parties,'[18] each of whom wills the means to end of preserving his life.[19] 'And whoever wishes to preserve hisown life at the expense of others should also give it up for them when necessary…. It is in order to avoid being the victim of an assassin that a person consents to die, were he to become one.'[20]

A quite different approach to justifying state authority to punish by death appeals to the idea of societal self-defense or self-protection.[21]This approach argues that just as an individual has a right to use deadly force to address imminent, unavoidable aggression against self or other innocent parties, so does society, as a collective, has a right to employ deadly force to address violent aggression against innocent third parties within that society.[22] Like in the case of individuals, the amount of punishment that society has the moral right to employ in self-defense is curtailed i.e. the response must be proportionate to the threatened loss. So, given a moral right of individuals to employ deadly force in defense of their own or other innocent persons' lives, by analogy, they argue, the society has such a right to use death as a punishment for murders of innocent third parties in the society.[23]

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15 *Supra* note 13.

16 *See,* THOMAS HOBBES, LEVIATHAN(1651).

17 *Id.*

18 JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762).

19 *Supra* note 13.

20 *Id.*

21 *Supra* note 13.

22 *Id.*

23 *Id.*

However, recent theorists of social contract argue that individuals would consent to an institution only if it would leave them better off than they would be in its absence.[24]It is argued that this 'benefit principle' justifies a system of punishment, as each person would be better off with punitive sanctions than without.[25]Regarding capital punishment, though, a question has been raised, "can a person who receives the death penalty… regard himself as better off… than he would have been had he never agreed to the contract in the first place"? It seems paradoxical that individuals will to a system whereby they may be executed.[26]This echoes Beccaria's critique of death penalty.[27] He opposed death penalty on many grounds. Chief among his arguments was based on social contract theory and he believed that no man would rationally sacrifice his right to life. He asks "Who has ever willingly given other men the authority to kill him?"[28]According to him, the minimum of liberties that people sacrifice to emerge from the state of nature do not include right to life.[29]

It can be seen from the above discussion that differing opinions prevailamong social contract theorists about the State's right to kill based on the consent of individuals, depending upon their notion about the extent of rights that an individual surrenders to the sovereign. But even if the State has the authority to kill people on the basis of the social contract, it needs to be examined whether death penalty serves any purpose in terms of preserving peace and order i.e. whether it leaves individuals better off than in its absence. To this end, a brief discussion about the penological arguments profferedin justification of the state's authority to execute is necessary.

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24 *Id*

25 *Id*.

26 *Id*.

27 *See,* CESARE BECCARIA, ON CRIME AND PUNISHMENTS(1764).

28 *Id.*

29 *Id.*

Penological arguments for and against death penalty

In order to examine the constitutionality of death penalty, it is important to study the penological arguments in favour of retaining death penalty and their counter-arguments. This is because, if death penalty fails to serve the penological goals that it claims to serve, then it puts in doubt the legitimacy of death penalty as a value choice that can be made by a State that is committed to a constitutional order guaranteeing right to life, dignity and liberty to its citizens.

The major argument in favour of retaining death penalty is that it acts as a deterrent, obviously for the convict, but most importantly for the future offenders by instilling fear in them [deterrence].[30] The second justification is retribution i.e. the convicts deserve the harsher punishment of death for the crime that they have committed. It seeks to exact revenge and retaliation for the crime [retribution].[31] Another argument is that, by taking away the life of an offender who has done a heinous crime, the society becomes safe from his acts [incapacitation].[32] Yet another argument of the retentionist is that reformation is a futile exercise and therefore that option should not be available for capital criminals.

The abolitionists have posed strong counter-arguments to each of the above arguments of the retentionists.

Firstly, the deterrence effect of death penalty is highly doubtful. A survey conducted by the United Nations in 1988 failed to provide any evidence that executions were more of a deterrent than life imprisonment.[33] There is also evidence to show that the countries that have abolished death penalty did not record any increase in crime rate and sometimes even

30 LAW COMMISSION OF INDIA, 35TH REPORT ON CAPITAL PUNISHMENT (September, 1967), https://lawcommissionofindia.nic.in/1-50/Report35Vol2.pdf).

31 *Id,* at ¶297.

32 *Id,* at ¶ 300.

33 T. R. Andhyarujina, *Revenge Isn't Sweet*, THE INDIAN EXPRESS Nov. 17 2014(April 12,2021,3.30 PM) https://indianexpress.com/article/opinion/columns/revenge-isnt-sweet/.

recorded lower crime rate than the countries that retain death penalty. Further, many criminologists agree that deterrence is not caused by the severity of punishment but by the certainty of punishment and detectability of crime.[34]

The retributive justification for death penalty is also weak. The traditional understanding of retribution in the form of 'eye for an eye, tooth for a tooth' is an anathema for the modern criminal justice system. A mature criminal justice system should lead us to higher principles that demonstrate a complete respect for life, even the life of a murderer.[35] Even if retribution is understood as *jus deserts*, extinguishing life as a punishment is based on the view that crime and criminality are purely based on individual will and morality. This conveniently absolves the society of its responsibility in the commission of every crime and in the making of every criminal. It ignores the many socio-economic and cultural factors and institutional failures that creates and perpetuates crime in a society. A criminal is more often the reflection of a society that has failed him.

Thirdly, death penalty does not protect the society by removing the offender any more than life imprisonment.[36]Fourthly, death penalty, due to its irrevocable nature, forecloses all chances of reformation of the individual which is the aim of every modern criminal justice system.[37]The argument that reformation is a futile goal to be pursued does not taken into account the fact that our prisons are not ideal places to mend one's

34 *5 things about Deterrence* Jun. 5 2016(Dec 24,2021,12.30 PM) https://nij.ojp.gov/topics/articles/five-things-about-deterrence.

35 *Retribution (In Opposition of Death Penalty)*(April 12,2021,3.30 PM) https://deathpenaltycurriculum.org/student/c/about/arguments/argument2b.htm

36 H.A Bedau*, The case against death penalty*,(Jan 1,2020,9.30 AM) https://www.aclu.org/other/case-against-death-penalty

37 Prashant Singh and Meghna Sharma, *The Rhetoric and Reality of Capital Punishment*, THE HINDU Jan. 8, 2020(Jan10,2022,3.30PM) https://www.thehindu.com/opinion/op-ed/the-rhetoric-and-reality-of-capital-punishment/article30341861.ece.

ways. The solution is not to nullify the opportunity of reformation itself but to improve the avenues of reformation for a prisoner through prison reforms. The above arguments show that death penalty fails to serve any valid penological goal. Instead, as some criminologists argue, executions *brutalize* society; because by imposing death penalty the State diminishes respect for life.[38]

The above discussion reveals that the jurisprudential as well as the penological justification for the State'sauthority to execute its citizens is weak, or at best uncertain. Despite being so, death penalty has successfully survived constitutional challenge in countries like India and United States for so long. But on the other hand a comparatively young democracy, South Africa, held it to be unconstitutional under all circumstances. This difference in outcome stems from the difference in theapproach adopted by the courts in the three jurisdictions to test the constitutionality of death penalty, which in turn stems from the constitutional rights jurisprudence of the countries.

Constitutionality of Death Penalty – A Comparative Constitutional Analysis of Case Laws

This section of the article analyses the landmark cases that dealt with the constitutionality of death penalty inthe US, South Africa and India. The aim here is to understand the judicial reasoning employed and the standard of scrutiny adopted by the courts in the three jurisdictionsto uphold or reject the constitutionality of death penalty. This endeavor will later aid in examining the possibility of adopting a different approach and different standard of scrutiny to test the constitutionality of death penalty in India.

38 Nicholas Christof, *When We Kill,* THE NEW YORK TIMES Jun. 14 2019(Jan 10,2022,3.30PM) https://www.nytimes.com/2019/06/14/opinion/sunday/death-penalty.html .

United States

The death penalty jurisprudence in United States has taken many twists and turns.[39]A useful starting point to understand the US court's treatment of constitutionality of death penalty is the 1976 decision of the US Supreme Court in *Furman* v. *Georgia*[40]**.** At the time of the Court's decision in Furman, virtually every death penalty statutes in the United States afforded the sentencing court absolute discretion to impose either death or life imprisonment for certain crimes.[41]In Furman, the constitutionality of death penalty was challenged as being in violation of the protection against 'cruel and unusual punishment' under the 8th Amendment to the US Constitution read with due process clause of 14th Amendment. In a 5:4 decision, the court ruled death penalty to be unconstitutional. The judges constituting the majority –Douglas, Stewart, White, Brennan and Marshall JJ. -- gave out separate reasons for arriving at the decision

Justices Douglas, Stewart and White found death penalty to be cruel and unusual due to the arbitrary manner in which death sentences was being imposed, often indicating a racial bias against black defendants.[42]These judges reasoned that the infrequency with which the death penalty was being imposed raised a strong inference that it was being meted out arbitrarily in violation of equal protection concepts implicit in the eighth amendment. Justice Stewart concluded that "the Eighth and Fourteenth Amendments cannot tolerate... [a penalty that was] so wantonly and so freakishly imposed"[43]. However, these judges did not go into the constitutionality of capital punishment in the abstract; instead, their scrutiny was limited to death penalty as was administered by the statutes then.

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39 Mark S. Kende, *The Constitutionality of the Death Penalty: South Africa as a Model for the United States*, 38 GEO. Wash. INT'l L. REV. 209, 234 (2006).

40 408 U.S. 238 (1972).

41 Richard A. Berk, Jack Boger& Robert Weiss, *Chance and the Death Penalty*, 27 LAW & SOC'Y REV. 89, 90 (1993).

42 *Id.*

43 *Id,* at 306-314.

Justices Brennan and Marshall, on the other hand, doubted whether any system of capital punishment could solve the problem of arbitrariness. They held death penalty to be unconstitutional under all circumstances. Brennan J. stated that the death penalty is "cruel and unusual" because it is a 'denial of human dignity for the State to arbitrarily subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment.'[44] Justice Marshall reasoned that death penalty is not consistent with the 'evolving standards of decency that mark the progress of a maturing society'[45] – a test developed in *Trope* v. *Dulles*[46]to understand the scope of 8th Amendment. It is to be noted that the crucial difference between the reasoning of the first three judges and other two judges is that, while the latter found capital punishment to be unconstitutional *per se*, the former found death penalty unconstitutional only because of the arbitrary manner in which it was being imposed on convicts, This means that had the statutes in question contained adequate safeguards against arbitrariness, the former judges would have upheld its constitutionality.

After *Furman*, the federal and state legislatures revised their death penalty statutes to incorporate guidelines for the sentencing courts and other procedural safeguards to guard against arbitrariness.[47]It was in this background, that the next case of importance came to be decided- *Gregg* v. *Georgia*[48]**.** In a 7:2 decision, the Court held that death penalty under Georgia's statute did not violate the Eighth and Fourteenth Amendments. The court emphasized how Georgia's death penalty statute assured the judicious and careful use of death penalty by requiring a separate sentencing

44 *Id,* at 286.

45 *Id,* at 362-369.

46 356 U.S. 86 (1958).

47 Kende, *supra* note 41, at 237.

48 428 U.S. 153 (1976).

hearing, specific jury findings as to the severity of the crime and the nature of the defendant, and a comparison of each capital sentence's circumstances with other similar cases. This, they held,took care of the court's concern in *Furman* about the arbitrary and capricious imposition of death penalty. The court agreed with Georgia legislature's finding that capital punishment serves as a useful deterrent to future capital crimes and that it is an appropriate means of social retribution against its most serious offenders. The court also reasoned that it was apparent from the text of the 5th amendment to the US Constitution that the existence of capital punishment was accepted by the framers. The 5th Amendment says that no person shall be deprived of his life, liberty or property without due process of law.

After *Gregg*, the US Supreme Court embarked on a process of constitutional regulation of death penalty, aiming at minimizing the arbitrariness and discrimination in its administration, but always stopping short of declaring death penalty as unconstitutional, *per se*.[49]This constitutional regulation took the form of placing procedural constraints in the death penalty imposition. Apart from that,the Court also categorically prohibited death penalty for people declared insane[50], people with intellectual disabilities[51], people who were juveniles at the time of commission of the offense[52], and people convicted of non-homicide crimes[53] on the ground, either that they offend the fundamental human dignity requirement inherent in 8th Amendment or that they are excessive and disproportionate.

Though the US has stopped short of declaring death penalty as unconstitutional or outlawing it, there is a diminishing appetite for imposing death penalty. This is evident from the fewer death sentences that are being

49 Barry, *supra* note 2, at 1572

50 Ford v. Wainright, 477 US 399 (1986).

51 Atkins v. Virginia, 536 US 304 (2002).

52 Roper v. Simmons, 543 US 551 (2005).

53 Kennedy v. Louisiana, 554 US 407 (2008).

imposed by the courts[54] and from the fact that many states have abolished death penalty and most of the retentionist states use it with less frequency.[55]

South Africa

Death penalty was outlawed by the Constitutional Court of South Africa in *State* v. *Makwanyane and Another*[56] A unanimous main judgment, authored by then-President of the Court, Arthur Chaskalson, was supported by ten concurring judgments. The applicants in *Makwanyane* were convicted of murder and sentenced to death. They challenged the constitutionality of the legislative provision, section 277(1)(a) of the Criminal Procedure Act, which made capital punishment a legally valid sentence. The applicants' contention was that the impugned provision violated S. 9 and S. 11(2) of the Interim Constitution.[57]

The court examined the validity of capital punishment mainly with respect to S.11(2) that prohibits the infliction of 'cruel, inhuman or degrading treatment or punishment'. What amounts to a 'cruel, inhuman and degrading punishment' was left undefined and hence its meaning was to be given by the court. The court said that S. 11(2) must not be construed in isolation, but must be read with other provisions of the Constitutions, especially those which are of particular importance to a decision on the constitutionality of the death penalty *viz.*section 9 which says that 'every person shall have the right to life', section 10 which says that 'every person shall have the right to respect for and protection of his or her dignity', and section 8 which says that 'every person shall have the right to equality before the law and to equal protection of the law.'[58]

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54 Death Penalty Information Centre, 2*018 Sentencing*,(Nov 12,2021,4.30 PM)https://deathpenaltyinfo.org/2018sentencing#Defendants%20Sentenced%20to%20Death%20in%202018

55 Kende, *supra* note 41.

56 State v. Makwanyane and another, (CCT3/94) [1995] ZACC 3.

57 The case was decided under the provisions of the Interim Constitution, which are also retained in the South African Constitution, 1996.

58 State v. Makwanyane and another, (CCT3/94) [1995] ZACC 3, at ¶10.

The court noted that death is the most extremeform of punishment to which a convicted criminal can be subjected. It is final and irrevocable and it puts an end not only to the right to life itself, but to all other personal rights which are vested in the deceased under the Constitution. Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it '...involves, by its very nature, a denial of the executed person's humanity'and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.[59]The court also noted with concern the arbitrariness involved in death sentencing and held that even the 'guided discretion' provided by the statute was insufficient in light of the death penalty's disparate impact along racial and poverty lines.[60]

The court also specifically held that death sentence violates the right to human dignity guaranteed by S. 10 and the right to life guaranteed by S. 9. The court held that the dehumanizing effect of the death penalty *prima facie* violates the right to dignity.Turning to the right to life point, Chaskalson P observed, firstly, that the right to life guaranteed in S. 9 is expressed in an unqualified form.[61] Secondly, by relying on a Hungarian case law that abolished death penalty, he noted that right to life and the right to dignity, taken together, was the source of all other rights and thus formed the essential content of all rights under the Constitution.[62] Another judge noted that '*proclamation of the right [to life] and the respect for it demanded that the state must surely entitle one, at the very least, not to be put to death by the state deliberately, systematically and as an act of policy that denies in principle the value of the victim's life*.'[63]

59 *Id,* at ¶ 26.

60 *Id,* at ¶ 51.

61 *Id,* at ¶ 80.

62 *Id,* at ¶ 84.

63 *Id,* at ¶ 176 (Ackermann J.)

Having decided that death penalty violates S. 9, 10 and 11(2), the question which arose before the court was whether the death penalty was nevertheless justifiable as a punishment for murder under the limitation clause, S. 33(1) of the Constitution. S. 33(1) provides that a right entrenched in Chapter 3 of the Constitution may be limited if such limitation is 'justifiable in an open and democratic society based upon freedom and equality, it must be both reasonable and necessary and it must not negate the essential content of the right'. The justifications put forward by the State i.e. deterrence, prevention and retribution were held to be unconvincing by the court. ChaskalsonJ. noted that retribution cannot be accorded the same weight under their Constitution as the rights to life and dignity and that it has not been shown that the death sentence would be materially more effective to deter or prevent murder than life imprisonment. Thereafter, the court engaged in a formal balancing exercise, weighing deterrence, prevention and retribution against the alternative punishments available to the state and the factors, which taken together, make capital punishment cruel, inhuman and degrading. After engaging in such exercise, the court concluded that 'the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out'.[64]

It can be seen that unlike the US Supreme Court, the Constitutional Court of South Africa tested the constitutionality of death penalty on the touchstone of right to life and dignity and held it to be *per se* in violation of the constitutional guarantees, no matter the existence of procedural safeguards. In other words, the court held death penalty to be a constitutionally impermissible value choice to be made by the Legislature.

India

In India, death penalty has existed as a punishment from the colonial times.[65] After independence, the Indian Penal Code continued to retain death

64 *Id,* at ¶146.

65 262nd LAW COMMISSION REPORT, *supra* note 5, at 17.

as an alternative punishment for certain offences.[66] Apart from IPC, certain other central and state statutes like the Army Act, Protection of Children from Sexual Offences (POCSO) Act, Narcotic Drugs and Psychotropic Substances Act, 1985 etc also prescribe death sentence.[67] Mandatory death sentence was declared unconstitutional by the Supreme Court[68] and therefore Indian penal laws do not prescribe death penalty as the only punishment for an offence. Consequently, the sentencing court has the onerous task of choosing between death penalty and life imprisonment in most cases. Until 1955, the law required the court to give reasons for choosing life imprisonment over death.[69] Later, the requirement of giving reasons was dispensed with[70] until 1973, whenthe Code of Criminal Procedure was amended to incorporate S. 354(3) that required 'special reason' to be recorded by the sentencing court for imposing death penalty.[71] This indicates a shifting legislative preference for life imprisonment as the rule and death penalty as an exception. The 1973 amendment also bifurcated the criminal trial into two stages, with separate hearings for conviction and for sentencing.[72]

The constitutional validity of death penalty in India was first challenged before the Supreme Court in 1972 in *Jagmohan Singh* v. *State of Punjab*[73]. The court rejected the challenge and held that death penalty could not be called unreasonable or opposed to public policy. It noted that the framers of the Constitution considered capital punishment as permissible. This is evidenced from the existence of provisions like Article 72 (1) (c), Article 73 (3), Article 134 etc. The implication of these provisions is that the

66 *Id.*

67 262nd LAW COMMISSION REPORT, *supra* note 5, at 32.

68 Mithu v. State of Punjab, AIR 1983 SC 473.

69 The Criminal Procedure Code, No. 2 Acts of Parliament, 1898.

70 The Criminal Procedure (Amendment) Act, 1955.

71 The Code of Criminal Procedure, No. 2 Acts of Parliament, 1973, S. 354(3).

72 The Code of Criminal Procedure, No. 2 Acts of Parliament, 1973, S. 354(3).S. 235(2).

73 (1973) 1 SCC 20.

deprivation of life is constitutionally permissible if it is done according to the procedure established by law. The court further observed that the amount of discretion vested in sentencing judges under the 1955 amendments to the CrPC was not excessive, and that, therefore, the arbitrariness of outcomes was not a concern. The court noted that the exercise of judicial discretion on 'well-recognisedprinciples' was the best possible safeguard against arbitrariness. However, the court did not elaborate what these principles are.

After the 1973 amendment to CrPC, in *Rajendra Prasad v. State of Uttar Pradesh*[74]the court was called upon to discuss the meaning of 'special reasons' that was required to be given for the imposition of death sentence. The three-judge bench, headed by Justice Krishna Iyer, discussed the issue of streamlining sentencing discretion, and observed that the legislature had not done enough to channelize the discretion involved in capital sentencing. It further stated that it is not enough to merely hold that the discretion must be ruled by well recognized principles; it must be further demarcated as to what these principles are, so that the practice of the discretion does not militate against the mandate of fair and non-arbitrary procedures under Article 21.The court also held that the death sentence abrogates fundamental freedoms guaranteed under Article 19 of the Constitution and therefore the exercise of the discretionary power to impose the death sentence must show that such a sentence is a reasonable restriction, lest it should be in violation of the Constitution .Iyer J. observed that 'special reasons' under the CrPC meant factors relevant "not to the crime, but to the criminal"[75], and in laying down guidelines for sentencing, he urged sentencing judges to consider 'the personal and social, the motivational and physical circumstances' of the criminal along with duration of incarceration and death row as relevant factors.

74 AIR 1979 SC 916.

75 *Id,* at ¶ 9.

In 1980, came the landmark case *Bachan Singh* v. *State of Punjab*[76], wherein the Supreme Court was once again confronted with the question of constitutional validity of the capital punishment. The court was called upon to decide the constitutionality of two issues: first, the provision for death penalty under S.302 of the IPC; and second, the sentencing procedure articulated within the expression 'special reasons' under S. 354(3) of the CrPC. The constitutional validity of death penalty was challenged on the touchstone of Articles 14, 19 and 21.

Countering the challenge on the ground of Art.19, the court held that since right to life is not a part of Article 19, it cannot be invoked to determine the constitutionality of death penalty under S. 302 IPC. Death penalty cannot be called unconstitutional merely because it indirectly, incidentally or remotely affects the freedoms mentioned under Article 19. While dealing with the Article 21 challenge, the court, in light of the ruling in *Maneka Gandhi* v. *Union of India*[77]**,** held that the State *has* the right to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.[78]The court located the constitution maker's approval of death penalty in provisions like Articles 72(1)(c), 161 and 134. In answering whether the death penalty serves any penological purpose, the Court held that it would not be right to decide the issue judicially since it was a highly contested debate with strong divergent views on both sides.

The Court then proceeded to examine whether the sentencing procedure for death penalty is fair, just and reasonable. It noted that the requirement of special reasons in S. 354(3), bifurcated sentencing hearing under S. 235(2) and several other provisions in CrPC provided several safeguards against arbitrary imposition of death penalty.[79]Therefore, S. 354(3) was held to be

76 (1980) 2 SCC 684.

77 AIR 1978 SC 597.

78 Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at ¶ 138.

79 *Id*, at ¶ 167.

not unconstitutional. The court also laid down important guidelines to help the sentencing court to decide whether or not to sentence a person to death in a given case. Aggravating and mitigating circumstances have to be weighed and due regard must be given both to the circumstances of crime and criminal. The court's preference for rare imposition of death penalty was clear when it observed that '*a real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed'*[80]

The sole dissenting opinion in this case was by Justice Bhagwati and he took quite a different approach to the issue, which is in some ways similar to the ruling of South African court. Bhagwati J. held death penalty as violative of Article 21 and 14 of the Constitution as it conferred unfettered discretion on courts to choose between death penalty and life imprisonment. Howsoever careful be the procedural safeguards erected by law, he noted, it is impossible to eliminate the chance of judicial error that can even result in the execution of an innocent person.[81]He went on to note that death penalty as provided under S. 302 of IPC read with S. 354(3) CrPC does not subserve any legitimate end of punishment, since by killing the murderer it totallyrejects the reformative purpose and it has no additional deterrent effect than lifesentence and it is therefore not justified by the deterrence theory ofpunishment.[82]Further, the theory of retribution cannot haveany legitimate place in an enlightened philosophy of punishment.[83]He also observed that infliction of mental and physical pain and suffering on the condemnedprisoner by sentencing him to death penalty is cruel andinhuman and therefore arbitrary and unreasonable.[84] Based on these points, Justice

80 *Id,* at ¶ 215.

81 *Id*, at ¶ 243

82 *Id*, at ¶288.

83 *Id.*

84 *Id,* at ¶258.

Bhagwati held that death penalty has no rational nexus with any legitimate penological goal and it is arbitrary and irrational and henceviolates Articles 14 and 21 of the Constitution.He expressed no opinion about the consistency of death penalty with Art. 19.

It can be seen that the majority opinion in *Bachan Singh* and in the cases before that consideredthe State's right to execute people as a given. The only issue that then fell for their consideration was whether the procedure leading to its imposition was arbitrary. On the other hand, Justice Bhagwati's opinion deliberated whether death penalty is a constitutionally valid value choice that can be made by the legislature.

Some Observations

From the above analysis of death penalty jurisprudence in the three jurisdictions, a few inferences can be made.

Only South Africa has declared capital punishment as unconstitutional under all circumstances. Capital punishment *per se* was considered as an anathema tothe respect for life and human dignity, which are values that permeate the South African Constitution. The dehumanizing effect of death penalty and the arbitrariness involved in the sentencing process led the court to conclude that it was a 'cruel, inhuman and degrading punishment'. It is to be noted that the court refused to save capital punishment despite procedural safeguards and guided discretion incorporated in S. 277 of the Criminal Procedure Act.

In United States, when death penalty was held unconstitutional in *Furman*[85], it was expressly stated that the court, (to be more specific, the three concurring judges constituting the majority) was not dealing with the constitutional validity of death penalty *per se*.[86] Instead, what they were concerned with was the constitutionality of death penalty as

85 Furman v. Georgia, 408 U.S. 238 (1972).

86 *Id*, at ¶ 308.

it was currently being imposed then. The main reason for holding death penalty unconstitutional was the wide discretion that was given to the judges and juries to sentence a person to death and the consequent arbitrariness and capriciousness involved in death sentencing. Only Justice Brennan and Marshall opined that death penalty was *per se* cruel and an unusual punishment. Therefore, Furman did not sound the death knell for death penalty in US; it rather led to changes being made to death penalty statutes to overcome the concerns raised in Furman.

In *Gregg*[87], the court emphatically clarified that the death penalty was not *per se* invalid under the Eighth Amendment. In *Gregg* and in the death penalty cases after that, the court was mainly concerned with the constitutional regulation of arbitrariness involved in death sentencing, promoting the principle of individualized sentencing and assessing the excessiveness of punishment in relation to certain class of crimes and offenders.

The Indian Supreme Court has never held death penalty to be unconstitutional, except when it was prescribed as a mandatory punishment. The court has always saved its validity by either trusting that the judicial discretion will be exercised only in accordance with well-recognized principles or by referring to the special procedural safeguards that are contained in CrPC and the Constitution for the imposition of death penalty.In fact, the majority in *Bachan Singh*[88]clarified that the constitution makers envisaged death penalty to be a valid punishment under our Constitution. It was only Justice Bhagwati, in his dissenting opinion, who considered death penalty to be unconstitutional under all circumstances. Unfortunately, his reasoned opinion still remains a dissenting and lone voice in the death penalty jurisprudence in India.

