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FOREWORD

I am indeed personally as well as on behalf of the institution very happy to note that the Dharmashastra National Law University Student Law Journal; Issue 01 Volume 01 is in the process of being released. I compliment the Powerful Advisory Panel, Peer Review Panel and Student Editorial Board for doing this excellent job and bringing out an informative journal. This kind of academic activity will go a long way in promoting the student's ability to comprehend issues of current relevance and articulate them appropriately by following the research parameters. This journal is not only confined to students even Doctoral Degree holders and faculty are also associated in writing to this journal. I wish all the best for all those associated in bringing out this maiden journal. I hope shortly there will going to be a faculty journal also.

The student journal and faculty journal, I am sure will going to showcase the research potential of the Dharmashastra National Law University, Jabalpur.

Once again for all those who are associated with the journal, my best wishes.

Prof. (Dr.) V Nagaraj

EDITORS' NOTE

"When I sit down to write a book, I do not say to myself, 'I am going to produce a work of art.' I write it because there is some lie that I want to expose, some fact to which I want to draw attention, and my initial concern is to get a hearing."

George Orwell, Why I Write

We are extremely excited to release the inaugural volume of Dharmashastra National Law University Student Law Journal (DNLU SLJ). The Journal is a product of close to a year of meticulous conceptualisation and consultations on its scope and policies. We hope that it emerges as a leading forum for students and academics to engage in discussions on varied issues of contemporary importance in future.

With that, we are extremely proud to present the first volume of the DNLU Student Law Journal. I thank the University, the Advisory Board, the authors, and the professors who were involved in this process. A lot of hard work, intellectual discussions, and free exchange of ideas contributed to this journal. We hope for the journal, going forward, is that it should always seek to achieve newer and greater heights and keep the spirit of legal scepticism alive. An academic journal is a culmination of several people's efforts, the effort that goes into writing a paper, the effort that goes into shortlisting the papers, and finally the editing that goes into making sure that the ideas of the author are being expressed in the best possible way.

The hard work of everyone who has contributed to making this issue come to fruition must be acknowledged. We would like to take this opportunity to thank and express our gratitude to our Patron-in-Chief the Chief Justice of Madhya Pradesh High Court, Honourable Justice Ravi V. Malimath for valuable guidance. We are also grateful for the commitment, guidance and the mentorship of our beloved Vice-Chancellor Prof. (Dr.) V. Nagaraj. We are also grateful to our Registrar Shri Kapil Mehta & Controller of Examination Shri Dinesh Prasada Mishra for their continuous support.

We would like to thank the members of the Editorial Board, who have devoted substantial time and energy to reviewing and editing the articles. We are grateful to our Associate Professors Dr. Shilpa Jain & Dr. Manwendra Kumar Tiwari for their continual guidance and encouragement. We would also like to thank our Assistant Librarian, Mr. Sheel Bhadra Yadav for his continuous assistance. We hope that the inaugural volume is the first in a series of enriching, thought-provoking editions. We wish every success to future Editorial Boards of the Journal with the firm belief in their ability to realise the vision behind its creation and take it to new heights of scholarship and reach. Most importantly, we hope that this volume is engaging and enriching experience for the readers as it has been for us.

Adithya Anil Variath
Editor in Charge (Students)

Ashit Kumar Srivastava
Editor in Charge (Faculty)

On behalf of,
Editorial Board

AN EVALUATION OF EFFECTIVENESS OF BEPS ACTION PLAN IN COEVAL TIME

Shalini[*]

Base Erosion and Profit Sharing is a strategy of tax avoidance in which the taxpayer makes an arrangement to shift profits from high tax countries to lower ones. The non-uniformity of rules in different jurisdiction creates a gap which is utilised by the taxpayers to minimize the tax payment which the jurisdiction would be entitled to receive. After the arrival of the report, OECD members and G20 countries formulated a BEPS Action Plan. To give effect and implement the plan, the countries went ahead and on each item a report was prepared called BEPS Action Reports.The endeavour in the present paper is to analyse the plan in the light of requirement of adequate tax framework in the international tax system. To accomplish this, the researcher would initially understand the compelling reasons to bring BEPS into action. For this, the Pre-BEPS era is described then there is brief discussion on action plans. Further to this, the researcher attempts to analyse the short-coming and appraisals of the introduced plan. The researcher also describes the position of India in implementation of the BEPS Action Plan. The researcher has also presented certain arguments in relation to different impacts of BEPS on developing and developed nations. Also, in the contemporary time, the BEPS Action Plan implementation has suffered with many set-backs. Hence, the researcher has attempted to present certain recommendations to tackle the emerging issues.

I. INTRODUCTION

Every Taxpayer's main objective is to reduce his or her tax obligation.[1]To accomplish the purpose they recourse to the following three strategies: Tax Planning, Tax Avoidance and Tax Evasion. It has been rightly quoted that *taxpayers are not expected to arrange their affairs in order to pay maximal tax*. The assessee must therefore layout the matters in such a way that reduces the

* Shalini, 2020, LL.M., NALSAR University of Law, Hyderabad, Available at: shalini@nalsar.ac.in.

1 Tax Planning, Tax Avoidance and Tax Evasion, Income Tax Management *available at:* http://incometaxmanagement.com/Pages/Tax-Ready-Reckoner/Administration-Act/Tax-Planning-Tax-Avoidance-and-Tax-Evasion.html (Visited on December 17, 2020).

tax liability of the Taxpayers. But the question here is what strategy did he choose? Planning, Avoidance or Evasion of Taxes (It sets up the Moral Question).[2]These three are contradictory terms in Tax which keeps on creating uncertainty in the minds of Tax payers time and again.

Multinational Enterprises (MNEs) are group of companies which owns or regulate the facilities and look over the assets in more than one nation with the intent to fulfil the objective of products manufacturing and providing the services globally.[3]Tax policy and its role in giving a discourse to the continuing internationalisation of the production of goods and services are one of the critical areas.[4] Tax can be a key factor in determining the investment location for a company.[5] The challenges in the area of taxation in relation to global value chains are diversified and multifaceted. On the one side, in order to promote their incorporation in global economy, countries are striving to recognize and resolve possible tax and regulatory barriers to trade and investment. It has contributed to the growth of trade and investment agreements along with the development of the tax-treaty networks associated with them. However, in order to attract investment, income generating assets and employment, it has also led several countries to participate in negative tax competition, with uncertain implications for public finances and long `1term growth.[6]

On the other hand, to minimize their tax liabilities, the exponential growth in cross-border transactions has allowed Multinational Enterprises to shift profits between jurisdictions. With the expansion of digitalisation and the growing role of services and intangible assets in value-added trade, the potential for such aggressive tax planning and tax avoidance opportunities has been further broadened.[7]Digitalization highlighted the complexity of identifying the place where value is produced, and the resulting complexities involved in taxing the value-creating activities. These new challenges have triggered a global re-

2 Kaushal Kumar Agrawal, *Corporate Tax Planning*3 (Atlantic, New Delhi, 6thedn., 2007).

3 Multinational Corporations, *available at:* http://www2.econ.iastate.edu/classes/econ355/choi/mul.htm(Visited on December 17, 2020).

4 Multinational enterprises, value creation and taxation Key issues and policy developments,*available at:* https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637971/EPRS_BRI(2019)637971_EN.pdf(Visited on December 17, 2020).

5 Chris Jones and Yama Temouri, "The determinants of tax haven FDI", 51 J. World Bus.(2016).

6 Michael Littlewood, "Tax Competition: Harmful to Whom?", 26 Mich. J. Int. Law(2004).

7 Tax Challenges of Digitalisation: Comments Received on the Request for Input - Part I, *available at:*https://www.oecd.org/tax/beps/tax-challenges-digitalisation-part-1-comments-on-request-for-input-2017.pdf Visited on December 17, 2020).

thinking of tax policy, requiring greater collaboration and cooperation between countries.

BEPS has followed its standard through the peculiar production of continuous tax fugitive operations by Multinational Enterprises. Such innovations has create adoptions for MNEs to reduce their taxation liability substantially, by moving or shifting their successful location of business or centrally managed holding to a country's tax environment that fits their interest in double benefit non-taxation, resulting in governments losing their right to tax because another country's base is eroded.[8]India is part of BEPS Action Plan as it is one of the country in G20, hence, assented to comply with the action plans. To meet this purpose, India has taken lot of endeavours by changing its domestic laws to enforce the BEPS.

II. BACKDROP TO BEPS

A. Pre-BEPS

The mechanism of taxing the MNC's profit outcome was not welcomed and was subject to disagreement. There was huge outcry against practices adopted by MNCs with respect their activities which intended to gain tax advantages by exploiting the deficiencies in the taxation rules.[9] Imposition of higher taxes by any jurisdiction affects the investment which in turn creates impact on economy of the nation. Tax payment is an important factor to decide on investment aspects by the companies and investors. In cases where business is cross border and there is interplay of more than two jurisdictions with different set of tax regime, it raises concerns of multiple taxations. Generally, the country relies on residence and source to base their taxing rights. The former considers the place where the profits arise but the latter give importance to place of activity.[10] Before BEPS Action Plan nations arbitrarily used to seek for profit shares as the taxation system was based on 1920s agreements which was not suitable to the new regime of multinational companies. There were instances of tax evasion by many famous brands like Google, Amazon and certain others.[11] This motivated

8 Thomas L. Hungerford, The Simple Fix to the Problem of How to Tax Multinational Corporations - Ending Deferral, Economic Policy Institute, *available at*:https://www.epi.org/publication/how-to-tax-multinational-corporations/ (Visited on December 17, 2020).

9 Michael P. Devereux and John Vella, "Are We Heading towards a Corporate Tax System Fit for the 21 St", 35Fisc Stud 449-475 (2014).

10 Michael P. Devereux and John Vella, "Are We Heading towards a Corporate Tax System Fit for the 21 St", 35 Fisc Stud 449-475 (2014).

11 Martin Hearson, China's challenge to international tax rules and the implications for global economic governance, Martin Hearson, *available at:* https://martinhearson.net/category/taxing-multinational-companies/ (Visited on December 09, 2020).

political and public will to ask for a fairer tax system. The pre-BEPS era was full of lacunas where there were many gaps in laws leading to complexities. The nations started competing among themselves to attract investments by offering luring tax benefits and concessions. A country is guided by range of factors while deciding its tax system like increase of revenue and to give domestic corporations a competitive advantage.

OECD main focus was to tackle with the issue of "double non-taxation" and nations which has low or no tax base and distinguished income from the actions by which such income is generated.[12]Another issue which caught attention of OECD was treaty abuse.[13]It was remarked by the OECD that several tax systems of companies has concentrated on assigning risks and hard-to-value intangibles to countries with low tax for shielding themselves from tax payment.

III. WHY THERE IS NEED OF BEPS ACTION PLAN?

In the coeval times, globally, the Central and State Government is grappling to deal with the complexities of BEPS. This has aggravated with MNCs employing "*aggressive tax*" arrangements while dealing with its affairs which in turn resulted perturbation amid the government.[14] The intention behind MNCs adopting such path was to firm erosion while also ensuring the profit scale. Immense damage has been caused to the global economic functioning in time of distress due to the practices of companies of thinning the taxability within the ambit of "safe tax haven". This compelled the government functionaries to take at priority the concerns of tax fair practice which subsequently brought uneasiness with the tax-payer. Among various nations, United Kingdom is one nation that is presently tussling with companies such as Google and others who are not consistent and righteous towards tax payment.

However, the print and e-media in their reporting have confirmed to the failure of the governmental agencies that are not able to resolve the problem of tax non-payment and tax shunning. In fact, Vodafone is in spotlight with the government for adverting to discretionary permitting companies to place their tax accounts.

12 Are the Current Treaty Rules for Taxing Business Profits Appropriate for E-commerce?, OECD, *available at:* http://www.oecd.org/ctp/treaties/35869032.pdf (Visited on December 09, 2020).

13Tax reforms in EU Member States, *available at:* https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_28_en.pdf(Visited on December 09, 2020).

14 CA T. P. Ostwal, Base Erosion and Profit Shifting (BEPS)-Recent Developments, *available at:* https://www.bcasonline.org/ContentType/ITF%20Material/ITF-T.%20P.%20Ostwal.pdf (Visited on December 09, 2020).

All of these activities are finding their way through the system as a result of absence of strictness in the laws and execution issues. Consequently, there is need of stringent regulations, fine system and certain other measures for countering the present situation. In the milieu of tax evasion, Ireland has been directed by the European Commission to initiate payment of thirteen Billion Euros with interest from Apple.[15] Later, it was revealed that separate unlawful tax planning and set-up was sorted with the help of state for grabbling profit *via* Ireland. Similar to this, various other notable cases have collectively and undoubtedly perplexed the transnational tax regime. In ourcountry, the notable pronouncement of Vodafone case is a leading example calling for retrospective amendments to tax laws in cases of indirect transfers. Whether earlier judgments would have an impact of resulting to cross-border politics and economic quarrels over the EC? Could this lead to tax war? Also, whether this will lead to a question on effective execution of BEPS?In recent times of weaken global economy the major issues create a peril to tax fair practice, sovereignty and revenues. Such unethical practices by MNC's who deprive countries of their legitimate share of taxes is a reason of major concern among the politicians across the globe

IV. A DESCRIPTION TO BEPS

The consecutive events, discussed above, led to preparation of "Addressing Base Erosion and Profit Shifting" report in the year 2013. The term Base erosion and profit shifting ("BEPS") generally connotes to strategies of tax avoidance in which the taxpayer makes an arrangement to shift profits from high tax countries to lower ones. The non-uniformity of rules in different jurisdiction creates a gap which is utilised by the taxpayers to minimize the tax payment which the jurisdiction would be entitled to receive. After the arrival of the report, OECD members and G20 countries formulated a BEPS Action Plan. To give effect and implement the plan, the countries went ahead and on each item a report was prepared called BEPS Action Reports. It is premised on 3 fundamental principles: coherence, Substance and transparency. It is to bring coherence between domestic and international taxation rules. Also, introduction of substance requirement in the international tax system and enforcing transparency was the intention of the plan. The major objective of the plan was

15 Taxsutra, EU Apple ruling - Will Europe's "Vodafone" moment unleash a global tax war,*available at*:ibfd.org/sites/ibfd.org/files/content/pdf/Taxsutra_EU_Apple_ruling_final_template.pdf (Visited on December 03, 2020).

to construct a framework which could bring coherence and solution at international level.

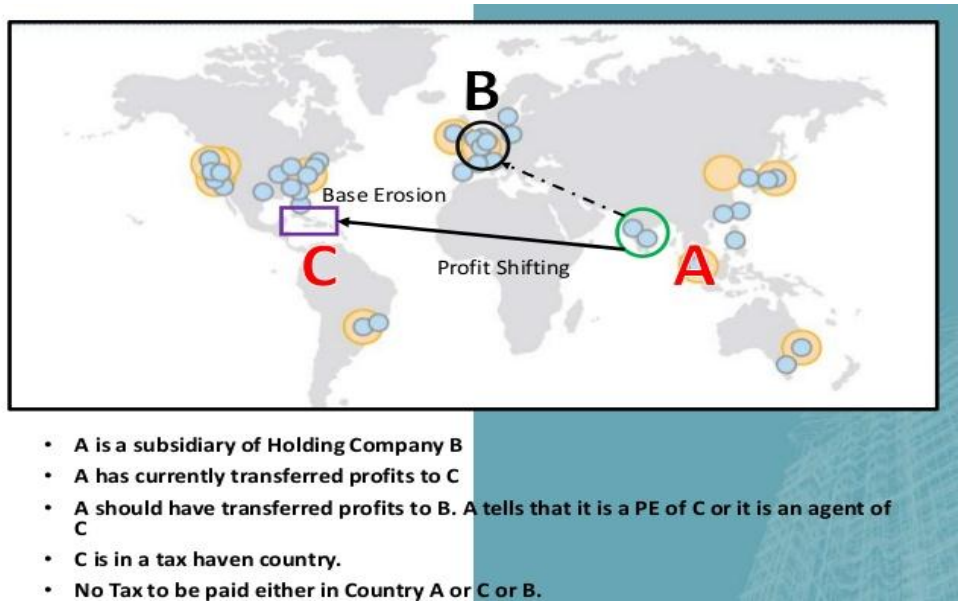

Figure: Method of Base Erosion and Profit Sharing

Another emerging problem was treaty abuse which BEPS Action Plan seeks to tackle. To curb treaty abuse several measures are proposed which requires total transformation of taxation regime.[16] Bringing huge changes in the international tax network was a herculean task, if resorted to treaty-by-treaty basis.[17] Due to political inconsistencies bilateral arrangements were not feasible and hence, the Action Plan uniquely resorted to Multilateral Instruments ("MLI") like multilateral treaty.[18] This resolution mechanism attempts to bring effective coordination along with implementation flexibility to eradicate the problem of base erosion.[19] This approach requires nations to opt from the prescribed template and mandates to comply with certain basic

16 Base Erosion and Profit Shifting [BEPS] Analysis and India perspective, Deloitte,*available at:* https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/tax-2016/in-tax-deloitte-beps-analysis-and-india-perspective-noexp.pdf(Visited on December 03, 2020).

17 What is BEPS?, OECD,*available at:* https://www.oecd.org/tax/beps/about/ (Visited on December 12, 2020).

18 India's MLI Positions: Impact on Availing Treaty Benefits,Nishith Desai Associates,*available at:*http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/India_s_MLI_Positions.pdf (Visited on December 12, 2020).

19 BEPS ACTION 15 Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures, *available at:*http://www.oecd.org/ctp/treaties/public-comments-received-discussion-draft-Development-of-MLI-to-Implement-Tax-Treaty-related-BEPS-Measures.pdf(Visited on December 12, 2020).

standards.[20] By providing standard choices and removing of bilateral negotiation, extends immediate resolution for earlier issues. Due to this, some luminaries have argued that BEPS is just an amendment to the existing system not a transformation or shift.[21] "*The substantive principle of the BEPS Action Plan is that tax should be paid in the jurisdiction in which the economic substance and value-addition activities of a transaction are carried out and the tax treaty benefits should not be provided to dummy/shell entities set up primarily to take unfair advantage of tax treaties and mis-match in tax rules."*[22] It is pertinent to discuss the 15 Action Plans briefly:

Action 1

It addresses the issues emerging from Digitalisation in tax regime and endeavours to find out how the digitalisation affects the international taxation network.

This action plan is based on two pillars:

Pillar 1: Reallocation of profit and revised nexus rules

Pillar 2: Global anti-base erosion mechanism

As there is no international taxation agreement, nations are enforcing unilateral tax on digital services.

Action 2

This plan focused on "*Neutralising the effects of hybrid mismatch arrangements".*

It was observed that in cases of international business, for same taxation problem different solutions were offered by distinct countries. It directs to change domestic laws with the intend to prevent hybrid mismatch arrangements. It also suggests amending the OECD model tax convention to tackle situation, wherein

20 Sudarshan Rangan, Significance of 'Preamble' in Tax Treaties, *available at:* http://www.fitindia.org/downloads/sudarshan_rangan_2017.pdf(Visited on December 17, 2020).

21 Multilateral Convention to Implement tax Treaty related measures to prevent base erosion and profit shifting, OECD,*available at:* https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf(Visited on December 12, 2020).

22 CMA MrityunjayAcharjee, Cross Border Taxation Base Erosion and Profit Shifting (BEPS) – India is moving towards the biggest ever international tax reforms, Tax Bulletin, *available at:*https://icmai.in/TaxationPortal/upload/DT/Article/8.pdf(Visited on December 18, 2020).

the corporate tries to receive profits in inappropriate manner. It came to curb the problem of double non-taxation resulting from hybrid mismatch arrangements.

Action 3

It majorly attempted to frame "Effective Controlled Foreign Company Rules". These rules are in the nature to prevent shifting of profits to low tax countries or tax heaven by incorporating subsidiaries in that jurisdiction.

Action 4

It seeks to "*Limit base erosion via interest deductions and other financial payments*". It provides a fixed ratio rule to domestic laws to facilitate corporates to deduct interest and also recommends group ratio rule.

Action 5

This plan aims to "Counter Adverse Tax Practices by Adopting Transparency and Substance Approach".

It focussed on substantial actions to determine about a jurisdiction's flexibility on tax matters and developed a "nexus approach". This approach primarily deals with intellectual property regimes. Further, it requires quick exchange of information with respect to tax pronouncements. This is to note that it is one of the minimum standards that BEPS nations have to comply.

Action 6

This plan is to curb treaty abuse by resolving issues like treaty-shopping, which in consequence causes double non-taxation. By creating model treaty provisions it safeguards the assignment of privileges in inappropriate circumstances. It mandates two important aspects in the treaty: First, the preamble of the tax treaty should mention that the treaty is not facilitating reduction of taxes or non-taxation by any means like tax avoidance, treaty shopping and tax evasion. Second, nations must have a specific provision which prevents the treaty abuse. This action is also a minimum standard for the nations which are part of BEPS Plan. Major concern areas of this plan were:

First, it clarified that tax treaties are in no way promoting double non taxation. Second, pointing out matters related to tax policies which a nation would consider before accepting the treaty.

Action 7

This action plan "prevents artificial avoidance of permanent establishment status" by changing the norms for creation of permanent establishment. Additional guidance was also given before designating a permanent establishment, irrespective of the location were essential business is conducted in a nation.

Actions 8, 9 and 10

These plans are put in same category by OECD because all these target on transfer pricing areas. It attempts to align the proceeds of transfer-pricing with value creation, by framing guidelines.

Action 11

Its objective was to prescribe methodologies and observe data on instances of BEPS. The analyses of such data were made and it concluded that substantial impact on economy was created by BEPS. Under this plan the corporate tax statistics database was created.

Action 12

This plan provides for disclosure of arrangements related to tax-planning, especially aggressive tax plans. This will facilitate nations with immediate information with respect to such plans.

Action 13

It seeks to re-evaluate and construct regulations on transfer pricing with the intent to improve transparency for tax departments. For efficient information flow 3 tier structure was made including: Master File, Local File Nation by Nation report.

Action 14

This plan concentrates on improving dispute resolution mechanism to deal with disputes arising out of treaty under Mutual Agreement Procedures.

Action 15

The last plan focussed on developing *multilateral instrument which can alter* treaties involving two nations with the intention to effectively execute measures for treaties involving tax matters framed in BEPS action plans.

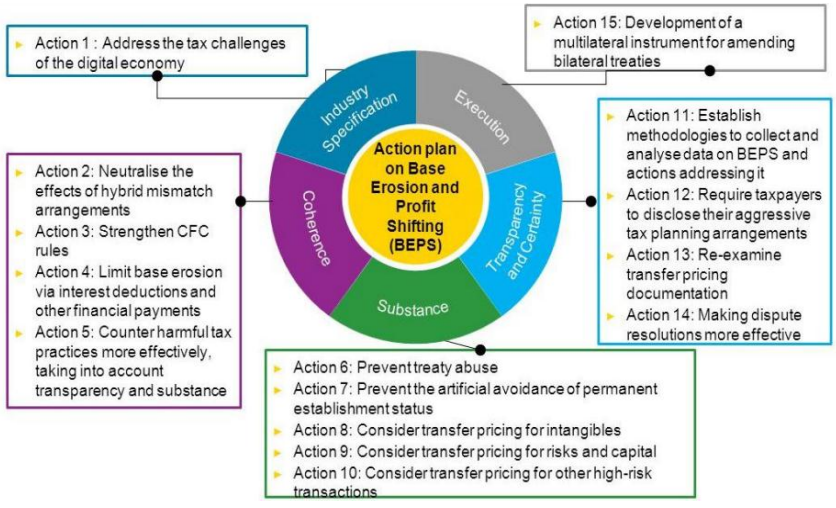

Figure: Fundamental Pillars of Action Plan

The below figure pertains to execution status of BEPS Action Plan in certain countries "✓" indicates plan implemented and "✗" indicates non-implementation.[23]

23 Beps Action Plans & Impact on India, *available at:*https://www.protact.in/application/public/uploads/cms/269/1061/BEPS_ACTION_PLANS___IMPACT_ON_INDIA.pdf(Visited on December 19, 2020).

Country / Action Plans	India	Australia	Brazil	China	Singapore	United Kingdom
Action 1: Addressing the Tax Challenges of the Digital Economy	✓	✓	✘	✘	✘	✓
Action 2: Neutralising the Effects of Hybrid Mismatch Arrangements	✘	✓	✓	✘	✘	✓
Action 3: Designing Effective Controlled Foreign Company Rules	✘	✘	✓	✓	✘	✘
Action 4: Limiting Base Erosion Involving Interest Deductions and Other Financial Payments	✘	✘	✓	✘	✘	✓
Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance	✓	✓	✓	✓	✘	✓
Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances	✓	✓	✘	✓	✘	✓
Action 7: Preventing the Artificial Avoidance of Permanent Establishment Status	✘	✓	✘	✓	✘	✓
Actions 8-10: Aligning Transfer Pricing Outcomes with Value Creation	✓	✓	✘	✓	✘	✓
Action 11: Measuring and Monitoring BEPS	✘	✘	✘	✘	✘	✘
Action 12: Mandatory Disclosure Rules	✘	✓	✘	✓	✘	✘
Action 13: Guidance on Transfer Pricing Documentation and Country-by-Country Reporting	✓	✓	✓	✓	✓	✓
Action 14: Making Dispute Resolution Mechanisms More Effective	✓	✓	✓	✘	✘	✓
Action 15: Developing a Multilateral Instrument to Modify Bilateral Tax Treaties	✘	✘	✘	✘	✘	✘

V. UNCERTAINTIES AND DILEMMAS IN BEPS PLAN

The pursuit of BEPS on the basis of single tax proposition is to inhibit double non taxation system.[24] The new proposition according to G20 leaders is that the financial gain should be taxed when business activities are obtained and worth is created.[25] In accordance to BEPS project the new direction of international law reform is to protect the individual tax theory apposing BEPS project.It is eminent to mention that fundamental reasons for BEPS opportunities are rickety international tax regime.[26]Hence, a transformational change is required for ongoing proposition.The correct approach for the BEPS project is to restore and rebuild the laws based on the condition.But it is sad that many old principles of international tax law is still conserved and pursued in BEPS project.

The new objectives of BEPS project have been reorganised. Moreover, the major concern for BEPS project has remained the same which is the non-implementation of new propositions and strengthening of old ones. Hence, elimination of both double taxation and double non-taxation is the motive behind international tax law.[27]Our government and MNEs has completely ignored the fact that there is humongous risk involved in the double non taxation system and however they are against this double taxation system.

One of the drawbacks of BEPS project is that it has continued to highlight the independent proposition and declined the implementation of new propositions. BEPS project is somehow ineffective and has failed to avail a logical as well as absolute application. Instead of that it has offered plan for harmonious integration of existing rules, causing it to be even more conflicting and complicated.[28]The efficacy and efficiency of BEPS project depends on its implementation by different number of countries.[29]In order to avert the negative

24 BEPS: Eliminate Double Non-Taxation Without Impeding Cross-Border Investment, *available at:*https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-beps-eliminate-double-non-taxation-without-impeding-cross-border-investment-february-2015.pdf(Visited on December 12, 2020).

25 OECD i-library, *available at:* https://www.oecd-ilibrary.org/docserver/9789264218789-4-en.pdf?expires=1610512948&id=id&accname=guest&checksum=05673376F10B91B8D824E8B178574CEF(Visited on December 12, 2020).

26 Reuven S Avi-Yonah and Haiyan Xu, "Evaluating BEPS",10Erasmus Law Rev.(2017).

27 Joanna Wheeler, Single Taxation?, *available at:*https://www.ibfd.org/sites/ibfd.org/files/content/pdf/18-079-single-taxation-final-web.pdf (Visited on December 12, 2020).

28Sergio André Rocha and Allison Christians (eds.), *Tax Sovereignty In The Beps Era*(Kluwer Law International BV, The Netherlands2016).

29*European Parliament, available at:*https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642258/EPRS_BRI(2019)642258_EN.pdf(Visited on December 12, 2020).

consequences between domestic systems, BEPS project needs to be implied explicitly. Likewise, the new level should not put forward the probability of explanation which may lead to controversy.[30]The strategy behind BEPS project is a multifaceted and multidimensional consensus crested by consent and thus not come up with directly enforceable binding provisions. BEPS project is a unanimous soft law action plan which is in need of transformation into national law.The permanent establishment approach is a significant concern. The concept of PE is acceptable, it just needs changed rules. The urge of e-commerce for separate legislation does not seem practical.[31] No doubt the Action plan has improved the international tax system in several areas; however, it failed to create an ideal tax regime. It acts as a setback to domestic businesses which are small, like family business, as they face difficulty in competing with MNEs. In other words, the BEPS Plan has reduced the fair competition in the market.

VI. TUSSLE CREATED BY BEPS AMID NATIONS

Currently, USA is one and only country for all their MNCs and MNEs, who is showing their existence in other country's market .Before implementation of BEPs, generally these MNEs were able to get benefitted or were enjoying the tax less profits .But nowadays all the other nations have started the unilateral plans for the digital transactions done . However, USA completely denied going for MLI. The reasons behind the declination were that most of the tax treaties provision of MLI were curbing BEPs and were also stopping the unilateral changes done by market countries. Generally, countries like USA have always followed its own method to tackle international taxation, that's why USA has its own US model convention.

If these model treaties are modified for the betterment or some unilateral action are taking then it can help the market countries a lot as these market countries can get right to tax on that American e-commerce .then under Article 23 for elimination of double taxation, USA needs to pay credits for taxes paid by different American MNCs in market counties.[32]And that will result in a great loss to American government in the form of lesser tax revenue. That is why US government usually start protesting whenever there is a talk to modify these

30 Review of Comparability and of Profit Methods: Revision of Chapters i-iii of the Transfer Pricing Guidelines, Centre For Tax Policy And Administration, *available at:* https://www.oecd.org/ctp/transfer-pricing/45763692.pdf (Visited on December 20, 2020).

31 Concerning the Taxation of Associated Enterprises, *available at:*http://www.oecd.org/tax/transfer-pricing/36221039.pdf(Visited on December 20, 2020).

32 *Available at:*file:///C:/Users/ADMIN/Downloads/07%20-%20Elimination%20of%20double%20taxation.pdf(Visited on December 20, 2020).

already existing systems of international taxation for E-commerce. As the MLI would become truly affected on the ground, it would hit the domestic market hardly, US government changed its domestic taxation, and it helped the US MNCs to get attracted and shift its tax base to USA only.

As we know developing countries like India generally imports capital and technology and have really contrast interest as compared to that of the developed countries like USA, as they want to attract more and more foreign investment so most of their revenue generate from tax collection. Many of the economist and members of international affairs think that BEPs project, which is amended by OECD-G20 countries would not help the developing countries but will work totally in favour of countries which are already developed. They said that the developing countries need to follow the provisions under MLI/BEPs generated or developed by developed countries. Each nation has the sovereign option to duty, and it has option to plan its assessment framework in a proper way. BEPs almost tried to cover the sovereignty of tax nations. It has also given the option to those countries to accept the provisions described under MLI provisions. It is appropriate to take note of that in the majority of nations, the helpful provisions among arrangement or the domestic law applies. Hence, in those conditions unless the modifications through MLI are incorporated in the domestic law , the BEPS related problems would not get resolved .In this manner, there are concerns that the developed nations would gradually take upon the developing countries sovereignty. In 2014, G20 proved came up with a plan to indicate the impact of BEPS on developing nations. Sections 1 and 2 had raised the issue for developing nations on source versus residence conflict enumerated in treaties which involves two nations displayed on the OECD and the Convention. However, the final reports did not consider this issue. BEPS claims to re-establish the burdening rights between the resident and source nation and does not modify the sharing of the taxing rights between the source nation and resident.

VII. Implementation of BEPS Plan in India

Since the initial stage, our country has been prompt in dealing with BEPS mechanism. India while executing all the measures of BEPS is also on the way to ratifying of MLI. The taxation and judicial system of our country has always taken efforts towards base erosion and source-based taxation. Tax is detrimental and is considered for conducting an investment-related settlement. However, it's not the sole parameter for reaching at an effective settlement. After the advent of BEPS, it is a requisite for the corporate to carry out its affairs in an effective

manner in order to get some benefit from any nation. India has always been a place that attracts cross-border investments because; our country is determined and dedicated towards ensuring translucency and consistency in conducting its affairs and towards its obligation to the government. One of its major activities is of facilitating nations with pricing documentation, i.e., details pertaining to monetary functioning of corporate to the revenue departments. With the intend to counter the effects of treaty shopping, India is also enacting anti-abuse regulations and re-negotiating its earlier tax treaty.[33]

BEPS endeavours to connect tax with value creation and this serves beneficial to the developing nations. Earlier for certain tax matters, the authorities faced critics which have now been settled with the coming of BEPS.[34]India has always been prompt in incorporating provisions highlighting the objectives and essentials of BEPS into its domestic legislations. Previously, Indian legislations considered form of transaction and not substance which in turn facilitated in treaty shopping. However, the Apex Court in a notable judgment of *Union of India* v. *Azadi Bachao Andolan*[35] directed that in the non-presence of the Limitation of Benefit clause, the treaty advantages will have greater hand. It is been affirmed in the pronouncement of Vodafone wherein the court remarked that unless it is proved that the entity is interposed with the intent to escape from tax liability, tax benefit cannot be rejected.

