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EDITORIAL

The year 2022 saw major events having national and international significance. Palpable positive sentiment across sector in India was on full-throttle on the recovery process to sustain the economic growth of the country. Subsequently, India was set as the world's fastest growing major economy as a post-pandemic retail boom and recent bank balance-sheet repairs lure new investment, fueling hot demand for everything from cars to televisions, coal and airliners.

The Government of India, with the view to bring the Indian tribal community in the realm of development brought three essential Constitution (ST) Order Amendment Bills during the Winter Session. In relation to the state of Tamil Nadu, *the Constitution (Scheduled Tribes) Order (Second Amendment) Bill, 2022*, was passed unanimously in Rajya Sabha on 22.12.2022. After the passing of this Bill in the Parliament, by virtue of which *Narikoravan* and *Kurivikkaran* communities were included in the list of Scheduled Tribes in Tamil Nadu. The bill was earlier passed by the Lok Sabha on 15.12.2022. Following this, in relation to the Sate of Karnataka, *the Constitution (Scheduled Tribes) Order (Fourth Amendment) Bill, 2022*, was also passed unanimously in Rajya Sabha on 22.12.2022. After passing of this Bill in the Parliament, the *Betta-Kuruba* as a synonym for the *Kadu Kuruba* community was included in the list of Scheduled Tribes in Karnataka.

Equally, judiciary remarkably laid down judgments upholding fundamental rights and moral values of Indian Constitution. In the arena of public health, in *Jacob Puliyel* v. *Union of India* (Writ Petition (Civil) No. 607 of 2021) a Writ Petition was filed in the Supreme Court highlighting the adverse consequences of emergency approval of vaccines in India. The petitioner contended that mandates of vaccines in the absence of informed consent as unconstitutional. The Petitioner further stated in the Writ Petition that coercive vaccination would interfere with

the principle of informed self-determination of individuals protected by Article 21 of the Constitution of India. The Court found the vaccination policy of the Union of India is not unreasonable and arbitrary. However, the court held that bodily integrity is protected under Article 21 of the Constitution of India and no individual can be forced to be vaccinated. Further, the Court observed: "Personal autonomy of an individual involves the right of an individual to determine how they should live their own life, which includes the right to refuse to undergo any medical treatment in the sphere of individual health. People who did not wish to get vaccinated can avoid vaccination. However, if there is a likelihood of such individuals spreading the infection to other people or affecting community health at large, the Government can regulate such public health concerns by imposing certain limitations on individual rights that are reasonable and proportionate to the object sought to be fulfilled." The Court also held the restrictions on unvaccinated individuals is not proportionate, as the Court found both vaccinated and unvaccinated individuals to be equally susceptible to transmission of the virus and thus directed the authorities to review the relevant orders and instructions imposing restrictions on unvaccinated individuals.

In field of Women Empowerment the Indian Judiciary, has been proactive in enforcing and strengthening the constitutional goals towards safeguarding the rights and dignity of women. Likewise, the Supreme Court in the *State of Jharkhand* v. *Shailendra Kumar Rai @ Pandav Rai* (Criminal Appeal No 1441 of 2022) bench consisting of Justices DY Chandrachud and Hima Kohli, observed that "The two-finger test must not be conducted....The test is based on an incorrect assumption that a sexually active woman cannot be raped. Nothing can be further from the truth, it is patriarchal and sexist to suggest that a woman cannot be believed when she states that she was raped, merely for the reason that she is sexually active" and held that the two finger test has no scientific basis. It instead re-victimises and re-traumatises women. Similarly, Supreme Court in *X* v. *Principal Secretary, Health and Family Welfare, Govt. of NCT Delhi,* (Special Leave Petition (Civil) No 12612 of 2022) held that "all women are entitled to safe and legal Abortion, and there is no rationale in excluding unmarried women from the ambit of Rule 3B of MTP Rules, which mentions the categories of women who can seek abortion of pregnancy

in the term 20-24 weeks" and further ruled that rape includes 'marital rape' for the purpose of MTP Rules.

In *Arunachala Gounder* v. *Ponnusamy* (Civil Appeal No. 6659 of 2011) In this case, the Court had to determine whether, before the commencement of the *Hindu Succession Act,1956* the self-acquired property of a Hindu male will devolve onto the daughter upon the death of her father intestate by inheritance or it will devolve on to father's brother's son by survivorship. The Court noted that "the legislative intent of enacting Section 14(I) of the Act was to remedy the limitation of a Hindu woman who could not claim an absolute interest in the properties inherited by her but only had a life interest in the estate so inherited." After analysing Hindu laws, customs and judicial precedents, the Court held that the right of a widow or daughter to inherit the self-acquired property or share received in the partition of a coparcenary property of a Hindu male dying intestate is well recognized not only under the old customary Hindu Law, but also by various judicial pronouncements.

In the matter of welfare legislations, taking note of the increased number of cases seeking bail, mainly because of the wrong interpretation of Section 170 of the Code of Criminal Procedure, the Supreme Court laid down guidelines regarding the grant of bail and urged the union government to enact a separate law to streamline the grant of bail in *Satendra Kumar* v. *CBI* (Miscellaneous Application No.1849 of 2021 in Special Leave Petition (Crl.) No.5191 of 2021. The Apex Court issued guidelines, namely the courts must satisfy themselves on the compliance of Sections 41 and 41A of the Code. Any non-compliance would entitle the accused for grant of bail; while considering the application under Sections 88, 170, 204 and 209 of the Code, a bail application need not be compulsorily filed; the State and Central Governments must comply with the directions issued by SC with respect to the constitution of special courts; the High Courts are directed to look for the undertrial prisoners who are unable to comply with the bail conditions and take appropriate action in light of Section 440 of the Code to facilitate their release; and bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening application. Applications for anticipatory bail are expected to be disposed of within a period of six weeks, with the exception of any intervening application.

With this note, the Karnataka State Law University is releasing this volume with articles on diverse subjects and intriguing aspects. The riveting article on 'the Role of Judiciary in Water Quality Management' by (Dr.) C. Basavaraju, Hon'ble Vice-Chancellor, Karnataka State Law University, Hubballi, critically elucidates the crucial role played by the Judiciary in taking serious note on the problem of environmental degradation in general and water pollution in particular. It is followed by enthralling discussion on 'Social Media, Democracy and the Right of Women to Engage in Political Discourse' by Prof (Dr) K. C. Sunny, emphasizing the need of safe online space for women politicians in order to protect the spirit of democracy. Work of Dr. Dilshad Shaik and Arya Abaranji P. S. on 'Victim Blaming- the Condemnation of the Sufferer Psychology- A Critical Analysis' is an master piece in understanding how condemning the sufferers of crimes silence other victims and stop them from coming forward. The article by Prof (Dr) G.R. Jagadeesh on 'Constitutional Morality, Transformative Constitutionalism and Liberalism in Working Model of the Constitution' illuminates the moral reading of the Constitution of India. Following it is another fascinating article of contemporary relevance by Dr. M.S. Benjamin and Sayed Qudrat Hashimy on 'the Fourth World Tussle for Recognition of Rights under International Law: A Cursory Glance' encapsulates the recognition of the Fourth World under International Law (FWIL). Dr. N. Sathish Gowda's work on 'Federal Approach in Placing State Laws in the Ninth Schedule of Indian Constitution: An Assessment' critically evaluates the Ninth Schedule of the Constitution of India as an element to the destruct the federal structure. Dr. Sunil N. Bagade's work on 'A Curious Case of Copyright Protection for Sports Moves – An Analysis' is of great contemporary significance as it explores sports in the arena of Intellectual Property Law due to the fact that Some sports persons out of their creativity have evolved certain unique moves which are distinctive and often mark fine line that separates the excellent sports person from the others. The last article by Jagadish A.T on 'Domain Names and Menace of Cyber Squatting' provides the insights regarding the menace of Cyber Squatting and possible solutions to overcome the menace.

We hold the scholarship of these legal luminaries in highest regard and appreciate their sincere efforts and investment of time in contributing their works to our journal.

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THE ROLE OF JUDICIARY IN WATER QUALITY MANAGEMENT

***Prof. (Dr.) C. Basavaraju**

Abstract

Water is an inevitable element for the existence of life on earth. However, now water is essential not only for human consumption but also for commercial activities in industries for various purposes such as fabricating, washing, diluting, cooling, etc. This in turn leads to release of water effluents in rivers and ocean leading to water pollution. Water pollution posses threat to human life as well as to the whole eco-system. In this regard it becomes pertinent to prevent and control water pollution for the wellbeing of life on earth. Therefore, an attempt has been made to analyse the role of judiciary in the light of existing water pollution control laws.

Key words: Water Pollution, Judiciary, Ganga Action Plan and the Water (Prevention and Control of Pollution) Act, 1974.

Introduction

The existence of all living creatures on the cosmos is due to the existence of natural resources. In the absence of natural resources, no developmental activities would take place. Water being a natural resource, is the most important of the elements of nature.[1]

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[1] Gurdeep Singh, *Environmental Law* (Eastern Book Company, Lucknow, 2016) p. 88.

Water being a nature's gift is inevitable for economic development and eco-balance of the country, which is required to be preserved and protected from any kind of pollution. Pollution of water is a universal phenomenon in which the quality of water is being deteriorated as a result of various human activities. The human activities, which are connected with water pollution, can be attributed to agriculture, mining, fisheries, forestry, urban-development, construction works, industries, mining operations etc. The demand of water is increasing every year due to the increase in population, increase in per capita consumption and increased activities of urbanization and industrialization taking place at a very fast rate. Due to the use of water for commercial purpose such as tannery industry. Therefore, attempt has been made to identify the severity of water pollution in India, examine the existing water pollution control and prevention laws and analyse the tremendous role played by the judiciary in the management of the water quality.

Causes of Water Pollution

Human beings can survive for 15 days without food, but they cannot survive without water even for a day. Therefore proper management of water resource is an important element of maintaining eco-system and environment. As water is used for different purposes i.e. for cultivation, for industries, for drinking purpose, the same has to be preserved with at most care. The survival of all living creatures on the earth is possible only when good quality of water is maintained. For the purpose of preserving good quality of water, proper management of water is inevitable which can be done by installing primary treatment plants. River being a primary source of drinking water for many towns and cities and often it is polluted mainly due to the following reasons:

Development of Urbanization

Many cities and towns, which came up on the banks of a river or lake are responsible for the pollution of water in the river and lakes. Community wastes are allowed to flow into the rivers causing water pollution. For instance, many cities and towns on the river Ganga discharge more quantity of sewage into the river Ganga without being treated. Many times effluents discharged from industries into the rivers also damage the quality of water. Such water unfortunately becomes the source of drinking water for another town or city downstream. Besides, the

towns and cities of India have not grown in a planned manner over the years because of the rapid population in these settlements. As these towns and cities are responsible for the discharge of untreated sewage, which flows into streams and rivers causes damage to the quality of water.

Industrial Pollution

Rivers and streams are important source for drinking and manufacturing purposes. But unfortunately, majority of the Indian rivers and Streams are polluted due to the industrial wastes and effluents. As industrial wastes or effluents contain toxics and heavy metals, they are dangerous to human life. The consumption of such water may damage liver, kidneys, reproduction system or respiratory system. Industry is the largest single user of water accounting for 50 percent of the daily water requirement. For example, a fully integrated steel mill requires about 15,000 liters of water per tonne of steel production, and production of one tonne of paper needs a million liters of water, for the production of one tonne of cement requires 750 gallons of water, for the production of one tonne hides requires 16,000 gallons of water. This clearly indicates that industries are using huge quantity of water for manufacturing process. As a result there would be scarcity of water not only for the industrial production but also for human consumption. Therefore, there is a need for the reuse of sewage to meet the demand for the larger quantities of water through the treatment plants. The presence of a wide variety of both inorganic and synthetic organic pollutants, many of which are not readily susceptible for biodegradation,[2] complicates treatment of industrial wastewater. For instance, solvents, oils, plastics, plasticizers, metallic wastes, phenols and many chemical derivates are difficult to identify and to remove without advanced technology. Pulp and paper industry is the third highest in the total industrial use of water. Pollution stems from suspended matter and large amount of dissolved organic substances. Likewise, Iron and Steel industries have been using large quantity of water. The amount of water needed ranges from 20,000 to 50,000 gallons per ton of steel produced. Industrial effluents may run at rates of 10 to 25,000 gallons per minute. The important pollutants are scale, oils and greases and chemical wastes.

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[2] G. R. Chhatwal *et al*, *Environmental Water Pollution and its Control* (Anmol Publication, New Delhi, 1989) p. 300.

Improper Agricultural Practice

Agriculture has been a victim of water pollution in many instances, but sometimes it is also responsible for polluting water.[3] During monsoons and heavy downpour, traces of fertilizers and pesticides are washed into nearest water bodies. Sometimes they flow into rivers and streams also causing water pollution. Consequently, the consumption of such water damages the health and life of the people because such water contains agricultural contaminants like fertilisers and pesticides. Many times, the farmers use more pesticides and fertilizers than the recommended doses. They remain in the soil while some of this may become inert over a period of time, traces end up in the closest in the water body. This could be in the form or irrigation or monsoon runoff. As rivers are the primary source of drinking water in most municipalities, municipal drinking water is contaminated with pesticides and fertilisers residues.

Religious and Social Practices

Many a times, animals are washed in the river water when their carcasses are disposed to river water causing water pollution. Under our ancient customs, dead bodies are cremated on the river banks, unburnt bodies of holy men, infants and those who succumb to contagious diseases are thrown into rivers causing damage to the river water. Several times in the name of the God mass bathing in a river during religious festivals also causes pollution of the river. Besides, devotees immersing offerings of a puja and plastic bag in to the rivers also causes pollution of water.

From the above discussion it is clear that, rivers being the primary source for drinking water are frequently subjected to pollution. The major source of water pollution is the discharge of untreated industrial wastes into the rivers unless the domestic and industrial effluents are not allowed to be discharged in to the water courses or adequate treatment plants are setup, the river water which is unsuitable as a source of drinking water, for supporting fish life and for use in irrigation such pollution of rivers and streams cause damage to the country's economy as well as to all living creatures.

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[3] P. R. Trivedi (ed.) VI *Encyclopedia of Ecology and Environment* (Indian Institute of Ecology and Environment, New Delhi, 1999), p.73.

Legislative framework for the Control and Prevention of Water Pollution

In order to prevent water pollution and to conserve quality of water management, the parliament of India passed an enactment called the Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred as Water Act) and the Act was amended in 1978 and 1988 inserting few new provisions. The principal objectives of the water Act are:

a) to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water (in the stream or well or sewer or land);
b) to establish central and state boards for the prevention and control of water pollution;
c) for conferring on and assigning to such Boards powers and functions relating thereto and matters connected thereto.

Section 16 of the Water Act empowers the Central Pollution Control Board (CPCB) to promote cleanliness of stream and well in different areas of the States. The Board also advises the Central Government on any matter concerning prevention and control of water pollution. It also provides technical assistance and timely advice to the State Pollution Control Board (SPCB). For the purpose of controlling water pollution, the SPCB have been empowered to obtain information from any person, industry or establishment regarding the construction, installation or any disposal system.[4] Persons authorised by the SPCB have a right to enter any place for the purpose of examining any plant, record, register, document or any other material object or conduct research in case of commission of an offence, by the person in-charge of the establishment, under the Water Act. The Act also empowers the authority to search and cease any place of the industrial establishment where there is a commission of an offence. Any person knowingly permits any poisonous, noxious or polluting matter to any stream or well or sewer or on land is liable to be punished under the Act. Besides, no person shall knowingly allow into stream any matter, which in combination with other matters impede or restrict the flow of water of stream resulting in substantial aggravation of pollution.[5] The Act

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[4] Water (Prevention and Control of Pollution) Act, 1974 (Act of 174) S. 20.

[5] *Id*., S. 24.

also empowers the State Pollution Control Board to impose certain restrictions against the establishment of any industry or any treatment plant which is likely to discharge sewage or trade effluents into a stream or well, sewer or on land. If by any accident or other unforeseen act, any poisonous, noxious or polluting matter is discharged or likely to be discharged at any place where any industry, operation, process or any treatment or disposal system is being carried on, into a stream or well or sewer or on land resulting into pollution, then the person in-charge of such place shall intimate the occurrence of such accidents to the SPCB and other authorities.[6] Failure to intimate the occurrence of the accident would amount to commission of an offence under the Act for which the punishment would be imprisonment, which may be extended to three months or fine to the extent of Rs. 10,000/-.[7] In case failure continues, an additional fine of Rs. 5,000/- per day may be imposed during the period of such failure. If the failure continues beyond one year, then the punishment shall not be less than two years, which may be extended to seven years with fine.[8] The Board is also authorised to issue directions to any person for closure, prohibition or regulation of any industry, operation or process or the stoppage or the regulation of supply of electricity, water or any other service.[9]

Role of Judiciary in Controlling and preventing Water Pollution

Despite the existence of water Act for regulating and preventing water pollution from different sources, yet many industries are discharging industrial effluents into the streams, rivers, lakes etc. causing water pollution. In this regard, the role of judiciary in preventing and regulating water pollution is commendable. For instance in *M/s Delhi Bottling Co. Pvt. Ltd.* v. *Central Board for the Prevention and Control of Water Pollution*[10] Delhi bottling Co. was carrying on the business of preparation of soft drinks at their factory situated at New Delhi. The company was discharging the trade effluents that fall into the stream, i.e. river Yamuna. The company duly obtained the consent order from the Central Pollution Control Board as per the provisions of the Water Act. The Board filed a complaint against

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[6] *Id*., S.31.

[7] *Id*., S. 41 (1)

[8] *Id*., S. 41 (3)

[9] *Id*., S. 33 A.

[10] AIR 1986 Delhi 152.

the company alleging that, on analysis of the samples of trade effluents it was found that, the company's discharge of trade effluents was not conforming to the parameters of the consent order of the company. Therefore, company should be restrained from causing pollution of the river Yamuna by discharging its effluents till the company sets up the required treatment plant and conforms to the quality of trade effluents according to the parameters of the consent order. The magistrate court issued an injunction against the company restraining it from causing pollution of the stream by discharging the trade effluents till the required treatment plant is set up.

Consequently, the company made an appeal to the High Court of Delhi against the Magistrate's order alleging that, the sample collected for analysis was not properly analysed in accordance with the provisions of Section 21 of the Water Act. The Delhi High Court set aside the Magistrate order and observed that, in order to issue any order under section 33 of the Water Act, strict compliance of the provisions of section 21 is mandatory. Besides the court also observed that section 33(1) of the Water Act provides only for the passing of a restraint order by the court against the company for ensuring stoppage of apprehended pollution of water in the stream in which the trade effluents of the company are discharged. But it does not empower the courts to issue directions to erect a treatment plant.

In *Municipal Council, Ratlam* v. *Vardichand,*[11] the Supreme Court has played an activist role for the regulation of environmental pollution, which is caused due to number of reasons within the Municipality area. For example, the Municipality had not constructed proper drainage system in the locality, open drains and pits were not covered and no facility for lavatories, dirty and filthy water of alcohol plants having chemical and obnoxious smells is also discharged. All these resulted in the pollution of environment and especially pollution of stream. The residents of the Ratlam Municipality filed a complaint before the Magistrate under Section 133 of the Criminal Procedure Code. Consequently, the Magistrate issued directions to the Municipality to remove all nuisances within six months. An appeal petition was filed in the session's court which reversed the order of the Magistrate. But the High Court affirmed the order of the Magistrate. The Municipality filed an appeal

[11] AIR 1980 SC 1622.

petition before the Supreme Court against the High Court order. The Supreme Court affirming the Magistrate's order rejected the pleas made by the Municipality where it pleaded for lack of financial resource to remove the nuisances. For the first time, the court issued the following directions to the Municipality and fixed time limit for regulating environmental pollution:

a) The Municipal Council must complete the execution of the work to provide proper drainage system within one year;
b) The municipal council must take action to stop effluents from the Alcohol plant flowing into the street. The State Government shall also take steps to stop pollution;
c) The Municipal council must construct, within Six months, a sufficient number of public latrines, provide water supply and scavenging service in morning and evening to ensure good sanitation; and
d) The Municipal Council must fill up cess poles and other pits and filth.

In *M.C. Mehta* v. *Union of India*[12] (Kanpur Tanneries case), a Public Interest Litigation was filed before the Supreme Court under Article 32 of the Constitution by an active Social worker to issue writ of Mandamus against the respondents as many large industries, which are situated on the bank of the river Ganga, were discharging industrial effluents directly into the river. Besides, sewage of the towns and cities on the banks of the river and trade effluents of tanneries are continuously being discharged into the river Ganga. It was also found that, neither the State Pollution Control Board nor the people had taken effective steps to prevent the discharge of effluents into the river. Therefore, the petitioner urged that, steps should be taken for the purpose of protecting the cleanliness of the stream in the river Ganga which is in fact the life sustainer of a large part of northern India. The Supreme Court issued notices to all such tanneries to stop from discharging trade effluents into the river till treatment plants are setup. Pursuant to these notices, many industrialists, and local bodies filed counter affidavits, explaining the steps taken by them for treating the trade effluents before discharging them in to the river. But many tanneries pleaded their financial inability to set up treatment plants. For example, the counter affidavit filed on behalf of the Hindustan Chamber

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[12] AIR 1988 SC 1037.

of Commerce it was found that, the cost of pretreatment plant for a 'A' class tannery is Rs. 3,68,000/- the cost of the plant for a 'B' class tannery is Rs. 2,30,000/ and the cost of the plant for a 'C' class tannery is Rs. 50,000/-. The Supreme Court held that, 'the financial capacity of the tanneries should be considered as irrelevant. While requiring them to establish primary treatment plants just like an industry, which cannot pay minimum wages to its workers, cannot be allowed to exist. A tannery, which cannot set up a primary treatment plant, cannot be permitted to continue to be in existence for the adverse effect on the public at large by the discharge of the trade effluents from the tannery to the river Ganga. It was also found that, for several years these tanneries were being informed to take necessary steps to prevent the flow of untreated trade effluents from their factories into the river Ganga. Besides, the effluents discharged from the tanneries were ten times more noxious and dangerous when compared to domestic sewage water that flows into the river from urban areas on the banks of the river. The Supreme Court by quoting the provisions of Art 48A and 51A of the Constitution of India, the proclamation adopted by the United Nations Conference on the Human Environment of 1972, and the provisions of the Water Act ruled that, the fact that effluents are first discharged into municipal sewers did not absolve the tanneries from being proceeded against under the provisions of the law in force, as ultimately the trade effluents reach the river Ganga from Municipal Sewers. Consequently, when the tanneries failed to set up primary treatment plants as directed by the court, directions were issued by the Supreme Court for the closure of those tanneries. The Court observed that, the closure of tanneries may bring unemployment, loss of revenue but life, health and ecology are also equally important to the people.

Again in *M.C. Mehta* v. *Union of India (Municipalities)*[13] the Supreme Court's Writ Jurisdiction was invoked by the petitioner through a Public Interest Litigation for preventing trade effluents from being discharged into the Ganga river. The petitioner M.C. Mehta drew attention to the Progress Report of the Ganga Action Plan prepared by the Industrial Toxicology Research Centre and Council of Scientific and Industrial Research. The Report shows that the pollution of water in the river Ganga is of the highest degree at Kanpur (Data from the Report on

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[13] AIR 1988 SC 1115.

biological oxygen demand, chemical oxygen demand and bacterial contamination indicate that 'water is not fit for drinking, bathing and fishing purpose).[14] The progress Report also stated that 'the Ganga is grossly polluted at Kanpur. All Nullahs are discharging the polluted wastewaters into river Ganga. But Jajmau bypass channel, Sismau, Muirmill, Golf Club and Gupta Ghat Nullahs are discharging huge quantities of polluted wastewaters. To improve the quality of Ganga, all major Nullahs should be diverted and treated. Effluent treatment should also be installed by all polluting industries.

Consequent to the Report, the Supreme Court issued many directions not only to the Kanpur Nagar Mahapalika but also to the State Pollution Control Board. The Court directed that, the Kanpur Nagar Mahapalika should take action under the provisions of the relevant by-law to prevent the pollution of water in the Ganga due to the accumulation of waste from cattle dairies, which are about 80,000. The Kanpur Nagar Mahapalika was also instructed to shift the dairies to a place outside the city to avoid the accumulated waste to reach the river Ganga. The Nagar Mahapalika was also directed to take immediate steps to increase the size of the sewers in the labour colonies so that sewage could be carried smoothly through the sewerage system. Directions were also issued to construct sufficient number of public latrines and urinals for the use of the poor people to prevent defecation by them on open land. Besides the court also directed the Kanpur Nagar Mahapalika and the concerned police authorities to ensure that dead bodies are not thrown into the river Ganga. The court gave due regard to the submission that whenever the Board constituted under the Water Act initiates any proceedings to prosecute industrialists or other persons who pollute the water in the river Ganga, the persons accused of the offences immediately institute petitions under Section 482 of the Cr. P.C in the High Court and obtain stay orders thus frustrating the attempt of the Board to enforce the provisions of the water Act. The Supreme Court opined that since the problem of pollution of the water in the river Ganga has become very acute, the High Courts should not ordinarily grant stay orders to criminal proceedings in such cases and even if such an order of stay is made in an extraordinary case, the High Courts should dispose of the case within a short

[14] Shyam Divan, Armin Rosencranz, *Environmental Law and Policy in India* (Oxford University Press, U.K., 2001) p.216.

period, say about two months from the date of the institution of such cases. The court also directed that, licenses should not be issued to establish new industries unless adequate provision has been made for the treatment of trade effluents flowing out of the factories. It is also observed that, the directions given to Kanpur Municipal Corporation apply mutatis mutandis to other Municipal Corporations and Municipalities.

All the above directions issued by the Supreme Court is to ensure the quality of water in the river Ganga and provide pollution free water to the residents of Kanpur.

Likewise in *M.C. Mehta* v. *Union of India (Calcutta Tanneries)*[15] tanneries, which are located at Tanga, Tiljala, Topsia and Pagla Danga the four adjoining areas in the eastern fringe of the city of Calcutta, were discharging untreated effluents. According to the examination Report submitted by the National Environmental Engineering Research Institute (NEERI), ninety percent of the Calcutta tanneries use chrome based tanning process, while the remaining utilise vegetable tanning process. According to the Report of the inspection team of NEERI, 'no appropriate wastewater drainage and collection systems are available in any of the tannery clusters. The untreated wastewater flows through open drains causing serious environmental, health and hygiene problems. Besides, no wastewater treatment facilities exist in any of the four tannery clusters. The Report of NEERI also pointed out that, Calcutta tannery units are located in highly congested habitations, offering little or no scope for future expansion, modernization or installation of effluent treatment plants. Surroundings of the tanneries are extremely unhygienic due to discharge of untreated effluents in open drains, stagnation of waste water in low lying areas around the tannery units, and accumulation of solid waste in tanneries. The Report also highlights that, the state of West Bengal and the state pollution control board are not performing their statutory duties properly to control pollution and stop environmental degradation. The inspection team also observed that, the proposed common effluents treatment plants (CETPS) schemes are not capable of treating the wastewater laden with high total dissolved solids, chromium and nitrogenous constituents. Besides, the

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[15] (1997) 2 SCC 411.

proposed designs have little scientific basic and are not useful for effective wastewater treatment in tannery clusters at Tangra, Tiljala, Topsia and PaglaDanga.

Having analysed the Report submitted by the National Environmental Engineering Research Institute the Supreme Court issued the following directions.

a) The Calcutta tanneries shall relocate themselves from their present location and shift to the new leather complex set up by the West Bengal Government. The tanneries, which decline to relocate, shall not be permitted to function at the present site;

b) The Calcutta tanneries shall deposit 25 percent of the price of the land with the authority concerned;

c) The tanneries that fail to deposit the said amount shall have to be closed;

d) The state Government shall render all assistance to the tanneries in the process of relocation;

e) The tanneries that decline to relocate and shift to the new leather complex, shall be closed immediately;

f) Superintendent of police and Deputy Commissioner of area concerned shall close all the tanneries operating in Tanga, Tiljala, Topsia and PaglaDanga areas of the city of Calcutta if they do not relocate themselves within the specified date i.e. 30-9-1997;

g) The State Government shall appoint an Authority or Commissioner who with the help of the Pollution Control Board and other experts shall assess the loss to the ecology/environment in the affected areas after giving opportunity to the polluting tanneries concerned;

h) The Authority shall determine the Compensation to be recovered from the polluter tanneries as cost of reversing the damaged environment;

i) The amount of compensation shall be deposited by the polluter tanneries with the collector/ District Magistrate of the area concerned. If they fail to deposit the same, the collector/District Magistrate shall recover the amount as areas of land revenue;

j) A fine of Rs. 10,000/- is imposed on all the tanneries in the four areas of Tanga, Tiljala, Topsia and PaglaDanga, which shall be deposited in the office of the collector/District Magistrate;

k) The amount collected from the polluter tanneries as compensation shall be utilized for restoring the damaging environment and ecology;

l) Such tanneries that fail to deposit the fine amount and compensation amount shall be closed forthwith;

m) The State Government in consultation with the expert bodies like NEERI, Central Pollution Control Board and state boards shall frame schemes for reversing the damage caused to the ecology and environment by polluted tanneries;

n) The workmen employed in the Calcutta tanneries shall have continuity of employment at the new place where the tannery is shifted. Besides, their terms and conditions shall not be altered;

o) The period between the closure of the tannery at the present site and its restart at the new place shall be treated as active employment and workmen shall be paid full wages with continuity service; and

p) The workmen employed in the tanneries, which fail to relocate themselves shall be deemed to have been retrenched from the date of the closure of the tanneries.

The Supreme Court gave full power to the Calcutta High Court (Green Bench) to monitor the above matters and issue appropriate orders for implementation. The directions given by the Supreme Court clearly indicate that polluter tanneries are obligated to follow the standards laid down by the pollution control boards before discharging the industrial wastes or trade effluents.

In *Indian Council for Enviro - Legal Action* v. *Union of India,*[16] the main grievance of the petitioner, who is a registered voluntary organisation working for the cause of environment protection in India was that, the notification issued by the Central Government dated 19-2-1991 declaring coastal stretches as Coastal Regulation Zones which regulates the activities in the said Zone has not been implemented or enforced. This led to the continued degradation of ecology in the said coastal areas. According to the notification of 1991, the Coastal areas cover Coastal stretches of seas, bays, estuaries, crecks, rivers and back waters which were influenced by tidal action up to 500 meters from the High Tide Line and the

[16] (1996) 5 SCC 281.

land between Low Tide Line and High Tide Line. The petitioner also challenged the Validity of the subsequent notification of Government dated 18-8-1994 whereby the first notification was amended and provided further relaxations of the provisions of the first notification. The petitioner also argued that, these coastal areas are highly complex and have dynamic eco-system sensitive to development pressures. Besides, the developmental activities in the Coastal areas are stated to cause short-term and long-term physical, chemical and biological changes that causes damage to flora and fauna, public health and environment. As a consequence of such indiscriminate industrialization and urbanization in the coastal areas, without adequate pollution control systems, the coastal waters are highly polluted. It is also alleged that, over exploitation of ground water in the coastal areas results in intrusion of salt water from the sea to inland areas and fresh water aquifers previously used for drinking, agriculture and horticulture are getting highly damaged.

The activities, which were declared as prohibited in the Regulation zones under the main notification, are:

a) Setting up of new industries and expansion of existing industries except those directly related to waterfront or directly needing foreshore facilities;
b) Manufacture or handling or storage or disposal of hazardous wastes substance as specified in the notifications of the Government of India in the Ministry of Environment and Forests;
c) Setting up and expansion of fish processing units including warehousing;
d) Setting up and expansion of units mechanisms for disposal of wastes and effluents, except facilities required for discharging treated effluents into the water course with approval under the water Act;
e) For discharge of untreated wastes and effluents from industries, cities or towns and other human settlements, schemes shall be implemented by the authorities concerned for phasing out the existing practices within a reasonable time period, not exceeding three years from the date of the notification;

f) Dumping of city or town wastes for the purposes of land filling or otherwise, the existing practice shall be phased out within a reasonable time period not exceeding three years from the date of the notification;

g) Any construction activity between the low tide and High Tide Line except facilities for carrying treated effluents and waste water discharges into the sea, facilities for carrying sea water for cooling purposes, oil, gas and similar pipelines and facilities essential for activities permitted under the notification;

h) Dressing or altering of sand dunes, hills natural features including landscape changes, 50 percent of the plot size and the total height of construction shall not exceed nine meters; and

i) Ministry of Environment and Forests and the State Government or Union Territory and such other authorities at the State or Union Territory levels shall be responsible for the monitoring and enforcement of the provision of the main notification with their respective jurisdictions.

Although detailed provisions are made in the main notification, yet the Ministry of Environment and Forests had not taken adequate measures to implement and following its own directions contained in the Notification. In view of this, the petitioner, through a Public Interest Litigation filed a writ petition under Article 32 of the Constitution requested the Supreme Court to issue appropriate writ or order or direction to the respondent to enforce the provisions of the main notification. The petitioner also alleged that, the Maharashtra Government has not implemented the directions contained in the main notification, rather it has permitted development activities which resulted in new polluting industries being established in the coastal area, thereby seriously endangering the ecology. The State Government also failed to make a master plan or regional plan as required under the notification. Consequently, the Supreme Court issued directions to all the respondents including the Ministry of Environment and Forests, State Government of Maharashtra to take immediate measures for the implementation of the provisions of the main notification. The court observed that, if any question arises with regard to the enforcement or implementation or infringement of the main notification as amended by the notification of 1994, the same matters should

be dealt with by the respective High courts. Therefore directions were issued to the High Court of Bombay to deal with the matter relating to the implementation of the main notification relating to Dahanu Taluk.

In *M.C. Mehta* v. *Kamal Nath and Others*[17] the Supreme Court took cognizance of the discharge of untreated effluents of M/s Span Motels Pvt. Ltd. into the river Beas. The Motel constructed many walls and bunds on the river Banks and in the river Bed which obstructed the flow of water. The Report submitted by the Central Pollution Control Board and the National Environmental Engineering Research Institute also highlighted that the discharge of untreated effluents of the Motel in to the river has caused substantial degree of water pollution and damaged environment and ecology of the area. In view of these facts the court imposed Rs. 10 lakhs as exemplary damages on the motel, which was responsible for the damage of environment and ecology. The court directed the state government to utilise the above amount for remedial works to set right environment which has already been damaged by the Motel.

Conclusion

From the above discussion, it is evident that the Supreme Court and various High Courts have been playing a crucial role in protecting the fundamental rights of the people and issuing various directions for the implementation and enforcement of the provisions of Water Act. In cases like Ratlam Municipal Council, Ganga river pollution, and Kamal Nath are classic examples where the Supreme Court has taken serious note on the problem of environmental degradation in general and water pollution in particular. The Courts have the Constitutional obligations, being the guardian of the people’s fundamental rights, for the enforcement of environmental laws. The primary role of the courts, while dealing with the environmental related issues, is to see that the enforcement agencies, whether it is the state or any other authority, take effective steps for the enforcement of the laws. The fact is that, in many instances, the courts have issued many directions to various authorities, industries, and many manufacturing units to prevent them from discharging industrial or domestic effluents into a stream, river or lake which shows that, the courts are acting as the guardian of the people’s fundamental rights

[17] (2002) 1 SC.

in securing clean, unpolluted environment to all living creatures. Though the Water Act of 1974 has provided enormous power to the Pollution Control Boards to control and to prevent water pollution yet many lakes and rivers are being polluted due to the discharge of industrial effluents and community wastes. Is it because of the fact that the Boards are not strictly enforcing the provisions of the Water Act? Or whether the Courts are not strictly enforcing the polluter-pay-principle? To answer all these questions, one has to look for the ground realities. In my view, the courts and the Pollution Control Boards alone cannot prevent and control the menace of water pollution, but people's participation is equally important to control water pollution and to secure clean and unpolluted water to them as part of fundamental 'right to life' guaranteed under Article 21 of the Constitution of India.

SOCIAL MEDIA, DEMOCRACY AND THE RIGHT OF WOMEN TO ENGAGE IN POLITICAL DISCOURSE

-Prof (Dr) K C Sunny *

Abstract

Social media platforms have proved to be an essential part of modern-day political discourses. In India's largely plural political sphere, all the major political parties use social media as an effective tool for canvassing majority support by discrediting their political opponents and justifying their political stance. Often their actions violate the limits of law and public decency. The findings of a recent research study, "Troll Patrol India" conducted by Amnesty International, reveal that women politicians, regardless of their political affiliation, are more prone to politically motivated harassment on social media platforms. Evidence suggests that the abuses directed against women politicians belonging to opposition parties and those with Dalit and Muslim identities are substantially severe in nature. The abusive, hurtful and hostile contents of the targeted campaigns directed by cyber goons of various political parties against women politicians, especially those directed against ones belonging to the minority and backward social backgrounds, raises serious concerns. The existing penal laws have proved to be inefficient in addressing these crimes and ensuring the right of women to participate in the democratic discourse on social media platforms. The author in this paper attempts to analyze the constitutional dimensions of this issue with the help of case studies.

Keywords: Democracy, Harassment, Social Media, Violence, Women.

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Introduction

Democracy is a significant form of governance which ensure the representation of various sections of society in the law-making bodies of the nation. Thus democracy stacks up against other political models by ensuring diversity of representation and thought. However, like any other administrative model democracy fails to adhere to most of its foundational principles owing to various reasons. The concept of democracy provides for people to choose their government through elections conducted over regular intervals of time. It's based on the belief that people know what they want and they get what is good for them. Further, the ideals of fundamental freedoms and basic human rights are closely associated with democracy. However, in reality, democracy often fails to be liberal as in essence democracy is largely influenced by the social constructs structured by the patriarchal insights of the common voter.[1]

The absence of proportional representation of the population is one of the major challenges faced by democracies around the world.[2] Women and subaltern sections of society often find it very difficult to achieve representation in democracies that are governed by traditional patriarchal norms.[3] While it is important for modern democratic nations to ensure that no political, social, economic, ethnic, geographic or class constructs are dominating or exploiting in nature most democracies work in the contrary. Fair and universal consensus is the ideal goal that democracy aims towards.[4] The failure to achieve the same can often result in denying fundamental guarantees of freedom of political expression and peaceful competition of different interests and ideas. The general perception is that the popular vote represents what is right. However, it can be inferred that popular votes can even be consolidated through flawed, outdated and discriminatory ideologies. This is a threat to the fundamental rights enshrined under the grund norm of a democratic nation to which it works towards, as popular votes which elect demagogues threaten the liberal values of the rule of law. Further, it can result in certain groups being dominated by others.

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[1] Dr. Shaillja Vasudeva, *Government And Politics* (Island Publishers, 2022) p. 179.

[2] *Id.*

[3] *Id.*

[4] Jon Wallace, Hance Kundnani *et. al*., *The importance of Democracy available at* https://www.chathamhouse.org/2021/04/importance-democracy

Flawed democracy which cannot ensure the representation of marginalized groups may fail to facilitate a social change that can transform society in a progressive direction.[5] Such democratic governments may make the people feel excluded from the social structure as the system remains unresponsive to them. Thus a structurally weak democracy that has been constructed on the flawed notion of dominance may make the subaltern groups and women feel a sense of injustice.[6]

It is important for liberal democracies to stress upon the right of individuals to engage in active political discussions as the representative model envisioned by democracy is "of the people, for the people, and by the people." Encouraging the expression of political views by women and subaltern sections of the society and its discussion will help in accommodating differences that can keep the system dynamic and healthy. This will further help in addressing the historical injustices done against these groups. Thus the efficiency of modern democracies can be assessed by considering as to how women and marginalized are accommodated and encouraged to openly present their disagreements and insecurities to reach a consensus that is influenced by rationality.