87 Gregg v. Georgia, 428 U.S. 153 (1976).

88 Furman v. Georgia, 408 U.S. 238 (1972).

This difference in judicial outcomes in the three jurisdictions may be attributed to one major difference in the way the Constitution of these countries guarantee right to life. While the US and Indian Constitution permits the state to deprive a person's life and liberty by due process of law and procedure established by law, respectively, the right to life guaranteed under South African Constitution is unqualified. This allowed more latitude for the South African court to strike down death penalty when it was found to be inconsistent with the values of human dignity and life. There is also a difference in the treatment of this issue by the courts in the three jurisdictions. In South Africa, the court directly addressed the consistency of death penalty vis-à-vis right to life and some Justices even answered in negative the specific question as to whether State can take the life of a person deliberately and systematically by way of punishment. On the other hand, in US and in India, the focus of the courts was on examining whether the death penalty statutes satisfied the procedural due process. Opinion on the substantive legality of death penaltyas a punishment *vis-a vis* right to life was confined only to the dissenting opinion of the judges.

Mounting a *Per Se* Challenge to the Constitutionality of Death Penalty vis-a-vis Right to Life

This section of the article seeks to argue for testing the constitutional validity of death penalty for its substantive due process under Article 21, being fully aware of the non-consensus about the existence of the concept of substantive due process in the Indian constitutional rights adjudication. The stimulus for this argument comes from the paper "The Death Penalty and the Fundamental Right to Life" written by Kevin M Barry[89] wherein he argues how the death penalty in the US deprives the right to life in violation of substantive due process.Substantive due process refers to "whether the government has an adequate reason for taking away a person's

89 Barry, *supra* note 2.

life, liberty, or property".[90]Barry argues for adopting a strict scrutiny review of death penalty on the touchstone of right to life. The gist of his argument is discussed below:

Possibility for a strict scrutiny review of death penalty in US

Barry says that in the US, the constitutionality of death penalty has always been tested against the 8th Amendment prohibition of 'cruel and unusual punishment'. The due process with which it was concerned in 8th Amendment cases like *Gregg*[91] was only procedural due process. The US Supreme Court has not squarely addressed the question as to whether the death penalty *per se* deprives criminal defendants of their fundamental right to life in violation of substantive due process.[92]He says that unlike an 8th Amendment challenge, a substantive due process challenge against death penalty will require the State to show a compelling state interest for depriving a person of his fundamental right to life.[93] In addition to that, State must also be required to show that death penalty is narrowly tailored to serve such interest.[94]He argues for the adoption of a strict scrutiny review of death penalty on the basis of the reasoning that a condemned prisoner's right to life is fundamental.[95]

Applying the first prong of the strict scrutiny test i.e. requirement of a compelling state interest, Barry agrees that deterrence and retribution are compelling state interests.[96] Turning to the next requirement of 'narrow tailoring', he says that death penalty fails to achieve the compelling state interest of deterrence and retribution due to arbitrariness, delay and

90 *Id*, at 1554.

91 Gregg v. Georgia, 428 U.S. 153 (1976).

92 Barry, *supra* note 2, at 1552.

93 *Id*, at 1553.

94 *Id.*

95 *Id,* at 1563-1589.

96 *Id,* at 1590.

unreliability.[97]He further argues that even if death penalty serves these compelling state interests, it is not a narrowly tailored measure as there is nothing to prove that death deters better than life imprisonment.[98] Death is also not the only available means to achieve the aim of retribution. Thus, he argues that by applying strict scrutiny test, abolition of death penalty will have a better chance for success than an 8th Amendment procedural due processchallenge.

The remaining part of this section argues for a similar substantive due process challenge against death penalty in India vis-à-vis Article 21 and for adopting strict scrutiny standard for the same.

Substantive due process in India

Substantive due process is different from procedural due process. While the latter requires the procedural law to be fair, just and reasonable, substantive due process empowers the court not just to question the fairness and reasonableness of procedure but the substantive value choices made by the legislature.

Article 21 of the Constitution states: "no person shall be deprived of his life and personal liberty except according to procedure established by law". The place of substantive due process in India's constitutional rights adjudication scenario has always been contested. The absence of 'due process' clause in our Constitution and the discussions during the Constitutional Assembly debates gives the impression that our constitution makers did not want to adopt American doctrine of substantive due process in India.[99] The Supreme Court stayed true to the intention of the Constitution

97 *Id*, at 1590-1593.

98 *Id*, at 1593-1594.

99 Abhinav Chandrachud, *A Tale of Two Judgments*, THE HINDU May 12 2016(Aug 12,2021,3.30PM) https://www.thehindu.com/opinion/lead/a-tale-of-two-judgments/article8586369.ece.

drafters when in *A.K. Gopalan* v. *State of Madras*[100], the court ruled that the procedure in Article 21 means any procedure adopted by the legislature and that the courts cannot go into the reasonableness of the same. However, in *Maneka Gandhi* v. *Union of India*[101], the court departed from *AK Gopalan*[102] and held that the procedure established by law under Article 21 must not be any procedure but must be just, fair and reasonable. Even such an interpretation did not import the concept of substantive due process in India, as what *Maneka Gandhi* also required is procedural fairness; it does not allow the court to question the legislative choices. This was evident from the *Bachan Singh*[103] case when the court held that as long as the procedure for imposing death penalty is fair, just and reasonable, the state can deprive the life and personal liberty of the convicted prisoner and the court stopped short from examining the substantive legality of the provision of death penalty. Even recently, in *Rajbala* v. *State of Haryana*,[104] the court strongly rejected the doctrine of substantive due process in India.

However, we can also see cases in which the Supreme Court and the High Courts have used the concept of substantive due process to test the constitutionality of a legislative act. For instance, in *Sunil Batra* v. *Delhi Administration*[105], while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution does not have a 'due process' clause as in the American Constitution *'what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter- productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21.'* Supreme

100 A.K. Gopalan v. State of Madras, MANU/SC/0012/1950.

101 Maneka Gandhi v. Union of India, AIR 1978 SC 597.

102 A.K. Gopalan v. State of Madras, MANU/SC/0012/1950.

103 Bachan Singh v. State of Punjab, (1980) 2 SCC 684.

104 (2016) 1 SCC 463.

105 MANU/SC/0184/1978.

Court's decision in *Mithu* v. *State of Punjab*[106] and *Distt Registrar and Collector* v. *Canara Bank*[107], Delhi High Court's decision in *Naz Foundation case*[108] and Bombay High Court's decision in *Shaikh Zahid Mukhtar* v. *State of Maharashtra*[109] have been cited by scholars as instances when Indian courts have used substantive due-process reasoning to invalidate a statute for transgressing a penumbral fundamental right.[110]

I submit that the substantive due process doctrine must be used for testing the constitutionality of death penalty as what is at stake here is the right of the person not to be deprived of his life by the State. When the life of a person is sought to be deprived deliberately and systematically by the State, it must not be just enough to show that the procedure involved is fair, just and reasonable; it must also be shown that it is justifiable and reasonable on the part of the State to kill a person.

A case for strict scrutiny test of death penalty on the touchstone of Article 21

Like substantive due process, the adoption of strict scrutiny standard in India has also been highly contested. Contributing to this debate is the contradictory views expressed by the Supreme Court in various cases. The first case that directly confronted the question of the applicability of strict scrutiny test in India is *Saurabh Chaudri* v. *Union of India*[111]. The court noted that strict scrutiny test is not applicable in India due to the existence of presumption of constitutionality,because strict scrutiny put the burden on the State to prove the constitutionality of the statute. However, it made

106 Mithu v. State of Punjab, AIR 1983 SC 473.

107 (2005) 1 SCC 496.

108 Naz Foundation v. Govt of NCT of Delhi, 160 DLT 277 (2009); *See also,* Vikram Raghavan, *Navigating the Noteworthy and Nebulous in Naz Foundation,* 2 NUJS L. REV. 397, 406 (2009).

109 2016 SCC OnLineBom 2600.

110 Raghavan, *supra* note 110. *See also,* Chandrachud, *supra* note 101.

111 (2003) 11 SCC 146.

two exceptions when the test may be applied –when legislation is found to be ex facie unreasonable and when by reason of a statute, the life and liberty of a citizen is put in jeopardy.[112] The implication seems to be that in such circumstances the presumption of constitutionality would not apply and the burden would be shifted onto the State.Later, a 5-judge Constitution bench of the Supreme Court in *Ashok Kumar Thakur* v. *Union of India*[113], strongly rejected the application of strict scrutiny test in India in all cases, again on the ground of existence of presumption of constitutionality. ButBalakrishnan, C.J, in his opinion, approved the applicability of strict scrutiny test for an Article 21 analysis.[114]

It has to be noted that presumption of constitutionality is not an absolute rule in India and that several exceptions were carved out by the court in *R.K. Dalmia case*[115]. Certain statutes by virtue of being unsubstantiated and ex facie irrational do not come within the domain of this presumption.[116]Even in American constitutional jurisprudence,strict scrutiny is meant to be applicable only to those legislations which are 'inherently suspect' or ex facie unreasonable and for which a presumption of constitutionality is not merited.[117] Therefore presumption of constitutionality cannot be posed as a reason for non-applicability of strict scrutiny test in all cases.

Further, we can see the application of some element of the strict scrutiny test by the Supreme Court in certain cases. For example, compelling state interest standard was used in Article 21 analysis in *People's Union for Civil*

112 *Id,* at ¶ 36.

113 (2008) 6 SCC 1.

114 RaagYadava, *Taking Rights Seriously: The Supreme Court on Strict Scrutiny,* 22(2) NLSIU REV 147, 156 (2010).

115 Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors, AIR 1958 SC 538, ¶ 14.

116 *Id*, at 158.

117 Yadav, *supra* note 116, at 165.

Liberties v. *Union of India*[118] and *Shardav*. *Dharmpal*[119]. Also, in *Gobind* v. *State of Madhya Pradesh*[120], without expressly endorsing the application of strict scrutiny, the court used the 'compelling state interest' standard and 'narrow tailoring requirement' to judge the constitutionality of a statute alleged to be infringing the right to privacy.

It is submitted that a heightened standard of review as required by strict scrutiny test must be adopted when the fundamental right in question is the life and personal liberty under Article 21 and when the legislation is ex facie unreasonable or 'inherently suspect'. This will ensure that fundamental rights remain fundamental.[121] Also, there is nothing in the structure of our Constitution that rejects the adoption of this test.[122] It is in harmony with Indian constitutional jurisprudence and the heightened level of judicial scrutiny provided by it is the 'next logical addition to prevailing standards'.[123]

Death penalty statutes give State the authority to take the life of a convict – the most basic and fundamental of his rights.It is an extreme and cruel form of punishment and it robes the convicted person of his dignity, especially with the unavoidable delay and uncertainty that has become hallmark of the death sentencing practice of India.[124]Also to be taken note of is the Law Commission's recommendation to abolish death penalty and the strong international consensus in favour of its abolition. Therefore, such a deprivation must not be afforded the presumption of constitutionality and must be tested using the strict scrutiny test. If strict scrutiny test is used to review the constitutionality of death penalty, the outcome is likely to be the same as what is expected in US. While the State may succeed in showing

118 (2003) 4 SCC 399.

119 (2003) 4 SCC 493.

120 AIR 1975 SC 1378.

121 Yadav, *supra* note 116, at 148.

122 *Id*, at 159-160.

123 *Id*, at 150.

124 Death Penalty India Report, *supra* note 6.

a compelling state interest, it is likelyto fail in showing that death penalty is narrowly tailored, due to doubts about its efficacy to achieve any valid penological goal more than life imprisonment, and the discriminatory way in which death penalty is being handed out, that strikes the poor and marginalized the most. Hence, death penalty is unlikely to stand the constitutional challenge vis-à-vis Article 21 if a strict scrutiny is carried out.

Conclusion

The growing evidence of futility of death penalty to serve any penological purpose, the global consensus against its retention and the dehumanizing effect of death penalty due to the inexorable delay, arbitrariness and uncertainty involved in the sentencing process makes death penalty unfit for a modern democratic society wedded to ideals of respect to life and human dignity. Therefore, the very authority of the State to deprive a person of his life for the purpose of punishment must be challenged. This article argued for a substantive due process challenge against death penalty vis-à-vis the fundamental right to life. The US strict scrutiny test should be used by Indian courts to review legislations that authorize the State to deliberately takeaway the life of an individual. This is necessary to ensure that the fundamental right to life remains fundamental, even for a convicted prisoner.

The Freedom to Marry in India: Recent Socio Legal Developments

Rashmi Kumari*

Introduction

One of the universal social institutions is marriage. It was created by human society to manage and regulate man's life. It is the foundation of a society. Children learn to become citizens in their families; they learn about relationships in their families; they learn what is expected of them in society, how to act, and how to be in their families. The conventional concept of marriage, which consists of one man and one woman in a monogamous and permanent relationship, is central to the nuclear family. To ensure a healthier society, we must promote and safeguard marriage. Marriage is legally recognized as a valid means of bringing two people together. Society supports the union of two souls since the major goal of marriage is to produce and raise children until they are able to care for themselves.

What is Marriage?

The dictionary defines marriage as "The legal union of a man and woman as husband and wife[1]. The definition of marriage can be looked at from a legal perspective. A legal dictionary defines marriage as "the state of being united to a person of the opposite sex as husband or wife in a legal, consensual, and contractual relationship recognized and sanctioned by and

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1 https://www.britannica.com/topic/marriage.

dissolvable only by law[2]. Legally, marriage is a binding contract between the two parties that joins together their possessions, income, and lives.

Right to Marriage By Choice

The right to marriage is a fundamental right given to both males and females under Article 21 of the Constitution but its practical interpretation in an Indian family is hard to find[3]. Marriage is one of the universal social institutions. The objective of marriage is to spiritually, emotionally, and physically combine a man and a woman in a covenantal relationship with their Creator as husband and wife. Spiritually, in the sense that completing religious responsibilities provides spiritual benefit.

One of the most precious sacraments in everyone's life is marriage. Marriage was acknowledged as a social institution for developing a civilized and ideal society after the development of a sociological society. Marriage is the legal union of two people that grants them legal rights against one other. It is a partnership in which there are no contractual obligations, simply trust and love bonded together by mutual support.

Freedom to Marry in India: Judicial Approach

Unlike Article 16 of the Universal Declaration of Human Rights, the Indian Constitution does not expressly recognise the freedom to marriage as a basic or constitutional right. Marriage is controlled by many statutory enactments, but its recognition as a fundamental right has only come about as a result of Supreme Court judgements in India. Article 141 of the Constitution makes such a statement of law binding on all Indian courts.[4]

2 https://www.Merriam-webster.com/dictionary/marriage.

3 Article 141 in The Constitution Of India 1949. Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India.

4 Article 141 in The Constitution Of India 1949. Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India.

Lata Singh v. State of Uttar Pradesh[5], a 2006 case involving an inter-caste marriage, was one of the first to address this problem. The Supreme Court ruled that because the petitioner was a major, she had the right to marry whoever she wanted and that there was no statute prohibiting an inter-caste marriage. The verdict, on the other hand, was limited to the facts of the case and did not constitute a "statement of law" by the Court. The Court specifically accepted the petitioner's ability to pick her own spouse.

This is a free and democratic country, and once a person becomes a major, he or she can marry whomever he or she wishes, the Supreme Court said, citing Art 21 of the Indian Constitution. If the boy's or girl's parents do not approve of the inter caste marriage, the most they may do is cut off social relations with their child, but they cannot threaten, commit, or instigate acts of violence, or harass the individual who is involved in the inter caste marriage. Both parents in this case were adults who were free to marry whoever they wanted. 'Under the Hindu Marriage Act or any other law, an inter-caste marriage is not prohibited.'[6]. Inter caste marriages are in fact in the best interest of the nation as they will result in destroying the caste-system.

The Supreme Court in *Safin Jahan v. Ashokan KM & others*[7], setting aside the Kerala High Court's decision and allowing a Muslim convert girl to live with her husband Safin Jahan held that Article 21 of the Indian Constitution guarantees a person's right to marry the person of his or her choice. The father in his own point of view and perception may feel that there has been an enormous transgression of his right to protect the interest of his daughter, but his viewpoint and position cannot be allowed to curtail the fundamental rights of her daughter, who resides with her husband.

5 (2006) 5 SCC 475

6 Lata Singh v State Of U.P. & Another, (2006) 5 SCC 475

7 (AIR 2018 SC 1933)

In *Justice KS Puttaswamy (retd) and others v. Union of India and others*[8], a Constitution Bench of nine judges dealt extensively with the issue of choice. The right to privacy is guaranteed as an integral aspect of the right to life and personal liberty under Article 21," the Court unanimously concluded. In paragraph 81 of Dr. DY Chandrachud J's majority opinion, the Court stated that the fundamental right to privacy in India would cover at least three aspects: I privacy of the person, (ii) informational privacy, and (iii) privacy of choice, which protects an individual's autonomy over fundamental personal choices.

Privacy reflects the heart of the human personality, the Court added, and acknowledges each individual's ability to make choices and take decisions governing intimate and personal affairs. Privacy involves at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation, it eventually concluded. The term "privacy" also refers to the right to be left alone. Individual autonomy is protected by privacy, which recognises an individual's ability to control important parts of his or her life. Privacy is inextricably linked to personal choices that define one's manner of life[9].

The Supreme Court issued two judgements shortly following the Puttaswamy case, both finding that a person's ability to marry whom she pleases is an essential part of individual dignity and vital to Article 21. It must be supremely borne in mind that when two adults consensually choose each other as life partners, it is an expression of their choice which is recognised under Articles 19 and 21 of the Constitution, the Supreme Court wrote in *Shakti Vahini v. Union of India*[10]. Such a right is recognised by constitutional law, and once that is done, the right must be protected.

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8 AIR 2017 SC 4161

9 Justice KS Puttaswamy (retd) and another v. Union of India and others, AIR 2017 SC 4161

10 (2018) 7 SCC 192

In *Shafin Jahan v. Asokan K.M.*[11], less than a fortnight later, the same bench restated this concept in the most specific terms imaginable, citing Article 16 of the Universal Declaration of Human Rights and the *Puttaswamy* case. The majority held that The right to marry a person of one's choice is crucial and basic to Article 21 of the Constitution, The right to life is guaranteed by the Constitution. This privilege can only be taken away by a law that is substantively, procedurally, and substantively fair, just, and reasonable. The power of each individual to make decisions on subjects vital to the pursuit of happiness is intrinsic to the liberty guaranteed by the Constitution as a fundamental right. Belief and faith, as well as whether or not to believe, are at the heart of constitutional liberty. The function of society in determining a selection of our partners should be non-existent.

While all of the preceding decisions established categorically that the right to marry is a basic right, none of them specifically acknowledged same-sex marriages. Is it possible to claim that the right to marry only extends to heterosexual couples and not to same-sex couples? In *Navjet Singh Johar and others v. Union of India*[12], a five-judge Constitution Bench ruled that Section 377 of the Indian Penal Code, 1860, was unconstitutional because it prohibited voluntary sexual intercourse between two consenting adults. The Court concluded that such a prohibition contradicted Articles 19(1)(a) and 14's rights to dignity, privacy, freedom of expression, and equality, and so knocked down the section. Despite the fact that the Court was only concerned with the constitutional validity of Section 377, the majority opinion (Dipak Misra CJ for himself and AM Khanwilkar J) and the concurring opinion (Dr. DY Chandrachud J) cited the Shafin Jahan and Shakti Vahini cases on the issue of the freedom to choose one's own life partner and recognised "sexual autonomy of an individual.

The most key observations in this case were made by Chandrachud J in the concluding section of his concurring opinion in para 156, in which

11 AIR 2018 SC 1933

12 AIR 2018 SC 4321

he stated that LGBT people "are entitled, as all other citizens, to the full range of constitutional rights, including the liberties protected by the Constitution," as well as equal citizenship and "equal protection of the law."

In the well-known *Hadiya case*[13], the Supreme Court overturned a 2017 ruling of the Kerala High Court annulling Hadiya's marriage to Shefin Jahan, noting a Love Jihad component to the marriage. Justice Chandrachud observed that Article 21 (right to life and liberty) of the Constitution guarantees the freedom to marry the person of one's choice. The choice of a partner, whether within or outside of marriage, is solely up to the person. Marriage's intimacies are contained inside an inviolable and sacrosant zone of privacy. Questions of faith have no bearing on an individual's full freedom to pick a life mate. The freedom to freely practise, profess, and promote religion is guaranteed by the Constitution. Individual autonomy reigns paramount in questions of faith and belief, just as it does in situations of marriage... Neither the state nor the law may impose a partner's decision or limit a person's freedom of choice in these situations. According to the Constitution, they are the essence of personal liberty.

Salamat Ansari and others v. State of UP and others[14] dismissed a case filed by the parents of a Muslim man against his wife, who converted to Islam and became a Muslim before marrying him, on the grounds that the court does not consider them to be a Hindu-Muslim couple. A bench consisting of Honourable Justice Pankaj Naqvi and Justice Vivek Agarwal underlined that a person's right to live with whomever he or she chooses, regardless of faith, is fundamental to the right to life and personal liberty. The judgement was made in the midst of a debate about "love jihad." This ruling is noteworthy because it upholds a number of constitutional liberty and freedom principles. The freedom to choose one's partner is incorporated in Article 21's right to life and personal liberty, and it is addressed in the Special Marriage Act.

13 AIR 2018 SC 1933

14 Cri WP No. 11367 of 2020

Same Sex Marriage in India

The Supreme Court handed down its decision on September 6, 2018. The Supreme Court declared unanimously that Section 377 is unconstitutional because it violates fundamental rights to autonomy, intimacy, and identity, thus legalizing homosexuality in India. The Supreme Court explicitly overturned its 2013 judgement.[15]

> "Criminalising carnal intercourse is irrational, arbitrary and manifestly unconstitutional". –Chief Justice Dipak Misra

> "History owes an apology to these people and their families. Homosexuality is part of human sexuality. They have the right of dignity and free of discrimination. Consensual sexual acts of adults are allowed for [the] LGBT community". –Justice Indu Malhotra

> "It is difficult to right a wrong by history. But we can set the course for the future. This case involves much more than decriminalizing homosexuality. It is about people wanting to live with dignity".
> –Justice Dhananjaya Y. Chandrachud

It was thus concluded that any discrimination based on sexual orientation is a plain violation of the Indian Constitution: Sexual orientation is one of several biological phenomena that is natural and inherent in an individual and is influenced by neurological and biological variables. Theoretically, an individual has little or no influence over who he or she is attracted to, according to science of sexuality. Hence any discrimination on the basis of one's sexual orientation would clearly be a violation of the fundamental right of freedom of expression of that individual.[16]

The Supreme Court also ordered the government to take all necessary steps to properly publicize the fact that homosexuality is not a crime, to raise public awareness and eliminate the stigma that LGBT people face, and to

15 Dhananjay Mahapatra and Amit Anand Choudhury,*SC decriminalises Section 377, calls 2013 ruling 'arbitrary,* THE TIMES OF INDIA 7 September 2018(Nov 15,2021,6.00 PM) https://timesofindia.indiatimes.com/india/sc-decriminalises-section-377-calls-2013-ruling- arbitrary-and-retrograde/articleshow

16 Navtej Singh Johar & Ors. v. Union of India, AIR 2018 SC 4321

provide police officers with periodic training on the subject. The decision also had a built-in (firewall) to prevent it from being revoked ever again under the protection of the "Doctrine of Progressive Realisation of Rights"[17].

In India, same-sex marriages are not legally recognized, and same-sex couples are not granted any limited rights like civil unions or domestic partnerships. A Haryana court awarded legal recognition to a two-woman same-sex marriage in 2011. Following their marriage, the couple began to receive threats from their village's friends and relatives. The pair was eventually accepted by their family.[18]

A group of concerned citizens presented the Law Commission of India with a draft of a new Uniform Civil Code in October 2017 that would legalise same-sex marriage, with marriage defined as a legal union between a man and a woman, a man and another man, a woman and another woman, a transgender with another transgender, or a transgender with a man or a woman. All married couples in partnership should be entitled to adopt. The sexual orientation of a married couple or partners should not be a barrier to adoption. Non-heterosexual couples will have the same open door to adopt a child as heterosexual couples will.[19]

Several same-sex marriage applications are currently pending in the courts. While same-sex marriage is still illegal, cohabitation and "live-in relationships" are however protected by law, as per held by the Uttarakhand High Court on June 12, 2020.[20]

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17 Rajagopal, K.. *377 verdict has inbuilt firewall*, THE HINDU 18 Sept 2018 (Oct 21,2021,5.30 P.M) https://www.thehindu.com/news/national/377-verdict-has-inbuilt-firewall/article24914104.ece

18 Dipak Kumar Dash and Sanjay Yadav ,*In a first, Gurgaon court recognizes lesbian marriage*., THE TIMES OF INDIA July 29 2011 (Oct 21,2021,6.00 P.M)https://timesofindia.indiatimes.com/city/gurgaon/In-a-first-Gurgaon-court-recognizes-lesbian- marriage/articleshow/9401421.c

19 Dey A, *A new UCC for a new India? Progressive draft UCC allows for same sex marriages*, CATCH NEWS Oct 13 2017(Oct 23,2021,9.00P.M) http://www.catchnews.com/india-news/a-new-ucc-for-a-new- india-progressive-draft-ucc-allows-for-same-sex-marriage

20 Apoorva Mandhani ,*Can't marry, but same sex couples have right to live together:*

In response to a case filed in the Delhi High Court by a same-sex couple seeking to legalise homosexual marriage, the Indian government's Solicitor General Tushar Mehta maintained that same-sex marriage is against Indian culture, demonstrating the government's contradictory stance on the matter.

Marriage and Latest Anti Conversion Laws in India

The Freedom of Religion Acts, commonly known as 'anti-conversion laws,' are state-level acts that control non-voluntary religious conversions[21]. At least 10 states, including MP and Himachal Pradesh, have anti-conversion legislation. The new laws are noteworthy in that they seek to outlaw conversions for the sole purpose of marriage.