Presently, certain changes have been made to treaties incorporated with Cyprus, Mauritius and Singapore to comprise anti-abuse regulations on gains. The legislative wing of the government has confirmed that treaty shopping marks to be one of the reasons for tax leakage, hence, India is making endeavours to frame stringent rules.[36]Also, the General Anti-Avoidance Rules (GAAR)was framed in compliance with BEPS Action Plan. India is dedicated towards a safer IP regime but harmful practices in other countries have created impacts on India

33 Jayesh Sanghvi, India Tax in a post-Base Erosion and Profit Shifting world, Economic Times, *available at:*https:// economictimes.indiatimes.com /news / economy/ policy/india-tax- in-a-post-base-erosion-and- profit-shifting- world/ articleshow/49448327.cms?from=mdr(Visited on December 17, 2020).

34 Ground-breaking multilateral BEPS convention signed at OECD will close loopholes in thousands of tax treaties worldwide, OECD,*available at:* https:// www.oecd.org/tax/ beps/ ground-breaking-multilateral - beps- convention- will-close- tax- treaty-loopholes.htm (Visited on December 17, 2020).

35(2004) 10 SCC 1.

36 Final Package of Measures Under The Base Erosion And Profit Shifting (‘Beps’) ProjectAn Indian Perspective, Dhruva, *available at:* https://dhruvaadvisors.com/ insights/ files/DhruvaBEPS _ Oct2016.pdf(Visited on December 17, 2020).

too.[37]The investors who are looking to India for investment or have already made investment are required to verify the present agreements or arrangements in the light of recent changes in GAAR.

VIII. RECOMMENDATIONS

After reviewing the positions of BEPS plan from different angles, the researcher finds the following suggestions apt to make Action plan more effective:

- It is pertinent to identify issues in implementation of the BEPS and to evaluate the effectiveness of the plans.
- It requires international community to show commitments to the action plans and to eradicate any conflicts.
- The corporate need to incorporate BEPS provisions in their tax arrangements and should draft situational implications on application of the plans. Then the responses are required to be observed in punctually and phased manner.
- The planning should be designed in a balanced manner to obtain maximisation of investments without affecting trans-national investments of the jurisdiction.
- The approach should shift from FAR to FARM analysis. It is required that market analysis must be part of the factors which is considered by the nations, as profit is coming because of market business. It is important to give weightage to assessment of market factors.
- Permanent Establishment is a praiseworthy concept but it requires new set of regulations. The definition is to be made in compliance of BEPS. In respect of e-commerce, nations should account for importer and exporter perspective.
- Many high-income counties have resorted to Arm's Length principle, but the low-income nations have adopted formulary approach. BEPS Plan attempts to resolve issues in transfer pricing mechanism, but has not recommended any alteration in the Arm's Principle. There is need of bringing balance between the two approaches.
- OECD needs to give more emphasis on the issues of developing countries by facilitating information on tax regulation, so that they can compete with developed nations.

37 Swapneshwar Goutam, "Critical account of the OECD's Action Plan on Base Erosion and Profit Shifting", 287 MLJ(2014).

IX. CONCLUSION

Monitoring and execution aspects of BEPS Plan is a challenging task as the action plan counter complicated problems like treaty abuse and address issues in dispute settlement, with assessment of reporting on implementation for nations. Also, the nature of the action plan is soft law, hence many countries has not objectively complied with the proposed plan. Nations which are in tax competition itself are expected to show cooperation in BEPS Action plan. The BEPS has also raised questions on sovereignty of jurisdiction to frame its domestic taxation rules by autonomy. The Action Plan seeks to achieve equality which does not seem to be a practical idea, as to increase investment jurisdictions are competing and not willing to let go their status of preferential regime. Only through transparency and substance requirement it is difficult to assume that an ideal international tax system would be developed, which was dream of BEPS Plan. In this respect, it is likely that even after Post-BEPS the fortune of international tax regime remained uncertain and many aspects. There is no doubt that the BEPS Plan was capable to counter many infirmities in tax regime. However, the Action Plan has failed in many aspects and now it requires the international community to improve the standard and effectiveness of the rules.

UNDERSTANDING COMMERCIAL SURROGACY: THE PACT BETWEEN BARREN AND BROKE

Sasthibrata Panda and Sanskar Jain[*]

Commercial surrogacy is, an agreement between intended couples and a surrogate mother, which is currently legal in India. The objective of the paper is to support the practice of commercial surrogacy and criticizes the draconian provisions of the Surrogacy (Regulation) Bill, 2019, which intends to prohibit commercial surrogacy. It argues that because commercial surrogacy paves the way to give a genetically related child to the infertile couples in return for consideration to the poor surrogate mother for her service. The paper resolves the conflict of parenthood and talks about the certainty of parenthood with the help of surrogacy contract within the purview of intention based and genetic relation based arguments. It contextualizes a commercial surrogacy agreement is neither unconscionable nor a baby-selling agreement. Next, it brings up the constitutional issues revolving around the Bill. It gives an insight into how the Bill violates the golden triangle of the Indian Constitution. It constantly emphasizes the importance of a robust form of mechanism to regulate this industry. It highlights flaws in the Bill and suggests how to tackle these flaws by giving appropriate solutions. Finally, it concludes by stating that commercial surrogacy should remain legal, but under the control of the government.

I. INTRODUCTION

The word surrogacy has brought happiness among infertile couples and has saved many marriages in India through In-Vitro Fertilization (IVF). Surrogacy is defined as the practice where a woman agrees to carry and deliver a baby for another individual.[1] The practice of surrogacy gained importance among the

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[1]Ruby L. Lee, "New Trends in Global Sourcing of Commercial Surrogacy: A Call for Regulation" 20 *Hastings Women's Law Journal* 275, 277 (2009).

couples who could not have a baby naturally due to reasons such as infertility and various other untreatable medical complications. As it is a deep-rooted human desire to have a genetic baby, and surrogacy fulfils such desire through the employment of a surrogate mother. But the acceptance of surrogacy turned it into a commercial activity where many women from different social backgrounds (mostly from poor families) came forward and agreed to become surrogates for couples who were willing to pay a substantial amount of money for their services. Their one-time income from surrogacy work is comparable to 5-10 years of family income.[2]

The commercialization of surrogacy has helped many poor women in earning a significant amount of money, which she can use to ameliorate her family's socio-economic condition and get themselves out of deplorable living conditions.[3] At the same time, research carried out by many independent organizations declared that the surrogacy industry contributed significantly to the Indian economy and had turned into a more than 445 million dollars a year business.[4]

India became the capital of commercial surrogacy due to its friendly approach towards technological advancements, lax regulations, and good medical care at significantly inexpensive, compared to other nations where access to commercial surrogacy is expensive.[5] Eventually, the Indian Judiciary recognized commercial surrogacy as a legal practice and directed to bring legislation that could regulate this growing industry. Since 2008, the legislature has been introducing the Assisted Reproductive Technology (ART) Regulation Bills to manage and regulate surrogacy, which is very important and should be enacted before a surrogacy bill for better regulation, but none of them were enacted yet.

In the Surrogacy (Regulation) Bill, 2016, the government changed its approach and advocated for a complete ban on commercial surrogacy. The Bill of 2016 only allowed altruistic surrogacy with a close relative. The term '*altruistic*

[2]Priya Shetty, "India's Unregulated Surrogacy Industry" 380 *Lancet* 1633-34 (2012).
[3]Nida Najar, "India Wants to Ban Birth Surrogacy for Foreigners", *The New York Times*, October 28, 2015, *available at* <http://www.nytimes.com/2015/10/29/world/asia/india-wants-to-ban-birth-surrogacy-for-foreigners.html?r=0> (Last visited on September 1, 2020).
[4]Jennifer Rimm, "Booming Baby Business: Regulating Commercial Surrogacy in India" 30 *University of Pennsylvania Journal of International Law* 1429, 1432 (2009).
[5]Neeta Lal, "India's booming surrogacy business", *The Guardian*, December 30, 2009, *available at* <https://www.theguardian.com/world/2009/dec/30/india-women> (Last visited on October 23, 2020).

surrogacy'[6] has been defined as the surrogacy where the surrogate mother does not earn any monetary compensation for her pregnancy or relinquishment of the surrogate baby. This subsequent change in the legal position not only prohibits commercial surrogacy agreement but also criminalizes the practice. Chapter VII of Bill of 2016 declared anyone who was found indulging in such practice will be punished severely.[7] The Bill of 2016 could not get the parliament's approval and was referred to the parliamentary standing committee. The committee recognized the defect and gave 42 recommendations in the 102nd report. But only 13 were implemented by the government in The Surrogacy (Regulation) Bill, 2019 (hereinafter '*Bill*'). The Bill drew heavy criticism for its regressive approach and lack of clarity from legal experts and chief stakeholders of the surrogacy industry. So, after a great hue and cry against the Bill, the government appointed a Rajya Sabha Select Committee to look after legal and ethical issues.

The paper presents arguments against the ban of commercial surrogacy, which is proposed by the Bill. For a better understanding, the paper is divided into parts. However, the paper is neither about analyzing the whole Bill nor comparative study between U.S. and Indian laws of surrogacy. The paper took the help of U.S. cases because of two reasons; first, both U.S. and India are common law countries, and second, lack of jurisprudence related to surrogacy in India.

Since, there is no provision for surrogacy agreement (or, surrogacy contract) in the Bill. Part II of the paper discusses the arguments on enforceability of commercial surrogacy agreement to bring certainty to determine the status of parenthood in India. It reveals the problem associated with the domestic surrogacy agreement and shows that commercial surrogacy agreement is valid, conscionable, and not against public policy. Part III analyzes how the Bill suffers from constitutional infirmities. Part IV discusses the arguments made by critics and supporters of the commercial surrogacy. Part V emphasizes the necessity of a regulatory framework and the positive recommendation made by the Rajya Sabha Select Committee. The paper ends with concluding remarks by supporting the legalization of commercial surrogacy entered through surrogacy agreement.

[6]Government of India, "Report of the Standing Committee on the Surrogacy (Regulation) Bill, 2019" p.no. 2 (Rajya Sabha, 2020).
[7]*Baby Manji Yamada v. Union of India & Anr,* (2008) 13 SCC 518.

II. SURROGACY AGREEMENT: CONTRACTUAL ASPECT

A surrogacy contract is an agreement between an infertile-intended couple and a surrogate mother (gestational carrier), creating contractual obligations that are enforceable under the Indian Contract Act, 1872.[8] There must be *consensus ad idem* between the parties for this advanced scientific reproductive procedure to take place in Fertility Centres registered under the Indian Council of Medical Research. The surrogate mother voluntary agrees to be artificially inseminated with the embryo of the intended couples, and subsequently terminate her parental right and responsibility towards the baby in favour of the intended couple.[9] Furthermore, the intended couple will provide financial consideration and medical facilities to the surrogate. We have to apply the Indian Contract Act to enforce the agreement, because there is no specific law regulating surrogacy agreement.[10] There is a dire need of an ironclad agreement for the enforceability of the surrogacy agreements between the parties before initiating the whole surrogacy process. The contract would remind the parties of their contractual obligations and duties to honour the contract.[11] In India, an agreement becomes enforceable when it satisfies all the conditions (i.e., free consent, competent parties, lawful consideration and lawful object) laid down under section 10 of the Indian Contract Act.

The enforceability of surrogacy agreements is an assurance of mutual benefit to the parties involved in the contract.[12] A well-drafted contract will protect the parties and help settle any conflicts which might arise during or after the process of surrogacy.[13] If it is not enforceable, then there will be a rise in numerous

[8]Naman Mohnot & Richa Vinod Singh, *Surrogacy and Law* 77, 78 (Mohan Law House, New Delhi, 2018). In the paper the man who wants to have child through surrogacy is referred as "*intended father*," or "*legal father*" and the women "*legal mother*," or "*intended mother*." The intended father and mother collectively referred as "*intended couple*".

[9]Richard A. Epstein, "Surrogacy: The Case for Full Contractual Enforcement" 81 *Virginia Law Review* 2305, 2307 (1995).

[10]USHA R. SMERDON, "India", in Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: Legal Regulation at the International Level* 187-218 (Hart Publishing, 2013).

[11]Mrinal Vijay, "Commercial Surrogacy Arrangements: The Unresolved Dilemmas" 3(1) *UCL Journal of Law* 200, 229 (2014).

[12]Richard A. Posner, "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood" 5 *Journal of Contemporary Health Law and Policy* 21, 23 (1989).

[13]*Supra* note 11 at 230. If, a party breaches the agreement then the other party can approach civil court under section 9 of the CPC, 1908. Additionally, the intended couple can move the application under section 4 of the Guardian and Wards Act, 1890 as an alternative; *Also see, Dr. Mrs. Kaushal Kadam v. Union of India*, 2015 SCC OnLineBom 8052, para. 12, here the High Court of Bombay held that the commercial surrogacy integrally connects the intended couples, the surrogate and the Fertility Clinic. The doctors of the Fertility Clinic also have a *locus standi* by applying principles of legitimate expectation and promissory estoppel (emphasis added).

problems.[14] So, this piece of paper is essential for the surrogacy process because it could mean the difference between having a successful surrogacy and facing legal actions. In the world of surrogacy, the majority of the litigation lies in determining the status of parenthood, which can easily be solved through enforceability of a surrogacy agreement.

The prime focus of this contract is on the welfare of the child born out of surrogacy.[15] Hence, the Indian Courts applied the concept of '*best interest of the child*'[16] to determine the custody of a surrogate baby when the first case of surrogacy, i.e. the *Baby Manji Yamada v. Union of India & Anr.*, knocked on the door. In re *Baby Manji*, a Japanese couple entered into a commercial surrogacy agreement with an Indian surrogate mother in Anand, Gujarat. Later, the couple got divorced, and the father demanded custody of the baby. The Supreme Court held that the custody of the baby should be awarded to the father because he is genetically related to the baby. The apex court also recognized the validity of a commercial surrogacy agreement and directed the legislature to enact a legislation to regulate surrogacy industry effectively.[17]

A. Intention Based Argument to Determine the Parenthood

Before entering into any contract, the intended couples and the surrogate must convey their specific intention and create legal obligations that can be enforced by the law.[18] A well-drafted contract between the parties, who will stick to their real intention of carrying out their contractual obligation, reduces the possibility of breaches.[19] The intention is a crucial element for the formation of a surrogacy agreement. In a surrogacy agreement, the surrogate consciously and intentionally agrees to hand over the baby to the intending parents. The California Supreme Court in *Johnson v. Calvert,*[20] observed that the intended couple had no intention to give the zygote as a gift to the surrogate mother in gestational surrogacy.[21] The only intention of the parties at the time of agreeing

[14]*Id.* at 229.
[15]*Supra* note 9 at 2317.
[16]AIR 2009 SC 84.
[17]*Supra* note 8 at 56.
[18]Randy E. Barnett, "Some Problems with Contract as Promise" 77 *Cornell Law Review* 1022, 1028 (1992).
[19]Deborah S. Mazer, "Born Breach: The Challenge of Remedies in Surrogacy Contracts", 28 *Yale Journal of Law & Feminism* 211, 238 (2016).
[20]851 P.2d 776 (Cal. 1993).
[21]Andrew W. Vorzimer, "The Egg Donor and Surrogacy Controversy: Legal Issues Surrounding Representation of Parties to an Egg Donor and Surrogacy Contract" 21 *Whittier Law Review* 415, 417 (1999).

is to enable the intended couple to have a baby through the surrogacy process, and the surrogate mother to carry the baby of the intended couple to term and relinquish custody of the baby after the birth.[22]

If none of the parents has any biological link with the baby, then with the help of intention-based argument, we can resolve the dilemma of parental status. In the case of *Buzzanca v. Buzzanca*,[23] the intended couple went for gestational insemination with the help of anonymous genetic donors. When the couple got divorced barely a few months before the birth of the baby, the intended father tried to evade his parental responsibility. He contended that the baby is not born out of the marriage and he has no genetic relationship with the baby. The court rejected the contention and held that even though the intended father has no genetic or biological relationship with the baby, the baby would have never been born if he had not intended for the artificial insemination.[24] The court cited law reviews of Professor John Lawrence Hill to support the intention-based argument. He focused on the relevancy of the parties' pre-birth judgment and prioritized such mental element over the biological connection. Further, Professor Hills quoted, '*the child would not have been born but for the efforts of the intended couple*'.[25] Therefore, the inception of the whole process is born out of the intending parents, making them '*first cause*' of the gestational surrogacy in entirety.[26] So, based on the intention-based argument, the intended couple got parental status. Further, the court in *Buzzanca* case differentiated between enforceability of the surrogacy agreement and determined the status of parenthood according to the intention of parties of the surrogacy agreement. In this case, neither of the parties shared a biological connection, but the court gave the child to the intended couple by acknowledging their prior consent for initiating artificial insemination.[27]

With the help of principles laid down by *Buzzanca* and the intention-based argument, we can give the right to same-sex couples and single persons through the pre-birth judgment process of determining the parental status.[28] Many western countries encourage this parenthood because it gave the happiness of

[22]*Supra* note 8 at 87.
[23]72 Cal. Rptr. 2d 280 (Ct. App. 1998).
[24]Bonnie Steinbock, "Defending Parenthood" 13 *International Journal of Children's Right* 287, 288 (2005).
[25]John Lawrence Hill, "What Does it Means to be a Parent – The Claim of Biology as the Basis for Parental Right" 66 *New York University Law Review* 353, 414 (1991).
[26]*Id.* at 414.
[27]*Supra* note 21 at 424.
[28]*Id.*, at 426.

being a parent to those who had been historically denied, like gay couples, unmarried or widowed person and transgender.[29]

B. Genetic Relation Based Argument to Determine the Parenthood

In recent years, the world started perceiving surrogacy in a positive way which substantially diminished the hostility towards commercial surrogacy. One of the reasons this happened because the intended couple favour gestational surrogacy over traditional surrogacy. The traditional surrogacy often juxtaposes the gestational surrogacy when it comes to establishing a biological link between the surrogate mother and the baby.[30] Such differences can be analyzed by distinguishing the *Baby M* case[31] from the *Johnson* case.[32] In re *Baby M*, there is a biological link between the surrogate and the baby. On the other hand, in the *Johnson* case and every gestational surrogacy case, the surrogate has no biological linked with the baby. In this type of surrogacy agreement, the surrogate mother enters only intending to give service, i.e., to carry the fetus inside her and then deliver the baby to the intended couple.[33] Both the parties favor gestational surrogacy, knowing that this arrangement is more standard because of its certainty about the status of parents, and the advancement of technology made pregnancy more predictable and less costly.[34] Seeing these advantages, intended couples prefer gestational surrogacy over traditional surrogacy, and lawmakers also aim to make gestational surrogacy mandatory.[35]

If we see the world of surrogacy through the lens of the *Johnson* case, the court gave the judgment by considering the strength of the biological or genetic relationship of the intended couple with the baby. This is because the embryo is entirely made up of the intended couple's gametes or the donor's gamete. Whatsoever, the surrogate mother has no biological relationship with the baby. Hence, this biological determination implies that the intended couple has genetic consanguinity and more maternal bonding than the surrogate. As per the 2005 Indian Council of Medical Research (ICMR) guidelines, the surrogate cannot be

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[29]DORON DORFMAN, "SURROGATE PARENTHOOD: BETWEEN GENETICS AND INTENT" 3 *JOURNAL OF LAW AND BIOSCIENCES* 404, 405 (2016).
[30]"About Surrogacy", *Surrogate available at* <https://surrogate.com/about-surrogacy/types-of-surrogacy/traditional-vs-gestational-surrogacy-whats-best-for-my-family/> (Last visited on May 27, 2020).
[31]*In Re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988).
[32]Elizabeth S. Scott, "Surrogacy and the Politics of Commodification" 72 *Law and Contemporary Problems* 109, 121 (2009).
[33]*Supra* note 8 at 91-92.
[34]Martha A. Field, "Compensated Surrogacy" 89 *Washington Law Review* 1155, 1158 (2014).
[35]The Surrogacy (Regulation) Bill, 2019, s. 4(iii)(b)(III).

genetically or biologically related to the baby.[36] Further, the Indian district courts made it clear that the surrogate is not the legal mother and reiterated that the intended mother has to be treated as the legal mother.[37] Since lack of genetic relation makes it easy for the surrogate to give away the baby.[38] A lot of surveys and interviews found that in the psychological screening, surrogate mothers do not feel maternal bonding because they have no genetic relationship with the baby.[39] This delegitimizes the surrogate mother's right to continue a relationship with the baby.[40] Additionally, the *Johnson* case concluded by observing the intention of the parties, as per the contract, that the surrogacy agreement is a service contract where the surrogate provides service by carrying the baby.[41]

Further, the court said that surrogate mothers do not perform this service just for fun.[42] If a woman wants to work as a surrogate mother, then it means that she agrees for a herculean task. The surrogate along with the intended mother has to go through many screening tests[43] and endure the excruciating labor pain of giving birth. John K. Mason, Michael D. A. Freeman, and Donna Dickenson, legal commentators on the surrogacy law, viewed the contract is for the gestational service and emphasized on valorizing the service and sacrifice of a surrogate because the value of bearing a baby earns reputation and empowers women in the society.[44] The contract foregrounds reproductive labor, refuting the '*baby as a property*' point by considering that the baby born from surrogacy cannot be a property or object of a contract.[45] Keeping an eye on the socio-economical aspect, nothing is demeaning and degrading in executing a service contract where the economic need is the reason behind the promise. Such commercialization of surrogacy promotes gender equality and solves the

[36] National Guidelines for Accreditations, Supervision & Regulation of ART Clinics in India, India, *available at*: https://main.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf (Visited on 30 June, 2021).
[37] *Jai Krishna V. Persaud & Anr .v. Tara Kumari & Anr.*, Suit No. 298/12.
[38] Amrita Pande, "At Least I Am Not Sleeping With Anyone: Resisting the Stigma of Commercial Surrogacy in India" 36 *Feminist Legal Studies* 292, 308 (2010).
[39] Lorriane Ali and Raina Kelly, "The Curious Lives of Surrogates", *Newsweek*, April 7, 2008, *available at* <http://claradoc.gpa.free.fr/doc/128.pdf> (Last visited on August 19, 2020).
[40] Janice C. Ciccarelli & Linda J. Beckman, "Navigating Rough Water: An Overview of Psychological Aspects of Surrogacy" 61 *Journal of Social Issues* 21, 21 (2005).
[41] *Supra* note 32 at 122.
[42] Ayan Guha & Neha Chauhan, "Regulation of Commercial Surrogacy in India: Some Suggestions" 6 *Indian Journal of Law & Justice* 92, 97 (2015).
[43] *Dr. Mrs. Kaushal Kadam v. Union of India*, 2015 SCC OnLineBom 8052, para. 11.
[44] Margaret Brazier, "Can You Buy Children?" 11 *Children and Family Law Quarterly* 345, 350 (1999).
[45] Donna Dickenson, *Property in the Body: Feminist Perspectives* 69 (Cambridge University Press, 2nd edn., 2017).

problem of infertility among individuals.[46] Further, it liberates a poor woman from the clutches of traditional patriarchal society by giving her economic independence and helps a couple to have a biologically related child.[47]

C. Repercussion of Altruistic Surrogacy with a Close Relative

In India, both commercial and altruistic forms of surrogacy are currently legal. The distinguishing factor between them is the monetary consideration paid by the intended couple to the surrogate for her gestational service. Such consideration exists in commercial surrogacy, whereas the intended couple only pays for the medical expenses and insurance coverage in altruistic surrogacy.[48] Unfortunately, the government has proposed an absolute ban on commercial surrogacy through the Bill. Only legalizing altruistic surrogacy, which does not allow any consideration for surrogate's service as the contract is made under natural love and affection between close relatives and family members. This is a kind of contract where only Section 25(1) of the Indian Contract Act will be applicable. However, the term '*close relative*'[49] is neither defined in the Bill nor judicially construed,[50] leaving room for misuse and abuse of the law.

In a contract (domestic agreement) between two family members, the effectiveness of a contract is at its lowest, but the effectiveness reaches its peak in a commercial contract.[51] Equal bargaining power between the parties is the differentiating element between domestic agreement and commercial contract. In commercial contracts, parties tend to be equal. If not, special welfare laws are there to protect the vulnerable party. On the contrary, in a domestic agreement, there is an inherent inequality and hierarchy among the family members.[52] The possibility of exerting undue influence over a family member is more than what it would be with a stranger. Hence, the chances of the surrogacy law misused by the intended couple will be higher in altruistic surrogacy cases.

Surrogate mothers have experienced that indulging in surrogacy with a close relative tends to be more complicated than with a stranger.[53] In the case of

[46]June R. Carbone, "The Role of Contractual Principles in Determining the Validity of Surrogacy Contract" 28 *Santa Clara Law Review* 581, 595 (1988).
[47]*Id.* at 588.
[48]The Surrogacy (Regulation) Bill, 2019, s. 2(b).
[49]Government of India, "Report of the Standing Committee on the Surrogacy (Regulation) Bill, 2019" p.no. 16 (Rajya Sabha, 2020).
[50]*Nisar Ahmed v. Rahmat Begum*, AIR 1927 Oudh 146.
[51]*Supra* note 46 at 581.
[52]*Id.* at 584-585.
[53]Kim Cotton, "Surrogacy Should Pay" 320 *British Medical Journal* 928, 928-29 (2000).

Munoz v. Haro,[54] an illiterate woman was manipulated by her cousin into gestational surrogacy. There are few similar scathing incidents where family members have behaved in '*a wicked and selfish way*'[55] by forcing their close relatives to get pregnant and carry their baby. Inside a family, a woman can be manipulated or coerced into surrogacy in a very clandestine way. But there will be very little chance for such emotional blackmail if surrogacy is done with someone outside the periphery of the family.[56] Both mental and physical abuse happens against women in a closed room of the Indian family, making it a critical zone for violence.[57] Indian families are infamous for domestic violence and gender subordination, making the whole altruistic surrogacy a very utopian vision to think that the family is a safe-haven for women.[58]

D. Against Public Policy

Section 23 of the Indian Contract Act enables interference by the Indian courts in the agreements having unlawful object or consideration. And Courts have held such agreements to be void and opposed to public policy.[59] The doctrine of public policy is a branch of common law, and just like other branches, it is also regulated through precedents.[60] Although, there is not a single judgment given by the Indian Court declaring commercial surrogacy agreement an unconscionable contract and opposed to public policy.

Opponents of commercial surrogacy, argue against commodification, dehumanization or exploitation of the poor surrogate mother by the rich intended couples. They contend that the surrogate gets coerced to carry the baby because of her poor financial condition, or she agrees without understanding the outcome of the surrogacy.[61] The trail of these contentions goes back to the one of the oldest case of surrogacy, the *Baby M* case, where the Supreme Court of New Jersey called such agreement as baby-selling agreements, since it has the potential to exploit all the parties involved. Another central contention is that

[54]No. 572834 (San Diego Super.Ct. 1983).
[55]"Mother Forced Daughter, 14, to Become Surrogate to Provide Her Own Child", *The Telegraph*, June 23, 2020, *available at*<https://www.telegraph.co.uk/news/uknews/10024450/Mother-forced-daughter-14-to-become-surrogate-to-provide-her-with-another-child.html> (Last visited on June 30, 2020).
[56]*Supra* note 53 at 928.
[57]Mangala Subramaniam et al., "Women's Movement Groups in State Policy Formulation: Addressing Violence against Women in India" 44 *Indian Anthropologist* 37, 38 (2014).
[58]Sharmila Rudrappa, "Why Is India's Ban on Commercial Surrogacy Bad for Women" 43 *North Carolina Journal of International Law* 70, 90 (2018).
[59]*Central Inland Water Transport Corp Ltd. v. Brojo Nath Ganguly*, (1986) 2 SCR 278.
[60]Pollock & Mulla, *The Indian Contract Act, 1872* 533 (LexiNexis, 15th edn., 2018).
[61]*Supra* note 32 at 109-10.

commercial surrogacy agreement is an unconscionable agreement because the surrogate mother is in an unequal bargaining position.[62] The question that is to be addressed, in light of Section 23 is whether the surrogacy contract shall be declared void because it contravenes the public policy.

After, the Indian Court, in the case of *Baby Yamada*, gave a very pro-contract and pro-surrogacy judgment.[63] The Gujarat High Court in the case of *Union of India & Ors. v. Jan Balaz & Ors.*,[64] held that commercial surrogacy is legal in India, but it needs to be regulated through legislation. Similarly, the critiques of the surrogacy shared the same vision to protect poor surrogates by demanding stringent laws and regulations.[65] However, instead of regulating it, the Indian government is planning to do the opposite by banning commercial surrogacy.[66]

i. Baby-selling Agreement and Commodification of the Surrogate.

The commodification argument was dismissed by the Supreme Court of Kentucky in *Surrogates Parenting Associates Inc. v. Armstrong*, where it was held that in surrogacy agreements

> '*the essential consideration is to assist a person or couple who want a baby but are unable to conceive one in a customary manner to achieve a biologically related offspring*'.[67]

This reasoning given by the court was significant for its efforts to draw a distinction between baby-selling and surrogacy. In many courts, it has been held that gestational surrogacy, where the surrogate is not genetically related and only provides service, is not a baby-selling agreement.[68] Implying that, there is no illegitimate commodification in surrogacy. Besides, the Supreme Court of Michigan in *Syrkowski v. Appleyard*,[69] held that the intended father could not buy a baby who was already his own. The court found it irrelevant to consider

[62]Stephen G. York, "A Contractual Analysis of Surrogate Motherhood and A Proposed Solution" 24 *Loyola of Los Angeles Law Review* 395, 404 (1991).
[63]*Supra* note 8 at 56.
[64]AIR 2010 Guj 21, para. 10.
[65]*Supra* note 58 at 92-94.
[66]Sharmila Rudrappa, *Why India's New Surrogacy Bill Is Bad for Women*, August 25, 2016, *available at* <https://liberalarts.utexas.edu/prc/op-eds/rudrappa-huffington-post.php> (Last visited on August 2, 2020).
[67]704 S.W.2d 209 (Ky. 1986).
[68]*Supra* note 4 at 1449.
[69]362 N.W.2d 211, 420 Mich. 367 (1985).

the argument of commodification if both biological father and legal father were the same.[70] Also, in the *Johnson* case, the court said,

> '*surrogacy does not turn children into commodities despite the fact that they are effectively the subject of a contract*'.[71]

The court further observed that the agreement involved informed, rational, and free consent by the surrogate mother to use her body, and there is no evidence which substantiates the exploitation of the surrogate by coercive means. Besides, it has been observed in many qualitative and quantitative studies from a sociological and psychological point of view that surrogate mothers felt very happy and positive throughout their surrogacy journey and they do not develop any kind of emotional attachment with the baby.[72] On numerous occasions, Indian courts have taken inspiration from American Courts to settle many complex legal issues, and a similar approach is needed to distinguish between baby-selling and surrogacy.[73]

ii. Unequal Bargaining Power of the Surrogate.

In reply to the contention that a surrogate woman agrees without knowing the consequences, it must be considered that contract law only recognizes the decision of the surrogate while entering into the contract, which is free from hormonal and emotional changes that accompany pregnancy.[74] Additionally, there are psychological screen tests to avoid any possible risk. In the *Baby M* case, the psychologist warned,

> '*the surrogate mother demonstrated certain traits that might make surrender of the child difficult and that there should be further inquiry into this issue in connection with her surrogacy*'.[75]

But, this information was never conveyed to the intended couple. If they had known this, they would have ended the surrogacy agreement immediately.

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[70]Clifton Perry, "Surrogacy Contracts: Contractual and Constitutional and Constitutional Conundrums in the Baby 'M' Case" 9 *Journal of Legal Medicine* 105, 109 (1988).
[71]*Supra* note 42 at 97.
[72]Elly Teman, "The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychological Scholarship on Surrogate Motherhood" 67 *Social Science & Medicine* 1104, 1110 (2008).
[73]Simi Rose George, "Reproductive Rights: A Comparative Study of Constitutional Jurisprudence, Judicial Attitudes and State Policies in India and the U.S." 18(1) *Student Bar Review* 69, 71 (2006).
[74]*Supra* note 46 at 597.
[75]*In Re Baby M*, 109 N.J. 396 (N.J. 1988).