Social media platforms are the modern day political messaging model that facilitates public dialogues. It provides a space for people from all sections to express their opinions and concerns freely by using one's digital devices. Earlier, only men were part of such discourses as they were free from household responsibilities and privileged enough to enhance their knowledge through avid reading. However, now the social media revolution have made women and subaltern an active part of political discussions as it provides them a space to analyse and discuss political issues without spending much time and effort. Thus social media have helped women specifically to influence administrative decisions to a great extent. This democratic character of social media needs to be preserved to serve the interests of the voiceless and to enlighten them to present their experiences and difficulties so as to promote debates and diversity that influence tomorrow.

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[5] Gary W Cox & Jon H. Fiva *et. al.*, *Parties, Legislators, and the Origins of Proportional Representation*, 52(1) Comp Polit Stud 102 (2019).

[6] *Id.*

Implications of Attacks against Women in Social Media

The United States Supreme Court's infamous judgment on *Minor* v. *Happersett*[7]of 1875 which held that women do not have the right to vote as the citizenship does not confer them with the same reflects the then existing social mindset which refused to accept women as lawful voters. The discrimination which is based on irrelevant considerations that can in no way override the general claim for equality is unjust as equality means absence of discrimination for reasons which are irrelevant to the circumstances in consideration. As observed by Sir Leslie Stephen "Justice implies essentially indifference to irrelevant considerations, and therefore, in many cases, equality in the treatment of the persons concerned."[8]

Targeted attacks against women who are vocal about their rights is one of the indicators that point toward the structural weakness of democracies around the world.[9] Women who actively engage in political discourses are targeted with an agenda to preserve male dominance in the democratic system that is in place. Violence against women in social media platforms represents as to how women are targeted in the virtual platforms as they are targeted in the physical world. Targeted violence is a form of discrimination as it devoid women opportunities which they could otherwise have enjoyed as part of exercise of their basic rights. It reminds one about the time when women were struggling to secure their right to vote.

Violence against women on social media platforms is poisoning the country's social fabric. Social media platforms play a significant role in the proliferation of hate against vocal women representatives who make conscious and constant efforts to mark their societal position. These platforms encourage insulated groups with polarized political, religious, and social opinions to weaponize the platforms by creating a trend of side-lining their political enemies. Thus, religious and political majorities use social media to disseminate their outdated patriarchal ideologies to

[7] 88 US (21 Wall.), 162 (1875).

[8] D. Daiches Raphael, "Equality and Equity", 21 (79) *Cambridge University Press On Behalf Of Royal Institute Of Philosophy* 118 (1946).

[9] "India: Women Politicians Face the Shocking Scale of Abuse on Twitter - New Research", *Amnesty International Uk* (Jan 23, 2020, 12:06 PM), https://www.amnesty.org.uk/press-releases/india-women-politicians-face-shocking-scale-abuse-twitter-new-research.

silence the voice of women who belong to the social and educationally backward sections.[10]

Mainstream political parties use social media platforms to give publicity to their ideology and programs to a wider audience and to mobilize broader support.[11] They use paid news as a tool to validate their venomous statements directed against women. Thus, in the modern age of the internet, nothing will remain within its own boundaries, and targeted hate flows without disruption across the platforms and reach a wide number of people like a high sea tide.[12] Structural police agencies have failed to prevent this hate flow due to the wide range and the momentous reach that the social media platforms are having in addition to the anonymity that it ensures to their users. Thus, efforts are made by all the mainstream political and religious groups to exploit the emotions of volatile people and blind followers for their personal gains and to silence the voices of dissent that throw questions on the structural institutions of patriarchy.

Ganged cyber-attacks targeting socially oppressed groups and furthering the majoritarian patriarchal agenda aim to hold women answerable for their outspoken voice against the established social structures.[13] To further focus their attention on women who are vocal on social media platforms opinions of anarchists and sociopaths are compared and equated with theirs. The phrase *Feminichi* coined by these groups had a great life and it went beyond their personal discussion rooms.[14] This coinage grew in the garden of social media and became a usage of the ruling elite. Major front-lead leaders of political parties and religious groups are part of this elite group who occasionally use this word to demoralize the spirit of women who hold different views.

Social media platforms maven to exploit the sentiments of people to engage the attention of the audiences. The manner in which women who use social media platforms to express their voices of dissent in the form of posts against the

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Nidhi Suresh, "How Women Tackle Inequality and Abuse in Mollywood", Live Wire (Nov 30, 2022),* https://livewire.thewire.in/out-and-about/movies/how-women-tackle-inequality-and-abuse-in-mollywood/.

established notions of right and wrong are targeted for their opinions that are dictated by one's own conscience by framing them as "Feminazis" is a matter of concern that has to be carefully observed and studied by the policymakers and legal experts.[15] It is important to ensure the freedom of speech and expression of women on social media platforms so as to ensure an opportunity for them to signal their resistance to patriarchy and its agendas which prey upon them.[16] The qualifier that women can express their opinions only when they respond to each and every event of harassment and exploitation that happens around the world is illogical.

Violence against politically engaging women in social media platforms debases the constitutional values of liberty, equality and fraternity which lays the foundation of our Constitution.[17] Human dignity as a value has largely been compromised by discouraging and derogatory forms of violence against women in social media platforms.[18] Violence against women in social media platforms represents an unequal society that violates the sisterhood of citizens who belong to diverse backgrounds.[19] A healthy democracy requires healthy political discourses wherein people acknowledge their reciprocal responsibilities towards each other through mutual aid, tolerance and cooperation.[20]

It is the constitutional obligation of individuals to refrain from derogatory practices that harm the dignity of women. Such a duty aims to uphold and protect the unity, integrity and spirit of brotherhood among the people. The concept of good citizenship aims to promote harmony and welfare by ensuring a welcoming atmosphere. While the Indian society as a whole transcends religiously, linguistically, regionally and sectionally, this added further instigates violence against women who engage in political discourses. The dignity of a human being is a fundamental value as well as an individual right that finds its origin in the preambular goals of equality and fraternity which forms critical and doctrinal

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[15] Pooja Chaudhari, "Misinformation through a Feminist Lens", *The Hindu* (Aug 10, 2021, 12:15 AM), https://www.thehindu.com/opinion/op-ed/misinformation-through-a-feminist-lens/article35824916.ece.

[16] *Id.*

[17] *Id.*

[18] *Supra* note 1.

[19] *Supra* note 13.

[20] *Supra* note 13.

underpinning that justify the need for imposing effective restrictions on derogatory and discouraging speech that affects the participation of women in political discourses. Restrictions can thus be imposed on speeches that devalue the individual dignity of a woman as a value as well as a right as it is contradictory with the fundamental right of equality and freedoms specified under Part III of the Indian Constitution. Thus rights specified under Part III of the constitution have an important role in ensuring plurality and multiculturalism in India. Further, it can be concluded that owing to the fundamental rights provided under the constitution of India citizens owe reciprocal responsibilities towards one another by absorbing the ideals of tolerance, cooperation and mutual aid.

Democracy and Freedom of Speech and Expression

The legal academia is divided with regard to the extent to which freedom of speech and expression can be permitted in a democratic society. While one group on the basis of the legitimacy theory focuses on the need to promote free and unrestricted speech in ensuring the values of democracy, the other group stresses on the need to effectively regulate speech which is foul and vicious.[21] According to legitimacy theory, free and unrestricted speech must be permitted in a democracy regardless of how hateful the speech is, thus they do not support legislation that aims to curb such speech in the online and offline world.[22] They are of the opinion that the legitimacy of democracy can be ensured only through permitting unrestricted free speech in society.[23] Legitimacy theory observes that introducing legislation that restricts hateful free speech can cause serious harm to the democratic fabric of the country.[24] The most acclaimed judgment of *Shreya Singhal* v. *Union of India*[25] and the proposed amendment to the Kerala Police Act by inserting Section 118 A are the best examples that vet the view of legitimacy theorists. The court in the judgment observed that "where no reasonable standards are laid down to define guilt in a Section which creates an offense, and where no clear guidance is given

[21] Gauri Thampi P, "Democratising the Cyber Law", *Live Law* (Dec 3, 2020, 11:45 AM), https://www.livelaw.in/columns/democratising-the-cyber-laws-166724?infinitescroll=1.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] (2013) 12 SCC 73.

to either law-abiding citizens or to authorities and courts, a section which creates an offense and which is vague must be struck down as being arbitrary and unreasonable."[26] However, the other group observes that it is essential to ensure that the free speech of the subaltern is protected through legislative enactments and judicial rulings. Though the ideologies of both groups appear to be conflicting to each other, it has to be observed that both groups ultimately aim to protect and ensure the guarantee of democracy to work towards achieving a system that can enjoy the commendable implications of free speech in a modern democracy.

While the legislation restricting free speech can result in abuse of executive power, it is of utmost importance to address the growing violence against women in social media platforms. Regardless of the extreme hardships that unrestricted speech in social media platforms causes towards women and the vulnerable sections of society, the government and law enforcement agencies are hesitant to push themselves for the formulation of laws that can address violence against women in social media platforms. absence of law has created a huge gap in law wherein instances of violence against women in social media platforms remain unaddressed. This has resulted in the system leaving victims of social media violence with no remedy against their perpetrators.

Law enforcement agencies often do not act over the complaints that are raised by women or they charge the offenders under bailable minor offenses of the Indian Penal Code. This has resulted in women mostly withdrawing themselves from cyberspace and thereby surrendering their space in modern cyber democracy. Instances of women activists taking the law into their own hands are also increasing these days. However, such protests are dealt with the iron hands of the system, wherein they are charged with serious offenses and denied bail for retaliating against the injustice that they have suffered. This further silences possible voices of dissent from the general public. Thus it can be observed that the inadequacies of law are always acting in favour of the accused while it turn its back on women and marginalized sections of society. All these make it essential for the State to come up with legislation that can ensure women a safe space in social media platforms to express themselves. The inherent tendency of a system to misuse the

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[26] *Id.*

existing laws which prove to be sufficient to put down voices of dissent should be seriously taken into account while thinking about legislating a law to address the increasing violence against women in social media platforms.[27] Such a law should clearly lay down that its objective is not to restrict free speech but is to regulate and address vicious forms of violence against women in social media platforms.

Role of Women in Modern Cyber Democracy

India has a large number of internet and mobile phone users.[28] Telecommunication companies are viewing India as a major market with data revenue and consumption.[29] However, with this development, India is reporting more cyber crimes.[30] This is related to the patriarchal institutionalization of social media platforms. In modern democratic India, women are testing the boundaries of patriarchal institutionalization through social media platforms. Social media platforms help women to come together and actively participate in political discourses that challenge misogyny and violence. The creation of a social media profile is a mode of self-assertion by the woman that she can use to express herself and organize those with similar views. Women are aware of this possibility of self-assertion though many claims that they do not intent to use it. This possibility has however subjected them to intense and direct surveillance by their guardians.

Violence against Women in Social Media and its effect on Free Speech

India being a deeply conservative society underwent only through a facial transformation while their deep social conservatism is still being well recognised. Thus the freedom of expression that is enjoyed by women in India has been granted with the limitations that are prescribed by the patriarchal frameworks of caste and community politics. Thus while women are allowed to access education and to a certain extent secure a job, they are still treated as a free labour force who can be used to satisfy the heterosexual desires of men. However, young educated women have begun to question the illogical constructs of the past and social media has

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[27] Tackling Violence Against Women: A Study of State Intervention Measures, Bhartiya Stree Shakti, (2017), https://wcd.nic.in/sites/default/files/Final%20Draft%20report%20BSS_0.pdf.

[28] *Supra* note 13.

[29] *Supra* note 13.

[30] *Supra* note 13.

become an effective tool for them to protest against the indirect discrimination directed against them in society.

The #MeToo movement, #KissofLove movement #ForaBetterFb movement are some of the major political campaigns which women initiated through social media platforms.[31] This indeed triggered the conservative groups which launched organized social media attacks against women who actively used these platforms to express themselves. These organized attacks initiated by institutionalized patriarchy are with the aim to ensure that even educated women who are dissatisfied with the system are confirming with the social norms and make efforts to not overstep the boundaries that are drawn by patriarchal institutions. The women who overstep these boundaries invite violence on themselves. This is out of the fear of society which is pessimistic about her stepping away from the constantly surveilled domestic space. Thus they are treated as one's who move away willingly from the protection of society and so are considered to be sexually motivated. Self-expression that does not pass the scrutiny of domestic space is thus considered sexual. Hence, even educated liberal parents hesitate to allow their daughters to use social media platforms to express themselves as the chance of the family's honour and their own safety being compromised is very high. The images of women being morphed to produce porn is a commonly reported crime these days. While ideally these offenses should be seriously dealt with by the system by ensuring severe punishments to the perpetrators the blame is always projected as the 'problem of the woman' that she could have prevented this from happening to her through self-restrictions and self-censorships.

Violence directed against politically engaging women in social media platforms is the reflection of the Indian society that still encounters the evils of increasing dowry-related deaths and domestic violence cases. Hence, violence is used as a tool to subordinate women so that they don't grow over the established institutions of patriarchy. Most women do not explore the possibilities of these platforms to be used as a political medium to express themselves on various social issues that they experience in their personal, professional and social life. Thus, a closer look at the issue provides that women are confined even in the virtual world wherein the limits of their relationships are confined to family and community.

[31] *Supra* note 13.

It is extremely difficult for socially engaging women who face cyber violence like that of revenge porn, doxing or trolling to find their space back in public. Women who experience such crimes are often subjected to victim blaming in addition to the advice that they should have taken care of themselves in this vulnerable world that is unfair to them. Women thus unintentionally avoid a direct confrontation with the system to avoid slut shaming in social media platforms and free themselves from the harassment of the law enforcement agencies. Thus social media is a mere reflection of the society wherein women are supposed to build their own identity by avoiding uses that might make them vulnerable to attacks that have the capacity to destroy their public identity.

Women in Action: A Wakeup Call for the System

According to NCRB data there has been a steady increase in cyber crimes.[32] The increasing violence against women holds a major chunk of this wherein there are reports of circulation of fake, real and surreptitiously recorded videos with the high-speed cheap internet services. The recent incident of a Youtuber being manhandled by three women activists, shows that the carefree attitude of the state in handling the violence against women in social media platforms has led to activists taking the law into their own hands. Had it not been for such bold responses the law enforcement agencies would have remained mute even in that case. The instance of morphed photos of a young women writer was uploaded in an adult website which was registered in California and the hardship that forced her to lash out at the law enforcement authorities forced the system to act upon the crime.[33] The social harassment faced by a housewife named Sobha Sajju and the constant efforts that she had to take to secure justice is another incident wherein the law enforcement bodies were forced to wake up from their sleep.[34]

The above cases make it clear that justice is not easily accessible to the victims of social media violence. Law enforcement agencies often remain as mute spectators who oversee violence that women experience in the country on a day-to-day basis. Complaints lodged by the victims evoke little interest from the authorities. In

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[32] NCRB Report, 2022.

[33] *Sup*ra note 25.

[34] *Supra* note 25.

most cases owing to technological incompetence and lack of trained staff, they explain their inability to address the problem that is raised before them. But, when these incidents attract public attention, the system responds with immediate interference. Other cases however go under the table and the victim never receives justice. Thus the victims often face extreme disappointment. In order to remedy this issue many scholars have opined that stringent laws to convict the offenders need to be brought in on an urgent basis to address the indifference of law enforcement agencies towards such crimes. While cybercrimes are increasing on a daily basis the incidents of social media violence that are initiated as cases wherein the accused is awarded stringent punishment are very few.

Besides the he pervasiveness of patriarchal attitudes in the state, civil society, and the family, the law's shortcomings, the officers' lack of preparation and difficulties obtaining evidence, the institutions of law enforcement and justice's unapproachability, and the very nature of social media, which thrives on "more clicks, no matter how", police authorities lack the legal, technological, and human understanding necessary to successfully deal with GBCV, but they also appear to be plagued with strong patriarchal prejudice.

Conclusion and Suggestions

Democracy as a means can only achieve greater heights through the inclusion of women and subaltern sections of society. Hence the violence directed against women who engage in political discourses on social media platforms has to be viewed with utmost seriousness. These instances reflect the way in which the opportunities of women are restricted and as to how social media platforms can be used as an effective tool for the upliftment of the marginalized sections. To achieve the same an accurate understanding of the existing system has to be made. From the points discussed above the authors have drawn the following major conclusions.

i. Social media platforms have been patriarchally institutionalized to proliferate targeted violence against women who politically express themselves.

ii. Violence directed against women in social media platforms largely remained unchecked in the absence of laws and policies that can effectively address these crimes and punish the offenders.

iii. Organised derogatory forms of violence in social media platforms compromise the dignity, self-esteem and privacy concerns of women and the subaltern.

iv. Non-existence of laws against violence against women in social media platforms along with the lack of effective and fair implementation of the existing legislation is a serious issue that requires immediate attention.

v. If the law-making bodies are intending on bringing in a special legislation to address violence against women in social media platforms it's limits, objectives and boundaries shall be clearly defined in order to prevent the potential misuse of the same as laws that can be misused will be a threat to the constitutional ethos.

vi. Anonymity that social media platforms offer to it users trigger the patriarchal mentality that is inherently present among the people.

vii. The focus should be on making the internet a safe platform for women to engage in political discourses.

viii. Social media has undoubtedly become the present and future of the modern world hence the solutions that are thought of to address violence against women should be thought of without compromising the opportunities that it offers.

ix. There exist a requirement for an equal and transparent partnership between law enforcement agencies and anti-patriarchal civil society to ensure a safe platform for women to express themselves.

In order to protect the spirit of democracy that is bound to provide free space for expression a comprehensive strategy must be used with the assistance of women and sualtern to provide safe spaces online. One of its key components is the creation of constitutionally sound legislation that upholds global norms for human rights. By pushing the government to refrain from interfering with the right to free speech and expression, such a strategy will not only make it easier for information to be shared freely but will also increase the legitimacy of democracy.

VICTIM BLAMING-THE CONDEMNATION OF THE SUFFERER PSYCHOLOGY- A CRITICAL ANALYSIS

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- **Arya Abaranji P. S.****

Abstract

Violence can take many forms, ranging from physical, sexual, emotional, cultural to financial violence. Where an act of violence is a choice for the perpetrator, it is a reminder that the victim has to carry for a protracted time. Despite being the sufferers as a consequence of an violent act, the victims are also subjected to harsh social judgements where they are held responsible in part or in whole for the harmful acts committed against them. Victim blaming exists because of the lack of understanding that irrespective of who the person is, no human deserves to undergo such cruel treatment. This ideology stems from gender and race-based historical prejudice that justifies the criminal act depending on the social group to which the injured party belongs to. One of the earliest records addressing the impending issue of victim blaming can be found in the work of Psychologist William Ryan in his book 'Blaming TheVictim' where he coherently expressed how holding the victim responsible for the perpetrator's act justified racism and gender inequality. Generally, victims of sexual abuse, rape, racially motivated crimes, poverty, drug abuse are indicted for what happened to them because of the common and ignorant belief that they contributed to the instigation of the offence. This paper explores the ways in which

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victim blaming attribution hinders victims to cope from PTSD (Post Traumatic Stress Disorder). The authors cite examples from various current day happenings and aim to shed light on how condemning the sufferers of crimes silence other victims and stop them from coming forward.

Keywords: Victim blaming, PTSD, Rape, Criminal act, Victim and Social Judgement.

Introduction

According to a survey conducted between the years 2019 - 2021, India is home to 29.3 % of Lifetime Physical and/or Sexual Intimate Partner Violence[1] and is ranked 123 in the Gender Inequality Index[2].Though the crime rate (crime incidence per 100,000 of population) in India has decreased from 487.8 in 2020 to 445.9 in the year 2021, the vehement aspersions against victims and what happened to them seldom seemto decline. India's recent High-Profile Rape Trial and highly sensational case of *Tarun Tejpal*, former editor of *Tehelka*, is a testament to the ever - existing problem of victim blaming. While acquitting the accused, the court delivered a 527 – page judgement that sparked outrage for shifting the blame to the victim for not conducting herself in a way that would have deterred the rapist. The judgement was quick to dismiss the victim's complaint of the sexual assault as the prosecutrix did not fit into the stereotypical state of mind and body of a 'victim' and the onus of proof was not burdened upon the accused to prove his innocence in the case was appalling. Judicial dictum has been, time and again, very critical of the level of sensitivity and utmost care that must be directed in dealing with cases of this nature. The trial spent much time on establishing a blemished character of the prosecutrix based on her sexual history and past lifestyle choices which are completely irrelevant to the current case and charges framed and impermissible in law to mention.When this is the state of affairs in our system which is supposed to be a sentinel of justice, the vile culture of victim blaming and shaming has no bounds in the modern day society.

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[1] Ever-married women in the age category 15 – 49 experience intimate partner physical and/or sexual violence at least once in their lifetime. International Institute for Population Sciences (IIPS) and ICF. 2021. National Family Health Survey (NFHS-5), 2019-21: India. Mumbai: IIPS.

[2] United Nations Development Programme, Human Development Report, 2020.

Victim blaming is a conceptualised justification that dismisses and denies aggression against victims. These are negative social reactions that have profound impact on the psychological state of the victims that welcomes unbecoming factors such as self - blame, Post Traumatic Stress Disorder (PTSD), detrimental social and interpersonal relationships, unhealthy alcohol and drug usage, maladaptive thoughts, etc.[3] There are robust evidence demonstrating the association between psychopathology and curtailed level of social support.[4] In the light of extensive mental health well - being, social reactions must be analysed to provide positive and survivor - friendly outcomes that benefit the victims.

Theories of Victim Blaming

Sexual assault and violence have been the alarming problems of the society for many centuries. While the state of the world is where one in every five women become a victim of rape or attempted rape[5], the number of such atrocities being reported to police and the concerned authorities are strangely low and even among the ones reported, only a handful perpetrators are successfully prosecuted.[6] Irrespective of the number of victims who come forward with their story, they are immediately condemned and attacked on the basis of their clothing, attitude, lifestyle choices, association with certain social groups, religious sentiments, the reason for being in the place of assault.[7] Scarcely enough, the light shifts upon the accused who almost never has to prove himself innocent. Feminist researchers and activists affirm that rape is inevitable in patriarchal societies where there is clear difference of power dynamics between men and women.[8] However, looking

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3 Allred S. K.. *Multiple levels of influence on the sexual assault victim: Examining the relationship of sexist beliefs, social reactions, and self-blame on recovery*, University of Oregon (2007).

4 Ahrens C. E., Cabral G. and Abeling S.," Healing or hurtful: Sexual assault survivors' interpretations of social reactions from support providers" 33(1) *Psychology of Women Quarterly* (2009) pp. 81–94 Available at https://doi.org/10.1111/j.1471-6402.2008.01476.x

5 United Nations Development Fund for Women [UNIFEM], 2008

6 Bohner G. *et al* "Rape myth acceptance: Cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator" In M. Horvath and J. Brown (Eds.) *Rape: Challenging contemporary thinking* (Willan Publishing,UK,2009) (pp. 17-45)

7 UN News; 'I will never stop telling my story': Confronting victim-blaming for sexual assault'; Available at https://news.un.org/en/story/2022/07/1122832

8 Burt M, "Cultural Myths and Support for Rape", 38 *Journal of Personality and Social Psychology* (1980) pp. 217-230.

further into this aspect, there are several psychosexual factors that come into play which leads to the social exoneration of perpetrator and continuous indictment of the victims.

A research shows that blame can be categorised into two forms: characterological blame and behavioural blame, where the former relies on the stable factor such as personality traits and the latter is related to the variable factors such as the likelihood of victim reacting in a particular manner.[9] Traditional studies vastly depended on the participation of the victim in the instigation of the offence. Initial researches mainly shed light and yielded results from several aspects.One of the first factors that strikes the mind is the attractiveness[10] of the victim. It is a common disreputable perception that the more attractive the victim is, the more likely she is to be assaulted. Another attribution that people take into assessing the situation is respectability of the victim.[11] If the victim fits the societal standard of a 'respectable person', then they are less likely to be attacked or assaulted. The nature of job[12] that the victim is in also influences the blame with respect to job being socially accepted as a decent profession. For instance, if the victim is an established actress, it is assumed that she is aware of the potential risks and she agreed to it anyway. In cases where alcohol is involved, the level of intoxication[13] of the victim is also taken into accountto form a judgement to assess the extent of how far the intoxication led to rape. In addition to the characteristics of the victim, significant importance is also given to observer's perception of the event. Observer's attitude and supposed lack of awareness of gender role attitudes greatly influence the judgment of persons.[14] The basis of these early studies is the Just

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9 Janoff-Bulman R. ,"Characterological versus Behavioural Self-Blame: Inquiries into Depression and Rape" 37 *Journal of Personality and Social Psychology* (1979) pp.1798-1809,

10 Calhoun L.G., *et al* "The effects of Victim Physical Attractiveness and Sex of Respondent on Social Reactions to Victims of Rape" 17 *British Journal of Social and Clinical Psychology* (1978) pp. 191-192

11 Jones C., and Aronson E., "Attribution of fault to a rape victim as a function of respectability of the victim" 26 *Journal of Personality and Social Psychology* (1973) pp 415-419.

12 Smith R.E., *et al* "Role and justice considerations in the attribution of responsibility to a rape victim", 10 *Journal of Research in Personality* (1976) pp 346-357.

13 Richardson D., and Campbell J.L., "Alcohol and rape: The effect of alcohol on attributions of blame for rape", 8 *Personality and Social Psychology Bulletin* (1982) pp. 468-476.

14 Davies M. and Hudson J., "Judgments toward male and transgendered victims in a depicted stranger rape" 58 *Journal of Homosexuality* (2011) pp. 237-247.

World Theory which suggests that the world is inherently fair and people get what they deserve and deserve what they get.[15] This theory is supported for the scrutiny of female victims and not for male victims. However, all the early traditional researches in this area are dismissed on the account of being small - minded and prejudiced.

Another relatively new theory that is used to explain the misfortune of assault victims which is the Defensive Attribution Hypothesis.[16] According to this theory, the increased prospects of similarity between the observer and victim makes the victim blamed less. The extent of blame depends on the level of dissimilarity. Several studies have further confirmed this hypothesis.[17] This theory stems from the empathetic need to protect oneself from possible assault and the blame is less likely to be placed on the victim if one relates the most with the victim. This is why male observers blame female victims more than female observers blame female victims because they find it difficult to relate to the victims. Hence, owing to the correlational nature of human beings, there is hesitation in blaming victims.[18] However, the major drawback of this approach is .when there is wider scope of gender fluidity and sexual orientations. Studies show that homosexual victims are blamed more for sexual assault acts committed against them than heterosexual victims.[19] This is a serious issue that acts as an impediment for victims to seek help and be a part of the society without judgment.

Arbitrary Disparity in Victim Blaming

Though perpetrators are held accountable for their crimes more than the victims, victims are also being slandered on the basis of the nature of crime and

[15] Lerner M.J. and Matthews G., "Reactions to suffering of others under conditions of indirect responsibility" 5 *Journal of Personality and Social Psychology* (1967) pp. 319-325

[16] Shaver K.G., "Defensive attribution: Effects of severity And Relevance on the Responsibility Assigned for an Accident" 14 *Journal of Personality and Social Psychology* (1970) pp. 101-113

[17] Grubb A.R. and Harrower J., "Attribution of blame in cases of rape: An analysis of participant gender, type of rape and perceived similarity to the victim" 13 *Aggression and Violent Behaviour* (2008) 396-405

[18] Donovan, R.A., "To blame or not to blame: Influences of target race and observer sex in rape blame attribution" 22 *Journal of Interpersonal Violence* (2007) pp.722-736.

[19] Mitchell D., Hirschman R. and Hall G.C.N., "Attributions of victim responsibility, pleasure, and trauma in male rape" 36 *Journal of Sex Research* (1999) pp. 369-373.

the state of mind of the observer. The ones who need compassion the most are the ones who are accused of being a crucial factor in provoking such attack against them.[20] While measuring the extent of blame, we need to take two concepts into consideration: blame and responsibility. The former refers to the social judgment as to the extent of which a person is to be held accountable and the latter refers to the contributing factors on the part of the victim to the crime.[21] Several studies show that blame is harsher in nature and is heavily manipulated by the traits and status of the victim.[22]

A very cogent variable in victim blaming is the relationship that the victim has with the perpetrator. Acquaintance rape victims are often accused and blamed more than stranger rape victims.[23] It is a common misconception that when there is a pre-existing relationship between the victim and the perpetrator, the perpetrator may have trouble understanding the lack of consent and presume that there is implied consent.[24] The level of blame seems to be comparatively less when the victims resist the attack to a greater extent.[25] This approach be found more among male observers. Submissive victims are more likely to be blamed to a higher degree than resisting victims.[26] The blame is predominantly higher in cases of marital rape than stranger rape as the victim-spouse is supposed to conform to their marital duties and very less number of people consider marital rape on par with stranger rape.[27] The factors such as romance, marriage, family downplay the severity of

[20] Crawford, R., "You are dangerous to your health: The ideology and politics of victim blaming; International" 7 *Journal of Health Services* (1977) pp. 663– 680 *available at* http://dx.doi.org/10.2190/YU77-T7B1-EN9X-G0PN

[21] Bradbury T. N. and Fincham F. D., "Attributions in marriage: review and critique" (1990) 107 *Psychol Bull*, pp. 3–33

[22] Cassidy L. and Hurrell R. M., "The influence of victim's attire on adolescents' judgments of date rape" 30 *Adolescence* (1995) pp. 319–323

[23] Calhoun L.G., Selby J.W., Warring L.J., "Social perception of the victim's causal role in rape: An exploratory examination of four factors" 29 *Human Relations* (1976) pp. 517-526

[24] *Supra* note 17

[25] Branscombe N.R., and Weir J.A., "Resistance as stereotype-inconsistency: Consequences for judgments of rape victims" 11 *Journal of Social and Clinical Psychology* (1992) pp. 80-102.

[26] Davies M., Rogers P., and Bates J., "Blame towards male rape victims as a function of victim sexuality and degree of resistance" 55 *Journal of homosexuality* (2008) pp. 533-544.

[27] Ewoldt C. A., Monson C. M. and Langhinrichsen- Rohling J., "Attributions about rape in a continuum of dissolving marital relationships" 15 *J. Interpers Violence,* (2000) pp. 1175-1182

the crime and thus observers are more inclined towards blaming marital rape victims for not performing their lawful duties.[28] Taking race as a factor into account, black rape victims are subjected to greater scrutiny compared to white rape victims.[29]

Similarly, traditional feminist approach recognised and accepted that only females could be the victims of rape. Despite there being a considerable number of sexual assault cases against men, very few have been reported to the police. Men are not expected to be raped or attacked which is based on the theory that the men are stronger and particularly dogmatic and hence they must be able to fight back and defend themselves.[30] Research suggests that intoxicated victims are subjected to more severe judgment than sober victims as it was considered that the victim must have presumed the outcome and could have refrained oneself from situation.[31] When 'race' is factored in, the extent of blame varies when the observer belongs to the same race as the victim. In a research study conducted in 2015,[32] a group of participants belonging to different ethnicities were brought together and they were assigned to read a rape scenario involving persons from various races. The findings showed that the victim blaming was less likely to happen when the victim and the observer belongs to the same race. But a crucial point of difference in the outcome of the study was that minority ethnic groups or the ethnic groups that faces discrimination on a large scale tend to blame the victim more when the victim belongs to the same minority group.[33] This disparity

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[28] Donnerstein E., and Berkowitz L., "Victim reactions in aggressive erotic films as a factor in violence against women" 41 *J. Pers. Soc. Psychol* (1981) pp. 710–724 doi: 10.1037/0022-3514.41.4.710.

[29] Foley L. A., *at el*, "Date Rape: Effects of Race of Assailant and Victim and Gender of Subjects on Perceptions" 21 *Journal of Black Psychology* (1995) pp. 6-18.

[30] Davies M., Pollard P. and Archer J., "The Influence of Victim Gender and Sexual Orientation on Judgments of The Victim in a Depicted Stranger Rape" 16 *Violence and Victims* (2001) pp. 607-619.

[31] Basow, S. A., and Minieri, A. "You Owe Me: Effects of Date Cost, Who Pays, Participant Gender and Rape Myth Beliefs on Perceptions of Rape" 26 *J. Interpers Violence* (2011) pp. 479–497.

[32] Casarella-Espinoza M., *Whose Fault is it Anyway? Comparison of Victim Blaming Attitudes Towards Sex Trafficking and Sexual Assault Across Gender and Two Ethnic Groups* (Order No. AAI3639712) (2015). *Available at* http://search.proquest.com/docview/1705044617?accountid=14556.

[33] Varelas N. and Foley L. A., "Blacks and Whites perceptions of interracial an intraracial date rape" 138 *J. Soc. Psychol*, (1998) pp. 392–400.

may be attributed to the accompanying stigma on other facets of racial or ethnic bias. The study evidently shows that victim- blaming is not always inter- racial but also intra- racial.

As discussed earlier, homosexuality tips the balance of blame,[34] any homosexual sexual assault victim is considered to have 'enjoyed the process' more than being violated and traumatised.[35] A recent study found that, where the subject pool consisted of heterosexual males and females, homosexual males and females, cross- dressers, transgendered persons, cross - dressers are blamed the most and heterosexual victims, irrespective of the gender, were blamed the least.[36] These studies prove that observer's perception of a particular crime against any person is dependent on the patriarchal tendencies and corrupted homophobic attitudes.[37] The sexual orientation of the victim is, by any means, influential in identifying whether such person is a victim or not. The actual psychological and social impact of the crime is given little to no consideration where, placing reliance on the studies and research conducted, the observer's world views and moral values appear to be more concerned about the victim's features and actions. This is an alarming sign that every time a person comes forward with any injustice that happened to them, the victim is put on trial to prove that they have tried every possible means to avoid that situation and in no way, was instrumental in instigating such attack against them.

Repercussions of Victim Shaming and the Way Forward

In order to offer the kind of rehabilitative treatment that the victim needs, it is essential to understand the difference between victims and non- victims. Victims are persons who are injured as a result of a crime or other event and still continue to suffer in the face of mistreatment. Often, when a crime is committed, focus is

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[34] White S. and Yamawaki N., "The Moderating Influence of Homophobia and Gender Role Traditionality on Perceptions of Male Rape Victims" 39 *Journal of Applied Social Psychology* (2009) pp. 1116–1136.

[35] Davies M. and Rogers P., "Perceptions of Male Victims in Depicted Sexual Assault: A Review of the Literature" 11 *Aggression and Violent Behavior*, (2006) pp. 357-367.

[36] Davies M. and Hudson J.,"Judgments Towards Male and Transgendered Victims in a Depicted Stranger Rape" 58 *Journal of Homosexuality* (2011) pp. 237-247.

[37] Willis C. E., "The effect of Sex Role Stereotype, Victim and Defendant Race, and Prior Relationship on Race Culpability Attributions", 26 *Sex Roles*, (1992) 213-226.

placed upon the nature of crime, the perpetrator and the victim of the crime. The observer forms harsh judgments based on the available information and at times, based on presumed facts that stem from the observer's world views and personal values. But the long- standing effects of the crime in the victim's life are usually ignored. In addition to this, victim blaming worsens the overall mental well-being and acts as a barrier for other victims. The long- term negative consequences include Post Traumatic Stress Disorder (PTSD), alarming health problems, substance abuse, depression, social isolation, suicidal tendencies, self- blame, etc.[38] When victims are investigated on the nature of the crime to rule out false accusations, questions always pertain to the method in which the act was committed and this leaves a lasting impact of trauma.[39] Studies show that victims find it emotionally unsettling to answer questions related to their sexual history, choice of clothing during the attack, their response to the assault. In some instances where the prosecution is of the opinion that there is inconsistency in the accounts of victim, an explanation is demanded from the victim to fill the gaps.[40] Victims have to undergo a gruelling process of investigation where they have to relive the traumatic experience over and over again. Several victims have reported that they would have not approached the police if they had known that they would be subjected to such ill- treatment.[41]

The effects of sexual assault and the allied victim blaming have been extensively studied and are found to have a profound influence on the victim's social standing and mental contentment. Though the impact is largely due to the crime, negative stereotypes and social stigma aggravate victims' distress. It was found that victims consider suicide following the assault and 19% have reported

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[38] Kilpatrick D. G., and Acierno R., "Mental Health Needs of Crime Victims: Epidemiology and Outcomes" 16 *Journal of Traumatic Stress* (2003) pp. 119–132.

[39] Halligan S. L., *et al*., "Posttraumatic Stress Disorder Following Assault: The Role of Cognitive Processing, Trauma Memory and Appraisals" 71 *Journal of Consulting and Clinical Psychology* (2003) pp. 419–431.

[40] Campbell R., and Raja S., "The Sexual Assault and Secondary Victimization of Female Veterans: Help Seeking Experiences in Military and Civilian Social Systems" 29 *Psychology of Women Quarterly* (2005) pp. 97–106.

[41] Logan T., *et al*, "Barriers to Services for Rural and Urban Survivors of Rape" 20 *Journal of Interpersonal Violence* (2005) pp. 591–616.

suicide attempts.[42] There are also issues of sexual dysfunction and avoidance of seeking help. More than 72% of the victims experience major depression and social isolation.[43] Victims often feel trapped engulfed by fear and anxiety and reduced sexual gratification.[44] Diminished self- esteem and increased self- blame show destructive effects upon the victim.[45] Negative victimization takes a significant toll on the victim's willingness to accept and take help. This leads to a myriad of complications such as losing the sense of self, fear of safety, lack of trust in interpersonal relationships, etc.[46]

The first and foremost change that must be brought forward is that the criminal justice system must be victim- friendly. The procedure must not traumatise the victim further rather, it should focus on helping the victim by securing justice and restoring by offering institutional help. In general, PTSD symptoms among victims of sexual abuse and sexual assault are disregarded after the disclosure of prior instances of victimisation.[47] It is pertinent to note that women are more prone to various forms of abuse and assault than men and therefore, a female victim might unfortunately have been sexually assaulted or abused more than once by same or different perpetrators.[48] While women are more likely at the risk of PTSD symptoms, there is indifference in the way of approach of such victims.[49] There is

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[42] Kilpatrick D.G., "Research on Long-Term Effects of Criminal Victimization: Scientific, Service Delivery and Public Perspectives". Paper presented at Colloquium entitled "The Aftermath of Crime" sponsored by the National Institute of Mental Health, with the cooperation of the National Organization for Victim Assistance, Washington, D.C (1985)

[43] Atkeson B.M., *at al*, "Victims of Rape: Repeated Assessment of Depressive Symptoms" 50 *Journal of Consulting and Clinical Psychology* (1982) pp. 96-102.

[44] Calhoun K.S. and B.M. Atkeson, "Rape-induced Depression: Normative Data" A Report Submitted to the National Institute of Mental Health (Grant No. MH29750).

[45] Burgess A. W. and L. L. Holmstrom, "Rape trauma syndrome" 131 *American Journal of Psychiatry* (1974) pp. 981-986.