The Madhya Pradesh Freedom of Religion Act, 1968 is repealed by the MP Ordinance. While previous law also made forced conversion illegal, the current law includes provisions for conversion during marriage, maintenance rights, and reversing the burden of proof so that the accused bears it. Himachal Pradesh repealed the 2006 Himachal Pradesh Freedom of Religion Act by the act of 2019. While the act provides for provisions of conversions for the purpose of marriage, the 2006 law also included the requirement of a prior declaration before a district magistrate. The prior notice requirements have already been found unconstitutional and intruding on the fundamental right to privacy by the High Court.[22]

The UP State Law Commission recommended a special law to address forced conversion incidents in a report released in 2019. The Commission

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Uttarakhand High Court, THE PRINT June 19 2020 (Nov 15,2021,5PM). https://theprint.in/judiciary/cant-marry-but-same-sex-couples-have-right-to- live-together-uttarakhand-high-court/444706/

21 Dr Abhishek Atrey, *Anti-Conversion Laws and their Constitutionality*. INDIA LEGAL Oct 5 2021(Sept 21,2021,8.30 PM) https://www.indialegallive.com/top-news-of-the-day/news/anti-conversion-laws-and- their-constitutionality/

22 Azad Rehman, *Allahabad HC says previous orders on interfaith marriages not 'good law'*,THE INDIAN EXPRESS 25 November 2020(Sept 24,2021,8.340 PM) https://indianexpress.com/article/india/allahabad-high-court-hindu-muslim-marriage- love-jihad-up-7063742/

suggested that fraudulent conversions, including conversions exclusively for the sake of marriage, be punished in a draft Proposal filed with the report. Following that, the Ordinance was enacted.[23]

The State Anti Conversion/ Freedom of Religion Acts

Prior Notice

- For a conversion to be valid, the Madhya Pradesh Freedom of Religion Act of 2021, which replaced the 1968 law, a 60-day advance "declaration of the intention to convert" to the District Magistrate is required, after which a couple of different religions can lawfully marry.[24]
- A 60-day prior notice is also required under the Uttar Pradesh Prohibition of Unlawful Conversion of Religious Ordinance, 2020. It also compels the Magistrate to conduct a police investigation to determine the true motive for the conversion.[25]
- The Himachal Pradesh Freedom of Religion Act, 2019 that revoked a 2006 law that required a 30-day formal notice to convert[26].It's worth noting that the Himachal Pradesh High Court knocked down a similar clause in an earlier version of this statute in 2012, declaring it unconstitutional and violating fundamental rights.[27]

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23 Apurva Viswanath, *3 states, 3 anti-conversion laws: what's similar, what's different*. THE INDIAN EXPRESS January 3 2021(Aug 17,20215 PM) https://indianexpress.com/article/explained/religion-conversion-bill-bjp-7129285/

24 Section 10, Madhya Pradesh Freedom of Religion Act, 2021

25 Section 8 (3), Uttar Pradesh Prohibition of Unlawful Conversion of Religious Ordinance, 2020

26 Section 7,The Himachal Pradesh Freedom of Religion Act, 2019

27 Ravinder Makhaik, *HC partially strikes down Himachal's anti-conversion law*, THE TIMES OF INDIA August 31 2012 (Oct 15,2021,9.30 PM) https://timesofindia.indiatimes.com/india/hc-partially-strikes-down-himachals-anti-conversion- law/articleshow/16036603.cms

- Religious priests must obtain prior approval from the district magistrate before converting anyone from one religion to another, according to the Gujrat Freedom of Religion (Amendment) Act, 2021[28]. Furthermore, the convert must "send an intimation" to the district magistrate in the prescribed form.[29]

Investigation

- Section 4[30] of the Madhya Pradesh law requires written complaint of the person converted or the person's parents or siblings for the investigation to be initiated by the police[31]. They can file a complaint only with the permission of the court. Investigation of offences under this law can be conducted only by a police officer with/above the rank of sub-inspector.[32]
- The UP law also allows the same people as allowed by the MP law to file a complaint[33].
- Under the Himachal law, the prosecution can be initiated only with the prior sanction of an officer not below the rank of a sub-divisional magistrate.[34]
- Under the Gujrat law, prior sanction of the DM or a sub-divisional magistrate is necessary to start prosecution against the accused[35]. An offence under this act shall not be investigated by an officer below the rank of a Police Inspector.[36]

28 Section 5(1), The Gujrat Freedom of Religion(Amendment) Act, 2021

29 Section 5(2), The Gujrat Freedom of Religion(Amendment) Act,2021

30 Section 4, Madhya Pradesh Freedom of Religion Act, 2021

31 Section 7, Madhya Pradesh Freedom of Religion Act, 2021

32 Section 14, Madhya Pradesh Freedom of Religion Act,2021

33 Section 4, Uttar Pradesh Prohibition of Unlawful Conversion of Religious Ordinance, 2020

34 Section 8, The Himachal Pradesh Freedom of Religion Act, 2019

35 Section 6, The Gujrat Freedom of Religion(Amendment) Act, 2021

36 Section 7, The Gujrat Freedom of Religion(Amendment) Act, 2021

Burden of Proof

- Under the MP law, the burden of proving that the conversion was done in a legitimate fashion lies with the person converted.[37]
- The Himachal law also has a similar provision.[38]
- The UP law places the burden of proof, not on the converted person, but on people who "caused" or "facilitated" the conversion.[39] Under this ordinance, if the Magistrate is dissatisfied, criminal action under Section 11 can be initiated against individuals who "caused" the conversion. This includes those who committed the offence, aided, abetted, counselled or procured people for committing the offences.[40]
- Under the Gujrat law, the burden of proof is on the accused "who has caused the conversion".[41]

Maintenance and Inheritance

- Any marriage in which a husband or wife has converted (even consensually) will be declared null and void unless the state government is given prior notice[42]. Even if the marriage is declared void, a child born out to the victim woman is considered "legitimate." If a woman's marriage is deemed null and void under Section 6, her children are entitled to support and will inherit the father's property under the father's inheritance laws[43]. This law also gives women and their children the right to maintenance in order to safeguard them

37 Section 12, Madhya Pradesh Freedom of Religion Act, 2021

38 Section 12, The Himachal Pradesh Freedom of Religion Act, 2019

39 Section 12, Uttar Pradesh Prohibition of Unlawful Conversion of Religious Ordinance, 2020

40 Section 11, Uttar Pradesh Prohibition of Unlawful Conversion of Religious Ordinance, 2020

41 Section 6A, The Gujrat Freedom of Religion(Amendment) Act, 2021

42 Section 6, Madhya Pradesh Freedom of Religion Act, 2021

43 Section 8, Madhya Pradesh Freedom of Religion Act, 2021

from "null and void" marriages[44]. This statute, however, does not provide a mechanism for assuring marriage's subsequent protection.

- There are no such provisions in the laws of Uttar Pradesh, Himachal Pradesh, or Gujarat.

Offences

- The crime of unauthorised conversion is a cognizable and non-bailable offence under the four anti-conversion statutes which implies that arrests can be made without a warrant, and bail is only given at the judge's discretion.
- The following are the provisions on imprisonment included in the ***MP law***: A person who converts or attempts to convert illegally faces a prison sentence of one to five years. Unlawfully converting a woman, a minor, or a member of the SC/ST community can result in a term of two to ten years in prison. For concealing one's religion during a marriage, three to ten years in prison is possible.[45]
- The UP statute stipulates that any violation of its provisions are punishable by 1-5 years in prison and a Rs.15,000 fine. Recurrent offences can result in the maximum sentence being doubled. If convicted of causing the conversion of a woman, a minor, or a person belonging to a SC/ST, men face a term of 2-10 years in jail and a fine of Rs.25,000. Registration of social organisations that conduct mass conversions is being terminated. This offence carries a sentence of 3-10 years in prison and a fine of Rs.50,000.[46]
- Under Himachal law, converting or attempting to convert illegally will result in a sentence of one to five years in prison. The punishment

44 Section 9, Madhya Pradesh Freedom of Religion Act, 2021

45 Section 5 and 11, Madhya Pradesh Freedom of Religion Act, 2021

46 Section 5, Uttar Pradesh Prohibition of Unlawful Conversion of Religious Ordinance, 2020

ranges from 2-7 years if the converted individual is a woman, a minor, or a member of a SC/ST group.[47]

- For illicit conversion, the Gujrat legislation stipulates a sentence of 3 to 5 years in prison and a fine of 50000 rupees. This is a punishable offence cognizable in nature[48]. In the case of a minor, a woman or a person belonging to a Scheduled Caste or Scheduled Tribe shall be punished by imprisonment for a term of up to four years and a fine of up to one lakh rupees.[49]

The Special Marriage Act and the Indian Judiciary

The current UP Ordinance is now considered as being in direct contrast with the Allahabad High Court's recent decision in the matter of *Smt. Sufiya Sultana v. State of U.P.*[50] The court declared those provisions to be declaratory rather than mandatory, and the requirement of mandatory publication of notice and inviting objection under sections 5, 6 and 7 of the Special Marriage Act, 1954, was repealed because it violated citizens' right to privacy, which was declared a fundamental right by a Supreme Court 9-judge bench in the case of K.S. Puttuswamy.

Religious conversions undertaken without a sincere belief in that faith and simply for the purpose of getting a legal benefit is illegal and unconstitutional, according to the Supreme Court in the landmark cases of *Lily Thomas v. Union of India*[51] and *Sarla Mudgal v. Union of India*[52]. In these cases the Hindu males converted to Islam in order to complete their bigamous marriages.

The legal concept established in these judgments applies to religious conversions performed only for the sake of marriage. The Special Marriage

47 Section 7(4) and 7(5), The Himachal Pradesh Freedom of Religion Act, 2019

48 Section 7, The Gujarat Freedom of Religion(Amendment) Act, 2021

49 Section 4, The Gujarat Freedom of Religion(Amendment) Act, 2021

50 2021 SCC Online 19 dated 14.12.2020

51 2000 (6) SCC 224

52 1995 (3) SCC 635

Act of 1954 already enables interfaith marriage, which is a legal privilege that the Uttar Pradesh government cannot interfere with, but it also imposes substantial repercussions on the participants to such a marriage. Thus, for a Hindu, the law automatically enforces a partition from the individual's undivided family, depriving them of any potential accrual to such property following the marriage, whereas for a Muslim, the law states that inheritance should be carried out under the Indian Succession Act, 1925 rather than Muslim personal laws following an interfaith marriage, the latter being more advantageous to a Muslim man. As a result, converting simply for the purpose of marriage to escape the impact of the Special Marriage Act gives discernible legal benefits and may be overturned by the dicta in Lily Thomas and Sarla Mudgal.

Furthermore, the Supreme Court has already ruled in the *Stainislaus case*[53] that religious proselytization is not protected under Article 25 of the Constitution. Therefore, it's difficult to argue that the UP legislation prohibiting religious conversions for the sole purpose of marriage is unconstitutional. It's further supported by the fact that states like Uttarakhand and Himachal Pradesh have passed similar legislation that have gone unchallenged .

The Special Marriage Act

The Special Marriage Act of 1954 is a significant piece of law governing inter-caste and inter-religious marriages. This provision allows civil weddings to be registered in courts without the need for conversion to some other religion. Despite multiple amendments since its inception in 1872, the law's Victorian-era protectionist features have remained. The criticisms of this law are:

1. The law stipulates a 30-day notice period during which the details of the marrying couple must be shown "prominently" in order for objections to be lodged. While this provision was intended to detect the possibility of fraud by one of the marrying parties, it has proven

53 Rev Stanislaus v Madhya Pradesh, 1977 SCR (2) 611

to be problematic because the marrying couple has been harassed by those opposed to the marriage.

2. The 30-day notice, in some instances, is used by local authorities to impose even onerous conditions on couples.
3. In India, no other religious marriage legislation requires the government to be notified or for third parties to protest to a marriage. This provision alerts families and others to an impending wedding, allowing them to try to persuade the couple not to marry.
4. If a member of an undivided Hindu family (including Buddhist, Sikh, or Jain) marries under this Act, he or she shall be "severed" from their parental family This takes away their right to inherit.

In *Smt. Safiya Sultana v. State of Uttar Pradesh*[54] the Allahabad High Court declared that couples are not required to publish a 30-day notice of their intention to marry under the Special Marriage Act. According to the court, this provision infringes on the fundamental rights to liberty and privacy, as well as the freedom of spousal choice. Since it only covers the Special Marriage Act, the Court's decision has no bearing on the anti-conversion law's implementation. This order, however, will have an indirect impact in the key areas:

1. The removal of the 30-day public notice law reduces the need for conversion, which many people choose for in order to avoid harassment as a result of interfaith marriage. The SMA technique eliminates the need to invoke the UP's anti-conversion law because it only applies when one party converts for the purpose of marriage.
2. Those who have been arrested and are attempting to dispute a provision of the recently approved anti-conversion statute may benefit from the order. The remark on privacy and the right to choose a spouse, which is backed by relevant SC law, may be beneficial to such people.

54 AIR 2021All56

Various High Courts' Views

- The recently approved UP ordinance was based on an Allahabad High Court decision from September 2020. The court ruled that conversion for the sole purpose of marriage is illegal. It should be mentioned that in this case, the appellant sought protection from his parents, who were opposed to the conversion.[55]
- In November 2017, the Uttarakhand High Court ruled that conversions for the sake of marriage are a sham and directed the government to pass legislation prohibiting such conversions. The Uttarakhand Freedom of Religion Act, 2018, was based on this, and it is the first anti-conversion law to include'marriage' among other fraudulent conversion methods. This law, however, does not prohibit conversion for the sole purpose of marriage. Rather, it declares null and void marriages entered into "solely for the aim of conversion."[56]
- In December 2017, the Rajasthan High Court issued guidelines that would be in force until the state government passed a law prohibiting forced conversions. The court emphasised that the constitutional right to freedom of religion must be protected at all costs. According to the guidelines, every conversion must be reported to the district magistrate in advance, and marriages including conversion must take place at least a week after the conversion. However the state's anti-conversion bill was not signed into law by the president.[57]

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55 *Supra* note 22

56 Kavita Upadhay,*Uttarakhand High Court asks state to make law to curb conversions*. THE INDIAN EXPRESS 21 November 2020(Dec 21,2021,3.30 PM): https://indianexpress.com/article/india/uttarakhand-high-court-asks-state-to-make-law-to-curb-conversions-4947128

57 Karishma. *Anti-Conversion Laws in India – Challenges and Way Ahead*. IAS EXPRESS 19 January 2021(Dec 23,2021,9.30 PM) https://www.iasexpress.net/anti-conversion-laws-in-india-challenges-and-way-ahead/

Supreme Court's View: *Rev Stanislaus v Madhya Pradesh*

The Supreme Court upheld the legality of anti-conversion laws in Madhya Pradesh and Odisha in the Stainislaus case[58]. In this judgement, the Supreme Court stated that the restrictions were designed to protect public disturbance by prohibiting religious conversions that were in a fashion offensive to the community's conscience" and that "forced conversion could cause public disruption.

According to the court, the freedom to freely profess, practise, and promote religion, provided in Article 25 of the constitution, does not include the right to convert. Everyone has the right to freedom of conscience and to freely profess, practise, and propagate religion, according to Article 25. Forced conversion is prohibited by Article 25 because it violates the "freedom of conscience." Conversion is not a basic right, according to the Supreme Court, and must be governed by the state.

The ability to disseminate one's religious views or the explanation of one's religion's precepts is referred to as the right to propagate. However, it does not imply the right to convert someone to one's own religion.

Arguments in Favour of Anti Conversion Laws

Religious conversions were not "fully voluntary," according to a committee led by Nagpur Chief Justice Niyogi[59]. Anti-conversion laws protect human rights by restraining the use of false, fraudulent, or deceptive marriage premises. These statutes give legal recourse for those who have been deceived or coerced into conversion. Wrongful confinement (Section 342 IPC), intimidation (Section 506 IPC), kidnapping (Section 59-69 IPC), assault (Section 352 IPC), the threat of divine displeasure (Section 508 IPC), and other offences are also involved in forcible conversion of one's faith[60].

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58 Rev Stanislaus v Madhya Pradesh, 1977 SCR (2) 611

59 *Niyogi Committee Report on Christian Missionary Activities*. (Dec 15, 2021,5.30 PM) https://indianculture.gov.in/report-christian-missionary-activities-enquiry-committee-madhya-pradesh-1956

60 *Supra* note 57

Anti Conversion Laws –A critique

These laws infringe on people's rights to privacy, choice, and marital liberty. The necessity that one has to reveal his or her wish to convert before doing so, violates that person's right to keep one's faith personal and private.

The dissemination of one's personal information to one's family and wider society has the potential to lead to honour killings. Over 350 similar homicides have occurred in the last six years. Such incidents go largely unnoticed as they are not even reported, and there are no legislative protections in place to prevent them.

These restrictions increase the likelihood of social discontent and communal strife. They take away a woman's agency and so restrict her sexuality as a result. These restrictions are based on the erroneous assumption that women are incapable of making their own decisions and are readily influenced by coercion..

Safeguards against coercive conversions already exist in the Code of Criminal Procedure. Excessive legislation simply makes ordinary actions illegal.

There are no conclusive proofs against forced conversions: The Centre informed the Lok Sabha that no case of love jihad has been recorded by any central agency. The National Investigation Agency and the Karnataka Criminal Investigation Department both conducted investigations and found no proof of such conspiracies. There are no statistics on love jihad kept by the National Commission for Women as well[61].

The UP ordinance has been criticised for using imprecise phrases to define the grounds for criminalising conversions, such as "undue persuasion," "coercion," and "allurement or marriage." It's also tough to

61 Asmita Nandy, *Laws on Love Jihad? But Modi Govt, NCW Have No Data or Definition*, THE QUINT 19 November 2020(Jan 20,2022,3.30 PM) https://www.thequint.com/news/india/laws-on-love-jihad-but-modi-govt-ncw-have-no-data- or-definition

tell whether or not a religious conversion is actually for the sake of marriage. The judge has complete discretion over how these subjective phrases are interpreted. While this ordinance is not explicitly unconstitutional, it does have the potential to be abused. This rule also makes "mass conversion" illegal, which is when two or more people are converted at the same time. This is seen as a more significant occurrence. It is arbitrary and unreasonable because it precludes the entire family from converting to their preferred religion. This crime carries a sentence of 3-10 years in jail.

It also coined the term "Religion Convertor," despite the fact that one does not require the help of a convertor or a witness to convert religion. It is possible that by intentionally promoting this concept, a greater number of people will be harassed.

Conversion is not considered a crime under the law. Reconversion can occur either of one's own free will or as a result of someone else persuading them. This rule allows some individuals/organizations to do anything they want in order to reintegrate converted people into the 'parent' religion. This law would classify such actions as "abetment, persuading, or conspiracy."

The statute does not explain why 'victims of conversion' should be compensated. The individual who 'caused' the conversion bears the burden of establishing that the conversion was 'lawful.' This provision disregards the views of individuals who have converted in favour of focusing solely on the "converter."

The Way Ahead

Marriage is a deeply personal affair. The right to marry or pick one's spouse is a part of constitutional liberty. The fundamental right to privacy safeguards one's ability to make personal choices and decisions. The judiciary can do a lot of good by establishing the idea that every citizen has the right to act in a way that is not detrimental to themselves or others. To avoid being exploited, these laws must be clear and unambiguous.

At the same time, it is the duty of the state to enable and facilitate interfaith/intercaste marriages. The Allahabad High Court's decision on Special Marriage Act is a step in the right direction. Anti-conversion legislation must be backed up with a thorough investigation into the reality of forced conversions. If such problems are discovered, the government can tighten the legislation that protects people from pressure and forced conversions.

Conclusion

It is illegal to force someone to marry them against their will. Similarly, regardless of family customs, religious conversion for marriage is a fundamental and personal right of every individual. And everybody can chose and worship any God or Goddess they like. States have the legal ability to regulate religious conversions and interfaith weddings under the Constitution. These laws, however, must be supported by data, evidence, and patterns. At the same time, they must protect the individuals' rights to equality, freedom, and personal liberty, as well as their right to life and privacy, with minimal interference from the state and society at large. Because it is a relationship between two people that they must maintain for the rest of their lives, the right to marry of one's own choice should be a fundamental right of every individual. Because it is a relationship between two people that they must maintain for the rest of their lives, it is proper to choose a partner of one's own choosing and there should be equal respect between them.

Interplay of Technology and Dispute Resolution

Noyonika Kar & Anushree Modi***

Introduction

Currently, the world is in the midst of a technological upheaval and revolution that is soon going to overtake the industrial revolution and irrevocably change every aspect of human lives; both personal and professional. This will not only change the manner in which business is conducted, but also the way transactions are done and disputes are resolved. The area of dispute resolution, in particular, will definitely be affected largely due to the advent of "artificial intelligence" (hereinafter "AI").

Time and resources required for dispute resolution can significantly be reduced with the use of AI. Not only this, but AI also has the potential to improving accuracy and reducing risks by discouraging claims that do not have merit and navigating through the complex situations easily. These are the plus points that are being discussed. However, there are also some very legitimate concerns that come up in this discussion, such as concerns regarding accessibility and precision of the decision-making of the AI. There was also the issue regarding confidentiality and personal data protection, which is always in question when it comes to matters of technology.[1]

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1 M.F. Cuéllar, *A Common Law for The Age of Artificial Intelligence: Incremental Adjudication, Institutions, And Relational Non-Arbitrariness* 119(7) J' Columbia L' Rev. 1773, 1790–1792 (2019), https://www.jstor.org/stable/26810848. (hereinafter "M.F. Cuéllar")

Technology and Dispute resolution

In the last few decades, humanity has seen some spectacular advancement in the field of technology and development of AI. With technology developing in leaps and bounds, it has now become a matter of concern that no man's job may be safe from being arrogated by AI, not even arbitrators. The possibility of AI taking over the international arbitration industry by replacing human arbitrators with computer programs that do the job of the former with more precision and accuracy is very real. But, while the assurance of resolving disputes and rendering awards in 1/10th of the time required by a human arbitrator seems both promising and convenient, AI still has a long way to go before they can completely take over from human arbitrators. This is because the dispute resolution industry has still not reached the stage where it can function without the fundamental human element. But it is not long before things change irrevocably.[2]

The application of AI in arbitration promises several advantages, such as: increase in efficiency, reduction in costs, possibility of introduction of arbitration in markets they weren't a part of before etc. There might be some resistence to the idea from traditionalists, but one cannot deny the fact that technology is slowly and steadily making its way into legal practice (which includes international arbitration).[3] This is how technology is overhauling established practices and making some irrevocable changes, which is merely the beginning of a future dominated by technology.

The use of videoconferencing, electronic recordkeeping, digital document producing tools, and more sophisticated legal research databases is becoming commonplace. To be sure, there have been minor adjustments. Parties now exchange pleadings by e-mail, and the majority of correspondence

2 T. Lee, *Technology-Based Experiential Learning: A Transnational Experiment* 64(3) J' Of Legal Edu 455, 470–479 (2015), http://www.jstor.org/stable/24716687.

3 C. Brower, L. Reed & Ors., *International Arbitration* 90 Proceedings Of The Annual Meeting (American Society Of International Law) 244, 350–353 (1996), http://www.jstor.org/stable/25659041.

from arbitrators are now sent via e-mail. The ICC's NetCase programme[4], which is a virtual case room that provides a safe online environment for case files for those who agree to use it, is an example of how technology is utilised to store and display documents. The usage of monuments with linkages to displays is another fantastic concept. The next phase is autonomous 'learning' by computers, sometimes known as AI.

AI, like practically every other aspect of the white-collar sector, may have the greatest potential to disrupt international arbitration. AI has the potential to assist manage cases and detect inefficiencies in the arbitration process by replicating and augmenting human cognitive skills, automating time-consuming but basic activities, and processing huge amounts of data.

AI might also assist parties in a disagreement in selecting an arbitrator by evaluating the track records of thousands of applicants in comparable circumstances. It might propose arbitration clause design ideas, assisting clients and attorneys in avoiding mistakes, identifying blind spots, and ensuring their interests are safeguarded. The core value proposition of AI is its capacity to automate administrative activities, allowing arbitrators and attorneys to focus on the portions of the process that need the most human judgement: analysing evidence, developing arguments, and deliberating to reach decisions.

Case administration might also be automated or greatly expedited with software, allowing arbitrators to focus on what they do best: arbitrate. A growing number of start-ups are working on disrupting the legal business, with some already providing case management and forecasting services to international arbitrators.

Due to an ever-increasing desire for speed and efficiency, some practitioners have argued for the use of AI in arbitration to assist in the handling of huge volumes of paperwork. Online platforms have displaced

4 M. L. Passador, *Challenging Arbitration: How Can Its History Inform Its Current (E-)Practice?* 24(2) Willamette J' Int'l L' & Dis. Res.233, 252–255 (2017), https://www.jstor.org/stable/26210451. (hereinafter "M.L. Passador")

a considerable portion of legal study and document review from libraries and client basement archives. International arbitration frequently necessitates concurrent knowledge of international law and various state legal systems. Furthermore, parties present a large number of hard copy and electronic documents to tribunals.[5]

International arbitration is a document-intensive field of law that necessitates numerous hours of legal research and document analysis by lawyers and arbitrators. Despite this, attorneys and arbitrators continue to go through many pages, many of which include extraneous language, in the pursuit of thorough investigation and evaluation. This may not last long, as AI-assisted legal research and document review will, in the not-too-distant future, reduce the time required for such tasks from hours to days to months to years (in some instances, less than milliseconds).

Meaning and Role of AI: In Arbitration

The phrase "artificial intelligence" refers to the overall process of combing through massive volumes of data with the help of strong, efficient data processing systems comprising of clever algorithms, which allow the software to systematically analyze the data and develop patterns by learning from it. It is often used loosely and refers to a wide range of topics (including machine learning, natural language processing, neural pathways, BOTs, deep learning, cognitive computing etc.) but it is the software's ability to learn on its own from recurring patterns in the data that distinguishes it as "intelligent".[6]

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5 A. Baumgartner, *Commercial Dispute Resolution: Unlocking Economic Potential Through Lighthouse Projects* 2 Aiib Yearbook Of International Law188, 203–207 (2019), http://www.jstor.org/stable/10.1163/j.ctvrxk3sj.14. (hereinafter "A. Baumgartner")

6 De Spiegeleire, S., Maas, M., & Sweijs, T, *What Is Artificial Intelligence? In Artificial Intelligence and the Future of Defense: Strategic Implications For Small- And Medium-Sized Force Providers*, Hague Centre for Strategic Studies 25–42 (2017), http://www.jstor.org/stable/resrep12564.7.

In layman's terms, AI is, "a technological method of leveraging software and data processing systems to ingest and analyse vast volumes of data using algorithms that allow the programme to learn as it goes". The possible breakthrough for AI in law will involve, among other things, "the use of cognitive computing to allow AI to deliver not just basic answers to queries and predictions about results, but also more complicated thinking, and to do it automatically and without human interaction".[7]

At the moment, the usefulness of AI is heavily reliant on the quality of the data analysed and the algorithm used, which dependencies are critical for understanding both the possible advantages and drawbacks of using AI to international arbitration. With the advent of digitization, nearly every item of material addressed in a normal arbitration is now available in digital form. This is true of the communications between the parties, between the arbitrators, between the parties and the arbitrators, the evidence (including email communications), the transcript, the draftsof the awards, etc.

This is known as arbitral micro-data, or "data that is relevant to a specific dispute and is addressed by one or both of the parties, the decision maker, and/or the institution while presenting, hearing, and/or determining a specific case". This may amount to literally millions of data points, and the primary use of AI today is to analyse and utilise that micro-data more quickly and effectively.[8]

Then there's the arbitral macro-data, which is information about the dispute resolution process and its outcome that's mostly contained in the award(s), such as who served as the arbitrators, as the counsel, what was the result of the dispute resolution session, what was the rationale behind the decision, what kind of damages were awarded, what was the method for valuation, etc. The arbitral macro-data is usually equated with the awards since that is the most essential piece of information concerning arbitral results, and hence it ensures ease of reference.

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7 *Id.*

8 A. Baumgartner, *supra* note 5, at 6.

While applying AI to arbitral awards is still in its early stages and will be a difficult process, it is widely expected that, over time, AI will be used to slice and dice data and predict trends and outcomes, forever altering the basis on which disputes are brought and the manner in which they are resolved. This, however, necessitates access to the arbitral rulings, which include the required data to generate these predictions.

Role of AI in International Arbitration

Speech Recognition

After NLP and ML, speech recognition (SP) technology is perhaps one of the most significant enabling technologies for AI.[9] The technology has advanced to the point that SP can now not only recognise distinct dialects and languages with incredible accuracy, but it can also recognise the voices of specific people. Consider a few of the applications for an SP-enabled AI platform[10]:

Transcripts: In most cases, the parties in international arbitration choose to employ transcribing services during proceedings. Of course, instructing such professionals is an additional cost for the contesting parties, and it entails a variety of logistical procedures and complexities. The AI technology would be able to record the hearing through microphones and offer a real-time transcript with speaker identification for all parties involved, potentially eliminating the need for court reporters.