Because why would anyone want to enter into such contract with an unqualified party. So, the intended couples, surrogate mother, and surrogate mother's husband must go through psychological screening to the extent their doctor determines before implanting the embryo into the surrogate's uterus.[76]

To maintain the negotiating power of the surrogates the salary should neither be too high nor too low. Low salary manifests the unequal bargaining position, while large sums may become even more predatory.[77] Ms. Sonali Kusum, a member of the International Surrogacy Forum, suggested that a government body should regulate and fix the consideration amount for surrogacy service to prevent the problem of unequal bargaining power.[78] Posner's theory says parties enter into a surrogacy contract because they get mutually benefitted.[79] In our opinion, a provision for surrogacy contract in the Bill would help in designing an optimal contract, which is acceptable to all the parties. Such provision will provide certainty and safeguard to all the parties, and prevent exploitation of a party from the hands of other party.

Therefore, the contention about the surrogacy contract being in contravention of the public policy can be resolved by fixing the problem of commodification and unequal bargaining position of the surrogate through laws and regulations.

III. THE REGRESSIVE BILL: CONSTITUTIONAL ASPECT

Progressivism means the principles, beliefs, or practices of progressives, which, according to the observations made by Emile Durkheim, meant the enhanced possibilities for individual freedom in forms of organic solidarity.[80] The government is empowered with the task of bringing political, economical, and social changes to ensure that the society progresses and accepts new ideas.[81] However, the government is seeking to obstruct this progress by proposing the Bill filled with lacunas and ambiguous provisions, which amplify the archaic patriarchal culture by invalidating the labour of the surrogate mother. The Bill seeks to put a blanket ban on commercial surrogacy, which is a well-organized social practice in this progressive society. And only envisages the continuation

[76]*Supra* note 8 at 90.
[77]*Supra* note 4 at 1444-45.
[78]Government of India, "102nd Report of the Department-Related Parliamentary Standing Committee on the Surrogacy (Regulation) Bill, 2016" p.no. 5 (Ministry of Health and Family Welfare, 2017).
[79]*Supra* note 12 at 22.
[80]ERLYN INDARTI, "PROGRESSIVE LAW REVEALED: A LEGAL PHILOSOPHICAL OVERVIEW" 3(1) *DIPONEGORO LAW REVIEW* 28, 29 (2018).
[81]*Id.* at 30.

of altruistic surrogacy in a restrictive manner. It is in direct contravention with many fundamental rights that are inherent and inalienable for every human being under the Constitution of India, 1950. Thereby, the complete prohibition on commercial surrogacy is grossly unreasonable, arbitrary, and not germane to the golden triangle (i.e. Article 14, 19 and 21) of the Indian Constitution.

A. Violation of Article 14

The Bill directly violates Article 14 of the Indian Constitution by not allowing LGBTQ, single, divorced or widowed parents, and live-in couples to avail any form of surrogacy.[82] The government has not justified its decision to exclude certain groups from the Bill with any reasonable explanation. The Bill was introduced with the objective of putting an end to exploitation that the surrogates were facing. However, the exclusion of certain groups has no direct or indirect relation with the objective intended to be achieved by the government through this ban.[83] The above-mentioned groups' right to be equally treated has not been respected as they are being discriminated and treated differently. Consequently, the Bill fails to satisfy the test of reasonable classification based on an intelligible differentia which is a part of Article 14.[84]

This will be a travesty of justice if the Bill does not allow the status of parenthood to single males and females, while other enactment shave allowed such parenthood.[85] So, at this hour the question which arises is why individuals will not be allowed to have a child through surrogacy. Besides this, exclusion of the LGBTQ community is another concerning issue that highlights the repressiveness of the Bill. Even after the decision of the Supreme Court of India in the case of *Navtej Singh Johar*,[86] which decriminalized Section 377 of the Indian Penal Code, 1860 and held that sexual orientation is an essential aspect of self-identity protected under Article 21 of the Constitution.[87] Now, with the

[82]*Simran Aggarwal* & *Lovish Garg*, "The New Surrogacy Law in India Fails to Balance Regulation and Rights", November 23, 2016, *available at* <https://blogs.lse.ac.uk/humanrights/2016/11/23/the-new-surrogacy-law-in-india-fails-to-balance-regulation-and-rights/> (Last visited on September 18, 2020).
[83]*Id*.
[84]Nitesh Mishra, "Commercial Surrogacy & the Regulation Bill*"*, *Law Times Journal*, March 1, 2019, *available at* <http://lawtimesjournal.in/commercial-surrogacy-the-regulation-bill/> (Last visited on August 10, 2020).
[85]The Adoption Regulations, 2017, s. 5(2); The Juvenile Justice (Care and Protection of Children) Act, 2015, s. 57(3).
[86]*Navtej Singh Johar v. Union of India thr.Secretary Ministry of Law & Justice*, (2018) 1 SCC 791.
[87]Shubhankar Tiwari & Aditi Mishra, "Surrogacy (Regulation) Bill 2019: A Regressive Move on the Verge of Becoming a Reality", *RMLNLU Law Review Blog, May 4, 2020, available at* <https://rmlnlulawreview.com/2020/05/04/surrogacy-regulation-bill-2019-a-regressive-move-on-the-verge-of-becoming-a-reality/> (Last visited on October 8, 2020).

decriminalization of consensual sexual acts between same-sex couples, many of them would desire to have a genetically related baby. Despite the judgment, there is a lacuna yet to be filled by legislation that will legalize marriages between same-sex couples, and give everybody a chance to have a family without any discrimination based on sexual orientation.[88] But the Bill has conceptualizes surrogacy as a privilege of heterogenic couples by not giving an equal status to non-heterogenic couples and single parents.

B. Violation of Article(19)(1)(g)

Article 19(1)(g) of the Constitution allows all the citizens to practice any profession, or to carry on any occupation, trade or business, but this is not an absolute right and can be restricted by the state on the grounds laid down under Article 19(6). One of the grounds specified under Article 19(6) is in the interest of the general public, which, according to the government, is a significant factor as to why it was necessary to impose a complete ban on commercial surrogacy.[89] However, it is essential that restrictions imposed should not be arbitrary or excessive, and they must ensure an equal balance between an individual's rights and social interest.[90]

The government failed to realize that many poor women consider surrogacy as a form of labour and are dependent on it for their livelihood. This cannot be said in the present case where the government's non-competence to regulate and safeguard the surrogacy industry from its evils is an essential reason for imposing a blanket ban on commercial surrogacy.[91] Restricting commercial surrogacy will evade the surrogate mother from earning some extra income from this unique employment. A pragmatic approach would have focused on introducing a law enabling regulatory framework seeking to achieve equal balance and common good.[92]Surrogacy is now accepted as a popular method of procreation.[93] So, the way Indian courts have extended constitutional protection

[88]Nayantara Ravichandran, "Legal Recognition of Same-Sex Relationships in India" 5 *Journal of Indian Law and Society* 95, 99-100 (2014).
[89]Anmol Jain & Aditya Saraswat, "The Surrogacy Law in India: Anathema to a Progressive Attitude", *South Asia Journal*, February 23, 2019, *available at* <http://southasiajournal.net/the-surrogacy-law-in-india-anathema-to-a-progressive-attitude/> (Last visited on September 22, 2020).
[90]*Chintaman Rao v. State of MP*, AIR 1951 SC 118.
[91]*Supra* note 89.
[92]*Id*.
[93]DIKSHA MUNJAL SHANKAR, "MEDICAL TOURISM, SURROGACY & THE LEGAL OVERTONES - THE INDIAN TALE"56(1) *JOURNAL OF THE INDIAN LAW INSTITUTE* 62, 68 (2014).

to the right to procreation under Article 21, similar protection should be extended to the surrogacy agreements.[94]

C. Violation of Right to Privacy and Reproductive Autonomy

Many legal experts, including Jurist Soli Sorabjee, the former attorney general of India, have commented on the restrictions imposed by the Bill as '*violation of basic rights of privacy and fundamental rights of reproductive autonomy*'[95] to every individual. The High court of Andhra Pradesh, in the case of *B.K. Parthasarathi v. Government of Andhra Pradesh*,[96] broadly dealt with the subject of reproductive autonomy. It held that the decision about reproduction is a highly private matter for any individual, and any intrusion by the state in such personal matters has to be contemplated by the Judiciary with great caution. The decision to protect the reproductive autonomy of an individual in this judgement was inspired by the case of *Skinner v. Oklahoma*,[97] in which the United States Supreme Court ruled that the right to procreate is one of the fundamental rights of an individual. Since then, the principle laid down, in this case, has been widely used by the Indian Judiciary to deal with the subject of reproductive autonomy.

Additionally, the judgement given by the United States Supreme Court in the famous case of *Roe v. Wade*, stated that an individual has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters'.[98] The Indian Court has concurred with this reasoning and held,

> '*the personal decision of the individual about the birth and babies called "the right of reproductive autonomy" is a facet of "right of privacy"*'.[99]

[94] *ID.*, 68.
[95] "Surrogacy Bill Violative of Privacy Rights", *The Hindu*, November 5, 2016, *available at* <https://www.thehindu.com/news/national/%E2%80%98Surrogacy-Bill-violative-of-privacy-rights%E2%80%99/article16437493.ece#:~:text=Three%20months%20after%20the%20Union,the%20test%20of%20constitutional%20rights.&text=Indian%20couples%20with%20biological%20or%20adopted%20children%20are%20prohibited%20to%20undertake%20surrogacy> (Last visited on October 10, 2020).
[96] (2000) 1 ALD 199.
[97] 316 U.S. 535 (1941).
[98] 410 U.S. 113 (1973).
[99] *B.K. Parthasarathi v. Government of A.P*, (2000) 1 ALD 199.

The Supreme Court of India accepted this view in *Justice Puttaswamy v. Union of India*, by saying,

> '*Privacy includes at its core the preservation of personal intimacies, sanctity of family life, marriage, procreation, home and sexual orientation. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life*'.[100]

D. Unreasonable Restrictions and Ambiguities in the Bill

The Bill is ambiguous and has numerous other problems. Like the narrow definition of infertility,[101] where only Indian couples, who aren't able to conceive after five years of unprotected coitus, will be allowed to have a surrogacy baby. It does not include those couples who cannot conceive due to medical complications such as uterine fibroids, in which carrying a baby to full term is not medically possible. Moreover, the Bill fails to define the meaning of '*close relative*'[102] and restricts an unmarried or childless woman to become a surrogate mother. The government failed to present any legal or medical evidence to support this ban. Similarly, we can see the same travesty when Overseas Citizen of India (OCI), Persons of Indian Origin (PIO) and Non-Resident Indians (NRIs) are not allowed for surrogacy in the Bill. Thereby, a newly revised bill must be introduced, with provisions adhering to constitutional provisions.

IV. THE BAN ON COMMERCIAL SURROGACY: BOTH SIDES OF THE ARGUMENT

A. Arguments for Introducing the Ban

Poverty, hope for a better life, and non-availability of work are some of the reasons why a poor woman chooses surrogacy as employment.[103] Nevertheless, the government failed to consider this and decided to impose a ban on

[100](2018) 1 SCC 809.
[101]Shonottra Kumar, "India's Proposed Commercial Surrogacy Ban Is an Assault on Women's Rights", *The Wire*, November 9, 2019, *available at* <https://thewire.in/law/surrogacy-ban-assault> (Last visited on August 7, 2020).
[102]*Id.*
[103]Ritika Mukherjee, *The Baby Business: A Study on Indian Market of Commercial Surrogacy and Its Implications*, Population Association of America 2015 Annual Meeting (San Diego, 30 April-2 May 2015), *available at* <https://paa2015.princeton.edu/papers/152404> (Last visited on August 14, 2020).

commercial surrogacy. This was based on the reasoning that women extending the services of a surrogate were being exploited by the other chief stakeholders of the industry, i.e., the intended couple and fertility clinics.[104]

The court in *Baby Yamada* case observed, '*The amount a surrogate receives varies widely from almost nothing above expenses to over $30,000*'.[105] This non-uniformity in consideration is due to a lack of regulation in the industry. The steep competitions among poor women who are willing to become surrogates worsen the situation by weakening their negotiating positing. Further, their lack of knowledge and incompetence in negotiating with the intended couple raises another serious question about the validity of surrogacy agreements.[106] It is claimed that these poor women are lured into carrying babies for a meagre amount of money. The consideration received by the surrogates is decided by the fertility clinics, which is often arbitrary, and they keep a majority of the payment made by the intended couple.[107] The guidelines issued by ICMR in 2005 had strictly informed every fertility clinic to abstain from interfering in the monetary transaction between a surrogate and an intended parent, but it did not happen and fertility clinics continued to function arbitrarily.[108]

Numerous studies have revealed that the surrogates who are legally entitled to receive payment are not compensated if the implantation of eggs fails.[109] It is further claimed that the surrogates are subjected to harsh medical procedures that they are not informed about when they agree to enter into the agreement. These procedures result in severe physical and psychological complications causing immense pain, and in some cases, death of the surrogates while delivering the baby.[110] The ban on commercial surrogacy was debated and discussed on several occasions where government officials and ministers declared commercial surrogacy as an extremely exploitative practice and stressed on the point that adapting altruistic surrogacy would be a revolutionary

[104]*Supra* note 58 at 72.
[105]*Baby Manji Yamada v. Union of India & Anr*, (2008) 13 SCC 518, para. 16.
[106]Lori B. Andrews & Nanette Elster, "Regulating Reproductive Technologies" 21 *Journal of Legal Medicine* 35, 41 (2000).
[107]Izabela Jargilo, "Regulating the Trade of Commercial Surrogacy in India" 15 *Journal of International Business & Law* 337, 347 (2016).
[108]*Supra* note 38 at 308.
[109]*Supra* note 103.
[110]Smitha R, "Pramila's Family Claims Yet to get Contract Money", *DNA*, May 26, 2012, *available at* <https://www.dnaindia.com/ahmedabad/report-pramila-s-family-claims-yet-to-get-contract-money-1693978> (Last visited on October 2, 2020).

step for Indian society.[111] The problems associated with altruistic surrogacy had been discussed in the Part II of this paper.

B. Arguments Against the Ban

The critics of this ban have argued that the government's decision to ban commercial surrogacy was based on moral considerations and bioethics rather than understanding what surrogates want.[112] The 102nd report also criticized the decision by stating that there is no reasonable argument as to why commercial surrogacy has to be prohibited.[113] The government failed to conduct an elaborate empirical study to discover the reality and went ahead with the ban without evaluating its consequences on the existing surrogates.[114] The ban has provided no other alternative framework through which these women could support their livelihoods and sustain themselves and their families.[115]

Many surrogates have argued that the income earned through surrogacy work made it possible for them to provide better education to their children, a better home, and able to pay off their debts resulting in better financial conditions.[116] Many women recruited for the work of surrogacy were earlier employed in garment factories or provided domestic services to affluent families. They claimed that on many occasions, they had to work for more than 14 hours in oppressive working conditions, and were subjected to extreme exploitation.[117] They also faced physical and mental problems ranging from respiratory difficulties and urinary tract infections to stress making their lives miserable.[118] They characterized surrogacy as safer and financially productive which gave them a sense of fulfilment and allowed them to improve their autonomy within

[111]Law Commission of India, "228th Report on Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy" (August, 2009).
[112]Sarah Huber et al., "Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy" 33(1) *Journal of Women & Social Work* 69, 81 (2018).
[113]Government of India, "102nd Report of the Department-Related Parliamentary Standing Committee on the Surrogacy (Regulation) Bill, 2016" p.no. 14 (Ministry of Health and Family Welfare, 2017).
[114]Shonottra Kumar, "India's Proposed Commercial Surrogacy Ban Is an Assault on Women's Right", *The* Wire, November 9, 2019, *available at*<https://thewire.in/law/surrogacy-ban-assault> (Last visited on August 30, 2020).
[115]*Supra* note 112 at 80.
[116]Scott Carney, "Inside India's Rent-a-Womb Business", *Mother* Jones, April 2010, *available at* <http://www.motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel?page= 1> (Last visited on September 9, 2020).
[117]Bronwyn Perry, "Surrogate labour: exceptional for whom?", 47(2) *Economy & Society* 214, 223 (2018).
[118]*Id.*, at 223.

the family spheres.[119] Fertility clinics have stated that many women apply to become surrogates, and only those selected are willing to go through the physical and psychological needs of the job.[120] This shows that the surrogates voluntarily choose this profession, so it should not be regarded as exploitative for those willing to be a part of it.[121]

The government also failed to take into account that the ban will result in a healthy black market filled with unqualified doctors and unsafe medical treatments. Its presence may result in more organized crime such as human trafficking.[122] Notwithstanding the risk, these couples are willing to turn to black markets to fulfil their desires even though the Bill prescribes severe punishment for pursuing commercial surrogacy.[123] This is because of the high demand for surrogates, and it can be anticipated that people would not abstain from indulging in commercial surrogacy even if the government proceeds with the ban. But once a black market gets established then it becomes impossible to form a potent legal market for that product. Because why would someone prefer to wait for months and adhere strict norms, while they can easily get the service of surrogacy from a black market by paying some extra money. Illegal clinics will reap all the benefits. This black market will create an illegal international market in surrogacy, which can exploit surrogate children by commodifying them to potential buyers throughout the world.[124]

V. NEED FOR THE ROBUST REGULATORY FRAMEWORK: A SOLUTION

Like the paper discussed in the Part II, a provision for surrogacy contract in the Bill would help regulating the surrogacy process and mitigate disputes. Further, the government must conduct a study to reveal the industry's benefits and vulnerabilities to create a safe and healthy environment for all the women acting as surrogates. Many experts have stated that banning commercial surrogacy will not resolve the problem of exploitation that the surrogates are subjected to, as many ill-equipped fertility clinics will continue to operate even after putting a

[119]*Id*., at 223.
[120]*Id*., at 227.
[121]Kevin Yamamoto & Shelby A.D. Moore, "A Trust Analysis of a Gestational Carrier's Right to Abortion", 70 *Fordham Law Review*93, 165 (2001).
[122]Stephen Wilkinson, "Exploitation in International Paid Arrangements", 33(2) *Journal of Applied Philosophy* 125, 145 (2016).
[123]Kanishka Singh, "Ban Drives Surrogacy-For-Foreigners Underground", *The Sunday Guardian*, January 2, 2016, *available at*<http://www.sundayguardianlive.com/investigation/2446-ban-drives-surrogacy-foreigners-underground> (Last visited on October 11, 2020).
[124]Iris Leibowitz-Dori, "Womb for Rent: The Future of International Trade in Surrogacy" 6 *Minnesota Journal Global Trade* 329, 337-38 (1997).

ban.[125] The government must introduce a robust and strict regulatory framework to ensure that every fertility clinic is registered with the appropriate authority, and ill-equipped fertility clinics must be directed to upgrade themselves and comply with the government's standards to continue operating legally. This framework must track the number of babies born through surrogacy, ensure the presence of qualified doctors, and scrutinize the modern equipment at the clinics to minimize every possible risk.[126] Access to legal opinion and the presence of a counsellor at every fertility clinic should be made compulsory. So, the surrogates would be able to understand their legal rights and the potential benefits and consequences of their decision to agree to become surrogate. The problem of discrepancies in the payment could be resolved if the government introduces a minimum standard payment policy, which would result in surrogates receiving the correct value of their services.[127] The 102nd report also suggested replacing '*compensation*' surrogacy for '*altruistic*' surrogacy so that the surrogate mother could avail reasonable consideration, which would be fixed by the government for the surrogate mother's service. The problem with mandating altruistic surrogacy without remuneration is the enforcement of age-old stereotype that a woman is supposed to stay within the family spheres and her fundamental role is to give birth to children, and she must do it based on the notion of love and duty without expecting to be paid for her services.[128] The European health model has accommodated fertility treatments in its healthcare system and acknowledges that infertility is a medical problem, and nobody has to be ashamed of it.[129] On the contrary, the Indian government has failed to address the problem of infertility, which affects many couples throughout the nation. Because of that, the stigma of infertility continues to exist, and some parts of the society still consider it lowers the reputation of a family.[130] Thus, the government should add a specific provision for alternative dispute resolution to resolve the issue of privacy. As per sub-clause 4(3)(b)(II) of the Bill allows only close relatives who are willing to become surrogate, hence, leaving the

[125]*Supra* note 116.
[126]*Id*; *Also see*, The Surrogacy (Regulation) Bill, 2019, ss. 10, 11, 12, 13.
[127]Helier Cheung, "Surrogate Babies: Where Can You Have Them, and Is It Legal?", *BBC*, August 6, 2014, *available at* <http://www.bbc.com/news/world-28679020> (Last visited on August 23, 2020).
[128]Shubhangi Agarwalla, "Decisional Autonomy as Central to Privacy: Reproductive Rights in India", *IACL - AIDC*, June 14, 2019, *available at* <https://blog-iacl-aidc.org/2019-posts/2019/6/14/decisional-autonomy-as-central-to-privacy-reproductive-rights-in-india> (Last visited on September 12, 2020).
[129]Judith Daar, "Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms" 23 *Berkeley Journal Gender Law & Justice* 18, 27 (2008).
[130]Himani Chandna & Apoorva Mandhani, "Restricting Surrogacy to Relative Won't Work, Doctors Say as Bill Is Tabled in Lok Sabha", *The Print*, July 16, 2019, *available at* <https://theprint.in/india/restricting-surrogacy-to-relatives-wont-work-doctors-say-as-bill-is-tabled-in-lok-sabha/263285/> (Last visited on August 6, 2020).

couples with no choice but to disclose such personal information with their relatives.[131] The Rajya Sabha Select Committee, which was constituted to recommend some changes in the Bill like; expand the ambit of the surrogate mother to every willing woman,[132] increase the period of insurance coverage to 36 months,[133] allow NRI, OCI, PIO, live-in couples, widows and divorced women to avail surrogacy and reduce the period to prove infertility from 5 year to 1 year.[134] Further, allow and regulate altruistic surrogacy for married infertile parents, who are between the age of 23-50 (female) and 26-55 (male).[135] However, the position of commercial surrogacy remained banned. There is a growing consensus among experts, critics of the ban, and surrogates that the government should reverse its decision to impose the ban on commercial surrogacy, and this can only happen if it recognizes reproductive labour as a form of employment and agrees to legitimize the industry.[136] Technological advancements have to be accepted, and at the same time, laws are needed to control the surrogacy industry, which will ensure the protection of the rights and interests of all the stakeholders.[137]

VI. CONCLUSION

Commercial surrogacy has acted as a panacea to the growth of the infertility rate among Indian couples. The thriving practise of commercial surrogacy helped many surrogates to move out of the slough of poverty. The surrogacy industry is well flourished, and it is rapidly expanding. The legislative should intent to draft a specific provision for surrogacy agreement in the Bill, rather creating problems and uncertainty due to lack of one. The passage of the Bill will turn many unfortunate infertile couples' dreams into a nightmare. It will infringe the fundamental rights of individuals and portray India as a homophobic country. Moreover, this blanket ban will encourage the de-regularization of surrogacy, which maximizes illegal business and black marketing while at the same time avoiding any contractual obligation due to a lack of enforceable commercial surrogacy agreement. Therefore, we need to do more research, empirical study and panel discussion before banning commercial surrogacy.

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[131] *Id*.
[132] Government of India, "Report of the Standing Committee on the Surrogacy (Regulation) Bill, 2019" p.no. 31 (Rajya Sabha, 2020).
[133] *Id*., at 29.
[134] *Id*., at 8.
[135] *Id*., at 31.
[136] *Supra* note 58 at 92.
[137] *Supra* note 11 at 217.

TREATY SHOPPING: ABUSE OF DOUBLE TAXATION AVOIDANCE AGREEMENT (DTAA): SPECIAL FOCUS ON THE CASE STUDY OF INDIA'S DTAA WITH MAURITIUS AND THE MLI FRAMEWORK.

Mohak Thukral[*]

The essay is an attempt to explain the concept of 'Treaty Shopping' and traces the response of the Indian Government in tackling this form of Treaty Abuse. The paper will analyse India's DTTA obligation with Mauritius, trace the trajectory of steps taken by the government including passing of GAAR rules and the judicial decisions starting from the Azadi Bachao Andolan Case to the recent Vodaphone Case while dealing with Treaty Shopping. The essay also briefly explains the recent developments in the international tax regime, including the ratification of the Indian Government of ratifying the Multilateral Convention (MLI), and its potential impact on the Indo-Mauritius Tax Treaty.

I. BACKGROUND: EXPLAINING DTAA IN DETAIL

DTAA (acronym for Double Taxation Avoidance Agreement) is a tax treaty entered into by two or several countries to ensure that the taxpayer is not taxed twice for the same income.[1] An income earned by a person is subject to taxation on the basis of the rule of residence or source.[2] As per the rule of residence, the income earned by an assessee would be taxed at the place which is its residential status in the preceding financial year, also known as previous year.[3] The rule of source, on the other hand, dictates that the taxation of income earned by the assessee would take place at the location where the income is earned, i.e., where the source of the income earned is. However, a situation may arise where the country of residence and the country where the income is generated are different for the assessee, i.e., the assessee resides in one country and earns income in another, and owing to different rules of taxation, the assessee is subject to pay

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[1] S. Rajaratnam and B.V. Venkataramaiah, *Treatise on Double Taxation Avoidance Agreements* Volume 1 (Snow White Publication, 2019)

[2] Michael Lang, Pasquale Pistone, et.al., *Source versus Residence: The Allocation of Taxing Rights in Tax Treaty Law: Problems arising from the Existing Tax Treaty Provisions and Possible Alternatives*, (Taxmann Publications, 2008).

[3] Bijal Ajinkya. *Source vs. Residence: Indian Perspective*. (Nishith Desai Associates, 4th Residential Refresher Course on International Taxation, 2010).

tax both in the source country as well as the country of residence. To avoid such a situation where an assessee can be taxed twice, countries enter into DTAAs. Such agreements provide safeguard against the possibility of Double Taxation after mutual agreement between countries party to the said agreement.

In the Indian context, the Section 90 of the Income Tax Act of 1961[4] allows the Indian Government to conclude DTAAs with other countries to prevent double taxation, tackle tax avoidance, and for sharing of information between the countries party to the agreement. Such treaties become a part of the tax statute after notification by the government. It must be noted that DTAAs are considered to be special provisions and special rules, and in a situation where there arises a conflict between the provisions of the Income Tax Act and the provisions of the DTAA, the provisions of the treaty would supersede the act and it will prevail owing to the doctrine of *Generalia Specialibus Non-Derogant*.[5]

II. TREATY SHOPPING EXPLAINED

It is important to note that the benefits of the DTAA are extended only to the residents of a countries which are party to the DTAA. Treaty Shopping takes place when residents of a country, which is not a party to the DTAA, take advantage of the provisions and the benefits extended in the Treaty.[6] Similar to shopping in a market, residents of a third country 'shop for' and obtain the residency of a country which is already a party to the DTAA. Such residents of the third country usually create artificial entities (known as "conduits") so as to access the benefits of the tax treaty. It is considered an "improper use of the tax treaty"[7] because the treaty was not designed to benefit the residents of the third country, and without shopping of the residency, such person would have been ineligible to take the advantages of the tax exemptions and other benefits offered in the DTAA.

The main purpose behind Treaty Shopping is to obtain tax benefits that are offered to the country party to the DTAA. This makes the indirect route of investment and business more beneficial than the direct route, due to the absence of taxation or low tax rates on capital gains, interest incomes, and dividends

[4] Section 90. The Income Tax Act, 1961 (Act 43 of 1961).
[5] *Commissioner of Income Tax vs Shahzada Nand and Sons,* 1966 AIR 1342.
[6] Vincent Arel-Bundock, "The Unintended Consequences of Bilateralism: Treaty Shopping and International Tax Policy." 71 *International Organization*. Pg. 351 (Spring 2017). Available at JSTOR, www.jstor.org/stable/44651944.
[7] *Indo-food International Finance Limited. vs J.P. Morgan Chase Bank,* [(2006) EWCA Civ.158].

earned under the DTAA.[8] Therefore, by using the device of treaty shopping, residents of the third countries usually establish their base in countries which have wide and favorable DTAA Network with other countries. Such countries include Mauritius, UAE, and Switzerland which have a favorable tax network treaty with most countries and hence are used as the base for most multinational corporations. Such an act of Treaty Shopping negatively affects the source country as they lose out on revenue because of the restrictive and low rate of taxation as per the DTAA, and it provides an undue advantage to the residents of the third country, and hence assist tax avoidance. [9]

III. CASE STUDY: THE MAURITIUS ROUTE

India's Tax Treaty with Mauritius is an interesting and useful starting point to understand India's response while tackling the issue of Treaty Shopping. The Treaty between the two countries was signed to encourage "*mutual trade and investment*"[10] in the year 1982 and has been effective since 1983 in both jurisdictions. The Tax Treaty has significant importance for the economy of both countries as Mauritius remains one of the largest contributors of the total amount of FDI (Foreign Direct Investment) in India,[11] and India is one of the largest exporters of goods and services to Mauritius.[12]

Article 13(4) of the Treaty provided an opportunity to the investors from the third country to avoid payment of taxes on account of Capital Gains. Under the Article 13(4) of the DTAA, any capital gains for a resident of Mauritius, arising out of the transfer of shares to be taxed as per the laws of Mauritius.[13] And in the country of Mauritius, such capital gains are exempted from taxation.[14] This made the Mauritius-India route extremely attractive for investors from third

[8] DP Mittal, *Indian Double Taxation Agreements and Tax Laws: A Veritable Article-wise Commentary on OECD Model Tax Convention on Income and on Capital*, (Taxmann Publications, 2014).
[9] Van't Riet, Maarten and Arjan Lejour. "Profitable Detours: Network Analysis of Tax Treaty Shopping." *Proceedings. Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association*. Vol: 108 (2015). Available at JSTOR, www.jstor.org/stable/90023150.
[10] Preamble, Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes of Income and Capital Gains, India-Mauritius (1982).
[11] DPIIT (Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India), "Quarterly Fact Sheet on Foreign Direct Investment (FDI) From April 2000 to September 2016" (2016).
[12] Ministry of External Affairs, Government of India. India- Mauritius Relations. (2016). Available online at: https://www.mea.gov.in/Portal/ForeignRelation/Mauritius_08_01_2016.pdf.
[13] Article 13(4). Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes of Income and Capital Gains, India-Mauritius (1982).
[14] The Income Tax Act, 1995 (Mauritius Revenue Authority). Available online at http://www.mra.mu/download/ITA1995consolidated291015.pdf.

countries, and instead of directly investing in India, they opted for this route to avoid paying Capital Gains Tax and enjoy the benefits that were not intended for them. The Foreign Institutional Investors (FIIs) ended up registering a conduit entity in the jurisdiction of Mauritius, whereby such an entity without being involved in any substantial business or commercial activities in Mauritius, are being used as a tool to make tax-free investments in India.

IV. THE RESPONSE OF THE INDIAN GOVERNMENT TO TREATY SHOPPING

In response to this irregularity, the officers of the revenue department declined the extension of the benefits of tax exemption under article 13(4) to the Foreign Institutional Investors who were prima-facie operating through conduits and were beneficially owned outside Mauritius. Similarly, the Authority for Advance Ruling (AAR) started refusing applications for tax benefits, if the transactions were designed prima facie to avoid payment of taxation.[15] This resulted in the exit of FIIs from India, and hence the Central Board of Direct Taxes intervened. The Board issued a circular dated 13th April 200 with circular number 789 and made the position of the Indian Government clear.[16] It stated that if the Mauritius Government has issued a certificate of residence to a corporation, such certificate of residence would be considered as sufficient evidence for the residence status of the corporation in question, for the application of Article 13(4) of the Treaty. Therefore, irrespective of the fact that a registered company in Mauritius is being involved in any commercial activity or Mauritius or not, the only requirement to obtain tax benefits on Capital Gains in India under the DTAA is the certificate of residence issued by the Government of Mauritius and no further inquiry by revenue officers will be allowed on the same. Therefore, the government legitimized the actions of the residents of the third party using the device of Treaty Shopping.

The legal validity of the Circular issued by CBDT was challenged before the Supreme Court in the landmark *Azadi Bachao* Case.[17] In this case, the Apex Court went on to conclude that Article 13(4) does not require beneficial ownership, or any form of control be established in India or Mauritius. The Court went on to say that the DTAA has no disabling or disentitling provision which could prohibit or declare Treaty Shopping illegal. Such abuse may have been

[15] *Dljmb Mauritius Investment vs Commissioner of Income Tax.* [(1996) 220 ITR 377 (AAR)]
[16] Central Board of Direct Taxes (Department of Revenue), Government of India. Circular No. 789. "Clarification Regarding Taxation of Income from Dividends and Capital Gains Under the Indo-Mauritius DTAC*"* (2002).
[17] *Union of India vs. Azadi Bachao Andolan*, AIR 1986 SC 16.

intended and in fact, permitted owing to scarce foreign capital or technology. Therefore, if the actions of the entity are as per the rules of the DTAA, nothing could affect the legality of the transaction. Further, the court held that the only remedy to avoid the treaty abuse is to bring an amendment into the DTAA entered between the two countries.