[46] Janoff-Bulman R., *Shattered assumptions: Towards a new psychology of trauma* (Free Press, New York,1992)

[47] Wolfe, J. and Kimerling R. in *Assessing Psychological Trauma and PTSD*, Wilson J. P. and Keane T. M. (eds.) (Guilford, 1997) pp.192–238

[48] Cortina L. M. and Kubiak S. P., "Gender and Post Traumatic Stress: Sexual Violence as an Explanation for Women's Increased Risk" 115 *J. Abnorm. Psychol* (2006) pp. 753–759.

[49] Tolin D. F and Foa E. B., "Sex differences in Trauma and Post Traumatic Stress Disorder: A Quantitative Review of 25 Years of Research" 132 *Psychol. Bull* (2006) pp. 959–992

a need for community- wide awareness about the vulnerability of victims and to be more sensitised to the trauma and abuse. No person wants to inflict a greater harm upon themselves and every person wants to live a safe and secure life. It is paramount to enable a multidisciplinary intervention that prevent further psychological distress, offer social support and promote restorative justice.[50]

Conclusion

Despite the recent agonising judgment that was delivered while acquitting *Tarun Tejpal*, the highest court of the country has been very critical about the kind of mistreatment and insensitivity that has been shown in dealing with cases of sexual assault and violence. The Apex Court showed its displeasure in celebrating women's rights when the society does not show any concern about protecting the honour and dignity of women.[51] Each instance must be reviewed based on the facts and circumstances of the particular case. The Supreme Court also opined that information such as the sexual history and the sort of lifestyle of the prosecutrix has no legal relevance when matters of sexual assault are being dealt with.[52] The Apex Court has, time and again, emphasised on the importance of judges displaying responsiveness and impartiality during proceedings.[53] The judgement in Tejpal case casts lights upon the misogynistic nature of the society. Sensitivity is the only way to resolve victim shaming and promote compassionate treatment towards victims.

Victim blaming, at its core, stems from the lack of empathy and fear induced reaction. Shaming the victims is neither going to undo the crime nor is it going to render justice. Having suffered the assault or abuse, the blame for the contribution of the crime often leaves the victims undervalued and suspected which only adds insult to injury. It is high time for the world to understand the devastating effects that blaming has on innocent victims who bear no responsibility for what happened to them. Victim blaming silences victims and induces an irrational fear in the

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[50] Koss M. P., "Restoring Rape Survivors: Justice, Advocacy, and a Call to Action" 1087 *Annals of the New York Academy of Sciences*, (2006) pp.206–234.

[51] *State of Punjab vs. Gurmit Singh and Ors.*, 1996 SCC (2) 384

[52] *State of Uttar Pradesh* v. *Munshi* AIR 2009 SC 370, *Narender Kumar* v. *State* (NCT of Delhi) 2012 7 SCC 171

[53] *Aparna Bhat & Ors.* v. *State of Madhya Pradesh and Anr*. 2021 SCC Online SC 230

minds of victims that they will be subjected to cruel judgment and social indictment. This leads to the weakening of the criminal justice system and shakes the foundation of a welfare state. It is time that we shift focus to the perpetrators and hold them accountable for their crimes. The Government and social agencies must work together in order to protect the victims and promote compassion and empathy.

CONSTITUTIONAL MORALITY, TRANSFORMATIVE CONSTITUTIONALISM AND LIBERALISM IN WORKING MODEL OF THE CONSTITUTION

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Abstract

The Constitution of India was enacted in the year 1950 and institutionalised the system of limited government as it declares in part III the fundamental rights against State/Government in very broad and abstract language. Laws existed and are continued to be in force after commencement of the constitution are considered to be void, if they are inconsistent with the fundamental rights. State shall not make any law contravening this part and are void from the inception to the extent of contravention. The role of Judiciary is to adjudicate not only disputes, but also to decide on the constitutionality of the acts of the other two wings - namely, Executive and Legislature. Supreme Court of India resort *to a particular way of reading and enforcing Indian political constitution which could be called 'the moral reading. The moral reading proposes that judges, lawyers and citizens shall suppose to interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. The moral reading therefore brings political morality into the heart of constitutional law. But political morality is inherently uncertain and controversial, so any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative. In the Indian context justices of the Supreme*

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Court have that ultimate authority and the moral reading of the Constitution is therefore said by its critics to give judges absolute power to impose their own moral convictions on the public. However, there is nothing revolutionary about the moral reading in practice as lawyers and judges follow any coherent strategy of interpreting the Constitution.

Key Words:Constitutional Morality, Judicial Review, Freedom, Gender Justice, Equality, Liberalism and Constitutionalism and Uniform Civil Code.

Introduction

Almost all the issues that arise in the course of thinking about law in modern constitutional democracies find their most intense expression in the evolution of Indian constitutional law. Indian constitutional law is of immense historical, practical, and theoretical significance. Constitution of India is a politico-legal document reflecting major policy choices and aspirations of the people.

One must however, distinguish between the State[1] and the Constitution and understand that the State is created under the Constitution. However, it is amazing to note that there is no definition of "government" in the Constitution of India. India that is Bharat shall be the '**Union of States**[2] India is a federation transformed from Quasi-Federal-to Cooperative-to Collaborative- and may be to Techno Collaborative federation. The terms "State", "Government" and "Union" seems to be more confusing expressions and the only unambiguous expression is Constitution of India. When one considers, for example, the directive principles of the Constitution or the 'strivings' of the state, they include a fulsome engagement with matters of health, education, individual and communal safety, equality, and prosperity. This constitutionally enshrined vision of the future is what has often been seen as implying an activist and capacious state, responsible for creating conditions for the exercise of freedom.[3]

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[1] The Constitution does describes States in Schedule I and Union in Article 1 when it says India that is Bharat shall be a Union of States

[2] Constitution of India, art. 1.

[3] Uday S Mehta, "Constitutionalism", in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds.) *The Oxford Companion to Politics in India* (Oxford University Press, U.K.,2010) p. 15-27

The Constitution of India enacted in 1950 has institutionalised the system of limited government as it declares in part III the fundamental rights against State/ Government in very broad and abstract language. Laws existed and are continued to be in force after commencement of the constitution are considered to be void, if they are inconsistent[4] with the fundamental rights. State shall not make any law contravening this part and are void from the inception to the extent of contravention.[5] The role of Judiciary is to adjudicate not only disputes, but also to decide on the constitutionality of the acts of the other two wings-namely, Executive and Legislature.

Supreme Court of India resort to a particular way of reading and enforcing Indian political constitution which could be called 'the moral reading.[6] The moral reading proposes that judges, lawyers and citizens shall suppose to interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.[7] Article 19(1) (a) for example, recognises a moral principle that all citizens shall have the right to freedom of speech and expression but subject to 'reasonable restrictions' that could be imposed by means of a law made by parliament on eight grounds mentioned under Article 19(2).[8] It would be wrong for government of India to censor or control what a citizen say or publish. So when some novel or controversial constitutional issue arises-about whether, for instance, Article 19(2) permits laws against pornography-people who form an opinion must decide how an abstract moral principle is best understood. They must decide whether the true ground of the moral principle that condemns censorship, in the form in which this principle has been incorporated into Indian law, extends to the case of pornography.

The moral reading therefore brings political morality into the heart of constitutional law. But political morality is inherently uncertain and controversial,

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4 Constitution of India, art. 13(1).

5 Constitution of India, art. 13(2)

6 Ronald Dwaorkin, *Freedoms' Law- Moral Reading of the American Constitution*, (Harvard University Press, Cambridge, 1996).

7 *Ibid.*

8 Sovereignty and integrity of India, the security of the state, friendly relation with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

so any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative. In the Indian context justices of the Supreme Court have that ultimate authority, and the moral reading of the Constitution is therefore said by its critics to give judges absolute power to impose their own moral convictions on the public. However, there is nothing revolutionary about the moral reading in practice as lawyers and judges follow any coherent strategy of interpreting the Constitution.

'Liberal' or 'Conservative'

It would be easy to categorise justices of the apex court as 'Liberal' or 'Conservative' on the basis of their best explanation of the differing patterns of their decisions that lies in their different understanding of central moral values incorporated in the Constitutional text.[9] Conservative judges naturally interpreted abstract constitutional principles in a conservative way, as they did in the first 25years of interpreting the constitution of India. The judges of those days wrongly supposed that certain rights over property and contract are fundamental to freedom. Judges whose convictions are more liberal will naturally interpret those principles in a liberal way, as they did in the post emergency days. It is true that in post millennium liberal judges have ruled more statutes or executive actions unconstitutional.

The moral reading is not, in itself, either a liberal or a conservative charter or strategy. Conservatives strongly disapprove, on moral grounds, the affirmative action programs that give certain advantages to SC/ST/Minority/woman to educational institutions or employment opportunities and Conservative justices have not hesitated to follow their understanding of what the moral reading required in such cases.[10] The moral reading helps us to identify and explain not only these large scale patterns, moreover, but also more fine-grained differences in constitutional interpretations that cut across the conventional liberal-conservative divide. Conservative judges who particularly value freedom of speech, or think it

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[9] Justice Bhagavathi who was a party to the decision in Habeas Corpus case- *ADM Jablpur* v. *Shivakanth Shukla judgment* (1975) - black dot in the judicial history is found to be a surprise as he becomes protagonist of public interest litigation in post 1980 period.

[10] *Ramakrishna Dalmia* v. *Justice Tendulkar* 1958 AIR 538; and *Balaji* v. *State of Mysore* 1963 AIR 649

particularly important in democracy, are more likely than other conservative to extend the protection to acts of political protest, even for causes that they despise, as the Supreme Court's decision protecting flag-hoisting in private premises.[11]

Lawyers and judges, in their day to day work, instinctively treat the Constitution as expressing abstract moral requirement that can only be applied to concrete cases through fresh moral judgments. Indeed, it would be revolutionary for a judge openly to recognise the moral reading, or to admit that it is his/her strategy[12] of constitutional interpretation, and even scholars and judges who come close to recognising it shrink back, and try to find other, usually metaphorical, description of their own practice

Mismatch Between Role and Reputation

There is a striking mismatch between the role the moral reading actually plays in Indian Constitutional life and its reputation. Moral reading of the Constitutional provisions has inspired all the greatest constitutional decisions of the Supreme Court, and also some of the worst. But it is almost never acknowledged as influential even by constitutional lawyers, and it is almost never openly endorsed even by justices whose arguments are incomprehensible on any other understanding of their responsibilities. On the contrary, the moral reading is often dismissed as an "extreme" view that no really sensible constitutional scholar would entertain. It is patent that 'judges' own views about political morality influence their constitutional decisions, and though they might easily explain that influence by insisting that the Constitution demands a moral reading, they never do. Instead, against all evidence, they deny the influence and try to explain their decisions in other-embarrassingly unsatisfactory-ways.[13] They say they are just giving effect to obscure historical "intentions" for example, or just expressing an overall but unexplained constitutional" structure" that is supposedly explicable in non-moral terms.

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[11] *Union of India* v. *Naven Jindal* (2004) Case No-Appeal (civil) 2920 of 1996.

[12] A lady Judge of High Court of Maharashtra (2021) who gave bail to an accused in POCSO case on the ground that there was no skin to skin touch was denied confirmation as Justices of the High Court.

[13] Justice Chandrachud(2021) was found to be a liberal judge in *Ayyappa Swamy Temple Entry Case* whereas in *Ayodhya case* his stance was not bit liberal or secular is the critique against him

This mismatch between role and reputation is easily explained. The moral reading is so thoroughly embedded in constitutional practice and is so much more attractive, on both legal and political grounds, than the only coherent alternatives, that it cannot readily be abandoned, particularly when important constitutional issues are in play. But the moral reading nevertheless seems intellectually and politically discreditable. It seems to erode the crucial distinction between law and morality by making law only a matter of which moral principles happen to appeal to the judges of a particular era. It seems grotesquely to construct the moral sovereignty of the people themselves-to take out of their hands, and remit to professional elite, exactly the great and defining issues of political morality that the people have the right and the responsibility to decide for themselves.[14]

Theoretically, moral reading is not acceptable since constitutional theory wholly rejects that reading. Politicians try to convince the public that the great constitutional cases turn not on deep issues of political principle, which they do, but on the simple question of whether judges should change the constitution by fiat or leave it alone. This was accepted even by liberal interpreters of the constitution. They called the Constitution of India a **"living" document** and said that it must be "brought up to date" to match new circumstances and sensibilities.[15] They resorted to 'judicial activism' which seemed to suggest reform which seemed to suggest inventing a new document rather than interpreting the old one. In fact, this account of the argument was never accurate. The theoretical debate was never about whether judges should interpret the Constitution or change it-almost no one really thought the latter-rather it was about how it should be interpreted. But Politicians exploited the simpler description, and they were not effectively answered.[16]

The confusion engulfs the political bosses as well. Executive in the parliamentary government promise to appoint and confirm judges who will respect the proper limits of their authority and leave the Constitution of India alone, but since this misrepresents the choices judges actually face, the politicians are often

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[14] Ronald Dwaorkin, *Freedoms' Law- Moral Reading of the American Constitution*, (Harvard University Press, Cambridge, 1996).

[15] All Constitutions are heirs of the past and testators of the future.

[16] *Supra* Note 6

disappointed. **'Collegium'** in the apex court which occupied the field of recommending who shall be appointed as justices of the Supreme Court dominated the scenario since 1992 onwards. Political Executives were upset when their proposal for establishment of 'National Judicial Service Appointment Commission' was turn down as unconstitutional[17] as this violates basic structure by the judges of the Supreme Court by 2015.

Political executives were intense in their outrage at the Supreme Court's "Usurpation" of the people's privileges,[18] they said they were determined to appoint judges who would respect rather than defy the people's will. In particular, they denounced the Court's verdict by new legislation. However, the expectation of political executives who appoint judges at the instance of Collegiums' recommendation were often defeated because the political executive fail to appreciate how thoroughly the moral reading, which they say they deplore, is actually embedded in constitutional practice. Its role remains hidden when a judge's own conviction support the legislation whose constitutionality is in doubt-when a justice thinks it morally permissible for the majority to criminalise abortion, for example. But the ubiquity of the moral reading becomes evident when some judge's conviction of principle-identified, tested, and perhaps altered by experience and argument-bend in an opposite direction, because then enforcing the constitution must mean, for the judge, telling the majority that it cannot have what it wants. 'Collegium' nominees to the apex court and legislators all pretend that hard constitutional cases can be decided in a morally neutral way, by just keeping faith with the "text" of the Constitution of India, so that it would be inappropriate to ask the justice elevated any question about his or her own political (bias) morality.

The most serious result of this confusion, however, lies in the Indian public's misunderstanding of the true character and importance of its constitutional system. The Indian ideal of government not only under law but under principle as well is the most important contribution of our history of struggle for freedom. Indian

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[17] Constitution (99th Amendment) Act 2014 was declared unconstitutional and void, and the Pre-Amendment position has been restored and revived, -*Supreme Court Advocates –on-record Assn* v. *Union of India*, (2016)5 SCC 1

[18] Shabanu's decision was overcome by legislation in 1989. Many Constitutional Amendments were made to by- pass judicial verdicts.

ideal has increasingly and self consciously been adopted and imitated in South Africa. But we cannot acknowledge our own contribution, or take the pride in it, or care of it, that we should.

Chief Justice Mishra presided over one of the most “activist” period (2016-20) in the Supreme Court’s history and became one of the most liberal and explicit practitioner of the moral reading of the Constitution in the new millennium. Justice D.Y Chandrachud who occupied the seat of 50th Chief justice of India by 2022 is also considered to be in the band of liberal judges.

That judgment will appear extravagant, even perverse, to many lawyers and political scientists. They regard enthusiasm for the moral reading, within a political structure that gives final interpretive authority to judges, as elitist, anti-populist, anti-republic, and antidemocratic. That view rests on a popular but unexamined assumption about the connection between democracy and majority will, an assumption that Indian constitutional development has in fact consistently rejected. When we understand democracy better, we see that the moral reading of a political constitution is not antidemocratic but, on the contrary, is practically indispensable to democracy. This does not mean that there is no democracy unless judges have the power to set aside what a majority thinks is right and just. Many institutional arrangements are compatible with the moral reading; including some that do not give judges the power they have in the Indian structure. None of these varied arrangements, however, is in principle more democratic than others. Democracy does not insist on judges having the last word, but it does insist that they must not have it.

The Moral Reading

The fundamental rights under part III of the Constitution protect individuals from governments. Many of these articles are drafted in exceedingly abstract moral language. Article 19(1) (a) read with Art 19(2) refers to the Freedom of speech and expression, for example, the Article 21 to the procedure established by law (Due process) that is due to any person, and the equal protection under Article 14. According to the moral reading, these Articles must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporates these by reference, as limits on governmental power.

There is of course room for disagreement about the right way to restate these abstract moral principles, so as to make their force clearer to us, and to help us to apply them to more concrete political controversies. Here a particular way of stating the constitutional principles at the most general possible level could be favoured. The principles set out in the fundamental rights and directive principles, taken together, commit the Union of India to the following political and legal ideas: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with concern; and it must respect whatever individual freedoms are indispensable in the document, such as the freedoms of speech and religion. Other lawyers who endorse the moral reading might well formulate the constitutional principles, even at a very general level, differently and less expansively.

Of course the moral reading is not appropriate to everything a constitution contains. Constitution of India includes a great many articles that are neither particularly abstract nor drafted in the language of moral principle. Article 53 specifies, for example that the person to be the president of India must be at least thirty-five years old and the personal liberty under Article 21 insists that government may not interfere with the personal liberty of any person except through the procedure established by law. The latter may have been inspired by a moral principle; those who wrote and enacted it might have been anxious to give effect to some principle protecting any person. The moral reading of 'personal liberty' is inclusive of 'right to privacy' as interpreted later.[19] But Article 21 is not in itself a moral principle; its content is not a general principle of privacy. Whereas, equal protection clause under Article 14 which declares that State shall not deny to any person equal protection of the laws, has a moral principle as its content though the Article 21 does not.

This is a question of Interpretation. For instance, Article 22 was drafted to provide constitutional safeguards to an accused person. We find nothing in history, however, to cause us any doubt about what the framers of the Article 22 meant to say. Given the words they used in Art 22(4) to (7) we cannot sensibly interpret them as laying down any moral principle at all, even if we believe they were inspired by one. They said what the words they used would normally be used to

[19] *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1

say: not that personal liberty must be protected, but that person preventively detained must not be denied procedural safeguards during peacetime.

The framers of the 'equal protection clause' no doubt had fairly clear expectations about what legal consequences the Article 14 would have. They expected it to end certain of the competing inequalities in day to day life of a common man. But they did not anything about exercise of power in an arbitrary manner is a negation of equality or homosexuality or gender bias, one way or the other. They said that "equal protection of the laws" is required, which plainly describes a very general principle, not any concrete application of it.

The framers meant, then, to enact a general principle. But which is a general principle? This must be answered by constructing different elaborations of the phrase "equal protection of the laws," each of which we can recognise as a principle of political morality that might have won their respect, and then by asking which of these it makes most sense to attribute to them, given everything else we know. The qualification that each of these possibilities must be recognizable as a political principle is absolutely crucial. The qualification will typically leave many possibilities open. Whether the framers intended to stipulate in the equal protection clause, only the relatively weak political principle that laws must be enforced in accordance with their terms, so that legal benefits conferred on everyone, including exploited, suppressed and the downtrodden must not be denied, in practice to anyone need to be analysed retrospectively.

Constitutional interpretation must take into account past legal and political practice as well as what the framers themselves intended to say, and it has now been settled by unchallengeable precedent that the political principle incorporated in the equality clause in Articles 14 to 18 is not that very weak one, but something more robust. Once that is conceded, however, then the principle must be something much more robust, because the only alternative, as a translation of what the framers actually said in equal protection clause, is that they declared a principle of quite breathtaking scope and power: the principle that government must treat everyone as of equal status and with equal concern.

Restraints on Moral Reading

Two important restraints sharply limit the latitude the moral reading gives to individual judges. Firstly, under that reading constitutional interpretation must

begin in what the framers said, and, just as our judgment about what friends and strangers say relies on specific information about them and the context in which they speak, so does our understanding of what the framers said. History is therefore plainly relevant but only in a particular way. We turn to history to answer the question of what they intended to say, not the different question of what other intentions they had. We have no need to decide what they expected to happen, or hoped would happen, in consequence of their having said what they did, for example: their purpose, in that sense. That is a crucial distinction. We are governed by what our law makers said-by the principles they laid down-not by any information we might have about how they themselves would have interpreted those principles or applied them in concrete cases.

Secondly and equally important, constitutional interpretation is disciplined, under the moral reading, by the recruitment of constitutional integrity. Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other brother judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest. Those judges are like authors jointly creating a chain novel in which each writes a chapter that makes sense as part of the story as a whole. Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement, because that interpretation simply does not fit Indian Judicial history or practice, or the rest of the Constitution.

Nor could the judge plausibly think that the constitutional structure commits any other than basic, structural political rights to his care. He might think that a society truly committed to equal concern would award people with handicaps special resources, or would secure convenient access to recreational parks for everyone, or would provide heroic and experimental medical treatment, no matter how expensive or speculative, for anyone whose life might possibly be saved. But

it would violate constitutional integrity for him to treat these mandates as part of constitutional law. Judges must defer to general, settled understandings about the character of the power the Constitution assigns them. The moral reading asks them to find the best conception of constitutional moral principles-the best understanding of what equal moral status for men and women really requires, for example-that fits the broad story of India' record of Judicial history. It does not ask them to follow the whisperings of their own consciences or the traditions of their own class or sect if these cannot be seen as embedded in that record. Of course, judges can abuse their power-they can pretend to observe the important restraint or integrity while really ignoring it. But Prime Ministers and other Council of ministers can abuse their powers, too. The moral reading is a strategy for lawyers and judges acting in good faith, which is all any interpretive strategy, can be.

These constraints of record of Indian judicial history and integrity show how exaggerated is the complaint that the moral reading gives judges absolute power to impose their own moral convictions on the rest of citizens of India. Critics say that the moral reading turns judges into philosopher-kings. Constitutional law of India, and like all law it is anchored in history, practice, and integrity. Still, we must not exaggerate the drag of that anchor. Very different, even contrary, conceptions of a constitutional principle-of what treating men and women as equals really means, for example-will often fit language, precedent, and practice well enough to pass these tests, and thoughtful judges must then decide on their own which conception does not credit to the nation. So though the familiar complaint that the moral reading gives judges unlimited power is hyperbolic, it contains enough truth to alarm those who believe that such judicial power is inconsistent with a republican form of government. The constitutional sail is a broad one, and many people do fear that it is too big for democratic boat.[20]

What Is The Alternative?

Constitutional lawyers have therefore been anxious to find other strategies for constitutional interpretation, strategies that give less power. They have explored two different possibilities. The **first** and most forthright concedes that the moral

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[20] *Supra* Note 14.

reading is right-that the fundamental rights in part III can only be understood as a set of moral principles. But it denies that judges should have the final authority themselves to conduct the moral reading- that they should have the last word about, for example, whether women have a constitutional right to choose abortion or whether affirmative action treats all caste people with equal concern. It reserves that interpretive authority to the people. Than is by no means a contradictory combination of views. The moral reading is a theory about what the Constitution means, and not a theory about whose view of what it means must be accepted by rest of us-we the people.

The first alternative offers a way of understanding the arguments that the courts should take final authority to interpret the Constitution only when this is absolutely necessary to the survival of government-only when the courts must be referees between the other departments of government because the alternative would be a chaos of competing claims to jurisdiction. The practice has now settled that courts do have a responsibility to declare and act on their best understanding of what the Constitution forbids.[21] Supreme Court could not have decided that equal protection clause fits into narrower classification doctrine as it did it in *Ramakrishna Dalmia* v. *Justice Tendulkar.*[22] However, decisions rendered by the apex Court post *E.P Rayappa* v. *State of Tamilnadu*[23] (1974) that expanded equality clause-New Doctrine -Arbitrary exercise of power is negation of equality. Apex Court also expanded the scope of religious freedom, right to information as integral part of freedom of expression, right to education and right to privacy as an integral part of personal liberty. These decisions are now almost universally thought not only sound but shining examples of our constitutional structure working at its best.

The first alternative strategy favors the moral reading. The second alternative, which is called the "original" or "original Intention" strategy, does not. The moral reading insists that the Constitution means what the framers intended to say. Originalism insists that it means what they expected their language to do, which is a very different matter. According to Originalism, the great clauses of the

[21] Constitution of India, art. 13(2)- Judicial review Power
[22] AIR 1958 SC 538
[23] AIR 1974 SC 555

fundamental rights should be interpreted not as laying down the abstract moral principles they actually describe, but instead as referring, in a kind of code or disguise, to the framers' own assumptions and expectations about the correct application of those principles. So the equal protection clause is to be understood as commanding not equal status but what the framers themselves thought was equal status, in spite of the fact that the framers clearly meant to lay down the former standard not the latter one.

The classification doctrine of equality was deemed to be restrictive interpretation resulting in traditional strait jacketed formula. The content equality may possibly be denied in the interpretation of traditional doctrinal classification test. The moral reading insists that they misunderstood the moral principle that they themselves enacted into law. The originalist strategy would translate that mistake into enduring constitutional law.

The strategy, like the first alternative, would condemn not only the classification traditional equality doctrine but many other Supreme Court decisions that are now widely regarded as paradigms of good constitutional interpretation. For that reason, almost no one now embraces originalist strategy in anything like a pure form. The originalist strategy is as indefensible in principle as it is unpalatable in result, moreover. It is as illegitimate to substitute a concrete, detailed provision for the abstract language of the equal protection clause as it would be to substitute some abstract principle of Privacy for the concrete terms of Article 21, or to treat the clause imposing a minimum age for a president as enacting some general principle of disability for persons under that age.

Though many conservative politicians and judges endorsed originalism, and some have been tempted to reconsider whether judges should have the last word about what the Constitution requires, there is in fact very little practical support for either of these strategies. Yet the moral reading is almost never explicitly endorsed, and is often explicitly condemned. If neither of the two alternatives is actually embraced by those who disparage the moral reading, what interpretive strategy do they have in mind? The surprising answer is: None. Constitutional experts often say that we must avoid the mistakes of both the moral reading, which gives too much power to judges, and of originalism, which makes the contemporary

constitution too much the dead hand of the past. The right method, they say, is something in between which strikes the right balance between protecting essential individual rights and deferring to popular will. But they do not indicate what the right balance is, or even what kind of scale we should use to find it. They say that constitutional interpretation must take both history and the general structure of the Constitution in to account as well as moral or political philosophy. But they do not say why history or structure, both of which figure in the moral reading, should figure in some further or different way, or what that different way is, or what general goal or standard of constitutional interpretation should guide us in seeking a different interpretive strategy. There must be an interpretive strategy somewhere between originalism and the moral reading.

Constitutional Morality

The interpretive question of what the law holds on a particular subject is, in principle, an open ended question.[24] It is the judge's duty to discover what the rights of the parties are, even when no settled rule disposes of the case[25].For resolving hard cases[26] judge has to rely upon principles rather than mere rules. Judges prefer Principle of "local priority" wherein "legal material and doctrines, cases or statutes directly dealing with the material at hand" in formulating interpretive arguments. How far a judge must venture into this general territory for announcing a conclusion about the state of the law is essentially a practical one. The Judges of the Supreme Court of India have had to undertake a 'theoretical ascent'[27] on numerous occasions and, in doing so; they have discussed various theories of constitutional adjudication.

In the case of *M. Nagaraj* v. *Union of India* [28](2006) Justice Kapadia explored the nature of constitutional adjudication.

"At one extreme it is argued that the judicial review of legislation be confined to the language of the Constitution and its original content. At the other end, non-

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[24] Ronald Dworkin, *Justice in Robes* (Harvard University Press, London, 2006) p.25
[25] Ronald Dworkin, *Taking rights seriously* (Harvard University Press, London, 1978) p.85
[26] *Ibid,* p.54
[27] As Dworkin calls
[28] (2006) 8SCC212

interpretivism asserts that the indeterminate nature of the constitutional text permits a variety of standards and values. Others claim that the purpose of a Bill of Rights is to protect the process of decision –making. Constitutional adjudication is like no other decision-making process."[29]

The description of the different approaches to constitutional adjudication implies that there are those who believe that the Constitution is incomplete or open-ended, so that judges have no choice but to expand its provisions to meet new cases.[30] Other believe that the constitution is abstract as it lays down general moral principles that contemporary lawyers , judges, and citizens must apply by finding the best answer to the moral questions these abstract principles pose.[31]

There are those whose who believe that the Constitution, properly understood, is not so much open-ended as structural-it requires that judges serve the role of guardians of moral principles inherent in the national tradition.[32] These different approaches to adjudication all contemplate judges exercising 'a more judgmental and less mechanical role in interpreting the Constitution'[33] One such 'judgmental' approach to constitutional adjudication is 'legal pragmatism'. Advocating careful judicial decisions which try to discover what really works in practice rather than attempt to deduce concreted decisions from large, broad, abstract statements of principles[34] is the rubric of 'legal pragmatism'.

The Supreme Court of India has in some of its recent judgments like *Sabarimala temple entry*[35] (menstruating girls/woman can also enter sanctum sanitarium of the *Sabarimala* temple) and *LGBTQ cases*[36] (Homosexual/Lesbian relationship is not an offence) relied on 'constitutional morality' as the touchstone

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29 *Id* at 242

30 *Supra* note 6 at 289

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 *Supra* note 6 at 132

35 *Indian Young lawyers Association* v. *State of Kerala* (2018), Supreme Court of India in Writ Petition (Civil) No. 373 of 2006

36 *Navatej Singh Johar* v. *Union of India* (2019) Supreme Court of India in Writ Petition (Criminal) No. 76 Of 2016

to invalidate existing laws or to declare constitutional rights. It was felt that the term 'constitutional morality' required to be defined with clarity as constitutional morality was given more importance by the apex court than the 'Social morality'.

Constitutional morality would refer to the morality inherent in the constitutional structure beyond what is literally stated in the Constitution-that which any individual required to act as per constitutional norms ought to follow, even if the same is not specifically stated.

The more complex question that then arises is as to whether the requirement to follow such implied norms and to act as per them can be enforced as law or demanded as a matter of right or is it intended only to act as a moral compass? For example, if constitutional morality dictates that a person entrusted with constitutional duties must not be accused of serious criminal offences, can such restrictions be imposed by courts even if they are not specifically imposed in the Constitution itself or in any other law? Can an enforceable constitutional right be claimed or a restriction imposed on the basis that constitutional morality so dictates or can a law be declared invalid by courts on the basis that it is contrary to the principles of constitutional morality? If yes, then should courts become the arbiters of the standards of constitutional morality?

What then is 'Constitutional Morality' and What are its Implications?

The genesis of 'constitutional morality' can be seen in the Constituent Assembly debates themselves. Dr B.R Ambedkar had in fact, said: "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people are yet to learn it." For the question why the structure of the administration required to be mentioned in the Constitution Dr Ambedkar responded by saying that since Indians were yet to cultivate the sentiments of constitutional morality, "it is wiser not to trust the legislature to prescribe forms of administration.

It would be ideal if the principles of 'constitutional morality' are imbibed by all those requiring to act in accordance with the Constitution, then this cannot lead to creation of constitutional rights or restrictions in addition to those specifically set out in the constitution itself.

The inherent problem lies in the very unpredictable nature of the word 'morality'. As has repeatedly been seen, this term is capable of such varied and

subjective interpretation that while it might be used in an extremely progressive manner, it is also capable of extreme misuse. In fact, 'morality' is so flexible a term that it is incapable of a water-tight definition.

The standards of each man's morality are entirely different. In that situation, for courts to enter into a realm of determining constitutional rights on the basis of constitutional morality could be viewed as or lead to a serious incursion by courts into the legislature's exclusive domain, which is to legislate.[37]

It is arguable that even if the term 'constitutional morality' is not specifically referred to, this principle is inherent in the reasoning adopted by the courts over several decades to expand the scope of fundamental rights of citizens (especially the scope of right to life). It can also hardly be denied that the Supreme Court's judgments in the recent past have been progressive and veering towards providing citizens with greater liberties.[38]

The broader question though is as to whether they step on the exclusive domain of the legislature and whether they travel beyond the scope of the Constitution itself. The answer is not an easy one-especially since the feeling amongst the common man largely appears to be that the legislature has, by and large, not been quick to take a progressive approach towards the right of citizens and it is the courts that have stepped in where the legislature failed.[39]

The question, however, still remains as to whether the determination by courts of constitutional rights on the basis of words and phrases which are not to be found in the Constitution at all and are incapable of precise definition and are extremely subjective would be ideal in a democracy set-up and whether the perceived failure of the legislature could justify such an approach. The answer is not an easy one.[40]

Transformative Constitutionalism

The key elements of transformative constitutionalism are the central role of the State in fulfilling the project of emancipation and constant development of the

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[37] Shailesh Madiyal, "Constitutional Morality and Court", *Deccan Herald*, 3.1.2019

[38] *Ibid.*

[39] *Ibid.*

[40] *Ibid.*

Constitutional ideals of Liberty, equality and fraternity. It is these principles on which the society must sustain itself and the state must play an active role in constituting a society based on those principles.

The need to interpret the constitution as a transformative document was made possible in *Akhila Bharat Soshit Karmachari Sangh (Railway) V Union of India*[41](1981). Justice Krishna Iyer has remarked that - *"The authentic voice of our culture, voiced by all the great builders of modern India, stood for abolition of the hardships of the bonded labour, the hungry, hard-working half slave, whose liberation was integral to our independence. To interpret the Constitution rightly we must understand the people for whom it is made.-the finer ethos, the frustrations, the aspirations the parameters set by the Constitution for the principled solution of social disabilities"*.

We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. Social democracy means a way of life which recognises liberty, equality and fraternity as the principle of life.

The Constitution of India has been interpreted as a radical document that seeks to reconstitute Indian Society. The duty of ensuring that transition is placed on a state that truly imbibes transformative character and pursues it relentlessly. Therefore, two key aspects of the term transformative constitutionalism emerge:

i. It envisages attainment of substantial equality by recognising and eliminating all forms of discrimination as they may have existed or may develop in the future;

ii. It calls for a realisation of full human potential within 'positive social relationships'-

The use of the term 'positive social relationship' instead of limiting it to an individual's interactions with the state is indicative of the pervasive nature of transformative constitutionalism in the private sphere as well.

Transformations happen in small ways on day to day basis when we refuse to let a small injustice happen to us. India's constitutional moment was said to be a

[41] (1981) 1 SCC 246: 1981 SCC(L&S) 50 at p.264

shift away from old practices and hierarchies. Advocates ought not to address judges as "MY Lord" given the mandate of Article 146. Transformation from colonialism to Republicanism is to be fine tuned. A de-colonisation of the legal profession - institution of Senior Counsel and of our laws is yet to take place

Towards Substantive Freedom

An understanding of transformative constitutionalism demands that the state actively pursue liberty, equality freedom and other ideals enshrined in the Constitution and remove all barriers to enjoyment of such ideals. Moreover, we are facing internal enemies like Poverty, Socio-economic inequality, hierarchies of Caste, Race, and Gender bias etc

"Development as Freedom" alludes to the notion of substantive equality. The 'tyranny of unfreedoms' restricts growth and development of an individual.[42] These un-freedoms include systematic social depravation, neglect of public facilities, intolerance or over activity of repressive states. The denial of these substantial freedoms are sometimes related to economic poverty, which robs people of the freedom to satisfy or to be adequately clothed, obtain remedies for terrible illness, and the idea of well-being etc. What people are actually able to be or do is to be considered.

Transformative Constitutionalism and the Judiciary

'Adversarial system' that we are accustomed was unsuited to Indian Conditions as it was based on "self identification of injury and self selection of remedy". Given the vast people ignorant of legal literacy this would not ensure access to justice. No primary or any level of legal education is provided at the instance of Government. Whereas, the legal maxim speaks "ignorance of law is no excuse.

The Apex court in search of legitimacy, articulated the jurisprudence of 'public interest litigation (PIL). On many occasions justice has been done to thousands through the relief given by public interest litigation. However, Public interest litigation can be an instrument of oppression perhaps more deadly than any other since it is so heavily dependent on the "discretion" of the judges.

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[42] Amartya Sen, *Development as Freedom,*(Oxford University Press, 2001)

The Power is always purposive. Power is said to have been abused if it is exercised for different purposes. It is arbitrary power then. Power cannot be used for a collateral purpose in the name of “discretion”. Rule of ‘discretion’ is contrary to the ‘rule of law’. No law can be implemented; no executive can function without “discretion” as a legal concept in decision making. India lacks; “absence of theory of abuse of process” and “theory of responsibility for wrong doings”- Thus, resulting in decision to degenerate to favouritism; face of law and not case law and targeting of dissenters, under cover of law-This must be remedied forthwith

The post emergency[43] era depicts the conceptualisation of constitutional ideals of equality, liberty and fraternity. Affirmative Action policies came into picture through Mandal Commission”. Based on the idea of achieving substantive equality, and subject to wide ranging debates, reservations in educational institutions, and now in promotions also as approved by the Supreme Court in *BK Pavitra II*[44] (2017) have been single handedly responsible for ensuring whatever little diversity in different walks of life we see today. Justice D.Y Chandrachud in B.K Pavitra-II remarked that; “there is substantial evidence that the members of the constituent Assembly recognised that (i) Indian Society suffered from deep structural inequalities; and (ii) the Constitution would serve as a transformative document to overcome them. One method of overcoming these inequalities is reservations for SCs/STs in the legislatures and State services.

The first and foremost important question is, has the Indian Constitution worked? Democratic elections continue to take place and the rule of law provisions have been strengthened. But it’s working pathology show tensions which are more wear and tear; the first test is the absence of an intrinsic institutional morality to work its process. Without a working morality, no governance is possible. The second test is to ask whether the constitutional socio-economic objectives have been met.[45] In short, have the three organs of the State, the legislature, the Executive and the Judiciary vindicated in a substantial measure, the solemn promises

[43] 1980 onwards scenario.
[44] AIR 2017 SC 820
[45] *Supra* Note 3 p.38

incorporated in the Constitution? Definitely there is some progress, but not enough. As a result, the institutions of governance have been losing their credibility.[46]

Liberalism in Constitutionalism

Liberal Constitutionalism has been a driving force in modern time theorizing justice and democracy. Liberal Constitutionalism suggests that justice and democracy can be intertwined into a cohesive political order. But, one may ask is it possible? According to Liberal Constitutionalism, it certainly is. Firstly, Liberal Constitutionalism is defined by a political order which is based on a Constitution outlining the framework of a political system characterized by the bundle of civil and political rights derived from the principle of justice. Secondly, it regards individual as sovereign in them and democracy in a political framework.

The marriage of justice based on pre-political rights in tandem with the idea of democracy where people are fully sovereign seems contradictory and untenable. This leads to a dichotomy in Liberal Constitutionalism due to the polar principles it seeks to amalgamate. The tension between justice and democracy questions the theory of Liberal Constitutionalism to choose justice over democracy or democracy over justice. Justice requires pre-political rights outside the reach of democracy which undermines the sovereignty of individual and on other hand democracy excludes pre-political rights which undermine liberal justice. This tension interplays in each and every aspect of the political system.[47]

This tension is most profound in freedom of religion and equality. One of the major reasons why religion poses a threat to equality is the former's tendency of claiming itself rightful enough to possess benefits and subsidies. The conflict intensifies because of the plurality of minority groups which flares the disparity of polar principles of equality and religion. Due to religious pluralism, there are abound differences across the world and is a threat to the concept of equality which is recognized and respected.