Interpretation: In international arbitration, parties frequently need to present witnesses, which may necessitate the use of interpreters. This also

9 E. W. Felten, M. Raj & R. Seamans, *A Method to Link Advances in Artificial Intelligence to Occupational Abilities*, 108 Aea Papers And Proceedings54, 55–57 (2018), https://www.jstor.org/stable/26452704.

10 S. De Spiegeleire, M. Maas, & T. Sweijs, *AI – Today and Tomorrow*, 22(1) Artificial Intelligence And The Future Of Defense: Strategic Implications For Small- And Medium-Sized Force Providers43, 57-59 (2017), http://www.jstor.org/stable/resrep12564.8.

entails time and money, which might be saved by deploying AI for hearing interpretation.

Translation: Parties to a document-heavy international arbitration may be forced to translate evidence into the arbitration language, incurring significant expenditures and prolonging the arbitration process. Of course, AI will be capable of accurately interpreting hundreds of documents in seconds, including scanned, hand-written, and annotated papers.

Drafting of Awards

The parties, the procedural history, the arbitration clause, the controlling legislation, the parties' views, and the arbitration fees are all traditional portions of arbitration decisions that arbitrators spend a lot of time formulating. By outsourcing the drafting of such "boilerplate" parts to AI computers, arbitrators can save time and money.[11]

Appointment of Authority

When the parties cannot agree on arbitrators or the arbitrators cannot agree on a chair, a default appointing authority will be used. AI could help with such appointments by recommending candidates based on a variety of factors, including knowledge and experience in specific areas of law, languages, the number of pending and completed arbitrations, the level of party satisfaction in previous cases, the average time to render a final award, and, most importantly, potential conflicts of interest that AI can detect by scanning databases and the Internet.[12]

AI as Arbitrator

It appears reasonable to assume that AI built for international arbitration would continue to progress at a rapid pace, eventually reaching a point

11 V. McQuitty, Emerging Possibilities: A Complex Account of Learning to Teach Writing 46(4) RESEARCH IN THE TEACHING OF ENGLISH 358, 383–389 (2012), http://www.jstor.org/stable/41583590.

12 M.F. Cuéllar, *supra* note 1, 15, at 4.

where AI may be asked for an expert opinion and even give an award. The lack of knowledge of how the choice was made is an immediately apparent source of pain and an impediment to allowing AI to do such activities. Watson's developers, on the other hand, believe that when Watson answers queries, it generates hypotheses and makes evidence-based judgments (taking into account a degree of confidence in percentage terms based on the preponderance of evidence).[13]

As a result, AI is capable of thinking, and over time, AI will begin to produce logical lines of reasoning. As previously stated, the costs and time required in producing an AI-generated expert opinion or an arbitral decision will be reduced to a bare minimum: a development that the international arbitration community will undoubtedly embrace.

Positive Impact of AI in Arbitration

Using smart technology to improve the efficiency and quality of arbitrations has been accelerated during the times of Covid-19. As actual hearings were not possible, the reliance on technology, such as video-conferencing software that allowed for real-time convening through the internet, parties and tribunals online meetings, and desktop sharing, increased significantly. With the pandemic hitting, we were forced to address the urgent need for technology-assisted alterations to the traditional technique of human-conducted adjudication, which needs further thinking and actions for now and future as well.

AI Tools Adopted in Arbitration

Various AI tools are adopted at first and second level AI technology, which are very helpful in Arbitration.

With large documentation and database in Arbitration matter, AI-led system helps in researching, analysing and summarising poise to be faster and effective than humans. Through the built-in algorithm, responses can

13 M.L. Passador, *supra* note 4, 22, at 5.

be derived from the concluded data and analysed evidence for productively resolving the issue.

AI has had a significant impact on ***E-discovery coding system***, since AI solutions based on predictive coding are employed for efficient document creation and inspection.For the first time in the United Kingdom, e-discovery predictive coding was permitted in *Pyrrho Investments Ltd. v. MWB Property Ltd.*[14] This includes "limiting down from millions of documents by sorting them according to their significance as defined by set parameters and criteria in the protocol agreed upon by the parties (e.g., TeCSA/SCL/TECBAR eDisclosure Protocol and CIArb's eDisclosure Protocol)." It was also discovered that the expense of technology must be appropriate, with the ultimate decision made on a case-to-case basis.

Some of the other cases which followed the e-discovery coding are: *Dorchester Group Ltd* v. *Kier Construction Ltd.*[15]; *Triumph Controls UK Ltd.* v. *Primus International Holding Co.*[16] and *Brown* v. *BCA Trading Ltd.*[17]

Arbitrator Intelligence, for instance, by analysing figures and information from awards generates AI Reports.

Then, ***Arbitrator Intelligence Questionnaires*** in order to precisely identify the arbitrator's tendencies from prior decision-making at various phases of arbitrations. This, together with the arbitrators' relevant experience on a wide range of topics and disputes, provides a trustworthy resource for arbitration selection.[18] Pre-selecting potential arbitrators based on subject matter, required knowledge, and other defined criteria will result in better Arbitrator selection and faster conflict resolution.

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14 Pyrrho Investments Ltd. v. MWB Property Ltd., [2016] EWHC 256 (Ch).

15 Dorchester Group Ltd v. Kier Construction Ltd. [2015] EWHC 3051 (TCC).

16 Triumph Controls UK Ltd. v. Primus International Holding Co. [2018] EWHC 176 (TCC).

17 Brown v. BCA Trading Ltd. [2016] EWHC 1464 (Ch).

18 Aditya Singh Chauhan, *Future of AI in Arbitration: The Fine Line Between Fiction and Reality*, Kluwer Arbitration Blog (Nov. 12, 2021, 09:45 PM), http://arbitrationblog.kluwerarbitration.com/2020/09/26/future-of-ai-in-arbitration-the-fine-line-between-fiction-and-reality/.

AI Voice Recognition, is another tool which can help with certain procedural phases as explained quite at length above. This tool records the proceedings which can be more reliable rather than the transcripts produced by the Tribunals steno/reporter/official. AI technologies can assist with evidence searches and summarization, translation, transcribing, or authoring of arbitral award compilatory elements, or even drafting of other legal documents.[19]

Pros of AI as an Arbitrator

Following, are the advantages of AI as an Arbitrator:

1. ***Practical, Rational and Analytical Approach***: From an Arbitrator it is expected that they have reasonable approach while delivering judgment and award, yet the possibility of being affected by the external surroundings and environment will impact human reasoning and decision-making. As the human mind is divided into three parts: "*conscious, subconscious* and *unconscious*".[20] The decision-making is done by the conscious part of our brain, but also there is an interplay of subconscious and unconscious part involved as well while making the judgment, as the humas cannot discard that fully.

   Such erroneous factors have little effect on AI algorithms. Algorithms are used to programme them to operate autonomously. As a result, the decisions made by AI are far more reasonable than those made by humans.[21]

19 Jenny Gesley, *Artificial "Judges"? – Thoughts on AI in Arbitration Law*, Library of Congress (Nov. 13, 2021, 04:54 PM), https://blogs.loc.gov/law/2021/01/artificial-judges-thoughts-on-ai-in-arbitration-law/.

20 AM Legals, *AI & Its Effect on Arbitration*, Mondaq (Nov. 13, 2021, 08:04 AM), https://www.mondaq.com/india/arbitration-dispute-resolution/956956/ai-its-effects-on-arbitration. (hereinafter "AMLegals")

21 Sonal K. Singh, Anish Jaipuriar & Sayantika Ganguly, *AI in Arbitration: Revolutionary or Impractical*, Mondaq (Nov. 13, 2021, 08:20 AM), https://www.mondaq.com/india/arbitration-dispute-resolution/1027248/artificial-intelligence-in-arbitration-revolutionary-or-impractical. (hereinafter "Sonal")

2. ***No Cognitive biases***: The anchor effect is type of cognitive bias wherein, humans' tendency is to make judgments based on the first piece of information they receive. While deciding the matter in evening after tiring day, they are more prone to such cognitive biases. Whereas, AI machines are not affected by their surroundings and do not suffer from cognitive biases.[22]

3. ***Elimination of Errors***: Blind sports and solutions can be found with the aid of AI at various stages of proceedings, to eliminate inefficiencies. That will make the process more effective and fast along with automating management duties.[23]

4. ***Reducing Delays- Achieving Arbitration Primary Goal***: The basic aim of infusing Arbitration was to secure a fair settlement if disputes by unbiased third-party without incurring undue costs or long court proceedings. The application of AI in arbitration procedures will augment the goal of arbitration of saving money and time, by automating the time-consuming labour of legal research and data analytics.[24]

5. ***Predicted Conclusions***: "AI may be used to choose appropriate arbitrators and forecast the outcome based on the information presented, documents submitted, and the arbitrator's reasoning.[25]"

6. ***Enforcement of Award Immediately***: In the current arrangement, the process of award enforcing is where the parties must wait till it is passed by the tribunal or appellate court. There is a lag between the filing of an appeal and its execution, or an application for setting aside the award or a stay of enforcement is not filed. Therefore, AI will allow for the instant enforcement of a judgement.[26]

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22 AMLegals, *supra* 20, at 11.

23 *Id.*

24 Sonal, *supra* 21, at 12.

25 AMLegals, *supra* 20, at 11.

26 Horst Eidenmuller & Faidon Varesis, *What Is an Arbitration? Artificial Intelligence and the Vanishing Human Arbitrator*, 17 N.Y.U. J.L. & Bus. 49 (2020).

> For instance, in the case of a money dispute, a judgement of award is issued in which one party (A) agrees to provide a certain amount of money to another party (B), and the money may be moved promptly from A's bank account to B's with the use of AI. AI can also issue periodic reminders to the necessary parties and authorities to ensure that the award is implemented.[27]

Negative Impact of AI in Arbitration

AI is not yet advanced enough to be able to capture the arbitration industry in its current shape. Even though AI tools are potential enough improve the efficiency and cost-effectiveness of human jobs, as per the requirements of the parties. Nevertheless, the algorithms employed in these procedures are not without flaws. Intentionally or accidentally incomplete or selective data, or data designed in a selective manner, might result in biased or untrustworthy outcomes.[28]

Moreover, the need for AI tools are large amount of data, particularly sensitive data, and personal information must be acquired, processed, and kept someplace, which may pose privacy and data protection problems in some countries. Furthermore, even well programmed tools might be utilised in a dysfunctional manner. Also, resulting into misuse of technology by the humans.[29]

Cons of AI as an Arbitrator

1. *Privacy of Data*: One of the most fundamental requirements of arbitration proceedings is confidentiality. The intellectual algorithms

27 *Id.*

28 Temitayo Bello, *Online Dispute Resolution Algorithm: The Artificial Intelligence Model as a Pinnacle*, 84(2) Int'l J. of Arb. Med. & Disp. Man. 159, 161 (2018).

29 Cecilia Carrara, *The Impact of Cognitive Science and Artificial Intelligence on Arbitral Proceedings – Ethical Issues*, Austrian Yearbook on International Arbitration, 527 (2020).

and software programming programmed by the programmer, is what an AI is entirely relied on. Also, only a limited few have full access to such algorithms, which may deliver the ultimate judgement in a given instance.

Software development is vulnerable to hacking. "There is a risk that the parties' sensitive information will be compromised as a result of hacking. Any system update exposes the system to the risk of a virus and other sophisticated technological concerns.[30]

2. *Massive Investment*: With the more technological development, responding to such dynamic technology necessitates training of officials. The creation of AI systems is done to reduce the cost of proceedings, but creating such AI programmes and advanced algorithms costs a lot of money, which instantly escalates the price of such a system. It will be cost-effective for individuals interested in arbitration in the near future if it is adopted.[31]

3. *Technical Difficulty to officials and Employment*: Officials aged 40+ years will find it hard to adopt to such change. It is a known fact that the mostly the human Arbitrator appointed are retired Judges, who are aged. So, the time reduced for disposing of matter early will be compensated by the time the officials will take up to get use to this advancement and their trainings. Using such system would require technical knowledge and being working in legal field knowledge of law is also must. It'll be difficult to find enough people who poise the knowledge of both the fields.

4. *Lack of Flexibility:* All cases in arbitration are unique, thus if the judgment will be delivered using a same ratio-system and an organised techniques for resolving every case the purpose of principle "*distributive and equitable justice*" will be fractured. The emotional quotient that

30 AMLegals, *supra* 20, at 11.

31 *Id*.

human Arbitrator poses by looking at the background of parties, will be lacking as well. Making this system inflexible and unjust.

Every award is presented with a statement outlining the factors that contributed to the decision. If there are just a few fixed algorithms, there will be only a few judgement combinations, resulting in a rigid structure.[32]

5. *Lack of Transparency hence, Non-Acceptance*: The lack of rationality, Lack of crystal clarity, danger to data and information, the parties involved would not sign up for such resolution process and depend on the inference derived by the AI utilising the formulas and algorithms, resulting in non-acceptance of such decision. Hence, they'll approach the court which again will put the burden on cases on courts.

   For instance, in US famous case known as "Loomis case", wherein, "Eric Loomis" was convicted grounded on the results of a closed-source risk assessment programme named "*COMPAS (Correctional Offender Management Profiling of Alternative Sanctions)*". The software had 137-item Questionnaire's algorithms and formulas against which appeal was made which showed the non-acceptance of such secretive-AI tools.[33] The risk of programmers not revealing the potential threats and bugs will always exist, which will make the system vulnerable as loose-ends might get hacked.

6. *Error in defining algorithms*: "AI is built by people who work as programmers. Human faults are possible while building such clever systems. If such programming flaws are introduced into the code of an AI application, there is a risk of incorrect conclusions and other problems. Due to such human mistakes, the AI-enabled system designed for identifying and eliminating faults will produce extra errors, resulting in an additional load and cost.[34]"

32 *Id*.

33 E.M. Zorrilla, *Towards a Credible Future: Uses of Technology in International Commercial Arbitration*, 16(2) Schieds VZ Ger. Arb. J'107 (2018).

34 James Hope, *Can a Robot Be an Arbitrator?*, Stockholm Arbitration Yearbook 104 (2019).

7. *Appeals:*"It is difficult to predict whether an AI-based arbitration will be able to provide parties with the right of appeal. An appeal is made to a higher authority in conventional arbitration. Because an AI system lacks such hierarchical classification, it appears difficult to establish an AI-based appeal scenario.[35]"

Conclusion

Even though the AI tools are effective in reducing time and money still the disadvantage and negative impact of AI Arbitrators cannot be ignored. Ultimately these machines are made by Human-mind only and just like no human is perfect the AI Algorithms can also be not perfect. The human Arbitrator error can be resolved by another Arbitrators, but an AI algorithm imperfection will not be easily solved and traceable. Leading to innumerable issues wrongly concluded and awarded.

The principle of "distributive and equitable justice" for decision-making is based on cognitive capability and emotional quotient is only present in human Arbitrator but Ai does only possess cognitive thinking and lack the emotional capabilities. Additionally, the parties need to understand the reasoning as to why such award/judgment has been passed by the Tribunal which cannot be explained due to technicality of such decision-making, done by AIs. Fully depending on AI Arbitrator and replacing human Arbitrator, is not a resilient solution to Arbitration matters.

Therefore, aid of AI tools like *Arbitrator Intelligence, E-discovery coding, AI Voice Recognition and Arbitrator Intelligence Questionnaire* etc. can assist the human Arbitrator through the course of proceedings making the process speedy and cost-effective. Which will fulfil the purpose fundamental goal of Arbitration. It is also necessary to ensure that these AI tools does not infringe the rights of parties/stakeholders and treats each party equally hence, regular checks on these tools are necessary for any future hacking issues as well.

35 Sonal, *supra* 21, at 12.

However, with constant development in technological world, the day is not far where we would have to mostly depend on AIs. Hence, a robust rules and regulation needs to be established which does not jeopardize the fundamentals of Arbitration and legal systems.

The Conundrum of Constitutionality of Restitution of Conjugal Rights

Dipti Gabriel *[1] & Kanad Chatterjee **

"Law is not law if it violates the principles of eternal justice."
–Lydia Maria Child

I. Introduction

The sacred bond of marriage is an epitome of unison of two individuals who are united by a band of mutual and conjugal respect, affection and consideration. However when these conjugal obligations are disrupted by either spouse, particularly by abandoning the other, the law outshines as a saviour to help sustain the marriage. On the contrary, the legal scholars state this as a superficial act being done at the cost of exploitation of the basic human and fundamental rights of the abandoning spouse by imposing a compulsion on them in the name of restitution of conjugal rights. The upholding of the constitutional validity of such remedy under the Hindu Personal Law by the Apex Court creates a conundrum among the debates raising questions on such violation of the principles of natural justice of the withdrawing spouse. In this research article, the authors intends to critically analyse the important holdings of the courts from the unconstitutionality to the reversing of the judgment by the Supreme Court with respect to the restitution of conjugal rights under Section 9 of The Hindu Marriage Act,

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1955. The article aims to bring out a common ground as a recommendation between both faces of such remedy.

A. Restitution of conjugal rights- meaning and purpose

Section 9 of The Hindu Marriage Act 1955[1] as a remedy, states that when either party to the marriage withdraws without any reasonable excuse, from the society of the other, the aggrieved party can use such remedy and apply to the District Court for the restitution the conjugal rights. Once both the parties are given opportunities to be heard as to prove that there was a withdrawal of the alleged party from the society of the other; and that there was a reasonable excuse of the withdrawing party for such withdrawal, a decree for restitution shall be or not be passed by the said Court, accordingly[2]. Other statutes like The Special Marriage Act, 1954, The Indian Divorce Act, 1869 and even The Parsi Marriage and Divorce Act, 1936 provides a similar remedy for restitution.

The sole purpose and aim of this provision is that unlike other remedies under the legislation like divorce, judicial separation which play a negative role as a remedy for marriage; it focuses on implementing the objective of the Act, which is to sustain, protect and preserve the marriage, by providing a cool-off period of one year for the parties to reconsider their decisions[3]. Hence it prevents the breaking up of the marriage by focussing on reinstating the conjugal rights on the basis of which the wedlock sustains.

Looking into the legal requirements for seeking the remedy under Section 9, the following essentials shall be met;

(i) there should be withdrawal by either spouse from the society of the other spouse,

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1 The Hindu Marriage Act, 1955 S 9.

2 Burden of proof as held in P. Rajesh Kumar Bagmar v. Swathi Rajesh Kumar Bagmar, 2004 4 CTC 338.

3 Paluck Sharma, *Restitution of Conjugal Right: A Comparative Study Among Indian Personal Laws*, Indian National Bar Association(May 8,2021,8.30 PM) https://www.indianbarassociation.org/

(ii) such withdrawal shall be without any reasonable excuse,

(iii) there should be no legal grounds by which the court can refuse the grant of the relief, and,

(iv) the court shall be satisfied that the statements made are true in its nature and grant the decree for restitution.

What amounts to a 'reasonable excuse' again depends on facts and circumstances of each and every case.

B. Constitutional Validity debate

The constitutionality of restitution of conjugal rights has always been a heated discussion. The following landmark judgements dealt with the same. The first being the case of *T. Sareetha v. T. Venkata Subbaiah*[4], wherein it was held that this remedy is; (i) Violates the rights of the abandoning party, (especially wife's) right to equality under Article 14 of the Indian Constitution as the provision inherently favours the husband and it lacks the aspect of rationality, serving no public purpose. (ii) It is violative of Article 21 having the essence of right to life and personal liberty of an individual as the execution of the decree of restitution of conjugal rights compels the unwilling spouse to be subject to marital intercourse which thereby acts as mental and physical torture by degrading her dignity and spirit. Hence the remedy was termed to be 'barbarous, savage and uncivilised'.

However the issue was again ignited before the Delhi High Court in *Harvindar Kaur v. Harmander Singh Choudhry*[5], wherein the judgment was passed highlighting the importance of preserving the marriage. It was held that Section 9 is constitutional in nature as it aims to re-build a broken home and re-establish the relation between the estranged spouses. Further the

4 T. Sareetha v. T. Venkata Subbaiah, AIR 1983 AP 356.

5 AIR 1984 Delhi 66.

Supreme Court in the case of *Saroj Rani v. Sudarshan Kumar Chadha*[6]settled the debate by stating that the remedy is constitutional in nature, thereby upholding the judgment of the Delhi High Court. The reasoning for the same was that, the provisions of Section 9 provide sufficient safeguards which prevent it from being tyrannical. Instead the ulterior objective of the provision should be understood in its complete sense, which is to settle the matter between the spouses in the most amicable manner possible and thereby live in togetherness. This remedy does serve a social purpose which is to assist in restoring the marital life.

C. Execution of decree of Restitution of Conjugal Rights

Once the decree is passed in favour of the petitioner spouse, the next step is to file a petition for the execution of the decree. Rule 32 Order XXI of The Code of Civil Procedure, 1908[7], facilitates the same. As per the said provision, if the party, against whom the decree is passed, gets an opportunity to comply with the same, but does not do so deliberately, or if he/she wilfully fails to obey the same, then the decree can be enforced by way of attachment of the property of the alleged party.

The Oxford Dictionary[8] defines attachment of property as the act of seizure, appropriation, confiscation of the property to enforce or satisfy a judgment.

The entire purpose of this provision is based on the non-binding effect of the restitution decree on either spouse and hence the power of the execution is derived from such provision after the passing of the decree. Without such execution, the decree is a mere document, not binding on either spouse[9].

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6 1984 4 SCC 90.

7 The Code of Civil Procedure, 1908, Rule 32 Order XXI.

8 OXFORD LEARNER'S DICTIONARY(May 10,2021,5.30 PM) https://www.oxfordlearnersdictionaries.com/

9 Shristi Borthakur, *Legal consequences of denying conjugal rights to your spouse*, 5 December 2017(May 10,2021,5.30 PM) https://blog.ipleaders.in/

D. Validity of Restitution of Conjugal Rights and its execution

For the purpose of understanding the aspect of the execution of the said decree, it is important to understand the purpose of Section 23[10] of the Act. This provision essentially depicts the granting of decrees or reliefs available under the Act once it conforms to the specified conditions mentioned therein. One of the important requirement being that the person seeking relief under the Act should approach the Court with 'clean hands' and should not be involved in any conduct which is 'wrong' or which shows his *mala fide* intention to seek the relief, as it would disrupt the sanctity of the legislation as well as the time and resources of the judiciary.

The other essential of the said provision is that under Section 23 (2) and (3) the courts strive to effectuate the objective of the legislation, which is to bring reconciliation between the estranged parties.

Apropos the holding in the case of *Saroj Rani v. Sudharshan Kumar Chadha*[11], wherein it was emphasized that, 'after the passing of the decree, the husband is entitled to the remedy of divorce, under Section 13 of the Act, even in case of his failure with respect to cohabitation, it would not amount to a 'wrong' for the purpose of Section 23,' stands as a mere skeleton with no flesh and blood. With regards to what amounts as a 'wrong' under Section 23, even if the bench did make a distinction between when the decree holder 'fails to resume cohabitation' and when he/she 'deliberately prevents the judgment debtor from performing his/her conjugal rights'[12],there still lies a possibility which has not been looked upon by the court.

The question which lies here is that, how can the spouse who himself/herself, files for restitution of conjugal rights, at the same time fail to resume cohabitation when it is implied that he/she is taking a step forward to prevent

10 The Hindu Marriage Act 1955 S 23.

11 *Supra* note 6.

12 *Restitution of Conjugal Rights and its execution*, 7 May, 2020(May 10, 2021,3.30PM) https://bhandarilawfirm.com/

the breakdown of marriage? This can also be interpreted in a way that the decree holder, absents himself, or omits to act, or fails to perform his/her own conjugal duties, instead of directly preventing the opposite spouse from performing their conjugal obligations, which thereby, acts as an *innuendo* to reach for divorce proceedings in a faster manner. This however implicates a *mala-fide* intention of the decree holder which by going through the judgment of *Saroj Rani*, won't amount to a 'wrong' under Section 23 of the Act.

These circumstances make it difficult to be proven in the court of law due to lack of witnesses or even circumstantial evidences which substantiate the actions done behind closed doors.

Secondly, it is important to note, that with respect to the execution of the decree, the courts have no stand that would compel the parties to actually come forth and fulfil the disrupted conjugal rights as a matter of fulfilment of the decree so passed. In *Asst. Commissioner v. Velliappa Textiles Ltd*[13]it was highlighted, that the attachment as well as the sale of property, or even the periodical payment of sum by the judgment debtor to the decree holder, in favour of whom the decree is passed, still does not completely substitute the restoration of the conjugal and marital obligations as it is something inherent in the marriage, and cannot be effectuated by the execution of law.

This however, highlights a dilemma on the absolute need for having the execution of the decree itself. Even in *Bimla Devi v. Singh Raj Dasondhi Ram*[14], it was specifically emphasized that the entire execution of the restitution of conjugal rights is nothing but a 'symbolic mode of execution' as the legislative intent was that it is not quite reasonable to physically compel or unite two spouses to live together.

This indicates that Section 9 by itself stands as a mere decree to sustain the marriage, or prevent its breakdown. The push to comply with such a decree is provided in the procedure of its execution under the Code, as

13 MANU/SC/1218/2003.

14 AIR 1977 P H 167.

discussed above. However, such execution process, through attachment of property acts as a compulsion, forcing the unwilling party to restore the marriage. Hence, Section 9 in itself does not prove to be flawed, but its execution process does.

Therefore Section 9 of the Hindu Marriage Act, 1955 alone does not prove to be an efficient remedy until and unless its execution under the Code of Civil Procedure is followed. However, when even this execution is not mandatory;as non-compliance of restitution decree amounts to no 'wrong' under Section 23 and even the spouse who fails to resume the cohabitation is entitled to relief under Section 13 of the Act; the entire purpose of having the execution procedure amounts to no merit. Rather it proves to be a redundant provision. This raises the issue of, whether or not this provision coupled with the execution order amounts to the violation of fundamental right under Article 21 of the Indian Constitution[15]. Setting aside the *Harvindar Kaur*[16]judgement, for the aforementioned reasons, and looking at Section 9 of the Hindu Marriage Act along with the provision in the Code of Civil Procedure, the rationale given in 1983 judgment of the Andhra Pradesh High Court[17], in its strict sense becomes applicable.

E. Consortium versus Cohabitation

The basic difference between both these terms can be simply put as; cohabitation is a subset of consortium. There can be no cohabitation without consortium. If this happens, it would not be a lawful cohabitation and would attract the provisions of criminal law. Now, since marital rape is still not illegal in India, executing the restitution of conjugal rights decree against the judgment debtor, disregards his/her consent in the light of just restoring the marital bond. It should also be kept in mind that the excuse of the spouse for abandoning the other may be reasonable for him/her but may not be

15 INDIAN CONST.art 21.

16 Harvindar Kaur v. Harmander Singh Choudhry, AIR 1984 Delhi 66

17 T. Sareetha v. T. Venkata Subbaiah, AIR 1983 AP 356

considered as reasonable in the eyes of law. The remedy in the name of sustaining the wedlock and bringing consortium, promotes non-consensual cohabitation.

As emphasized by the Delhi High Court, Section 9 is not limited to cohabitation or sexual intercourse, rather it is a step to promote consortium which is not trivial. Yet the court fails to acknowledge that cohabitation still lies within the aspect of consortium. The court is impliedly giving a license to the decree holder to exploit the rights of the other spouse just to ensure that there is no breakdown of marriage. Therefore, even if the entire purpose of restitution is to safeguard the marriage, it shouldn't be done at the cost of infringement of the basic dignity and freedom of choice of the opposing spouse.