The Mauritius route continued to be subject to litigations, however, after the Supreme Court's decision in the *Azadi Bachao* Case declaring the Circular as valid and the upholding the Mauritius Route, the future rulings of the AAR and the Courts followed the same conclusion. In the case of *E-Trade Mauritius Ltd. vs DIT International Taxation*,[18] the court went on to say that there exists no "*legal taboo against treaty shopping*" and Treaty Shopping is not a colorable device. The court held that till the time the entire transaction is not a sham and the documents submitted are bonafide, the act of tax avoidance must not be labelled as objectionable, as the transaction clearly falls within the four corners of law and is by no means prohibited. If an individual or a corporation has planned its affairs according to the provisions of the treaty and the law, the transaction cannot be held as invalid or illegal. The reasoning of *Azadi Bachao* and the validity of the Mauritius Route was affirmed again in the 2012 *Vodafone International* Case of the Supreme Court[19] where the apex court held that requirement of limitation of benefit clause or beneficial ownership clause cannot be read into a tax treaty without an express provision being present, and if the government wishes to avoid Treaty Shopping, they must bring in an amendment into the DTAA.

It must be noted that the Indian Government on numerous occasions tried to bring an amendment into the Tax Treaty entered with Mauritius. However, it was met with serious backlash from the Mauritian authorities and pressure from the investor market. Therefore, such amendments were deferred after failed negotiations with the stakeholders.

V. ANALYSIS OF THE PROTOCOL AMENDING THE DTAA BETWEEN INDIA AND MAURITIUS:

However, on May 10th of 2016, the two countries signed and entered into a Protocol that amended the DTAA entered into between them, in order to prevent

[18] (2010) 324 ITR 1 (AAR).
[19] *Vodafone International Holdings B.V. vs. Union of India* [(2012) 1 S.C.R. 573].

the tax evasion on income and capital gains.[20] The Protocol brought significant changes to tackle the issue of Treaty Shopping by providing the source jurisdiction the right to tax any capital gains arising out of the alienation of shares which were purchased on April 1, 2017 or later. Additionally, the protocol inserted a "*Limitation of Benefit Clause*"[21] and on the fulfilment of the conditions under the said clause, a benefit and concession of 50% of the total tax rate on capital gains would be available on the sale or purchase of shares for the time period between 1st April of 2017 to 31st March of 2019.

The added 'Limitation of Benefit Clause' includes two conditions. First, the entity or the transaction in question must be bonafide and not incorporated or entered into for the "*primary purpose*" of taking advantage of the tax benefit extended in the DTAA. Second, the entity must not a conduit company. The Protocol defines a conduit company as the one which has "*negligible or nil business operations, or with no real and continuous business activities* [being] *carried out in contracting state*". Additionally, the Protocol highlights the situation where an entity can be deemed to "*not be a conduit company*". This may happen when the total expenditure incurred by the entity in the preceding twelve months is equal to or more than twenty-seven lac Indian rupees (INR 27,00,000), or if the entity seeking advantage of the tax benefits listed on a stock exchange recognised by the contracting state.

It is important to note that the Protocol and the resultant amendment was limited to the capital gains that arise on the transfer of shares. There was no change in the existing structure under the DTAA for taxing rights with respect to capital gains on instruments like debentures, convertible debentures, or similar hybrid instruments. The Protocol, further, includes provisions for better transparency, exchange of information, and greater cooperation to avoid tax evasion.

VI. THE MLI FRAMEWORK: DOES IT IMPACT INDIA AND MAURITIUS DTAA?

The BEPS Project (acronym for the Base Erosion and Profit Shifting Project) was undertaken by the OECD (acronym for Organisation for Economic Cooperation and Development) to tackle aggressive tax planning and exploitation of gaps in Treaty provisions. As discussed in the previous parts,

[20] Protocol Amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, 10th May of 2016. Published on 10th August of 2016. [Notification Number: S.O. 2680(E)].
[21] Article 27A. Id.

such Treaty abuse has resulted in the shifting of profits by the corporations to low or perhaps no income tax jurisdiction and avoided payment of taxation to the source countries. The BEPS Project has identified and suggested 15 Action Plans to tackle this and proposed the Multilateral Convention (MLI) as an instrument which can be adopted to give effect to the recommendations of the BEPS Project without going into the time-consuming and bilateral process of amending already existing tax treaties.[22] The Preamble of the MLI states that existing agreements need to be re-interpreted to eliminate treaty gaps that allow for acts of tax evasion, and reduced or non-taxation through tax avoidance strategies like treaty shopping transactions.[23] MLI is an innovative tool that allows the countries to retain a certain level of flexibility to implement these changes (in the form of standardised choices), along with mandating a certain minimum standard that must be adopted by the countries in respect of bilateral treaties to curb treaty abuse. Hence, the Multilateral Instrument not only offers a quick solution to the issue of Base Erosion and Profit Shifting but also allows the countries to retain their autonomy while participating in the process.

The minimum standard provisions include the provisions for the prevention of treaty abuse under BEPS Action 6 and for the improvement of dispute resolution under BEPS Action 14. The minimum standard in BEPS Action 6 related to treaty abuse goes on to identify Treaty Shopping as a major concern and involves requires member parties to express their clear intention to exclude opportunities for treaty abuse practices including treaty shopping in the preamble (Article 6) and provides member parties with three alternative provisions that may be adopted to tackle such treaty abuse (Article 7). These are: First: an extensive Principal Purpose Test (PPT). According to this test, treaty benefits shall be denied, if in light of available facts and circumstances, it's proved that a specific transaction or arrangement was entered only for the tax benefits. Second is a combination of a Principal Purpose Test and a simplified 'Limitation of Benefit' Provision. The third is a detailed and extensive 'Limitation of Benefit' Provision with specific rules targeting conduit financing arrangements in the jurisdictional countries.

[22] OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. Available at: https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf
[23] Preamble. Id.

India has opted for the second option, which is having a Principal Purpose Test and a simplified 'Limitation of Benefit' Provision,[24] whereas Mauritius has agreed for the first option, which is an extensive Principal Purpose Test (PPT).[25] We need to understand that for MLI to be applicable, it must be signed and in force in both the contracting states, i.e., the contracting state must not only be a signatory but should have also submitted the instrument of ratification. In the case of India and Mauritius, both the countries are signatories to the MLI and both of them have submitted the instrument of ratification on 25th June 2019 and 18th October 2019 respectively.[26] However, what is interesting to note is that even though MLI is in force in both the countries, it does not have any effect because India's Tax Treaty is not a Covered Tax Agreement (CTA), i.e. India and Mauritius have not submitted the Tax Treaty entered between them as a CTA under their MLI position. Therefore, MLI would not be applicable to their Tax Treaty, and hence Treaty Abuse will continue to be addressed as per the earlier arrangement. Hence, any change that India and Mauritius want to bring to tackle Treaty Abuse must come through bilateral negotiations between them.

VII. CONCLUDING REMARKS

The case study of India's DTAA with Mauritius provides an interesting insight into the issue of Treaty Shopping and the response of the government of India while dealing with the treaty abuse. The Supreme Court, the Legislature, and the CBDT played an important role in defining India's position with respect to the same. The 2016 Amendment to the Tax Treaty, and the consequent Limitation of Benefit Clause, brought in a major change into the tax regime, however, it is safe to say the loophole is still not completely plugged in.

Lately, the government has been taking aggressive steps to combat impressible tax avoidance and tax evasion. This includes passing of domestic laws like the General Anti Avoidance Rules (GAAR)[27] which allows for greater scrutiny by the revenue department, while focusing on the substance of a transaction and not the form. However, such rules are not applied directly to the issues concerning a Tax Treaty. The Central Board of Direct Taxes in a clarificatory notification

[24] Delloitte, *Multilateral Instrument (MLI) Ratification Impact on Indian tax treaties*. (2019). Available online at: https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/in-tax-multilateral-instrument-ratification-noexp.pdf
[25] Earnest and Young, *Mauritius: Examination of the application of the BEPS MLI.* (2019). Available at: https://www.ey.com/en_gl/tax-alerts/mauritius---examination-of-the-application-of-the-beps-mli
[26] OECD, Signatories and Parties to the MLI: Status as of 25 March 2021. Available online at: https://www.oecd.org/ctp/treaties/beps-mli-signatories-and-parties.pdf
[27] D.P. Mittal, *Law and Practice relating to GAAR*, (Taxmann Publications 2012).

has highlighted that in a situation where the avoidance can be sufficiently addressed by the provisions included in the tax treaty like a Limitation of Benefit Clause, GAAR Rules must not be invoked.[28] In this light, it can be said that the government needs to continue to push for amendments in the Treaties that are not covered under the MLI, including the DTAA with Mauritius, China, Germany, and the USA to avoid loss of tax revenue which is taking place through the device of Treaty Shopping. Such amendments must be aimed at better information sharing, transparency, and with an extensive Limitation of Benefit Clause.

[28] Central Board of Direct Taxes (Department of Revenue), Government of India. Circular No. 7 of 2017. "Clarifications on Implementation of GAAR Provisions Under the Income Tax Act, 1961" (2017).

PANDEMIC & SECTION 144: UNRAVELLING THE DEBATE BETWEEN FREEDOM OF SPEECH AND SUPPRESSION OF FAKE NEWS

Deepnainee Kaushal*

Abstract

The Constitution of India entitles right articulate speech and expression under the dominion of article 19(1)(a). The debate between the extent of such freedom and the restriction posed by the government was recently resurrected in the arduous time of COVID- 19 pandemic when the Mumbai Police Commiserate came up with a circular to control the propagation of fake news and hate messages. The order however, categorically made sharing of messages that criticizes the State Government, a crime. The paper analysis the philosophical viewpoint and Indian legal position with regards to the freedom to speak and express freely of discourse and articulation. The freedom encompasses right to criticize the government within its ambit. The research critiques on use of Section 144 of the Code of Criminal Procedure, 1973 to put a curfew on fundamental rights. Social media has emerged as an important platform of sharing information. However, lately it has been robotically hijacked to promote political propaganda. The outpour of misinformation during Covid-19 pandemic has increased to an extent that it has posed a threat on the doctrine of free speech. In this backdrop, there is undeniably a desideratum for comprehensive analysis of how the freedom operates as an instrument of Constitutional bulwark and to examine how democratic is social media. The paper provides in depth analysis of the gag order and concludes that the principle of proportionality needs to be followed to ensure that fundamental rights are guaranteed without compromising law and order.

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I. INTRODUCTION

> "The maturity of a society committed to a democratic way of life lies as much as in its respect for those who conform as in its deference for those who do not."[1]

The Constitution of India expresses that aegis of freedom of speech is the obligation of the State. Additionally, the purport of the State is the welfare of citizens and establishment of a society where the people who appreciate state are as equally protected as those constructively criticizing it.

The conflict between right to condemn and criticize the the State instrumentalities and maintenance of public order has always been rampant in a democratic setup in so much so that the law enforcement agencies have on various instances under the garb of maintaining public order, endeavored to thwart the rights assured under Article 19(1)(a). With the evolution of technology, the freedom of speech and expression has been accepted over various platforms. The propagation of opinion via mode of Internet has therefore become central percept of article 19(1)(a). Therefore, any restriction to such right must in accordance to Article 19(2).

The right to freedom and the security of states are two equally critical aspects of a democratic nation. There has always been a controversy with regards to the prioritisation of the above two attributes. Internet has deviated from its egalitarian purpose and its beleaguered use to manifest fake news and fulfill political propaganda is at an escalation. However, the role of Internet as a facilitator cannot be overlooked or arbitrarily controlled. The problem though seems to be a simple one but its solution cannot be attained without avoiding a conflict. The answer needs to gauged prudently because no sate can function seamlessly without ensuring sufficient liberty to its citizen. Such liberty cannot be compromised at the altar of security of state and pendulum should remain in center at all times to ensure law and order of state and well-being of citizen is well guarded.

The paper seeks to establish that a new era of progress and reconciliation between freedom and functioning of State is vital to sustain democracy in times of global crisis. It analyses the scope of Fundamental Rights in light of reasonable restrictions. The research critiques the role played by social media to facilitate proliferation of fake news and the exploitation of Section 144 of the

[1] *A.C. Dighe* v. *State of Maharashtra*, 2001 Cri LJ 2203 para. 6.

Code of Criminal Procedure, 1973 [*hereinafter, referred to as* Criminal Procedure Code] to control dissenting views.

II.

III. FREEDOM OF SPEECH CONUNDRUM

A. The Philosophical View

> *"I despise what you say but will defend to the death your right to say it"* [2]

The true essence of freedom of speech is that is has to be defended and protected even at the cost of despising certain individuals.

The right to free speech is justified by twofold explanation. The moral justification flows from the very understanding of what it is to be a 'person'. Therefore, the restrictions on one's speech and expression come in direct conflict with an individual's right of dignity whether in place of the speaker or of the listener or sometimes in both ways. The instrumental reason for the protection of speech are governed by materialistic measures like peace, contentedness, personal and economic growth. Hence, free speech encapsulates a medium to reduce friction and promote societal well-being. The same view was propounded by John Stuart Mill. He developed the nexus between free flow of ideas and development. The humankind must not be deprived of objective truth which can only come into existence after winning the battle with error and half-truth.

The right to free speech however cannot be unscathed. Its scope is restrained by the "harm principle." The doctrine implies that any power in order to be exercised as a right against will of any individual forming part of a civilised society must pass the touchstone that such power exercised against such member is exercised for the greater purpose to prevent harm to others.

The democratic ideal of 'welfare state' flows from legitimacy which in turn is ensured by extensive freedom of speech. Ronald Dworkin provides preconditions for a government in order to be termed as 'democratic'.[3] According to his notion legitimacy and democracy run parallel to each other.

[2] Nigel Warburton, *Free Speech: A Very Short Introduction* 27 (Oxford University Press, USA, 2009).
[3] Ronald Dworkin, "The Right to Ridicule", 53 *New York Review of Books* 44 March (2006).

The legislation of a nation cannot be termed as legitimate unless and until they are adopted after a tedious democratic process of discussion and debates. A process can only be said to be 'democratic' if it allows the people to express their inhibitions with respect to the law and policy and has subsequently accepted the peoples' notion and preferences about how that piece of legislation ought to be. Therefore, democracy is a continuous process which reaches its form by the contribution of all members of society.

B. The Indian Jurisprudential Status

The Preamble to the Constitution of India embodies liberty to express divergent perspectives, opinions, thought and practice diversified beliefs and faith. It inter alia declares India as a 'democratic republic'. The cardinal principle 'that governs the very existence of democratic setup is 'freedom of thought and expression.

i. Fundamental Rights Under Part III vis-a-vis Restrictions

The 'freedom of speech and expression' is Constitutionally backed by Article 19(1)(a) under the head "*protection of certain rights with regards to freedom of speech etc.*" the article states that "*All citizens shall have the right to freedom of speech and expression"*[4]. The right however cannot be read in isolation and its accomplishment is incidental to "reasonable restrictions" provided under article 19 (2). The article states that the "*freedom so guaranteed shall not affect the operation of any existing law, or prevent the state from making any law, as far as the restrictions imposed by the law on freedom are reasonable*".

The article requires the restriction to pass a twofold test. Firstly, it must be sanctioned by law and secondly it must be reasonable. The grounds for imposition of restrictions have been enumerated under the article as follows:

- Sovereignty and integrity of State
- Security of India
- Friendly relations with foreign nations
- Public Order
- Decency or morality
- Contempt of Court
- Defamation or incitement to an offence

[4] The Constitution of India, art. 19.

The Hon'ble Supreme Court in catena of judgements has protected the 'freedom of speech and expression'. In as early as 1950, the Court opined that freedom encompasses the foundation of democracy.[5] The Constitutional bench reiterated the view by upholding that the right is of paramount importance which proposes the preservation of change in legislatures as well as governments to confirm with changing needs of society.[6] The boundaries of freedom were further broadened to include within its domain to incorporate freedom of press because plays an instrumental role in working of a democratic institution.[7]

In *S. Khushboo* v. *Kanniamal and Another*[8], the Apex Court while explaining the genesis of right held that though there is no skepticism in the fact that freedom to transmit speech and expression is not absolute and is tied to certain rational limitations but it certainly not intends to prohibit tolerance of unpopular views. The right therefore demands unrestricted flow opinions and ideas to sustain the informed citizenry. The importance of people to remain well informed on hand is needed for meaningful governance, on the other hand from sociological point of view the culture of open discussion holds great significance.[9]

The Constitution pristinely adopted did not contain the expression "public order". The Constitution (First Amendment) Act, 1978 lead to the addition of "public order" as one of the grounds for restriction under article 19(2).

The Supreme Court has interpreted the expression "public order" to classify those disorders which were of less serious than those affecting the "security of state". The Court drew an analogy of three concentric rings to differentiate the characteristics of both terms. The largest of the ring denotes law and order which is of least severity; within it lies the circle that denotes "public order" and the smallest of the circles represents "security of state".[10]

Thus, on the bases of the above-mentioned analogy, an order which affects law and order would not affect public order and a disturbance of public order would not affect the security of state. The demarcation was further explained by the hon'ble Supreme Court in the case of *Arun Ghosh* v. *State of West Bengal*,[11]

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[5] *Romesh Thappar* v. *State of Madras*, (1950) S.C.R. 594 (602).
[6] *Sakal Papers (P) Ltd. and Others.* v. *Union of India*, (1962) 3 S.C.R. 842 (866).
[7] *Bennett Coleman & Company and Others* v. *Union of India & Ors.* (1973) 2 S.C.R. 757 (829).
[8] (2010) 5 SCC 600.
[9] *Id*., at para. 45.
[10] *Dr. Ram Manohar Lohia* v. *State of Bihar and Others*, (1966) 1 S.C.R. 709 (746).
[11] (1970) 3 S.C.R. 288 (290).

where disruption of public order was pronounced to distress gargantuan part of the community than the infringement of law and order. Thus, the degree and extent of effect of disturbance on the community at large is the determining factor to classify it under the two heads.

The "tendency" is to be interpreted with regards to the article in a liberal way. The provision should be read as a whole and then it should be looked into the fact as to whether in the mind of a reasonable man the freedom in question would lead to a tendency to do a certain offence.[12]

C. The Proportionality Principle

The rule of proportionality is not an alien concept to the Indian Constitution, considering the mention of the word 'reasonable' under Article 19. In a catena of decisions, the Apex Court has held "reasonable limitations" are imperative for the acknowledgment of opportunities revered under Article 19. The 9-judge bench of the Hon'ble Supreme Court laid the emphases on the doctrine in the following manner.

> *"...Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law..."*[13]

The essence of the doctrine, can be best described by the aphorism *"you must not use a steam hammer to crack a nut, if a nutcracker would do.*" [14] The vital feature enabled by the proportionality test is to decipher whether a measure is proportionate with regards to its restriction posed on the Fundamental right.[15] The restriction must have a "reasonable nexus" with the object that is ought to be achieved. In the scenario of lack of the required proximity with the object, it cannot be termed that the restriction put passes the test of reasonableness within the meaning of article 19(2).

The word "reasonable" incapsulates intelligent caution and deliberation. The legislation in dispute with freedom if excessively invades the right then it is arbitrary exercise of power[16]. A balance needs to be maintained between

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[12] *State of Bihar* v. *Shailabala Devi*, (1952) S.C.R. 654 (664).
[13] *Infra* note 16.
[14] *R* v. *Goldsmith*, [1983] 1 WLR 151, (155).
[15] *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1(509) para. 325.
[16] *Chintaman Rao* v. *The State of Madhya Pradesh*, (1950) S.C.R. 759.

freedom guaranteed under article 19(1) and grounds of restrictions enumerated under article 19(2).

In order to determine reasonableness of a restriction, The Apex Court devised a set of parameters in the case of *M.D.C.R.C.* v. *State of Madhya Pradesh*[17] that need to looked into before reaching to conclusion with respect to reasonableness of act:

(a) Legitimate Goal Stage: An action constraining a right must be backed by a legitimate goal.

(b) Rational Connection Stage: The means applied in reaching the objective must be rational.

(c) Necessity Stage: The measure adopted should be both least invasive as well as most effective in comparison with other available alternatives.

(d) Balancing Stage: The impact of the act must not be disproportionate to the right guaranteed by the constitution.[18]

The Court however cautioned that such factors needs to be tested on touchstone of objectivity. Therefore, a self-restraint and sense of responsibility needs to be maintained by judges and they should not be swayed by their own social philosophy and values.[19] The rule of harmonious construction has to be applied in such a case to ensure co-existence of competing interests.[20]

IV. SOCIAL MEDIA: A NEW PARADIGM

There is no dispute that democracy is bolstered upon 'freedom of speech and expression' as it ensures transparency as well as accountability. The role has been upheld to an extent that media has been accustomed as the fourth limb of democratic setup. The role of expression was further strengthened by the coming of internet. Keeping in view the societal benefits provided by social media, the liabilities levied on internet domains were diminished. However, as the role of internet grew, the utopian ideal became more impracticable. The very virtue of internet cannot be termed as its adversaries. The humongous extent of circulation of data and its connected impact cannot legitimize thee need to curb

[17] (2016) 7 SCC 353.
[18] *Ibid.*
[19] *State of Madras* v. *V.G. Row, State of Travancore-Cochin,* (1952) S.C.R. 597, (606).
[20] *Supra* note 15.

information. Also, the un called for censorships not only poses a threat to the right to express freely but also the less informed are denied honest and unbiased data which is of intrinsic value to frame a sound view regarding any matter.

A. How Besieged Misinformation Operates on Social Media in Indian Scenario?

An interview with a student from Mumbai during 2014 Maharashtra assembly elections briefly critiques the problem. The student was approached by an acquaintance with a lucrative offer to make money at home. All he was required to do was to create several authentic *Twitter* accounts. He made about fifteen such accounts. The accounts were used as a propaganda tool to upload political post against the opponents. Resultantly, the opponent was defeated and the student was paid in cash for fulfilling his task.[21]

Over a period of time, the problem of organised misinformation has become more than a digital crisis. It has seeped into society to manifest it into a lopsided keel. At a point of time when social media posits itself as a fourth pillar of democracy, it is worth analysing whether its access is genuinely egalitarian. This question becomes particularly pertinent when algorithm fed sources control the medium, leaving only a small chunk free of influence.

A recent study involving 2.3 lakh highly political twitter accounts suggest that 89 per cent of those were created strategically before 2014 polls in June and July of 2013. Approximately 74 per cent of the accounts had put up a post at an average of twenty minutes whereas 18 per cent had an average of putting a post every eight minutes.[22]

A recent study has published that more than 50 per cent of the Indian population received false news over various electronic media domains (such as Facebook and WhatsApp) before the 2019 Lok Sabha election.[23] According to The *Misinformation Review* by the Harvard Kennedy School, 10% of images

[21]H. Mishra, "How targeted misinformation works on Indian social media" *The Hindu*, 26 September 2020, *available at* https://www.thehindu.com/sci-tech/technology/internet/social-media-is-an-extension-of-our-physical-world-and-it-is-rife-with-propaganda/article32694059.ece/amp/ (last visited on 3March, 2021).
[22] *Ibid.*
[23] "India discusses fake news impact on Lok Sabha Elections 2019" *The Asian Age*, 10 April, 2019, *Available at* http://www.asianage.com/technology/in-other-news/100419/india-discusses-fake-news-and-its-impact-on-lok-sabha-elections-2019.html (last visited on 29 March, 2021).

circulated on politically-oriented WhatsApp groups in India were known misinformation.[24]

Social media now seems remotely associated with its claim of being a benign tool. It resonates with a puppet that dances to the tunes of those who wield power in the real world.

B. The Fake News Ascension

The issue with spread of data via web-based media is that the evident realities and made up content viewed at equivalent stature. Resultantly, computerized platforms accommodate views of third party and politically persuaded interests. The innovation which once served an authentic information stage are presently abused by disinformation entertainers to control clients by testing and focusing on advertisements, concealing spring of data, and streaming of news from alleged autonomous and not from reliable journalism. The technique for news dispersion via online media (web messengers specifically) sabotage news cognizance and trust. The primary explanation behind the breakdown is that substance is isolated from its outlet that produces it. The discontinuity of news sources has made an atomized world wherein lies, talk and tattle spread with disturbing rate. Falsehoods that are generally shared online inside an organization, whose individuals trust each other more than they trust any traditional press source, can rapidly assume the presence of truth.[25]

The receiver of text cannot recognize whether the piece of information is fabrication or certainty-based news. The conventional media gave a setting to pass judgment on paper's believability like the area the specific paper in the newspaper kiosk, a committed segment for opinion delineating itself from news segment, bylines and datelines. Online media assumes a noteworthy function in the scattering of unfounded news. The core of the issue is that web-based media makes a reverberation chamber where "realities" from companions are rehashed, fueling affirmation predisposition and offering legitimacy to claims dependent on how regularly or how many times they are forwarded. The significant vacuum of gatekeeper whereby data that is given to public is filtered, the pace of conveyance of data and the economic method of correspondence and data access

[24] *Ibid.*
[25] "The Art of Lying" *The Economist*, 10 September 2016, *available at* https://www.economist.com/weeklyedition/2016-09-10 (last visited on 1 March, 2021).

are the essential explanations behind dissemination of unsubstantiated and unchecked substance on web.

i. Infodemic: The Pandemic of Fake News

> *"We are not just fighting an epidemic; we are fighting an infodemic. Fake news spreads faster and more easily than this virus, and is just as dangerous."*[26]

The World Health Organization explains that infodemics are an unnecessary surge of data concerning an issue, which makes finding a solution with respect to that solution even more difficult. Infodemic is described by the spread deception, disinformation and rumours during a global health crisis. Resultantly, it can hamper a successful general wellbeing reaction and create disarray and doubt among individuals.[27] On the bases of review embraced by the Press Gazette, United Kingdom , it was seen that over 8% of the sample population accepted that the development of Covid-19 indications was associated 5G network radiations.[28]

The pandemic since its initiation has been joined by heaps of gossipy tidbits and phony news. The World Health Organization (WHO) in its report on February 2, 2020 expressed that the spread of the infection was invited with an "infodemic" which could be similarly negative to general wellbeing[29].It was analyzed by the Massachusetts Institute of Technology in an extensive research of Twitter that 126 thousand reports were tweeted by three million clients over the period of ten years. The examination reasoned that a fabricated story contacts individuals 6 times more quickly than a genuine story.[30]

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[26] Department of Global Communications, "*UN tackles 'infodemic' of misinformation and cybercrime in COVID-19 crisis*", 31 march, 2020, *available at* https://www.un.org/en/un-coronavirus-communications-team/un-tackling-'infodemic'-misinformation-and-cybercrime-covid-19 (last visited on 2 March, 2021).
[27] *Ibid.*
[28] D. Ponsford, "Infodemic: Survey reveals people who get news from Facebook and Youtube more likely to breach lockdown and spread Covid-19", *Press Gazette,* 18 June, 2020, *available at* https://pressgazette.co.uk/infodemic-survey-reveals-people-who-get-news-from-facebook-and-youtube-more-likely-to-breach-lockdown-and-spread-covid-19/ (last visited on 2 March, 2021).
[29] R. Schulman and D. Siman, "*From Biological Weapons to Miracle Drugs: Fake News about the Coronavirus Pandemic*". Institute for National Security Studies, 2020, *available at* http://www.jstor.org/stable/resrep23529 (last visited on 1 March, 2021).
[30] P. Dizikes, "Study: On Twitter, False News Travels Faster Than True Stories", *MIT NEWS* ,8 March 8 2018, *available at* http://news.mit.edu/2018/study-twitter-false-news-travels-faster- true-stories-0308 (last visited on 2 March, 2021).

Disinformation is frequently spread by method of photographs and recordings whose provenance and setting are apprehensive and whose substance is changed by altering or by utilization of computerized reasoning to produce profound fakes. "Deepfakes" are made by embedding photos into an Artificial Intelligence calculation that puts one face on head of another. [31] For instance, *Fakeapp* is a program that provides a genuinely straightforward and accessible software to make recordings within a short time span 8 to 12 hours[32]. With the advent of such software, humans can be alleged of doing an act which they actually never did. The unprecedented accomplishment of superfluous deceptive news being acknowledged in the commercial sphere makes grave worries for people as well as the State. The situation is significantly more exacerbated when a video is added to the condition.

ii. Is The 'Fake News' Phenomenon Undermining the Doctrine of Free Speech in India?

India has been named as the world's Covid-19 falsehood hotspot. [33] The Hon'ble Supreme Court expressed its concern with regards to the spread of disinformation fueling the migration of labourers and related unrest in the case of *Alakh Srivastava* v. *Union of India*,[34] by setting out the set of principles for the media regardless of the fact that whether it is print, electronic or online media. It forewarned the media to keep up a solid awareness of other's expectations and guarantee that unsubstantiated news equipped for causing alarm isn't spread. The Court scrutinized the evil impacts of frenzy on emotional wellness and following up on the recommendation of the Solicitor General of India, directed to build up an everyday portal by the Government of India to answer the questions from individuals concerning web-based media and related institutions. The Supreme Court additionally explained that it didn't expect to meddle with the free conversation about the pandemic, however on the same time coordinated the media publish to and distribute the official a notification

[31] D. Beres and M. Gilmer, "A guide to 'deepfakes,' the internet's latest moral crisis", *Mashable*, 2 February 2018, *available at* https://mashable.com/2018/02/02/what-are-deepfakes/#FPVRcf.91qqM (last visited on 3 March, 2021).
[32] K. Roose, "Here Come the Fake Videos, Too', *New York Times*, 4 March 2018.
[33] M. Goodier, "Infodemic investigation: Facebook is the Biggest Source Of False Claims About Coronavirus" *Press Gazette*, 6 July, 2020, *available at* https://pressgazette.co.uk/infodemic-investigation-facebook-is-biggest-source-of-false-claims-about-coronavirus/ (last visited on March 2, 2021).
[34] 2020 SCC OnLine SC 345.

about the turn of events with regards to government measure taken for managing disease.

The perturbation of disinformation can be highlighted by the incidence that occurred in Indore in March, 2020. As indicated by the facts of the episode, the disorder was sparked by a message streamed on "*Whatsapp*" whereby it was falsely alleged that a huge connivance is arranged against Muslims in the attire of handling the infection. The message affirmed that the community was purposely plagued with the infection and afterward murdered by the toxic infusions for the sake of treatment. The famous content forewarned the community to dismiss any specialist or cop who desires Covid test. If a positive report comes, the message exhorted the individuals to secure themselves their homes and not to go for treatment regardless of whether hard perseverance is made by the administration staff.

In addition to the above said message, a video was also circulated which indicated one of the families whining about being held in detachment without reason and not being tried appropriately. The family in the video blamed the medical experts for erroneously catching and announcing them Coronavirus positive without any justifiable reason. As the adverse impact of flow of notorious message and video, violence erupted between the cops and the inhabitants which lodged into an assault on the medical services authorities and the cops. [35] The medical services authorities and cops were manhandled, stones were pelted in view of frenzy made by counterfeit message. While official portals and a few private reality checkers kept on expeditiously exposing the false news, the full-deceptions and misleading statements proceeded with unabated by the efforts of fraudsters attempting to mint some income sans work by flowing fraudulent bank account details for contributions to the government relief funds.

iii. The Legislative Framework

The government passed the Epidemic Diseases (Amendment) Ordinance in the aftermath of the incident, which made acts of violence and harassment against

[35] M. Ghatwai, "Fake videos behind attack on health team in Indore, 4 booked under NSA", *The Indian Express*, 3 April 2020, *available at* https://indianexpress.com/article/coronavirus/indore-coronavirus-video-mob-attacks-health-officials-6343475/ (last visited on 1 March, 2021).

healthcare personnel deployed in combating COVID-19 a non-bailable offence with maximum punishment of seven years imprisonment and Rs. 5 lakh fine.[36]

The Cyber Crime Portal of the Ministry of Home Affairs (MHA) has given warning to direct the lead of online media. The above circular gives a set of principles to be trailed by clients of online media during the health emergency. It puts a ban on the dissemination of unsubstantiated messages regarding the virus. Without explicit administrative system to forestall the spread of fake news, such cases have been filed under existing statute(s).

Section 505(1) of Indian Penal Code, 1860 forces the discipline for making, distributing or flowing any announcement, gossip or report which may make dread or alert the general population or to any segment of people in general. The provision provides for detainment which may reach out to 3 years fine or both.[37]

The Disaster Management Act, 2005 under the provision of Section 54 mentions

> *"whoever makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic, shall on conviction, be punishable with imprisonment which may extend to one year or with fine*"[38].