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[46] The working of India's Constitution over seven decades also has depicted a lot-the use of military in the North-East and Kashmir, the use of emergency provisions to collapse democracy and federalism on a more than 200 occasions, an unforgivable (1975-77) and the continuing lawlessness and corruption of government, atrocities by its functionaries and its people and more than half of its people living in abject poverty.

[47] Andrew Heywood, *Political Ideologies: An Introduction*, (Palgrave Macmillan, Hampshire,2015) P.39

The Indian Constitution though framed in 1950 is regarded as a progressive document. The preamble to the Constitution guarantees justice-social, economic and political. Article 14 guarantees equality to all individuals before the law and equal protection of the law. Article 15 states that the State shall not discriminate amongst any citizen on the ground of religion, caste, sex or place of birth. Article 25 states that individuals are free to profess any religion of their choice. Liberal Constitutions, in essence, are secular' and our Constitution is no exclusion. The idea of secularism is varied from the prevalent ones in the United States, United Kingdom, and France which contemplates complete demarcation of State and religion whereas our Constitution contemplates that State shall work for the equal promotion of all religion. Secularism is defined aptly by Justice Chinnappa Reddy as Indian Constitutional secularism is not supportive of religion at all but has adopted what may be termed as permissive attitude towards religion out of respect for individual conscience and dignity.[48]

Secularism mandates that State has no religion of its own and the right to citizenship is not restricted by adherence to any particular religion or State prescribed religion in a Liberal Constitution around the world. But, all Liberal Constitutional democracies prescribe restriction on what activities may be regulated by States, including of course religious activity which a State may enforce as its own. The plurality of religious groups demands State inactivity in matters of religion. But, there is bound to be conflict as the political system culminates favoring one over the other thereby violating the mandate of Article 14 and 15. The Liberal Constitution mandates that canons of equality and freedom or justice and democracy be followed. In this light, we shall look into some instances of divergence in the basic principles of our Constitution.

One of the early proponents of Liberal Constitutionalism, John Rawls while outlining his idea for political liberalism propounded the reasonable comprehensive doctrine'. He explained the doctrine as reasonable persons are not moved by general good as such but desires for its own sake a social world in which they, as free and

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[48] Prof. K. Nageshwar, *Constitutional Perspective of Secularism,* National Seminar on Constitution of India, Held on 26/11/2021 *available at* http://www.thehansindia.com/posts/index/Editors-Desk/2016-08-13/Constitutional-Perspective-on-Secularism/248263 (Last accessed on: Nov 26, 2022)

equal can cooperate with others on terms. He insisted on reciprocity which should exist so that each can benefit from others.

By contrast, individuals are unreasonable when they seek fulfillment of their desires but fail to cooperate with others in their rights. The liberal State need not, according to his view, accommodate those that are unreasonable and are not prepared to respect the rules of society that determine the basis upon which we co-operate.[49]

In United States of America, Nelson Tebbe[50] pointed out the conflicting nature of religious traditionalists after the apex court affirmed the legal right of same-sex couples to marry and promoted the advancement of LGBTQ rights. He stated that Expansion of equality law has contributed to a sense among some religious traditionalists that there has been an inversion. They feel they are now the minorities who require protection from an overweening liberal orthodoxy.[51] But as religious traditionalists do not affirm equality to individuals; in view of John Rawls the State should not accord protection and freedom to such associations.

Religion and Equality in Liberal Constitutionalism

After the Constitution of India was adopted, its authoritative interpretation and characterization were left to the Supreme Court of India. We have found that the framers of the Constitution did not engage too deeply with liberalism as a political philosophy or with the nature of a liberal constitution. Whether these ideas had greater traction in constitutional argument before the Supreme Court is under scrutiny. Do lawyers and judges use this conceptual framework to understand and interpret the Constitution? A careful review of Supreme Court decisions from 1950 suggests a modest reliance on the concepts of liberalism and a liberal constitution to interpret and apply the Constitution to hard cases.

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[49] Wenar, Leif, "John Rawls", *The Stanford Encyclopedia of Philosophy* (Summer 2021 Edition), Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/sum2021/entries/rawls/.

[50] Nelson Tebbe is a Brooklyn Law Professor, who previously worked for the ACLU, author of the Book entitled Religious Freedom in an Egalitarian Age.

[51] Nelson Tebbe, *Religious Freedom in an Egalitarian Age*, (Harvard University Press, Cambridge, 2017) *available at* http://religionandpolitics.org/2017/03/28/the-clash-between-religious-freedom-and-equality-law/ Last accessed on Nov 26,2022

Beef Ban

To highlight the dichotomy between religion and equality one analogy that can be drawn is beef ban'. Article 48[52] remains one of the most contentious provisions in present times due to its interpretation to impose the draconian ban. If one was to trace the root of Article 48 in the Constituent Assembly Debates, one finds there were certain reservations on the inclusion of such a provision in the Constitution. Dr. BR Ambedkar, the architect of the Constitution was reticence and the provision found back door entry in Part IV which is Directive Principle of State Policy. Despite it not being a fundamental right, the article has superseded fundamental rights as seen from various decisions.

The Hon'ble Supreme Court in *Hanif Qureshi* v. *State of West Bengal*[53](1959) held that an effective total ban on cow and its progeny is valid but a with regard to other milch animal such as she-buffalo, bull, bullocks who have ceased to be draught or milch is invalid.

Further, In *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat*[54](1998) the Hon'ble Supreme Court held that total ban on cow slaughter is valid as cow never becomes useless. In my opinion, the logic behind such reasoning is flawed. Many critics have termed it as State policing in matters of food choices which is a violation of Article 21. Nevertheless, 24 States in our country have banned beef.[55]

Women Rights

Though we advocate egalitarianism, but it is hardly implemented to several religious conflicts. In certain instances, the State unshackles inequality with its authoritative power that hinders equality but in other instance, it fails to do so. One such example is the apex court's judgment on Triple Talaq. In *Shayara Bano* v. *Union of India*[56] (2017), the Supreme Court declared the practice of Talaq-e-

[52] Article 48 states that the State shall endeavour to organize agriculture and animal husbandry and in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

[53] 1959 SCR 629; AIR 1958 SC 731

[54] AIR 1998 Guj. 220; (1999) 3 GLR 2007

[55] Kumar Uttam, "Cattle Slaughter Ban" *Hindustan Times*, June 1, 2017 *available at* Website:https://www.hindustantimes.om/india-news/cattle-slaughter-ban-5-reasons-why-the-beef-ban-controversy-is-good-for-bjp/story-lH6TqOyH2FI2Bj8nQB8nLO.html (Last accessed on Nov 26,2021)

[56] (2017) 9 SCC 1

Biddat[57] as an unessential religious practice which is against the basic tenements of Quran. Through this, the Supreme Court aimed to protect women from any discrimination by the archaic and unfounded practice but it lacks measure to fully promote equality for women. For instance, even though Quran permits the women to choose Khula, but delegate excessive powers in the hands of spouse which promotes inequality.

According to clerics, women can chose Khula but this procedure requires consent of her husband and if it is only affirmed by her husband, the marriage can be annulled by a Maulvi. Thus, what we observe from such a practice is that the religious association promotes inequality for females whereas excessive powers are vested in their counterparts. This particularly goes against their pre-political rights and liberal justice.

Also, the women's right of entry to religious places during menstruation is denied in almost all the religions. Hindu women are not allowed to enter the temple during menses. The *Sabarimala Ayyappa Temple* conditioned the entry of women only if detectors are installed at the entrance to check if a woman is menstruating to curb it.[58] Not only is it a violation of human rights but also threat to privacy.

Further, in Muslim women are not allowed to pray when they're bleeding. They are not only denied entry but are discriminated from becoming a religious head. In the Abrahamic religions (Christianity, Judaism and Islam), a woman is not allowed to become a religious head which makes them a minority among minority. Any religious association which acts discriminatory fail to honour diversity should not be allowed to claim any protection unless they co-operate and honour others right in a liberal system.

Hajj Subsidy

Furthermore, Article 27 of the Constitution expressly restricts the State from collecting tax for purpose of promoting or maintaining expense of any particular

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[57] Triple Talaq is instant, irrevocable, unilateral divorce by husband by formula of pronouncing divorce three times.

[58] Krishnadas Rajgopal, "Do you have a constitutional right to prevent women's entry at Sabarimala? SC to Devaswom" *The Hindu,* 11/09/2016 *available at* http://www.thehindu.com/news/national/Do-you-have-a-constitutional-right-to-prevent-womens-entry-at-Sabarimala-SC-to-Devaswom/article13995792.ece (Last accessed Nov 27,2021)

religion or its denomination. However, our government provides subsidy to different religion for various reasons. In *Prafull Goradia* v. *Union of India*[59] (2011), the Supreme Court dealt with the question if the Government violates Article 27 while granting fund for religious subsidies from taxpayers' money.

The court observed that in our opinion Article 27 would be violated if a substantial part of the entire income tax collected in India, or a substantial part of the entire central excise or the customs duties or sales tax, or a substantial part of any other tax collected in India, were to be utilized for promotion or maintenance of any particular religion or religious denomination. In other words, suppose 25 percent of the entire income tax collected in India was utilized for promoting or maintaining any particular religion or religious denomination, which, in our opinion, would be violative of Article 27 of the Constitution.[60]

In 2012, the constitutionality of Hajj subsidy provided by the Government was called in question in *Union of India* v. *Rafique Shaikh Bhikan*[61](2012). Justice Alam stated we also take note of the fact that the grant of the subsidy has been found to be constitutionally valid by this court. We are not oblivious of the fact that in many other purely religious events there are direct and indirect deployment of State funds and State resources. Nevertheless, we are of the view that Hajj subsidy is something that is best done away with.[62]

The Supreme Court while interpreting the case found out the number registration for Private Tour Operators (PTO) has increased in recent years and predicted that in coming years that such subsidy can be burden to the State fund.[63] The Government decided such fund shall be slowly shifted from Hajj subsidy to promotion of education. But, now the question arises why only Hajj subsidy was compromised among all. As per Article 290A, the State of Kerala provides Rs. 46.5 lacs annually to Travan core Devaswom Fund; Tamil Nadu provides Rs. 13.5 lacs to the Devas wom fund for maintenance of Hindu Temples.

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[59] (2011) 2 SCC 568

[60] *Prafull Goradia* v *The Union of India*, (2011) 2 SCC 569, para 6

[61] (2012) 12 SCC 459

[62] *Union of India* v *Rafique Shaikh Bhikan*, (2012) 12 SCC 459, para 38

[63] *Union of India* v *Rafique Shaikh Bhikan*, (2012) 12 SCC 459, para 8

The Centre and the Uttar Pradesh Government also spent Rs. 1,150 crore and Rs. 11 crore respectively on the Allahabad Kumbh.[64] Having examined all of these, now if you ask a question to yourself- Does not these subsidies possess similar features for which the Government decided to stop funding for Hajj pilgrims? Why cannot be these subsidies be exchanged for other purposes like education and other allied sectors?

Uniform Civil Code

Another issue is with regard to the introduction of Uniform Civil Code' (UCC). Article 44 of our Constitution obligates the State to endeavour to bring in a political climate that would be conducive to enacting the code. After several decades and umpteen failed attempts in fulfilling the directive policy, the radical liberals question it on the ground of religious freedom. Due to religious pluralism, there exists a conflict between different religions. On determining such cases, the Supreme Court has in several instances expressed its concern with regard to upholding of article 44. The apex court observed that there is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their persona law.

A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.[65] In another case, the apex court stated When more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of uniform civil code for all citizens in the territory of India.[66]

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[64] See also expenditure of States like Kerala, Tamil Nadu, Chhattisgarh, Delhi, Karnataka, Madhya Pradesh and Uttarakhand.; Faizan Mustafa, "Cancelling Haj Subsidy Is a Good Step, Now the Government Should Stop Spending on All Religions"*The Wire*, 17/01/2018 *available at* https://thewire.in/214770/haj-subsidy-government-spending-on-religion/ (Last accessed on Nov 26,2021) ; Ipshita Chakravarty, "Apart from the Haj, India subsidises a range of pilgrimages most of them Hindu" *Scroll*, 14/01/2017, *available at* https://scroll.in/article/826656/apart-from-the-haj-india-subsidises-a-range-of-pilgrimages-most-of-them-hindu (Last accessed on 26/11/2021)

[65] *Mohd. Ahmed Khan* v. *Shah Bano Begum and Ors*., (1985) 2 SCC 556, para 36

[66] *Kuldeep J's judgment in Smt. Sarla Mudgal & Ors* v. *Union of India & Ors*, (1995) 3 SCC 635

Group rights to protect vulnerable and exploited groups are not illiberal additions but integral to a multicultural conception of liberalism. Now, let's look into the changes that will take place after the enactment of Uniform Civil Code. Firstly, it would lead to abolishment of Hindu undivided family institution which entitles them for certain tax benefits; Secondly, the provisions of Indian Succession Act applicable to Christians and Parsis with respect to egalitarian and gender justice would be applicable to all with certain amendments; Thirdly, the law regarding testamentary succession for disposal of property to outsiders shall be changed (which exist in Muslim law) and such unbridled power shall be made limited (one third only), thus leading the disposal of property to the legal heirs only; Fourthly, there will be balance made between the marriage law of Hindu (who considers it as sacramental) and Muslim (who considers it as a contract).

Apart from these, there exist issues like polygamy, maintenance, laws on domestic violence etc.[67] If these changes are incorporated and at last we have Uniform Civil Code, wouldn't it be violative of the freedom to practice and profess religion. Respect for diversity is the key reason underlying the protection to freedom of religion and the government by implementing Uniform Civil Code would violate the principle of secularism which forms part of the basic structure doctrine as laid down in *S.R. Bommai* v. *Union of India* (1993).[68] Article 44 is to be re-thought in light of the basic structure doctrine. Is there a failure of Indian constitutional liberalism to draw on "Indian epistemologies regarding identity and community?

The theory of Liberal Constitutionalism finds itself fraught with the polar principles of freedom and justice. Tension arises between freedom of religion and equality which finds the political system trapped in such a situation where it has to choose one over the other. Thus, where the judiciary is approached to strike a balance, it should give regard to the principles of reciprocity, protection of diversity, avoiding harms and balance the religious freedom with the overall constitutional scheme. Also, the State's religiously guided action be taken into strict scrutiny to

[67] Flavia Agnes, "The Modi Government's Hindutva Ideology Could Stall Any Progress on the Uniform Civil Code" 7/7/ 2016 *available at* https://thewire.in/49580/bjp-uniform-civil-code/ (Last accessed on Nov 26,2021)

[68] 1975 Supp SCC 1.

protect the democratic fabric of the society for the promotion of harmony and peace.

Article 48 states that the State shall endeavor to organize agriculture and animal husbandry, and in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

A Liberal Constitution in the Supreme Court

Whether liberalism or liberal justifications have been commonplace in the Supreme Court's interpretation of the Constitution?

The reference to 'liberalism' was made in *Indira Gandhi* v *Raj Narrain*,[69] (1975) where a Constitutional Bench of the Supreme Court applied the basic structure doctrine to declare the Constitution (39th Amendment) Act, 1975 to be unconstitutional. The court ruled that Parliament could not divest the judicial branch of the power of judicial review over election disputes related to the Prime Minister. Chief Justice C.J. Ray surveyed the historical lineages of the concept of separation of powers[70] and democratic constitutionalism. He approvingly cited Bertrand Russel's conclusion that '19th century liberalism' was designed to prevent the arbitrary exercise of power by separating out the governmental power into three branches even at the cost of efficiency. Though C.J. Ray canvassed a wide range of academic materials to support his opinion, it's fair to say that the conclusion on the constitutional principle of separation of powers partially rested on an account of 'liberalism.'[71]

There are stray references to economic liberalism which is more properly described as the policy of economic liberalization.[72] What we need to work on is "Economic Justice". Economic Justice was a magic wand that would remove poverty.

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[69] *Indira Gandhi* v *Raj Narrain*, 1975 Supp SCC 1.

[70] See also State of *UP* v *Jeet S. Bisht*, (2007) 6 SCC 586, SB Sinha J at p.81

[71] *Ib.* at 537-39.

[72] See *Hussainbhai Calicut* v *Alath Factory Tezhilali Union, Kozhikode*, (1978) 4 SCC 257, Krishna Iyer J at p.4; *Inder Singh* v *State (Delhi Administration),* 1978 (4) SCC 161, Krishna Iyer J at p.11.

However; in *Bhanumathi* v. *State of U P*[73](2010) Justice A.K. Ganguly upheld a State legislative amendment that permitted a motion of no-confidence in local government leadership as it was essential to maintain a republican form of government. Further, he concluded that this republicanism was consistent with democratic socialism and radical liberalism in the Constitution. Though Justice Ganguly did not develop a full account of these concepts and how they are manifested in the constitution, this is surprisingly only the second substantive reference to liberalism by the Supreme Court in 75 years.

This neglect of liberalism in the Constitution appears to have changed by 2018.In *N. Radhakrishnan* v. *Union of India*[74],(2018) Chief Justice Mishra speaking for a three-judge bench denied the request for a ban on a book on the grounds that it offended religiously minded temple goers. He affirmed that the free speech guarantee in the Constitution protected the 'liberalism' necessary for artistic expression. For the first time in Indian Supreme Court adjudication, he affirmed liberalism as an epistemic personal requirement for writers and artists to read any material and to express themselves in diverse ways.

In *Indian Young Lawyers Association* v. *State of Kerala* (2016) the court had to decide whether the individual liberty of menstruating women to enter a temple would override the religious and customary practices of the priests that barred their entry. Chief Justice Mishra emphatically upholds individual liberty and writes: Constitutional democracies do not necessarily result in constitutional liberalism. While our Constitution has adopted a democratic form of governance, it has at the same time adopted values based on constitutional liberalism. Central to those values is the position of the individual. The fundamental freedoms which Part III confers are central to the constitutional purpose of overseeing a transformation of a society based on dignity, liberty and equality.[75] In this opinion, CJI Mishra clarifies the place of liberalism in the Constitution in two distinct ways: first, he finds that fundamental rights in Part III of the Constitution express the political value of liberalism and secondly, he outlines the tension between the simultaneous pursuit

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[73] *Bhanumathiv* v *State of UP*, (2010) 12 SCC 1 56
[74] *N Radhakrishnan* v *Union of India*, (2018) 9 SCC 725
[75] *Indian Young Lawyers Association* v *State of Kerala* 2016 SCC OnLine SC 1783, Mishra CJI at p.188

of the democratic and the liberal principle in a constitutional regime. This is a significant advance in the recognition and understanding of liberalism in the Constitution by the Supreme Court, albeit by only one opinion in the case.[76] CJI Mishra's use of the phrase egalitarian liberalism would not adhere to any standard account of political liberalism and is best understood on its own terms.

When Justice Chandrachud dissenting in the *Aadhaar* case[77]summons liberalism to challenge the Aadhaar scheme he surprisingly relies on a distinction between positive and negative liberty. He rightly points out that liberalism may demand both restraint and positive action from the state, and then remarkably concludes that the direct benefit transfers enabled by Aadhaar are a form of neo-liberalism. In any event, these reasons do not drive his conclusion that the Aadhaar scheme is unconstitutional and are best seen as providing additional support. The Political liberalism in the constitutional interpretation of the Supreme Court appears to rest on the shoulders of apex Court judges.

Indian liberals were swooning over Justice D.Y. Chandrachud, hailing him as one of the few progressive voices left in the Supreme Court. Agog at his passionately-written dissent notes on Aadhaar and the controversial arrest of five activists in the *Bhima Koregaon case*, the media hailed him as "a judge who is not afraid to dissent", "the man who doesn't mince words", and "judge with a mind of his own."His observation that "dissent is the safety valve of democracy" while hearing a plea against the arrest of five activists became the abiding mantra for liberals to swear by. While the Supreme Court bench had refused to interfere in the matter, Chandrachud had disagreed with the majority view, saying an SIT should be set up to probe their arrest.

In the historic judgment holding privacy as a fundamental right, Justice Chandrachud (2018) was one of the five Supreme Court judges to overturn the infamous *ADM Jabalpur* judgment – authored by his father, late Chief Justice of India Y.V. Cha-ndrachud, among others – which ruled that the right to life itself could be suspended during an emergency. Justice Chandrachud went on

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[76] 'egalitarian liberalism' in *Navtej Johar* v *Union of India* (2018) 10 SCC 1, CJI Mishra at p.97
[77] *K.S. Puttaswamy* v *Union of India*, (2017) 10 SCC 1,

to overrule another judgment by his father which had upheld the controversial adultery law.

The core idea of modern liberalism, as political theorists understand, flows from the concept of limited government, which itself, is an outcome of the social contract theory. Based on limited government, the liberals have constructed the philosophical structure on twin concepts of liberty and equality and the principles of pluralism and tolerance.

If the judges in hard cases tilt in favour of individual rights when pitted against the State power, minority rights in a contest against majoritarian Government, women in promoting gender justice, or free speech against intolerance, the tag of being a 'liberal Court' gets attached

The Constitution of India enacted in 1950 has institutionalised the system of limited government. The role of Judiciary is to adjudicate not only disputes, but also to decide on the constitutionality of the acts of the other two wings-namely, Executive and Legislature. If the judges in hard cases tilt in favour of individual rights when pitted against the State power, minority rights in a contest against majoritarian Government, women in promoting gender justice, or free speech against intolerance, the tag of being a "liberal Court" gets attached.

In recent times, the jurisprudence around transformative constitutionalism has developed strongly, especially in relation to the rights of the LGBTQI communities through a series of judgments. In *Navtej Johar* v. *Union of India*[78] (2019) the Supreme Court held that "Transformative Constitutionalism" is considered to be one of the objectives of adopting a constitution itself.

The purpose of it is to have a Constitution which guides the nation of transforming itself from a medieval and hierarchical society to an egalitarian democracy to embrace the ideals enshrined in the preamble to the Constitution. It was held that as a constitutional court whose job is to protect its people from humiliation and discrimination, it cannot provide a static interpretation to the rights of liberty and equality and remain a mute spectator to the struggle for the realisation and attainment of rights. The rights that are guaranteed as Fundamental Rights

[78] *Navatej Singh Johar* v. *Union of India* AIR 2019

under our Constitution are the dynamic and timeless rights of "liberty" and "equality" and it would be against the principles of our Constitution to give them a static interpretation without recognising their transformative and evolving nature. The argument does not lie in the fact that the concepts underlying these rights change with the changing times but the changing times illustrate and illuminates the concepts underlying the said right"[79]

It is said that all Constitutions are the heirs of past and testators of the future. However, every generation has the right to decide for themselves what the Constitution means for them, to interpret the Constitution after their own aspirations. An endeavour to decriminalize S.377 IPC started two decades before the Navtej's case by the Naz Foundation which was reversed in Koushal most shamefully. Natej's is a reaffirmation of Naz. The judgment of the Supreme Court in Navtej Johar was preceded by the judgment in Justice *K.S Puttaswamy V Union of India*[80](2017) This judgment was instrumental in holding the right of privacy as a fundamental right under part III of the Constitution. While the specific contours of privacy yet remain to be tested in specific factual scenarios, the judgment has set the ball rolling to initiate discourse rights that flow from the right to privacy such as the right to be forgotten, which will have significant impact on the functioning of the criminal justice system.[81]

On the question, is the label "liberal Court" on the Supreme Court of India, justified, the answer is undoubtedly yes, because:

i. The Supreme Court of India struck down criminalisation of adultery and set the tone for recognition of the right of a woman to have sex outside the marriage without inviting any civil consequences (at present adultery is a ground for divorce);

ii. The Supreme Court of India upheld individual's choice in sexual orientation by striking down criminalisation imposed by the colonial State power in S.377

[79] Chief Justice Deepak Mishra Highlighting the core of Transformative Constitutionalism

[80] AIR 2017 SC 4161

[81] Indira Jai singh, Transformative Constitutionalism, speech delivered at NLSIU, Bangalore on 22.7.2019

of the IPC and by this, it has paved the way for removal of discrimination against LGBTQIA[82] individuals;

iii. Though Supreme Court of India sided with the State authority in prescribing Aadhaar as a biometric identity, its use as a weapon of surveillance has been incapacitated by delinking from mobile phones and bank accounts and banning its use by private entities; and

iv. The fourth and the last decision is on gender justice in opening the gates of Sabarimala temple to women of the age of 10 to 50 years, whose entry was stopped long back. In this contest, it was between the claim of equality and the right to practice religion versus the mighty religious institutions.

No Transformation in Gender Justice

The slews of judgments in Puttaswamy, Nalsar, Shafina Jahan and Navtej Johar have reflected the progressive elements in the judiciary. However, the relief provided has been limited as the courts have largely shied away from taking any firm stand. Nothing epitomizes this self imposed limitation of the judiciary more than its judgments in several cases relating to the rights of women, starting from 1950's to the recent cases of ***Sabrimala*** and ***Triple Talak***.[83] The reasoning in these cases could have been more rigorous and transformative to have a progressive impact.

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[82] **LGBTQIA** -

L-Lesbians (Woman who has a sexual orientation toward women).

G-Gay (Men who are attracted to Men in a romantic/erotic/emotional sense.

B-Bisexual (A person who experience sexual /physical/spiritual attraction to more than one gender).

T-Transgender (A person whose sense of personal identity or gender does not correspond to the sex they were assigned at Birth).

Q-Queer (Attraction to people of many gender-All non-hetero-sexual people).

I-Intersex (People born with any of 30 different variations in sex characteristics including chromosomes, gonads, sex hormones or genitals.

A-Asexual (A person who experiences little or no sexual attraction to others and a lack of interest in sexual relationships-Ace)

[83] Indira Jai Singh, *Transformative Constitutionalism*, "NLSIU Annual Themed Conference on Transformative Constitutionalism Exploring Ideas, and Possibilities in its Theory and Practice", Bangalore on 22.7.2019 *available at* https://www.scconline.com/blog/post/2019/03/29/nlsiu-annual-themed-conference-on-transformative-constitutionalism-exploring-ideas-and-possibilities-in-its-theory-and-practice

The judgments of the apex court starting from the case of ***Narasu appu*** have continuously ignored the question of gender equality on the pretext of personal law is not law within the meaning of Article 13(3) of the Constitution. This stand of the Court was later challenged in the cases of *Mary Roy, Gita Hariharn, Sha Bano, Goolrookh, Sabrimala* and the *Triple Talak* but the court dodged the question. Religion remains the last frontier that women have to cross to attain equality and to become Indian women than Hindu women, Muslim or Christian women.

It was only in Sabrimala that the court has sought to address the question in the affirmative, exorcising the ghost of Narasu Appu to a certain extent. In a concurring judgment, Justice D.Y Chandrachud held that preventing women from entering the temple amounted to another form of untouchability. The majority ignored the argument. Menstrual taboos amounts to "untouchability was not accepted and in fact criticised. There are always new and emerging forms[84] of untouchability apart from what is prohibited under Article 17 of the Constitution.

In ***Goolrookh*** Gujarat High Court has held arrived at a shocking proposition that a woman acquires the religion of her husband on marriage. Thus a woman has the religion of her father on birth and of her husband on marriage! The Supreme Court has yet to answer the question.

In ***Triple Talak Case*** the Supreme Court came up with divided opinions as to why the practice of Triple Talak must be stopped. While it was held by two judges that the practice was manifestly arbitrary and unconstitutional, other judges said it was unislamic. None of the judges said it was violative of Article 15 or 21 of the Constitution. The court relied on the doctrine of "essential practices" continuing the legitimacy of laws which are at the source of this discrimination. Thus, wherever the question of equal rights for women has come forward, the approach of the courts has been disappointing.[85]

The ***Shafin Jahan*** **Case** is an illustration of transforming interpersonal relationships. Arguments in this case however ranged from questioning if Hadiya, a 24 year old Hindu woman had been brainwashed, programmed, or indoctrinated to convert to Islam and marry a Muslim Man. However, Hadiya stood in the

[84] 'Social distancing' in the context corona./omicron virus for maintaining good health.
[85] *Supra* Note 77, Indira jai Singh.

Supreme Court, before the then Chief Justice, Dipak Mishra and Justices Chandrachud and Khanwilkar when the court directed that they want to interact with her. Upon being questioned,

> *"Her crystal clear voice rang through the court room, "I want my freedom." Did the court have any choice at that point? No, when asked if she wanted to continue her education, she said "I want my faith and my education". Then when it was clear that she would be sent to the college hostel she said, "I want to be able to talk to my husband when I need to discuss anything, I want his companionship". This fight for gender justice, perhaps is the story of failure of transformative constitutionalism in India*[86]

Sexual harassment at workplace remains, "a problem from Hell" as they are just "collateral damage". "Me Too" movement has yielded no concreted results for women in India. The problem from Hell continues … even after law was being enacted.

Inconsistent Liberal

But inspiring as some of Justice Chandrachud judgments may be for liberals, his credentials as a liberal have been somewhat inconsistent, to say the least. In 2018, Chandrachud, along with former CJI Dipak Misra and Justice A.M. Khanwilkar summarily dismissed a bunch of PILs seeking an independent probe into the death of Brijgopal Harkishan Loya in December 2014, and said that the petitions were an attempt to scandalise and obstruct the course of justice. He went on to say that PILs are "capable of being and (have) been brazenly misutilised by persons with a personal agenda."

"At one end of that spectrum are those cases where public interest petitions are motivated by a desire to seek publicity. At the other end of the spectrum are petitions which have been instituted at the behest of business or political rivals to settle scores behind the facade of public interest litigation," he had said. That same year, when CJI Misra was at the receiving end of criticism for assigning important cases to himself, Chandrachud was part of a three-judge bench that ruled it was the "exclusive prerogative" of the CJI to allocate cases and constitute benches.

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[86] *Supra* Note 77, Indira jai Singh.

In the controversial *Hadiya case*, while Chandrachud's intervention and line of questioning led to the Supreme Court restoring her marriage to a Muslim man, the court fell short of disallowing the NIA from investigating a terror angle in her marriage. In 2017, Chandrachud was also part of a three-judge bench that banned liquor vends on highways - a judgment that the Supreme Court had to later significantly dilute. In the *Ayodhya verdict*, Chandrachud, who is slated to become the CJI for a term of two years in 2022, chose to tread carefully. He refused to dissent in a judgment that unanimously concludes that the site where the Babri Masjid was constructed was the *Janmsthan* (birthplace) of Lord Ram. After this judgment, it is unlikely that liberals would be waiting for Justice Chandrachud's term as Chief with bated breath like they were just about a year ago.

An overall assessment of the trajectories of political liberalism in the Indian Supreme Court based on the discussion above would be that it is a minor aspect of Indian constitutional law doctrine. It appears very rarely to explain or justify a particular interpretation of the separation of powers and the scope of fundamental rights. However, even in these cases, it does not offer a distinctive or indispensable reason for the conclusions reached.

Liberalism in Constitutional Design

So far the focus has been on the express invocation of the word or the concept of liberalism by the framers to explain or justify their constitutional choices, or by the Supreme Court's to justify its constitutional interpretation. It is found that both political projects do not extensively use liberalism to make constitutional choices or to interpret the Constitution. We should nevertheless describe the Indian Constitution to be a liberal constitution when we locate it in the global family of national constitutions. This exploration would necessarily be comparative and typological.

Firstly, one must have an account of the features of a Justice Chandrachud invoked among others Isaiah Berlin, F.A. Hayek, Amartya Sen, Martha Nussbaum, Henry Shue to discuss liberalism and positive and negative liberty.

Secondly, if the Indian Constitution possesses these features in full or in greater proportion than many other constitutions across the world

Prof Dieter Grimm's (2012) effort to develop a typology of constitutions is instructive and the appropriate place to begin this enquiry. He usefully distinguishes between a typology built on the legal features of a constitution-written/unwritten, higher or ordinary law, rigid or flexible-from one that is made by reference to political values-democratic/non-democratic, liberal /illiberal. While there are strong historical linkages between the legal features of a constitution and its political values, this is not a necessary conceptual connection. Hence, we may discover that an unwritten constitution may be properly described to be liberal or illiberal depending on the constitutional norms observed in a particular society. So, it follows that liberalism may be embedded in the legal or non-legal aspects of the constitutional arrangements in any society. For Grimm, a liberal constitution is one that fully embraces the pluralism of individual opinions and interests. A deep liberal commitment would entail that citizens would have the right to express their political choices not just electorally but at all other times and places. Hence, though the democratic principle would legitimatize and institutionalize majority rule, if any particular group were able to suppress the expression of any other opinions and interests, the liberal character of the constitution would come under threat. While a constitution may be both liberal and democratic, it cannot accommodate the maximalist expression of either principle in institutional design or practice. So as a practical matter, the hyphenated expression 'liberal-democratic' constitution must be understood as a mutual compromise between these two political values essential for their simultaneous expression in a modern society.[87]

Before we turn to the institutional expression of political liberalism in a constitution, it is useful to sketch the dimensions along which we may expect the political idea of liberalism to exert itself. For Mill,[88] liberalism was committed to protecting individual freedom from social power exercised by traditional societies—with aristocratic or monarchical regimes—and more modern democratic societies through unbridled majoritarian power. Further, he was clear that the

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[87] Sudhir Krishnaswamy, "How Liberal is India?" in Ronald Meinardus, *Is Indian Constitution Liberal? – the Quest for Freedom in the Biggest Democracy on Earth* (Academic Foundation, New Delhi, 2019) pp.54-56

[88] Glyn Hughes, "Glyn Hughes' Squashed Philosophers on John Stuart Mill On Liberty" *available at* http://sqapo.com/mill.htm

paternalistic or feudal exertion of social power even when unrelated to political state power was a core threat to liberty that liberalism must combat.

Thirdly, while he endorsed property rights and market arrangements, he was no enthusiast for laissez-faire liberalism with unregulated markets. Above all, he stressed the need for the state to regulate private markets or to directly provide 'liberal essentials' like education, work and other public goods essential for an individual to exercise autonomy and self-government. Hence, liberalism is best understood as a political principle that operates in all three spheres where collective authority impinges individual freedom-namely, the social, political and economic spheres. So now we may ask whether the Indian Constitution is 'liberal' along the dimensions identified above. While a full answer to this query requires a comprehensive review of the entire constitutional text and its practice, in this essay let us confine to evaluating a few key features of the Indian Constitution—namely, judicial review and fundamental rights. Both these institutional features are identified in the cases discussed above, and tightly linked to securing what Grimm describes as a liberal commitment to pluralism. To show that the Indian Constitution is liberal we need to show that these key features are necessary for a liberal society both conceptually and in political and social practice.

Judicial Review

The Indian Constitution embraces a fully developed version of judicial review. The Supreme Court and High Court are expressly given the power to strike down legislation and executive action that infringes fundamental rights oversteps subject matter and territorial jurisdiction or otherwise abridges the constitution.[89] The Supreme Court has expanded this power of judicial review to include control over the power to amend the constitution through the doctrine of basic structure and more recently proposed to use a new doctrine of constitutional morality as an implicit limit on political power. 'Constitutional morality' is an off-shoot of the liberal Constitutionalism. It is two faced. The ruler is promised stability and required to adhere to constitutional norms and purposes with integrity. The ruled must inculcate the culture of obedience, and pursue their constitutional rights

[89] Constitution of India, art. 13(2)

As this brief description of the institutional feature of judicial review suggests, it is primarily concerned with limiting the scope of the political power of the state to constrain individual freedom. While it is occasionally exercised 'horizontally' to restrict the civic power of private actors, it is at its core concerned with the vertical political relationship between the state and citizens. When rights are interpreted to generate positive duties on the state or private actors to ensure the achievement of 'liberal essentials,' judicial review may be reconfigured to operate as an institution that enhances the autonomy of individuals to fully participate in political and social life.[90]

Judicial review is commonly understood to be an essential feature of a liberal constitution. As liberalism is committed to the protection of liberal rights, it is assumed that it must also be committed to the protection of liberal rights through the robust institutional arrangements of independent judicial review. This view is often associated with the constitutional debates that led to the founding of the Constitution of the United States, 1789. However, in the much cited Federalist Papers No. 78 Alexander Hamilton reveals that the core motivation for the institution of judicial review was to check the abuse of power by Congress. He emphasized the need to check majoritarian excess rather than any special ability of the judiciary to protect fundamental rights. Hence, it is more accurate to view judicial review as an institutional mechanism that constrains the full expression of the majoritarian democratic principle rather than to see it as being essential to the protection of liberal freedoms. This is made clearer when we assess whether constitutions without judicial review may be liberal.

In the English parliamentary model constitution, the absence of judicial review did not result in the erosion of liberal freedoms. While England has moved away from this model, and its adoption elsewhere in the world is clearly declining, these shifts are not indicative of a shift from an illiberal to a liberal constitutional arrangement. The adoption of judicial review appears to be critical to demarcate the extent to which the democratic principle may be expressed in a constitutional society. This check on majoritarian democratic expression is compatible with limited protection of liberal freedom. While the Indian Constitution adopts a robust

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[90] Sudhir Krishnaswamy, *Op cit.*

version of judicial review, judicial review is not necessarily designed to protect liberal freedom but instead to limit the excesses of majoritarian democratic power. However, whether the practice of judicial review in India has effectively enhanced liberal freedom is not addressed here as at various points in India's constitutional history, the courts have been erratic in their protection of liberal freedom. A cumulative assessment of this institutional feature would require a complicated and lengthy enquiry.

Fundamental Rights and Directive Principles

The Indian Constitution guarantees a wide array of fundamental rights in Part III as well as a bundle of Directive Principles in Part IV of the Constitution: conventional individual rights to life and liberty, equality and non-discrimination, speech and expression, conscience and profession; unconventional group rights to affirmative action and for the protection of minority religious groups; and a directly applicable right prohibiting caste-based untouchability. These rights impose obligations on the state and under certain circumstances on other citizens. The constitutional guarantee of rights is often seen as the ultimate expression of political liberalism in the constitution, though group rights are often described as an illiberal aspect of the Indian Constitution. While rights guarantees have become commonplace in post-World War II constitutions, the Indian Constitution goes further to outline a set of directive principles to guide legislation and executive policymaking and implementation. These principles are wide-ranging and include directions to prevent the accumulation of economic power and wealth, regulate the labour markets and to ensure education, nutrition and public health. The courts have been ambiguous about the legal status of these principles, but in recent years they have gained greater political and legal salience. These principles are often presented as a socialist manifesto and hence unrelated to political liberalism. However, they may be well described as a part of the 'liberal essentials' bundle that extends political liberalism beyond the political to the social and economic spheres. By requiring the state to ensure that the conditions necessary for individuals to exercise their autonomy and self-determination are satisfied either directly by the state or through the regulation of the market and social spheres, directive principles may be seen to be part of the liberal character of the Indian Constitution.

The place of rights in a constitutional order is best understood from a historical perspective. Where a legal order already protects liberal freedoms through ordinary law and political practice, a constitutional guarantee of rights is unnecessary to ensure a liberal society. Hence, English constitutional law did not adopt a bill of rights till 1998 and yet was arguably a liberal society since the 19th century. However, in India, the pre-Independence colonial regime disavowed rights guarantees and preserved an illiberal political regime through the brazen exercise of the police power. Hence, the adoption of the constitutional guarantees of fundamental rights in India coincided with the introduction of liberal legal and political order. So, while constitutional fundamental rights are not conceptually necessary for a liberal society, in India these rights inaugurated the birth of a liberal society.