F. Constitution within personal laws

Moving ahead with the critical analysis, the reasoning of the previous Delhi High Court judgment, which upheld the constitutionality of the said Section, can still be debated. This judgment still matters as the Apex Court upheld the constitutionality of the provision in consonance with the Delhi High Court judgment

The well-known principle of involving constitutional principles in the personal and private laws, acts as a 'bull in a china shop', which was emphasized in the *Harvindar Kaur* case, can be countered in certain circumstances.

Firstly, it is acceptable that personal laws particularly those relating to marriage are based on factors like love, sacrifice, adjustment, patience and therefore involving constitutional and legal principles of equality, freedom, personal liberty and so on will do nothing but disrupt the basis of conjugal band which connects the mind, body and soul of the spouses.

However, it is quite imperative to note that even in the bonds of marriage, the spouses are individuals before being life partners to each other

and hence, there lies an 'invisible threshold' with respect to their individual freedoms and rights within the bond of marriage. Such threshold lies between the conjugal rights and the individual rights of each of the spouse.

Legislations like The Protection of Women from Domestic Violence Act, 2005, The Dowry Prohibition Act 1961 and the like, are based on the idea so as to protect the strangulated rights of the wife who is being threatened by her husband or his relatives with respect to any physical, mental or emotional cruelty or even want of dowry. Such legislations are in consonance with the provisions of the Constitution of India that means, they are derived from the law of the land.

In light of the same, one can state that the legislature still plays an important role to protect the rights of the spouse who is being exploited by the other spouse. In other words, when the said invisible threshold is being crossed or breached by either of the spouses leading to intervention in the individual rights of the opposite spouse, then it becomes the inevitable duty of the legal system to serve its purpose.

Hence, it can be implied that there still lies a massive need of interference of the constitutional provisions within the personal laws so as to ensure that the individual rights of a person is not sacrificed at the cost of implementing the conjugal rights.

G. Inclusion of personal laws within Article 13

There is a need to include personal laws within the definition of 'law' for the purpose of Article 13. The basis of Article 13 states that no pre-constitutional or post-constitutional laws can be violative of the fundamental rights under Part III of the Constitution. There have been several cases wherein the Apex Court was of the opinion that personal laws being derived from customs and precepts of religion, cannot be categorised as 'law' or 'laws in force' under the said Article and hence personal laws cannot be tested on the touchstone of Part III of the Constitution. On the contrary, there have also been several other judgments which emphasize the opposite

Even though one can vouch for keeping the Constitution and the personal laws separate to avoid infringement of one's customs and the subsequent chaos that can ensue, in light of the above-mentioned arguments, any law so made under the label of a personal law can be respected on the touchstone of the customs on which such laws are based at the same time ,the practicability of the same in the modern society should also be ensured.

The prominent ratio so laid down in the case of *Keshavananda Bharathi v. State of Kerala*[18], with respect to the significance of the basic structure of the Constitution, states that any amendment can be made to any of the provisions of the Constitution provided that the basic structure or the basic principles which permeates throughout the Constitution remain untouched. Hence, when personal laws are enacted but not covered under the ambit of Article 13, it impliedly generates an aspect of arbitrariness to the execution and implementation of the same which ought to be prevented. This means that the personal laws should be tested on the touchstone of Part III of the Constitution, thereby allowing these legislations to be placed under Constitutional purview of Article 13. The landmark judgments of declaring triple talaq as unconstitutional[19], allowing maintenance to a Muslim divorced woman[20], allowing the entry of women in Sabrimala temple[21] and so on, exemplify the need for intervention of the test of fundamental rights in the personal laws to conform the present day requirements of the people to enjoy their individual rights. This further enhances the need for bringing personal laws within the ambit of Article 13.

Therefore, all laws, including personal laws should be subjected to the test of constitutionality for the purpose of their enactment or for it to exist. In other words, all laws should be subjected to Article 13 of the Constitution,

18 AIR 1973 SC 1461.

19 ShayaraBano v. Union of India, AIR 1973 SC 1461.

20 Mohd. Ahmed Khan v. Shah Bano Begum and ors, AIR1985 SC 945

21 Indian Young Lawyers Association &Ors v. The State of Kerala &Ors, Writ Petition (Civil) No 373 of 2006.

and no law should exist without passing the test of constitutionality. Fundamental rights are of utmost significance in the Constitution, and if any law whatsoever, is not in consonance with the same, it should be deemed unconstitutional. Otherwise the entire purpose of the test of constitutionality is defeated. This test acts as a filter that removes all debris, or those statutes that give a scope of violation of the fundamental principles of the land.

It would be a complete undermining of the *Keshavananda Bharati*[22] judgement which upholds the purpose of the basic structure doctrine in order to ensure the upholding of the sanctity of the Constitution and removing the scope of any such law's existence which is not in consonance with the fundamental rights. Therefore, the rationale of *Harmander Singh* case, that personal laws should not be subjected to the constitution is arbitrary as personal laws cannot be said to supersede the fundamental rights. In the opinion of the authors, personal laws should in no way be isolated from the Constitution, as in a number of occasions it is seen that, when there arises any dispute over the existence of a specific personal law, arising from a custom, the Part III of the Constitution helps resolving that issue rather than prove to be a hindrance of it. It is to be noted that a lot of personal laws are a product of customs which in a number of instances, proves to be backdated, proving to be an instrument facilitating the dynamic nature of law. The Constitutional principles and structure helps one to realize as to what customs are not applicable and which proves to be an obstacle in a society rather than being an instrument of convenience, which thereby is the entire purpose of the existence of the laws in the first place.

Therefore, in the case of restitution, forcing cohabitation, using attachment of property for the purpose of saving the marriage is *prima facie* violative of a person's right to life. This saving of marriage happens at the cost of the destruction of free will by the court, coercing one party to live with the other against his/her will. The circumstances get from bad to worse if it is a woman against whom such a decree is passed. Forced cohabitation

22 AIR 1973 SC 1461.

would give a scope for the husband to have sexual intercourse with her wife, which technically would not be rape since they are, *albeit* on paper, still a married couple. This problem, despite of being addressed by the courts later, was not exactly solved. The reason being the sanctity of marriage and personal laws are given more importance than the fundamental rights of an own individual using flowery justifications and rationales with no merit, primarily as there was no justification as to in what was this savage practice be viewed for it to be in consonance with the constitution.

H. Need for Uniform Civil Code

The sole objective and the legislative intent of The Hindu Marriage Act 1955 are to bring codification to the Hindu Personal Law relating to marriage. Hindu Marriage is supported with the pillars of *Dharma, Artha, Kama, Moksha* and therefore, the aspect of restitution of conjugal rights it provides under Section 9, manifests such purpose. However, the basic conception that personal laws are based on customs does not purport validity in today's scenario as there has been several landmark instances wherein the customary practices which have been followed and practiced since time immemorial have been struck down to fit the present day functioning of the society. Even the purpose of the above mentioned legislation aims to introduce the concept of divorce and judicial separation which was never even close to the Hindu *Dharmashastras* and religious scriptures. Such drastic change proves to be justified in the interests of aggrieved spouses even if it breaches certain customs. This shows that the said legislation is not solely based on the Hindu customary practices and has clearly been codified to meet the changes and needs of the present day beneficiaries of the legislation and therefore is not backdated.

The purpose and aim of the legislation also provides for amending the said law which clearly implies that any such provision which is not in consonance with the changing social circumstances, can be and shall be amended which is essentially the purpose of having amendment procedure in the first place.

Article 44[23] of the Indian Constitution being a Directive Principle of State Policy, defines that it is the duty of the State to endeavour to bring a uniform civil code for the citizens. This Uniform Civil Code is a common set of principles for each and every citizen which aims to replace the several personal lawsinto one uniform code.

On a broader perspective, the Indian Constitution, through the assistance of Article 44 aims to bring a uniform set of principles for the citizens of the country, in order to ensure social welfare which can be done by including personal laws within the purview of Article 13 and therefore this will further ensure that any personal law being enacted is not violative of the fundamental right of the beneficiaries of the legislation, rather it is tested on the touchstone of Part III of the Constitution.

II. Suggestions and Conclusion

One may conclude from the said research paper that the authors are trying to establish the invalidity or unconstitutionality of the restitution of conjugal rights under Section 9 of the Act, however it should be understood that the hypothesis of the paper itself is to bring a common ground with respect to the constitutionality or otherwise of the said remedy. Therefore following points are humbly suggested;

- The Hindu Marriage Act, 1955 being a personal law, should be to be brought under the ambit of Article 13. This will help to ensure the conformity of the Act with the constitutional provisions.This would further ensure social welfare through promoting a uniform civil code as per the provisions of Article 44. It should be emphasized that the constitutional provisions should supersede and be promoted within the personal laws.
- Section 9 of the Hindu Marriage Act, 1955 being a mere decree of restitution without its execution procedure stands without value. The

23 INDIAN CONST.art 44.

said provision shall be amended so as to include an execution process along with the remedy under Section 9, which will further give it the supposed value for restoring the marriages and fulfilling the objective of the Legislation as it will then have the power as well as the procedure to implement the same.

- With respect to the existing execution procedure for the decree of restitution of conjugal rights available under Rule 32 Order XXI of The Code of Civil Procedure 1908, the same should be reconsidered with respect to the attachment of property of the judgment debtor. The said provision forsakes the aspect of the free will of the person, instead imposes a compulsion to fulfil the execution of the decree, thereby infringing the principles of natural justice as it forces the unwilling spouse to restore the disrupted conjugal rights, even if it is done with an *innuendo mala fide* intention of the decree holder.
- The reasoning of the Delhi High Court as well the Apex court in upholding the constitutionality of Section 9 is flawed in certain respects and should therefore not be followed in its absolute completeness. It should be analysed thoroughly before it is applied in some other case.

Hence to conclude, Section 9 cannot be declared as unconstitutional as it promotes the objective of the legislation which is essentially to sustain the marriage, however the execution procedure shall be considered for a review with respect to its constitutional validity.

Global Minimum Corporate Taxation: A Socio-Legal Issue

Koninika Bhattacharjee*

Introduction - Identifying the Problem

Countries have always had a tough time taxing multinational corporation (MNCs). Governments around the world lose direct tax revenue worth US$ 245 billion a year due to tax evasion by multinational corporations, according to the State of Tax Justice Report 2020.[1] According to the study, the Cayman Islands, the United Kingdom, Amsterdam, Luxembourg, and the United States generate significant tax losses for others, while the US, UK, Germany, Brazil, and France post the most critical tax losses.

India loses $10.32 billion (US) a year due to global tax evasion, equal to the salary of 4.23 million nurses and 44.7% of its health expenditures.[2] Studies indicate that MNCs practice tax evasion by shifting debt, registering intangible assets (such as trademarks and copyrights) and using strategic

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1 THE STATE OF TAX JUSTICE 2020: TAX JUSTICE IN THE TIME OF COVID-19,(Nov 2020) https://taxjustice.net/wp-content/uploads/2020/11/The_State_of_Tax_Justice_2020_ENGLISH.pdf

2 Press Trust of India, *India Losing $10.3 bn Every Year Due to Tax Abuse by MNCs, Evasion: Report*, Business Standard (Oct. 01, 2021, 10:35 AM), https://www.business-standard.com/article/economy-policy/india-losing-10-3-bn-in-taxes-per-year-due-to-tax-abuse-by-mncs-report-120112001332_1.html.

transfer pricing methods, which enable them to move gains to tax havens.[3] In this regard, the most pressing issue facing developing countries such as India is Base Erosion and Profit Shifting (BEPS), exploitation of tax laws by cross-border companies. Tax haven economies are known to shift profits to low-tax economies. Tax havens like Switzerland, Hong Kong, Ireland, and Switzerland are the most popular. Furthermore, a shift in yields has become more evident since the explosion of the digital economy. Digital services are hugely popular in emerging markets, such as India, and they want a share of the profits that global telecommunications' giants reap there - especially since the new OECD arrangements call for the taxation of giant multinational companies that have online ventures but no physical presence in the country in which they earn their profits.

To address companies' "aggressive tax planning" as well as those challenges of taxing large distributions of income made by gig economy firms, India and 129 other nations have called for a global minimum tax as a worldwide effort to prevent multinational corporations from shifting profits to low-tax jurisdictions to avoid taxes. G7 countries' fiscal framework rests on two pillars:

- There is a primary pillar: Taxation of the country's largest and most profitable multinational companies. The companies should allocate and tax at least 20% of their profits above the profit margin of 10% within the countries where they operate.
- Secondly, a global minimum tax rate of 15% is set to prevent any undercutting of corporate profits.

By establishing a minimum corporate tax rate, some of the world's most prominent companies would be able to address low effective tax rates paid by subsidiaries created to channel profits to nations with low tax

3 Misha Ketchell, *How Multinationals Continue to Avoid Paying Hundreds of Billions of Dollars in Tax – New Research,* The Conversation (Oct. 01, 2021, 10:35 AM), https://theconversation.com/how-multinationals-continue-to-avoid-paying-hundreds-of-billions-of-dollars-in-tax-new-research-124323.

systems, such as Ireland, the British Virgin Islands, the Bahamas, or Central America, such as Panama.

India's Digital Tax

The Indian government has introduced a 2% equalisation levy on foreign e-commerce sellers who don't pay taxes in India to reduce BEPS.[4] US companies have called India's policy biased against them because it is perceived as biased against US firms. Retaliatory tariffs were imposed in response to this move on Indian products like shrimp, rice, gold, silver, and many more. Retaliatory tariffs were suspended for six months as a result.[5]

The Indian government also redefines income that is subject to taxation. The Significant Economic Presence (SEP) rule stipulates that a business entity exceeding the threshold for revenues (20 million INR) or users (30000 users) is a non-resident of India. From 2021-22, the rule will be in effect.[6]

However, the domestic tax rate in the Indian economy will not affect India's Foreign Direct Investment (FDI). Over the past 2-3 years, India has ranked as one of the top three foreign direct investment destinations, according to a recent survey by CII-EY.[7] Investors find the market attractive

4 Finance Act, 2016, § 165 A, No. 28, Acts of Parliament, 2016 (India).

5 Dilasha Seth & Shreya Nandi, *Google Tax: US Imposes Tariffs on India, But With Six-Month Delay,* Business Standard, (Oct. 01, 2021, 10:35 AM), https://www.business-standard.com/article/economy-policy/google-tax-us-imposes-tariffs-on-india-but-with-six-month-delay-121060201669_1.html.

6 Sudhir Kapadia, *FDI in India – Now, Next and Beyond: Reforms and Opportunities,* (Oct. 01, 2021, 10:35 AM), https://www.ey.com/en_in/tax/fdi-in-india-now-next-and-beyond-reforms-and-opportunities.; *India Issues Thresholds for Triggering "Significant Economic Presence in India",* Ernest & Young, (Oct. 01, 2021, 10:35 AM),https://www.ey.com/en_gl/tax-alerts/india-issues-thresholds-for-triggering--significant-economic-presence--in-india.

7 CII Media Releases, *India Amongst the Top Three Choices for Future Investments: CII – EY FDI Survey of MNCs,* Confederation of Indian Industry, (Oct. 01, 2021, 10:35 AM), https://www.cii.in/PressreleasesDetail.aspx?enc=q73UVW2gfolsA+MrPNDqbHnlTnCxK4w7frVxTgeAOoE=.

owing to the skilled workforce, a potential market, and political stability. India has around INR 4,000 crore (approx. 6%) as revenue from the equalisation levy.[8] After the imposition of GMCT, the removal of the equalisation levy is expected to cost India in terms of revenue.

"Income inclusion" is another factor affecting developing countries in the deal. Suppose a multinational group's profits are taxed below the minimum global rate in any of its operating countries. In that case, its parent company will have to pay the additional top-up tax based on where it operates. Tax havens are expected to lose out to countries as the threshold under the deal becomes operational globally. India is estimated to have gained at least US$ 4 billion as a result of the tax changes, according to the Tax Justice Network.[9]

Adding a 15% tax threshold to the bottom line worldwide is expected to bring in more than $100 billion in revenue annually.[10] Finally, a uniform global framework is paramount to effectively preventing tax evasion by multinationals. By allocating the profits equitably, countries would better tax their profits from multinational corporations.

A Component Analysis of the Costs of GMCT: Properties and Modeling Issues with Existing Tax Structures

1. ***Costs associated with administration:*** Tax administrations gather information, among other things. Because data quality can vary, this

8 Dipak Mondal, *India Collected Rs 4,000 Crore 'Google Tax' Since 2016; Rs 1,100 Crore in FY20, ,* Business Standard, (Oct. 01, 2021, 10:35 AM), https://www.businesstoday.in/latest/economy-politics/story/india-collected-rs-4000-crore-google-tax-since-2016-rs-1100-crore-in-fy20-267794-2020-07-21.

9 Sudhir Kapadia, *What G&'s Global Minimum Tax Holds for India, ,* Ernest & Young, (Oct. 01, 2021, 10:35 AM), https://www.ey.com/en_in/tax/what-g7s-global-minimum-tax-holds-for-india.

10 Newsroom, *130 Countries and Jurisdictions Join Bold New Framework for International Tax Reform,* Organisation for Economic Co-operation and Development, (Oct. 01, 2021, 10:35 AM),https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm.

is a complicated problem to model. Auditors "know" that a taxpayer is evading taxes, but it is quite another thing to have enough evidence to sustain a court finding to this effect. It is also essential to consider whether data can be concealed easily and how accessible it is. There are two parties with conflicting interests in any market transaction, so it is desirable to tax them globally instead of taxing an individual's consumption.[11] First of all, in any market transaction, two parties have conflicting interests. As a result, any deal designed to conceal information is liable to be reported to the authorities by at least one party unhappy with the result. Another property is that information on a transaction is easier to gather when well documented. The documentation requirement of a large corporation makes it easier to tax a significant transaction than a transaction involving a small firm.

2. ***Compliance Cost: Consider this problem –***

   - Is it best to delegate countries the authority to collect taxes and relay information about companies operating within their jurisdiction, which requires the administration to audit both the taxpayer agent and the taxpayer,
   - or would it be more efficient only to deal with the companies themselves?

Moreover, by forcing the tax administrator to forward this information, administrative costs would be reduced significantly. In addition, the government can reduce total social costs by imposing a two-stage collection system if the value of collecting information is higher than the cost of collecting information.

3. ***Deadweight loss:*** It occurs when taxes are imposed on taxpayers that create a wedge between their relative prices (Parent-Subsidiary Company operating in different jurisdictions). There is a continuous

11 Slemrod, J., Yitzhaki, S. *The Costs of Taxation and the Marginal Efficiency Cost of Funds*. *IMF ECON REV* 43, 172–198 (1996). https://doi.org/10.2307/3867356

and increasing loss of weight created by the tax rates and the combined taxes used. The deadweight loss cannot be characterised as a constant function if the set of taxed commodities isn't given.

4. ***Risks of Tax Evasion***: In the Allingham and Sandmo model, the taxpayer only engages in tax evasion if he anticipates that his expected income will increase, including the typical fine he would have to pay if caught. Therefore, MNCs' risk exposure and income expectations that evade taxes are raised. As a result, society is exposed to additional risks. An agreement that requires the taxpaying MNC to pay a global corporate income tax rate of 15% would be better for the host country if it would receive its due share of the revenue. GMCT can only be implemented if every country worldwide agrees. Unless it's done, either existing tax havens will be preserved, or new ones will be created. A developing country like India will suffer in either case. The excess burden of tax evasion attributable to Indian government risk neutrality equals the risk premium that a multinational company would be willing to pay to eliminate the exposure to risk .In light of the assumption that detection is one-sided, the penalty structure is asymmetric, and risk aversion is constant, the excess burden of evasion will increase with the rate of taxation.

5. ***From a social standpoint, reducing taxes creates a deadweight loss.*** Because the distinction between avoidance and compliance costs depends on the taxpayers› intentions, it isn›t easy to distinguish between the two in practice. Identifying who controls each activity will become apparent later on. Taxpayers are responsible for activities that produce excessive burdens (such as avoidance), while tax administrators are responsible for compliance and administration costs.

6. ***Problems of Normative Models for Enforcing GMCT***: With a few exceptions, normative models of tax evasion enforcement suggest

that the most effective penalty to abolish all evasion is a sufficiently severe penalty. This is a fundamental principle. In the case of a rational taxpayer, evasion is impossible if the sentences are too high. By increasing the penalties to infinity, the tax administrator can maximise the private price. The amount of monitoring will almost be zero since there will be no evasion. In addition, this kind of model disregards the possibility of an abuser of the system or the harsh punishment of an honest mistake. Whether the sentence is severe or not, the system is cruel and unfair in the event of an evil administrator or genuine harm: the harsher the penalty, the more rigorous the prosecution, which may increase administrative costs. Analytical models usually establish a ceiling on the penalty rate by assumption due to not modelling the interaction between the penalty rate and administrative expenses.

Evaluating Marginal Efficiency of 15% Global Benchmark *vis-à-vis* Income Inequalities

Raising the domestic corporate tax rate may address income inequality between the host country and tax havens. Individuals with higher incomes tend to own more corporate shares and bear the burden of a tax increase on corporate income (under the income inclusion rule). Nevertheless, this thinking fails to remember that corporate income taxes are borne by high-income shareholders and their stockholders and by lower-income employees of these firms, which reduces everyone's total income. In other words, higher corporate income taxes would result in lower wages for workers, lowering after-tax incomes for them. If an MNC, thus, wants to prevent this reduction of employee's income, it has to shift gains to tax havens. To understand this better in the Indian context, let us analyse the patterns of household incomes annually. This way, we can understand the income disparity and corporate taxation prevalent in India.

In 2011, the National Council for Applied Economic Research conducted the Indian Human Development Survey II (IHDS-II) based on

a nationally representative sample about the income of households. IHDS-II indicates that families are earning more than Rs. 1.6 lakh belong to the wealthiest 20% in the country.

Income Quintiles	Annual Income Range (in Rs.)
Poorest Quintile (Poorest 20%)	1,000 – 33,000
2nd Quintile	33,001 – 55,640
3rd Quintile	55,641 – 88,820
4th Quintile	88,821 – 1,59,600
Richest Quintile (Richest 20%)	1,59,601+

Note: Quantile represents 20% of a given population
Data Source: India Human Development Survey, 2011-12

The survey demonstrates that India is not a rich country. Because of this, it is not surprising that only a tiny fraction of Indians pays income tax. Additionally, it portrays that the incidence of a global minimum corporate income tax impacts the state of income inequality in developing countries. Tax increases discourage corporate activity, which leads to a rise in non-corporate activity. In the presence of non-corporate activities, it may be possible for the risk to rise through personal reasons (as opposed to market trends), leading both to more successful and unsuccessful business owners. A reallocation favouring non-corporate business can result in an uneven income distribution due to this effect. This creates an unstable market and an unpredictable environment for attracting foreign investors.

Suppose that an MNC operates in the GMCT ecosystem and therefore can evade a portion of the additional tax. Saving one dollar by evasion or by substituting cheaper but less satisfying forms of activity would permit him to sacrifice the value of one dollar to save one dollar. We can estimate

the costs to society without knowing whether the "leak" occurred through evasion or substitution.

The same rule applies to avoidance activities, as well as substitution, evasion, and avoidance, as well as any other action controlled by the corporation. It is sufficient then to compute the marginal efficiency cost of raising revenue if we know the potential tax (taking into account an adjustable tax base) from a change in a parameter of the tax system and the actual tax increase (tailoring all behavioural responses).

GMCT's marginal efficiency can be evaluated by examining two critical assumptions. One assumption is that taxpayers are not constrained. There is no reason to presume that in a two-taxpayer economy, the taxpayer would lose more money from a corner solution than from saving one; therefore, the profit loss from the "leak" may be greater than the cost of the revenue loss. Consider a taxpayer who does not report any payroll income; since the taxpayer is bearing the risk of not reporting, he is evading one dollar; while another taxpayer who has the same payroll income says everything. While revenue collected is exactly double the potential tax base, the MECF for an increased tax rate is only 1.2. If substitution and avoidance responses are not taken into account, the MECF for an increased tax rate is just 0.8.

Furthermore, it is assumed that taxpayers bear the exact cost in reducing their tax burden as the social cost. Private costs often take the form of distorted consumption baskets, for example, and this is undoubtedly true in many instances. However, the personal and social prices are not always the same. The taxpayer can deduct the costs incurred by an accountant who seeks legal ways to reduce taxable income, for example. However, the social cost here outweighs the private one.

As a result, if no nation agrees to the proposal for global minimum taxes, it may result in a new sort of competition. This can be seen in corporations opting for countries without minimum tax rules, as their residences. Thus, we will end up with new tax havens that will demonstrate

a more subtle divergence between the social and private costs of tax reduction. Profits being moved to a country with lower tax rates than GMCT is undoubtedly a benefit for the MNC but a cost to the nation. Because evasion results in lower revenue leakage than revenue leakage itself, the revenue leakage caused by evasion has a lower social value.

The reality is that investors are willing to accept a higher host country tax burden (and a more practical approach) if they have excellent business enabling and market conditions, a stable regulatory framework, and a number of lucrative opportunities that are specific to the host country. If a country has extensive location-specific profit opportunities, it makes sense for policymakers to be reluctant to adopt a low tax burden. India's Finance Minister reduced corporate taxes for new domestic manufacturing companies to 22% and 15% in September 2019 to bolster investment activity. In 1961, the Income-Tax Act was amended to introduce section 115BAA, providing that businesses can qualify for a 22% tax rate if they meet certain conditions, including not availing of any incentives or deductions. For existing domestic companies applying for the concessional taxation regime, a Minimum Alternate Tax (MAT) will also not be required. As a result, India would benefit from the global agreement on a minimum 15% corporate tax rate, since the effective domestic tax rate would be higher than 15%, thus attracting investment into the country.

Need for Global Anchoring – An Alternative Minimum Tax?

Do we have the capacity to agree on what is fair when it comes to taxation?

A global minimum tax would allow governments to convert untaxed profits into public expenditures as well as exercising their sovereignty over businesses. Nevertheless, nearly all multinational corporations are headquartered in the global North. By establishing a minimum tax, developing economies would not attract FDI, necessary for economic growth.

In that regard, the safest bet for India was not to accept GMCT in the first place. A 15% minimum corporate tax will hit India the most since it offers tax breaks. But now that many nations, including India, have accepted the global threshold of 15%, international agencies such as World Trade Organisation (WTO) and International Monetary Fund (IMF) must make the imposition of GMCT mandatory for all countries. If this is not viable, a MAT of 15% should be decreed regardless of tax breaks. Thus, any country wishing to attain political or social goals through special incentives will have to do so through budgetary grants, not tax concessions.

Furthermore, it is reasonable to say that Ireland's growth model of the 1960s and 1970s proves that attracting FDI through low corporate taxes can lead to development. Global South countries can follow this path as well. It is common to find structurally deformed economies in countries in the South after colonisation, deindustrialisation, and, on gaining independence, independence itself. In low-value-added parts of the global value chain, minimum corporate tax rates prevent these countries from specialising. Yet, in the present day, Ireland is claiming more than just low tax rates to be competitive. The government is peaceful, has strong institutions, and its infrastructure, education, and labour force are well developed. It has contributed to Ireland's specialisation in high-value-added segments of global value chains. Corporate tax rates in the twentieth century were low due to policies that favoured corporations.