The section also states

> *"Whoever makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic, shall on conviction, be punishable with imprisonment which may extend to one year or with fine".*[39]

Section 3 of the Epidemic Disease Act, 1897 has been invoked by the Government to make misleading publications punishable.[40]

The Information Technology Act, 2000, Section 66D states

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[36] PTI "Ordinance will help millions of COVID-19 warriors: Indore doctor attacked with stones lauds move", *The New Indian Express*, 23 April 2020, *available at* https://www.newindianexpress.com/nation/2020/apr/23/ordinance-will-help-millions-of-covid-19-warriors-indore-doctor-attacked-with-stones-lauds-move-2134225.html (last accessed 2 March, 20201).
[37] The Indian Penal Code, 1860 (Act 45 of 1860), s. 505 (1).
[38] The Disaster Management Act, 2005 (Act 53 of 2005), s. 54.
[39] *Ibid*.
[40] The Epidemic Disease Act, 1897 (Act 3 of 1897), s. 3.

> *"whoever, by means for any communication device or computer resource cheats by personating shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees".*[41]

The vacuum because of nonattendance of explicit law to address the problem has given unchanneled powers to the State under the conventional laws to act abstractly against any activity scrutinizing the working of the administration as prohibitory. The Union government in *Firoz Iqbal Khan* v. *Association of India*[42] , pressed the Supreme Court to outline rules to separate the space between editorial opportunity and dependable news coverage for computerized media first instead of standard electronic and print media. In the sworn statement recorded by the Union, it was referenced that electronic news entries, YouTube channels just as Over the Top (OTT) stages could get viral. In contrast to standard distribution and broadcast, computerized media was ceaselessly enlarging its viewership, as in a circle, through different web and online media stages, for example, WhatsApp, Twitter and Facebook. Consequently, what was composed or appeared in advanced media had 'genuine effect and potential'.

V. SECTION 144: SHIELD OR SWORD

Section 144 of The Criminal Procedure Code is based upon the doctrine of Imminent Lawless Action whereby it gives power to the magistrate to *"issue order in urgent cases of nuisance or apprehended danger"*

> *"144. Power to issue order in urgent cases of nuisance or apprehended danger. —*
>
> *(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate…direct any person to abstain from a certain act …if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray.*

[41] The Information Technology Act, 2000 (Act 21 of 2000), s. 66 D.
[42] 2020 SCC Online SC 737.

(2) ……

(3) An order under this Section may be directed to …the public generally when frequenting or visiting a particular place or area."[43]

A. Essential Features

The essential ingredients of the Section needs to be analysed in order to determine the ambit of authority conferred by the provision.

(A) Preliminary Inquiry: The Magistrate is required before issuing the order to satisfy himself that:

(1) Sufficient grounds exist for issuing the said direction i.e. the order is issued to prevent the untoward incidents mentioned in the clause (1)

(2) The situation is of such a compelling nature that demands immediate action

The use of the word *"opinion"* incorporates that the Magistrate needs to perform inquiry in a careful manner in order to meet the extraordinary power conferred upon him.

(B) Subject Matter: the next step involves issuing of the order by the Magistrate which may either of prohibitory nature i.e. abstaining people from performing an act or of mandatory nature i.e. compelling people from taking a specific action with regards to the property in their possession. However, the provision specifically disqualifies the Magistrate to issue a blanket order. Also, the order must be a reasoned order and it must mention the compelling facts and circumstances behind such order.

(C) Announcement: The section requires the order must be communicated according to the framework laid out in Section 134 of the Code i.e. if practicable it must be served to the person against whom it is intended. Otherwise, it could be communicated by the way of proclamation and publication. However, in cases of emergency situations, the order can be served ex parte.

[43] The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 144.

In general scenario, the order is directed against a specified person in a specified manner. In extraordinary case, when the number of persons against whom order is directed is such huge that no clear demarcation can be made between general population without avoiding the risk enumerated in section, then general order is justified. *"A general order is thus justified but if the action is too general, the order may be questioned by appropriate remedies for which there is ample provision in the law".*[44]

(D) Time duration: The section imposes temporal restriction because of its extra ordinary power. The order cannot be issued for the period of more than two months. However, the

Sate Government is empowered to extend the order for a further period not exceeding six months, if the situation so demands.

(E) Modification: The section empowers the Magistrate to make alterations in the order either suo moto or the bases of an application made by any person. On the similar notion, the State government is also conferred power for making modifications. The modifications have to be made only after person hearing is given and reasons have to be recorded in case application has to be rejected. The applications should be disposed off expeditiously.

B. The Judicial Interpretation

The Hon'ble Supreme Court in the case of *Anuradha Bhasin* v *Union of India*,[45] discussed the procedural limitations of the provision.

i. The power conferred under the section is not only remedial but also preventive. Thus, the order under the section can be issued under both conditions; one where present danger prevails and other where is reasonable apprehension which is of urgent nature, only for the purpose of preventing the events enumerated in the provision.

ii. The Court vehemently cautioned the use of power to suppress legitimate right of expression of opinion.

[44] *Madhu Limaye* v. *State of Maharashtra*, 1978 SCR (1) 749.
[45] (2020) 3 SCC 637 para 140.

iii. In order to enable judicial review, the "material facts" should be provided in order. The power should be based on application of judicial mind.

iv. The magistrate while making the order is required to apply the proportionality principle to balance the rights and the limitations and should desire to apply the least restrictive measures.

v. The Court termed repetitive orders as an 'abuse of power'.

C. The Applicability of Article 13

The legal provision laws down the supremacy of fundamental rights over any law in force in cases of conflict between them. The role of provision is often termed as that of giving teeth to the Constitution. The legislative framework ensures that rights so guaranteed cannot be contravened by the Government either by the way of passing a law or by administrative deed. Any such act shall be declared void *ab initio* to the extent of contravention of rights guaranteed under Part III.

Whether the order made under Section 144 of the Criminal Procedure Code,1973 is bound by the principle established under Article 13 of the Constitution?

The question of applicability of Article 13 was discussed by the Court in case of *Dr. Ram Manohar Lohia* v. *State of Bihar and Ors.*,[46] where the Court opined that Article 246 defines the extent of legislative powers of parliament which is subject to fundamental rights incorporated in part III. Moreover Article 13 pronounces that,

> *"13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.*
>
> *(2) ....."*[47]

Thus, the use of language in the Article clarifies that any order made under Section 144 if inconsistent with part III shall be void.

[46] *Supra* note 10.
[47] The Constitution of India, art. 13.

VI. THE GAG ORDER

The Mumbai Police Commiserate on April 10, 2020 came up with a prohibitory order to control the dissemination of fake news and hate messages. The order also stated that the proliferation of gargantuan 'misinformation' has a tendency to cause 'panic, confusion and mistrust against the Government functionaries' as well as the actions undertaken by the administration to tackle the spread of the zoonotic disease.

The disputed order had categorically put blanket embargo on the

> "*Dissemination of information through various messaging and social media platforms like WhatsApp, Twitter, Facebook, Tiktok, Instagram etc.*
>
> *i. which were found to be incorrect; or*
>
> *ii. were derogatory and discriminatory towards a particular community; or*
>
> *iii. Caused panic and confusion among the general public; or*
>
> *iv. Incited mistrust towards government functionaries and their actions taken in order to prevent spread of the COVID-19 virus and thereby caused danger to human health or safety or a disturbance of the public tranquility."*[48]

In addition to the above-mentioned prohibitions, the order additionally declared that any person disobeying it would be liable to penal consequences under Section 188 of the Indian Penal Code, 1860.[49]

A. The Constitutionality of the Order

The order comes in direct conflict with 'right to freedom of speech and expression'. The restriction on the right have been imposed on the grounds which fall outside the ambit of article 19(2). As discussed earlier, the right is subject to restrictions only specifically enumerated in clause (2). The imposition of the order to curb 'panic and confusion amongst general public' and 'inciting

[48]*Available at* https://www.scribd.com/document/463180132/Mumbai-prohibitory-orders-May-25#fullscreen&from_embed, (last accessed 3 October 2020).
[49]*Supra* note 36, s. 188.

mistrust towards government and its actions' is ex facie ultra vires the constitution.

The order is an insidious attempt to censor the legitimate expression of opinion. The practice of pre censorship has been particularly refrained by the Supreme Court. It added that it is undeniable that electronic platform has emerged stronger than traditional print media but still banning the content before broadcasting is not supported by the constitutional ideals.[50]

i. The Test of Proportionality

The four stages of the principles laid by the Court in *M.D.C.R.C v. State of Madhya Pradesh*[51] have to be satisfied in order to pass the test of proportionality.

1. The first prong of the doctrine is 'Legitimate Goal Stage'. Here the question that needs to be answered is that Whether restriction imposed by the gag order over the right of free speech has a legitimate goal.

   The order aims at regulating the dissemination of 'fake news, misinformation and incorrect information' which is likely to cause 'panic and confusion among public, or may create a law and order situation, or may pose danger to human health and safety or disturbance to public tranquility'[52].

   The fact remains undisputed that fake news proliferation with regards to extension of lockdown has led to panic and confusion among labourers which in turn has created a law and order situation.

   The false treatments circulating on social media have posed threat to human health and messages blaming the 'jamaat' for increase in infection have led to animosity towards community and has further led to disturbance of public tranquility.

   As far as the above objects are concerned, the order passes the first stage.

[50] *Firoz Khan* v. *Union of India*, 2020 SCC Online SC 737.
[51] *Supra* note 17.
[52] S*upra* note 46.

2. The next step is to determine the 'Rational Connection' i.e. to comprehend whether the order is executed is in furtherance of the object. On the evaluation of the restrictions imposed under para 4, the first three restrictions i.e. to control (i)fake news, (ii) discrimination towards a community, (iii) panic and confusion pass fulfil the 'rational nexus' criteria.

   However, when it comes to para 4(iv) the rational connection of restriction with the object is prima facie missing. The order purports to put a blanket ban on any message that could 'incite mistrust towards government'.[53] The manifest exercise of the power to save itself from criticism in lieu of protecting citizens is irregular and cannot be permitted. The whistle blowers right is hampered in particular by such imposition.

3. The phase of the doctrine encompasses 'necessity stage'. Here it needs to be determined as to whether there is existed any other law or method which was equally effective but less restrictive.

   Section 505 of the Indian Penal Code under clause (1) defines "statements conducing to public mischief"[54]. It states-

   (1) "Whoever makes, publishes or circulates any statement, rumour or report, —

   1. ...

   2. with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility; or

   3. with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community, shall be punished with imprisonment which may extend to three years, or with fine, or with both…"

The exception to the Section reads *"It does not amount to an offence, within the meaning of this section when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that*

[53] *Ibid.*
[54] *Supra* note 36, s. 505.

such statement, rumour or report is true and makes, publishes or circulates it in good faith and without any such intent as aforesaid."[55]

Apart from the above-mentioned legal provision, Section 153 A and 295 A make hate speech as a punishable offence[56]. Also, Section 54 of the Disaster Management Act, 2005 punishes for false warning. It states-

> "*Whoever makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic, shall on conviction, be punishable with imprisonment which may extend to one year or with fine".*[57]

Thus, the availability of the above provisions leads to inference that a an effective and less invasive law existed to deal with the facts of the situation.

4. The 'Balancing Stage' is the last phase of the test whereby it has to considered that Whether the gag order has a disproportionate impact on the constitutional right

   The order exceeded its scope and aimed to silence every voice that intended to criticise the government. The overreach thus resulted in infringement of democratic right of 'freedom of speech and expression'.

B. Ambiguity in the language used

The order has been alleged to suffer from vice of vagueness. The restrictions imposed under para 4 are not clearly defined. The language employed is so nebulous that it gives despotic powers to the government to include every act as illegal according to its whims and fancies. The circular by using 'open ended and undefined' offences permits administrative authorities to set a trap which is large enough to trap any person as accused. For instance, Para 4(i) of the order mentions the term 'distorting facts' without laying down a clear definition with regards to what exactly is meant by the term. In such vacuum, any *bonafide* opinion which is of contrary nature could be termed as 'distorted facts.' In the absence of a mode to check the genuineness of situation and undefined terms the circular is not only overreaching the freedom of expression but also poses difficulties for the purpose of judicial review.

[55] *Ibid.*
[56] *Id*, ss. 153 A, 259 A.
[57] *Supra* note 38, s. 54.

C. Section 144: The Curfew of fundamental rights?

Section 144 is one of the primary techniques employed by the State to maintain 'public order'. The principle is well established principle that the provision cannot be exploited to thwart 'legitimate expression of an opinion or grievance.'[58] The order also violates the 'principle of proportionality' thus making the its operation beyond the scope of its ambit.

i. Imposition of Group Admin Liability

The order imposes individual liability on the admins of the group in case on violations of prohibitions mentioned in paragraph 4 of the impugned order.[59] Apart from it, the circular also imposes positive obligation on the admin to review as well as report the information shared [60]. In the absence of clear-cut definition of what would be considered as prohibited, the order leaves a grey area which would create more ruckus and confusion. This provision exceeds the scope of section 144 as it has been clearly established that the legal provision can be used only for the purpose of imposing preventive measures.[61]

The law in place does not make the admin liable for the post shared by its member. The admin has restricted dominion of adding or removing members from the group. It is not the case that members have to seek prior approval of the admin before putting up a message. Therefore, the admin cannot be made liable for the act of a member unless the case suggests that he played an active role in aiding or assisting in sharing of a prohibited message. The argument is further supported by the Delhi High Court judgement where it was held that the admin of the group is not legally responsible for defamatory messages circulated by any of the group member.[62]

The element of *'mens rea'* is important for an act to constitute a crime. The *'actus reus'* and '*mens rea'* must be present together to amount to a crime. The Apex Court has further established that the concept of *'vicarious liability'* does not exist in the criminal law domain unless the same is specified by the statute.[63] The Information and Technology Act, 2000 has not made the admin as an intermediary. He therefore, cannot be subjected to intermediary obligation such

[58] *Anuradha Bhasin* v *Union of India*, (2020) 3 SCC 637 para 140.
[59] *supra* note 46, para 5.
[60] *Id.*, para 6.
[61] *Ramanlal Bhogilal Patel* v. *N.H. Sethna*, (1970) GLR 1014.
[62] *Ajay Bhalla* v. *Suresh Chawdhary*, CS (OS) No.188/2016.
[63] *H.L.H.L. Bhagwati* v. *CBI*, (2003) 5 SCC 25.

as to remove an objectionable post. Section 144 cannot overreach to impose such criminal liability on the admin.

D. Is Criticizing the State a Crime?

"Those who hold important positions must have shoulders which are broad enough to accept with grace a critique of themselves. Critical appraisal is the cornerstone of democracy" [64]

The right to condemn and criticize has been designated as the "cornerstone of democracy'.[65] The Constitution safeguards that supporter as well as opposer are thought are meticulously protected of their freedom of expression. It would be risky tradition in public arena if the rights of individual holding conflicting perspectives with the dominating population are down trodden only because they hold a contrary view. However, the right is not absolute i.e. the citizen has a right to criticise as long as he does not incite people in a violent act against government functionaries.[66] The three terminologies vital for 'freedom of speech' are "discussion", "advocacy" and "incitement". The circular however, categorically penalises mere discussion on the inability and failures of the government. The Supreme Court has opined that any prior limitation on the expression restricts the viewpoint from reaching society. It is unconstitutional to give state a dominant control of what can be allowed to seep in the 'marketplace of ideas'.[67] Therefore, holding of inappropriate views against government cannot be made punishable. Especially in a democratic setup where the scheme allows rotation of power, bestows individuals the right to criticise government[68].

E. Comparative Analysis: Section 66A of IT Act, 2000

i. Can the Gag Order be Labelled as an Interim Section 66A of IT Act?

The gag order creates a situation that echoes with facts of *Shreya Singhal* v. *Union of India.*[69]According to the facts of the case, two women were arrested

[64] *Indibility Creative Pvt. Ltd. and Other*s v. *Government of West Bengal and Others*, AIR 2019 SC 1918.
[65] *Ibid.*
[66] *Kedar Nath Singh* v. *State of Bihar*, 1962 SCR Supl. (2) 769.
[67] *Brij Bhushan & Another* v. *the State of Delhi*, AIR 1950 SC 129.
[68] *Javed Habib* v. *the State of Delhi*, (2007) 96 DRJ 693.
[69] (2015) 5 SCC 1.

under the provisions of section 66A of the Information Technology Act, 2000 for putting up an objectionable post against the government. The Section read-

> "[*66A Punishment for sending offensive messages through communication service, etc. -Any person who sends, by means of a computer resource or a communication device, -*
>
> *a) any information that is grossly offensive or has menacing character; or*
>
> *b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or*
>
> *c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.]"*[70]

The repealed section categorically prohibited a person from 'sharing an information on electronic device that would be highly offensive or is circulated with an intent to cause annoyance or inconvenience or to deceive the receiver of the origin of such message.'

The provision was alleged to violate the 'freedom of speech'. Also, it was contended that the restrictions fell beyond the purview of reasonable restriction under article 19 (2). The section created disproportionate balance between restriction and right on which such embargo was imposed. The section was declared unconstitutional by the Apex Court as it provided a wide ambit to the State to cover almost every contradicting opinion.

The facts demonstrate that the situation in hand is distinctive from that of *Shreya Singhal*[71]. In any case, by imposing the order, the administration is attempting to summon an interim Section 66A. One reason behind declaration of Section

[70] Section 66A has been struck down by the Supreme Court's Order dated 24 March, 2015 in the *Shreya Singhal* v. *Union of India,* (2015)5 SCC 1.
[71] (2015) 5 SCC 1.

66A as unconstitutional was that it laid no sensible norm to characterize 'guilt' which makes an offense and subsequently was ambiguous in character. Its ambiguity gave wide amplitude of power to the police to capture an individual. This vagueness coincides with the order at hand and the legislature cannot take the shield of COVID-19 for fulfilling their illegitimate aims by summoning a similar law which has been formerly held illegal by the Supreme Court. The authority under Section 144 cannot be used as a legal tool to stifle the Constitutional Rights of the citizens.

VII. CONCLUSION

Since the inception of the Constitution, the State has been working to protect the rights of individual. 'Freedom of speech' has been believed as a weapon to protect the public by enabling a system that responds to the unwarranted acts. With the progressing technology, the right has expanded its application on the medium of internet. The social media, which was ordained benign purpose has been doomed by propaganda tactics. However, the disuse cannot overshadow the role of internet towards building an egalitarian society.

The application of power in a *bonafide* manner is distinctive from its abuse in a *malafide* manner. The first situation emerges when a lawful authority abuses the power conferred to violate the law. Such demonstration creates a fraud on powers which would render the impugned order or act ultra vires. Constructive criticism is the quintessence of democracy and the way of ensuring that 'government of the people, by the people and for the people' is not sabotaged by dictatorship.

The government is formed by the people, for the people and citizens have the right to not only to criticise the inefficient working of the government but the right to know the real factual steps being taken up in furtherance of administration.

In a democratic regime, the danger professed by criticism is not troublesome but no criticism at all undeniably is. The potent hazard exemplified by the order is the jeopardy of imperilling the freedoms to actions which are not backed by the statutes and overreach the lawful exercise of public power.

The plethora of authoritative activities enabled by the statutory arrangements are not only subject to statutory remedies but also amenable to judicial review under constitutional regime. The governance based on rule of law keeps a check on

frenzied power. Such practices are treacherous because they are not legally backed and pose a threat. The individual is left in a grey area without being cognized of the bases of punishment for the act. Hence, imposition of an embargo to condemn the government by application of provisions of Section 144 of the Criminal Procedure Code was neither necessary nor could have been justified under authority of law, contemplating the facts and circumstances of the present case.

HECKLER'S VETO AND THE THREAT TO CINEMATIC FREEDOM IN INDIA

*Aisiri Raj**

Freedom of speech and expression, including creative & artistic expression, is an inherent right. However, this right has been subject to two modes of censorship, i.e., limitations imposed by statutes and restrictions by public opinion. The restrictions to an individual's fundamental right to speech and expression by a group of people who believe it be against their ideals gives rise to Heckler's Veto. The paper provides an overview of the evolution of the doctrine of Heckler's Veto in the United States and seeks to provide a proposition for its application to the free speech jurisprudence in India. The paper specifically focuses on the hindrances to cinematic expression due to the use of public order restrictions under the Indian Constitution that is generally used to curtail the freedom of expression due to an apprehension or actual breach of public order caused by the mobs.

I. INTRODUCTION

Freedom of speech is a quintessential element of constitutional democracy. It is the hallmark of an open society wherein ideas and thoughts are discussed freely, and the functioning of the government aims to be transparent and accountable. The major components of free speech are expression and dissemination of ideas, thoughts, information including artistic and creative articulation and the right to seek information, although the latter is recent in development.[1] The right to free speech, later manifested in the form of right to press, which allowed for the publication of one's thoughts and opinions. Withal, the term 'freedom of expression' subsumed itself in the concept of free speech due to the increased use of the term by the Judges of the US Supreme Court who considered it as a

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[1] Kruthika N.S, "Addressing net neutrality through the lens of compelled speech" 28 *National Law School of India Review* 40 (2016).

succinct notion to freedom of speech and press.[2] Nevertheless, censorship has been used as a tool of control to restrict free speech since time immemorial.[3]

A consequentialist outlook towards the protection of free speech weighs the harms created by speech in relation to the virtue of the freedom granted.[4] One of the leading consequentialist theories of free speech is utilitarianism[5] and the greatest proponent of free speech, J S Mill, viewed it as *"the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense."*[6] Mill's ideas of free speech were influenced by Bentham's utilitarian ideals of attaining the "*greatest good for the greatest number*." Although Bentham's ideas centred around freedom of press and political discussions, Mill focused on liberty of an individual's thoughts and discussions.[7]

Mill made a strong case against censorship and believed that an obstruction to individual's liberty of free speech through both legal instruments of the state and moral coercion[8] by public opinion was dangerous[9] as it does not allow for maximisation of an individual's liberty. However, the latter is often overlooked in debates surrounding censorship. Mill believed that there were exceptions to absolute speech which he espoused in his harm principle, which states that one cannot cause harm to another person while exercising his individual right.[10]

On the other hand, a Deontological view of free speech focuses on defending the freedom of speech, which is a determinant of individual autonomy and self-expression.[11] Kant, who belongs to this school, placed the individual at the centre and opined that when a restriction imposed obstructs a person from

[2] Patrick Riordan, "Freedom of Expression, No Matter What?" 105 *Studies: An Irish Quarterly Review* 163 (2016).
[3] Mette Newth, "The Long History of Censorship", *available at:* http://www.beaconforfreedom.org/liste.html?tid=415&art_id=475 (Visited on Sept.5, 2020).
[4] *Erica Goldberg, "Free Speech Consequentialism" 116 Columbia Law Review 696 (2016).*
[5] David Ward, "Philosophical Issues in Censorship and Intellectual Freedom" 39 *In Library Trends* 85 (1991).
[6] J.S Mill, *On Liberty* 7 (Longman's, Green and Co. Ltd, London, 1926).
[7] Peter Niesen, "Speech, truth and liberty: Bentham to John Stuart Mill" 18(1) *Journal of Bentham Studies* 3 (2019).
[8] Bruce Baum, "Freedom, Power and Public Opinion: J.S. Mill on the Public Sphere" 22(3) *History of Political Thought* 502 (2001).
[9] *Supra* note 2 at 160.
[10] David Van Mill, "Freedom of Speech", *available at:* https://plato.stanford.edu/entries/freedom-speech/#HarPriFreSpe (Visited on Aug. 25, 2020).
[11] Nicholas Shackel, "Freedom of Speech" 1 *Encyclopedia of Global Bioethics Springer* 2 (2015).

exercising his full autonomy,[12] such a law becomes antithetic to self-expression. Ironically, Kant's works were subject to constant censorship by the authorities.[13]

II. EVOLUTION OF THE DOCTRINE OF HECKLERS VETO IN THE UNITED STATES

The fundamental right to speech and expression guaranteed to people allows them to express opinions or thoughts in any form and manner, which includes the right to disagree and dissent. Subjectivity in the acceptance of ideas and opinions differs from person to person; what is offensive for one might not be for another. However, the conundrum lies as to what the degree of acceptable behaviour is when it comes to distinguishing a mass dissent and mass disruption of free speech.[14] The use of violence and force to disregard an individual's fundamental right to speech and expression gives rise to 'Heckler's Veto'.

Harry Kalven Jr. coined the term 'Heckler's Veto' in his book 'First Amendment and suppression of civil rights advocates'.[15] Heckler's veto can be understood as an *"impermissible content-based restriction on free speech due to the anticipation of a violent reaction of the audience."*[16] There is a constant tussle between the two rights and duties; an individual's right to free speech and the duty of the state to maintain peace and order in the society in order to avoid reactionary consequences arising due to an individual's speech.

The American jurisprudence relating to free speech is based on the Virginian Declaration of Rights, one of the first treatises to elevate press as an inherent human right, which was previously perceived as a right granted by the sovereign.[17] The First Amendment of the US Constitution states:

> "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the*

[12] *Supra* note 5 at 87.
[13] John Christian Laursen, "Censorship from Rulers, Censorship from Book Piracy: The Strategies of Immanuel Kant" *Bloomsbury Academic* 104 (2015).
[14] Martin D. Snyder, "State of the Profession: Free Speech and the Heckler's Veto" 88(2) *American Association of University Professors* 103 (2002).
[15] Roy Gutterman, "Gutterman Essay: Feiner and the Heckler's Veto", *available at :* https://journalism-history.org/2019/08/06/gutterman-essay-feiner-and-the-hecklers-veto/ (Visited on Aug. 22, 2020).
[16] Startzell v Fisher, 533 F.3d 183 (3rd Cir. 2008).
[17] Virginia Declaration of Rights, *available at:* https://www.mtsu.edu/first-amendment/article/878/virginia-declaration-of-rights (Visited on Aug. 22, 2020).

> *freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances.*"[18]

The conception of free speech in the US is a reflection of the capitalist mindset of the lawmakers in the country. This view was substantiated in *Associated Press v. the US*, wherein the court observed that the extent of conferment of free speech is similar to a free market, which cannot be monopolised by either the government or any private party.[19] Furthermore, Holmes J, in *Abrams v. United States,*[20] viewed the First Amendment as a "*market place of ideas."*

A. War of Nations and Suppression of Speech

The development of the Heckler's Veto doctrine in the United States can be understood in two phases; the first being the socio-political conditions that persisted during the two World Wars, which led to cases relating to sedition being subject to strict scrutiny by the US judiciary.[21] In the case of *Gilbert v. Minnesota,*[22] the petitioner who criticised the mandatory conscription by the United States government as 'unnecessary' was convicted for violating the Minnesota sedition statute. Similarly, in *Schneck v. United States,*[23] the petitioner who belonged to a socialist party was charged under the Espionage Act for sending letters to the newly enlisted conscriptions stating they were placed under servitude, which was considered to be violative of the Thirteenth Amendment. Holmes J observed that the rights of the petitioner could have been protected in ordinary times, but if such letters were allowed in the times of war, it could dissuade men from serving in the army. However, in the same year, in a case wherein a person was convicted under the Espionage Act for publishing a supposedly offensive article, Holmes J observed the fundamental rights of a man under the First Amendment could not be compromised even in situations of war.[24]

[18] The Constitution of United States, First Amendment.
[19] 326 *U.S.* 1 (1945)
[20] 250 U.S. 616 (1919).
[21] Ruth McGaffey, "The Heckler's Veto" 57(1) *Marquette Law Review* 43 (1973).
[22] 254 U.S. 325 (1920).
[23] 249 U.S. 47 (1919).
[24] 249 U.S. 204 (1919).

The 'clear & present danger test' put forth by Holmes J in *Schneck's case*[25] was adopted by majority bench in *Gitlow v. New York*,[26] wherein the court observed that government need not wait until speeches or publication *"led to actual disturbances of the public peace or imminent and immediate danger of its own destruction."* Holmes J, along with Brandies J in their dissenting opinion, observed that the test had to be applied stringently. In *Deaborn Publishing Co v. Fitzgerald*,[27] an injunction was granted to a newspaper company against the order of the police who did not let them peddle newspaper on the street, as they believed it would cause distortion. In the case of *Termineollo v. Chicago*,[28] the petitioner was arrested by the police for disrupting peace by a speech made by him. The court observed that arresting an individual for 'breach of peace' was ultra vires of the US Constitution as it breached free speech.

Ultimately, the court saw a shift from the *Schneck's case*[29] wherein the court held that an act or speech by an individual advocating illegal activities was substantially protected under the First Amendment and the government could only interfere in cases where there was an 'imminent lawless action'.[30]

i. Right to Assembly and Breach of Peace

The problem of hostile audience and individual's freedom of speech has always been at crossroads. The American Constitution, in its First Amendment, protects the rights of individuals to form assemblies in order to voice their opinions and beliefs. The Bill of Rights Committee was called upon to formulate a solution to the problem of formation of assemblies as a reaction to an individual's speech or publication that led to public disturbances.[31] Prof Zaecharia Chafee, who was a member of the committee, provided three alternatives to the issue, first, to give full powers to the police to determine the safety of a city. The second measure was the opposite of the first one, wherein regardless of the reactionary consequences, the police could not restrict such activities. Finally, the last option was to only allow such meetings by applying the 'clear and present danger test'.

[25] *Supra* note 23.
[26] 268 U.S. 652 (1925).
[27] D.C 271 F. 479.
[28] 337 U.S. 1 (1949).
[29] *Supra* note 23.
[30] *Brandenburg v. Ohio* 395 U.S. 444 (1969).
[31] *CIO v. Hague* 25 F. Supp. 127 146 (1938).

The landmark decision of *Feiner v. New York*[32] presented two opinions in the backdrop of free speech and hostile audiences. The court held:

> *"Ordinary murmuring of an audience cannot be used to silence the speaker; however, the breach of peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others."*

Black J, in his dissenting opinion, rejected the indictment by the police and wrote:

> *"The police, of course, have the power to prevent breaches of the peace. But if in the name of preserving order, they ever can interfere with a lawful public speaker, they must first make all reasonable effort to protect him."*

Black J's dissent in Feiner's case solidified the rejection of Heckler's Veto.[33]

B. School Speech and Heckler's Veto

The second phase in the development of the doctrine of Heckler's Veto began with the protection of public school speech. In *Tinker v. Des Moines Independent Community School District*, the school administration directed the students not to wear black armbands which was a symbol of support for an armistice in the Vietnam War and threatened them with suspension. [34] The parents challenged the act of the school authorities as it contravention of the First Amendment rights. The Court categorically observed that students do not lose their fundamental rights upon entering the school premises. The court observed that the school authorities could not restrict speech due to a mere possibility of interruptions in the operation of the school, as only a "*material and substantial interference*" was required.

However, in *Dariano v. Morgan Hill Unified School District*,[35] a case with similar factual circumstances as *Tinker*, the court held that there was no violation of free speech under the First Amendment. In Dariano's case, a group of students who arrived at school wearing shirts with the American flag, on an event

[32] 340 U.S. 315 (1951).
[33] *Supra* note 15.
[34] 393 US 503 (1969).
[35] 1767 F.3d 764 (9th Cir. 2014).

celebrating the Mexican day were sent back home by the school authorities as they perceived it to be an intervention with the peaceful functioning of the school's affairs. The majority opinion, in this case, held that the circumstances in the case were different from the *Tinker*'s case as the school had a history of violence based on racial lines and justified the decision taken by authorities as a precautionary measure.

Nevertheless, the dissenting opinion of O'Scannlain J held that there was a clear misinterpretation of *Tinker's case* by the majority as the fundamental tenant of the first amendment is to ensure that no authority should silence a speaker based on reaction of audiences to a speech.[36] He observed that:

> "*hecklers veto doctrine attempts to avoid threatening violence against those with whom you disagree, you can enlist the power of the State to silence them.*"

The 'time, place, manner of speech' test was employed in the case of *Bethel School District v Fraser*, to test the reasonability of the actions of the school authorities for suspending a student for lewd sexual remarks. The court held that the speech of student was antagonistic to the *"fundamental values of public school education*."[37]

III. FREE SPEECH JURISPRUDENCE IN INDIA

The colonial regime in India placed several limitations on freedom of speech and expression through restrictions on public assemblies, associations as well as on a free press. The Indian Penal Code introduced in the year 1860 is a comprehensive code of criminal offences and the prescribed punishments that reflected the totalitarian controls of the British rule. Following the footsteps of revolutionaries around the world who used the power of writing to arouse feelings of nationalism in the minds of fellow citizens, Indian leaders extensively wrote for publications in regional languages as well as in English. Gandhi's ideals of free speech had a direct correlation to his call for 'Swaraj' or 'Self-Independence' wherein he remarked that attainment of freedom of speech was at the crux of the freedom struggle.[38]

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[36] *Id.*
[37] 478 US 675 (1986).
[38] Pradyumna K. Tripathi, "Free Speech in the Indian Constitution: Background and Prospect" 67 *Yale Law Journal* 393(1958).