Rights are a power-shifting device in two senses: they shift power away from the legislature and the executive towards the courts and secondly, they shift power away from the state to the citizen. In this sense, constitutional fundamental rights perform two functions— as a check on democratic majoritarianism and to enhance liberal autonomy. However, the directive principles in the constitution, unlike fundamental rights, are not directly enforceable by the courts. Hence, directive principles don't shift power away from the democratic branches to the courts. Their work in the constitution is to enhance the ability of citizens to exercise their autonomy in the social, political, and economic spheres.

Whether the presence of fundamental rights and directive principles make the Indian Constitution a liberal one? We find that fundamental rights serve a dual function: to enhance liberal autonomy and to simultaneously constrain democratic majoritarianism. Directive principles, on the other hand, prioritize the 'liberal essentials' by targeting democratic power to their achievement. This is a novel and uncommon constitutional legal instrument of instructions in the governance of the country that has been poorly understood in Indian constitutional practice.

While the Indian Supreme Court has been awash with fundamental rights litigation, it has disavowed engagement with directive principles altogether. On balance, the court has protected fundamental rights against majoritarian democratic power at critical junctures of Indian constitutional history. However, it has not done so

with a keen appreciation of the nature of liberal autonomy. Despite the tepid evocation of liberalism in the Indian courts, rights talk has permeated deep into Indian social life. It is the lingua franca of all types of protesting groups and social movements. This social and political rhetoric has more often focused on translating the 'liberal essentials' in the directive principles into rights claims through legislation. This emphasis on juridification and legal enforcement of the directive principles has ironically enhanced its anti-democratic character. The popular and judicial confusion about the directive principles has arisen primarily from the failure to recognize its critical liberal function.

Whether key features of the Indian Constitution are exclusively justified on liberal grounds or necessary features of a liberal constitution?

Whether the features of the Indian Constitution are exclusively motivated by, or best understood to be an application of the political ideas of liberalism. The key features of judicial review, fundamental rights and directive principles being analysed to trace that except for directive principles, the other two features in the constitution responded more to the concerns of the separation of power between the democratic and non-democratic branches rather than affirming individual autonomy.

This is not an exhaustive analysis of all the features of the Constitution that could potentially be understood to be a part of a liberal constitution: the horizontal separation of powers between the branches of government and the vertical division of powers between territorial units are appropriate candidates for analysis. However, even a cursory review of the literature and cases on these features of a constitution; reveal that they're motivated by several concerns that go beyond political liberalism. The discussion so far confirms that while the Indian Constitution shows liberal features, there is no part of the constitution that can be described as a necessary feature of a liberal constitution.

Conclusion

The common assumption is that the Indian Constitution is liberal in character. Whether this assumption has a sound basis is explored. The constitutional framers did not set out to create a self-consciously liberal constitution as it was depicted in CAD. The Indian Supreme Court has not mobilized political liberalism to explain

or justify their interpretation of the constitution in any significant manner either is clearly demonstrated.

Finally, the key features of the Indian Constitution like judicial review and fundamental rights are not conceptually necessary for a liberal society and are primarily motivated by the need to preserve the political value of constitutionalism by constraining democratic majoritarianism is also exhibited. Notably, directive principles are more keenly focused on securing 'liberal essentials' necessary to enhance self-determination and autonomy by empowering the democratic branches to undo social and economic barriers to liberty. By reassessing the liberal character of the Indian Constitution in these three ways we could raise several reasons to doubt a full-throated proclamation of the Indian constitution as a liberal constitution. However, are these Conclusions about institutionally structured Indian constitutional discourse and design a result of oversight or indicative of a need to rethink the relationship between political liberalism and the constitution? It may be that political liberalism in Indian society is not directly encoded in the Indian Constitution but nested in the relationship between state and society that has emerged through the governance and regulatory practices of the post-Independence Indian state. So, while constitutional mechanisms may prevent backsliding in a liberal society under some circumstances, India may become an illiberal society without a change in the constitutional text or its constitutional interpretation. So those concerned with the preservation of political liberalism in India would do well not to rely on its constitutional entrenchment, but rather invest in embedding liberalism in our collective social and political institutions and practices.

THE FOURTH WORLD TUSSLE FOR RECOGNITION OF RIGHTS UNDER INTERNATIONAL LAW: A CURSORY GLANCE

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Abstract

This article examines the recognition of the Fourth World under International Law (FWIL). It is especially appropriate to talk about the role of international law from the context of the Indigenous peoples, where the fourth world literature has strongly expressed ideas like the Fourth World and Indian Reality by George Manuel and Michael Poslums in 1974.The study offers a new perspective on to struggle for freedom. It explores the contour of the social and political path for recognizing indigenous rights for political sovereignty and Independence under International Law. This article outlines the nexus between Fourth-World populations and Third-World nations' experiences, expectations, and legal strategies. Since this piece does not describe a semantic and etymological evolution, the study relies on the literature that has already been written about the Third World. The study ponders a question what are the justifications nations might have for refusing to uphold indigenous people's rights within their borders? How can countries collaborate more effectively to support indigenous people in these

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circumstances? The study employs a doctrinal method with a normative approach and relies on third-world primary and secondary literature.

Keywords: Human Diversity, Indigenous Culture, Indigenous People, the Fourth World and recognizing indigenous rights.

Introduction

Indigenous peoples are among the most marginalized, underprivileged and vulnerable groups. More than 370 million people are in over 90 different countries, dispersed across the globe from the Arctic to the South Pacific. Indigenous peoples comprise around 5% of the global population.[3] Indigenous peoples have different histories, cultures, languages and legal systems.[4] Most indigenous peoples closely relate to their ancestral lands and territories.[5] They have experienced historic injustice, like the dispossession of land and violation of their human rights, fraught with their cultures.[6] They have endured centuries of non-recognition of their own political and cultural institutions, which has compromised the integrity of their traditions.[7] Development activities also negatively affect indigenous populations, endangering their ability to survive. Indigenous peoples and their groups have urged on a national and international level to protect human and fundamental rights.[8] Despite this, Indigenous peoples are visible and known at international forums. However, the global world saw them with little attention. In 1971, the UNGA formed the Sub- Commission on the Prevention of Discrimination and the Protection of Minorities V. Martinez Cobo was designated as a Special Rapporteur, tasked with conducting a thorough investigation into discrimination against indigenous populations and recommending regional and global levels.[9] Numerous

[3] Armi Beatriz Bayot, 'A Fourth World Critique of the Indigenous Peoples' Right to Free, Prior, and Informed Consent' (2015) 1 SSRN Electronic Journal 1, 4.

[4] Nelson H. H. Graburn, "1, 2, 3, 4... Anthropology and the Fourth World" (1998) 166, 74.

[5] *Supra* n. 2 at 4.

[6] 'Who Are the Indigenous and Tribal Peoples?' (22 July 2016) <http://www.ilo.org/global/topics/indigenous-tribal/WCMS_503321/lang—en/index.htm> accessed 10 November 2022.

[7] *Supra* n. 2 at 8.

[8] Hiroshi Fukurai, "Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law" *Asian Journal of Law and Society* (2018) p. 225.

[9] Katja Göcke, "Protection and Realization of Indigenous Peoples Land Rights at the National and International Level" 5 *Goettingen Journal of International Law/* (2013) p. 154.

indigenous groups are dispersed throughout several countries. Indigenous people frequently reside in rural locations and deeply bond with the land essential to their survival. How can governments collaborate with indigenous people to join forces in attempts to protect the environment? This article addresses the problems above and demonstrates how, despite its drawbacks, a skillfully crafted Fourth World viewpoint can pave the way for ecological sustainability. For individuals who want to discuss concerns of indigenous nationalism and bioregionalism, the Fourth World theory offers crucial lessons and a post-state global order.

The Fourth World

Fourth World includes Indigenous Americans, Aboriginal Australians, Maoris, Canadians, and Dalits / Tribes of India.[10] The most notable, significant, and respected Indigenous leader in Canada, George Manuel,[11] promoted the political unification of indigenous people worldwide by founding the Fourth World Movement and popularising the idea of the Fourth World.[12] Travelling to Sweden, Nicaragua, Chile, and Guatemala while serving as the World Council of Indigenous Peoples president from 1975 to 1981, Manuel realized that Indigenous people share a lot in common and that their togetherness keeps them together in difficult times.[13] Furthermore, The Fourth World: An Indian Reality was published in 1974 by Michael Posluns to spread awareness of the Fourth World viewpoint.[14] Manuel's campaign found resonance in many facets of Indigenous people's lives, from fraternity to nationhood.[15] Manuel makes references to the shared experiences of the indigenous groups around the globe that fight for self-determination and identity throughout this work.[16] Manuel also notes in history and the vocabulary used to categorize the world into different categories that adhere to various empirical

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[10] N. Sreenivasa Rao and P. Sreenivasulu Reddy, "Fourth World Literature: An Introduction" 9 *International Interdisciplinary Research Journal* (2013) p. 276.

[11] George Manuel and Michael Posluns, "The Indian World and the Fourth World" 67 *Current History* (1974) p. 263.

[12] S*upra* note 9 p. 276.

[13] *Id* at 10.

[14] John W. Bailey, "Reviewed Work(s): The Fourth World: An Indian Reality by George Manuel and Michael Posluns" 2 *American Indian Quarterly* (1975) p. 251.

[15] *Ibid*

[16] *Id* at 252.

formulations of economic progress. Considering that it is frequently used to identify any economically and politically marginalized society, this concept of the Fourth World tends to slip into generalizations.[17] The idea of the IV World still seems to have several slightly overlapping applications and interpretations. However, the literature reveals the following indigenous people:[18]

i. Asian Minorities

ii. In East and Central Africa

iii. The African's Predicament in Rhodesia

iv. The position of Black in Brazilian society

v. Regions in the Soviet Union, including Jews,

vi. Muslims and Buddhists, Orthodox and

vii. Catholic Christians

viii. The Crimean Tatars and Volga Germans – both displaced peoples

ix. The Burakumin in Japan

This broad spectrum is not limited to "ethnic groupings," autochthonous groups (such as Asians in Africa), or minorities (such as Blacks in Rhodesia) (Catholic and Orthodox Russians).[19] However, it is possible to regard these "victims of group oppression" as victims of internal colonialism, considering them as oppressed or disenfranchised groups. Thus, the autochthonous peoples are those whose lands and culture have been colonized by the modern nations of the I, II, and III worlds.[20] Because they still lack political autonomy within contemporary nation-states, indigenous people-typically minorities-are subject to types of internal colonialism.[21] The existence of Asian and African states with Asian and African governments representing the populations of Asia and Africa may be found in both Africa and Asia.[22] The rights to self-determination and recognition as

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[17] *Id* at 256.

[18] S*upra* n 3 p. 66.

[19] *Supra* n 2 p. 45.

[20] S*upra* n. 13 p. 255.

[21] S*upra* n.3 p.67.

[22] S*upra* n.7 p.68.

independent nations have been struggled for and won by the people of the Third World.[23] For instance, the struggle for recognizing the Dene State by the governments and people. Furthermore, it is now necessary for all people to recognize the presence and rights of those living in the Third World.[24] The time must come when the countries of the Fourth World will be respected and recognized.

One other significant Fourth World concept was published by economists and used by some in the UN.[25] It refers to countries occasionally referred to as "basket cases," like Afghanistan, where the average per capita income is less than $50 annually.[26] Accordingly, if we adopt the majority definition of the idea, we may include the Ainu, tribal communities in India, the Indian peoples of Central and South America, the minorities of the USSR, and some of the people of New Guinea in the IV World.[27] The study argues that this is an inappropriate determination for three reasons:

i. It does not reflect the explicitly political meaning that emerged for the III World;
ii. It is based on flimsy financial income data, which is highly dubious and may be of little or no significance to the people involved; and
iii. It ignores the colonized minorities

In the context of India, D.N. Majumdar defined a tribe in the context of India as a social group with a territorial affiliation, endogamous without specialization of functions, governed by tribal officers, hereditary but without caste stigma, adhering to tribal beliefs and customs, and illiberal of naturalizing ideas from foreign sources. He stressed the awareness of homogeneity of ethnic and territorial, which is well-known "tribes in transition."[28] However, there is no universal

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[23] S*upra* n. 13 p. 256.

[24] *Id* at 257.

[25] Kumari Priti, "Fourth World and Its Reflection in Mahasweta Devi's folkloric Fiction the Book of The Hunter" 3 *AdLitteram: An English Journal of International Literati* (2018) p. 19.

[26] Richard E Bissell, "The 'Fourth World' at the United Nations" 31 *Royal Institute of International Affairs* (1975) p. 379.

[27] Olon F. Dotson, "Fourth World Theory: The Evolution of . . ." 4 *Buildings* (2014) p.155.

[28] Patrick Ngulube (ed), *Handbook of Research on Theoretical Perspectives on Indigenous Knowledge Systems in Developing Countries* (IGI Global, 2017) 115 *available at* <http://services.igi-global.com/resolvedoi/resolve.aspx?doi=10.4018/978-1-5225-0833-5> accessed 10 November 2022.

consensus on what constitutes a tribe because some are still in the prehistoric stage, some are still developing, and others have attained mainly a condition that renders them identical to the other groups. Marshall Sahlins describes a tribe as "a divided organization.[29] A tribe is an assembly of equal kin group blocs, each comprising multiple equivalent unspecialized multifamily groupings that are structurally identical. The PM of India, Jawaharlal Nehru, ordered a program for the oppressed tribals.[30]

i. People should be allowed to develop their talent.
ii. It is essential to respect tribal rights
iii. It is best to avoid integrating too many outsiders into the tribal communities.
iv. Tribals should be worked on by their institution.
v. Human character, not financial expenditure, should be used to determine the tribes and indigenous

In India, tribes are comparatively backward and secluded populations. Nevertheless, they have always existed within Indian civilization, society, and culture. Remotely located people have historically been regarded as an integral element of cultural and historical processes, whether in the Sanskrit Epics or the literature from the Middle Ages. It has never been absolute isolation; it has always been relative.[31]

Fourth World Theory

Without mentioning the Fourth World theory, which originated in Sweden in 1972 at the United Nations Stockholm Environmental Conference, it is impossible to effectively explain the contemporary conflicts between indigenous peoples and industria.[32] First Nations representatives from North America found that they shared significantly more in common with Saami from Finland/Sweden, Bretons from France, and Basques from France/Spain than they did with representatives from the Third World at this conference.[33] These indigenous delegates recognized that

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[29] *Supra* n. 13 at 43.
[30] *Supra* n. 24 at 20.
[31] *Id* at 108.
[32] *Supra* n. 26 at 156.
[33] *Id* at 157.

they had much in common with one another's self-determination struggles. George Manuel,[34] a Shuswap Chief, went on to lead this movement, which eventually gave rise to the Fourth World hypothesis.[35] Individual citizens of Fourth World countries have a shared heritage, language, and region and frequently feel that the centralized governmental structures of modern states are invading their area.[36] Modern nations emerged simultaneously after industrial civilization got off the ground.[37] The main characteristics of Industria are industrial technology, enlightened philosophy (rational humanism), and state-based (but not necessarily democratic) political organization.[38] Fourth, the World theory offers a comprehensive analysis of international conflicts, concentrating on the historic national groups ruled by states.[39]

Marxism and the Fourth World

Although a Marxist understanding of global capitalism and the Fourth World critique of multi-national businesses are comparable, many neo-Marxists view the Fourth World theory as dangerous.[40] This is due to how it casts both the North and the South as oppressors and thieves debating how to split up the loot taken from Indigenous peoples. There are two reasons for Marxist antagonism to the Fourth World idea.[41] *First*, the conventional Marxist theory holds that indigenous peoples modernize (i.e., industrialize), so they essentially enunciate their cultures to participate in a proletarian revolution.[42] This stance has alienated several indigenous groups, which has led many Fourth World countries to reject Marxist theories. *Second,* Marxists frequently underestimate the significance of indigenous issues, which has led many in the Fourth World to believe that Marxism is only

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[34] *Supra* n. 13 at 255.

[35] *Supra* n. 26 at 158.

[36] *Id.* at 159.

[37] *Supra* note 10.

[38] *Supra* n. 26 at 160.

[39] *Id.* at 161.

[40] Amanda Cats-Baril, *Indigenous Peoples' Rights in Constitutions Assessment Tool* (International IDEA, Stockholm, 2020) p. 21 *available at* <https://www.idea.int/publications/catalogue/indigenous-peoples-rights-constitutions-assessment-tool> accessed 10 November 2022.

[41] *Id.* at 34.

[42] *Supra* n. 13 at 45.

dedicated to "its own, destructive, vision of modernity." Marxism and capitalism both display the modern tendencies of dialectical conceptual frameworks, the eradication of local voices, and the ignorance or concealment of difference.[43] The phrase is first used historically in a series of classifications of the world systems, according to the Marxist interpretation of the Fourth World.[44] Karl Marx created a world map based on his study of the monopolistic tendencies of late capitalism's capitalist organization, which also influenced how imperialism was discussed at the time.[45]

The Relations between III World and the IV World

The 1955 Conférence of Non-aligned Nations in Bandung, which comprised Yugoslavia, Indonesia, China, and other countries, gave rise to the III World or "*Tiers Monde*".[46] Similar to the IV World, Alfred Sawry in 1956 and Franz Fanon have been given credit for the term's actual inception.[47] Although the time was first attributed to politically non-aligned countries, it is now frequently used to denote (a) less developed states; (b) former colonial countries, and (c) non-white peoples.

While a Third-World perspective on international law is a well-developed and growing issue,[48] Fourth World problems are still not being discussed in great detail regarding the discipline's philosophical underpinnings.[49] In reality, since TWAIL has become a prominent scholarly paradigm, very few people have argued for an FWAIL.[50] The term "fourth world" refers to the split of the international

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[43] *Supra* n. 26 at 165.

[44] *Ibid.*

[45] *Id.* at 170.

[46] Ana Filipa Vrdoljak, "Indigenous Peoples, World Heritage and Human Rights" 25 *International Journal of Cultural Property* (2018) p. 251.

[47] WIPO, *The Protection of Geographical Indications in South Africa- Symposium on the International Protection of Geographical Indications*, WIPO/GEP/CPT/99/3A (September 1, 1999)

[48] SD Muni,"The Third World: Concept and Controversy" 1 *Third World Quarterly* (1979) p. 119.

[49] Abhijeet Singh Rawaley, "Understanding the 'Fourth-World' from the Literature on 'Third-World' in International Law" *Cambridge International Law Journal* (2018) available at http://cilj.co.uk/2018/02/03/understanding-the-fourth-world-from-the-literature-on-third-world-in-international-law/

[50] *Ibid.*

community along economic, political, and ideological lines. It is an etymological extension of the "three-world" paradigm. The term "fourth world" refers to the split of the international community along economic, political, and ideological lines.[51] It is a historical extension of the "three-world" paradigm.[52] Therefore, the term "Fourth World" refers to the indigenous peoples, who are currently recognized as descendants of pre-invasion occupants of the territory now colonized by others.[53] Although TWAIL, by its definition, emphasizes the Third World, it has an expansive definition that includes all peoples excluded by the western legal system."[54] The first world serves as a "vehicle, vessel, and countenance of global control. There must be some "narrative coherence" when placing states or peoples into various political "worlds" (and thus in international law).[55] Baxi praises the rise of scholars of the Third World on the world stage of law-making. For instance, the drafting of DRIP by UNGA in 2007.The main contention of Professor B.S. Chimni is that international law serves as a justification for maintaining uneven power relations.[56] The Third-World group ideology, according to his criticism, "obscured specificity in its pursuit for generalizability."[57] Even though DRIP is simply a declarative, non-binding treaty, nations have a lot of leeway in applying it to their indigenous communities' unique regional struggles. But, this is crucial international legislation concerning the Fourth World. The study found that the Third World's subjection to international law is unidimensional and that a dualistic framework is necessary to comprehend Fourth World concerns fully.[58] Not only by international and global

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[51] Martina Guidi, "The Protection of Indigenous Peoples- Concerns in World Bank-Funded Projects" in Giorgio Sacerdoti (ed.), *General Interest of Host in International Investment Law Cambridge University Press* (Cambridge University Press, Cambridge, 2014) p. 240.

[52] United Nations, *The United Nations Declaration on the Rights of Indigenous Peoples and the Development of International Law* (13 September 2007)

[53] Dwayne Mamo, *The Indigenous World 2020* (Eks-Skolen Trykkeri,Copenhagen, 2020) p. 19.

[54] Amar Bhatia, "The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World" 14 *Cambridge International Law Journal* (2014) p. 157.

[55] Upendra Baxi, "What May the 'Third World' Expect from International Law?" 27 *Third World Quarterly,* (2006) p. 713.

[56] B.S. Chimni, "Third World Approaches to International Law: A Manifesto" 8 *International Community Law Review* (2006) p. 4.

[57] *Id.* at 5.

[58] *Supra* n. 27 at 55.

forces but also by their domestic state apparatuses, populations in the Fourth World are subject to cultural imperialism, intervention, and subordination.[59] Therefore, the inhabitants of the Fourth World must contend with more than just the "integrationist worldview" and "civilizational goals."[60]

The Role of the United Nations

In 1982, in response to growing international cooperation among indigenous peoples through non-governmental organizations such as the World Council of Indigenous Peoples, the International Indian Treaty Council, and the ECOSOC specialized agency of the UN established a "working group" entrusted with the responsibility of drafting a Declaration on Indigenous "Populations" rights.[61] In 1993, The Working Group on Indigenous Populations agreed on a draft Declaration on the Rights of Indigenous Peoples, moving at the typical "lightning speed" of United Nations bodies.[62] The Working Group members, like the Founders of the United States Constitution, went above and beyond their mandate while farming Declaration on the Rights of Indigenous "Peoples".[63] The preamble of UNDRIP[64] affirms that Indigenous people are equal to other people. It also demonstrates that the diversity of humankind and common heritage can be achieved only by people's contribution. Indigenous peoples experienced historic injustice due to land dispossession and natural resources. Indigenous culture contributes to sustainable environmental management. Demilitarization of the land brings peace and economic and social progress to the right of indigenous people; Recognizing and understating the friendly relations of people with indigenous people includes children's rights. They acknowledge the charter of the UN, UDHR, ICESCR, ICCPR, and Vienna Declaration and Programme action. So indigenous people are entitled to economic, political, social, and cultural freedom without discrimination. Art. 8 Protect the culture of indigenous people against assimilation destruction,

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[59] *Supra* n. 55 at 22.

[60] *Supra* n. 54 at 718.

[61] *Supra* n. 51 at 11.

[62] *Id* at 9.

[63] Siegfried Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis" 2 *Harvard Human Rights Journal* (1983) p.101.

[64] The United Nations Declaration on the Rights of Indigenous Peoples and the Development of International Law (13 September 2007)

and state members shall be bound to prohibit the above acts and provide an effective redressal mechanism. States shall protect their lands and resources.

The Tussle of Definition

Perhaps unexpectedly, it has been challenging to define the term "indigenous people."Established nation-states did not appear to endorse that terminology out of concern for the potential threat to their territorial integrity posed by claims to external self-determination whose legitimate claimants were identified as "peoples" under Articles 1, 2, 55, 56, and 73 of the U.N. Charter. Nation-states aimed to avoid conflating indigenous peoples legally protected claims with those of colonized communities. Because of this, the "International Decade of the World's Indigenous People" purposely used the single form of "people." However, the text of the Draft Declaration by the U.N. Working Group is the most positive intergovernmental response to indigenous peoples' claims.

The Inter-American Human Rights Commission, presenting the Declaration on the Rights of Indigenous Peoples, abandoned an attempt in an original draft at delimiting the term, just as the United Nations Working Group did in its 1993 Draft Declaration by consciously choosing to forego any attempt at a definition. It was not a lack of effort that prevented this project from succeeding. The Definition provided by Martinez Cobo, the first Special Rapporteur of the United Nations on the issue of discrimination against indigenous peoples, is perhaps the most well-known: Because of their historical ties to the pre-invasion and pre-colonial societies that evolved on their territories, "indigenous groups, peoples, and countries are those that consider themselves separate from other sectors of the society now prevailing in those territories or sections of them."[65] Their ethnic identity and ancestral territories are the foundation for their continued existence as people. They are determined to protect, develop, and pass them down to future generations through cultural norms, social institutions, and legal systems. They currently make up non-dominant sectors of society.Martinez Cobo's Definition can be viewed as being too narrow:

[65] *Supra* n. 62 at 110

i. By emphasizing "historical continuity with pre-invasion and pre-colonial societies," a link to the phenomenon of European colonization and invasion may be established, restricting the concept of indigenous communities primarily to peoples in the Americas and Oceania and possibly excluding indigenous peoples in Africa, Asia, and other places who are oppressed by equally "original" inhabitants of neighbouring lands who are now the dominant group.

ii. The need for the organization to "protect ancestral territories" could be used as a justification for excluding indigenous peoples who were forcibly displaced from their land and are now living in urban areas but still identify as indigenous.

iii. The emphasis on indigenous peoples as "non-dominant sectors of society" undoubtedly captures the majority of indigenous communities worldwide.

This concept may include separate minority groups that have lived in a nation-state for a considerable time, maybe since the state's founding, under the umbrella of indigenous peoples. The ethnic minority of Hungarians in Romania is a prime example. It would be too inclusive if it were stretched that far. Some governments, particularly those in Asia, have required a definition before addressing the specific rights enumerated in the Draft United Nations Declaration at the level of the working group formed by the Human Rights Commission.

Governments have called for a definition that exclusively includes indigenous tribes that have endured colonization by people from other parts of the world, not an invasion by the neighbours.[66] Indigenous peoples in the Working Group appear to like the adaptability provided by the lack of a clear definition.[67] They instead emphasize self-identification as a crucial element of description that might be accepted. The claim that a purpose will clear up any ambiguity regarding the proposed declaration's "*ratione personae*" seems to make some intuitive sense.

They are, therefore, crucial to the legal system. It is harder to argue that a definition of the range of beneficiaries of the United Nations Declaration cannot be achieved, given that both ILO Convention No. 169 and the Proposed American Declaration have been successful in "*ratione personae,*" restricting their extent

[66] *Id* at 113.

[67] *Ibid.*

of application. However, the viability of a definition does not preclude it from being relevant to the current problem. The search for definitions is tainted if they exclude communities typically considered indigenous from the protection of international laws. In its assertions on political autonomy, land and resource rights, and self-determination, the draft, in particular, goes beyond ILO Convention No. 169. However, formal definitions might help defend indigenous peoples from governments that reject their existence.

The term's widespread usage may lend credence to Professor Daes' first criterion, priority in time.[68] According to a college dictionary, "indigenous" individuals are "originating in or distinctive of a certain region or country." The Latin word "*indigenae*" means "persons born in a particular location," as opposed to "*advenae"* or "persons who came from elsewhere."

The conflict between the "s" and the "peoples" is still ongoing. The U.N. Working Group on Indigenous Populations has handed the ball to the Commission on Human Rights in the race to the adoption by the UNGA of a Declaration on the Rights of Indigenous "Peoples" by capitalizing on the particular drive and influence of indigenous peoples' movements in its midst. There, nation-state influence will be much more noticeable, and formulations that completely rule out the possibility of political independence may be discussed, not unlike the language of the Proposed American Declaration.

Quests for Self-Determination (Article 4)

In addition to accord the right to self-determination, it also established several specialized collective rights, such as the freedom of political, economic, social, and cultural identities. They were granted the right to be free from genocide or ethnocide; any action was taken against or affected a group of people's integrity as distinct individuals, cultural values, or identities. Examples of such activities include land confiscation, assimilation or integration, forced relocation, the imposition of foreign lifestyles, propaganda, and forced assimilation. The rights explicitly guaranteed to Indians as groups include the right to observe, teach, and practice tribal spiritual and religious traditions; the right to protect and protect examples of their cultures, archaeological and historical sites, and artifacts; and

[68] *Id* at 114.

the right to establish spiritual property taken without their free and informed consent. The rights to protect and use tribal languages, pass on their oral histories and traditions, receive education in their language, and manage their educational systems are also included. The Draft above Declaration supports the right of indigenous people to own, control, develop and use the lands and territories they have historically owned or otherwise occupied and operated. This includes the right to restitution of lands taken without their free and informed consent through occupation, confiscation, or other means, with the option of providing just and fair compensation in cases where such a return is not feasible.

Nation-states are hesitant, to put it gently, to affirm Indian populations' claims that they are "peoples" with the right to self-determination solemnly outlined in the United Nations Charter, the ICCPR,1966, and recently proclaimed as an *erga omnes* obligation of all states under customary international law. Secession threatened the "New World" circumstances, primarily established through conquest on paper or in battle. The claim of self-determination by indigenous peoples could imply several things:

i. "External" self-determination, the right of individuals to freely choose their place in the world, including the choice of declaring political independence;

ii. Internal self-determination, which is the right to participate in political processes and freely elect a government; and

iii. Their rights as "minorities" within a given nation-state structure to special rights in the cultural, economic, social, and political spheres (limited autonomy).

Professor James Anaya has proposed a re-conceptualization of self-determination to overcome this conflict and the prevalent opposition between internal and exterior self-determination in the context of indigenous peoples. In his proposal, he combines "ongoing" self-determination, which calls for a "governing order in which individuals and groups can make meaningful decisions affecting all spheres of life continuously," with "constitutive" self-determination, which calls for "minimum levels of participation" in processes of "creation, alteration, or territorial expansion of governmental authority." The recent successful divorces of Eastern European nations, the dissolution of the Soviet Union, the

velvet dissolution of the unhappy marriage between the Czechs and the Slovaks, and the dissolution of Yugoslavia must all be taken into consideration in the debate over the political independence option of self-determination, the right to secede.These significant instances of intra-mainland secession have significantly damaged, if not destroyed, the salt-water idea of self-determination. A claim made by peoples to secede from established nation-states outside and beyond the context of colonialism would seem to be supported in particular by the recent recognition of the unilateral secessions from the Socialist Federal Republic of Yugoslavia by the international community as well as the establishment of Eritrea as an independent state.

The Issue of Collective Rights

Individual human beings have rights that they can use in their name. In contrast, collective rights belong to groups of people and can only be used by the collective entity and its authorized representatives.Based on a fictitious, mythical idea of the social contract, the individual is pitted against the state. Indian thought is considerably different, at least in their old stateless society. According to them, people are born into a tightly knit network of family, kinship, and social and political ties.Rights and obligations only exist within these networks; clan, kinship, and family identities are fundamental components of one's identity. Since Indian society is made up of a web of interpersonal relationships, it is horizontal rather than vertical.

Unlike Western nation-states, Indigenous people do not view their "nations" as having distinct Hegelian existences separate and independent from their constituent parts. In a web of incredibly devoted horizontal interactions, tribal community members are existentially bound to one another.

The group of collective rights of indigenous peoples is intended to safeguard this decision-making process and its surrounding cultural, geographic, social, and economic context. Thus, in contrast to the wholly individualistic viewpoint, certain collective entitlements are recognized by the United Nations and the IACHR draught declaration on indigenous rights. The pertinent group rights defend internal decision-making, culture, land usage, and control. A functional system for conserving indigenous traditions and ways of life cannot be implemented without

this recognition. These rights' goals would be defeated if they were "individualized."Collective phenomena, culture. It covers the tribal lifestyles and the physical and spiritual settings where these traditions are upheld and nurtured. Prescriptions meant to protect such phenomena must necessarily take on a group aspect. The community will operate as such in creating and executing its culture, possibly overriding the preferences of individual members. Of course, these "overrides" are constrained by genuinely individual interests within the confines of international human rights legislation, much like state governments' political authorities.

Furthermore, Western constitutional practice does not entirely exclude the granting and defining rights to collectivities. Like Fiji, New Zealand also allows a fixed number of seats in Parliament to its indigenous population. Many other countries offer racial and ethnic minorities constitutional protection, as stated in article 27 of the ICCPR. Canada officially recognizes "aboriginal rights" in its 1982 Charter of Rights and Freedoms. Even though it was ultimately breached, the 1835 United States Treaty with the Cherokee Nation gave the tribe, after moving from Georgia to Oklahoma's purported "Indian Country," shelter and the right to self-government. For instance, the "*Delaware"* and other tribes were expected to join forces with the United States, form a state, and send a representative to Congress, according to Article VI of the US treaty with *Delaware*, the country's first agreement with an Indian nation. Thus, group rights are essential complements to the member's rights in the context of indigenous peoples. The idea of a Permanent Venue for Indigenous People is laudable since it offers a critical forum for communication between indigenous peoples and governments and among themselves. However, to depart from its sphere of influence at this point would not exceed the influence and power of current institutions. In a limited sense, the Working Group on Indigenous Populations has already filled that role.

Territory in the Fourth World

What constitutes a physical "territory" and how it might be defined are closely related to the ethical position adopted toward the land. At the time of the first continuous encounter between European civilization and North America, epistemology and ontology predominated, but those of indigenous cultures

demanded a moral perspective. Territorial use, concepts of ownership, and the feasibility of boundaries have all been causally impacted by this. The fact that the Nuxalk lives outside the "Treaty boundary" indicates that they have never sold or relinquished any of their lands to colonial authorities.

The nation-based study of modern geopolitics is called Fourth World Theory. Additionally, its actualization in indigenous nationalist movements significantly impacts the state system's territorial presumptions. Fourth, world territoriality resembles eco-geographical or bioregional imaginings of post-state territorial forms and differs considerably from the static boundaries that constitute states.[69] The Nuxalk nation, which occupies traditional, unceded territory on Bella Coola, Turtle Island (or "North America"), has been one of the most outspoken international supporters of the Fourth World political philosophy.[70] However, the Nuxalk and other Fourth World countries face significant obstacles in gaining some degree of sovereignty over ancestral lands, including inadequate theorizing about the position of non-indigenous residents in contested territories and states' reliance on the exploitation of resources from indigenous territories.

Geographical and geopolitical factors are essential to efforts to bind the biosphere, the industrial state's complicated relationship with economic development, and environmental Protection."[71] The modern state has inscribed sustainable borders, allowing for a reformulation of the global biosphere with little to no current concepts of territorial structure.

The Fourth World or indigenous bioregions and Fourth World or indigenous another mutation of the nation-state are considered (biological or Eco-World approach to territory is not a justification for yet geographical regions). On the other hand, Territories in the Fourth World typically follow bioregional boundaries. In this article, the study contends that countries in the Fourth World, especially those in what is now known as "Canada," embrace concepts of land ethics and territoriality. Under the guise of a neo-territorial, human rights Arguments are seen as sovereign in this relationship since it is so tense.

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[69] William TL Hipwell, "Industria-The Fourth World, And The Question Of Territory" p.10.

[70] *Ibid*.

[71] *Id* at 2.

The Birth of Modern States

The Treaty of Westphalia marked the start of the modern state system. The Treaty of Westphalia provides one crucial distinction. By the I960s, the final remnants of empires had vanished, and nearly every square centimetre of the Earth had been divided among the 192 nations that currently comprise the state system.[72] The European powers' colonial actions facilitated this state system expansion. Industrial technology has long been accepted as a critical element of modern society. Industrial man no longer joins any connection to his natural environment and only interacts with organized technical intermediaries. Man discovers that once he is enclosed in this artificial invention, there is "no exit;"He cannot break through the technological barrier and return to the prehistoric environment to which he has evolved for hundreds of thousands of years. The notion of industrial control over remote places is supported by the old cartography approach of uniformly shading state territories.[73] The interests of trans-state corporations are intertwined throughout industrial states.However, no environmentalist who has studied the destruction of ecosystems in the socialist countries of eastern Europe holds capitalism to a higher standard of ecological collapse. Regardless of who controls the means of industrial production, for the nations of the Fourth World, the issue is with the industry itself.[74] Thus, when alarmists warn about "the approaching anarchy," a breakdown into "lawlessness," and the end of "rational" governance in areas like Afghanistan, they are not being entirely accurate. Their main worry is that Fourth World nationalism threatens industrial state-based hegemony. Such prophets of doom ignore that "anarchy" would probably be a welcome change for citizens in Fourth World countries like the Ogoni from the state terror tactics used to ensure Shell Oil's access to their resources.

Fourth World Tussle for Recognition

National sovereignty is still a topic of debate. The ability of the Fourth World to reach amicable agreements with their non-indigenous neighbours will determine

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[72] *Supra* n. 46 at p. 115.
[73] *Supra* n. 13.
[74] *Supra* n. 48.

the political success of their aspirations for recognition and territorial sovereignty.[75] One possibility is for Fourth World countries to grant non-native residents "citizenship" in their countries. This would enable the development of a new geographical identity.[76] Politics practicality requires that Fourth World countries like the Nuxalk strive for territorial sovereignty in addition to the intrinsic connection to the land that is treasured by indigenous cultures and which indeed deepens territorial bonds.[77]

The issue of state sovereignty, which is not that of a nation but rather a legal-political framework for international cooperation, is now on the table. In this light, it is instructive to think about the evolution of the European Union.[78] While European states have shown a "willingness to cede sovereignty over health and environmental protection standards to a higher level of government, they tenaciously hold on to "Cultural sovereignty," for instance, over education, language and "territorial sovereignty" in the sense of control over natural resources.[79]

The Fourth World's nations can in no way afford the Industrial indulgence of problematizing territoriality.[80] This argument for land rights recognition shows how important the land is to indigenous political goals.[81] There are still countless indigenous conflicts throughout Asia, from the east to the southwest.

Today, Asia has endured a variety of warfare and Indigenous peoples' quests for independence in their ancestral territories in many different regions. These conflicts have their origins in the history of European colonialism and Asian imperialism. As a result of the "ethnic cleansing" and genocide committed by Myanmar's armed forces in December 2017, more than 600,000 native Rohingya

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[75] Rfidiger Wolfrum, 'The Protection of Indigenous Peoples in International Law' 2 *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* (1999) p.16.

[76] *Supra* n. 8 at 375.

[77] *Supra* n. 68 at 6.

[78] *Supra* n. 8 at 92.

[79] *Id* at 96.

[80] *Supra* n. 68 at 8.

[81] *Supra* n. 62 at 60.

people in the Rakhine State of Myanmar fled to Bangladesh.[82] Ethnic conflicts began in the nineteenth century in the Arakan State of British-controlled Bengal.[83] British policies caused long-lasting religious hostility between the Rakhine Buddhist majority and the Rohingya Muslim minority, who have long been subjected to government persecution.[84] Despite the extreme violence used by Indian police and paramilitary forces in the Kashmir Valley of the Indian-administered Jammu and Kashmir, the indigenous struggle for independence in Kashmir continues today. Indigenous people in Kashmir fought for the right to self-determination after the British-imposed border of 1947 split Kashmir between India and Pakistan.[85] In Afghanistan, local Pashtuns who crossed the national border were labelled "terrorists" and attacked by US drone strikes and Special Forces.[86]

The "Durand Line," imposed by the British on the Pashtunitan region in 1896, divided the local population into the states of Afghanistan and Pakistan, while the Pashtuns and the Afghan government continued to reject the externally imposed, "artificially" drawn border.[87] The Republic of Iraq has been enforcing genocidal policies against Kurds, including the so-called Anfal genocidal campaign in northern Iraq between 1986 and 1988 that resulted in the deaths of tens of thousands of Kurds.[88] In September, over 90% of Iraqi Kurds voted in favor of the independent Iraqi Kurdistan state, trying to secede from the Republic of Iraq.[89]

The Mandate System, dominated by Britain and France after the First World War, partitioned the native Kurds' homeland, incorporating their severed homelands into the current borders of Iraq, Iran, Syria, and Turkey.[90] On the island of New

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[82] Azeem Ibrahim, *The Rohingyas Inside Myanmar's Hidden Genocide* (Hurst, London, 2016) p. 27.