It cannot be ignored that businesses need government limits on their power. Negotiations need to be more inclusive than the G7 to reach a truly global consensus. It is also imperative that these negotiations account for divergence in economic development, allowing for the detrimental competitive advantages of the global North and granting special treatment to less developed economies.

Dilemma of Corporate Governance: Solved through Blockchain Technology

Anshuman Singh*

Introduction

Blockchain is a new technology on the block, hailed by many as the new age's internet. Blockchain is a peer-to-peer ledger which is operated without any centralized authority. It is a new technological evolution for systems as old as time and business. Originally Blockchain as an idea was introduced by Haber and Stornetta's 1991 proposal[1] for time stamping a document digitally to authenticate ownership of digital documents. After that in 2008, Satoshi Nakamoto (pseudonym) utilized the idea of Blockchain in his cryptocurrency called "Bitcoin", which utilized the concept of Blockchain in connection to public ledger in an open-source network.

Blockchain is a shared immutable ledger that records transactions and assets, the blockchain ecosystem aims to build decentralized, disintegrated, and distributed technology. It has three distinct and essential characteristics which are it is transparent, meaning each user can see all the transactions entered on the blockchain since its creation. Secondly, blockchain technology

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1 Stuart Haber and W. Scott Stornetta, *How to time-stamp a digital document,* 3JOURNAL OF CRYPTOLOGY :99-111(1991).

is secure, it is built on cryptographic techniques of private-public keys which makes it like an impregnable fortress. Lastly, blockchain is decentralized, meaning it works on a peer-to-peer network where each user has a copy of the decentralized ledger on his or her computer[2].

Blockchain technology is already widely used for exchanging, fundraising, and for purchasing cryptocurrencies but additional applications like digital asset transfers registries and smart contracts also exist. Digital asset transfer is the most common which is transferring assets like cryptocurrency, shares, etc. in a more secured manner. Blockchain works as a global distributed ledger that is accessible to anyone and is fully secure to keep information and data[3]. Lastly, Smart Contracts are simply programs stored on a blockchain that run when predetermined conditions are met. Once a condition is met, the contract is executed immediately. As smart contracts are digital and automated, there's no paperwork to process and no time spent reconciling errors that often result from manually filling in a document[4]. Blockchain technology presents a possible innovation in our traditional Corporate Governance practices, unlike the present system which is prone to hacks and is a cause for security concern much like the recent data breaches like the Air India date breach of the Facebook data breach. The more secure, transparent, speedy, and efficient blockchain technology will create an everlasting change to our Corporate Governance practices.

Blockchain as a tool in Corporate Governance

Corporate governance, in general, is the tools, methods, and various practices that are used to control a company thus it can also be said that

2 *What is Blockchain Technology* (June 29,2021,9.30AM), https://www.ibm.com/topics/what-is-blockchain>.

3 Toshendra Kumar Sharma,,*How Blockchain can be used in asset registry and Tracking?*(June 5,2021,9.30AM), <https://www.blockchain-council.org/blockchain/blockchain-within-asset-registry-how-it-works/>

4 *What Are Smart Contracts On Blockchain* ?(June 5,2021,9.30AM) <https://www.ibm.com/topics/smart-contracts>

corporate governance is a framework. Corporate governance has been in the spotlight for over the last few years and is one of the most essential parts of a corporate organization. There have been many cases of failures and scams in the corporate sector due to lack of proper disclosure, less transparency, presence of ineffective internal audit and another one of major problems in corporate governance is often the disputes between the management and shareholders of a company which results in great financial losses.

The main characteristics of a company are; limited liability, distinct legal personality, transferable shares, centralized management under a Board, and Investor ownership. Allocation of powers in hands of the owners that are shareholders is unfeasible because shareholders of a company constantly changing hence the decision-making power is largely vested in the Board of Directors by Company law. Due to such a system shareholders are left with virtually no powers and have to depend on the Board of Directors to operate the company for them but the interests of the Board can diverge from that of their shareholders, this problem was also mentioned by Adam Smith in his book Wealth of Nation.[5]

Blockchain technology is changing our traditional practices and strategies for corporate governance. Blockchain-based information storage and record-keeping can be faster and more transparent because of the decentralized nature of blockchain than any other alternative. Thus it doesn't come as a surprise that many corporations are now using blockchain technology to advance their corporate governance. The basic benefits that blockchain brings to Corporations are increased efficiency by removing administrative burden, mitigates the risk for fraud and it also provides greater transparency to the larger public. Several Stock markets around the globe have started testing with blockchain technology for companies to list, trade, and vote their share which grants added advantage to the shareholders, as it leads to greater transparency in the process, faster transfer of ownership, and much less risk of fraud.

5 ADAM SMITH, WEALTH OF A NATION (1776)

Shareholders

According to Companies Act shareholders are the owners of the company and they control it through the exercise of their voting rights.[6] Shareholders merely are not the persons who have title to the company but also those who fulfill the information-producing rules that make the crux of corporate law. The law also requires shareholders to approve corporate actions by way of special or ordinary resolutions. Most investors are hesitant to purchase stocks/ shares of a company because generally a public company records the transactions and transfer of stocks and they only keep track of stockholders and shareholders. This compels the stockholders to trust the companies for the preservation of all their details and data which becomes a problem especially when larger companies are more prone to data breaches and hacking attempts. Blockchain could allow companies to keep a comprehensive record of all of their shareholders and their transactions on a secure, transferable, and immutable ledger[7]. Implementing blockchain in corporate governance protocols would remove the need for any intermediary to establish trust between the issuer and its shareholders. Shareholders will be able to verify that their vote is included in the voting outcome. Also, blockchain technology can harmonize shareholder engagement opportunities by offering a common and lean discussion platform for shareholders and board members[8].

Transparency and Disclosure

Transparency and disclosure are at the base of any good corporate governance model in that they help shareholders to make informed decisions

6 Companies Act 2013, S 47

7 Federico Panesi, Ross P. Buckley, and Douglas W. Arner *Blockchain and Public Companies :A Revolution in Share Ownership, Transparency, Proxy Voting, and Corporate Governance,*2STANFORD JOURNAL OF BLOCKCHAIN LAW AND POLICY 2019(May 1,2019) (December 17,2021,8.30AM)https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3389045>

8 Christoph Van der Elst and Anna Laffare ,*Blockchain and Smart Contracting for the Shareholder Community* (Dec 21,2021,3.30 PM) <https://corpgov.law.harvard.edu/2018/09/06/blockchain-and-smart-contracting-for-the-shareholder-community/>

and make the corporate executives accountable for their actions. Shareholders using blockchain technology could offer a visible real-time observation of their stocks, more transparency in the transfer of stocks from one owner to another, and also lower costs of trading[9]. Public issuing and transfer/trading of stocks can be noted and verified on blockchain replacing the intermediaries with a self-regulated system. Blockchain technology has significant potential in managing company information related to shareholders. As shown by the Delaware Blockchain initiative, Delaware(a state in the U.S.) has already started using and implementing blockchain technology in maintaining its records of shareholders(Delaware Blockchain Initiative[10]). The Delaware code demonstrates that blockchain can provide a distributed registry of members and under this code, companies would be able to provide shares digitally that would provide transfer of shares in real-time and further reduce transaction costs.

Voting

Existing electronic voting systems all suffer from a fundamental flaw and that is that they are centralized and thus are vulnerable to hackers and data breaches. This design flaw is therefore hindering the adoption and implementation of electronic voting as much as it should in this age of computer and technological advancements. Unlike the present system which is a proprietary system, which is centralized by design, Blockchain is decentralized, open-source, and distributed ledger technology that offers a more secure alternative to its counterpart[11]. Blockchain in shareholder

9 Joan Hemingway and Adam J Sulkowski ,*Blockchain, Corporate Governance and Lawyer's role* (July 1,2021,4.00 PM) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3473577> .

10 Andrea Tinianow,*Delaware Blockchain Initiative: Transforming the Foundational Infrastructure of Corporate Finance* (Jan 24,2022,6.30PM) < https://corpgov.law.harvard.edu/2017/03/16/delaware-blockchain-initiative-transforming-the-foundational-infrastructure-of-corporate-finance/>

11 Pierre Noizat, *Blockchain Electronic Vote,* https://www.weusecoins.com/assets/pdf/library/blockchain-electronic-vote.pdf.

voting is still in its nascent and exploratory stages but it is feasible in this area. Blockchain technology also has the potential to offer a permanent solution to the traditional problems associated with accurate and timely vote confirmations. According to many commentators, blockchains could successfully administer virtual shareholder meetings by tracing share transfers and identifying who is entitled to participate in the meeting and vote; registering proxies, voting instructions, and actual votes; ensuring that quorums and majority requirements are met, shedding light on empty voting practices[12] .The implementation of a voting system using blockchain technology can be very beneficial to corporations, the benefits include low costs and increased efficiencies. According to the Report submitted by the working group on issues related to Proxy Advisors. Further, it also can resolve concerns with over/under voting, investor anonymity, and distribution costs.[13]

Smart Contracts

Advances in technology and the wide implementation of Blockchain on flexible platforms like Ethereum have given smart contracts more potential to be used in routine commercial activities. Smart Contract is a program that runs on the Ethereum Blockchain. It's a collection of code (its functions) and data (its state) that resides at a specific address on the Ethereum blockchain[14]. Hence Smart Contracts can enable the performance of a contract without the help of any middlemen and thus remove the risk of manipulation from third party individuals. Similar to legal contracts

12 Chiara Picciau ,*The (Un)Predictable Impact of Technology on Corporate Governance*, 17 HASTINGS BUS. L.J. 67, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3643500

13 REPORT SUBMITTED BY WORKING GROUP ON ISSUES RELATED TO PROXY ADVISORS, 29th July 2019 (July 7,2021,3.30PM) available at https://www.sebi.gov.in/reports/reports/jul-2019/report-of-working-group-on-issues-concerning-proxy-advisors-seeking-public-comments_43710.html

14 *Introduction to Smart Contracts,* (July 5,2021,5.30 PM*)*https://ethereum.org/en/developers/docs/smart-contracts/

Smart contracts also define rules and penalties around an agreement and non-compliance can lead to the implementation of such actions. A company is a nexus of contracts between the supplier, skilled laborers, raw materials, customers, and other groups as given by Jensen and Merckling 1976 essay Agency of Cost[15] As Smart contracts cannot be interrupted or rescinded without the agreement between both parties entering into it, this provides a clear potential of what the smart contracts can do to our traditional system of transactions and contracts.

Over time stock markets have evolved elaborate processes for allotting, lending, and voting of shares and stocks. Many of the stock investors relegate these tasks to their brokers for cost savings and simplicity. The involvement of these intermediaries has often caused fiascos in the areas of payment of dividends and evaluation of votes. Smart contracts seem to be a straightforward solution to these problems. As already mentioned if a share exists virtually on a blockchain it could be embedded with a smart contract that could be responsible for payments of dividends, sell securities when margin calls are triggered, and also prohibit double voting[16]. While however Smart contracts are accurate and may prove valuable it is undeniable that smart contract use does not necessarily translate into corporate governance benefits warranting the risks associated with committing to a set and irreversible course of action, once a smart contract is active and the set occurrences happen, execution is automatic. Accordingly, without prior regulation of the status of smart contracts within the realm of investment instruments, companies should not engage in such transactions to better safeguard shareholders' interests as well as the overall company's stability[17].

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15 Michael C. Jensen and William H.Meckling ,*Theory of the firm :Managerial behavior, agency costs, and ownership structure,*3(4) JOURNAL OF FINANCIAL ECONOMICS 305-360(1976), https://doi.org/10.1016/0304-405X(76)90026-X

16 David Yermack ,*Smart Contract And Corporate Governance*,2(1) REVIEW OF FINANCE 7-31(2017), https://www.oenb.at/dam/jcr:4d26c6fe-2223-46bf-9b0e-0137ff616991/Yermack.pdf>

17 Fiammetta S. Piazza ,*Bitcoin and the Blockchain as Possible Corporate Governance Tools: Strengths and Weaknesses*, 5 PENN. ST. J.L. & INT'L AFF. 262(2017),(June 4,2021,5.30PM) elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1163&context=jlia

Accounting

Many corporate governance failures have resulted due to faults in the accounting department. Thus it is not wrong to say that accounting is a quintessential part of corporate governance as a whole as accountants only periodically release a compiled date of all the internal activities to the shareholders. Accounting plays a paramount role in corporations conduct both their financial and management reporting. Section 133 of the Companies Act, 2013 states the Indian Accountant standards that all the companies must follow to conduct their accounting. Section 133 includes the disclosure of accounting policy to cash flow statements and contingencies[18]. The biggest corporate failures like the Satyam scandal were because of fraudulent accounting practices[19].

If all of the routine accounting data of a corporation is stored on a blockchain it could be permanently recorded with a timestamp and unable to be altered. All of the stored data would be visible to any shareholder, creditor, lender, or any of the parties. If this is implemented the company would benefit as a shareholder would be more involved with the company's affairs thereby creating more trust and further there wouldn't be a need to hire costly outside auditors to audit the annual financial statements[20]. Implementing blockchain technology would lead consumers of financial statement information to trust the certainty of the data on the blockchain and impose their accounting judgment to make their non-cash adjustments such as depreciation or inventory revaluation[21].

Insider Trading

18 Indian Companies Act 2013,S 133

19 *Satyam Scandal:The biggest issue revolving around Corporate Governance* ,(June 25,2021,13;30) <https://lexforti.com/legal-news/satyam-scandal-the-biggest-issue-revolving-around-corporate-governance/ >

20 David Yermack, *Corporate Governance and Blockchains,* NBER WORKING PAPERS 21802, (June 21,2021,4.30PM) www.nber.org/people/david_yermack?

21 *Id*

Insider Trading deals with a company's security with the help of confidential information which has not been made public by the company for a profit or loss. Section 12A of the SEBI Act,1992, prohibits insider trading. Prohibition of insider trading is necessary to make the securities market fair and transparent and it also helps all the investors be on a level playing field. Classic insider trading is based on a direct relationship between shareholders and management of a company and is a securities fraud. In cases like *Reliance Industries Limited (RIL)* v. *SEBI* and *Satyam Computer Scandal case*, SEBI conducted an investigation and have stringently sought penal actions against companies involved in Insider Trading[22]. According to SEBI all directors, KMP, officers, and substantial shareholders in a listed company have to disclose information to the company to prevent Insider Trading but even after all these regulations and bodies to keep Insider trading in check it is still rampant in the corporate sector[23].

If stock/share transfers are recorded on a public blockchain it may be harder to conceal than on current electronic ledgers. If a company's shares are listed on a public blockchain, they can be observed by the public in real-time at any time. Concealment would be easier if the company were to list its shares on a private blockchain. Even in a private blockchain, it would create more holistic and real-time information of the shares of a company which is much better than the current scenario. Further, Government's access to these blockchain models on which trades are recorded will deter any unlawful activities[24].

22 Insider Trading regulations in India By Simrin Kapoor, Insider Trading regulations in India BLOG (11/07/2021, 11:30) <https://legalstudymaterial.com/insider-trading/#Case_Law >

23 No. LAD-NRO/GN/2014-15/21/85, published 15 January 2015

24 Joan Macleod Hemingway and Adam Sulkowski ,*Blockchain, Corporate Governance and Lawyer's Role*, 65WAYNE LAW REVIEW (2019)

Environmental, Social, and Governance

Another area where implementing Blockchain technology can have a positive impact is Environmental, Social and governance ESG grew out of investment philosophies clustered around sustainability and, thereafter, socially responsible investing. Early efforts focused on "screening out" (that is, excluding) companies from portfolios largely due to environmental, social, or governance concerns, while more recently ESG has favorably distinguished companies that are making positive contributions to the elements of ESG, premised on treating environmental and social issues as core elements of strategic positioning[25]. In May 2021 SEBI has issued a circular implementing a new sustainability-related norm for the top 1000 listed companies by market capitalization[26] . These new requirements are based on the need for more transparent and standardized disclosure on ESG parameters. These new requirements will help companies reach their sustainability goals better and also help in promoting their market performance.

One of the largest issues with ESG reporting is the simple fact that there are no globally enforced reporting and compliance standards for ESG and other sustainability information. For financial reporting, and fully acknowledging the inconsistencies and issues with those standards, there at least are standards in the form of Generally Accepted Accounting Principles (GAAP) and International Financial Reporting Standards (IFRS). Increasing the transparency and consistency, via blockchain reporting frameworks and standards, will lead to the increased use of this information[27]. Many stock markets also promote ESG reporting and disclosure. Data on a blockchain can help by allowing consumers, producers, market participants,

25 Mark S. Bergman et al, *Introduction to ESG* ,(July 10,2021,10.30 AM) https://corpgov.law.harvard.edu/2020/08/01/introduction-to-esg/

26 SEBI/HO/CFD/CMD-2/P/CIR/2021/562, 10,May,2021

27 Sean Stein Smith, *Blockchain Could Be The Key To Making Environmental Reporting More Meaningful*, (June 11,2021,10.30PM), https://www.forbes.com/sites/seansteinsmith/2020/07/08/blockchain-could-be-the-key-to-making-esg-reporting-more-meaningful/

members in a supply chain, and governments to add and verify time stamped information without having to rely on self-serving corporate social responsibility reports touting their ESG achievements[28].

It is clear that if used correctly Blockchain has the potential to drive many sections of our corporate governance sector like Shareholder Voting, Transparency and disclosure, Recordkeeping, etc. in a positive direction but even with all this potential, there are many challenges in the road for widespread implementation of blockchain technology in our corporate sector.

Current Scenario for Blockchain

Many private companies and governments have started implementing Blockchain technology in their corporate governance practices. Blockchain, as a record-keeping technology, has the potential to fundamentally alter significant aspects of corporate governance, in particular, those involving data-tracking or communication[29]. Yet one of the biggest problems that Blockchain technology faces in the present is its unregulated nature. French legislators have already introduced the definition of blockchain in French laws by passing two ordinances and in doing so France has become the first country to officially recognize blockchain technology in the field of financial securities.[30] In the United States, states like Delaware have started the use of blockchain widely yet cryptocurrency and blockchain haven't been officially regulated, the SEC has important precedents and other securities judgments to rely on. Agencies like IRS(Internal Revenue Services), FTC(Federal Trade Commission), etc. are also trying to regulate blockchain. In India currently, there is no regulation or law to regulate Blockchain

28 Marcia Narine Weldon & Rachel Epstein, *Beyond Bitcoin: Leveraging Blockchain to Benefit Business And Society* TRANSACTIONS:THE TENNESSEE JOURNAL OF BUSINESS LAW (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3443675

29 *Id*

30 Paola Heudebert and Claire Leveneur, *Blockchain, Disintermediation And The Future Of The Legal Professions* 4 CARDOZO INT'L & COMP. L. REV. 275-319 at 297(2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3781504

technology. The only remarkable judgment on crypto currency/Blockchain was the *Internet and Mobile Association of India* v *RBI*[31]where the apex court removed the ban put on cryptocurrencies by the RBI.

If history has proven anything it is that anything produced to scale must have some regulations for its security and stability. Regulation and implementation of Blockchain seem to be the need of the hour. In India, many have started using blockchain technology in various sectors like corporate governance, supply chain finance, banking, land registry, etc. but the road was full of challenges[32]. The major reasons were lack of awareness, evolving nature of the blockchain platform, and lack of regulations. To ensure the growth of the industry while also protecting consumers and preventing money laundering, a pro-innovation approach to regulation is needed. Positive and proactive engagement by industry with law enforcement and regulators, through the Blockchain Alliance and otherwise, has been critical to the growth of this sector to date. Continued engagement of this type will be equally important going forward, as the industry seeks to foster an approach to lawmaking and rule-making that encourages, rather than stifles, innovation[33]. The governments should release this new reality of decentralized platforms and engage in discussion with the innovators and leaders of the decentralized industry. Regulators and Innovators must come to an understanding on how to blend traditional practices in corporate governance and other sectors and blockchain technology to avail the maximum benefit. It is very important that all the countries coordinate to make regulations of Blockchain and cryptocurrency so that there is no confusion and chaos. Only then can the full potential of blockchain technology be realized.

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31 Writ petition 373 of 2018

32 *Blockchain technology in India Opportunities and challenges* ,(July 12,2021,5.30 PM) https://www2.deloitte.com/in/en/pages/industries/articles/blockchain-technology-in-india.html .

33 Jason Weinstein, Alan Cohn, *Promoting Innovation through Education: The Blockchain Industry, Law Enforcement, and Regulators Work Towards a Common Goal,* <https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1489775_1.pdf>

Right to Health in Comparative Perspective: India and South Africa

Drishti Goel*

Introduction

The preamble to the WHO constitution defines health as, "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[1]

It is important for individuals to maintain good health, both physical and mental, so as to participate in the enjoyment of other human and social rights. It is what ensures the well-being of the masses and is thus important to human condition. Despite its utmost importance, many countries across the world have failed to provide adequate health services to its citizens. The expenditure on health in some countries is dwindling, or its results are not very much visible.[2]

The concept of a social right to health is about empowering individuals who should be allowed to enjoy this right thoroughly. The preamble of WHO also states that,

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1 WORLD HEALTH ORGANISATION,1948,Preamble.

2 Sheetal B. Shah, *Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India*, 32 VAND. J. TRANSNAT'L L. 435.

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition." [3]

This definition of health as a fundamental right, that should be enjoyed by every human being throws light on the fact that a right to health should be empowering. This means, that a right to health should give individuals a choice to gain control over their own health through empowerment. This can be done by removing the obstacles of "race, religion, political belief and economic or social conditions" as found in many developing countries. This interpretation of a right to health surpasses the basic protection of the well-being of individuals and broadens its understanding to societal conditions related to health.[4]

Many institutions at the international level have recognised the right to health and have aimed at defining and refining its meaning as well as interpret it in various ways. Article 55 of the United Nations Charter pledges its members to consciously work towards finding solutions to health and related problems.[5] The UDHR also mentions that everyone has a right to an adequate standard of living for the well-being of himself and his family which includes access of water, shelter, clothes, food, medical care and other important social services. It also states that some individuals, like pregnant women and children, who are the most vulnerable should be provided with special protection[6]. However, the most comprehensive assurance of right to health is mentioned in the International Covenant on Economic, Social and Cultural Rights which states that:"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"[7]

3 *Supra* note 1

4 *Supra* note 2

5 Charter of the United Nations and Statute of the International Court of Justice, 1945

6 Universal Declaration of Human Rights, 1948

7 Art 12(1)

Furthermore, the second clause mentions several steps which are to be taken by the States Parties for the full realisation of the right including betterment of health of children and reduction in infant mortality rate, improvement in environmental and industrial hygiene, prevention and treatment of epidemics, endemics etc., and better accessibility and availability of medical services and attention.[8]

Apart from these international sources of right to health, constitutions of various countries across the world have also attempted to lay down the right for their citizens. This paper aims to compare and contrast such provisions of two countries, namely India and South Africa, by analysing their respective constitutional provisions relating to right to health, the jurisprudence available on the topic from the apex courts of both the countries and on the basis of implementation of the right in both countries.

2: A comparative study of right to health in India and South Africa

2.1: The constitutional perspective:

2.1.1: India-

The framers of the Indian constitution recognised the importance of political, social and economic equality as a must to create a stronger state. They emphasise on the importance of social rights to ensure participation of individuals in the democracy. Thus, guaranteeing social justice to its citizens is one of the central features of the Indian constitution.[9] Hence, the words found in the preamble to the Indian constitution,

"WE, THE PEOPLE OF INDIA, having solemnly resolved…..to secure to all its citizens: JUSTICE, social, economic and political….assuring the dignity of the individual…" [10]

8 *Id*

9 *Supra* note 2

10 INDIAN CONST, Preamble

The provisions for right to health are found mainly in two places in the constitution- the Directive Principles of State Policy and the Fundamental Rights. The DPSPs are considered foundational to the governance of the country. They are a high order of recommendation that helps the three organs of the government to undertake actions in furtherance of these set principles along with implementing policies and making laws so as to maintain the welfare of the people of India. [11]

The various articles under Part IV that mention about right to health of the individuals include,

- the state should direct its policy making such that both men and women citizens equally have the right to an adequate means of livelihood[12]
- Article 39 (e) aims to ensure the equal accessibility of health care to men and women workers. It also mentions the prohibition of abuse of the tender age of children and that citizens are not forced to take up any occupations due to economic necessity, which is not suitable for their age or strength.
- Article 39 (f): this clause focuses on the well-being of the children and the youth of the country by mentioning that each child should be provided with opportunities and facilities to develop in a healthy manner along with conditions of freedom and dignity. The childhood and youth should also be protected against exploitation and against moral and material abandonment.
- State must make provision for securing just and humane conditions for work and also for maternity reliefs.[13]
- Article 47: imposes a duty on the State to raise the level of nutrition

11 *Supra* note 2

12 INDIAN CONST ,Art 39 (a)

13 INDIAN CONST, Art 42

and the standard of living of its people and also for the improvement of public health. The article also mentions that the State shall try to prohibit the consumption of intoxicating drinks and of drugs which are injurious to health, except for medical purposes only

- Article 48A: states that the State shall aim to protect and improve the environment and to safeguard the forests and wild life of the country.

The second place where the right to health can be found in the Indian constitution is in Part III which comprises of the fundamental rights given to every citizen of the country. The right to health is seen as an extension of the fundamental right to life and personal liberty enshrined in article 21 of the constitution. The apex court of India, which is the Supreme Court of India, in its landmark judgment of *Consumer Education and Research Centre v. Union OfIndia,*[14]had clearly stated that right to health and medical care is a fundamental right under article 21. The court relied heavily on the international sources of social rights such as UDHR and ICPSCR that talk about the standard of adequate living for workers and how they should be entitled to favourable and safe working conditions. The court also listed various articles under the DPSPs, like article 39, 42, 43, 46 and 48-A, that broadly outline the state's role in ensuring better working conditions for workers and also mentioned how article 21 gets its essence from these DPSPs. Furthermore, the expression 'life' under article 21 does not mean mere animal existence, but has a much wider meaning which includes a right to livelihood, better standards of living and hygienic conditions in workplace as well as importance of leisure in the lives of the workers. After relying on several past judgments, the court finally came to the conclusion:

"Therefore, it must be held that the right to health and medical care is fundamental right under Article 21 read with Articles 39(c), 41 and 43

14 A.I.R. 1995 S.C. at 636

of the Constitution and make the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the health and strength of the worker is a minimum requirement to enable a person to live with human dignity. The State, be it Union or State government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness. The health and strength of the worker is an integral facet of right to life. Denial thereof denudes the workman the finer facets of life violating Art.21."

2.1.2: South Africa-

The South African constitution has various sections which outline the contours of right to health. These sections can be found in chapter 2 of the constitution that talks about the Bill of Rights. The Bill of Rights is considered as a cornerstone for the South African democracy and enshrines the fundamental rights of its people.[1]The sections relevant to right to health include: [2]

- Section 12 (2): talks about how every individual has a right to bodily and psychological integrity. The section allows the citizens to make decisions regarding reproduction as well as regarding security and control over their own bodies. It also protects the individuals from any medical or scientific experiments without their proper consent.
- Section 24 (a): states that everyone has a right to an environment that is not harmful to their health and well-being.
- Section 27 (1) (a): talks about the universal access to health care by stating that everyone has the right to health care services which is inclusive of reproductive health care.
- Section 27 (2): talks about the right of individuals to be entitled to

1 *'South African Constitution: The Bill Of Rights* (14 May 14, 2020,4.30PM).https://www.sahistory.org.za/article/south-african-constitution-bill-rights>

2 S.AFR.CONST.,1996

reasonable legislative measures by the state for the progressive realisation of the right to health, within the available sources with the state. This right therefore also acts as a duty imposed upon the state to make informed laws and policies keeping in mind the well-being of the individuals of the country.