One of the foremost documents advocating for freedom of speech in India was the Constitution of India Bill 1895.[39] Article 14 of the Bill provides for public participation in affairs of the country, and according to article 17 of the Bill, every citizen has the right to expression in words or writing. The article further provided that any such expression in the form of print would not be censored unless it was abusive in nature.[40]

Building on this as a precedent, the National Convention in 1925 headed by Tej Bahadur Sapru formulated the Commonwealth of India Bill, which contained a provision for the right to form of opinions,[41] which was later adopted verbatim in the Nehru Report of 1928.[42] An esteemed member of the Constituent Assembly, Shiban Lal Saxena moved for an amendment for the inclusion of 'public order' as a restriction on freedom of speech in the draft of article 19, which was negative. Finally, the restrictions on freedom of speech were limited to contempt of court, defamation, public decency and morality.[43]

Post-independence, several petitions were filed in the High Courts and the Supreme Court relating to article 19(1) (a) and the most significant of concerns raised was that the freedom of speech and expression provides leeway to such activities or speech that vouch for violence and murder. In *Romesh Thapar v. State of Madras,*[44] the Apex Court observed that the restrictions provided under article 19(2) were limited to libel and slander and no other law could operate in a way to restrict such a freedom, even if it is for the reason of maintenance of public order. Despite oppositions from various luminaries who believed that an amendment to article 19(2) would restore the pre-independence colonial stance, an amendment was passed in 1951 with prescribed limitations in the form of public order and morality. [45]

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[39] The Constitution of India Bill (Unknown, 1895), *available at:* https://www.constitutionofindia.net/historical_constitutions/the_constitution_of_india_bill__unknown__1895__1st%20January%201895 (Visited on Sept. 2, 2020).
[40] *Id.*
[41] The Commonwealth of India Bill (National Convention, India, 1925), *available at:* https://www.constitutionofindia.net/historical_constitutions/the_commonwealth_of_india_bill__national_convention__india__1925__1st%20January%201925 (Visited on Sept. 2, 2020).
[42] The Nehru Report, *available at:* https://www.constitutionofindia.net/historical_constitutions/nehru_report__motilal_nehru_1928__1st%20January%201928 (Last Visited on Sept. 2, 2020).
[43] The Constituent Assembly Debates on December 2, 1948, *available at:* https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02 (Visited on Sept. 2, 2020).
[44] AIR 1950 SC 124.
[45] Gautam Bhatia, "On Reasonable Restrictions and the First Amendment", *available at:*

A. Interpretation of 'Public Order' by the Higher Judiciary

The pre-existence of words such as 'public order', 'public tranquillity' and 'public safety' in the Indian Penal Code and the term 'public order' contained in the Constitution of India led to various opinions by the judiciary relating to its true interpretation. Before the word 'public order' was added to article 19(2), it was discussed in *Romesh Thappar v. State of Madras*, wherein the court observed public order meant *"a state of tranquillity among the members of a political society due to internal regulations enforced by the government"* and *"public safety was an extension to the notion of public order."*[46] The primary difference between the words 'public order' under article 19(2) and 'public safety' in the Indian Penal Code was discussed in *Brij Bhushan v. State of Delhi*, wherein it was held that 'public order' relates to small riots or affray that affects a small group of persons, while 'public safety' refers to internal disorders that are capable of jeopardising the safety of a state.[47]

The interpretation of the word 'public order' again came before the Supreme Court in *Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia.*[48] Subbarao J observed that 'public order' under article 19 was of local significance and held that it also denoted public safety, tranquillity and peace. This was clarified in *Madhu Limaye's*[49] case wherein the Supreme Court held that the terms 'public order' and 'public tranquillity' were interrelated but were not synonyms of each other. Furthermore, in *Ramjilal Modi v. State of Uttar Pradesh,*[50] the Apex Court observed that the words 'in the interest of public order' mentioned in article 19(2) was wide in ambit and included 'maintenance of public order' within its purview. In *Babulal Parate,*[51] the Court observed that the restrictions on article 19 in the interests of public order are permissible and that the government should take measures to maintain public order in advance.

B. Reasonable Restrictions and Public Order

The limitations to free speech and expression are subject to two important considerations, *first*, to recognise if a law falls within article 19(2), and *secondly*,

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https://indconlawphil.wordpress.com/2016/06/27/on-reasonable-restrictions-and-the-first-amendment/ (Visited on Sept. 2, 2020).

[46] *Supra* note 44.

[47] 1950 SCR 245.

[48] 1955 CrLJ 623.

[49] 1971 AIR 2486.

[50] AIR 1957 SC620.

[51] 1960 SCR (1) 605.

to examine if the restrictive action is reasonable. The word 'reasonable restrictions' was added through the First Amendment to the Constitution of India, which extends its application to both procedural and substantive laws in the country.[52] In *State of Madras v. V.G Row*, the court observed that to adjudicate an act as being reasonable, the facts and circumstances would have to be taken into consideration and *"no abstract standard or general pattern of 'reasonableness"* can be applied uniformly."[53] However, in the same case, the court observed that to test the reasonability of an executive act, the court has to necessarily look into the various facets of a particular case, such as

> "*the right that has been claimed to be infringed, purpose, extent and necessity of such a restriction imposed by the executive, conditions prevailing during the imposition of the restriction as well as the disproportion in its imposition."*

The connection between 'law' and 'in the interest of public order' requires an intimate connection between them, and it cannot be remote or a fanciful.[54]

In addition to this, the principle of 'Ex Hypothesi' of freedom of speech and expression requires that a reasonable restriction imposed has to be consistent with article 14 of the Constitution of India.[55] Article 14 lays down the twin notions of equality before law and equal protection of law. Any claim of infringement of article 14 was tested based on the traditional doctrine of equality,[56] which requires

1) Intelligible differentia distinguishing those grouped from others.

2) Rational nexus to the object it seeks to achieve in order to pass the scrutiny of the constitution.

The test of reasonable classification was seen to be incapable of testing the validity of executive actions, as its primary focus was discriminatory actions. In *E.P Royappa v. State of Tamil Nadu*,[57] the Supreme Court broadened the scope of article 14 by laying down the 'test of arbitrariness.' The test of arbitrariness was instrumental in bringing within its scope various acts of the executive,

[52] M.P. Jain, *Indian Constitutional Law* 1407 (Lexis Nexis, 7th edn., 2014).
[53] 1952 AIR 196.
[54] *Supra* note 48.
[55] *Papnasam Labour Union v. Madura Coats Ltd.,* AIR 1995 SC 2200.
[56] 1952 SC 75.
[57] AIR 1974 SC 555.

which were prima facie not discriminatory but were unreasonable, irrational and arbitrary in nature.

IV. PUBLIC ORDER RESTRICTIONS ON CINEMA AND THE ROLE OF EXECUTIVE

The creative filed of artistic expression through the lens of cinema has grown into a vast industry of its own. The right to claim a violation of the fundamental right under article 19(1) (a) is provided only to the makers of the cinema, whose views are presented in the film. The Supreme Court has always considered cinematic expression as a separate form of art, as it is perceived to have the tendency to arouse more emotions than any other form of art, primarily due to the use of visual mediums.[58]

A. The functioning of the Censor Board

A look into the history of England's Cinematography Act, 1909 reveals that the Act was introduced to protect audiences who were likely to face danger from fire due to the methods used to exhibit cinemas in open places.[59] Post-independence, a modified version of the colonial legislation was introduced in the form of The Indian Cinematography Act (Hereinafter referred to as "the Act") that came into being in 1952, with the primary intent to regulate the content produced by filmmakers through a provision for certification of movies.[60] The Act gives powers to the Central Government to constitute a Central Board of Film Certification (hereinafter referred to as "CBFC" or the "Censor Board").[61] The Act prescribes that on receipt of an application by any person desiring to exhibit his film, the Censor Board shall conduct a thorough examination of the film, after which an appropriate certification would be provided.[62]

Section 5-B of the Act states that the CBFC shall ensure that no such film would be allowed to be exhibited that affects the sovereignty, security and integrity of India, international relations, public order, morality, defamation or contempt of

[58] *K.A. Abbas v. Union of India*, AIR 1973 SC 123.
[59] Luke Mckernan, "Diverting Time: London's Cinemas and Their Audiences, 1906–1914" 32(2) *The London Journal* 129 (2017).
[60] The Cinematograph Act, 1952 (Act 37 of 1952).
[61] The Cinematograph Act, 1952 (Act 37 of 1952) s. 3.
[62] *Id*. s.4.

court or inciting the commission of any other offence not mentioned.[63] Furthermore, section 13 empowers the Central Government, Lieutenant Governor in case of Union Territories or the District Magistrate of a district to suspend any such exhibition of films that could cause a breach of the peace for two months, which can be extended by the Central Government.[64]

B. Judicial Approach to Censorship in India

The subject matter surrounding the censorship of films revolves around three broad categories, which are violence, sexual representation and politics; however, in India, the visual representations relating to politics and gory violence receive greater relaxation compared to sexual representations in movies.[65] The Supreme Court has justified pre-censorship of movies as an essential in the pretext of societal interests, despite the hues and cries of filmmakers that it breaches their fundamental rights.[66]

One of the landmark cases relating to censorship in India is *K.A Abbas v. Union of India* wherein section 5-B of the Cinematography Act was challenged for being a blot on Article 19(1)(a).[67] The Supreme Court justified pre-censorship in India according to the constitutional principles of free speech. The Court added that the law did not create a way for illegitimate abuse of power in the hands of the authorities who exercise control to censor movies. Similarly, in *Rangarajan v. P. Jagjivan Ram,*[68] the Court observed that pre-censorship was *"not just desirable but necessary."* The court remarked that there is a duty imposed on the Censor Board to ensure that the moral sensibilities of people are not shaken due to the reason of *"social change or cultural assimilation."* The opinions of the court were heavily influenced by what the judges believed to be appropriate and desirable for the popular morality and therefore, reflected a conservative view on free speech.

Although the Central Board of Film Certification is the primary authority to provide or refuse certifications to a film, in several instances the Supreme Court has intervened in matters where there was a clear case of breach of the fundamental right under article 19(1)(a). In *F.A. Picture International v.*

[63] *Id* s.5B.
[64] *Id* s.13.
[65] Someswar Bhowmik,"Politics of Film Censorship: Limits of Tolerance" 37(35) *Economic and Political Weekly* 3574(2002).
[66] *Supra* note 53.
[67] *Supra* note 58.
[68] (1989) 2 SCC 574.

CBFC,[69] the Bombay High Court directed the Board to grant the movie an appropriate certification even though the movie portrayed the Godra riots in a gruesome manner.

C. Invoking Public Order as Cinematic Restrictions

The problems that the cinema maker's face is two-fold, first, the CBFC mandates several cuts and deletion of a substantial amount of scenes before green signalling the movie for exhibition, which reduces a significant amount of what the filmmaker seeks to portray. Post-release, movies face disruption in peaceful screening due to reactionary audiences who object to the exhibition of such movies, which again restricts their rights under article 19(1)(a).

The case of *Union of India v. KM Shankarappa*[70] highlights the opinion of the Supreme Court that when an expert body, i.e., the CBFC has members other than the chairperson to judge the effects of a movie on the public and then take appropriate decisions regarding the film's exhibition, the *"excuse of law and order situation"* by the government is not acceptable as it is the government's responsibility to maintain order. The court added that the fact that certain sections do not agree with the decision of CBFC's Appellate Tribunal could not be a ground for the governments to review the order. The government was instead asked to take actions against those who willfully breach law and order.

Similarly in *Madhu Limaye v. State of Maharashtra,*[71] the Supreme Court held that the decision taken by CBFC, which is a competent authority consisting of specialised individuals, must not be brushed aside by the magistrate. This view was further elucidated in *Prakash Jha v. Union of India,*[72] wherein the movie 'Aarakshan' which was based on reservations was suspended in states of Punjab, Andhra Pradesh and Uttar Pradesh. The court observed that prior to the certification, the CBFC invited a prominent person related to the Dalit movement to be a part of the committee of experts for reviewing the movie. The court emphasised on the fact that without the actual screening of the movie or publicly exhibiting it in cinema halls and theatres, the governments could not use their executive power to stall such movies on the presumption of disruptive activities. The court observed that since it was established that the state must maintain law and order, it is inherent that the state needs to protect the

[69] AIR 2005 Bom 145.
[70] (2001) 1 SCC 582.
[71] A.I.R. 1978 SC 47.
[72] (2011) 8 SCC 372.

individuals involved in a movie such as the filmmakers and the actors as well as the audience who wish to watch such movies.

In Raj Kapoor v. State of Maharashtra,[73] the Apex Court observed that when it comes to discerning the nature of creative freedoms, law could not be asphyxiated by people who find objection in every material art form. The court added that the rich cultural heritage of the country would be in trouble if this continued. In *Rangrajan's case*, a narrow understanding of cinematic expression was provided by the court which observed that movies were initially intended to be a mere form of entertainment and not a material form of art or expression; nevertheless, the court held that the state could not justify its inability to control possible hostile audiences by restricting freedom of speech which would be contrary to the rule of law.[74] The court observed that claims under article 19(1)(a) and 19(2) could not be of equal weight although there is a compromise between the two articles. However, a more significant consideration has to be provided to the former unless there is proximate and direct nexus to the danger caused by such an expression.

In the case of *Lakshmi Ganesh Films v. Government of Andhra Pradesh,*[75] the government of Andhra Pradesh suspended the exhibition of the movie, The Da Vinci Code, in order to stall probable agitations and demonstrations based on the representations by various Christian minority organisations, who believed that it hurt their religious sentiments. Prior to the ban, the movie received an 'A' certification by the Censor Board and was reviewed by the Union Government to see if any objectionable content could be found. Post review, the central government permitted the release of the movie along with a disclaimer to the moviegoers regarding its content. The court rejected the justification of the state government to ban the film stating that the state government had equated the term 'breach of peace' mentioned under section 8 of the 1995 State Act with 'public order' under article 19(2). The court laid down a test to determine the reasonableness of the executive action and to see if such an act is

(a) within the permissible area of restriction;

(b) reasonable; and

[73] 1980 AIR 258.
[74] *Supra* note 68.
[75] 2006 (4) ALD 374.

(c) to see if there were other actions which were considerably less restrictive and could serve as an alternative for the state to pursue before resorting to the impugned action.

Another case challenging the same movie was brought before the Madras High Court, the court observed that when the CBFC, which is a competent authority has no qualms about a movie and has granted the certificate for exhibition, self-appointed censors could not call for its suspension.[76] In the same case, the court formulated four essential questions for a determination regarding the tussle between article 19(1) (a) and 19(2), which are to determine

1) if the public has a 'right' to accept or reject alternative interpretations provided in the form of literature, art or movies.

2) Whether an individual's freedom of expression can be compromised merely because a section of people do not believe that the individual can exercise the right.

3) Whether the State is duty-bound to protect an individual's right, which is threatened by a breach of peace. The court observed that all the questions in the above scenario have to be construed in favour of the individual whose fundamental right is violated.

The freedom of cinematic expression is no less free from the clutches of political censorship, especially when it is based on the life of a politician or a historical figure. One such example is the notice sent by the leaders of the Bahujan Samaj Party to the Indian Motion Picture Producers Association and the Indian Film Directors' Association to restrain the production or filming any movie based on Mayawati's life. Although there is no such legal requirement for seeking consent from the person to film a biography, such activities have become usual.[77]

In *Lyca Production Pvt. Ltd v. Government of Tamil Nadu*,[78] the petitioner who was the producer of a commercially hit Tamil movie, faced oppositions from political organisations who attacked cinema halls due to the reason that the production company had close ties with the President of Sri Lanka. The petitioner voluntarily agreed to enter into a compromise with the political organisation to remove the name of the production house from the movie's

[76] *Sony Pictures v. State of Madras* (2006) 3 MLJ 289.
[77] A.G. Noorani, "Films and Free Speech" 43(18) *Economic and Political Weekly* 12 (2008).
[78] 2014 S.C.C. Online Mad. 1448.

posters and advertisements, after which all the protests stopped, and the movie was allowed to be exhibited. However, the petitioner asked for protection from the government to ensure the peaceful exhibition of the movie. The same was not granted, and he filed a writ petition before the Madras High Court to protect the exhibition of the movie. A counter affidavit by the ACP stated that such protection could not be granted as the movie screened across 510 theatres in Tamil Nadu. The Court held that political organisations could not be allowed to function as 'Super Censor Board' and any such demand by the organisations that seek to remove certain dialogues or scenes post censorship was nothing less than blackmail. The Court also observed that the law enforcement agencies could not take the defence of their inability to provide police protection by the reason that voluntary agreements were entered upon by the petitioner with such organisations.

In addition to the powers given to magistrates and State Governments to halt the exhibition of movies under the Act, section 144 of the Criminal Procedure Code has also been used in several instances to prohibit the exhibition of movies. Section 144 empowers the district magistrate to prevent immediate cases of nuisance by issuing orders to restrain any person from doing any act to prevent injury to public tranquillity. In the case of Kamala Hassan's movie Vishwaroopram, district magistrates across 31 districts of Tamil Nadu issued prohibitory orders to restrict the exhibition of the movie under the section fearing law and order situation, as it hurt the religious sentiments of a particular community. However, the Madras High Court lifted the ban later.[79]

V. CONCLUSION

An open society allows for a liberal discourse that helps in the development of an individual's personality as well as the society's aspirations as a group. Freedom of speech is not an absolute right. The social contract entered upon by individuals to be part of a civilised society requires them to give up certain absolute rights, and restrictions contained in article 19(2) in the form of public order restrictions can be considered to be one of them.

H M Seervai noted:

> *"Fundamental rights represent the claims of the individual, and the restriction under 19(2) protect the claims of other individuals and the claims of society or the State; the limitations imposed on Article*

[79] PTI, "Madras HC lifts ban on Vishwaroopam", *The Hindu Business Line,* Mar. 12, 2013.

> *19(1) (a) are not to belittle the fundamental rights available to individuals but to say that fundamental rights are not absolute in society and can only be enjoyed in an orderly society."*[80]

However, the problem herein is the tendency of the central and state governments and the police to arbitrarily exercise their powers to curtail creative freedoms due to the fear of the unruly mob. The functioning of extra-judicial censorship signifies a shift from despotic imperial censorship to a mob dictated censorship that operates laterally as opposed to a centrally imposed authoritarian restriction.[81] The over-usage of words such as 'in the interest of general public', 'interest of society' that are mentioned under various statutes provide unfettered powers to the executive to restrict free speech. It is necessary to determine the difference between creative speech and expression and hate speech wherein full freedom has to be provided for the fulfilment of the former,[82] and stringent measures have to be adopted to prevent the latter.[83]

The landmark case of *Rangarajan*[84] echoed Black J's condemnation of the heckler's veto in *Glasson v City of Louisville,*[85] wherein he observed:

> *"Freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem."*

The same approach was highlighted in the case of *Tamil Selvan v. Government of Tamil Nadu*,[86] wherein the Madras High Court observed that the state has a positive obligation to protect the life and freedom of expression of the authors, and that the police officials were not the best judges in matters of literary and cultural issues. Furthermore, the absence of laws that punish people who create

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[80] *Supra* note 52.
[81] Mini Chandran, "The Democratisation of Censorship: Books and the Indian Public" 45(40) *Economic and Political Weekly* 31 (2010).
[82] Srinivas Burra, "Decriminalising Creative Offence" 49 *Economic and Political Weekly* 18 (2014).
[83] Devika Agarwal, "Meesha book controversy: Ban on literary work violates freedom of speech; test for such moves should be extremely stringent" *Firstpost, available at :* https://www.firstpost.com/india/meesha-book-controversy-ban-on-literary-work-violates-freedom-of-speech-test-for-such-moves-should-be-extremely-stringent-4924361.html (Visited on Sept.10, 2020).
[84] *Supra* note 68.
[85] 518 F.2d 899, 906 (6th Cir. 1975).
[86] 2016 SCC OnLine Mad 5960.

law and order situations and threaten freedom of speech also adds on to the problem of unruly mob behaviour.

OTT (over-the-top) platforms exercise greater freedom when it comes to determining the content that is displayed on their streaming sites. These platforms not just feature full-length movies but also serials and short films, which are otherwise regulated by different authorities in the country. The autonomy provided in terms of regulation of content allows for the greater exercise of creative expression through visual media while observing the Universal Code of Regulation that is uniform across all platforms.[87] Although it may be challenging to adopt the same model for exhibiting movies in theatres, which would also considerably reduce the Censor Board's power, a liberal approach towards cinema can bring about this change gradually. However, the recent developments in the country's stance on OTT platforms have initiated discussions regarding the imposition of regulations of such platforms.[88]

The freedom of speech and expression includes the freedom to hold opinions and heckler's veto not just infringes the right to freedom of speech and expression but also the right to self-determination through motion pictures. The balance of rights must be in favour of the individual exercising his foremost right. Therefore, it is necessary to ensure that the speaker or the person exercising his fundamental right is not subject to heckling that restricts his fundamental right in the form of executive actions under article 19(2).

[87] Aroon Deep, "A complete guide to OTT content regulation in India" *MediaNama, available at:* https://www.medianama.com/2020/07/223-ott-content-regulation-reading-list/ (Visited on Sept. 10, 2020).
[88] Gaurav Laghate & Vasudha Venugopal, "Govt drawing up broad guidelines for OTT censorship in India" *Economic Times*, Jan 27, 2021.

THE COMPARATIVE JURISPRUDENCE OF SECULARISM IN FRANCE AND INDIA WITH REFERENCE TO THE ENACTMENT OF ANTI-SEPARATISM LAW AND THE CAA

Deep Dighe & Tulsi Mansingka[*]

The liberties provided by the principle of secularism in France and India are quite distinct from each other. The 1905 law i.e. laicite is a result of hard fought rejection of Catholic Church in the governance of the State and that has been the prevailing norm in France ever since. Additionally, the absolute exercise of freedom of expression linked with laicite has become the basis of the "founding values" in France. On the other hand, in India, secularism has not been implemented in an extreme manner. The provisions relating to secularism as well as Freedom of speech and expression form a part of the gray area of law. Moreover, religion has always been important in the Indian context and a diversity of religious beliefs has prevailed as an intrinsic part of Indian secularism. The recent turn of events in both the jurisdictions raises serious concerns on the value of secularism practiced in the States so far, as they are believed to be encroaching upon the freedom of religion of a particular religious group. The controversial legislations in question are Anti-separatism law and the Citizenship Amendment Act introduced in France and India respectively. The authors try to point out the disconnect between the principle of secularism in these countries and the impugned legislations. Whilst also looking into the possible effects of these laws on the notion of secularism and the inter-relationship between both the laws.

I. INTRODUCTION

The principle of secularism has been at the very heart of most modern democratic republics, it is for this very reason one can suppose it has been a deeply contested issue throughout the democracies around the globe from east

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to west.[1] The traditional idea of secularism is that there shall be a separation between the Church and the State i.e. religion will have no role to play in the governing/ruling of a state. This is however a rather simplistic way to put it and does not cover the aspects of modern secularism and its relation with the nation-state. The theoretical foundation of secularism is a well-researched domain and it would not serve any purpose to either analyze or comment on the same. This paper only intends to focus on secularism through a legal prism and study its contemporary implications. The two jurisdictions, which the authors have decided to choose for this paper, are the Republic of India and the Republic of France. The reason for choosing these two jurisdictions is the distinct nature of secularism, which is adhered to in both of these jurisdictions. It is fundamentally different from the one in the classic western democracies and it would be a fair comment to say that the Indian and French versions are at two extreme ends of the spectrum of secularism.

To understand the application of secularism it is imperative to grasp the background of both these countries and how the principle came into being. India as we know it today did not exist up until the year 1947 the time when the former British colony got her independence and the present-day Indian State was formed. The debate around secularism was one of the most vexed issues that was confronting the nation to be and led to great amount of time and effort in addressing the same, however a decision was made to commit to the value of secularism and hence it was codified and formally recognized in 1950 after the commencement of the Constitution[2]. The idea of having a secular Constitutional democratic republic however was not accepted without great opposition and that was because of the trauma, which was experienced due to the partition of erstwhile British colony of India. The creation of the Islamic Republic of Pakistan left a sour taste for many Indian nationalists and they felt while Pakistan had opted to be a non-secular state India was obligated to accept secularism as a fundamental principle and it was an imposition of some form[3]. These events set the tone for discourse on secularism in the country even today. The question

[1] Jeremy Ghez, "Debate: On secularism in the 21st century", *The Conversation,* February 22, 2008, *available at:*https://theconversation.com/debate-on-secularism-in-the-21st-century-91669 (last visited on March 15th, 2021); Rohit Sharma, "The Study of Secularism in India: with regards to the Constitution, Constitutionalism in India and Society," SSRN (June 2020) *available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3610649#references-widget (last visited on July 05th 2021)

[2] The Constitution of India, 1950, Preamble (Sovereign Socialist Secular Democratic Republic)

[3] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 148 (Oxford University Press, USA 1999); Dr Suprita Dash, "Origin and Evolution of Secularism in India," Vol. 22, Issue 7, IOSR-JHSS (2017)

of the rights of religious minorities and the extent to which religion can be permitted to seep into politics and the administration of state are also questions, which are raised during the debate on secularism in India.

The French value of secularism is called "laicite"[4] it can be noted that the term mentioned here roughly translates to secularism[5] and there is no direct equivalency as such between the two terms. The French story for the proclamation of a secular state begins way earlier than India in the 19th Century where there were clashes(sometimes violent) between the Church and the Clergy on one side and the Secularists, Atheists, Rationalists and Socialists on the other. The skirmishes were over the way of life, which could prevail in the French state. This brutal ideological conflict ended with a triumph for the anti-church forces.[6] The laicite was codified in the year 1905[7] by the National Assembly and since then it has become a defining feature of the French society. The fundamental element here is that when the principle of laicite was evolving the French society only had Christianity as the major religion unlike India or even present day France. Now that has led to many outside France questioning the legitimacy of laicite[8]and this is something, which will be dealt later in this paper at some length.

There are not many similarities between India and France legally or culturally so it naturally begs the question as to why countries with such a sharp contrast have been chosen for the sake of this article. The primary reason being that

[4]Secularism and Religious Freedom, *available at:* https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/secularism-and-religious-freedom-in-france-63815/article/secularism-and-religious-freedom-in-france (last visited on March 15th, 2021); Editorial, "Why the rest of the world struggles to understand French Laicite", *Scroll.in*, November 24th, 2020, *available at:* https://scroll.in/article/979180/why-the-rest-of-the-world-struggles-to-understand-french-laicite (Last visited on
April 3rd 2021)

[5] Editorial, "EXPLAINED: What does laïcité (secularism) really mean in France?" *The local*, November 23rd, 2020, *available at:* https://www.thelocal.fr/20201123/explained-what-does-lacite-secularism-really-mean-in-france/ (last visited on March 15th, 2021); Editorial, "Why the rest of the world struggles to understand French Laicite", *Scroll.in*, November 24th, 2020, available at: https://scroll.in/article/979180/why-the-rest-of-the-world-struggles-to-understand-french-laicite (Last visited on April 2 nd 2021)

[6] Editorial, "What is French laïcité?" *The Economist*, November 23rd, 2020, *available at:* https://www.economist.com/the-economist-explains/2020/11/23/what-is-french-laicite (last visited on March 15th, 2021); Martin Evans, "What is French Secularism?", *History Today*, January 22nd, 2016, available at: https://www.historytoday.com/what-french-secularism (Last visited on April 2nd 2021)

[7] Law of December 9, 1905 concerning the separation of Church and State; *ibid.*

[8]*Supra* note 4; Anastisia Colosimo, "Laïcité: Why French Secularism is So Hard to Grasp" *Institut Montaigne*, December 11th 2017, *available at:* https://www.institutmontaigne.org/en/blog/laicite-why-french-secularism-so-hard-grasp (last visited on March 15th, 2021)

despite the factors that distinguish both of these nations there is a common thread which can be explored that is the relationship both of these countries have with the largest minority group (Muslims) in their respective nations and that is because of the sizeable population this minority has in both these countries which primarily identify themselves as secular democracies. India has the third largest Muslim population with about 17.22 crore[9] in the world and France has the highest Muslim population for any nation in Europe[10]. As the recent turn of events indicate that both of these States have had political troubles because of their hostile relationship with the said minority group owing to which certain legislative or policy decisions have been made which have not gone down well either with the Constitutional principle of secularism[11] or with the International community[12]. Even though the idea of practicing secularism differs extremely in the two countries, both follow the basic principle of providing equal footing to every religion before the law and in pursuance of the same, the States are bestowed with the duty of protecting minority identity and dignity. A particular religion, especially a minority, if not allowed to practice their beliefs will end up losing its culture and identity. Stepping towards social reforms without taking into account any particular community and alienating them is a step in line with legislation, which singles out the practice of a minority community, and disregards their practice of belief in public. This is the primary reason for choosing the two jurisdictions. The authors will make an attempt to analyse the said decisions in the backdrop of the socio-political situation and legal principles of both the jurisdictions. The above-mentioned exercise will be undertaken by impugning two pieces of legislation in both the jurisdictions, which are perceived to be in contravention with secularism and corrosive to the inclusive social fabric existing in both these countries. The Citizenship Amendment Act that the Indian Parliament passed in 2019[13] and the Anti-Separation Law enacted by the French National Assembly in February this year[14]. Thus having briefly summarized the events, which have shaped the contemporary form of secularism

[9] World Population Review, *available at:* https://worldpopulationreview.com/countries/france-population (last visited on July 05th, 2021)
[10] Ibid.
[11] *Supra* note 2; *Supra* note 5.
[12] Editorial, "CAA and Police Brutality: What the world is saying?", *The Citizen*, December 17th, 2019, *available at:* https://www.thecitizen.in/index.php/en/NewsDetail/index/6/18026/CAA-and-Police-Brutality-What-The-World-Is-Saying (last visited July 05th, 2021); Editorial, "France's Controversial 'separatism bill: Seven things to know", Aljazeera, February 15th, 2021, available at: https://www.aljazeera.com/news/2021/2/15/frances-controversial-separatism-bill-explained (last visited on July 05th 2021)
[13] The Citizenship (Amendment) Act, 2019
[14] The Bill n ° 3649 confirming respect for the principles of the Republic

in India and France it would be appropriate to elaborate on how secularism is embedded in the legal systems of both these countries.

II. SECULARISM AS A LEGAL PRINCIPLE IN INDIA

Secularism, although not defined in the Indian constitution, means that the State is neutral in nature, does not have any religion of its own but respects all religions equally.[15] The word 'secular' was included in the Preamble to the Constitution only after the 42nd Amendment Act,[16] prior to that there was no express term like 'secular' or 'secularism' in the Constitution. Regardless, the thought of secularism was always implicit from the Freedom of religion granted as Fundamental rights under Part III.[17] The Apex Court in *Keshavananda Bharti v. State of Kerala*[18]asserted that secularism forms a part of the basic structure of the Constitution. The same was reaffirmed in the case of *Indira Gandhi v. Raj Narain*[19] and *S.R. Bommai v. Union of India.*[20]

Unlike western countries, there is no wall of separation between religion and the State in India. In Articles 25 & 26, the law and the courts have been entrusted with the task of drawing a line between matters of religion and the secular. The said provisions allow the State to intervene in essential matters of religious groups and communities and modify them in the larger social interest.[21] Further, by virtue of Article 15 & 16 any discrimination by the State on the basis of religion, class, race, sex or place of birth is prohibited.[22] These grounds imply impermissible discrimination, that is for a law to be violative of Article 15 should effect discrimination based on these grounds.[23] However, this Article is applicable only to Indian citizens.

The fundamental principle of secularism in India is embedded under Article 14, which affords equality before the law and equal protection of the laws within the

[15]Chishti, S.M.A.W. "SECULARISM IN INDIA: AN OVERVIEW" *The Indian Journal of Political Science*, vol. 65, no. 2, 2004, pp. 183–198, *available at:* www.jstor.org/stable/41855808 (last visited on March 14th, 2021); Rohit Sharma, "The Study of Secularism in India: with regards to the Constitution, Constitutionalism in India and Society," *SSRN* (June 2020).
[16] The Constitution (forty-second amendment) Act, 1976, s.2
[17] The Constitution of India, 1950, art. 14, 25 & 26
[18] AIR 1973 SC 1461
[19] AIR 1975 SC 2299
[20] AIR 1994 SC 1918
[21] The Constitution of India, 1950, art. 25 (2)(b)]
[22] The Constitution of India, 1950, art. 15 & 16
[23]Dattatraya Motiram More vs State Of Bombay, AIR 1953 Bom 311

territory of India.[24] Equality before law infers that every person should be treated equally and the state cannot discriminate between persons through state action.[25] The Rule of Law guarantees equality of law. The Rule of Law states that, in a country which does not have any religion of its own should not discriminate against any religion.[26] While acknowledging the inequalities in the society, if discriminatory actions are taken in order to reinstate equality then such action should be based on intelligible differentia and it must have reasonable connection with the legislative intent sought to be achieved.[27] In the case of *Navtej Singh Johar v. Union of India*[28], Justice Indu Malhotra , in her judgment, applied grounds under Article 15 into Article 14 and observed that, "*Where a legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia*".Further, while referring to the grounds under Article 15, she explained that they form an intrinsic and core trait of an individual, "*Race, caste, sex, and place of birth are aspects over which a person has no control, ergo they are immutable. On the other hand, religion is a fundamental choice of a person. Discrimination based on any of these grounds would undermine an individual's personal autonomy.*"Religion was held to be a facet of personal autonomy, and a classification based on it would be treated as impermissible classification.