[83] *Id* at 28.

[84] *Id* at 25.

[85] *Supra* n. 7 at 222.

[86] Amnesty International Report on the State of the World's Human Rights 2017/2018 p. 66.

[87] Various, *Routledge Library Editions: War and Security in the Middle East available at* <https://www.taylorfrancis.com/books/9781134891269> accessed 10 October 2022.s

[88] Dylan Evans, "The Kurdish Quest for Independence and the Legality of Secession under International Law" 12 *Washington University Global Studies Law Review* (2003) 22, 291.

[89] Amnesty International Report, *supra* n. 86 at 203.

[90] *Routledge Library Editions: War and Security in the Middle East, supra* n. 87 291.

Guinea, in September, the 1.8 million-signature West Papua independence petition—officially outlawed by the Indonesian government was "smuggled" out of West Papua and delivered to the UN's decolonization committee, which has been keeping track of the progress of former colonies toward independence.[91] Since 1963, West Papua has been militarily occupied by Indonesian state security forces, which are blamed for flagrant abuses of human rights and the ruthless repression of the region's independence struggle.[92] President Rodrigo Duterte imposed martial law in Mindanao, the second-largest island in the Philippines, in May 2017.[93] He also sent his security forces there to deal with radical Muslim Moro populations, who have been engaged in their own long-running de-colonial struggles for independence for the past four centuries.[94]

Conclusion

Indigenous people are more likely to experience social issues (poor health, access to education, access to water, and drug addiction).The term "Fourth World", which is an augmentation of the three-world model (i.e., the First, Second, and Third World classification), typically refers to the group of indigenous people descended from a typical nation of aboriginal populations who have been denied their own territory and political rights, such as the numerous indigenous people currently battling for their independence in various parts of Asia. Nevertheless, tribal communities have hierarchical structures and a process by which a common will develops. There is evidence to support the claim that complicity is still present today due to the continued reification of the state system in contemporary geography, where states are used as the focus of analysis and nation peoples are frequently referred to as "ethnic" or "minority" groups (in their territories). These urban-based states can all be distinguished from Fourth World countries by their shared cultural, political, and economic characteristics. Although states on other continents have now embraced this global culture's intellectual and political orientation, it is European in origin.

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[91] Amnesty International Report, *supra* n. 86 at 295.

[92] *Id* at 296.

[93] Felipe Villamor, "Philippines Extends Martial Law in South for Another Year" *The New York Times* (13 December 2017) *available at* <https://www.nytimes.com/2017/12/13/world/asia/philippines-martial-law-duterte.html> accessed 15 November 2022.

[94] *Ibid.*

FEDERAL APPROACH IN PLACING STATE LAWS IN THE NINTH SCHEDULE OF INDIAN CONSTITUTION: AN ASSESSMENT

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Abstract

The Government India in order to carry out agrarian reforms passed the First Constitutional Amendment Act of 1951 thereby introduced Articles 31-A and 31-B and created Ninth Schedule in order to curtail the power of the Court in the matter of judicial review of Agrarian reforms legislation. Therefore, author of the Paper intends to identify the federal approach of the Parliament in placing State laws into the Ninth Schedule and to examine whether the Parliament is partial or impartial in accommodating laws of few states by screening 284 legislations which were housed from 1951 to 1995. Further, an attempt has also been made to discuss the federal constitutionality to place the laws of Parliament into the Ninth Schedule by the Parliament itself to destruct the federal structure by implementing its own laws on States in India.

Key words: Land Reforms, Federal Structure, Constitution of India, Ninth Schedule and Center-State Relationship.

Introduction

Strong Centre-State relations ensure good governance in the country. Good governance between the Union government and regional governments always

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upholds federal democracy. The quality of federal polity depends upon the union government's commitment to implement all constitutional schemes and policies in true spirit without making any discrimination among states. Co-ordination and co-operation between Centre and States are the hallmark principles of federalism. Federalism generally, provides a constitutional device for bringing unity in diversity and for the attainment of common national goals. A distinctive feature of the federal government, as contrasted to unitary government, is the constitutional division of functions and responsibilities, powers and finances between the central and state governments. It is this division of functions, powers and finances that determine the respective role of the central and the state governments in the formulation and implementation of developmental plans. The concept of federalism is recognized under the Constitution of India to encourage decentralization and achieve the constitutional and democratic goals resulting in a welfare state. India, being a multicultural, multilingual, and diverse nation cannot be governed, just by the Union Government alone. It needs to have a State Government to avoid the conflict of interest. Further, union government shall not discriminate against any State on grounds only of the same party in power, the financial position of State, or to get support to form a government and backwardness etc. In the case of placing State laws in the ninth schedule through a constitutional amendment by the Parliament should also be impartial not selective.

After independence, reforms in agrarian, social and economic structure became a top priority. Accordingly, several land reform legislations were passed by various states, aimed mainly at the abolition of intermediaries in the agricultural economy, and the institution of land ceilings. However, problems regarding the constitutional validity of these legislations soon arose, in the context of the chapter on fundamental rights of the Constitution and this initiation affected the Fundamental Rights of the Zamindars. As a result, the Central Government to carry out agrarian scheme sponsored by the party in the power brought the First Constitutional Amendment of 1951 by which 31-B read with the Ninth Schedule was incorporated in the Constitution curtailing the power of the Court in the matter of judicial review of land reforms legislation and to protect laws related to agrarian reforms and abolishing zamindari system.

Since the subject matter relating to land reforms falls under the State list,[1] State legislatures of respective States are competent to enact a law on ceiling limits on landholding etc. But, agrarian reform-related legislation was violating the then fundamental right to property. To get protection for these legislations, State governments have to approach Parliament and the same has to be amended by the Parliament through the Constitutional amendment to place those legislations in the Ninth Schedule of the Indian Constitution. At this juncture, an attempt has been made in this article to know the federal approach of the Parliament in placing State laws into the Ninth Schedule and to examine whether the Parliament is partial or impartial in accommodating laws of few states by screening 284 legislations which were housed from 1951 to 1995. Further, an attempt has also been made to discuss the federal constitutionality to place the laws of Parliament into the ninth schedule by the Parliament itself (Creation of Ninth Schedule is to accommodate state laws through constitutional amendments not the laws of Parliament) to destruct the federal structure by implementing its own laws on States in India.

Brief History of the Ninth Schedule

India is predominantly an agrarian country with nearly three-fourths of the people dependent on agriculture or rural economy. When India became independent in 1947, a huge majority of its people was living in rural areas and was dependent on the agrarian economy for their livelihood.[2] The state of this economy was very poor, primarily as a result of the policies of the British. The living conditions of the peasants during the British period were so critical and deplorable. Consequently, after independence, Indian leaders had to concentrate on the harsh realities of the country's economy and poverty.[3] Independence had raised high hopes and expectations among all the sections of society. As a result, the democratic Governments of States and Center had moved largely to remove the unhealthiest

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[1] Entry 18 of List II of Seventh Schedule of the Indian Constitution [Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization]

[2] See Mohammed Ghouse, "*Agrarian Reforms* v. *Social Engineering*", 10(4), *Indian Bar Review* (1983) pp. 600-603.]

[3] Vera Michells Dean, *New Patterns of Democracy in India* (1969) p. 103. [by Prof. P.K. Rao, as quoted in Supreme Court and Parliament – Right to Property and Economic Justice, p. 3].

impediments to the progress of the agrarian Sector. Land reform programmes, which were given a place of special significance both in the First and in the Second Plan, have two specific objects. Consequently, land reform legislations were passed by some States and immediately few aggrieved zamindars questioned the validity of those Acts in the different States High Courts on the ground of contravention of Fundamental Rights recognized under Part III of the Constitution. In 1950, the Bihar Land Reforms Act was challenged before the Patna High Court in *Kameshwar* v. *State of Bihar.*[4] In a decision of Patna High Court, it was held that the Bihar Land Reforms Act was violative of fundamental rights and declared unconstitutional. But, the Allahabad High Court upheld the relevant agrarian laws passed in Uttar Pradesh.[5] The Nagpur High Court also upheld the agrarian legislation. The person aggrieved by these decisions filed appeals in Supreme Court and some of the parties filed writ petitions under Article 32 directly in the Supreme Court.

Before, however, the Supreme Court in appeals, could give its verdict on the validity or otherwise of this type of legislation, the Central Government under Shri Jawaharlal Nehru became restive at the delay being caused by litigation in furthering the programme of agricultural land reforms and thought of short-circuiting the judicial process. Nehru was an ardent supporter of agrarian reform which he regarded as a process of social reform and social engineering. The Center wanted to remove any possibility of such laws being declared invalid by the courts and have brought the amendment to put an end to all these litigations. Therefore, for the Central Government to carry out agrarian scheme, the First Constitutional Amendment Act of 1951 was passed and by which Articles 31-A and 31-B were introduced and Ninth Schedule was created in the Constitution curtailing the power of the Court in the matter of judicial review of Agrarian reforms legislation.

Debates on Ninth Schedule in the Provisional Parliament

The then Prime Minister Nehru introduced the Constitution (First Amendment) Bill in the Lok Sabha (Provisional Parliament) on 8th May 1951. While moving the Bill he said:[6]

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4 AIR, 1951, Pat.91, SB.

5 *Surya Prakash v U.P. Government*, AIR, 1951, All.674, FB

6 Parliament Debates.Vols.XII – XIII, pt.II.p.8814 (1951)

“The Bill is not a very complicated one; not is it a big one. Nevertheless, I need hardly point out that it is of intrinsic and great importance. He further said that, the real important provision which he was putting before the house related to Article 3.1[7] Emphasizing the need for Article 31-B and Ninth Schedule, he said that if they did not make proper arrangements for the land, all their schemes would fail. As such something of the above amendment was necessary.[8]

Further, he opined that “When I think of this Article the whole gamut of the picture comes up before my mind. I am not a Zamindar nor am I tenant, I am an outsider. But, the whole length of my public life has been intimately connected with agrarian agitation in my province”. The debates in Parliament before the enactment of the First Amendment throw light on the factors that led to the creation of the Ninth Schedule.

Pandit Jawaharlal Nehru set the tone of the debates in Parliament on May 18, 1951.[9] According to him, the question of land reform is under Article 31 and that the said amendment tries to take it away from the purview of the courts. Due to the confusion of doubt created by Patna, Allahabad and Nagpur High Courts on the issue of progressive agrarian reform legislation by giving contrary decisions on the matter, Nehru was worried. He said,

“…Are we to wait for this confusion and doubt gradually to resolve itself, while powerful agrarian movements grow up? If there is agrarian trouble and insecurity of land tenure nobody knows what is to happen. Therefore, these long arguments and these repeated appeals in courts are dangerous to the state, from the security point of view, from the food production point of view, and the individual point of view, whether it is that of the zamindar or the tenant or any intermediary.” He further said, Articles 31-A and 31-B were aimed to give effect to a dynamic move of directive principles and strengthen the Constitution.[10] He trusted that immunity to the Scheduled legislations was essential for advancing social change initiated by the State.

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7 *Id*. at 8820-21.
8 *Id.* at 8831-2.
9 http://www.frontlineonnet.com/fl2402/stories/20070209005101200.htm.
10 Parliamentary Debates, Part II. Vol.XII and XIII on May 15 –June 9, 1951

Prof. K.T. Shah, a Member of the Constituent Assembly who opposed the Ninth Schedule, appealed against it to “uphold the sanctity of the Court”, and urged the government to validate the laws to be placed under the Ninth Schedule after the Supreme Court considered them on a reference by the President. But, Nehru was categorical. He replied to the debate: “Millions wait and have been waiting for decades. Do you think that lawyers or any petty legal arguments are going to come in the way of these millions? Are we to submit to things and wait till some great revolution comes to change the condition of things?”

He further said: “The Constituent Assembly took great care to lay down that these changes should not be challenged in a court of law. Despite this care, perhaps the language was not clear enough. That was our fault and so it has been challenged and these reforms have been in consequence delayed. Are we to wait for this delaying process to go on and for this process of challenge in courts of law to go on month after month and year after year? And the people who talk about waiting do not know what is stirring the hearts of those millions outside.

On May 29, 1951, after the Select Committee submitted its report on the First Amendment, Nehru said: “It is not with any great satisfaction or pleasure that we have produced this long Schedule. We do not wish to add to it for two reasons. One is that the Schedule consists of a particular type of legislation, generally speaking, and another type should not come in. Secondly, every single measure included in this Schedule was carefully considered by our President and certified by him. If you go on adding at the last moment, it is not fair, I think, or just to this Parliament or to the country”. Nehru’s reply was in response to some members who had given notice of amendments to add other laws to the Schedule.

Finally, the Constitution First Amendment Act, 1951 was passed and added Articles 31-A and 31-B read with Ninth Schedule to the Constitution. This is how The First Amendment was made to the Constitution in 1951 by the Provisional Parliament.[11]

The rationale for Article 31-B and the Ninth Schedule becomes clear on reading the Parliament debates on the First Amendment relating to the Ninth Schedule. It

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[11] The Bill was passed with 238 ayes and 7 noes (Speaker announces the final result by saying ‘The Ayes/Noes have it) and received the assent of the President 18th June 1951.

is not the fear of the judiciary striking down land reform laws that compelled the Nehruvian state to prevent judicial review of those laws, but its remarkable degree of impatience - characteristic of those early years following the achievement of freedom - with the conservatism of the judiciary.

Retrospective Effect of Article 31-B

The very significant characteristic of Article 31-B is that it is having a retrospective effect. As a result of this effect, any legislation is previously declared void by the Supreme Court on the ground that it violated any of the fundamental rights, receives if such void legislation is introduced in the Ninth Schedule by the Constitutional Amendment. Any Act, cannot after its introduction in the Ninth Schedule be declared void or ever to have become void, on the ground of its inconsistency with any fundamental right. In the State of *Uttar Pradesh* v. *Brijrnder Singh* case[12] Supreme Court also made the above observations. Because of this characteristic of Article 31-B, it became very easy for the Parliament to validate any Act already declared unconstitutional, simply by putting such unconstitutional Act in the Ninth Schedule. Once legislation enters into the protective umbrella of the Ninth Schedule its constitutionality cannot be challenged as per the wordings of Article 31-B.

It is pertinent to note that the Parliament has no competence to enact or legislate upon matters concerning agrarian reforms since the same is listed under the State list as mentioned above. Considering the fact that the Ninth Schedule was introduced to ensure that the legislations concerning agrarian reforms were not declared null and void by the Supreme Court, there is no scope for the Parliament to insert laws passed by itself on other subjects in the Ninth Schedule. The legislative intent of introducing the Ninth Schedule is manifest in the aforementioned discussions that took place in the then provisional Parliament. The addition of various laws concerning other subject matters is violative of the legislative intent in itself which fundamentally strikes at the root of constitutionalism and is contrary to the principles of federalism.

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[12] AIR 1961 SC 14.

Agrarian Reforms

While the parliamentary debates state the legislative intent of introducing the Ninth Schedule, no definition was provided for the same. Since there was no express definition to define the term, it was open to a liberal interpretation without placing any limits on the Parliament to enact the laws. However, the Hon'ble Supreme Court in subsequent judgment attempted to define the term and provided a liberal construction. Considering that it is the Hon'ble Supreme Court that took upon itself to define the term 'Agrarian reforms', the definition is not exhaustive and evolved from case to case in line with the changing times and period.

Agrarian reform usually refers to the redistribution of land from the rich to the poor. More broadly, it includes regulation of ownership, operation, leasing, sales, and inheritance of land (indeed, the redistribution of the land itself requires legal changes). In an agrarian economy like India with great scarcity and unequal distribution, of land, coupled with a large mass of the rural population below the poverty line, there are compelling economic and political arguments for land reform. Not surprisingly, it received top priority on the policy agenda at the time of Independence.[13]

The word Agrarian reform has been interpreted in liberally [14] and it is not restricted to only improving the method of tilling land, since it has a much wider scope.[15] It also includes-

a) Improving standards of living and working in village.[16]

b) Provision for development of rural economy including consolidation of holding.[17]

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[13] Kaushik Basu "*Land Reform in India*", Oxford University Press.

[14] *State of Kerala* v. *Silk Mfg.co. Gwalior Rayon* AIR 1973,SC.2734

[15] *Kangra Valley StaeCo.Ltd* v. *Kidar Nath*, 66 Punj. L.R.966; AIR, 1964,Punj.503.

[16] *Jit Singh* v. *State of Punjab,* AIR, 1964, Punj, 419.

[17] *Ranjith Singh* v. *Stae of Punjab* AIR, 1965, SC.632.

c) Increasing agriculture production and encouraging self-cultivation.[18]

d) Equitable distribution of land[19] and agriculture income[20] between landlord and tenant, in order to prevent concentration of lands in the hands of a few landholder[21] Provision ancillary to agrarian reforms, e.g. annulment of anticipatory transfer to defeat a law of agrarian reform;[22] transfer of surplus land to the village panchayath for the use of general community, such as promotion of agriculture or welfare of the agricultural population; acquisition of private forest lands belonging to a Jagir or inam for such purposes;[23] for settlement of agriculture labour,[24] fixing a ceiling area and providing for distribution of the surplus amongst the tillers of the soil, acquisition of land together with standing crops and improvements.[25] Supreme Court and respective State High Courts have interpreted the term 'agrarian reform' differently in different cases.

Constitutional Amendments and the Overburdening of Ninth Schedule

The Ninth Schedule of the Indian Constitution was inserted in the year 1951. Since then, until 1995, around 284 legislations were added in the same to provide immunity from judicial review. Most legislations were introduced during the tenure of Smt. Indira Gandhi. Around 138 legislations concerning various subject matters were introduced when Smt. Indira Gandhi was holding the office of the Prime Minister. Various Constitutional amendments added/omitted various Acts/ provisions in the Ninth Schedule from Item No. 1 to 284. It is as under:

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[18] *Thippeswamy* v. *State of Karnatka*, AIR , 1975,Kant.53.

[19] *Godavari Sugar Mills Ltd* v. *S.B.Kamble*, AIR, 1975,SC,1193,

[20] *Madusudan Singh* v. *Union of India*, AIR, 1984, SC,374.

[21] *Gangadar* v. *State of Bombay*, AIR, 1961, SC, 288.

[22] *Raghubir Singh* v.*State of Ajmer* AIR, 1959,SC, 475.

[23] *State of U.P* v. *Anand* (1967)1 SCR, 362: AIR 1967, SC.661.

[24] *Ibid*.

[25] *Joseph M.T.* v. *State of Kerala*, AIR 1974 Ker. 28(para 7)

Table -A

Sl.No.	Amendments	Year	No. of Laws	
1	1st Amendment	1951	1-13	(13)
2	4th Amendment	1955	14-20	(7)
3	17th Amendment	1964	21-64	(44)
4	29th Amendment	1971	65 -66	(2)
5	34th Amendment	1974	67-86	(20)
6	39th Amendment	1975	87-124	(38)
7	40th Amendment	1976	125-188	(64)
8	47th Amendment	1984	189-202	(14)
9	66th Amendment	1990	203-257	(54)
10	76th Amendment	1994	257-A	(1)
11	78th Amendment	1995	258-284	(27)

From the first amendment to the 78th amendment, 284 legislations were put in the 9th Schedule. Out of which 3 laws were omitted from the list of Schedule and inserted one more law in sub entry. At present, The Ninth Schedule comprises 282 Acts and Regulations, of which almost 218 were inserted after April 24, 1973. According to the provision of article 31-B, "none of the laws specified in the 9th schedule shall be deemed to be void on the ground that it was inconsistence with any of the fundamental rights, notwithstanding any judgement, decree or order of any court or tribunal to the contrary".

This meant that the laws put in the Ninth Schedule were not subject to judicial review. The justification offered was that courts should not be allowed to get in the way of socialist policies such as land reforms. But, during an internal emergency, it was used to protect repressive legislation dealing with personal liberty, press freedom and political rights which were later deleted from Ninth Schedule. The latest addition to the Schedule is the Tamil Nadu Reservation Statute of 1994, which clearly purports to surpass the well-thought judgement rendered by the

Supreme Court in *Mandal Case*[26] and also violated the federal polity by favouring the state of Tamil Nadu for political gains.

Table -B

Sl.No.	Subject	No.of.Acts	Percentage
1	Laws Relating to Agrarian/ Land	251	88.38
2	Laws Relating to Industrial Development	15	5.28
3	Laws Relating to Economic Offences	7	2.46
4	Laws Relating to Social Welfare	6	2.11
5	Laws Relating to Elections and Press	2	0.70
6	Miscellaneous Laws	3	1.05
	Total Laws	**284**	**100.00**

As noticeable above, over 88.38% of the legislations placed in the Ninth Schedule of the Constitution deal with Agrarian or Land reforms which further clarifies the contention of the author that the said Schedule was introduced to provide for judicial immunity for legislations concerning land/ agrarian reforms. However, 33 legislations or around 12% of the legislation in the Ninth Schedule do not relate to agrarian reforms. This has to be corrected considering that these legislations go beyond the purview of land reforms and thereby violate the legislative intent. The need of the hour is to review these legislations and undo the damage done to the principle of constitutionalism and more specifically federalism which is an inherent and essential part of the spirit of the Constitution and the basic structure. As the 44th Amendment to the Constitution undid and corrected the errors made to Constitution, the time has come for the Parliament to reconsider the presence of laws in the Ninth Schedule.

[26] *Indra sahney* v. *Union of India (Mandal case)* A.I.R. 1993 S.C. 477.

Table- C

SL No.	State	No of Legislations
1	Tamilnadu/ Madras -	33
2	West Bengal	31
3	Bombay/Maharashtra	29
4	Bihar	23
5	Kerala	21
6	Orissa	14
7	Gujarat	14
8	Madhya Pradesh	13
9	Rajasthan	13
10	Hyderabad/Ap	12
11	Uttar Pradesh	10
12	Mysore/ Karnataka	10
13	Assam-4 Punjab - 2 Delhi - 1 Haryana - 3 Himachal - 5 Tripura - 2 Dadra Nagar Haveli - 2 Goa, Daman Diu - 3 Pondicherry -3	25
14	Central Laws	36
	Total	**284**

There is also a clear manifestation of arbitrariness in the treatment of different states. While the Parliament has obliged and arbitrarily placed a huge number of legislations enacted by certain state legislatures, it has given step-motherly treatment to a few other states. For instance, the Parliament has placed 33 legislations passed by the Tamil Nadu legislature and 31 legislations enacted by the state legislature of West Bengal. On the other hand, the Parliament has placed only 10 laws passed by Uttar Pradesh and Karnataka state legislatures. Further,

only 25 legislations of eight states and union territories have been inserted in the Ninth Schedule which is lesser than the number of legislations enacted by Tamil Nadu and Maharashtra each which have been inserted in the Ninth Schedule. This explicitly signifies the blatant arbitrariness of the Parliament exercising its powers according to its whims and fancies. This is apparent considering that the Union Parliament deemed it fit to insert the legislation concerning reservations that breached the 50% mandate in Tamil Nadu, but failed to do the same in the case of Karnataka in the light of the decision of the Hon'ble Supreme Court in *M. R. Balaji and others* v. *the State of Mysore.*[27]

This signifies that apart from the fact that the Parliament placing laws that are not like agrarian reforms, it has meted out a differential treatment to different states. Considering that states like Tamil Nadu, West Bengal and Kerala had non-Congress governments, it is a possibility that the Union Parliament had to bow down to political compulsions in these states and the electoral considerations gained priority over constitutional norms since all the legislations in the Ninth Schedule were inserted during the period of Congress governments or Congress-led governments.

This was indeed a disturbing trend considering that it will undermine the constitutional norms wherein the judiciary which is tasked to test the constitutional validity of laws is deprived of its power to do the same. Another aspect to the same is that the Parliament exercised a centralizing tendency in exercising its power to place the legislation in the Ninth Schedule of the Constitution. The Parliament has not applied or developed any standard or criterion to be considered before placing the legislation in the Ninth Schedule. As it is stated above, even though legislations concerning agrarian reforms were considered to be placed in the Ninth Schedule, over a period, this requirement was diluted and the Parliament whimsically placed legislations that are non-agrarian in the Ninth Schedule.

Further, as mentioned above, the entire aspect concerning agrarian or land reforms comes within the scope of state legislatures. Therefore, since agrarian reforms through legislation can only be enacted by states, it is bewildering to notice 36 central enactments placed in the Ninth Schedule. The Parliament has

[27] AIR 1963 SC 649

transgressed from the legislative intent of introducing the Ninth Schedule which has been elucidated above. This is a constitutional transgression considering the arbitrariness which is manifest in placing the legislation in the Ninth Schedule. The Parliament placing its laws in the Ninth Schedule cannot be justified. It has set a precedent wherein the Parliament has given itself the power to enact unconstitutional legislation and subsequently place them in the Ninth Schedule. The Hon'ble Supreme Court in the *I.R. Coelho case*[28] has held that such laws cannot escape judicial validation in toto. The very fact that even to this date there are 36 central legislations[29] in the Ninth Schedule signifies the transgression of the legislative intent by the Parliament itself.

21 of the aforementioned Central Acts were enacted during the tenure of Smt. Indira Gandhi showcases a strong centralising tendency and strikes at the root of

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[28] *I.R. Cohelo (Dead) by LRs* v. *State of Tamil Nadu*2007(1) SC, 197

[29] [The Delhi Land Holdings (Ceiling) Act, 1960 (Central Act 24 of 1960); The Manipur Land Revenue and Land Reforms Act, 1960 (Central Act 33 of 1960); The Tripura Land Revenue and Land Reforms Act, 1960 (Central Act 43 of 1960); The Industries (Development and Regulation) Act, 1951 (Central Act 65 of 1951); The Requisitioning and Acquisition of Immovable Property Act, 1952 (Central Act 30 of 1952); The Mines and Minerals (Regulation and Development) Act, 1957; The Monopolies and; Restrictive Trade Practices Act, 1969 (Central Act 54 of 1969).; The Coking Coal Mines (Emergency Provisions) Act, 1971 (Central Act 64 of 1971); The Coking Coal Mines (Nationalisation) Act, 1972 (Central Act 36 of 1972).; The General Insurance Business (Nationalisation) Act, 1972 (Central Act 57 of 1972); The Indian Copper Corporation (Acquisition of Undertaking) Act, 1972 (Central Act 58 of 1972); The Sick Textile Undertakings (Taking Over of Management) Act, 1972 (Central Act 72 of 1972); The Coal Mines (Taking Over of Management) Act, 1973 (Central Act 15 of 1973); The Coal Mines (Nationalisation) Act, 1973 (Central Act 26 of 1973); The Foreign Exchange Regulation Act, 1973 (Central Act 46 of 1973); The Alcock Ashdown Company Limited (Acquisition of Undertakings) Act, 1973 (Central Act 56 of 1973); The Coal Mines (Conservation and Development) Act, 1974 (Central Act 28 of 1974); The Additional Emoluments (Compulsory Deposit) Act, 1974 (Central Act 37 of 1974); The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974); The Sick Textile Undertakings (Nationalisation) Act, 1974 (CentralAct 57 of 1974); Section 66A and Chapter IVA of the Motor Vehicles Act, 1939 (Central Act 4 of 1939); The Essential Commodities Act, 1955 (Central Act 10 of 1955); The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (Central Act 13 of 1976); The Bonded Labour System (Abolition) Act, 1976 (Central Act 19 of 1976); The Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1976 (Central Act 20 of 1976) ; The Levy Sugar Price Equalisation Fund Act, 1976 (Central Act 31 of 1976); The Urban Land (Ceiling and Regulation) Act, 1976 (Central Act 33 of 1976); The Departmentalisation of Union Accounts (Transfer of Personnel) Act, 1976 (Central Act 59 of 1976); The Delhi Land Holdings (Ceiling) Amendment Act, 1976 (Central Act 15 of 1976);]

the federal structure. Such over-centralisation of power is detrimental to the federal structure envisaged in the Constitution. When the election of Smt. Indira Gandhi was challenged on allegations of electoral malpractices, it is noticed that Parliament brought in the 39th Amendment Act which was marred by majoritarian tendencies. The 39th Amendment Act, 1975 amended the Representation of People's Act, 1951 wherein the election of the Prime Minister could not be challenged in any courts of law. The same was inserted into the Ninth Schedule. Similarly, even the draconian Maintenance of Internal Security Act, 1971 was also inserted in the Ninth Schedule. Other laws concerning the nationalisation of industries and various sectors of the economy were also inserted into the Ninth Schedule. This signifies the strong centralising nature of governance wherein the Union Parliament arbitrarily inserted several legislations into the Ninth Schedule with complete disregard to the constitutional norms and mandate. The centralization of power and enacting legislations that blatantly violate the Constitution to subsequently place them in the Ninth Schedule only signifies the arbitrariness regarding the functioning of the Parliament. This is a clear violation of the federal structure of the Constitution.

Laws Added to Ninth Schedule during the Tenure of Various Prime Ministers

The following list provided below provides the information and details concerning the number of legislations inserted into the Ninth Schedule of the Constitution during the tenure of different Prime Ministers. While it can be seen that the initial tendency has been concerning the agrarian reforms, during the tenure of Smt. Indira Gandhi various laws concerning different subject matters were also added to the Ninth Schedule.

Jawaharlal Nehru- 44 Legislations (Aug 15, 1947 – May 27,1964)

a) The first amendment Act was an interesting constitutional amendment. A new technique of blocking the Judicial Review was initiated. The acts which abolished the Zamindari System was included in the Ninth Schedule. But, later on the Ninth Schedule was not limited to the same purpose and it was expanded over time. It was made during the reign of Prime Minister Jawaharlal Nehru. Entries 1-13 were added by this amendment.

b) The Constitution (First Amendment) Act had added Art 31A to protect Zamindari abolition Laws from being challenged under Arts 14, 19 and

31. Fourth Amendment 1955 the Art 31(2) was modified. Secondly, a new Article 31(2)(A) was added. The Fourth Amendment also added a few more Acts into the Ninth Schedule that is entries 14-20. This Amendment also redrafted Art 305, and its purpose was to protect laws creating State Monopolies or nationalizing any undertaking from the operation of Art 301. The Constitution (Seventeenth Amendment) Act, 1964 was also introduced and widely discussed during Nehru's tenure as the Prime Minister. However, the same came into force during the tenure of Shri Lal Bahadur Shastri. 17th amendment of the constitution was made in the year 1964 [20th June 1964] during this Amendment the Ninth Schedule was expanded by including forty-four state Enactments to immunize them from judicial review. By this, the Ninth Schedule came to have 64 Acts in total and covered a wide field of acts concerning ceiling on agricultural holdings, abolition of certain types of tenures, acquisition of land belonging to religious and charitable endowments, Fixation of rent, protection of tenants from eviction etc.

Indira Gandhi- Jan 24,1966-Mar 24,1977 , Jan 14,1980-Oct 31,1984

a) Twenty-Ninth Amendment Act, 1972 two Kerala Acts dealing with land reforms were included in the IX Schedule to the Constitution which received the protection of Art 31B. It also was responsible for the addition of the Monopolies and Restrictive Trade Practices Act, 1969 into the IX schedule.

b) Thirty-Fourth Amendment Act 1974, 20 state Acts concerning land ceiling and land tenure reforms were added to the ninth schedule.

c) In 1975 the 39th Amendment was an important phase, it was during this time that the election case of Indira Gandhi occurred, entries 87-124 was made in this amendment. This amendment prevented the judiciary scrutinizing the election of the President, the Vice President, the Prime Minister and the Speaker of the Lok Sabha, thus giving immense power to one organ of the government. The 39th amendment not only gave meagre consideration to the principle of judicial review, it had complete disregard for the principle of separation of power. These two principles form the

backbone of good governance. It gave unjustifiable power and position of authority to the Central government.

d) In 1976 the 40th Amendment extended immunity to 64 Central and State Statutes by their inclusion into the ninth schedule. These statutes were related to land reform, urban ceiling and prevention of publication of objectionable matter.

e) 47th Amendment (26 August 1984) was made in the year 1984 and added 14 State Acts dealing with land to the 9th Schedule.

f) Adding 138 legislations in the Ninth Schedule through the above-mentioned amendments during the tenure of Smt. Indira Gandhi, it can be noticed that there was a strong centralizing tendency in the process of law-making and can be considered to be an assault on the federal democracy. The laws which were inserted did not concern or deal with agrarian reforms in pith and substance.

Morarji Desai – (Mar 24,1977- July 28 1979) one legislation was omitted

a) The 44th Amendment 1978 was enacted by the Janata Government to undo most of the provisions of the 42nd Amendment. Through this, the entry Entries 87, 92 and 130 of the Ninth Schedule were omitted.[30] This Amendment is pertinent considering the fact that even with a wafer-thin majority and an unstable coalition government, an attempt was made to instil constitutionalism. The Amendment ensured that there was a corrective mechanism to ensure that the spirit of the Constitution did not disappear by centralizing tendencies.

VISHWA PRATHAP SINGH- (Dec 2, 1989- Nov 10, 1990)

a) 66thAmendment 1990 was enacted to put several laws passed by the state legislatures mostly relating to the land reforms into the ninth schedule. After this, the total number of laws in the 9th Schedule increased to 257. This was done to provide immunity to these laws.

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[30] Entries 87, 92 and 130 omitted by the Constitution (Forty-fourth Amendment) Act, 1978, s. 44 (w.e.f. 20-6-1979).

P.V.NARASIMHA RAO (Jun 21, 1991-May 16, 1996)

a) 76th Amendment 1994, was enacted by the government to put the Tamil Nadu Reservation Act under the ninth schedule. Thus, shielding it from the purview of the judiciary. This resulted in the gross misuse of power by the central government. It also differentiated between states without reasonable justification.

b) 78th Amendment 1995, added a few states Acts to the Ninth Schedule the number of the total legislation came up to the total of 284.

M.N. Venkatachaliah Report on Ninth Schedule

National Commission to review the working of the Constitution (NCRWC) was set up by the government under the chairmanship of Justice (Retd.) MN Venkatachalaiah, Former Chief Justice of India to suggest changes to the Constitution. After analysing and studying various reports, precedents and laws enacted by the Parliament and various state legislatures, the committee suggested a definite criterion to be included in Article 31-B of the Constitution. The Committee in Paragraph 3.17 suggested as follows: In article 31-B, the following proviso should be added at the end, namely: -

"Provided that the protection afforded by this article to Acts and Regulations which may be hereafter specified in the Ninth Schedule or any of the provisions thereof, shall not apply unless such Acts or Regulations relate –

a) in pith and substance to agrarian reforms or land reforms;
b) to the reasonable quantum of reservation under articles 15 and 16;
c) to provisions for giving effect to the policy of the State towards securing all or any of the principles specified in clause (b) or clause (c) of Article 39."

This signifies that it is important to provide a definite criterion and standard to justify the insertion of any legislation to the Ninth Schedule. Considering that the federal structure also forms the basic structure of the Constitution, the laws inserted after 1973 till 1995 has to be tested on the touchstone of constitutional validity concerning the basic structure of the Constitution.[31]

[31] *Keshavananda Bharathi* v.*State of Kerala*A.I.R. 1973 S.C. 1461.

Conclusion

The very first amendment of the Indian Constitution gave birth to the Ninth Schedule, the purpose of such a schedule was to incorporate various land reforms and agrarian laws. The addition of Articles 31-A and 31-B ensured that the laws added to the ninth schedule would be protected from the questioning of their constitutional validity. This ensured the speedy implementation of these land and agrarian laws, which at the time were the need of the hour. The vast discussion that took place in the provisional Parliament stand witness to the fact that the ninth schedule was added for the sole purpose of improving the land and agrarian situation of the country.

This step was taken by the then government under the guidance of Former Prime Minister Jawaharlal Nehru towards an equitable society. The rationale behind the schedule was to protect agrarian laws and not any other legislation. There was a consensus between all the organs to put such a provision in the Indian constitution to bring the necessary change in the socio-economic structure of society. The makers of the Constitution believed that such a schedule would be used for the betterment of the people and not as a shield for the ruling government to hide behind. However, Prof. K.T. Shah, a Member of the Constituent Assembly who opposed the Ninth Schedule, appealed against it to "uphold the sanctity of the Court", and urged the government to validate the laws to be placed under the Ninth Schedule after the Supreme Court considered them on a reference by the President.

Over the years, the ninth schedule has been exploited to serve the agendas of the government. There have been instances where the ninth schedule has been utilised for the same purpose that it was designed for. Jawaharlal Nehru was could be considered as the proponent of this schedule used it wisely and judiciously by bringing in various land reforms Acts to guide in the newly formed country India into a new dawn. Then during the period of Lal Bahadur Shastri, a variety of state-related agrarian and land reform laws were included in the ninth schedule. Moving further on the glaring misuse of Article 31-B and Ninth schedule was seen in the period of Smt. Indira Gandhi, the government under her passed a series of laws, out of these a number of them were central laws. There was an evident abuse of

power by the central government. Draconian law like the Maintenance of Internal Security Act 1971 was placed under the ambit of the Ninth schedule to protect them from any judicial interference even though basic fundamental rights were glaringly violated. The strong centralised tendency portrayed by the government proved quite worrisome for the federal structure of the country. The basic structure of the Indian Constitution had been compromised by such Acts of the central government. Next came the Moraji Desai government, this was the only government that made no addition to the Ninth Schedule as such but brought about an amendment to remove certain unscientific laws from the Ninth schedule and it was almost like the 44th amendment was an ointment for a much damaged and hurt Constitution. The Janta Dal government gave a sliver of hope to the people of the nation.

Then came the VP Singh government which went on to add another set of land reforms and agrarian laws. The last additions to the Ninth schedule were made by the P.V. Narasimha Rao government a string of laws were accommodated into the Ninth schedule among them was the Tamil Nadu Reservation Act, 1994 which broke the cap of 50% as decided by the Supreme court in the case of *Indira Sawhney* v. *Union of Indi*a.[32] This step taken by the legislature was an audacious response to the judgement of the Supreme court. The government not only overstepped when it came to disregard the judgement of the apex court but also showed a bias and disparity in the inclusion of state laws in the Ninth Schedule.

The author opines that a definite set of guidelines must be included under Article 31 to maintain a certain procedure in the inclusion of laws in the Ninth Schedule. While the parliamentary debates signified that the Schedule was to consist of agrarian reforms, the Parliament has considerably divulged from the same. Article 31-B also does not manifestly signify the same. Therefore, it is pertinent to include a definite set of criteria as suggested by the Justice M.N. Venkatachalaiah Committee. Similarly, the term “Agrarian reform” has to be defined in the Constitution in Article 366 or any other provision that the Parliament may deem fit for clearly interpreting the same. This will ensure the protection of

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[32] *Supra* note 26.

the federal structure of the country. The purpose of the existence of the Ninth schedule must be kept in mind, to maintain the sanctity of lawmaking.

Further, the Union may receive resolutions from the state legislatures to determine the state legislations concerning the subject matters relating to agrarian reforms which are to be kept or inserted in the Ninth Schedule to ensure equitable application of federal principles. The Parliament may, after due consideration omit the legislations which do not fit the criterion evolved. This would also ensure that the principles of federalism are upheld and the concept of cooperative federalism is nurtured in the law-making process.