- Section 27 (3): states that no one can be denied emergency medical treatment.
- Section 28 (1) (c): mentions the right of children to basic nutrition, shelter, health care services and social services
- Section 35 (2) (e): talks about the right of detainees (including every sentenced person) to be entitled to conditions of detention that respect their human dignity. These conditions include exercise, adequate accommodation, nutrition, reading material and medical treatment at state expenses.

From the bare reading of the provisions relating to right to health in both the constitutions it can be clearly noted that the South African constitution is much more comprehensive when it comes to defining what all should be included in the right to health, even though the provisions mentioned in both the constitutions are quite similar in essence. The South African constitution also mentions about the reproductive health at several places which was absent in the Indian provisions. But at the same time, Indian provisions also talk about equality between men and women when it comes to accessing health care services which is not mentioned in the South African provisions explicitly.

Another thing which is noticeable is that all the provisions related to right to health are mentioned under the Bill of Rights in the South African constitution, which means that all these provisions are a fundamental right of the South African citizens and as such can be directly enforced by the court. However, the main content of right to health in the Indian constitution is mentioned under the DPSPs which are not enforceable in the court.

They are just directives that guide the organs of the government as to how each one of them should act, but they cannot directly be held against the three organs. The only way to hold the government accountable is through the fundamental rights.The Courts in India by judicial activism has given status to many of the DPSP under the fundamental rights chapter. Therefore, if the state doesn't ensure the right to health to the Indian citizens as its laid down in the DPSPs, it leads to the violation of the right to life (as it is inclusive of the right to health), who can then approach the; court for remedies and can hold the state accountable for their actions.

2.2: Jurisprudence on the right to health and the remedies available:

2.2.1: India-

There are various judgments by the Supreme Court of India that form the jurisprudence on the right to health. Through various Public Interest Litigations the apex court analysed the meaning and the contours of right to health as well as held the state and other institutions accountable for not providing the right in an effective manner to the individuals. We have already analysed the court's role in making right to health a fundamental right under article 21 of the constitution. The following cases further outline the court's role in the accessibility and availability of the right to health.

In the case of *Parmanand Katara v. Union of India*[3]the court addressed the issue of access to curative health care services and emergency medical treatment. A scooterist who was badly injured by a speeding car was taken to a hospital where he was refused emergency medical aid and instead was told to be taken to another hospital 20 kilometres away which was authorised to handle medico-legal cases. But on the way to the other hospital, the scooterist succumbed to his injuries and died. The petition was filed by a small human rights activist who prayed before the court to

3 A.I.R. 1989 S.C. 2039.

direct the Union of India to instantaneously provide medical services to injured citizens and then follow the set legal procedures and formalities in order to preserve lives. The court held that article 21 casts an obligation on the state to preserve life. Preservation of lives is of paramount importance and no legal procedure or law can intervene in the discharging of duties of a medical professional for saving lives. The court extended this order to medical professionals of not only government hospitals but also non-governmental ones and directed the state to remove any such laws or procedures that stop doctors from saving lives first.[4]

In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*[5], the court addressed the issue of adequacy and availability of medical care for individuals who are in need of medical treatment. In this case, a man fell from a train and as a result suffered from some serious head injuries. He was immediately brought to a Primary-Health Centre where he was told to go to a State hospital instead due to lack of the necessary facilities needed to treat his head injuries. The state hospital also refused him treatment due to non-availability of beds in the hospital. Thereafter, the injured person was taken to a number of other State hospitals where he was refused treatment either due to non-availability of a bed or lack of proper medical facilities to treat such a grave head injury. Finally, the injured was admitted in a private hospital where he was treated for his injuries. The question before the court was whether the non-availability of the medical facilities for the treatment of serious head injuries has resulted in a denial of the fundamental right guaranteed under article 21 of the constitution.[6] The court held that it's the primary duty of the State to ensure the adequacy and the availability of medical treatment as has as such violated the man's right to life under article 21. It directed the state to ensure that Primary Health Centres are fully equipped immediate medical assistance for serious inju-

4 *Id*

5 (1996) 3 S.C.J. 25, 29.

6 *Id*

ries and also to increase the number of specialist and regional clinic around the country. The court also suggested a centralised communication system in the State hospitals to inquire the status of available beds in the nearby radius so that the patients can be transferred there at the earliest. The court acknowledged the significant expenditure needed to ensure the above obligations, but held that the state cannot shy away from its obligations just because of financial constraints.[7]

Another landmark case is that of *Bandhua Mukti Morcha v. Union of India*[8], in which the court took a step towards recognising the "social conditions surrounding the right to health"[9]. The issue before the court was whether the workers at the stone quarries were denied of their right to health due to the inhumane working and living conditions. The court in its judgment stated that the right to live with human dignity is inclusive of the protection of the health of individuals and as such it is the duty of the state to provide the basic conditions and facilities for a proper enjoyment of health which will ensure that right to live with human dignity. Thus, the court held that the State has an obligation to provide workers with proper medical facilities, sanitation and clean drinking water in order to ensure safe and healthy working and living conditions.

Over the years, the Supreme Court has also addressed the issue of environmental pollution and its impact on the health of the individuals. Through cases like *M.C. Mehta v. Union of India*[10], the court has shut down private businesses for causing environmental pollution despite the large economic costs involved. The court has also ordered the construction of sewage treatment plants and undertaken various other environmental measures[11].

7 *Supra* note 2

8 A.I.R. 1984 S.C. 802, 808

9 *Supra* note 2

10 A.I.R. 1987 S.C. at 1086

11 *Supra* note 2

2.2.2: SouthAfrica-

The Constitutional Court is the apex court of South Africa and has over the years has given various judgments in an attempt to decide when and how the right to health can be enforced. Since 1994 there have been a number of cases that have defined several terms and concepts of the provisions of right to health.[1]

The first major decision in which the Constitutional Court analysed the socio-economic right of health enshrined in the South African constitution was that of *Soobramoney v Minister of Health (KwaZulu-Natal)*[2]. In this case, the applicant was denied a dialysis treatment even though he suffered from a chronic renal failure and was not a candidate in line for a kidney transplant. As a result, he needed kidney dialysis for the rest of his life as his condition was incurable. However, according to the policy of KwaZulu-Natal Department of Health, access to dialysis was to be limited to patients suffering from acute renal failure or chronic renal failure patients who are in line for a kidney transplant. The policy was made for those patients who could be completely cured and had the best chance of eventually living without needing dialysis. The applicant claimed that this act and policy of the Department violated his right under Section 27 (3) of the Constitution according to which he cannot be denied emergency medical aid[3]. However the court held that, the applicant wanted treatment for an ongoing chronic condition which does not fall under the label of emergency medical services. Instead, Section 27(3) is intended for those situations where,

"A person who suffers a sudden catastrophe which calls for immediate medical attention……should not be refused ambulance or other

1 Khulekani Moyo, *'Realising The Right To Health In South Africa'* in SOCIO-ECONOMIC RIGHTS — PROGRESSIVE REALISATION?.(Foundation for Human Rights 2016)

2 1998 1 SA 765 (CC)

3 Moyo ,s*upra* note 26

emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available, be given immediately to avert that harm."[4]

The court further stated that the claim of the applicant actually fell under the purview of Sections 27(1) and 27(2) which stipulate the right to health to individuals by the State "within its available resources".[5] The court however noted the budgetary constraints faced by the Health Department and that by diverting additional resources to renal dialysis and related programmes from within the health budget would put other important health programmes at a disadvantage. Moreover, the court stated that it will be slow to interfere with the decisions taken in good faith by the political organs and medical authorities who are constituted for dealing with matters like fund allocation. Thus, the court held that there was no breach of Sections 27(1) and 27(2).[6]

In the case of *Minister of Health and Other v Treatment Action Campaign*[7]the restrictions on the provision of the antiretroviral drugs for HIV-positive pregnant women, which led to thousands of deaths, were challenged. The State had come up with a policy to provide the antiretroviral drug-Nevirapine (NVP), during childbirth, but only at the State established 18 research sites (2 in every province). The policy also banned medical professionals working in state health care facilities from administering the drug unless they worked in one of the 18 research sites. This meant that pregnant women who couldn't afford private health care or who didn't have access to the research sites would not be able to access the antiretroviral treatment. The applicants claimed that this act of the government was violative of their right of access to health care guaranteed under Section 27 of the constitution as well children's right to access of health care under

4 Soobramoney v Minister of Health (KwaZulu-Natal) ,1998 1 SA 765 (CC)

5 *Id*

6 Moyo ,*supra* note 26

7 2002 (5) SA 721 (CC)

Section 28(1)(c). The court found the policy of restricting the provision of NVP to only research sites unconstitutional as it failed to address the needs of an entire section of the population. The programme had failed to address the needs of mothers by restricting their access to essential health services like reproductive services. The court noted the importance of the drug and also the negligible cost of administering it and hence ordered the State to make the drug fully available throughout the public sector. The case was seen as a step towards establishing a framework for judicial review in South Africa and enforcement of the right to health by the State. [8]

In the case of *Lee v Minister of Correctional Services*[9], the court deliberated on the right to health of detainees. The applicant was a former detainee who contracted TB while he was in prison and sued the Minister for the poor health management in the prison as a result of which he contracted the infection. The High court upheld the claim of the applicant but the Supreme Court of Appeal (SCA) ruled that while the prison authorities were negligent in the adequate management of health conditions in the prison, the Minister cannot be held liable for it. The SCA further found that the applicant had not proved that his infection could have been prevented if there was in fact a proper management of health conditions and precautionary measures undertaken in the prison. However, the Constitutional Court found this approach of the SCA of applying factual causation to the present scenario to be rigid and inflexible as it drew the conclusion that because the applicant didn't know the source of his TB, his claim will fail. The court held that by adopting this approach it is unlikely that any detainee in the situation of the applicant will be able to claim damages. Thus, the court upheld the applicant's claim by stating that it is the legal duty of the prison authorities to provide adequate health care services to all detainees as is their constitutional right. [10]

8 Moyo ,s*upra* note 26

9 2013 (2) BCLR 129 (CC)

10 Moyo ,s*upra* note 26

From reviewing the jurisprudence on right to health available in both countries, it can be noticed that the apex court in India is a bit stricter in its approach than the South African apex court in promoting and ensuring the right to health to its citizens. The Indian court, through various PILs has held the state accountable for its inaction and has also penalised it for the same by ordering the State to pay damages to the aggrieved. The court has expanded the meaning of right to life through its power of judicial review and has directed the State in ensuring and improving the accessibility and availability of health care services to the citizens of India.

The Constitutional Court of South Africa has also taken steps to ensure the right to health to its citizens, but it is still a bit hesitant in holding the State accountable. This can be seen in the *Soobramoney case* where the court says that it will be slow in intervening with the actions of the political organs and medical authority as, according to the court, they are responsible enough to deal with such matters on their own.[11] However, one thing that was found in the South African jurisprudence was the right to health for detainees. There is not much Indian jurisprudence on the same topic, but the South African one has accounted for the right to health of detainees and adequate health care services inside the prisons by the authorities. In fact, the South Africa constitution has a separate provision for it which is absent in India.

Other than this, the courts in both the countries have attempted to make social rights justiciable to their citizens through their activism, which is quite commendable.

2.3: The barriers to an efficient health care system

The health care systems in both India and South Africa are quite similar. Both countries have a public health care sector which is under resourced and under staffed and a private healthcare sector which provides high quality services at high costs. The pubic health care sector is

11 Soobramoney v Minister of Health (KwaZulu-Natal) ,1998 1 SA 765 (CC)

a three-tier system in both countries, with sub-centers or clinics as the first tier, primary health care centers as the second tier and the community health centers or hospitals with specialists as the last tier. These three health care centers are usually found in the rural areas and sub-districts/ districts. The private health care centers and hospitals are usually found in urban areas as they cater to a wealthier section of people than those living in rural areas. [12]

It was noted that in both countries the expenditure on health care was quite low and even if it was increased, the outcomes were still poor. In the financial year 2019-20, India spent only 1.29% of its GDP whereas South Africa spent nearly 8.1%.[13] Despite South Africa spending such a significant percentage on health, the public health centers remain under staffed, their quality of services poor, low staff productivity, inefficient infection control and drug stock-outs.[14] The situation in India is no better, in fact quite similar.

Moreover, in both the countries, majority of the population approach the government health care centers and only go to the private institutions when the public health centers are unable to meet their needs. While, the government health centers provide services at a very low price or free of cost, the private health centers are quite expensive and their fee can prove to be a burden on the families. The poor have to bear the cost of transportation and the follow up visits to the doctor in these big hospitals. The private sector health centers are also very much unregulated in both nations, which could be the reason for them charging such high prices and over servicing the patients for their profit motive.[15]

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12 M Chokshi et al, *Health Systems In India* 36 JOURNAL OF PERINATOLOGY 9-12 (2016)

13 Puja Mehra, *India's Economy Needs Big Dose Of Health Spending'*(May 14,2021,3.30PM), https://www.livemint.com/news/india/india-s-economy-needs-big-dose-of-health-spending-11586365603651.html

14 Moyo, s*upra* note 26

15 Abhijit Das, *Right To Health In India: Contemporary Issues And Concerns*, 12 JOURNAL OF THE NATIONAL HUMAN RIGHTS COMMISSION. (2013)

Another common problem in the working of the health care system is the poor implementation of standard and policies related to health care. In South Africa, the government has developed a myriad of national policies and legislations in accordance with international standards to comply with the constitution. But despite that, the health care system continues to remain of poor quality and inequitable to the people. The rich provinces in South Africa spend more amount on health care for each person than the poor provinces spend on health care on each person there.[16] In India as well, the poor are the most vulnerable to health rights violation and also the most ill-equipped when it comes to approaching the court for the same. Despite the courts laying down standards and regulations for ensuring a better right to health, they not always complied with or implemented at a very slow pace. Moreover, the regulatory bodies in the country are often corrupt making the implementation of the right all the more difficult.[17]

Conclusion

From the above comparative study of right to health in India and South Africa it can be concluded that even though both the countries have a difference in how they have guaranteed the right to health in their respective Constitution, their enforcement judicial decisions and the subsequent jurisprudence on the topic, the implementation of the right as well as the barriers to an effective health care system in both countries is quite similar. Both countries thorough their respective courts have outlined the content of the right to health and have as such adhered to the international standards on right to health when it comes to policy making. However, they still have a long way to go in properly putting these stipulations into action in order to ensure a much safer, exceptional and efficient health care system for their citizens.

16 Moyo, s*upra* note 26

17 *Id*

Amazon.com Nv Investment Holdings LIC…Appellant v. Future Retail Limited & Ors… Respondents

Shantanu Devendra Haldavnekar*

CIVIL APPEAL NOs. 4492-4493 OF 2021

With

CIVIL APPEAL NOs. 4494-4495 OF 2021

CIVIL APPEAL NOs. 4496-4497 OF 2021

Date of decision - 6 August 2021

Bench - Division Bench of Justice R.F. Nariman and Justice B.R. Gavai.

Author of the Judgment- Justice R.F.Nariman.

Counsels-

1. For Appellant- Mr. Subramanium, Mr. Chinoy, Mr. Ranjit Kumar, etc.
2. For Respondents- Mr. Salve, Mr. Nankani, Mr. Vishwanathan, etc.

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I. Introduction

In recent times, owing to a huge stockpile of pending cases in judicial courts and delays caused in resolving disputes, Alternative Dispute Resolution (ADR) mechanisms such as Arbitration, Mediation, Conciliation, etc. have gained importance. Several countries including India have not only endorsed but have also legally recognized settlement of disputes outside Courts of law. The Indian courts of law have time and again clarified confusions and settled the principles related to the Arbitration and Conciliation Act, 1996.

With changing dynamics of commercial disputes the Arbitration Institutes of different countries have innovated different mechanisms suited for agile dispute resolution process, the appointment of Emergency Arbitrator for getting quick interim relief is one such mechanism wherein the aggrieved party is allowed to apply for an urgent interim relief before an Emergency

Arbitrator prior to the formal constitution of the arbitration tribunal. The present dispute between two corporate giants namely Amazon.com and Future Retail Ltd. gave the honorable Supreme Court of India the opportunity to finally settle the position of Indian law with regard to the enforceability of the arbitral award passed by an Emergency Arbitrator.

II. Facts

1. The Appellant Amazon.com NV Investment Holdings LLC ["Amazon"] initiated proceedings before the High Court of Delhi to enforce the award passed by Emergency Arbitrator dated 25th October, 2020.
2. The Arbitration proceedings were initiated by Amazon against respondents no. 1 to 13 ["Biyani Group"] two prime respondents *inter alia* are respondent no.1 Future Retail Limited ["FRL"] and respondent no.2 Future Coupons Pvt. Ltd. ["FCPL"] (FCPL holds 9.82% equity in FRL)

3. The seat of arbitration proceedings was New Delhi and parties agreed to apply Singapore International Arbitration Centre Rules ["SIAC Rules"]
4. Biyani Group entered into a Shareholders Agreement. ["FRL SHA"] By virtue of this agreement FCPL secured special and material rights with regard to FRL especially with regard to FRL's retail assets.
5. Subsequently, Amazon, FCPL, and members of Biyani Group entered into another Shareholders Agreement. ["FCPL SHA"] By virtue of this agreement amazon secured rights granted to FCPL under FRL SHA. In consideration of this, Amazon invested a sum of □ 1,431 Crore in FCPL by way of the Share Subscription Agreement dated 22nd August 2019.
6. The aforementioned agreements ensured that FRL could not transfer its retail assets without Amazon's Consent. Further, FRL was also prohibited from transferring its retail assets to "Restricted Persons" one of them was Mukesh Dhirubhai Ambani Group ["Reliance Industries"]
7. On 29th August 2020 respondents no. 1 to 13 entered into a transaction with Reliance Industries which sought to amalgamate FRL with Reliance Industries.
8. Aggrieved by this, Amazon initiated arbitration proceedings seeking emergency interim relief under SIAC Rules. The learned arbitrator stayed Biyani Group from taking any step in furtherance of impugned transaction with Reliance Industries.
9. By describing the Emergency Arbitrator as *coram non judice* and award passed by him as a nullity, Biyani Group went ahead with the impugned transaction, without challenging Emergency Arbitrator's award under section 37 of the Arbitration and Conciliation Act, 1996 ["Arbitration Act"]
10. Amazon filed an application under section 17(2) of the Arbitration Act. While disposing of this application learned single judge of the

High Court of Delhi restrained Biyani Group from carrying forward the impugned transaction. An appeal against this was filed by FRL and a Division Bench of the High Court of Delhi stayed the order and judgment passed by the learned single judge.

11. Against this order of Division Bench, by way of Special Leave Petitions Amazon approached the Supreme Court of India. Supreme Court stayed the proceedings before the learned Single Judge and Division Bench of the High Court of Delhi and listed the matter for final disposal.

III. Issues

1. Whether an award delivered by an Emergency Arbitrator under SIAC Rules can be said to be an order under section 17(1) of the Arbitration Act?
2. Whether an order passed under Section 17(2) of the Arbitration Act in enforcement of the award of an Emergency Arbitrator by a learned Single Judge of the High Court is appealable?

IV. Principal Legal Provisions Referred

1. Arbitration and Conciliation Act,1996- Sections- 17(1), 17(2), 37, 9(1), 2, 34, 5, 85, 49, 15, 36, 42, 50.
2. Code of Civil Procedure,1908 - Sections- 9-A,etc.
3. Indian Contract Act,1872 - Section- 28
4. Commercial Courts Act,2015 - Section- 13(1)

V. Arguments in Brief

By Appellant,

1. Party autonomy is the *grundnorm* (Basic norm) of arbitration in view of sections 2 and 19(2) of the Arbitration Act.

2. An appeal under section 37(2)(b) of the Arbitration Act is restricted to granting or refusing to grant an interim measure under section 17 and therefore not applicable to enforcement orders of the award of Emergency Arbitrator.
3. Arbitration Act is a complete Code in itself an appeal beyond Section 37 of the said Act is incompetent. The Non-obstante clause to section 37 added by the 2019 amendment strengthens this position.
4. Enforcement orders of the award of Emergency Arbitrator are made under Arbitration Act and not under Code of Civil Procedure therefore, appeal filed under Order XLIII, Rule 1(r) of the said Code is not maintainable.
5. The 2015 amendment to Arbitration Act envisages decongestion of courts, an Emergency Arbitrator's award under institutional rules to which both the parties have mutually agreed furthers this very objective.

By Respondents,

1. Parliament did not adopt the suggestion of the 246th Law Commission to include Emergency Arbitrator under section 2(1)(d) of the Arbitration Act. This indicates that orders of Emergency Arbitrator would be outside the purview of section 17(1) of the Arbitration Act.
2. As per the scheme of the Arbitration Act arbitral tribunal can mean only a tribunal that is constituted between the parties. Emergency Arbitrator is outside its purview.
3. Under the FCPL SHA and FRL SHA provisions relating to Emergency Arbitrator's award as per SIAC Rules are subject to the Arbitration Act and therefore the aforesaid provisions of FCPL SHA and FRL SHA would not apply since the Arbitration Act did not provide for the Emergency Arbitrator.
4. Under SIAC Rules Emergency Arbitrator is appointed before the arbitral tribunal is constituted and the language of section 17(1)

makes it clear that a party can apply to arbitral tribunal only during arbitral proceedings and not before the arbitral tribunal is constituted.

5. Since orders made in enforcement proceedings are under Code of Civil Procedure and not under Arbitration Act, therefore appeals can be filed from such orders under the said Code.
6. The language of section 36(1) and section 17(2) makes it clear that the award shall be enforced in accordance with the Code of Civil procedure. An award is a decree of a civil court for all purposes including appeals.
7. The judgment relied upon by the appellant in *Kakde Construction*[1] and *Jet Airways*[2] is applied only to section 36 and not to section 17 of the Arbitration Act, which is the subject matter of the present case.

VI. Judgment (*Ratio Decidendi*)

For Issue-1,

1. In the present case as per SIAC Rules (to which parties have mutually agreed), the arbitral proceedings have commenced from the date of receipt of a complete notice of arbitration by the Registrar of the SIAC. This indicates that arbitral proceedings under SIAC Rules commence much before the constitution of an arbitral tribunal. Therefore, Section 17(1) read with section 21 of the Arbitration Act along with Rule 3.3 of SIAC Rules coupled with no interdict against Emergency Arbitrator in the Arbitration Act would cover Emergency Arbitrator's order under section 17(1) of the Arbitration Act.
2. The judgment in Centrotrade[3] makes it clear thatparties have not bypassed any mandatory provision of the Arbitration Act by agreeing

1 Kakade Construction Co. Ltd. v. Vistra *ITCL*, 2019 SCC Online Bom 1521 : (2019) 6 Bom CR 805

2 Jet Airways (India) Ltd. v. Subrata Roy Sahara, 2011 SCC Online Bom 1379 : 2012 (2) AIR Bom 855

3 Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., (2017) 2 SCC 228

to the SIAC Rules. Arbitration Act conspicuously endorses party autonomy in choosing to be governed by institutional rules.

3. As per Arbitration Act Section 2(1)(d) only applies *"unless the context otherwise requires"*. Section 9(3) and section 17 form part of one scheme therefore, instead of section 2(1)(d), "arbitral tribunal" as spoken of in section 9(3) would apply in the context of section 17.

4. As per the ratio of *Avitel*[4], when the recommendation of a Law Commission report is not followed by the Parliament it can not be concluded that what has been recommended by the Law Commission can not form part of the statute when properly construed.

5. A party is estopped from saying that the award of Emergency Arbitrator is a nullity when it first expressly agreed as well as participated in an Emergency Arbitrator's proceedings.

Thus, the honourable court decided the first issue as follows,

> "We, therefore, answer the first question by declaring that full party autonomy is given by the Arbitration Act to have a dispute decided in accordance with institutional rules which can include Emergency Arbitrators delivering interim orders, described as "awards". Such orders are an important step in aid of decongesting the civil courts and affording expeditious interim relief to the parties. Such orders are referable to and made under section 17(1) of the Arbitration Act." [5]

For Issue-2,

1. The 2015 Amendment to Arbitration Act has provided the same powers to an arbitral tribunal as are given to a court. It would be an anomaly to hold that if an interim order was passed by the tribunal

4 Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713

5 Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors, LNIND 2021 SC 220

and then enforced by the court by referring to Order XXXIX Rule 2-A of the Code of Civil Procedure,1908, such order would not be referable to section 17 of the Arbitration Act.

2. The ratio of *Paramjeet Singh*[6], *Rajasthan State*[7], *East End*[8], *Union of India*[9], etc. makes it indubitably clear that the legal fiction created under section 17(2) for enforcement of interim orders is created only for the limited purpose of execution. This legal fiction can not be extended to include appeals from such orders.

3. On matters pertaining to arbitration, the Arbitration Act is a self-contained code. The parameters of section 37 of the Arbitration Act alone have to be looked at while determining the maintainability of appeals. Appeals under Order XLIII Rule 1 of the Code of Civil Procedure are not maintainable from the orders made under the Arbitration Act. This position is explicit from the ratio laid down in *Sumitomo Corpn*[10]., *BGS*[11], *Kandla Export*[12], etc.

4. The non-obstante clause contained in section 5, the constricted right of first appeal and interdiction of the second appeal under section 37 of the Arbitration Act clearly explain the position with regards to appeals under the Arbitration Act.

5. Even under the 2015 amendment to the Arbitration Act, no change was made in section 37(2) to bring it in line with order XLIII, Rule1 (r) of the aforementioned code the said section restricted appeals

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6 Paramjeet Singh Patheja v. ICDS Ltd., (2006) 13 SCC 322

7 Rajasthan State Industrial Development & Investment Corporation v. Diamond & Gem Development Corporation Ltd., (2013) 5 SCC 470

8 East End Dwellings Co. Ltd. v. Finsbury Borough Council, 1952 AC 109 : (1951) 2 All ER 587 (HL)

9 Union of India v. Vedanta Ltd., (2020) 10 SCC 1

10 Sumitomo Corpn. v. CDC Financial Services (Mauritius) Ltd., (2008) 4 SCC 91

11 BGS SGS SOMA JV v. NHPC, (2020) 4 SCC 234

12 Kandla Export Corporation v. OCI Corporation, (2018) 14 SCC 715

only from an order granting or refusing to grant any interim measure under section 17. The language of section 17(2) shows the legislative understanding that orders that are passed in an appeal under section 37 are relatable only to section 17(1). Therefore, it is clear that enforcement proceedings are not covered by the appeal provisions.

Thus, the honourable court decided the second issue as follows,

"The second question posed is thus answered declaring that no appeal lies under section 37 of the Arbitration Act against an order of enforcement of an Emergency Arbitrator's order made under section 17(2) of the Act."[13]

As a result, the honourable court set aside the impugned judgments of the Division Bench of Delhi High Court, dated 8th February, 2021 and 22nd March 2021.