III. THE CAA AS AN ANTITHESIS TO SECULARISM

Secularism as has been established through the above-mentioned provisions and precedents is not just a principle but also a tenet of the rule of law and a part of the basic structure of the Indian Constitution. The question then arises what can be made of legislations, which ostensibly fly in the face of this legal principle and foundational value of the Indian Republic. There have been legislations, which have been called into question over the years for being anti-secular. However for the sake of this paper the authors will only focus on the Citizenship Amendment Act, 2019[29] (hereinafter referred to as "CAA"). The CAA was brought about by the government in order to relax the rather stringent provisions, which exists for 'aliens' to acquire the Indian Citizenship. The rationale behind CAA was that the various religious minorities are being persecuted in the

[24] The Constitution of India, 1950, art. 14
[25]Aniket Tiwari, "An Overview of Right to Equality under Article 14 of the Constitution", *iPleaders*, January 06th, 2020, *available at:* https://blog.ipleaders.in/article-14/ (last visited on March 15th, 2021)
[26] Naomi Choi, "Rule of law" *Encyclopedia Britannica*, August 27th, 2019, *available at:* https://www.britannica.com/topic/rule-of-law (March 15th, 2021)
[27]Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar & Ors., 1958 AIR 538
[28] WRIT PETITION (CRIMINAL) NO. 76 OF 2016
[29]*Supra* note 13

neighboring countries because of their religious beliefs and India as a Democratic state adhering to the rule of law must provide them with sanctuary.[30] This noble intent when put into action through the CAA however does something insidious and contrary to the principle of secularism. It excludes Muslim community as a whole from the group of persecuted minorities[31] and makes a classification on the grounds of religion something, which is not permissible under the Constitutional scheme of India. The supporters of the CAA and ruling party contend that this is nothing but intelligible differentia and the exclusion is well founded.[32] That argument has not been accepted by many in academia and civil society hence the large-scale resentment. The reason why this legislation is impugned is that it is a flagrant violation of Article 14 and by that virtue Article 21 of the Indian Constitution[33]. The above-mentioned fundamental rights are being abridged by this legislation as Article 14 provides for the equality clause in the Constitution which is directly contravened by the CAA.[34] This is because as per the Constitutional scheme of India certain fundamental rights are available to even aliens and the right to equality is one of them.

The idea that persecution only because of religion is a legitimate ground for the exclusion of a particular religious community is erroneous. The challenge to the CAA on the said ground is impending before the Supreme Court[35] and until the pronouncement of any judgement it would not be wise to make any conclusion however a cursory reading of the Act and the relevant Constitutional provisions along with the academic literature definitely make a strong case for it to be read down. One might ponder what similarity it has with the French Laicite and the

[30]Abhinav Chandrachud, "Secularism and the Citizenship Amendment Act", *SSRN* (January 4, 2020), *available at:* https://ssrn.com/abstract=3513828 or http://dx.doi.org/10.2139/ssrn.3513828 (last visited on March 15th, 2021); Editorial, "Citizenship (Amendment) Act, 2019: What is it and Why is it seen as a problem," *The Economic Times*, December 21st 2019, *available at:* https://economictimes.indiatimes.com/news/et-explains/citizenship-amendment-bill-what-does-it-do-and-why-is-it-seen-as-a-problem/articleshow/72436995.cms (Last visited on April 2nd 2021)

[31]*Supra* note 13, s.2

[32]*Supra* note 30; Jhalak M. Kakkar, "India's new citizenship law and its anti-secular implications", *Law Fare,* January 16th, 2020, *available at:* https://www.lawfareblog.com/indias-new-citizenship-law-and-its-anti-secular-implications (last visited on March 15th, 2021)

[33]Maneka Gandhi v Union of India, 1978 AIR 597

[34]Krishnadar Rajagopal, "Does the Citizenship (Amendment) Bill go against Article 14 of the Constitution?, *The Hindu*, October 06th, 2019, *available at:* https://www.thehindu.com/news/national/does-the-citizenship-amendment-bill-go-against-article-14-of-the-constitution/article29605976.ece (last visited on July 5th, 2021)

[35]Krishnadar Rajagopal, "140 please against Citizenship Amendment Act hang fire in Supreme Court", *The Hindu*, December 06th 2020, *available at:* https://www.thehindu.com/news/national/concern-over-delay-in-hearing-pleas-against-caa-in-sc/article33264290.ece (last visited on July 05th, 2021)

global debate on secularism and the answer to that is, it in a rather Machiavellian fashion excludes only one religious group, which is a minority back home.

The intention of the dispensation has been questioned because many believe that the CAA is just a device to take care of the problem of minority group[36] (Muslims) and at the same time appear benevolent while doing so. Therefore, it can be said that the very idea of secularism which India boasts about internationally and also claims to be the rationale for the CAA will be undermined by the CAA itself and this is what has become the "secularism paradox" i.e. acts done supposedly in consonance and pursuance of secularism will make it hollow from within. This theme will be a recurring one in this paper and will appear in the next part as well when the controversial "Anti-Separatism" law will be dealt with in some detail.

IV. UNDERSTANDING LAICITE AS A LAW IN FRANCE

As discussed earlier, Laicite is the codified law that creates a wall between the Church and the State.This 1905 French law is the constitutional principle of secularism in the country. In the French Constitution, Article 1 declares the State as secular, democratic, indivisible, and social Republic. It also ensures that all citizens are equal before the law and that French census does not distinguish on the basis of origin, race or religion. The provision is interpreted to preclude religious involvement in government affairs and in determination of state policies and discourages the government intervention into religious affairs. Laicite is a law that stands on pillars of three principles: complete separation of political institutions from religious denominations, freedom of conscience, and equal standing of different religions and beliefs in the eyes of law.[37] The principle of the notion of secularism is found entirely in the first title of laicite, ensuring freedom of conscience but restrictive in the interest of public order.[38] The State does not subsidize, remunerate or recognize any religious denomination. The provision provides for the principle of neutrality regarding

[36]Editorial, "Interrogating the Citizenship (Amendment) Bill", *The Economic and Political Weekly*, December 14th, 2019, in its editorial, for instance, argued that the CAA "reflects the ideological zeal to target minority groups in India." By enacting the CAA, it argued, the government has communicated to the communities included in it that those excluded by the CAA are "secondary citizens", Editorial, "The Political fix: After a month of Citizenship Act protests in India, what have we learned?", *Scroll.in*, January 20th, 2020, *available at:* https://www.epw.in/journal/2019/49/editorials/interrogating-citizenship-amendment-bill.html (last visited on March 15th, 2021); *available at:* https://scroll.in/article/950351/the-political-fix-after-a-month-of-citizenship-act-protests-in-india-what-have-we-learned (Last visited on 02nd April 2021)

[37]*Supra* note 14

[38]*Supra* note 7, art. 1

various religious beliefs without differentiating with the principle of equality amongst the religions.[39]

The statute envisages renouncing "at the free disposition of associations" new "buildings [affected by Public Domain] used for public religious worship".[40] Issues related to ownership of public places of worship are also taken into account.[41] The principles regulating the religious police are covered under Title V of the law, to discuss some important provisions- Article 28 prohibits "raising or affixing any sign or religious emblem on public monuments or in any public place whatsoever, with the exception of religious buildings, burial land in cemeteries, funerary monuments, as well as museums or exhibitions." It also provides that the principle of liberty of conscience, if harmed, will be subjected to sanction of French penal law. Laicite provides for penal and preventive provisions in case of violation of articles under the said law. For instance, Article 31 imposes punishment on those who employ physical violence or threats against any individual in order to make him either participate or refrain from participating in any religious activities.

The law asserts that faith is a private matter and cannot be exercised outside home and worship places. The stance of neutrality towards different faiths has been the governing principle of secularism in France and not an attempt to clear religion from public space entirely.Despite the fact that French secularism law does not favour any religion and promotes neutral communitarianism, it is not devoid of prejudices. The plausible rationale behind this is that the said law is restricted to the intricacies of Christianity and it is not suitable for other religions to fit the configuration of a church. Moreover, the Law of 1905 did not evolve to possibly include various new religious associations as it could not see these religious organizations entrenching themselves in France and it is evident from the state action discussed below.

V. ANTI-SEPARATISM LAW CONTRARY TO THE SPIRIT OF PLURALISM

The Bill No. 3649 confirming respect for the principles of the Republic[42] (hereinafter referred to as the Anti-Separatism Law) became the law on 16th February, 2021 and that is despite the stir it caused at home and outside France. The impugned legislation has reignited the debate on secularism worldwide. The

[39] *Supra* note 7, art. 2
[40] Supra note 7, art. 13
[41] Supra note 7, art. 14-17
[42] *Supra* note 14

authors will try to analyze the said law and explain why it is against the pluralist spirit of the French Republic. This law amends the existing criminal code, civil code and the Separation of Church and State Act of 1905. The amendments are in pursuance of what French government describes as "values of the Republic"[43]. The detractors of this law submit that this legislation is only in response to ghastly killing of the French Teacher Samuel Paty and all the horrific acts of violence, which were committed by Islamist Separatists/Extremists[44]. There are specific provisions under this law, which single out and criminalize certain practices of the Muslims. The limitation of this paper compels the authors to only briefly touch upon the controversial provisions of this law. The Chapter III of this law titled "Provisions relating to the dignity of the human person"[45] having Article 14 and Article 15 in it criminalize polygamy which is peculiar to only one religious group and also make it a ground for rejection of asylum and non-issuance of residence permits in France. The idea that something as personal as marriage needs to be governed by such stringent provisions seems a bit uncanny given the idea of Laicite only meant the exclusion of religion in the public sphere. The subsequent part of the legislation which raises concern is the Chapter V[46] titled "Provisions relating to education and sports" in this Article 20 effectively makes schooling in the conventional form mandatory and Article 21 imposes an obligation on all those private institutions imparting education to get themselves registered or else face the might of the state. This provision also can be construed as an attempt to prohibit Muslims to send their children the Madarsas[47] and stop alleged indoctrination that takes place there. This is what has become the secularism paradox as mentioned earlier that ostensibly neutral laws target one religious group and take a great leap of faith from the original principle of secularism.

This begs the question that can a Secular state bring about legislation which targets a particular religious group and can laicite be stretched even to the personal domain to outlaw certain practices which might seem regressive to persons who do not believe in them. The answer would be in the negative and

[43] *Supra* note 4
[44] Editorial, "France teacher attack: Seven charged over Samuel Paty's killing", *BBC News*, October 22nd 2020, *available at:* https://www.bbc.com/news/world-europe-54632353 (last visited on March 15th, 2021); Norimitsu Onishi and Constant Mehheut, "A Teacher, His Killer and the Failure of French Integration," *The New York Times*, October 22, 2020, *available at:*https://www.nytimes.com/2020/10/26/world/europe/france-beheading-teacher.html (Last Modified on October 29, 2020)
[45] *Supra* note 14
[46] Ibid.
[47] *Madrasas are schools for Muslim children where they are taught about Islamic theology and other academic areas of study.*

withstanding the chilling effect such a law will have on the rights of the religious group concerned.

VI. CONCLUSION

Secularism is a principle that authorizes all forms of beliefs and is not a belief in itself. This is the reason why it is considered neither pro nor anti-religious. The Indian model of secularism has been refreshingly novel in terms of its practice and in theory. It does not strictly adhere to the Separation of Church and State and rather recognises all major religions something which is called as "positive secularism"[48]. The recent legislative acts indicate a shift away from this principle by the disavowal of a particular religious group. The legislations or policies in question might not get struck down through judicial review but the stakeholders should contemplate the corrosive effect it will have on the celebrated value i.e. Indian Secularism.

In France the extent of State intervention wherein the government has the power to control intimate matters such as the attire, marriage and schooling is not just violation of freedom of conscience but misuse of secularism to stigmatize people. This kind of secularism along with absolute freedom of expression can lead to social division in France. The idea of the State's neutrality towards religion implies that all citizens are equal before the law irrespective of their religious belief and not to make amends in law in order to erase the differences under the notion of secularism. With greater cultural diversity comes more need for secularism in France only to enable all of its citizens to live together while keeping their philosophical and religious beliefs intact and the social culture that allows them to enjoy freedom of conscience and freedom to practice a religion.

[48] Ismael Faruqui v. Union of India (1994) 6 SCC 360; Shaikh Mujibar Rehman, "Why Diversity needs secularism," *The Hindu*, November 02, 2016, *available at:* https://www.thehindu.com/opinion/op-ed/Why-diversity-needs-secularism/article16086904.ece (Last Modified on December 02, 2016)

DIVESTING FEMALE PROFESSIONALS OF THEIR RIGHTEOUS FUTURE: IMPLICATION OF MATERNAL PENALTY AND STRIVE BETWEEN EQUITY- EQUALITY

Amisha Raghuvanshi & Vidushi Keshan[*]

This article provides a comprehensive view of the struggle of pregnant women and mothers in workplaces by drawing a comparison to the male employees. It reflects on the existing inequalities against pregnant women in the workplace with few of the instances that have been brought to light. As most of the professions involving physical activities or long hours of work have been considered male-centric, the article draws an insight on how these discriminations against women are man-made and not natural especially by the terms of their contracts. This article also enlightens about the prevailing discrepancies between a man and a woman in professional areas of sports and their endorsing companies with an emphasis on its disapproval by some elite sportswomen. The article posits on the disparities in the legal sector along with existing studies involving those in the academia and their experiences relating to pregnancy-associated discrimination. On a concluding note, certain suggestions have been imparted that can be inculcated by States to support pregnant women and mothers at workplaces.

I. INTRODUCTION

Life has never come in full circles for women and right from the start of human civilization, females have fought for the most rudimentary of their rights either be it in the political, social, or economic sphere. In the twenty-first century, when the human populace has pivotal matters to consider, women are still trying to make their place at par with their male correspondents. Ironically, inequality between men and women is so entrenched that females have to bear the brunt of it till date in their professional lives. The question that might arise at this juncture is, "Why are females still considered inferior to males? Is it only pertaining to their child-bearing capacity?" It might appear incongruous to most of us, but unfortunately, the response is affirmative.

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Pregnancy, though a physiological state, can bring in major life-altering experiences for women especially in terms of their work-life.[1] There exists no quaint reason as to why pregnancy should put a halt in their professional lives and why are there accommodations by the employers only in papers and not in execution. It is significant to note that pregnancy should by its nomenclature not come as either a disability or an impairment,[2] but rather have women-friendly clauses in the contracts that are signed between the employer and the women employee.

To answer such multifarious questions and to analyze how women have climbed up the ladder despite some of the stark inequalities, the article will talk through the development of women-friendly laws and prominent judicial pronouncements in various jurisdictions along with some life-grounding incidents of those who have faced such inequalities. It will also focus on how expecting women and mothers are treated differently in the legal arena and the sports industry which are still believed to be 'male-dominant professions.' Finally, the question that should linger around while reading this article is that, "are we prioritizing physiological condition of women over their innate talent resulting in the redundancy of mothers and pregnant women at workplaces?"

II. TRACING BACK THE PANG AND PREJUDICE: PREGNANT WOMEN AND THEIR PROCURABLE CLAIMS

A. General

"The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."

-Justice Bradley

The struggle for equality between the two sexes is not something unheard of. Tracing back to the nineteenth century, there has been a worldwide strive to break the gender stereotypes and lay a firm ground for females to have equal rights and opportunities as their male counterparts. The 'assimilation feminists,' popularly known as the equal rights feminists, nurtured their notions that emphasized the existing similarities between men and women unlike the trend

[1]Sheerine Alemzadeh, "Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion" 27 *WIS. J. L. GENDER, & SOC'Y* 1 (2012).
[2]"Equal Employment Opportunities for Individuals with Disabilities" 56(114) *FED. REG.* 35727 (Jul. 26, 1991).

back then.[3] Feminists like Wendy Williams and Ruth Bader Ginsburg prioritized the idea of coalescing and defying sex-based conventional image in male-dominated arenas.[4]

One of the focal points of distinction between a man and a woman is the notion of pregnancy that often ostracizes women in a plethora of labour-intensive workplaces.[5] Moreover, such differences create a sense of hostility against the female working-class leading to dwindling hiring rates and lower female participation because of the labeled 'special treatment' creating animosity rather than integration.[6] The said feminists, furthermore, challenged the 'single standard of equality' in workplaces whereby the male archetype was hoisted forcing the female workforce to rise to that level, leading to grave injustices against them.[7]

Such discrimination was not only the result of patrilineal societies that prevailed but also their advancement by various courtroom judgments. Howbeit, it is unclear as to how pregnancy came to be referred to as an impairment as there exist no strict policy regulations that categorize it so. It was in the West, especially in the United States of America (hereinafter referred to as the 'USA'), that the initial movements took place. This was majorly due to the fact that courts used the female body to justify their working hours.[8] Moreover, the judges also stated that women are at a disadvantageous position owing to their physical appearance and rendition of maternal functions.[9]

Thus, in the early feminist struggle, the reluctance of leading feminists is a key characteristic of the exclusion of pregnancy as a disability in common law jurisprudence. They argued that it was every woman's right to decide if they are willing to work over their pregnancy and it is not for the paternalistic employers to determine for their choice of work.[10] Hence, it has been poignantly said by

[3]Wendy Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate" 13 *N.Y.U. REV. L. & SOC. CHANGE* 325 (1984).
[4]Vicki Lens, "Supreme Court Narratives on Equality and Gender Discrimination in Employment" 10 *CARDOZO WOMEN'S L.J.* 520 (2004).
[5]*Id.*
[6]*Supra* note 3 at 325.
[7]Martha L. Fineman, "Implementing Equality: Ideology, Contradiction and Social Change" *WIS. L. REV.* 792 (1983).
[8]*Muller v. Oregon* (1907) 208 U.S. 412, 418-20.
[9]*Id.* at 421.
[10]Elaine Draper, "Reproductive Hazards and Fetal Exclusion Policies after Johnson Controls" 12 *STAN. L. & POL'Y. REV.* 119 (2001).

Wendy Williams that, "we cannot have it both ways, so we have to think carefully about which way we want to have it."[11]

B. Unfolding the Transnational Progression of Pregnancy Discrimination Laws

Historically, every State had the same belief considering the 'pregnancy effect' of women at workplaces apropos their male counterparts. But those days were not far when a change was the only ray of hope for all women generally and for those working specifically. It was the USA that was the path-breaker in shunning the discriminatory ideologies at the institutional level followed by other States. As a culmination of the various feminist movements as well as judicial pronouncements, States have tried to reach a balance to call out against pregnancy related adversaries.

i. <u>United States of America:</u>

In the USA, Congress did not lay down any rules specifically for the prohibition of sex discrimination. It was in this regard, that the congressional committees sought advise from the courts in its legislative intent.[12] With the amendment of the Civil Rights Act of 1964[13] in 1972, there was a prohibition only with regard to 'sex' and the legislature did not intend to encompass pregnancy discrimination within the ambit of Title VII.[14]

The enforcement of the Civil Rights Act was done by the Equal Employment Opportunity Commission (hereinafter referred to as 'EEOC'), which treated pregnancy as any other temporary disability and not as lawful sex discrimination.[15] It was not only the Congress but also the courts that treated pregnancy discrimination as any other temporary disability. The Supreme Court in the case of *General Electric Co. v. Gilbert*[16] held that pregnancy discrimination was not to be considered as sex discrimination under Title VII. Howbeit, this narrow interpretation

[11]Joan Williams, "Do Women Need Special Treatment? Do Feminists Need Equality?" *9 J. CONTEMP. LEGAL ISSUES* 281 (1998).
[12]Sally J. Kenney, "Pregnancy Discrimination: Towards Substantive Equality" 10 *WIS. WOMEN'S L.J.* 360 (1995).
[13]Civil Rights Act, 1964, as amended in 1972, 42 U.S.C. s.2000a-2000e-2(a).
[14]Carolyn Bird, *Born Female: The High Cost Of Keeping Women Down* 5 (1968).
[15]Code of Federal Regulations, 1975, 29 C.F.R. s.1604.10(b). (U.S.A).
[16]*General Electric Co. v. Gilbert* (1976) 29 U.S. 124.

of the court was revisited in the case of *Nashville Gas Co. v. Satty*[17] whereby the court adjudicated that those policies which burdened the pregnant employees rather than benefitting them were in sheer violation of Title VII.

Finally, it was the abovementioned cases that spurred the feminist movements in and around the USA guiding the Legislature to pass the Pregnancy Discrimination Act in 1978 reversing the court's decision in *Gilbert* to bring pregnancy based adversaries within sex discrimination.[18] This was also a welcome change by the courts in their outlook of the said disparities. The court in the case of *Newport Shipping and Dry Dock Co. v. EEOC*[19] held that the Act was intended "to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[20] The Congress moved further to take an expansive approach by passing the Family and Medical Leave Act (hereinafter referred to as 'FMLA') of 1993 that provides for added benefits to the employee like unpaid leaves up to twelve weeks in cases of both childbirth and adoption, for taking care of the child or oneself in case of illness, making it a gender-neutral criterion.[21]

ii. The European Union

Being the only existing supranational organization, the European Union has its own laws, courts, legislature and an executive for effective implementation.[22] The European Court of Justice (hereinafter referred to as 'ECJ') differs a lot from that of the USA's Supreme Court and the impact can be traced back to its decision on sex discrimination and equal pay. In the case of *Defrenne v. Sabena II*,[23] the ECJ ruled that the guarantee of 'equal pay for equal work' laid the foundational basis of the community which was also reflected in the social objective of the 'Treaty of the European Union.'

[17]*Nashville Gas Co. v. Satty* (1977) 434 U.S. 136.
[18]Hannah Arterian Furnish, "Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964" 66 *IOWA L. REV.* 63 (1980).
[19]*Newport Shipping and Dry Dock Co. v. EEOC* (1983) 462 U.S. 669.
[20]*Id.*
[21]Christine Littleton, "Does it Still Make Sense to Talk About 'Women'?" 1 *UCLA WOMEN'S L. J.* 15 (1991).
[22]John Bridge, "American Analogues in the Law of the European Community" 11 *ANGLO-AM. L. REV.* 130 (1982).
[23]*Defrenne v. Sabena II* (1976) Case 43/75 E.C.R. 455 (European Union).

Such protection was available to an individual not only against the government but also against any other private employer irrespective of the member State passing this law in their concerned region.[24] The ruling of the court in the *Defrenne* case helped the Council to implement Article 119 after nineteen long years despite its repeated attempts.[25] Moreover, the Council also enacted the Equal Pay Directive in 1975 that made it mandatory for the employers to pay equally on the basis of the value of the work done[26] making it advantageous for the female workforce. Additionally, the Council passed several directives on atypical work,[27] parental leave,[28] and reversal of the burden of proof in cases of discrimination.[29]

The European Union when posed with the question, 'if pregnancy discrimination was prohibited under the Equal Treatment Directive,' it took an expansive equality approach. The ECJ in the case of *Dekker v. Stichting Vormingcentrum voor Jonge Volwassenen* (VJV-Centrum)[30] adjudicated that any discrimination on the basis of pregnancy would encompass sex-based discrimination infringing the Equal Treatment Directive irrespective of whether the employer disfavoured the male employees who were ill. Thus, the advancement of feminist goals by the European Union has been evolutionary rather than revolutionary.[31]

iii. India

The Maternity Benefit (Amendment) Act, 2017 now subsumed under the latest Social Security Code,[32] provides maternity leave up to twenty-six weeks of which not more than eight weeks shall precede the expected date of delivery,[33] making it concurrent with the requirements of the International Labour Organization. If any person fails to comply with the maternity benefit provisions provided under the Social Security Code, 2020, such person shall be liable for a punishment which may extend to

[24]*Id.*
[25]*Supra* note 12 at 360.
[26]Council Directive 75/117, 1975 OJ. (L 45) 19.
[27]1990 O.J. (C 224).
[28]1984 O.J. (C 316).
[29]1988 O.J. (C 176).
[30]*Dekker v. Stichting Vormingcentrum voor Jonge Volwassenen* (1991) Case 177/88 I.R.L.R. 27 (European Union).
[31]*Supra* note 12 at 374.
[32]Chapter VI, The Code on Social Security, 2020 (Act 36 of 2020).
[33]Section 60, The Code on Social Security, 2020 (Act 36 of 2020).

> imprisonment for a term of six months or with a fine which may extend to rupees 50,000, or both.[34]
>
> However, even though such expansive benefits are granted by the legislature, emphasis has not been laid on the arising cost of female employees thereby making it difficult to employ them during their maternity leaves.[35] The problem with such an increment in the maternity leave does not pose to be a threat to the employers, but rather to the female employees, as they are now at greater risk of losing their jobs as the said amendment has made employment of females far less lucrative.[36]
>
> Thus, this drastic step only furthers the existing employment discrimination between the two sexes. The employment of fewer women in the workforce widens the private-public disparity as women in the private sphere are restricted to jobs of childrearing.[37] Hence, there should be greater State participation to ease the pressure on the employers and such a view should not be regarded as strife between the women's right to work and the employer's right to hire.

Ergo, instead of questioning whether a pregnancy is abnormal or similar to an illness, both courts, as well as the legislature, should consider it as a major life activity and seek employer accommodation based on substantial restrictions.[38] Correspondingly, the 'special treatment' adhered to women was nothing but a proxy for protectionism that proved to be deleterious to the female working class instead of promoting equal treatment approach.[39]

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[34]Section 133, The Code on Social Security, 2020 (Act 36 of 2020).
[35]"Government should bear additional cost of maternity leave: MSME Body", *TIMES OF INDIA*, Aug. 26, 2016, *available at:* http://timesofindia.indiatimes.com/india/Government-should-bearadditional-cost-of-maternity-leave-MSME-body/articleshow/53861179.cms. [last visited on Feb. 15. 2021].
[36]Erin Kelly & Frank Dobbin, "Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies" 105(2) *AMERICAN JOURNAL OF SOCIOLOGY* 484 (1999).
[37]Ira Chadha-Sridhar & Geetika Myer, "Feminist Reflections on Labour: The Ethics of Care within Maternity Laws in India" 13 *SOCIO-LEGAL REV.* 12 (2017).
[38]*Supra* note 1 at 4.
[39]S*upra* note 3 at 371.

C. Claims Encompassing Pregnancy Associated Discrimination

The employers around the globe are expected to treat pregnant women at par with other workforce. The only criteria for evaluating them should be on their ability to work.[40] For any claimant proving discrimination on the basis of pregnancy, it is necessary to establish a direct link between adverse treatment and the social arena.[41] As it was in the USA that the first few cases of pregnancy discrimination were dealt with, courts have come up with different approaches in order to establish if there existed any pregnancy based discrimination under Title VII claim.[42] Albeit, it is this analytical framework that is applied globally to establish a *prima facie* case of such discrimination, the courts in every situation do not fundamentally apply it:

i. Individual Disparate Treatment:

a. Direct Approach:

In this claim, in order to indicate that an adverse impact was created, the plaintiff is required to produce substantive evidence belonging to the 'protected class.' Such a claim is most commonly used in mixed-motive cases.[43]

b. Indirect Approach:

It is commonly known as the burden-shifting approach that was laid down in the case of *McDonnell-Douglas Corp. v. Green*.[44] There is a three-level analysis that the courts indulge in whereby the plaintiff must prove that she was subjected to *prima-facie* discrimination. Such a circumstance can be proved by showing that: (i) the plaintiff belonged to the protected class, (ii) she was qualified for the position held or that her work was satisfactory, (iii) she was rejected, not promoted or suffered some other employment action that was adversarial, and (iv) though employed, her position was still open to other applicants with similar qualifications.[45]

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[40]Wendy J. Ray & Michelle T. Bell, "Pregnancy Discrimination" 1 *GEO. J. GENDER & L.* 622 (2000).
[41]*Williams v. MacFrugal's Bargains-Close Outs, Inc.* (1998) 79 CAL. RPTR. 98, 101.
[42]Title VII of the Civil Rights Act, 1964, 42 U.S.C. 1964.
[43]S*upra* note 40 at 624.
[44]*McDonnell-Douglas Corp. v. Green* (1973) 411 U.S. 792.
[45]*Id.* at 802.

ii. Systematic Disparate Treatment:

In this claim, it is not for the plaintiff to prove by way of evidence[46] that a discriminatory approach was taken by the employer as the claim rests on the terms of discrimination on the basis of pregnancy, childbirth, employer policy etc.[47] and not on why such discrimination happened in the first place.

iii. Disparate Impact Treatment:

The plaintiff in this framework need not profess any evidence to prove adverse treatment by the employer.[48] What the courts require is for the plaintiff to prove that if all the prevailing circumstances were similar in a parallel case scenario, except for her pregnancy, then she would have not been discharged of her duties as an employee or would have not suffered from such an adversarial action.[49]

Thus, discrimination can be either overt or subvert varying on different case scenarios. However, courts around the world have unanimously ruled against such a differential treatment solely on the basis of the physiological appearance of women. Unlike the ancient times, when women were not employed or if employed, were looked down upon considering trivial matters like the lifting of a heavy box, juggling between personal and professional life etc. and even the judicial pronouncements were not women-friendly then, it is only in the recent past that the courts have come to rescue them from 'fetal protection policies.'[50]

III. DELETORIOUS POLICIES VIS-À-VIS EXPECTANT WOMEN AND MOTHERS AT WORKPLACE: A DAMSEL IN DISTRESS

A. Overview

Patriarchy has had its roots firmly embedded into the conscience of world societies throughout history, as a result of which women got lesser rights and opportunities in their career than their counterparts. Antecedently speaking, the

[46] *UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 192, 199.
[47] *Id.*
[48] *International Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 335-36.
[49] *Troupe v. May Dep't Stores Co.* (7th Cir.1994) 20 F.3D 734, 738.
[50] *Supra* note 46.

only profession, which the world found suitable for women, was initially that of a wife and subsequently that of a mother.[51]

The social stigma against women was so deeply entrenched that the Supreme Court of the USA, which is the torchbearer to most of the countries today, in *Bradwell v. Illinois*[52] (1873) and later in *Muller v. Oregon*[53] (1908) validated the State laws and limited the number of jobs and the working hours for women. The basis of the said absurd law was in the fact that the government considered it as an obligation to advance maternal responsibilities. However, such responsibilities as per their estimations were inconsistent with workplaces.[54]

Even in the twenty-first century, the mindset of the masses has not undergone an overhaul change with respect to issues contributing to women discrimination. As was evidenced by the 2017's infamous Google memo written by a software engineer,[55] hinting at a plethora of gender stereotypes including the perception that women are not suited for certain jobs and are less logical than men, it is clear that people advocating discriminatory ideology against women somehow still exists.

B. Maternal Penalty: Engendering Myriad of Lost Talent

It is challenging to determine what to expect when you are expecting, especially in the workplace.[56] Though the expecting women are delighted to let her near and dear ones know of her pregnancy, the same does not hold for discussion with her employer. The 'task' of letting the employer know is so arduous for women that a host of career guidance websites and articles throwing light on how to go about this 'anxiety generating' discussion with the employers[57] are readily available on the web.

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[51]Carole Scholl Davie, "Pregnancy: A Laborious Issue" 7(3) *ABA J.* 36 (1978).
[52]*Bradwell v. Illinois* (1873) 83 U.S. 130.
[53]*Supra* note 8 at 412.
[54]Saranna Thornton, "Pregnancy Discrimination Act", *SLOAN NETWORK ENCYCLOPEDIA ENTRY* (Jan. 2005), *available at:* http://wfnetwork.bc.edu/encyclopedia-en- try.php?id=272. (last visited on Dec. 11, 2020).
[55]Daisuke Wakabayashi, "Google Fires Engineer who Wrote Memo Questioning Women in Tech", *THE NEW YORK TIMES* (Aug. 7, 2017), *available at:* https://www.nytimes.com/2017/08/07/business/google-women-engineer-fired-memo.html. (last visited on Jan. 7, 2021).
[56]Jennifer Bennett Shinall, "The Pregnancy Penalty" 103(2) *MINN. L. REV.* 750 (2018).
[57]Liz Ryan, "How to Tell Your Boss You're Pregnant", FORBES (Aug. 15, 2014), *available at*: https://www.forbes.com/sites/lizryan/2014/08/15/how-to-tell-your-boss-youre-pregnant/#726ed6eb5b25. (last visited on Jan. 13, 2021).