It is also asserted that the Ninth Schedule of the Constitution should not consist of the laws enacted by the Union Government which is implicitly stated in the discussions that took place in the provisional Parliament to limit the centralization of the law-making process. It is paradoxical since the Parliament itself should not be given the power to pass patently unconstitutional laws and place them in the Ninth Schedule to escape judicial scrutiny.

A CURIOUS CASE OF COPYRIGHT PROTECTION FOR SPORTS MOVES – AN ANALYSIS

- Dr. Sunil N. Bagade*

Abstract

It is interesting to note that the tentacles of Intellectual Property Law have spread to include the field of sports. The reason is, now sports have not remained just as some sports activity. The creativity has become core of sports. Some sports persons out of their creativity have evolved certain unique moves which are distinctive and those brilliant moves often mark fine line that separates the excellent sports person from the others.

The granting of intellectual property protection to such sports moves has been much debated issue. From the iconic 'Ali Shuffle' to the 'Nadal Forehand', every signature move ever created has an undeniable level of creativity and technique involved that makes it unique.[1] *These moves are believed to be superior in execution and crucial for the sports person's success in their respective sports fields. The recognition of such sports moves, as a creative work, could not only dramatically change the way a sport is played but also change the lives of such sports persons.*

Copyright exists to protect the fruits of a man's work, labour and skill. Thus, the notion of creativity is at the very heart of copyright law. It is well established that original works of expressions deserve economic and moral rights protection.

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[1] Walter Champion and Kirk Willis, Intellectual Property Law in the Sports and Entertainment Industries, 56 (Praeger Publishers, 2014).

In this background when the copyright protection to sports moves is examined the question which arises for consideration is: at what juncture do sporting moves and/or choreographies become creative pieces in their own right and thus protectable as an author's unique artistic expression? As sports have grown to a global multi-billion-dollar business, it becomes significant that these forms of expression shall be protected for decades, even after the death of the original sports person. Accordingly, this article analyses whether sports moves and choreographies fit into the concept of originality and thus whether they are copyrightable.

Key words: Sports moves, Creativity, Competition, Fair play and Copyright.

Introduction

Throughout sports history, scripted plays and innovative moves performed by athletes have played an important role. There have been groundbreaking plays conceived by coaches either, well in advance of a competition, or thought of in the heat of a close scoring game, when only a few seconds remaining. There have also been revolutionary moves performed by athletes that have both won important games and completely changed the way particular sports are played.

This shows that now sports has not remained just the activities. It has assumed the form of scripted sports. It is pertinent to recall the most famous illustration of such sports play is the development of "T-formation" technique in football play by Coach Clark Shaughnessy of Stanford University.[2] It is said that he developed this technique in 1940 as one of American football's most innovative offenses. During the 1940-41 season, Stanford became the first college team to use this technique and this allowed them to go undefeated in their nine regular season games and win the 1941 Rose Bowl against Nebraska.[3]

Apart from the scripted sports plays invented by coaches that have won big games and revolutionized athletics, particular moves by athletes have also been viewed as extremely innovative and creative. Without a doubt, much skill, thought,

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[2] F. F. Scott Kieff, "It's Your Turn, But It's My Move: Intellectual Property Protection for Sports Moves", 25 *Santa Clara High Tech. L. J.* 765, 766 (2012).

[3] *Ibid,* p.767.

and practice has gone into making these moves flawless enough to be performed in pressured game situation. For instance, the use of the bicycle kick in soccer was revolutionary in the sport.[4] Although there has been much debate over which player and country "invented" this complicated kick, many credit player, Ramón Unzaga, from Spain with being the first player to use the bicycle kick in 1914.[5] It is said that, in the 1930s and 1940s, Leonidas da Silva from Brazil further perfected the bicycle kick. It is pertinent to note that the bicycle kick also became the signature move of the Brazilian player Pelé, Mexico's Hugo Sanchez, and Argentinas Diego Maradona.[6]

Furthermore, the important question which arises for consideration is whether these types of choreographed moves and plays should be afforded intellectual property protection. Generally, American intellectual property law does not afford protection to athletic moves and plays. However, the scholars like Robert Kunstadt, F.Scott Kieff, etc. vehemently argue for granting IPR protection to scripted sports moves.[7] They put forth this argument way back in 1996 itself. They argued the copyright protection should be afforded for moves that are "creative" in nature.

It is in this background that this paper attempts to analyze whether scripted sports moves qualify for copyright protection. This paper also analyzes whether such sports moves can meet the various requirements of copyright protection. An attempt is also made to understand why copyright protection is a good fit for such moves and plays.

Need for granting Copyright protection to scripted sports moves

It is to be noted that our society needs to adapt its viewpoint of athletic moves and plays, and come to recognize and appreciate the effort and refined technique put into creating these maneuvers. Sports plays and moves should be afforded copyright protection because such rights would give proper reward and recognition to coaches and athletes.

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[4] Robert M. Kunstadt, F. Scott Kieff & Robert G. Kramer, "A New Hook for IP Practice-Intellectual Property Protection for Sports Moves", 22 *NAT'L L.J.* 613, 615 (1996).

[5] *Ibid,* p.616.

[6] *Ibid.*

[7] Gururaj Devarhubali and Sarfaraj Patel, "A Study of Extension of Intellectual Property Rights to Sports Moves, On-Field Celebrations and Team Strategies", 26 *IOSR-JHSS* 42, 43 (2021).

In other words, providing creators, in this case athletes and coaches, with copyright protection for their maneuvers and plays provide a greater economic incentive for such creation and innovation to continue.[8] The addition of sports moves and plays to the realm of intellectual property protection will not only economically benefit professional athletes and coaches, but also may help amateurs in a sport reap the economic rewards of their creative athletic endeavors.

It should be noted that only creative and substantially innovative sports moves and plays should be afforded copyright protection, as opposed to basic and universal moves and plays. Creative and inventive moves are essential to athletic games; if plays were boring and never- changing, very few people would continue to be fans.[9] Moves and plays contribute greatly to sports, and as such, it is essential that copyright protection should be granted to protect the time, effort and creativity exhibited by the coaches and athletes.

Scripted sports moves and a claim for Copyright protection

The growth of scripted sports moves and its popularity has given rise to the heated debate over granting of copyright protection to such moves. One group of scholars argues in favour of granting copyright protection to such moves, whereas other group of scholars put forth arguments for not granting such protection. They are discussed as under:

Arguments in favour of granting IPR protection to scripted sports moves

The proponents who support the grant of IPR protection for scripted sports moves maintain that in order to ensure the competitive nature of sports, athletic moves and diagrammed or pre-conceived plays should gain limited intellectual property protection.[10] This should be afforded in the forms of copyright protection, trademark protection, etc.

It is to be noted that the arguments for allowing intellectual property law to provide protection for sports moves and plays vary in scope. They are presented as under:

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[8] Aswathy Sujith, "Sports and Intellectual Property Rights-An Overview on the Indian Standards", 2 *Journal of L.S.R.* 58, 59 (2019).

[9] *Ibid,* p.61.

[10] Paras Sharma, "Intellectual Proeprty Rights in Sports", 8 *IJCRT* 267, 268 (2020).

First, intellectual property protection would reward the effort by both athletes and coaches. Protection would also validate the principle that new moves by athletes are the result of increasing athletic ability of players.[11]

Second, there is undoubtedly a large economic incentive that intellectual property protection would afford the innovators of creative sports moves and plays.[12]

Third, one can argue that sports moves and plays should receive protection from intellectual property law because providing such protection would essentially be the same as protecting other art forms.[13]

Fourth, it is argued that scripted sports plays should receive intellectual property protection because they are "no different than other protected works such as theatrical plays, musical songs, or architectural blueprints. The coach serves as the author, composer, and designer of the play as an act of original ingenuity."[14]

Apart from the above, another argument presented is that, in modern society, rapidly increasing developments in technology have made methods of copying extremely easy. The sports world relies heavily on competitive interactions between teams and athletes. New technologies allow the dissection of plays and moves, such as frame-by-frame analysis, and new copying methods allow these in-depth examinations of plays and moves to potentially be abused. It therefore follows that if an athlete's or team's opponents are able to carefully analyze and then copy or even pre-empt the original player's moves or team's plays, this would destroy the true competitive nature of sports.[15] Hence, providing additional level of protection for the hard work and creative effort that goes into developing sports moves and plays serves to the great benefit of society.

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[11] Hennry Abromson, "The Copyrightability of Sports Celebration Moves: Dance Fever or Just Plain Sick?", 14 *Marq. Sports L. Rev*. 571, 572 (2004).

[12] *Ibid,* p.573.

[13] *Ibid.*

[14] Win. Tucker Griffith, "Beyond the Perfect Score: Protecting Routine Orient Athletic Performance With Copyright Law", 30 *CONN. L. Rev*. 675, 683-84 (1998).

[15] Loren J. Weber, "Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves", 23 *COLUM.-VLA J.L. & ARTS* 317, 318 (2000).

Arguments against granting IPR protection to scripted sports moves

The other group of scholars who oppose the grant of IPR protection to scripted sports moves maintain that sports moves and plays do little, if nothing, to benefit our society. They argue that it would be difficult to prove infringement by both recreational athletes and those who "copy" and "imitate" moves or plays they have seen.[16]

There is also the argument that having such intellectual property protection might negatively affect the "flow" of athletic games. It is said that giving sports plays intellectual property protection restrict the competitive nature of athletics, thereby offending the principles of fair play.[17] The proponents of this view heavily rely on the decision rendered by Second Circuit Court of USA in *National Basketball Association* v. *Motorola Inc.*[18] The Court in this case observed that even where athletic preparation most resembles authorship, a performer who conceives and executes a particularly graceful and difficult acrobatic feat cannot copyright it without impairing the underlying competition in the future.[19]

The proponents also argue that even the athletes and coaches themselves might not think their moves merit protection. They also maintain that, while individual sports, such as figure skating and gymnastics might deserve protection, team sports are not forms of "art" and should not be afforded intellectual property protection.[20]

They also claim that intellectual property protection, such as copyright protection, was never intended to protect sports moves and plays, and by allowing copyright law to protect these athletic ideas would go against the vary purpose of copyright law. They have *entertainment value than commercial value.*[21] Hence intellectual property protection should not be granted to sports moves.

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16 *Ibid,* p.319.

17 *Ibid.*

18 05 F.3d 841, 846 (2d Cir. 1997).

19 *Supra* Note 15, p.324.

20 Viola Elam, "Sporting events as dramatic works in the UK Copyright System", 24 *Entertainment and Sports Law Journal* 523, 524 (2020).

21 Sharada Kalamadi, Intelelctual Proeprty and the Business of Sports Management, 17 *JIPR* 437, 438 (2012).

Whatever are the arguments for and against the granting of IPR protection to scripted sports moves but the claim for granting such protection to scripted sports moves is increasing day by day. The next leg of discussion analyzes whether the sports moves can meet the various requirements of copyright protection so as to grant such protection.

Are scripted sports moves entitled for Copyright protection – An Analysis

In determining whether scripted sports moves are eligible for copyright protection, it must be considered whether or not these moves qualify as the subject matter protected by the Copyright Law. It is apt to note that copyright protection is given to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device".[22] In other words, a work must be original, fixed in a tangible medium of expression, and within the proper subject matter.

Originality and Scripted sports moves

To qualify for copyright protection the first requirement is that the work should be original. It is apt to note that the term "originality" in copyright works is the *sine qua non* of all the copyright regimes of the world. The common conception of the meaning of 'original' is something that is new, not done before. Originality is the aspect of created or invented works by as being new or novel, and thus can be distinguished from reproductions, clones, forgeries, or derivative works.[23] It is a work created with a unique style and substance.

The Supreme Court of India in *Eastern Book Company* v. *D.B. Modak*[24] adopted a 'Modicum of creativity' approach as followed in the USA and held that the work to be original must satisfy minimum requirement of creativity. Thus, now there are two sub-requirements, namely, originality and creativity. In other words, the work not only be original but also have creative element to qualify for copyright protection.

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22 *Ibid,* p.439.

23 Dr. V. K. Ahuja and Dr. Archa Vashishtha, *Intellectual Property Rights: Contemporary Developments*, 32 (Generic Publications, 2020).

24 (2008) 1 SCC 1.

It is said that the originality requirement for copyright protection in sports moves can be met because such moves are novel or improvised versions and involve creativity.[25] Coaches and athletes can develop plays and moves either collaboratively or on their own. The creativity requirement for copyright protection in sports plays and moves can be met because there are numerous arrangements of sports moves or sports plays that can be produced. Coaches and athletes have the ability to structure their plays and moves differently with seemingly never-ending combinations to facilitate their final products. Furthermore, sports moves are arguably creative because they add an innovative element to basic physical movements. It is said that the sports moves in essence a involve combination of force and speed as well as skill and creativity. As such they fulfill the requirement of originality and creativity.

Furthermore, observation of U.S. Supreme Court in *Bleistein* v. *Donaldson Lithographing Co.*[26] is apt to note. The Court had the occasion to explain the notion of creativity requirement for original works. It observed that *if certain works command the interest of any public, they have a commercial value and the taste of any public is not to be treated with contempt*. From this verdict it can be understood that the works which have a high value in the eyes of public qualify as creative enough for earning copyright protection.

Athletic games have continuously had an impact on our society, regardless of time period or country. While sport in many traditional cultures had been an integral part of life in an increasingly modern, industrial society sports became identified with and reserved for leisure time. Accordingly, given the seemingly uninterrupted popularity of athletic games in our society, it follows that sports moves and plays can "command the interest" of the public and therefore qualify as creative in order to receive copyright protection.[27]

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[25] *Supra* note 23, p.38.

[26] 188 U.S. 239, 252 (1903).

[27] Alexander Bussey, "Stretching Copyright to its Limit: On the Copyrightability of Yoga and Other Sports Movements in Light of the U.S. Copyright Office's New Characterization of Compilations", 20 *Jeffrey S. Moorad Sports L.J.* 1, 3 (2013).

Expression in tangible form and scripted sports moves

To be entitled for copyright protection a work must be fixed in a tangible medium of expression. Sports moves and plays can be fixed by recording the plays and moves.[28] The move or play may also be seen in tangible form if it is recorded on a videotape or DVD from a television broadcast. It is said that like choreography, the moves may be explained in a form of combination of diagrams, coach's description book or video recording.

Subject Matter Requirement and scripted sports moves

A work to be entitled to copyright protection must come within the purview of the subject matter categories provided by the Copyright Law. Generally literary and artistic works, musical works, dramatic works, choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works are the subject matters of the copyright protection.

The perusal of the above quoted subject matters shows that scripted sports moves or plays are not the part of the same. However, it is to be noted that the list of subject matters is not exhaustive. It is inclusive one.[29] Therefore, it may be possible for sports moves and plays to qualify as one of the enumerated types of subject matters. The scholars opine that there is a possibility of inclusion of sports plays and sports moves into any one of the categories such as dramatic works or choreographic works for granting copyright protection.

The strongest argument for a subject matter category for sports moves and athletic plays is under choreographic work. Moves and plays in sports are a combination of steps and gestures, arguably quite similar to works of choreography. One may argue that sports moves and plays should receive copyright protection as a form of choreography as well. "A scripted sports play is nothing more than a group routine with individuals performing a predetermined set act in cohesion with one another.[30]

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[28] *Ibid,* p.6

[29] *Ibid,* p.10.

[30] Enrico Bonadio and Nicola Lucchi (eds.), *Non-Conventional Copyright: Do New and Atypical Works Deserve Protection ?*, 543-545, (Edward Elgar Publications, 2019).

It is to be noted that the types of moves and plays that should be afforded protection by copyright law must be both creative and innovative. Limiting the category of moves and plays that would qualify for protection is essential to brining copyright protection under the banner of "choreography." That is, since copyright in chorographical works does not cover basic or simple dance steps and routines, this would arguably carry over to basic athletic moves and plays.[31] Accordingly, it is important that groundbreaking moves and plays be granted copyright protection, as opposed to basic and routine sports maneuvers and plays, because they better satisfy both the originality and subject matter requirements of copyright law.

Factors affecting granting of copyright to Sports moves Effects of the Merger Doctrine

There are certain factors which may likely to affect or interfere with the grant of copyright protection. They are discussed as under:

Merger Doctrine and Copyrightability of sports moves

It is to be noted that, the merger doctrine holds that when there is only one or a few ways of expressing an idea then a court must find that the idea behind the work merges with its expression and the work is not copyrightable.[32] The purpose of the merger doctrine is to prevent copyright owner from having a monopoly in a particular market.

Relying on the merger doctrine, some scholars opine that the sports moves and plays should not qualify for copyright protection because there is a limited way in which a person can physically accomplish the goal of catching, shooting, hitting, or kicking a ball and therefore even the most creative idea for making such a move or play would merge with its expression, thus barring copyright protection.[33]

However, this proposition is countered with argument that there are more than a few ways, in fact almost an infinite amount, that an athlete or coach can employ to play a game or accomplish the goal. He can introduce changes in the moves in many ways so as to reach to the desired end. Hence, it is said that the

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[31] *Ibid,* p.547.

[32] *Ibid,* p.551.

[33] Rikki Bahar, "The Copyright Infringement Test: A New Approach to Literary Misappropriation in Film", 4 *Pace. Intell. Prop. Sports & Ent*. L.F. 529, 535 (2014).

argument that there are only one or a few ways of performing an athletic maneuver or play is severely limiting and does not take into account the many unique ways an athlete or coach performs.[34] It is this unique myriad of ways that continues to make athletic games interesting and constantly changing for its fans and viewers. Thus, the merger doctrine is found to be inapplicable with respect to the grant of copyright protection for creative sports moves and plays.

Issues with Derivative Works and its impact on Copyrightability of sports moves

The term derivative work is understood as a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.[35] It is to be noted that a derivative work may obtain its own copyright, provided that it is sufficiently original.[36] It may also be based on another copyrighted work or based on a work in the public domain. In the latter case, copyright in the derivative work applied only to the new creative expression.

In this background the effect of derivative works on granting of copyright protection for sports moves and plays is to be examined. The scholars who argue for not granting of copyright protection to sports moves are of the opinion that many of the same sports moves and plays are used by multiple athletes and coaches across a sport. As being the case, this gives raise to a question whether it allows each new implementation of the move or play copyright protection as a derivative work, provided that the added elements are sufficiently original?[37]

In reply to the same, the scholars in favour of grant of copyright protection argue that even such derivative works are eligible for copyright protection as they also involve creativity and originality. Thus, it is said that the principle of derivative works would not negatively affect the copyrightability of sports moves.

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[34] *Ibid,* p.536.

[35] 4 Simon Gardiner and John O'Leary, *Sports Law*, 154 (Rotledge Publications, 2011).

[36] *Ibid,* p.158.

[37] Cory Tadlock, "Copyright Misuses, Fair Use, and Abuse: How Sports and Media Companies and Overreaching Their Copyright Protections", 7 *J. Marshall Rev. Intell. Prop. L.* 621, 623 (2007-2008).

Judicial approach towards Copyrightability of scripted sports moves

There are no judicial pronouncements on this issue in India. However, the courts in USA had few occasions to deal with such cases. The reference to such cases may throw light on the legal position relating to grant of copyright protection for sports moves.

In 1986, the Seventh Circuit Court had an occasion to address the said issue in *Baltimore Orioles, Inc.* v. *Major League Baseball Players Association.*[38] The Court ruled that the athletic performance on the field constituted copyright protection. In that case, the issue was whether the players' right to publicity was pre-empted by the clubs' copyright in the telecasts of games. The players argued that their "performances" were not copyrightable because they lacked sufficient artistic merit. The court stated that artistic merit is not the standard, but rather a modest level of creativity is. It further held that the players' actions on the field meet such a threshold and hence amenable to copyright protection.

In this case, the players on the Orioles team sued Major League Baseball (MLB) to determine ownership of broadcast rights of baseball players' performances in the major league baseball games. For many years, the players had been concerned with the allocation of revenues stemming from the televised baseball games. The players argued that the games were being recorded and televised without their consent and the property rights in their own performances were being misappropriated. The athletes claimed that they retained a right of publicity in their performances in the course of playing baseball and that this right of publicity belonged to them and not the team owners or the MLB. The MLB countered that any right of publicity was pre-empted by the availability of copyright in the game performance. The District Court held that the MLB and the teams, not the Players, owned a copyright in the telecasts as works-for-hire and that the teams' copyright in the telecasts pre-empted the athletes' rights of publicity in their performances. The Seventh Circuit affirmed this decision and at the same time held that athletic performance on the field constituted copyright protection.

[38] 2 Jamesh Nafziger, *International Sports Law*, 121 (Brill Publications, 2004).

Despite the fact that the *Baltimore Orioles* decision concerned the televising of baseball games (and not the actual playing of the games), the Court's analysis and reasoning supports the conclusion that sports games may be given copyright protection in the future. The Seventh Circuit noted that the Players' performances possess the modest creativity required for copyrightability.

Given the Seventh Circuit's finding that baseball players' performances during games meet the minimum creativity requirements for an original work, this reasoning could later be used by players and athletes seeking to gain federal copyright protection in the actual maneuvers they perform and conceive.

In contrast to the *Baltimore Orioles* ruling, the Second Circuit in *National Basketball Association* v. *Motorola Inc.*[39] has held that basketball games do not merit copyright protection. The facts of the case are, in 1996, Motorola began selling a pager device that transmitted game statistics and scores of live basketball games organized by National Basketball Association to customers. Among other claims, the National Basketball Association sued Motorola for federal copyright infringement with regard to the underlying games and their broadcasts, seeking to prevent Motorola from disseminating the game information.

The Second Circuit concluded that the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute original works of authorship under 17 U.S.C. § 102(a). The Court continued that athletic events are neither similar nor analogous to any of the listed categories in Section 102(a) of the Copyright Act, and accordingly did not merit protection. Additionally, the Second Circuit reasoned that sports games were not authored, and consequently should not be protected under federal copyright law.

The Court continued that unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script. Athletic events may also result in wholly unanticipated occurrences.

It is said that, despite the Second Circuit's ruling in the *Motorola* case, it is important to note that their reasoning and holding appears to apply only to athletic events, rather than specific athletic moves and plays.[40] Few scholars have noted

[39] *Supra* Note 18.

[40] Proloy K. Das, "Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays", 75 *Indiana Law Journal* 1074, 1075 (2000).

that the Second Circuit's decision suggests by negative implication that individual moves do closely resemble the congressionally-authorized forms of copyrightabale subject matter.[41]

Another case discussing the merits of federal copyright protection in athletic events is *Hoopla Sports & Entertainment, Inc.* v. *Nike, Inc.*[42] Hoopla Sports developed a U.S. versus the world basketball game involving all-star teams of male high school players. The plaintiff argued that even though all-star games, international U.S. versus the world games, and high school basketball games had all been played before, this was the first time that all of these elements had been combined into one event. Nike agreed to sponsor the event, which occurred on June 18, 1994 at DePaul University in Chicago.

Subsequently, Hoopla Sports learned that Nike was planning to hold a nearly exact replica of the game in Massachusetts on May 13, 1995 and brought suit against Nike for copyright infringement, among other claims. The Court denied copyright protection for Hoopla Sports game because the event was an unprotectable idea.[43]

Undoubtedly, the *Baltimore Orioles*, *Motorola* and *Hoopla Sports* cases have differing implications for the future of intellectual property law's involvement in athletics. However, this split in circuit court and district court opinions has the potential to allow a judge the opportunity to examine new claims of copyright protection in sports maneuvers, and perhaps reach a different conclusion than the Second Circuit.

It is to be noted that all sports seem to provide some space for athletes to invent new either useful or entertaining moves. As such going by the verdict of the Seventh Circuit, the Players' performances possess the modest creativity required for copyrightability and such entitled to copy right protection.

Conclusion

The modern athletic industry has progressed considerably There is no doubt that the sports moves and plays discussed in this paper reflect a growing creative

[41] *Ibid,* p.1076

[42] *Ibid.*

[43] *Ibid,* p.1079.

athleticism that should be protected by intellectual property law. As such, copyright law should be amended to incorporate sports moves and plays as a category of protected works.

However, with the proposed incorporations for intellectual property law, each case of possible infringement should be determined and analyzed on a case-by-case basis. Many plays and moves are innovative and creative on different levels. Some moves and plays are very innovative, but do little to change a particular sport completely and do not have a groundbreaking impact. Therefore, the scope of protection given via copyright law should vary accordingly based on the substantial innovation used in creating or re-developing a play or move, as well as the effect the newly imagined play or move has on the specific sport.

It is suggested that the duration of copyright protection in athletic moves and plays should be significantly shorter than what is currently afforded under the Copyright Law. The copyright protection should have duration of fifteen years, with options to apply for renewal based on whether or not the move or play is still significant to the particular sport.

In order to maintain the competitive spirit of athletic games, copyright violations that may occur during an athletic event should not be enforced while a game is in play. Rather, notes should be taken on which athletes or coaches potentially infringe on existing copyrighted moves or plays. When an infringement occurs, the infringer must take reasonable measures to attribute and make known the source of the move he copied. This could potentially be done in post-game press conferences, in interviews with TV and radio stations, or even on an athlete's or coach's Twitter, blog, or social networking website.

DOMAIN NAMES AND MENACE OF CYBER SQUATTING

-**Jagadish A.T***

Abstract

As the domain name has become the cornerstone of internet, a corresponding area of law has emerged. Basically, a domain name is little more than an internet address. The registration and use of domain names have given rise to numerous disputes, most notably between trademark owners and domain name owners. The term cyber squatting covers a range of dubious actions. Cyber squatting implicates issues of trademark law, unfair competition law, free-speech rights and other legal concepts. Cyber squatting is seen as problem that can be addressed in several ways. First, the trademark owner can simply attempt to buy the domain name from the alleged cyber squatter. Although this has been done in a number of instances, it hardly seems an appropriate solution for most trademark owners who believe they must protect their intellectual property rights and should not give into the demands of cyber squatters. Second, the trademark owner may be able file trademark infringement or unfair competition lawsuit against the domain name registrant. This is an expensive proposition. Moreover, an infringement action generally requires the trademark owner to show that the alleged cyber squatter has used the domain name as a trademark. Such a showing may be difficult where the alleged cyber squatter has simply registered the domain name and has done nothing else with it. Third, the trademark owner may file complaint before WIPO

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Arbitration and Mediation Centre. This article analyses the possible solutions to overcome the menace of cyber squatting.

Key words: Domain names, Cyber squatting, Trademarks, Internet Corporation for Assigned Names and Numbers, the Anti-cyber squatting Consumer Protection Act, 1999.

Introduction

The information available on the internet with no title under which the information on the particular area is stored would put the information accessee in trouble. The accessee has to spend lot of time looking through each paper to get information. The existence of domain names or Uniform Resource Locator's (URL's) has made it convenient for the information accessee. Domain names are one of the most important types of the cyber properties. Consequently, they are objects of many high-profile legal battles in the field of Cyber Law as well as under Intellectual Property Law. With the growth of internet, domain names have increasingly come into conflict with trademarks. The possibility of such conflict arises from the lack of connection between the systems for registering trademarks, on the one hand and the domain names, on the other hand. The trademarks is administered by a governmental authority on a territorial basis which gives rise to rights on the part of the trademark holder that may be exercised within the territory. The domain names are usually administered by a non-governmental organization without any functional limitation.[1]

Domain name disputes are also important from an academic point of view since they throw up important discussions on conflicts between cyber society and non cyber society.[2] VeriSign, Inc. a global provider of domain name registry services and internet infrastructure, announced that the third quarter of 2022 closed with 349.9 million domain name registrations across all top-level domains, a decrease of 1.6 million domain name registrations, or 0.4%, compared to the second quarter of 2022. Domain name registrations have increased by 11.5 million, or 3.4%, year

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1 P.S Sangal, "Trademarks and Domain Names: Some Recent Developments" 41:1 *Journal of the Indian Law Institute*, 1999.

2 Roger E. Schechter, John R. Thomas, chapter 33 Trademarks on the Internet, Hornbook series, Thomson and West, March, 2003 at p.787-788.

over year.[3] Rapid developments and enhancements in Information Technology have brought a new platform for trade and business. The significance of domain names has been increased in the online markets. Therefore trademarks play an important role in the cyberspace and therefore there is a need to protect domain names in the cyber world.[4]

Role of Domain names

Internet Protocol (IP) addresses, which consist of a string of numbers separated by periods, are used to identify internet sites. A domain name provides a corresponding alphanumeric address which is easier to remember and often intuitive. For example: www.kslu.ac.in

Domain names represent the same purposes as trademarks online, for business and commercial purposes. They serve to identify the goods and services, such as promotion of business and building up of the customer base online and offline by internet.

Disputes over rights to domain names, which serve as a source – identifying function in cyberspace, similar to a trademark, arise at the heart of this intersection between international trademark law and the Internet. In an effort to reconcile the unique complexities presented by domain name disputes, a host of vehicles have been developed by which aggrieved parties may assert their rights such as the Uniform Domain Name Dispute Resolution Policy (UDRP) promulgated by the Internet Corporation for Assigned Names and Numbers (ICANN), the non-profit organization that manages the DNS.[5]

Domain names are economic asset of a business. Internet domain names have raised legal issues which do not have complete solution. The courts throughout the globe have given protection to the domain names in the line of trademarks. With the ever increasing use of internet, the significance of domain names has

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3 https://blog.verisign.com/domain-names/verisign-q3-2022-the-domain-name-industry-brief/ visited on 20/12/2022.

4 http://www.legalservicesindia.com/article/article/cybersquatting-and-domain-names-1745-1.html visited on 12/11/2022.

5 http://www.legalservicesindia.com/article/article/cybersquatting-and-domain-names-1745-1.html visited on 14/12/2022.

sky-rocketed in the last two decades. Since domain name which gives the identity of the person, goods and service in the cyber society as that of trade mark in meta society it is very important to find proper authority for registration of domain names, though it is administered under Internet Corporation for Assigned Names and Numbers (private organization) headed by United States of America and there exist certain policies such as Uniform Disputes Resolution Policy, World Intellectual Property Organization and Organization for Economic Co-operation and Development guidelines, to what extent their applicability has to be made remains unanswered. The protection of domain names has been the potential challenge to make the internet a safer medium to transact.

Cybersquatting is a term which has come to be associated with the registration of domain names without the intention of using them, in the names of popular brands or personalities solely for the purpose of making money. The essence is that "name" belongs more appropriately to another entity. Secondly registrant is intending to trade the name. Domain name registration system started on the basis of the "First come First serve" basis. The registrant authority which was initially the "Internic" did not take the responsibility for checking the ownership of the name. Later when the internet became popular, large popular companies wanted to enter the internet with their own websites and often found that the domain name they were seeking had already been booked. So companies which wanted the same domain name had to pay a price, which were sometimes unimaginable.

This increasing cost of buying back of domains resulted in 'Meta society' trade mark owners coming together and claiming that their intellectual property rights on a registered trade mark should be extended to "domain name". This has resulted in considering "Registration of Domain Names without the intention of using them" as cyber squatting.

Modern day businesses do like to have their presence in the cyberspace. It is marketed through internet and business entities provide online services or information online to the customers. With the growth of science and technology there is a need for these organizations to establish their presence in the cyberspace which could be done through launching a websites. Websites can be launched after registering the name of the website known as domain name, which will be

generally the name of the company or the business.[6] A domain name generally comprises of the trademark of an organization or business. A domain name has two essential elements, the top level domain (tld) such as .com, second level domain (such as .co) and third level domain which may comprise of a trademark.[7] In India, trademark has assumed several forms including a domain name, which means a name of a website used to denote an internet protocol address and is an easy way to remember a complex numerical value. Domain names are easily remembered and often coined to reflect the trademark of an organization.

Significance of Domain Names

The importance of domain names have sky-rocketed with the growing use of internet. There is a tendency in the domain names field to register the names of the well-known or reputed business or commercial undertakings as domain names. Since the business or commercial undertakings prefer to register their names as the domain names to have their presence in the internet they have purchase the same in their names. This tendency of registering the names of the well known commercial undertakings by the persons other than the owners of such commercial undertakings is known as cybersquatting.[8]

Why domain name need legal protection?

On one hand domain names have a great economic value to online businesses, on the other, these names exposed to three ways in which it puts domain names at risk. It includes:

a) cyber squatters who occupy a name hoping that a trademark owner will make an offer for it;

b) activists who register confusingly similar versions of domain names, pointing them to gripe sites that carry propaganda for a cause and against the company; and

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[6] Dr. Sreenivasulu N.S., *Intellectual Property Rights* Regal Publications, New Delhi, Second Revised and Enlarged Edition, 2011 at p..152.

[7] Karnika Seth, Computers, Internet and New Technology Laws, Lexis Nexis Butterworths Wadhwa, Nagpur, First Edition, 2012 at p..258.

[8] *Supra* note 1.

c) typo-squatter who registers domain names incorporating variations of well-known trademarks terms such as misspellings and use them for websites to take advantage of unwary Internet users.[9]

Legal definition of domain name

The meaning of domain name has been expanded and affirmed by the court practice. Thus it can be defined as:

i. A common address depends on the location, while the web-address is selected by an applicant provided that it is not identified to any other address name; and

ii. A web-address may be often guessed, since inorder to enter a site of a firm, its name should be typed. Therefore a domain name is not a common address; it is rather a sign, which, like a poster in a shop indicates the "place" of goods and services for sale. A domain acquires features, which characterize industrial property.

Cybersquatting is a term which has come to be associated with the registration of domain names without the intention of using them, in the names of popular brands or personalities solely for the purpose of making money. The essence is that "name" belongs more appropriately to another entity. Secondly registrant is intending to trade the name.

Domain name registration system[10] started on the basis of the "First come First serve" basis. The registrant authority which was initially the "Internic" did not take the responsibility for checking the ownership of the name. Later when the internet became popular, large popular companies wanted to enter the internet

[9] Moe Alramahi, Domain Names Protection in the Globalized World, Edited by G.Usha, Domain Names: Privacy and Protection, Amicus Books, The Icfai University Press, First Edition, 2008, Hyderabad.

[10] http://www.internic.net/faqs/domain-names.html visited on 22/11/2022. The Domain Name System (DNS) helps users to find their way around the Internet. Every computer on the Internet has a unique address - just like a telephone number - which is a rather complicated string of numbers. It is called its "IP address" (IP stands for "Internet Protocol"). IP Addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of the arcane IP address. So instead of typing 207.151.159.3, you can type www.internic.net. It is a "mnemonic" device that makes addresses easier to remember.

with their own websites and often found that the domain name they were seeking had already been booked. So companies which wanted the same domain name had to pay a price, which were sometimes unimaginable.

This increasing cost of buying back of domains resulted in 'Meta society' trade mark owners coming together and claiming that their intellectual property rights on a registered trade mark should be extended to "domain name". This has resulted in considering "Registration of Domain Names without the intention of using them" as cybersquatting. In order to prevent cybersquatting, same countries have imposed rather arbitrary limitations on domain names use such as restrictions on the choice of domain name to match the registrant company's name or to contain no generic terms. Some countries have imposed limits on the number of domains that a registrant may own, making it difficult for companies to register multiple brands. This may present a problem for many US conglomerates that own hundreds of brand names. United States of America has "Anti-Cyber Piracy Act" to define the rights on domain names.

In the absence of any law, disputes regarding domain names are resolved through the uniform Disputes Resolution Mechanism that the registrants have agreed to practice. The WIPO has been supporting the Dispute Resolution based on "Trade Mark Rights". Disputes are mainly resolved through an "Arbitration Process".

In India certain cases have decided such as *Yahoo Inc* v. *Akash Arora.*[11] In this case plaintiff, who is the registered owner of the domain name "Yahoo. Com" succeeded in obtaining an interim order restraining the defendants and agents from dealing in service or goods on the internet or otherwise under the domain name"Yahooindia.com" or any other trademark/domain names which is deceptively similar to the plaintiff's trademark "Yahoo".

In *Rediff Communication Limited* v. *Cyberbooth.*[12] The Bombay High Court has held that the internet domain names are of importance and are a valuable corporate asset. A domain name is more than an internet address and is entitled for protection as a trademark. The advancement and progress in technology and the

[11] 1999 (2)AD (Del)229.

[12] AIR 2000 Bombay 27.

service has rendered internet site also come to be recognize and accepted and are being give protection so as to protect such provider from passing off the services rendered by others as his service.

Some of the important cases which came up for the scrutiny of courts in India are between ICICI and LIC on www.jeevanbhima.com, *Reddy's (Dr) Laboratories Ltd* v. *Manu Kosuri,*[13] *Tata Sons Ltd* v. *Manu Kosuri,*[14] *Acqua Minerals Ltd* v. *Pramod Borse,*[15] *Info Edge (India) (p) Ltd* v. *Shailesh Gupta,*[16] registrant of www.indiainfospace.com was decided in favour of infospace.com through an uncontested arbitration in WIPO.

Significance of the domain name has increased dramatically and the concept of a domain name is changing from mere address to a sort of security key to access information.[17] A domain name acquires the features of a trademark, trade name or band and de facto, it is a means of individualization of a certain business entity, its goods and services. The value for the trademark of companies already existing outside the internet is transposed and extended on to internet in most cases. Sometimes the value of trademark is built on the internet right from Scratch. The recent survey in United States of America and Europe shows that there has been rapid increase in domain name infringement and are of reason of online abuse.

Connection between Domain Names and Trademarks

The growth and use of domain names appears to have increased the number of bad faith registrations and further raised concerns that trademark owners' rights are increasingly rights are increasingly infringed or diluted by the use of trademarks in domain names. That is domain names have come into conflict with trademarks. The main reason for such conflict can be attributed to the lack of connection between the system of registering trademarks and the registration of domain names. The former is a system granting territorial rights enforceable only within the

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13 (2001) PTC 859 (Del).

14 (2001) PTC 432 (Del).

15 (2001) PTC 619 (Del).

16 (2002) 24 PTC 355 (Del).

17 Edited by Torsten Bettinger- Domain Name Law and Practice- An International Handbook, Oxford, at p. 3 to 54 and 409 to 447.

designated territory, the latter is a system of granting rights that can be enforced globally. Because trade mark law is territorial, a mark may be protected only in the geographic location where it distinguishes its goods or service. Thus, trade mark law can tolerate identical or similar marks in different territories even within the same classes of goods and services. Domain Names, by contrast, are both unique and global in nature. Only one entity in the world can own the righto use a specific domain name that can be accessed globally. Moreover, there is an opposition procedure for trademarks registration, while there is no notice period for the domain names registration.[18]

The problem with domain names arises because most companies prefer using their known trade-marks associated with a certain amount of goodwill, as domain names.[19] This is done because the consumers are already familiar with these marks and guess that the trademark would also be the domain name. However, the distinction lies in the fact that whereas in trademarks, the same marks may be used for different products or services as long as it is not used for two similar things, with respect to domain names, this is not possible.[20]

Problems with Domain Name System (DNS) and the infringement of trademarks include the following:

The problem of the conflict of domestic laws as trademarks is a subject of domestic legislation of each state and the terms and conditions therein vary. Therefore, it becomes difficult to determine as to what would constitute trademark infringement or passing off, and what laws will be applicable to each case. This problem arises owing to the fact that whereas trade-mark laws can be restricted on the basis of physical boundaries, on the internet –there no borders, as any website can be accessed from any state.