VII] Analysis

1. The present judgment finally settles the position of Indian arbitration law regarding the validity of Emergency Arbitrator's award seated in India. However, it is important to note that Section 17 which is contained in Part I of the Arbitration Act with some exceptions applies only to arbitrations seated in India. The necessary implication of this would be that present judgment may not benefit much to Emergency Arbitrator's award seated outside India.[14]
2. The natural outcome of treating Emergency Arbitrator at par with Arbitral Tribunal is that now awards made by Emergency Arbitrators would also come under the purview of section 37 of the Arbitration Act as far as filing appeals from such awards is concerned.

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13 Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors, LNIND 2021 SC 220

14 Promod Nair, *Enforceability Of Emergency Arbitrator Decisions in India - The Decision in Amazon v. Future Retail,* , (07 Aug, 2021, 11:06 AM),https://www.barandbench.com/columns/the-decision-in-amazon-future-retail

VIII. Conclusion

The present judgment paves the way for parties to get expeditious interim relief from the Emergency Arbitrator without much of court interference. This would certainly help to buttress India's pro-arbitration stance. With the help of a catena of precedents, the present judgment categorically highlights 'Party Autonomy' as a vital component of arbitration proceedings. This position would definitely bolster confidence in corporate giants and growing businesses to engage unhesitatingly in commercial relationships without worrying much about smooth dispute resolution process.

The Indian Arbitration Act was passed in 1996 at that time legislature could not have envisaged the concept of Emergency Arbitrator. However, now several arbitration institutions have incorporated Emergency Arbitrators under the provisions of their respective institutional rules and in view of the present judgment, the parliament now should endeavor to expressly include Emergency Arbitrators under the provisions of Arbitration Act. This will facilitate India's position as a business-friendly state and will also bring Indian Arbitration Law at par with global arbitration practices. Apart from jurisprudential impact with regard to Indian Arbitration Law, the present judgment also has a significant bearing on the ongoing legal battle between two corporate giants striving to reign India's $ 1,200 billion retail industry.[15]

15 (December 30,2021,3.30PM),https://www.statista.com/statistics/935872/india-retail-market-size/

State of Goa & Anr. v. Fouziya Imitiaz Shaikh & Anr. 2021 SCC OnLine SC 211

Dhriti Laddha*& Tanishq Khandelwal**

Introduction

The election process of India is one of its kind. It's the purity of the process which makes it so majestic in nature. The brassbound task of maintaining this purity intricate multi-dimensional approach that involves eliminating clout of bad money and power in politics, disposal of elections matters, maintaining the supremacy of the election commission and making sure to remove any biased leverage of executive and legislature from the election matrix. Yet from time to time, the electoral institutions face these hurdles which are made sure to be properly eradicated either by the electoral institutions or the judiciary.

The State of Goa & Anr. v. Fouziya Imitiaz Shaikh & Anr.[1], challenges the judgment passed by the Division Bench of Bombay High Court at Goa Bench wherein the order related to the delimitation of constituencies, reservation of seats and supremacy of State Election Commission was challenged. This commentary is based upon the judgment given by the Apex Court.

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1 2021 SCC OnLine SC 211.

FACTS

The present Civil Special Leave Petition No. 3937/2021 was filed against the judgment dt. March 01, 2021, passed by Bombay High Court at Goa Bench (hereinafter referred to as 'High Court'). The issues prompted out in the petition raises the important question on the provisions of Part IX-A of the Indian Constitution.

Goa State Election Commission (hereinafter referred to as 'SEC') which is constituted under Section 237 of the Goa Panchayat Raj Act, 1994, exercises its power of superintendence and control of the conduct of all elections to the council, decided to conduct municipal elections in 11 municipalities of Goa in consequence of their expiring term on November 04, 2020.

On November 03, 2020, the Governor of Goa appointed the Law Secretary of the Government of Goa, as State Election Commissioner in addition to his duties as Law Secretary.

On November 05, 2020, Municipal Administrators were appointed for 11 municipal councils where elections were to be conducted.

The SEC exercised its power in consideration of the outraging Covid-19 pandemic in the entire State of Goa and taking into account the geographical positions of the 11 municipal councils, postponed the general elections by a further period of three months by issuing a notification on January 14, 2021.

Thereafter on February 04, 2021, the State of Goa amended Section 10(1) the Goa Municipalities Act, 1968 (hereinafter referred to as 'Act'). This allowed the Government to issue a notification for reservation of wards at least seven days before the notification of dates for the election. Subsequently, the Director of Municipal Administration issued a notification for reservations in the 11 municipalities.

Against the order dt. February 04, 2021, nine different writ petitions were filed before the High Court.

Judgement of the Bombay High Court

In its judgment, the High Court[2] concluded that:

The Director acted in breach of the statutory provisions of the constitution by failing to provide reservation of 'not less than one-third' of the total number of seats, in favor of women. The expression under Article 243T[3] affirms that there can be no violation of both constitutional and statutory mandate if reservation exceeds one-third but there will be a violation if the reservation is less than one-third. In addition to this, the same was held for the statutory mandate for reservation of SCs/STs/OBCs. Hence, the impugned order dt. February 04, 2021, was quashed and set aside

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2 Romaldo Fernandes v. State of Goa,Through its Chief Secretary(2021) 2 Bom CR 820.

3 243T. Reservation of seats
(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality
(2) Not less than one third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes
(3) Not less than one third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality
(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide
(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in article 334
(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens

The High Court was also discontented with the actions of the SEC which was an independent authority and persuaded that it was the duty of the SEC to act promptly and rectify any illegality in the impugned order by issuing appropriate directions to the Director. SEC has not only directory power but also superintendence over the conduct of elections and on top of it, the failure of the SEC to execute the constitutional mandates was contemplated to be highly detrimental to the democratic concept of this country.

Issues Framed

I. Whether the election matters with a constitutional bar under Article 243ZG[4] are maintainable under Article 226 through a writ petition?

II. Whether the order dt. February 04, 2021, is illegal and ultra vires of Article 243T read with Section 9 and 10 of the Goa Municipalities Act, 1968?

III. Whether the officer of state government or central government can be appointed as commissioner to the SEC?

The Supreme Court Analysis

The Hon'ble Supreme Court (hereinafter referred as 'the Court') cited a plethora of judgments to hold out whether Articles 243T, 243ZA, 243ZG of the Constitution of India and Sections 9, 10 and 22 of theAct applies to the present facts of the case or not?

The Court held that the constitutional bar under the said Article does not apply to the facts of this case and applied the findings of *Anugrah Narain*

4 Bar to interference by courts in electoral matters
Notwithstanding anything in this Constitution,— (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243ZA shall not be called in question in any court; (b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.]

Singh v. the State of U.P.[5] as the Goa Act also does not contain any provision corresponding to Section 10(2) or 10(4) of the Delimitation Commission Act, 1962, against what was accentuated in the case of *Meghraj Kothari v. Delimitation Commission*[6] providing that the orders of the Delimitation Commission have the force of law and cannot be called in question in any court of law.

The order dt. February 04, 2021, by the Director of Municipal Administration, Goa, the Court upheld the decision of the High Court i.e., it is illegal and ultra vires the provisions of Article 243T of the Constitution read with Section 9 and 10 of the Act. The Court into the bargain vindicated the decision of the High Court that the fraction has to be worked upwards to be consistent with the provisions of Article 243T which provides for reservation of women shall 'not be less than' one-third and the same shall go for the compliance of reservation mandate for OBCs/SCs/STs under Section 9 as well as for the principle of rotation. The Court rationalized that doing what the Constitution strictly forbids cannot be held as a reasonable comprehension and any order based on such comprehension is ultimately vulnerable and will have to be quashed and set aside.

The court accentuated the imperious appointment of Law Secretary to the State of Goa as the State Election Commissioner, and thereupon, rounded that the election process was faulted from the beginning itself as the SEC had no longer the independent status quo as mandated under Article 243K. Thereby, the State Government was directed to rectify this position by appointing an independent person to the SEC at the earliest.

Hence, the SLP Civil Appeal was allowed and order dt. February 04, 2021, was quashed and set aside. Lastly, the SEC was directed to issue a fresh schedule for the election.

5 (1996) 6 SCC 303.

6 (1967) 1 SCR 400.

Critical Analysis

1. Bar Contained in Article 243ZG

a) Article 243ZG(a)-*the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243 ZA shall not be called in question in any court.*[7]

The Court distinguished the case of *Meghraj Kothari*[8]from the case of *Anugrah Narain Singh*[9]and reckoned with the findings of the judgement in the latter's case. In *Meghraj's*[10], it was held once the orders made under Section 8 & 9 of the Delimitation Commission Act, 1962 are published in the Gazette of India and Official Gazettes of the States concerned under Section 10(1), these matters could not be oppugned in any court of law by the terms of Section 10(2) and the bar enforced under Article 329(a). In *Anugrah's*[11], the U.P. Nagar Maha Palika Adhiniyam, 1959 affirms delimitation orders which states; the draft order shall become final only after it has been published in the Official Gazette for objections for a period not less than seven days and has been amended, altered or modified accordingly, as required.[12] But it does not stipulate that such order upon reaching finality will have the force of law and shall not be called in question in any court of law. Therefore, it is not beyond the challenge by virtue of Article 243ZG.

The same analogy has been correctly used in the present case as the Goa Municipalities Act does not contain any provision corresponding to

7 INDIA CONST. art. 243ZG, cl. (a), *inserted by* the Constitution (Seventy-Fourth Amendment) Act 1992.

8 (1967) 1 SCR 400

9 (1996) 6 SCC 303

10 (1967) 1 SCR 400

11 (1996) 6 SCC 303

12 U.P. Nagar Maha Palika Adhiniyam, 1959,§32, No. 2, Acts of Utttar Pradesh State Legislature, 1949(India) .

Section 10(2) of the Delimitation Commission Act. Hence, the bar carried in terms of Article 243ZG(a) does not apply to this case as the SEC is the sole in charge of the elections of municipalities[13] under Part IX-A of the Constitution and the Delimitation Act will not be applicable upon the elections of municipalities as the Goa Municipality Act is a self-contained code in itself and comes under the purview of the State Government in the Entry 5 of the State List[14].

Thereafter, the court meticulously rejected the contention raised by the appellants that these proceedings comprise 'calling in question an election' and hence not being maintainable under the bar expressed in Article 243ZG; relying on *Election Commission of India v. Ashok Kumar*[15], the court cited, *"*anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election*."* Therefore, the bar imposed under this Article is not applicable to the facts of this case.

b) Article 243ZG(b)-*no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.*[16]

The Court in case of *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*[17], held that the word 'election' used in the Article 329 (b) is exhaustive to include the complete election process that initiates with the issue of notification and concludes with the declaration of election result of a candidate and challenging its validity under Article 226 is barred.

Nevertheless, in *Mohinder Singh Gill v. Chief Election Commissioner*[18], this Court made a distinction between the challenges under Article 226

13 Kishansing Tomar v. Municipal Corpn., Ahmedabad, (2006) 8 SCC 352.

14 INDIAN CONSTI., art. 246, Seventh Schedule, List II, Entry 5.

15 (2000) 8 SCC 216.

16 INDIAN CONSTI., art. 243ZG, cl. (b), *inserted by* the Constitution (Seventy-Fourth Amendment) Act 1992 .

17 1952 SCR 218.

18 (1978) 1 SCC 405.

while the election process is in continuation, which intervenes with the progress of election as against approaching a writ court to subserve the completion and to act in furtherance of the election.

Contemplating upon the findings of *Ashok Kumar's case*,[19] it would be delusive to admit ''a single step taken in furtherance of election'' is equivalent to election. Consequently, if the Commissioner is averting an election instead of advancing it, the Court's order will accelerate the flow and not cease the process. It is rational to hold that the law inflicted by Article 324 cannot be defied by the Commissioner but his functions, however, are subjected to the ethos of fairness rules and he cannot act arbitrarily.

The words 'superintendence, direction and control' and 'conduct of all elections' has to be construed in the broadest terms[20]. Article 243ZA is *pari materi*a to Article 324 of the Constitution. The Act does not contain any provisions or policy relating to the delimitation of constituencies and the rotation of the reserved seats; instead of acting prudently, the Commissioner acted arbitrarily with the application of reservation of seats and henceforth, with the principle of rotation of reserved seats. There was indeed malice in law,[21] so far, the SEC is concerned, the motive was clear while pertaining to the facts that the arbitrary and irrational acts were made to forestall the proceedings of the High Court from commencing the hearing of the writ petitions only on the ground that election process is imminent.

Subject to the aforementioned findings, the orders issued by the SEC are open to judicial review on the established criteria which ensures judicial review of the decisions made in matters with mala fide or arbitrary exercise of power or breach of law by the statutory bodies[22] and it will be valid to knock the doors of the writ court if the election process will be smoothened and advanced further and not hampered and delayed.

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19 (2000) 8 SCC 216.

20 Re : Special Reference No. 1 of 2002 ,(2002) 8 SCC 237.

21 Kalabharati Advertising v. Hemant Vimalnath Narichania, (2010) 9 SCC 437.

22 Dravida Munnetra Kazhagam v. State of T.N., (2020) 6 SCC 548.

2. Reservation mandated under 243T

a) 243T- Reservation of seats-

(2) *Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.*

(3) *Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.*[23]

b) Section 9-*in every Council, no less than (1/3) seats shall be reserved for women;*[24]

The apex court in *Ganesh Sukhdev Gurule v. Tahsildar Sinnar & Ors.*[25], held:

"Vote of a person cannot be expressed in a fraction. When the computation of a majority comes with a fraction of a vote that fraction has to be treated as one vote because votes cannot be expressed in a fraction.*"*

In *Ashok Maniklal Harkut v. The Collector of Amravati and Anr.*[26], it was held that *"*it is clear that whenever the Legislature wanted that the fraction should be ignored it has specifically provided for it.*"* In Maharashtra Municipalities Act, 1965, proviso to Section 9(2)(c) provides for rounding up of a fraction. It enunciates that *"*a fraction of such proportion if less than one-half shall be ignored and if one-half or more shall be reckoned as one in determining the number of seats."

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23 INDIAN CONSTI., art. 243T, cl. (2) & (3), *inserted by* the Constitution (Seventy-Fourth Amendment) Act 1992.

24 Goa Municipalities Act, 1968, § 9, No. 16, Acts of Goa State Legislature, 1968 (India).

25 (2019) 3 SCC 211.

26 1988 Mh.L.J.378.

Thereby, the expressions used in the constitution along with the Act are 'shall' and 'not less than' which leaves no room for the dilemma, that even a fraction cannot be ignored and if so, the reservation will be less than one-third and in doing so, it will be in contravention of the constitutional mandate. The normal principle of rounding off cannot be applied here. Quashing and setting aside the order of February 04, 2021, was just and fair because the director acted in infringement of the Constitution as well as the statutory provisions of the Act.

3) Independent Status and Power of SEC under Article 243K r/w Article 243ZA

The powers and the independent status quo of SEC under Article 243ZA & Article 243K is *pari materia*to the power of the Election Commission under Article 324. The verbiages, "superintendence, direction and control"&"code of conduct*"* suggest that SEC & Election Commission are on an equal pedestal in terms of the power to conduct elections, however, these powers are subjected to the law made by Parliament or the State Legislatures, but, these powers do not encroach upon the administered powers of the said Election Commissions[27].

The SEC is an autonomous body not subservient to the State Government. It's the duty of SEC to carry out its obligations in line with the Constitution and relevant laws. In addition, the State Election Commissioner is a pivotal constitutional functionary who is responsible for overseeing the whole election process in the State for panchayats and municipalities, hence, the commissioner must be independent of the State Government.

SEC has the untrammeled power to make the State Government abide by its directions in the same manner in which the State Government follows the directions of the Election Commission of India during the elections for the Parliament and State Legislatures for municipal elections. Moreover, it is the duty of the State Government to commit their resources for full assistance and cooperation to the SEC to ensure that free and fair elections

27 *Supra* note 13.

are conducted; if the SEC while discharging its duty feels anywhere the State Government is obliviating or not providing the cooperation to dispense its duty, then,

> *"*It will be open to the State Election Commission to approach the High Courts, in the first instance, and thereafter the Supreme Court for a writ of mandamus or such other appropriate writ directing the State Government concerned to provide all necessary cooperation and assistance to the State Election Commission to enable the latter to fulfil the constitutional mandate*."*[28]

Further, SEC, at any stage of the election process, found election manipulative in any manner, then it's in power to cancel the election[29].

Thus, the powers bestowed by the Indian Constitution to the SEC is not to carry out only the constitutional mandate or obligations but also to fill in a void where there is no rule of law for governing a particular situation during the electoral process.

Conclusion

This case relates to the encroachment of powers by the executive branch upon the authority of an autonomous and independent constitutional functionary. All the respective constitutional mandates were arbitrarily infringed with ease by the State Government barely by appointing its own executive for a paramount post rather than an independent individual who would have safeguarded what is solely in the domain of SEC. This is a landmark judgment that will be evident of the fair interpretation of the Constitutional as well as statutory provisions related to the elections of local government. The judges have rightly criticized the appellants that when such a vide power of 'as it deems fit' is vested in anybody, in absence of any law, provision or policy, it becomes more responsible to not act erratically instead, supplemented prudent and judicious actions are anticipated.

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28 *Supra* note 13.

29 Vipul Jain and Ors. v. State of Uttarakhand, 2019 SCC OnLine Utt 1024.

HDFC Bank Limited v. Rohan Dyes and Intermediates Ltd.
Company Petition No. 320 of 2013
Pronounced on : 19 July, 2016.

Divyanshu Saxena*

Introduction

In the Law of contracts, the principles that guide the dynamics of a contractual relationship are highlighted to govern the agreement reached upon by either of the parties involved. The lawful consideration agreed upon becomes the legal basis for the furtherance of a contract. On the contrary, there have been various cases where it has been difficult for the parties to reach a definite agreement, which gives rise to the concept of contingent contracts. Under section- 31 of the Indian Contracts Act, 1872, a "contingent contract" is defined as,

"a contract to do or not to do something, if some event, collateral to such contract, does or does not happen."[1]

The element of contingency gives an uncertain touch to the promise signified under the contract. Moreover, the Companies Act, 1956 underlines the regulations over the procedural functioning and formation of the various

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1 Indian Contract Act 1872, S 31

companies across the country. The case that is being considered in this case comment, involves the derivative transactions between a bank and a company that deals with exports in the foreign exchange market. Fundamentally, a derivative transaction is a security with a price that is dependent upon and derived from one or more underlying assets. The fluctuations in the underlying assets are caused by price movements and speculative conjectures can be drawn by observing the market trends and foreign exchange dynamics. In a contingent claim, one of the parties has the legal right, instead of an obligation, to buy or sell an underlying asset from the other party. The purchasing price is fixed in the terms of the contract and is a compensatory payoff for the loss incurred by the aggrieved party throughout the business. These concepts would be elaborated further in the arguments laid down by the court but, a peripheral understanding is established through these elementary definitions.

Case Background

The petition is filed by the petitioner HDFC Bank Ltd. against the respondent company, on grounds of the outstanding debts worth approximately Rs. 8.74 crores which comprise Rs. 8.19 crores and simple interest of Rs. 54.96 Lacs. The petitioner Bank is an authorized dealer in foreign exchange under Category- 1 of the Reserve Bank of India (RBI). The company petition was originally dismissed by an order dated 7th September 2015 by the Bombay High Court. However, an appeal was filed by the petitioners on 4th February 2016 in one of the division benches of the court and the case was brought up for a fresh hearing. The respondent company, Rohan Dyes and Intermediates Limited, is involved in large foreign exchange transactions arising due to the substantial amount of imports and exports activities since 2007. This led to the company being exposed to the fluctuation risks of the foreign currency markets. To mitigate these risks, the company approached the Centurion Bank of Punjab (CBOP) to enter into derivative transactions. On 14th November 2007, the respondent company,to circumvent the interest and foreign exchange exposure ,entered

into interest and foreign currency swaps with the bank. The company authorized its directors Radheshayam Tarachand Agarwal and Rohan Agarwal, jointly and severally to enter into and execute all the relevant documentation regarding the aforementioned transactions. Subsequently, on 15th November 2007, following the RBI guidelines, the respondent company signed an ISDA agreement with CBOP, which would be supplemental to the derivative transactions. Along with the ISDA agreement, the company also issued a Risk Disclosure Statement in acknowledgment and acceptance of the foreign exchange risks.

However, on 23rd May 2008, CBOP merged with the petitioner bank, which led to the petitioner bank taking over all the rights and duties under a scheme of amalgamation duly sanctioned by the RBI. After the merger, on 26th June 2008, the petitioner bank entered into a deal confirmation with the respondent company, in which an agreement was reached upon for USD/INR options transaction. The expiry/maturity of the series of options was spread over a period extending between 27th June 2012 and 29th May 2013. The strike price agreed to was Rs.43.15 per dollar, and upon the condition that if the USD was traded below Rs.43.15, the company would sell 500,000$ to the petitioner bank, and if the USD was traded above Rs.43.15, the company would sell 800,000$ to the bank.

It was also decided that if the negative Market to Market (MTM) exceeded Rs.5 crores at any point in time, the bank would be allowed to make a margin call, which would lead to the dispatching of a post-dated cheque of Rs.5 crores to the bank. The dispute arose when the negative MTM touched Rs. 10 crores, and the cheque relevant to the margin call dated 4 December 2012_was dishonoured due to insufficient funds in the respondent company's bank account. The constant letters dated between 15th July 2009 and 14th March 2012 were sent by the petitioners against the deal confirmation but, were left unanswered by the respondent company. Subsequently, a petition was filed by HDFC Bank Ltd. on 7th September 2015.

Case Summary

The petition briefly describes the controversy as the deliberate unresponsiveness of the respondent company in fulfilling the debts arising out of the deal confirmation dated 8 November 2007.According to the ISDA agreement, the company by a letter dated 15th July 2009 called upon the respondent company to comply with the margin call. It should be notedat that point of time, the negative MTM was approximately near Rs. 4.03 crores and the respondents through a response letter expressed their intent to continue with the transaction and underlined that the company was hopeful that the Rupee would be appreciated in the international market in the short term as well as the long term. However, on the expiry of the first option under the deal which took place on 27 June 2012, the respondent company was obliged to sell 800,000 $ to the petitioner bank. However, an e-mail sent by them on 28th June 2012 highlighted that the deal confirmation signed was to square off all the previously pending transactions and the option being exercised by the HDFC Bank Ltd. is not legally enforceable in a court of law. Hence, the petitioner was forced to acquire 800,000$ from the open market and crystallized the said options transaction by incurring a loss of Rs. 1, 07, 68, 000/-. On 18th January 2013, the petitioner's advocate called upon the respondents to pay the outstanding debts as on 31st December 2012 within 21 days of receiving the notice, failing which the petitioner would be constrained to initiate a legal proceeding for the process of winding up the transaction under the section 433 and section 434 of the Companies Act, 1956. Also, a complaint was filed under section 138 of the Negotiable Instruments Act, 1881 on the dishonouring of the cheque worth Rs. 5 crores in the Metropolitan Magistrate Court, Ahmedabad being case no. 163 of 2012.

On the other hand, the respondent company's advocate, Mr.Cama, argued that under the derivative transaction agreed upon by both the parties, there is no physical delivery required and the transaction would amount to a wagering contract, hit by section- 30 of the Indian contract act, 1872. He further argued that the documents concerned with the deal confirmation were not signed by someone authorized by the respondent company and hence, are not binding over them. The petitioners under section- 6 (1) of

the Banking Regulation Act, 1949 proposed that a claim that arises during business activity would come within the definition of the word "debt" used in section- 2 (g).

Case Analysis

This case highlighted the ambit of section- 30 of the Indian Contract Act, 1872 and how it operates in the foreign exchange market. The issue of whether the aforementioned transaction is wagering or not is comprehensively discussed in the case of *Rajshree Sugars and Chemicals Limited v. Axis Bank Ltd*.[2], where the Madras High Court held that,

"18A.Contracts in derivative: Notwithstanding anything contained in any other law for the time being in force, contracts in derivatives shall be legal and valid if such contracts are –

(a) traded on a recognized stock exchange;

(b) settled on the clearinghouse of the recognized stock exchange, by the rules and bye-laws of such stock exchange."

The precedent laid down in this above case quite clearly renders the arguments of the respondent company as completely non-applicable in the context of the present case. Furthermore, a detailed argumentation over the contracts dealing with the stock market speculations is present in the English cases, *City Index Ltd. v. Leslie*[3] *and Universal Stock Exchange v. Strachan*[4].

> *"Agreements between those who are only ostensible buyers and sellers of stock and shares where the common interest of the parties is to pay or receive the differences between their prices on one day and their prices on another day. The court declared that contracts akin to cash-settled derivatives were 'contracts for differences."*[5]

2 AIR 2011 MADRAS 144

3 [1991] EWCA Civ J0314-9

4 (1904) 2KB 658

5 HALSBURY'S LAWS OF ENGLAND ,para 22

Section- 30 of the Indian Contract Act is deeply inspired by the English common law and the Gaming Act, 1845. However, there is still perplexing ambiguity in the provisions of this section by the public policy. In the case of *Union of India v. Raman Iron Foundry*,[6]the Chief Justice mentioned that,

> "In my opinion, it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party."

Hence, the Supreme Court inter alia held that when a contract is agreed upon to discharge unliquidated damages do not give rise to debt however, the liability is adjudicated and damages are assessed by a decree of court or other adjudicating authority. The petitioner in the case of *HDFC Bank Ltd. vs. Rohan Dyes and Intermediates Ltd*.[7], on lines of the above judgment, filed a notice after the expiration of all the available options under the contract, for a net settlement under the provision of the winding-up process dated 18th January 2013. The argument of the deal confirmation not being signed by an authorized signatory of the respondent company is completely negated by the court and, it is established that,

> "It is one thing to contend that the transaction itself was not entered into by an authorized person and it is wholly another to say that the correspondence exchanged concerning that very transaction, was not signed by a person authorized to do so."[8]

Hence, the contentions of the respondent throughout the case were wholly misplaced and were quite evidently with the purview of escaping the liability of paying the outstanding debts. The judgment reflects the

6 AIR1974 SC 1265

7 Company Petition no. 320 of 2013

8 *Id*

inability of the defence to prove that there is a Bonafede dispute over the discharge of the relevant contract and the claims of the agreement being void ab-initio are rendered baseless in the context of this case. The strong claims filed in the petition are upheld by the Bombay high court and through the order of the court, the respondents are directed to fulfil their debts.

Conclusion

The case primarily was based upon the discussion of whether or not derivative transactions would be considered under the umbrella of the principles laid under section- 30 of the Indian Contract Act. It also traces back the evolution of the Indian jurisprudence in the cases involving the uncertainty of the foreign exchange market and the wagering effect of the stock market speculations. The risk involved in such cases must be considered by both parties before entering into the restriction of a definite contract. The underlying principle of the law of contracts is re-affirmed through this case by strongly underlining the guiding theories of the lawful object and lawful consideration which determine the validity of a contract. The unique feature that establishes the importance of this case in the Indian judiciary is that it highlights the ambiguity and inconvenience caused due to the restricted definition of "wager" in the Indian Contract Act. The case opens a wide range of possibilities for the Indian Judiciary to amend the said ambiguities and inconvenience. Hence, the case is instrumental in defining the legality of the derivative transactions and differentiating it from the wagering agreements.

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