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[18] Faye Fangfei Wang, Domain Names Management and Dispute Resolutions- A Comparative Legal Study in the UK, US and China, Edited by G.Usha, Domain Names : Piracy and Protection, The Icfai University Press, Hyderabad, First Edition, 2008 Pageno.143 to 169.

[19] Marshall Leafer, Domain Names, Globalization and Internet Governance, Indiana Journal of Global Legal Studies, 139.

[20] Dennis Campbell, Law of International Online Business: A Global Perspective, London: Sweet &Maxwell, p.34.

Most of the state legislations do not extend protection to unregistered trademarks; and therefore, this itself gives rise to a plethora of problems. The issue of jurisdictions is complex in the case of trademark disputes as the accepted principle of personal jurisdiction requires application on a case to case basis and assessment of whether the defendant purposely chose the particular forum, and therefore, could be hauled before the court. However, this area is spreads with difficulties and uncertainties, as proved by the various judicial pronouncements. Further, the question of jurisdiction becomes almost impossible when the domain names are registered under the name of a fictitious person.[21]

Cybersquatting

Cybersquatting is registering, selling or using a domain name with the intent of profiting from the goodwill of someone else's trademark. It generally refers to the practice of buying up domain names that use the names of existing businesses with the intent to sell the names for a profit to those businesses.[22]

For example, Dell filed a lawsuit in 2007 against another party that had registered the URL"DellFinacialServices.com" and 1,100 others, alleging cybersquatting. In that case, the defendants had registered misspelled confusingly similar domains to those owned by Dell with the intention of capturing the traffic from people mistyping "DellFinancialservices.com".

Cyber squatters generally depend upon the goodwill associated with someone else's trademark. By buying up domain names that are closely linked with a pre-existing known trademarks or through sale of the domain to the trademark owner. Cyber squatters also may have more nefarious purposes such as capturing personally identifying data from unsuspecting users.[23]

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[21] Ankita Goel, "Trademarks and Domain Names", *Company Law Journal* 2004 pp.112- 120.

[22] *Nolo* ,"Cybersquatting: What It Is and What Can Be Done About It" *available at* www.nolo.com/legal-encyclopedia/cybersquatting-what-what-can-be-29778.html# (visited on 10/11/2022).

[23] Find Law, "Internet Cybersquatting: Definition and Remedies" *available at* www.smallbusiness.findlaw.com/business-operations/internet-cybersquatting-definition-and-remedies.html (visited on 10/11/2022).

Cybersquatting involves the pre-emptive, bad faith registration of trademarks as domain names by third parties who do not possess rights in such names.[24] While cybersquatting has always been a challenge since the early days of the internet becoming commercial, the risk has now increased considerably for two reasons:

i. More and more of business is being conducted through online channels that use the worldwide web as their backbone.

ii. Rapid increase in the number of Top Level Domains (TLDs) available.[25]

Till 1998, the internet was completely under the US Department of Commerce. Thereafter, with the formation of ICANN, the domain naming system was privatised. Even now, the privately held ICANN is responsible for coordinating the maintenance and procedures of registration of domain names. ICANN delivers these services based on a contract with the US Government. Prior to 2014 internet had only few generic top level domains (gTLDs) such as .com, .org, .edu, etc. in 2014, more than hundred new gTLDs were added. In addition, every country has its own unique Top Level Domains (ccTLDs).

As a result of increase in the gTLDs available, companies can potentially register almost 1000 domain names using a single name. Allowing third parties to own and operate internet addresses that are deceptively similar to your company name or trademark is greatly damaging as well. As a result of this rapid growth in gTLDs, the threat of cybersquatting too goes up.

Uniform Dispute Name Dispute Resolution Policy (the UDRP Policy) was the first initiative to address cybersquatting by providing a legal framework for the resolution of disputes between a domain name registrant and a third party (i.e. a party other than the Registrar) over abusive registration and use of a registered internet domain name in conjunction with other available gTLDs and ccTLDs. All ICANN- accredited Registrars that are authorized to register names in the

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[24] WIPO Arbitration and Mediation Center, "Guide to WIPO Domain Name Dispute Resolution" (Publication No.892) *available at* https://www.wipo.int/export/sites/www/amc/en/docs/guide-en-web.pdf (visited on 10/11/2022).

[25] Rajesh Vellakat, Partner, Fox Mandal and Associates, Bangalore, Practical Lawyer (2016) PL (IT) July 88.

gTLDs and the ccTLDs have adopted the UDRP Policy and have agreed to abide by it for those domains. According to data from the WIPO Trade marks owners filed 2634 cases in 2015 under the UDRP.

Cybersquatting has been defined as "an act of obtaining fraudulent registration with an intent to sell the domain name to the lawful owner of the name at a premium". The court in *Manish Vij* v. *Indra Chugh*[26] and the *Satyam Infoway Ltd* v. *Sifynet Solutions (P) Ltd*[27] case nailed the Indian domain name scenario way back in 2004 stating that-"As far as India is concerned, there is no legislation which explicitly refers to dispute resolution in connection with domain names. But although the operation of the Trade Marks Act, 1999 itself is not extra territorial and may not allow for adequate protection of domain names, this does not mean that domain names are not to be legally protected to the extent possible under the laws relating to passing off.

The Information Technology Act, 2000 of India along with 2008 The Information Technology (Amendment) Act addresses numerous cybercrimes and has set up a special cybercrimes cell. However the Act oddly ignores the problem of domain name disputes and cybersquatting. In case of cybersquatting domain names may be considered as trademarks based on use and brand reputation and so fall under the Trade Marks Act, 1999. However not all domain names are trademarks.

Other than the above mentioned civil remedies, according to Section 135 of the Indian Trade Marks Act, 1999 legal remedies for suits for infringement of registered trade mark or passing off includes injunction, damages or account of profits or delivery up of infringing goods or destruction of infringing goods. Section 103 imposes penalty for applying false trademarks or trade descriptions and Section 104 imposes penalty for selling goods or services bearing a false trademark or description, (in both the cases) which is punishable with imprisonment for a term not less than six months and may extend to three years along with fine not less than Rs. 50,000 which may extend to Rs. 2 Lakhs. The Copyright Act, 1957 is invoked at times and raids conducted, however domain name offences are still struggling for legislative clarity.

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[26] AIR 2002 Del 243.

[27] AIR 2004 SC 3540.

Definition of Cyber Squatting

According to the U.S federal law known as the Anti-Cybersquatting Consumer Protection Act, cybersquatting is registering, trafficking in, or using a domain name with bad-faith intent to profit from the goodwill of a trademark belonging to someone else. The term derives from squatting, the practice of inhabiting someone else's property without their permission.[28]

According Webopedia cybersquatting is the act of registering a popular internet address usually a company name-with the intent of selling it to its rightful owner.[29]

According to the U.S. federal law known as the Anti-Cybersquatting Consumer Protection Act, cybersquatting is registering, trafficking in, or using a domain name with bad-faith intent to profit from the goodwill of a trademark belonging to someone else. The term derives from *squatting*, the practice of inhabiting someone else's property without their permission.[30]

Cybersquatting is registering, selling or using a domain name with the intent of profiting from the goodwill of someone else's trademark. It generally refers to the practice of buying up domain names that use the names of existing businesses with the intent to sell the names for a profit to those businesses.[31]

History of cybersquatting

Before 1999, the business world was still resisting the need for the Internet as a tool for success. They didn't see the need to register their trademarks as domain names. Cyber squatters did see the increasing importance of the Internet, and saw the businesses making the mistake of ignoring it. This is how cybersquatting was born and began causing problems. Cyber squatters took advantage of those companies by registering domain names identical or similar to the business' trademarks. Domain name registrars accept all applications for domain names by

[28] www.searchsoa.techtarget.com/definition/cybersquatting, visited on 8/11/2022.

[29] Webopedia Staff , "Cybersquatting" *available at* www.webopedia.com/TERM/C/cybersquatting.html, (visited on 18/11/2022).

[30] Techtarget, "Brows Definition by Alphabet" *available at* http://searchsoa.techtarget.com/definition/cybersquatting (visited on 18/12/2022).

[31] *Supra* Note 23, *available at* http://www.nolo.com/legal-encyclopedia/cybersquatting-what-what-can-be-29778.html (visited on 18/12/2022).

applicants unless that exact identical name is in use. After the cyber squatter has the domain name registered, the company can no longer have their trademark as their domain name. This causes a problem since customers and clients frequently try to find businesses online.

One of the first cyber squatters were Dennis Toeppen in the early 90's who registered some very famous marks before companies did. He then demanded a ransom of $13,000 for each domain name. This type of cybersquatting causes firms to lose money not only by paying cyber squatters to get their domain names, but as a loss of profit for what they could be making with an effective website. Some of the cyber squatters made websites to slam a business using their own mark as a domain name for that page. This could ruin the reputation of a company and now take away from business they had at one point. Cybersquatting causes monetary losses and damaged reputations. Businesses were not happy when these issues become apparent to them. They have wised up since the beginning of cybersquatting, and now realize the harm it can cause to their business and customers. They have learned of the important benefits of owning their trademark domain names. Congress decided to take action in 1999 to help out businesses and stop cybersquatting. The laws and acts passed helped businesses battle the increase in cybersquatting from 1999 on.[32]

Future of Cyber Squatting

The importance of cybersquatting to corporations has been growing since the creation of the ACPA and will continue to grow as time goes on. We predict that cybersquatting will be an issue involved in e-commerce law in the future although the complainant may shift from big businesses to smaller businesses based on recent court decisions. In addition, there are various amendments that could be made to the current cyber squatting acts in order to increase their effectiveness as well as fairness. These changes will need to occur as the Internet expands and online businesses continue to flourish.

There are many current cases which challenge both the powerful individuals' and businesses' right to a domain name, as well as challenging the individual's

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[32] https://faculty.ist.psu.edu/bagby/fall05/346f05t8/history.htm, (visited on 10/12/2022).

right to hold the domain for personal use. Earlier this month, a case was tried in the U.S. Court of Appeals in regards to the use of the domain “fallwell.com” as a critical site to the preaching of televangelist Jerry Falwell. Jerry Falwell accused the owner of this site of infringing on trademarks and cyber squatting but his claims were rejected when the courts decided that the site could not be confused with Jerry Falwell’s official domain “falwell.com” due to differences in both appearance and content.

This case is a major victory for individuals who wish to criticize public figures or organizations through the use of the Internet. In the future, granted that the individuals who own and operate the domain have no intent to profit from its use, there is very slim chance that a court could find in favor of either a powerful individual or a large corporation. This lack of “bad faith” intent involved with the operation of a site is used to protect individuals from being bullied out of cyberspace by large businesses.

Bad Faith in the Future

“Bad faith” has been used as a defense for many small businesses and has provided them with a layer of security when their use of the domain does not infringe upon the larger company’s trademark. Non-profit use is one of the strongest defenses and its inclusion in the ACPA is one of the greatest strengths of the act. Many other aspects of the ACPA allow big businesses to push smaller ones out of the Internet market and simply having larger exposure and a larger name has allowed them to bully others out of the e-commerce market.

The ability of large companies to force smaller ones to give up domain rights is being challenged by many court cases and the victories of some of these small businesses is paving the way for others in the future. These results are also being looked at in many states as they look to clarify and improve the cybersquatting laws. This is because as we stand now, the Internet may not be able to survive only on the acts which have been passed in the last few years. With the Internet rapidly expanding into new domains, such as “.biz”, “.edu”, “.in”, and many others, the chances of registering common domains increases greatly. Along with this, many individuals and companies are becoming more educated on the technical aspects of cybersquatting. This is only increasing the complicated nature of cases

and making it harder for courts to come to a decision regarding the rightful ownership of a domain name.

Changes

Problems can be dealt with through the expansion of the acts that currently deal with cybersquatting. In USA, the ACPA, in conjunction with the ICANN, has power over the domain names that are registered and can influence the decisions made in regards to them. By enhancing the ACPA with more individual-friendly sanctions, the government can help to protect the rights of an individual to own and operate a site that may be common to a corporation's trademark. In addition to this, the ICANN and other such organizations have the authority to sell the rights to a domain to anyone who pays for it, but also have gained the power to transfer these rights to another party if they deem fit. These decisions can be appealed and taken to court; however, a failure to promptly file an appeal with the domain registrar can lead to a loss in court no matter what arguments are brought about.

In order to prevent these organizations from unfairly dictating the law of the Internet, legislation must be passed in order to amend the ACPA in order to correct the flaws that have been found in recent court hearings. This will undoubtedly gather much opposition from large businesses and influential individuals who wish to protect their own rights without concerning the right of the common individual. These laws in the United States act to override the laws of foreign nations and also act to undermine the authority of international efforts such as ICANN in order to avoid complex and costly international lawsuits. The ACPA has received much opposition and typically gains complaints including such grounds as legislative overkill, free speech concerns, and reverse domain hijacking. The future of the ACPA holds legal ramifications that will affect not only U.S. Citizens, but also foreign citizens and businesses. This holds true in the case of the International Olympic Committee which has used the ACPA as a weapon in order to prevent the use of domains remotely associated with the Olympics.[33]

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[33] https://faculty.ist.psu.edu/bagby/fall05/346f05t8/future.htm , visited on 17/12/2022.

Case laws on cybersquatting

In the case of *American Civil Liberties Union* v. *Reno*, Judge Mokenna has explained the Internet address system, as follows: each host computer providing Internet services has a unique Internet address. Users seeking to exchange digital information with a particular internet host require the host's address in order to establish a connection. Hosts actually posses two fungible addresses a numeric IP address and alphanumeric domain name with greater mnemonic potential.[34]

Types of Cybersquatting

Political cybersquatting:

The usage of the term 'cybersquatting' may evoke immediate recognition in the Indian courts. It may be called as 'domain grabbing' by an individual who has no legitimate interest in the domain name and chooses to register it and 'squat' over it, only so that he can either, licence or sell it to the rightful owner or any third party for a hefty consideration or put it into active commercial use to, either pass off his goods or services as that of the rightful owner of the domain name or merely ride on the 'initial interest confusion' created to divert traffic/users to his website. However, the term 'political cybersquatting' is a concept yet alien to the Indian Courts. 'Political cybersquatting' is a term coined to describe the situation where an entity advocating a particular social, political or other opinion registers a domain name that will induce individuals with the opposite view to visit its site.[35]

Planned Parenthood Federation of America Inc. v Bucci[36] The plaintiff was the well-known non-profit, reproductive health care organisation that provides services related to inter alia family planning including abortion. Defendant registered the domain name plannedparenthood.com wherein, views and material opposing abortion was provided. The court held that as the plaintiff's mark was very strong and the defendant's registered domain name would only give rise to

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[34] http://www.legalserviceindia.com/articles/cddisp.htm visited on 02/12/2022.

[35] VidwathB.Kashyap, "Emerging Intellectual Property Issues on the Internet: The India Story", *Karnataka Law Journal,* 2009(6).

[36] 97 Civ. 0629 (KNW)(S.D.N.Y. March 26, 1997), aff'd. 152 F. 3d 920 (2d Cir., Feb. 9, 1998), cert. denied, 525 U.S. 834 (1998).

confusion, causing trademark dilution. Thus, the domain name was transferred to the plaintiff.

In this case the plaintiff was the well-known, non-profit, reproductive health care organization that provides services related to family planning including abortion. Defendant, the host of 'Catholic Radio', a daily show broadcast in Syracuse, New York, had registered the domain name <Plannedparenthood.com>.[37] When an internet user typed in plannedparenthood.com, the first thing that would appear would be message: 'Welcome to the PLANNED PARENTHOOD HOME PAGE!' Further down the page, there was an advertisement of a book entitled 'The Cost of Abortion' that contrary to the views of Planned Parenthood was opposed to abortion. The defendant's counsel admitted that the use of the plaintiff's mark in the domain name. Defendant's counsel also admitted that the defendant 'was trying to reach internet users who thought, in accessing his website, that they would be getting information from plaintiff'. The court applied the Polariod test and found that there was a substantial likelihood of confusion because the plaintiff's mark was very strong, the two marks were nearly identical, the degree of competitive proximity was high, and testimony showed that the actual confusion had occurred. The court rejected defendant's parody defence, reasoning that 'parody depends on a lack of confusion to make its point, and must convey two simultaneous and contradictory messages: that it is the original, but also that it is not immediately realise the true nature of the site, confusion occurs and thus the site is not a parody. The court also rejected the defendant's claim that his use of plaintiff's mark was protected under the First Amendment. The court reasoned that defendant's use of plaintiff's mark would be protected speech only if it used the mark as part of a 'communicative message', not if it used the mark as an identifier of the source or origin of goods, or services. The court found that the First Amendment did not protect defendant's use of plaintiff's mark because by using the mark as a domain name and home page address and by welcoming internet users to the home page with the message 'Welcome to the Planned Parenthood Home Page!' defendant identified the website and home page as being the product, or forum, of plaintiff.

[37] Planned Parenthood's owner website used the domain name www.ppfa.org.

Bally Total Fitness Holding Corporation v Faber[38] the plaintiff sued the operator of the website Ballysucks, a site dedicated to complaints about Bally's health club business and is located at the domain www.compupix.com/ballysucks. Bally alleged trademark dilution and unfair competition but, the court denied the plaintiff's trademarks claims by observing that no prudent person would mistake the defendant's site for Bally's official site even if it registers it as 'ballysucks.com'. The Court concluded that there is no likelihood of confusion as to source or sponsorship, as no reasonably prudent internet user would believe that ballysucks .com is the official Ballysite or is sponsored by Bally.

Political cybersquatting is a term coined to describe the situation where an entity advocating a particular social, political, or other opinion registers a domain name that will induce individuals with the opposite opinion to visit its site.

Registration of personal names as domain names (Fan sites): Can it be prevented?

While cybersquatting is an anathema portraying predatory intent, Fan sites are sites devoted to appreciative discussion of popular shows, films, actors, actresses, sports teams and so on. Nevertheless, they represent their own set of problems for Intellectual property owners. With regards to personal names of famous or well-known personalities, there exists a commercial interest in their names irrespective of whether they register it as trademark. By permitting people to use a person's name in association with a product or a service, the personal name becomes an asset. The status of a personal name as an asset may be secured through the registration of a trademark.[39]

Following are the concerns raised by the registration of the personal names of famous or well-known personalities as domain names and the grounds on which personalities vehemently oppose the registration of their names as domain names;

a. The prevention of unjust enrichment through the unauthorised commerical use of another's identity.

[38] 29 F Supp.2d 1161 (CD Calif1998).

[39] TRIPS agreement, art. 15- the explicitly recognise that personal names are eligible for registration as a trademark. The personal name must be distinctive.

‘The rationale for (protecting the right of publicity) is the straight forward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay

b. A social interest is also protected as underlying legal principles protect personal names against misuse. This interest is apparent in the right to privacy, or the qualified right to control exposure of oneself, where personal distress and anxiety are recognised as valid reasons to accord protection.

For the UDRP to accord protection to personal names registered as domain names, the following conditions must be satisfied:

i. The UDRP does not require that the complainant must hold rights specifically in a registered trademark or service mark. Instead, it merely provides that there must be ‘a trademark or service mark in which the complainant has rights’. Without specifying how these rights are acquired. Bearing this distinction in mind, many decisions under the UDRP have therefore determined that a complainant might assert common law in unregistered trademarks and this will satisfy the first condition of the UDRP as a personality has an undeniable interest in his name and it has a commercial value. Allowing others to register his personal name as a domain name might allow people to assume an association or affiliation, which will dilute the commercial interest he has in his name and allow the other to commercially benefit. The UDRP in several decisions has depended upon this.[40]

ii. That there should not any evidence that the domain name registrant has any rights or legitimate interests in the domain name that he has registered.
Based on certain facts indicating that:

a. The domain name does not correspond to the respondents name; and
b. The respondent has registered the names of many other celebrities.

iii. Finally the domain name should be registered and used in bad faith.

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[40] *Julia Fiona Roberts v Russell Boyd*, WIPO, Case D2000-0210 (29th May, 2000); *Jeanette Winterson v Mark Hogarth*, WIPO Case D2000-0235 (22nd May, 2000).

Moreover, even if an action under the UDPR to protect a personality's famous registered or unregistered mark were to fail, the personality can also seek protection on grounds of his right to privacy and his right to control his exposure to the public. But although law may provide a remedy against registration of a personality's famous mark as a commercial o non-commercial site, the intellectual property owners till remain quite wary about initiating action against non-commercial fan sites due to fear of a 'Flame War'. Thus, many companies and personalities devise policies sympathetic to the interests of their consumers, sending cease and desist letters only to those sites that egregiously violate their rights, particularly if they do so in a commerical way, such as selling merchandise.[41]

Typo cybersquatting

The registrant seeks to take advantage of 'typographical errors' by registering a domain name that is almost the same as a registered mark but consists of a common misspelling of that mark. The perceived goal of these registrations is to get 'hits' from consumers who inadvertently misspell or mistype the name of the famous sites they actually intended to visit.

Toys 'R' Us Inc v. *Abir*[42] In this case, the defendant had registered the domain name <toysareus.com>. In its opinion, the court cited the defendant's correspondence with the plaintiff, which stated that: While searching for internet sites we have discovered that the name toysareus.com was not taken, and that the famous company preferred to use a different internet address of (sic) their online catalog. To us the choice seams foolish; since it is logical to assume that many potential customers will search the web using the name toysareus.com. Realizing that the company did not understand this fact, we have decided to obtain the name toysareus.com, and then sell or lease it to the company. We did. Then we called the company intending to work out a reasonable arrangement whereby we all benefit from the extra income that inevitably will be forthcoming. After all, by not obtaining the internet address toysareus.com, the company will be losing substantial

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41 *Supra* note. 26 at 52.

42 45 U.S.P.Q.2d 1944 (S.D.N.Y. 1997) (preliminary injunction decision), 1997 U.S. Dist. LEXIS 22435 (S.D.N.Y. Dec. 31, 1997) (order granting preliminary injunction), (S.D.N.Y. Aug. 27, 1998) (order granting summary judgment), 1999 U.S. Dist. LEXIS 1275 (S.D.N.Y. Feb. 10, 1999) (costs/fees proceeding).

sums of potential revenues from customers that will be losing substantial sums of potential revenues from customers that will not be able to fine9sic) the company on the web and thus, will buy their toys from competing toy companies. Thus, we thought that it was reasonable and morally correct that we, along with toys are US (sic), should benefit from our understanding of how potential customers may search the internet. However, the company responded to our approach by threatening us with legal action. Thus we have decided to start our own toy catalog. After all, if the leading company in the field is so incompetent we stand a good chance in this field.

Typo squatting, also called as URL hijacking. Cybersquatting form wherein the internet users make typographical errors while inputting a website address into the web browser. Once the user types the incorrect address, they are lead to a substitute website by the cyber squatter. In the United States, the 1999 Anti-Cybersquatting Consumer Protection Act includes, Section 3(a), amending 15 USC § 1117, with a sub-section (d) (2) (B) (ii) aimed at combating Typo squatting.[43]

Meta tags

A Meta tag is hidden information within a web site that broadly contains a synopsis of the information contained in the website, either in the form of single words, or as sentences.[44] The information in Meta tags is used mainly by search engines to rate how highly a search for a particular term matches the content in the page. The search engines work by sending out spiders to crawl over information in the web and index web pages. A database is then created which consists of a list of words and information on where the words are to be found. The hits are usually rated with the highest scoring hits displayed at the top of the list of hits found by the search engine. If a term is found in the Meta tags it is likely to be rated by the search engine as more relevant and so displayed more prominently in the search result.

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[43] Law Teacher, Cybersquatting Definition *available at* **http://www.lawteacher.net/free-law-essays/business-law/business-law-law-essays.php (visited on 28/12/2022).**

[44] Lilian Edwards and Charlotte Waedle, *Law and the Internet* (Hart Publishing, Oregon, 2000) p.174.

Other types of Cyber squatting

The World Intellectual Property Organization (WIPO), reports that cybersquatting is exploding globally ever since 2006. New methods have been developed to gain control of potentially lucrative addresses that have resulted in many trademark owners being stymied when trying to bring their product directly to consumers via the internet.The most common types of cybersquatting includes,

Cybersquatting: Bad-Faith intent registration; a cyber-squatter can sell to the highest bidder.

Under Uniform Domain-Name Dispute-Resolution Policy (UDRP), trademark holders can file a case at the World Intellectual Property Organization (WIPO) against typo squatters. The complaint has to show that the recorded domain name is undistinguishable or bafflingly relating to their trademark and there is no legitimate interest in the domain name used in bad faith by the registrant.

Domainer: A purveyor of domain names, who earns money from buying and selling them.

Dropcatcher: Internet domain name registrations are valid and expire within a certain time period. Re-registration of the domain name by the owner with an internet registrar prior to the expiration date is essential; if not then anyone can purchase the domain name after the lapse. Cyber squatters can use an automated tool to register the lapsed name immediately leading to a gain of the domain name.

Domain Tasting: getting domains for a five-day free refund period to test, then dropping for refund the one's that did not pan out.

Domain parking: A way of making money by having a small site with just advertising linked to a related domain name, where the owner paid a small amount whenever a person clicks on an ad; which can add up to millions in some cases.[45]

The Anti-cybersquatting Consumer Protection Act, 1999

The Anti-cybersquatting Consumer Protection Act, 1999 (ACPA) came into force in November 1999. Its application is solely to domain names.[46] Contains

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[45] http://www.lawteacher.net/free-law-essays/business-law/business-law-law-essays.php visited on 4/12/2022.

[46] *Bihari* v. *Gross* 119 F Supp 2d 309 (SDNY 2000).

both trade mark-related provisions and non-trade mark provisions. The trade mark-related provisions are:

i. Outlawing of registration, with the bad faith intent to profit, of a domain name that is confusingly similar to a registered or unregistered mark or dilutive of a famous mark; and

ii. Limiting the liability of and remedies against, domain name registrars for registering infringing domain name and for refusing to register, cancelling or transferring a domain name in furtherance of a dispute resolution policy.

The non-trade mark provisions relate to protection against the use of non-trademarked person names by cyber squatters. Under the Act, a person is liable in a civil action by the owner of a mark (including personal name protected as a mark) if, without regard to the goods or services of the parties, the defendant has a bad faith intent to profit from that mark, and registers, traffics in, or uses a domain name that is:

i. Identical, or confusingly similar to, a mark that is distinctive at the time of registration of the domain name;

ii. Identical, or confusingly similar to, or dilutive of , a famous mark that is famous at the time registration of the domain name; or

iii. A trade mark, word, or name protected under 18 USC $ 706 (the 'Red Cross', the 'American National Red Cross', or the 'Geneva Cross'), or 36 USC $ 220506 (Olympic symbols, including the words 'Olympic', 'Olympiad', and 'Olympia').

Bad faith under The Anti-cybersquatting Consumer Protection Act, 1999

The Act lists nine non-exclusive factors for determining bad faith.[47] As the second circuit noted in an early judgement, often cited by other circuit courts, the most important grounds for finding bad faith 'are the unique circumstances of the case which do not for neatly into the specific factors enumerated by congress, but may nevertheless be considered under the statute.[48]

[47] 15 USC $ 1125 (d) (1) (B).

[48] *Sporty's Farm LLC* v. *Sportsman's Market*, Inc 202 F 3d 489, 499(2d Cir 2000).

The trade mark or other intellectual property rights of the person, if any, in the domain name. This recognises that, under trade mark law, there may be concurring uses of the same name that are non-infringing, due to their use in conjunction with different types of product or service, or in different national markets.[49]

The extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person. This recognises that a person should be permitted to register his or her legal name or widely recognised nickname as the domain name of his or her website.[50]

The person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services. This recognises that the legitimate use of the domain name in commerce is a good indicator of good faith intent.

The Person's bona fide non-commercial or fair use of the mark in a site accessible under the domain name. This recognises the line of case law developed prior to the ACPA that held that the non-confusing use of a company name or marks in a domain name on a website used solely to criticise the goods or policies of that company was a fair use and thus could not be infringement. The courts are likely, however, to be unpersuaded by supposedly critical sites upon which criticsm only appears after the domain name dispute arises.[51]

The person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site. This recognises that cyber squatters who actually create a website under the domain names that they have registered using other parties' trademarks often intend to divert internet users to their own sites under false pretences.

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[49] *Virtual Works, Inc* v. *Network Solutions, Inc* 106 F Supp 2d 845 (ED Va, 2000), aff'd 238 F 3d 264 (4th Cir 2001).

[50] *Nissan Motor Co* v. *Nissan Computer Corp* 2002 WL 32006514 (CD Cal, 7 January 2002).

[51] *Shields* v.*Zuccarini* 254 F 3d 476 (3d Cir 2001).

The person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bonafide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct. This is premised on the basis that cybersquatters often intend to trade on the value of trademark owners mark by engaging in the business of registering domain names consisting of or incorporating those marks and selling them to the rightful trademark owners. However, Congress did not intend any offer tc sell a domain name to a trademark holder to be automatically indicative of bad faith.[52]

The person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct. Cyber squatters will often take great pains to avoid contact with trademarks holders, particularly if they are using the relevant domain names to divert internet users to their own sites by creating confusion as to the source, sponsorship, affiliation, or enforcement of the site.[53]

The person's registration on acquisition of multiple domain names that the person knows are identical or confusingly similar to marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties. This addresses the 'warehousing' of domain names whereby a cyber-squatter has amassed hundreds of domain names identical or confusingly similar to the marks of others.[54] While the warehousing of many domain names resemble well-known trademarks, tends to be viewed with suspicion by the courts,[55]'warehousing' by itself (even including domain names that resemble well-known trademarks) is not definitive proof of bad faith.[56]

The extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous, as defined within the amended

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52 *Contrast Virtual Works Inc* v. *Networks Solutions, Inc* 106 F Supp 2D 845 (ED Va, 2000).

53 WIPO Case No D2002-0950 *Wal-Mart Stores, Inc* v. *John Zuccarini d/b/a RaverClub Berlin*.

54 *Panavision International LP* v. *Toppen* 945 F Supp 1296 (CD Cal 1996).

55 *E &J Gallo Winery* v. *Spider Webs Ltd* 286 F 3d 270 (5th Cir 2002).

56 *Avery Dennison Corp* v. *Sumpton* 189 F 3d 868 (9th Cir 1999).

dilution section of the Lanham Act. This provides that the court should have regard to the strength of the plaintiff's mark. The stronger the mark is, the more chance there is for the possibility of confusion, and the less likely it is that the defendant could have registered the domain name in good faith in the absence of knowledge of the mark

Abusive registration of domain name

The WIPO has defined cybersquatting to be the 'abusive registration of a domain name'. According to the Final Report of the WIPO Internet Domain Name Process, published by WIPO in April 30, 1999, the registration of a domain name shall be considered to be abusive when all of the following conditions are met:

i. The domain name is identical or misleading similar to a trade or service mark in which the complainant has rights; and

ii. The holder of the domain name has no rights or legitimate interest in respect of the domain name; and

iii. The domain name has been registered and is used in bad faith.

Courts all over the world are trying to prevent cybersquatting using the intellectual property laws of the respective countries. The American experience is quite typical of this trend and therefore merits elaboration.[57]

Defenses to demands for the return of a domain name

Trade mark holders particularly those of famous or well-known trademarks are extremely vigilant at protecting their trade mark rights on the internet. To an extent this is justified. If they do not look after their marks, the danger is that they become generic and thus lost to public domain. But there are many cases where the use of a mark by a third party, which is the same as a registered trade mark, is perfectly legitimate. Unfortunately either these uses are often not appreciated by the trademark owners, or they contest that any such use is legitimate. This has resulted in a number of cases of reverse domain name hijacking, where the trademark owner will take action, regardless of the merits of the case. It is most often the small business or individual who suffers as a result. However, the holder

[57] Arun Roy, "Domain Name related disputes on the Internet: Emerging Trends", 29 *SEBI & Corporate Laws*, (2001) pp.13- 22.

of a domain name should not be too quick to give it up in face pressure. The use may be quite legitimate.[58]

Use in the course of Trade:

In USA, this was the first defence in the case of cybersquatting pled by cyber squatters, that the domain name was not being used in the course of trade. The mere registration of the domain name, without more, was not sufficient to satisfy this test, or so it was argued. Thus there was no infringement. Much academic ink has been spilt in trying to determine the question. Suffice it to say that the issue has not been one that has overly troubled the courts, in particular when the question is one of cybersquatting. The courts have been happy to find that mere registration, with the hint of possibility of selling the domain name either to the owner of the famous mark or to a third party[59], sufficient to satisfy this test, particularly where the action has been brought against domain name holder.[60] In other cases, where it has been NSI that has been sued for infringement for actually registering the domain name, the courts have been willing to say that mere act of registering a domain name is not a commercial use of a mark[61], but that would seem rather to be decision taken that it is not the registry that should be sued but rather the registrant. The distinction seems without difference, particularly if the intent is difficult to show. However, it reinforces the view that courts do not like cybersquatting and are willing to grant remedies, even if they involve creative use of trademark law.

Non-commercial Use: Free Speech

A defence of non-commercial speech and free speech has surfaced several times in the USA. In *Jews for Jesus* v. *Brodsky*[62] registered the domain name JewsforJesus.com. He used the website to make disparaging comments about the organization 'Jews for Jesus' who had a registration for that phrase. When challenged, Brodsky pled non-commercial speech and free as defences; arguing that he was just using the domain name as an identifier to makes comments about

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[58] *Law and the Internet: a framework for electronic commerce*, Lilian Edwards and Charlotte Waelde (Eds.) (Hart Publishing,Oregon, 2000) p.149.

[59] *Panavision* v.*Toeppen*, 945 F Supp, 2 ECLR 789 (DC Calif. 1996).

[60] *Ibid.*

[61] *Lockheed Martin Corp* v. *Network Solutions Inc*, 2ECLR 1244 (DC Calif. 1997).

[62] *DC NJ* Civil Action No. 98-274 (AJL) 3/6/98.

an organization whose policies and teachings he disagreed with. However, the court said that he had done more than just register the name; rather, the site was a conduct to another organization that sold merchandise. Importantly the court also noted that Brodsky's actions were in bad faith. The judgement was based on similar reasoning to that in Planned Parenthood *Federation of America Inc. v Bucci*[63] which involved a web site set up by Bucci, using the domain name plannedparenthood.com. Bucci used the website to make anti-abortion statements and promote sale of an anti-abortion book. Free speech was argued as a defence. The court said that the information was not protected free speech because it was not part of a communicative message. The use of domain name was more akin to use as a source identifier.

The analysis of the above cases indicate that if there is an element of bad faith by those registering the domain names in the use of the website, then any reliance on free speech will not be accepted. Rather court will find, by whatever route, some tarnishment, commerical use or orther overriding criterion that will trump the non-commerical and free speech arguments.

Parodies

The defence of parody is developed in USA. Parodies of trademarks are accepted under certain circumstances. So, in a non-Internet case, a wild boar was called Spa'am in a Mupper Treasure Island Film. This was held not to dilute the mark 'Spam' which had been registered for pork and ham luncheon meat[64] because it was said the public identification of the mark with the owner would be increased 'the joke magnifies the mark because it increases the fame'. Thus there was no blurring. Likewise, the mark was not tarnished because the character was likeable and positive.[65] It is certainly heartening to see that judges have a sense of humour. Would the same result be achieved on the internet in relation to domain names? There certainly are parodies of well-known names: thus there is DrudgeRetort.com- a parody of the well-known Internet journalist Matt Drudge; and there was a Peta.org, the domain name for a web site set up by a group calling themselves

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63 97 CIV-0629 (KMW) (3/6/97), 2 ECLR 370.

64 *Hormel Goods Corp* v. *Jim Henson Productions*, 73 F3d 497 (2d Cir 1996).

65 Mostert, *Famous and Well Known Marks* (Butterworths, London, 1997).

‘people Eating Tasty animals’, a parody of the organisation ‘people for the Ethical Treatment of Animals’. Sadly, this last one was the victim of NSI’s dispute resolution policy which is allowed no defence of parody.

Identifying Goods and Services

Another acceptable use of trademark is to use it to identify the goods and services belonging to the trademark owner. Thus, subject to certain parameters, a garage selling parts for Volkswagen cars will be able to use the term ‘Volkswagen’ in connection with its trade. One particular way in which this issue has arisen in the USA, is where a trademark was used within the file directory path of the internet address, only to the right of the Top Level Domain.

Use of Personal Names

There are number of significant differences in various jurisdiction in relation to the use of personal names, both as trademarks and as domain names. In the UK, one of the specific exceptions to infringement in the TMA is the use by a person of his own name or address. Hence, when there was much angst in Scotland recently over McDonald’s, the fast food chain, asserting its rights to the name McDonald, it was possible to reassure those Scots (and others) with the surname McDonald, that they would in no way be prevented in using it in any way that they wished. This would, or most certainly should, include use a domain name. However, in Germany, there has been a recent dispute over the name Krupp.[66] A certain Herr Krupp registered the domain name Kruppe.de in 1995. He was operating an on-line agency and offered internet related services to the public. This was challenged by the German steel company bearing that name which wanted the domain name. The court held that a company with an outstanding reputation can prohibit the use of its usual name as a domain name by others. However, the court was only able to prevent the use of the name as a domain name by others. However, the court was only able to prevent the use of the name by Mr. Krupp, not to order transfer to the steel company.

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66 *Re Krupp*, Regional Court of Appeal of Hamm, 13 Jan.1998 noted in (1999) EIPR N-24.

Conclusion

Cybersquatting has been an active threat since the early 1990's and has increased in severity ever since. The prevention of cybersquatting revolves mainly around two acts, the UDRP and the ACPA. The UDRP was adopted by ICANN in order to provide a mechanism for trademark holders to obtain domain names from cyber squatters. The UDRP states that before a domain name registrar will cancel, suspend, or transfer a domain name that is the subject of a trademark-based dispute, it must have an agreement signed by the parties, a court order, or an arbitration award. The development of the UDRP created a "cyber arbitration" procedure to quickly resolve domain name ownership disputes that involve trademarks. All owners of ".com", ".net", and ".org" domain names are subject to the UDRP by virtue of the registration agreements at the time of acquiring their domain names.The ACPA is a valuable tool intended to protect the infringement of trademarks online and to protect the credibility of a company through the protection of their name as a domain. However, it is also a weapon used by corporations in order to force smaller businesses out of the e-commerce market. For this reason, the ACPA must be modified in order to account for some of the unfair court cases which have been decided in the past years. The rights of the individual must be protected and as it currently stands, courts have been favoring the businesses with the largest name and largest pockets regardless of the intent of the individual who owns the domain.Both of these systems have their advantages, but they must be used properly in order to achieve the desired result. The UDRP provides a method for quick resolution of a dispute whereas the ACPA allows for an extended legal battle with the potential of large monetary settlements being awarded. However, both systems help to provide security and structure to the complicated and widespread problem of cybersquatting. These acts, along with the legal system, are the only protection available to those who wish to defend themselves from cyber squatters. Since cybersquatting is going to shift from larger businesses to small businesses in the future, modifications to the cybersquatting acts will need to be made in order to increase protection. The ACPA will need to be modified to protect individuals who own a cite similar to a corporation's trademark because currently the act favors big businesses. Cybersquatting problems are going to continue to develop because of the rapid growth and expansion of the Internet.

The issue cannot simply be ignored or else it may hurt the economy. It's important to learn from the victims of cybersquatting so we can prepare ahead of time for the issues to come.

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