The discrimination against pregnant employees has reached a stage where it cannot be ignored. It is so real that after taking into account all other fundamental differences between a pregnant and a non-pregnant woman, the likelihood of a pregnant woman being employed is 4.2% lesser than the non-pregnant ones.[58] The said gap in the employment outcome—one which cannot be expounded by factors such as personal choice, educational attributes, or demographics—is pregnancy or maternal penalty.[59]

A plethora of economists worldwide has attributed penalties and characteristics including race and the ethnicity penalty[60] in response to negative employment rates and outcomes. However, maternal penalty, which is the central point of this article, is surpassing almost all well-recorded penalties today.[61]

Furthermore, in the year 2012, 10.4 million mothers stayed behind at their homes—a number which clearly surpasses the sheer number of two million fathers who did so.[62] Adding to it, in the year 2011 only 21% of the fathers were recorded as being the primary caretaker for their children.[63] Therefore, in light of the above, the assumption of the employer that the burden of caregiving to the newborn will predominantly fall on the women's shoulder will, by and large, have some rationality.[64]

It assumes great importance to note here that UNICEF in the year 2019 used data from the Organization for Economic Cooperation and Development to prepare a report of forty-one countries in order to analyze their level in terms of 'family friendliness.'[65] Estonia came at the top spot as females are allowed job-protected leaves during childbirth and 100% salary for a year and a half which is followed by sixty-two weeks of 'maximum paid parental leave.'[66] Other

[58]*Supra* note 56 at 752.
[59]*Id.*
[60]*Id*.
[61]*Id*.
[62]Joni Hersch & Jennifer Bennett Shinall, "Something to Talk About: Information Exchange Under Employment Law" 165 *U. PA. L. REV.* 56 (2016).
[63]Lynda Laughlin, "Who's Minding The Kids? Child Care Arrangements: Spring 2011", *HOUSEHOLD ECONOMIC STUDIES* (Apr. 2013), *available at:* https://www.census.gov/prod/2013pubs/p70-135.pdf. (last visited on Jan. 28, 2021).
[64]Shelley J. Correll *et.al.*, "Getting a Job: Is There a Motherhood Penalty?" 112 *AM. J. SOC*. 1298 (2007).
[65]Yekaterina Chzhen *et.al*., "Are the World's Richest Countries Family Friendly?" *UNICEF* (Jun. 2019), *available at:* https://www.unicef-irc.org/family-friendly (last visited on Feb. 3, 2021).
[66]Miranda Bryant, "Maternity Leave: US Policy is Worst on List of the World's Richest Countries", *THE GUARDIAN* (Jan. 27, 2020), *available at:* https://www.theguardian.com/us-news/2020/jan/27/maternity-leave-us-policy-worst-worlds-richest-countries. (last visited on Nov. 30, 2020).

trendsetters in the list include Austria with sixty paid weeks[67] and Japan which grants maternity leave at the rate of two-third of a female's average salary for fourteen weeks while six of those fourteen weeks are compulsory.[68] A provision also exists in Japan under which both the father and the mother can avail parental leave until their child turns one and it can be stretched up to 14 months[69] if both the father and the mother avail so. Surprisingly, the USA has no national-level statutory law for maternity or paternity leave and only eight of its States have passed 'paid family leave' enactments.[70]

To sum it up, pregnancy is known to negatively affect the long-term career opportunities for women and some or all of the factors discussed above work together and the resultant combination give rise to what can be termed as 'maternal penalty' for women in the employment market. Nonetheless, the situation is not entirely gloomy as States, though not expeditiously, are coming up with certain policy changes in this regard.

C. Adding Insult to Injury: A Tussle between Employers and Pregnant Employees

An apparent fact which even the 'so-called' modern societies of this century advocating for gender inequality fail to acknowledge, is that pregnancy-related discrimination at workplace falls under the ambit of gender discrimination, as it is only women who can conceive.

The corporate sector in the USA proudly claims to be equally welcoming for both men and women with their considerate parental leave schemes, well-constructed comforting lactation rooms, and numerous other facilities for women. Nevertheless, the said advances proved futile in altering the fact that it does not matter whether it is Walmart or the Wall Street where women work, once pregnant, it is officially the time when they are thrown off their professional ladders.[71]

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[67]*Id.*
[68]*Id.*
[69]*Id.*
[70]Miranda Bryant, "The US doesn't Offer Paid Family Leave-but Will That Change in 2020", *THE GUARDIAN* (Oct. 28, 2019), *available at:* https://www.theguardian.com/us-news/2019/oct/28/us-paid-family-leave-2020-election. (last visited on Feb. 28, 2021).
[71]Natalie Kitroeff & Jessica Silver Greenberg, "Pregnancy Discrimination is Rampant Inside America's Biggest Companies", *THE NEW YORK TIMES* (Feb 8, 2019), *available at:* https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html. (last visited on Jan. 4, 2021).

As much as one would like to believe, in 2021, discrimination based on gender should be the last thing anyone has to encounter, unfortunately, it is not the scenario. A Stanford sociologist, Ms. Shelly Joyce Correll conducted a study[72] in which hundreds of hiring managers were presented with two résumés belonging to women with equal qualifications where half of such women hinted about their motherhood. The managers revealed that they were 'twice as likely' to give the woman who is seemingly childless a chance for an interview. The outrageous phenomenon was later rightly referred to by Ms. Correll, as 'motherhood penalty.'[73] She also added that a cultural perception has been set irrespective of any region in the world that if a woman is a good mother she cannot be equally dedicated towards her career.

As per an analysis, concluded at the University of Massachusetts by a sociologist, each child that a woman bears, cuts off 4% of her hourly wages.[74] On the contrary, men's earnings hike by 6% upon becoming a father,[75] thereby widening the existing gender disparity.

Another significant piece of research in this regard is a paper that was published in November 2017[76] scrutinizing the pay scale of spouses. The researchers at the Census Bureau who conducted the said research revealed that preceding two years from the date when a couple had their first child, the husbands earned just slightly more than their wives did. The pay-gap had doubled to far more than $25,000 by the time their child celebrated its first birthday.

A general impression pertaining to discrimination against women in pregnancy-related matters is that of small-scale employers being the perpetrators. To hold this notion misleading, apart from the overall statistics signifying discrimination against pregnant women in general, there are a number of specific stories from countless women reiterating their saga of injustice.

The New York Times with an aim to bring to forefront pregnancy-related discrimination at workplaces conducted extensive research involving thousands of public records and court documents along with interviews of women who

[72]Brianna L. Eaton, "Pregnancy Discrimination: Pregnant Women Need More Protection in the Workplace" 64 *S.D. L. REV.* 245 (2019).
[73]*Id.*
[74]*Supra* note 71.
[75]*Id.*
[76]Yoo Kyung Chung *et.al.*, "The Parental Gender Earnings Gap in the United States", *U.S. CENSUS BUREAU* (Nov. 2017), *available at:* https://www2.census.gov/ces/wp/2017/CES-WP-17-68.pdf. (last visited on Jan. 14, 2021).

faced discrimination. A clear pattern of prejudice came to light as a result of the research which showed that employers, even at the largest of companies, follow an orderly pattern of discrimination against their pregnant employees.[77]

To describe a few of such stories as interviewed by the New York Times, Otisha Woolbright, a Walmart employee, upon becoming pregnant asked her boss if she could resist lifting bulky trays. Her boss in a most shocking response cited 'Demi Moore' doing a flip despite being almost full term and pregnancy is thereby not excusable. Consequently, Ms. Woolbright had to continue lifting until she got injured.[78]

Another narrative is of Ms. Rachel Mountis, an employee of Merck, a leading pharmaceutical company of the USA. She was winning awards for her excellent saleswoman and leadership skills when she got pregnant, but only to get laid off by her company just three weeks before giving birth in what the company termed as a 'downsizing.'[79]

Ms. Elin Murphy is no exception when it comes to facing pregnancy-related discrimination at the workplace. Despite being a senior employee at Glencore, which is the largest commodity trading corporation in the world, she was not only belittled when she got pregnant but was also mistreated after coming back from her maternity leave and had to use a supply closet teeming with bins meant for recycling in order to pump milk.[80]

These tales and other similar ones are not true just for a handful of employees but tens and thousands of women have knocked the doors of courts alleging pregnancy discrimination at workplaces and leading companies including Walmart, Whole Foods, 21st Century Fox, Novartis, AT&T, KPMG and even a law firm Morrison & Foster[81] all of which proudly blow their trumpet of 'non-discrimination' have been accused as violators of basic human rights of women.

[77] *Supra* note 72.
[78] *Supra* note 71.
[79] *Id.*
[80] *Id.*
[81] *Id.*

IV. CLIPPING THE WINGS OF FEMALE ATHLETES: A TIP OF THE ICEBERG?

A. Exordium

The scuffle that women had undergone in the past few decades ranging from a right as minuscule as voting to still fighting for a place parallel to their male counterparts in various professional fields is umpteen. Equality of men and women should not even be a moot-point in this era but it is the society that impedes inequality based on women's outer appearance or to say, their child-bearing capacity. Enough has been said about the disparities between the two sexes and it is only the idiosyncrasies of social institutions that further ascribe women as the weaker gender.[82]

One of the most prominent of this social construct is in the sports fraternity. Even though female sports dates back to the 1800s,[83] it was never a popular choice amongst them accounting to the gender-biases. Nevertheless, female participation has started to see an upward trend in the sporting arena as well as in its endorsement. However, the athletic department opines that with a surge in the participation by women, the predicament of management of the individual athlete also increases.[84]

A major concern for athletic organizations and departments is the ability of women to get pregnant.[85] As this is the fundamental biological difference between a man and a woman, athletic departments have specific criterion in their contracts to deal with them analogous to their gender.[86] The guidelines outlined in the female athletic contracts concerning pregnancy are uniform for all their sporting events either be it in the organization or league or any other team.[87] Nonetheless, let us try and analyze how far are these clauses in the female

[82]Lucinda M. Finley, "Sex-Blind, Separate but Equal, or Anti-Subordination? The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination" *12 GA. ST. U. L. REV.* 1098 (1996).
[83]Mylene Moreno, "Timeline: **A** Brief History of Women's Team Sports in America", *PBS* (July 21, 2007**),** *available at:* http://www.pbs.org/pov/trueheartedvixens/timeline/. (last visited on Feb. 12, 2021).
[84]Maya Dusenbery & Jaeah Lee, "Charts: The State of Women's Athletics, 40 Years After Title IX", *MOTHER JONES* (June 22, 2012), *available at:* http://www.motherjones.com/politics/2012/06/charts-womens-athletics-title-nine-ncaa. (last visited on Feb. 24, 2021).
[85]"Getting Pregnant", *NHS CHOICES* (Jan. 23, 2018), *available at:* http://www.nhs.uk/conditions/pregnancy-and-baby/pages/getting-pregnant.aspx. (last visited on Jan. 20, 2021).
[86]Sarah McCarthy, "The Legal and Social Implications of the NCAA's "Pregnancy Exception"- Does the NCAA Discriminate Against Male Student-Athletes?" 14 *VLL. SPORTS & ENT L. J.* 355. (2007).
[87]*Id.* at 355.

contracts rational and whether they have any implications on the future women athletes.

B. No-Pause Clauses within Female Athletic Contracts: A Repugnant Reality

"Women's empowerment isn't just 'you go girl' and exciting marketing campaigns.

It means supporting athletes when it really counts, with our words and our actions."[88]

With the equality movement gaining momentum, there was also felt a need for equality of female athletes in terms of their salaries, performances, and restrictions imposed on them in their contracts.[89] To start at the very grassroots level, athletic contracts are very convoluted in their ethos incorporating numerous factors to be considered at the time of signing.[90] An important question that arises here is that "are women treated at par with men when they are signed for any game? Or are there variations in their contracts?" There are a few commonalities in the contract of any sportsperson, irrespective of their gender, like duration of the term for which the team signed an athlete, compensation in exceptional circumstances, duties that are posed on the athlete etc.[91] However, one clause that is 'certainly not found' in the contract of a male athlete is the pregnancy clause.

The purpose behind the insertion of a pregnancy clause in female athletic contracts is to regulate the pregnancy of the concerned person during their course of engagement in any team or league for active participation.[92] Such clauses are not only common in professional athletic contracts but also in collegiate contracts.[93] The female athletes often have to opt for 'pregnancy pause' in order

[88]The Burton Blog, "How We're Supporting Women and Families on the Burton Team", *BURTON* (May 16, 2019), *available at:* https://www.burton.com/blogs/the-burton-blog/how-were-supporting-women-and-families-burton-team/ (last visited on Jan. 7, 2021).
[89]Deborah Brake, "The Struggle for Sex Equality in Sport and the Theory Behind Title IX" 34 *U. MICH. J. L. REFORM* 12347 (Fall & Winter 2000 & 2001).
[90]"Sports Contracts- Basic Principles", *U.S. LEGAL, available at:* https://sportslaw.uslegal.com/sports-agents-and-contracts/sports-contracts-basic-principles/. (last visited on Jan. 22, 2021).
[91]*Id.*
[92]Suzanne Sangree, "Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute" 32 *CONN. L. REV.* 381 (2000).
[93]John B. Phillips, "Candace Parker and Pregnancy Discrimination", *WORD ON EMPLOYMENT LAW* (Jan. 29, 2009), *available at:* http://www.wordonemploymentlaw.com/2009/01/candace-parker-and-pregnancy- discrimination/. (last visited on Dec. 13, 2020).

to extend their contracts.[94] During such pregnancy pauses, a female has to 'pause' her eligibility term mentioned in the athletic contract vis-à-vis her pregnancy term.[95]

In professional leagues, it is the contract of the concerned athlete that ordains the reaction of the league in case she gets pregnant.[96] Most of these contracts have a specification that justifies the team's decision in case any athlete is unable to perform in accordance with her expected level.[97] Moreover, the crux of the problem is that many organizations still consider pregnancy like any other bodily injury making them treat the two similarly. It is for the same reason that pregnant female players are mandated to see a physician before they can start practicing and playing for their teams.[98]

The future of these sportswomen post-pregnancy majorly depends on the advice of the doctors who determine whether it is feasible for them to play or not. However, it should be noted that any sports fraternity should not exclude a female athlete based on her status of pregnancy but it should rather be based on the certification of a professional medical expert.[99] Every athletic contract has an implied agreement on the physical capability of the athlete to carry out duties that form the basis of their continued relationship when signed.[100] But, it should also be kept in mind, that the inability of any female to perform should not be considered as excused absences[101] as pregnancy is a natural occurrence in the female reproductive system.

There have been numerous instances of how the preconceived notions of society hinder way for its pregnant women[102] by imposing substantial limitations on them as opposed to proven medical experiments. One such instance is by Dr. Raul Artal, Chairman of Obstetrics, Gynecology and Women's Health at Saint Louis University who stated that "pregnancy should not lead to a state of

[94]*Supra* note 89.
[95]*Id.*
[96]*Supra* note 93.
[97]"Drafting Suggestions for a Sports Contract", *U.S. LEGAL, available at:* http://sportslaw.uslegal.com/sports-agents- and-contracts/drafting-suggestions-for-a-sports-contract/ (last visited on Dec. 17, 2020).
[98]Nancy Hogshead-Maker and Elizabeth A. Sorensen, *NCAA Gender Equity: Pregnant And Parenting Student-Athletes: Resources And Model Policies* 10 (2010).
[99]*Id.* at 10.
[100]*Strader v. Collins* (1952) 280 A.D. 582, 586.
[101]*Supra* note 98.
[102]Paula Lavigne, "Pregnant Athletes Don't Have to Sit Out", *ESPN* (Nov. 29, 2009), *available at:* http://espn.go.com/espn/otl/news/story?id4693739. (last visited on Dec. 25, 2020).

confinement. If a woman is willing to continue to practice and there exists no complications then she can."[103] Thus, it is to be borne in mind that it is not perilous for women to train while in their duration of pregnancy rather most doctors invigorate them to involve in physical fitness for a healthy pregnancy but with certain precautions for their wellbeing.[104]

The first highly publicized incident of a woman athlete playing shortly after being pregnant was of Tina Thompson, who became pregnant mid-training in 2005 and played two months after giving birth to her son.[105] Another narrative was that of Candace Parker who was often equated to Michael Jordan of Women's National Basketball Association (hereinafter referred to a 'WNBA'), who got pregnant mid-training. The WNBA, however, handled the situation with utmost naturalness professing that the society has to accept a female athlete getting pregnant, as she has to strike a balance between her career and family planning like any other woman.[106]

Nonetheless, the athletic contracts still subtly, if not directly, use pregnancy in comparison to any feeble disease by using terms like 'unfit to perform' or 'incapable of performing.'[107] These 'failure-to-perform clauses' are well-shrouded within such contracts themselves and have the ability to sway many female athletes as they attempt to balance their 'sex-gifted ability to bear children' with their 'talent-gifted ability to be an athlete.'[108] That being said, even though, some progressive laws have seen the light of the day, there is still a lot to be covered before these gender disparities are completely eroded in sports.

C. Voicing Out the Incessant Inequalities against Pregnant Athletes

The sports industry was particularly prejudiced to 'would-be mothers' or 'athletes turned mothers' for them to pick up their careers from where they left.

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[103]*Id*.
[104]Kristin R. Kardel, "Effects of Intense Training During and After Pregnancy in Top-Level Athletes" 15 *SCANDINAVIAN J. MED. & SCI. IN SPORTS* 79-86 (2005).
[105]Karen Crouse, "Candace Parker is Balancing Career and Family", THE NEW YORK TIMES (Jan. 23, 2009), *available at:* http://www.nytimes.com/2009/01/24/sports/basketball/24parker.html?th&emc-th. (last visited on Dec. 27, 2020).
[106]Paula Duffy, "Candace Parker's Pregnant and the WNBA Has Some Concerns", HUFFINGTON POST (Feb. 09, 2009*), available at:* http://www.huffingtonpost.com/paula-duffy/candace-parkers- pregnant b 156361.html. (last visited on Dec. 30, 2020).
[107]*Id*.
[108]Sarah Kanoy, "Pregnancy Clauses in Female Athletic Contracts: Discriminatory, or Just the Industry Standard" 85 *UMKC L. REV.* 1050 (2017).

However, it is not the case anymore where, though, the leagues and endorsement agencies are still relegating females but women have become their own warriors.

There have been multiple occasions where women have proved their worth after returning from maternity leave. Ranging from Mary Kom, Sania Mirza to the very recent return of Serena Williams, these sportswomen have defied all the pre-existing notions of society regarding post-pregnancy return to the field. To further illustrate, Sania Mirza made her comeback to tennis two years after giving birth to her son and won women's doubles title at the Hobart International.[109] Similarly, Mary Kom made remarkable comebacks after both her maternity leaves in 2007 and 2013 respectively.[110] Serena Williams, followed suit, after giving birth to her daughter in 2017 and reached her first Wimbledon finals in the year 2018.[111]

The most neoteric of the post-pregnancy returns has been of the olympian runners Alysia Montaño and Kara Goucher who took their pregnancy stories to the New York Times investigation and broke their 'non-disclosure agreements' in a historic fashion.[112] The duo said that they were scared to share their story publicly as they were bothered that they will have to suffer from risk pay cuts from sponsors both, during pregnancy and afterwards. Moreover, they also complied with the fact that the sports industry was still inclined towards men where rules were made for and by men only.[113]

Allyson Felix, another olympic runner came on board to disclose about her pregnancy. In her op-ed, she revealed that with the news of her pregnancy, Nike wanted to pay her 70% less than it already did prior to her pregnancy.[114] There

[109]"Sania Mirza Wins Hobart International Doubles Title After Returning From Maternity Break", *HINDUSTAN TIMES* (Jan. 18, 2020), *available at:* https://www.hindustantimes.com/tennis/sania-mirza-wins-hobart-international-doubles-title-after-returning-from-maternity-break/story-8wxz18hPAvTZ0bkNuDoLoN.html. (last visited on Dec. 27, 2020).
[110]Kathakali Chandra, "Mary Kom: Packing A Punch, Even At 36", *FORBES INDIA* (Mar. 1, 2019), *available at:* https://www.forbesindia.com/article/2019-wpower-trailblazers/mary-kom-packing-a-punch-even-at-36/52679/1. (last visited on Dec. 6, 2020).
[111]Simon Briggs, "Serena Williams Criticises System That Left Her With No Seeding On Return From Maternity Leave", *THE TELEGRAPH* (Mar. 8, 2019), *available at:* https://www.telegraph.co.uk/tennis/2019/03/08/serena-williamscriticises-system-left-no-seeding-return-maternity/. (last visited on Dec. 9, 2020).
[112]Alysia Montaño, "Nike Told Me to Dream Crazy Until I Wanted a Baby", *THE NEW YORK TIMES* (May 12, 2019), *available at:* https://www.nytimes.com/2019/05/12/opinion/nike-maternity-leave.html. (last visited on Dec. 11, 2020).
[113]Allyson Felix, "Allyson Felix: My Own Nike Pregnancy Story", *THE NEW YORK TIMES* (May 22, 2019), *available at:* https://www.nytimes.com/2019/05/22/opinion/allyson-felix-pregnancy-nike.html. (last visited on Dec. 3, 2020).
[114]*Id.*

has been a widespread backlash against Nike for portraying the elevation of female athletes but instead practicing its converse. As Alysia Montaño had put it in her op-ed "Nike Told Me to Dream Crazy, Until I Wanted a Baby,"[115] shows how these multi-millionaire companies are still not ready to accept the female body as it is.

Nonetheless, after all these Nike executives took outright decision to criticize the gender bias approach of the company, Nike immediately went forward to change its maternity benefits clause in the female athletic contracts. The company no longer makes performance-related reductions for eighteen months consecutively, dating from the start of pregnancy.[116] Moreover, Nike has also decided against rescinding an athlete's contract based on her pregnancy even when the players are willing not to compete during their term of the contract.[117]

It was not only Nike who made changes to their policies concerning female athletes but companies like Burton, Altra, Nuun and Brooks followed suit. For instance, Burton included the following changes in their policy:[118]

1. Pregnancy of a woman will not be equated to any medical condition;

2. In pregnancy or other maternity cases, there will be no reduction or suspension of compensation for six months;

3. There will be reasonable accommodations in the contractual obligations of pregnant athletes;

4. There will be no termination of a contract solely on the basis of pregnancy or maternity grounds; and

5. There will be reimbursement of airfare by Burton if a companion is required when the athlete is lactating.

Thus, gone are the days when female athletes prioritized their 'peak performance years' over building a family. The sports industry needs to opt for a rational aspect in terms of 'medical red-shirt' than by imposing substantial limitations or

[115]*Supra* note 112.
[116]Chris Chavez, "Nike Removes Contract Reduction for Pregnant Athletes After Backlash", *SPORTS ILLUSTRATED* (Aug. 16, 2019), *available at:* https://www.si.com/olympics/2019/08/16/nike-contract-reduction-pregnancy-protection-athlete-maternity-leave (last visited on Dec. 15, 2020).
[117]*Id.*
[118]*Supr*a note 88.

by banning them to play further.[119] Red-shirting lets a player stay in the team without wasting their season of eligibility.[120] Even though there exists no legal apprehension for the athletes to be tagged on the list of medical red-shirts, while being pregnant, if they voluntarily decide so; but, *prima facie* it has always been the social implications that took precedence over legal aspects when the question was about gender inequality and the athletes' disposition to be labeled as 'medical red-shirt.'[121] Hence, the world at large has always marked pregnant women with their fragile attributions making them incapable of performing any physical activity or engaging in sports for that matter. There has to be a paradigm shift in such societal notions whereby utmost care should be given to the fetus and the mother without affecting the rights of a female athlete to not be reckoned as peculiar to the non-pregnant female athletes.

V. THE HARD- HITTING TRUTH OF LEGAL FRATERNITY: PLIGHT OF FEMALES HARMONIZING PREGNANCY AND PROFESSION

A. Prefatory

> *"The profession, which is rightly referred to as the torch-bearer of justice in the society, should never be the one allowing perpetration of injustice towards nearly half of its own people who duly represent it, the female workforce."*[122]

The legal profession, a profession once believed to be entirely male-dominated, has seen splendid contribution from the female forces for a long time now. Surprisingly, it is commonplace to find instances of discrimination against women in the legal arena, which aggravate even further when they become pregnant. Irrespective of the fact that it is just one of the few professions boasting of possessing the competency to bring about a change in the archaic laws of any country; a power not many professions can boast of, pregnancy-related discrimination continues to tighten its grip.[123]

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[119]Laura Smith, "Changing Times", *MOMENTUM MEDIA* (Dec. 2004), *available at:* http://www.momentummedia-com/articles/tc/tcl409/changingtimes.htm. (last visited on Dec. 2, 2020).
[120]*Biediger v. Quinnipiac University* (2nd Cir. 2012) 691 F.3D 85, 91-93.
[121]*Supra* note 108 at 1043.
[122]Authors, Divesting Female Professionals of their Righteous Future: Implication of Maternal Penalty and Strive Between Equity- Equality.
[123]Audrey Wolfson Latourette, "Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives" 39 *VAL. U. L. REV.* 860 (2005).

As inaccurate as it might sound, gender discrimination and more specifically pregnancy-related one in the legal arena is not just typical of litigators, paralegals, legal secretaries, or judges but has equally affected the legal academia where not only the authorities at the universities but also the students in their subtle actions and remarks make the concerned woman conscious about her maternity status.

B. Manoeuvering from Lawyerhood to Motherhood: A Lawyer's Memorandum

While discussing women facing pregnancy related discrimination in the workplaces, the predicament of such women in the legal sector cannot be kept in dark. The topic assumes significant importance considering that the said profession is intrinsically linked to a majority of segments comprising the public sphere including the legislatures, the judiciary, and even the business sector. A huge proportion of judges are lawyers and so are a majority of the legislatures, and the employers at some point of time or the other, inevitably reach out to lawyers.[124]

Back in the twentieth century, there were only a handful of women enrolled in law schools. For instance, if England and Wales are to be considered, in the mid-1950s, there were just 337 women acting as solicitors and only 64 acting as barristers.[125] By the year 1980, unexpectedly, the numbers grew to 3,700 and 447 respectively and the year 2010 saw a percentage increase of tenfold with respect to women acting as solicitors and barristers.[126] Correspondingly, the USA saw the number of women lawyers increasing from 3% in the late 1960s to approximately half of the entire new lawyers' workforce in the year 2011.[127]

In the outcome of a research conducted by the American Bar Association's 'Commission on Women in the Profession' along with the 'Corporate Counsel

[124]Suzannah Bex Wilson, "Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform" 67(3) *IND. L.J.* 817 (1992).
[125]Jena McGill & Amy Salyzyn, "Queer Insights on Women in the Legal Profession" 17(2) *LEGAL ETHICS* 236 (2014).
[126]Hilary Sommerlad *et.al.,* "Diversity in the Legal Profession in England and Wales: A Qualitative Study of Barristers and Individual Choice", *LEGAL SERVICES BOARD* (2010), *available at:* http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lsb_diversity_in_the_legal_profession_final.pdf. (last visited on Feb. 2, 2021).
[127]Deborah L. Rhode, "From Platitudes to Priorities: Diversity and Gender Equity in Law Firms" 24 *GEO. J. LEGAL ETHICS* 1042 (2011).

Association'[128] appalling results were identified. The said research, which included 2,827 lawyers, revealed that along with lesser pay and much fewer promotions as compared to their male equivalents, female lawyers have a greater probability of being interrupted at any meeting, misunderstood as non-lawyers, assigned with non-legal housework, and provided with lesser access to paramount job functions than their male counterparts.[129]

Ironically, the aforementioned study also unveiled that women who were assertive at their jobs were criticized by their bosses and colleagues. One would like to state here that being 'assertive' is rather a boon than a bane for any lawyer. But quite contrary to the belief, women, if are too assertive are condemned for their 'un-ladylike' behavior and if lack 'enough' assertiveness, they are often mocked down upon and told that they would not succeed in the legal sector if they lack the said quality.

Talking about women and their journey from lawyerhood to motherhood, the study disclosed that the women felt as if they were being penalized for their desire of becoming a mother. While women on one hand confessed that they were not treated at work the same anymore, the men, on the other hand, were amusingly awarded a 'fatherhood boost.'[130]

One of the women while narrating her tale of woes reiterated that she was overlooked for partnership at a firm due to the sole reason that she bore a child. The other two male attorneys who were granted partnership were hired at the same time as she was and had the same prior experience and job responsibilities. Upon asking the reason as to why she was not granted partnership, she was slapped with a response, which stated 'because you just gave birth to a child.'[131]

Pregnancy-related discrimination in the legal field is not just particular to the USA but roughly all the countries on the globe are battling with the same issue. In India, for instance, a majority of companies are of the view that working-women do not constitute 'long-term assets' and pregnancy is thus more or less a curse for such women where they have to bear all sort of remarks ranging from 'why don't you take a break?' to 'we don't think we would need you back after

[128]Kim Elsesser, "Female Lawyers Face Widespread Gender Bias, According to New Study", *FORBES* (Oct. 1, 2018), *available at:* https://www.forbes.com/sites/kimelsesser/2018/10/01/female-lawyers-face-widespread-gender-bias-according-to-new-study/#3f90a6dd4b55. (last visited on Feb. 21, 2021).
[129]*Id.*
[130]*Supra* note 128.
[131]*Id.*

you deliver' and 'pregnant women are better off work, they don't fit in offices.'[132]

The said prejudicial practice against women is the condition specific not only of women in law firms but is also the grim reality of litigators. During the trial, women have been faced with outrageous remarks and comments concerning their pregnancies ranging from 'Ms. X, I believe that you are too pregnant to prosecute,' while another woman was told 'where do you think you are, a delivery room?' and a Judge even went to the level of commenting upon a woman's choice of getting pregnant by remarking her with, 'had your husband kept his actions to himself, you would not be in this condition today.'[133]

Owing to pregnancy-related discriminations and a host of other instances such as the aforesaid, a number of women are raising voices against their perpetrators. In one such occurrence, Jones Day, named among one of the largest and wealthiest law firms in the world, was sued in the year 2019 by six of its erstwhile female associates citing pregnancy discrimination among other forms of gender discrimination.[134] The associates accused the firm of not paying them accurately; curbing their advancements and firing them once they attain motherhood.[135]

Notwithstanding the alarming number of suits being filed against firms and individuals, pregnancy discrimination is still rampant so much so that even though both men and women are hired at the same rate by law firms, women are more likely to fall off the ladder to partnership at considerably greater levels.[136] Pregnancy discrimination laws still have a long way to go before such occurrences start dwindling worldwide.

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[132]Aarefa Johari, "Pregnancy Remains a Curse for Working Women in Corporate India", *QUARTZ INDIA* (Apr. 17, 2015), *available at:* https://qz.com/india/385866/pregnancy-remains-a-curse-for-working-women-in-corporate-india/. (last visited on Feb. 16, 2021).

[133]Elizabeth A. Delfs, "Foul Play in the Courtroom: Persistence, Cause and Remedies" 17 *WOMEN'S RTS. L. REP.* 311(1996).

[134]Tiffany Hsu, "Jones Day Law Firm is Sued for Pregnancy and Gender Discrimination by 6 Women", THE NEW YORK TIMES (Apr. 3, 2019), *available at:* https://www.nytimes.com/2019/04/03/business/jones-day-pregnancy-discrimination.html. (last visited on Feb. 18, 2021).

[135]*Id.*

[136]Helia Garrido Hull, "Diversity in the Legal Profession: Moving from Rhetoric to Reality" 4 *COLUM. J. RACE & L.* 7 (2013).

C. Subtle but Inescapable Pregnancy Bias: Responses from the Legal Academia

Historically speaking, various societal norms and cultural beliefs hindered the capability of women to attain what they seek, including their work-life options. While in 1919, a majority of teachers were females,[137] concerns from communities were often raised that the predominance of women in the field would 'affect the psyches' of boys.[138] The said absurd beliefs among many others continued till World War II after which the labour shortage ultimately resulted in married females being considered 'eligible' for jobs as teachers.[139]

Ergo, after World War II, though married women continued teaching, they were deemed unsuited to do so when pregnant.[140] In 1948, soon after the World War II ended, a National Education Association Survey in the USA revealed that 57% of schools in districts had 'unavoidable maternity leave' policies starting from the month a woman starts showing her bump and continuing even months after the delivery.[141] A series of judgments both favouring and opposing the said policy was passed and it was only in 1974, in the USA, that a landmark ruling in *Cleveland Board of Education v. LaFleur*[142] put an end to the arbitrary and unconscionable practice and women were allowed to work throughout and after their pregnancies.

Pregnant women in the legal academia are allegedly competent of 'having it all'[143] and when it comes to making family choices they are faced with the dilemma as to when and if at all to become mothers. The dilemma is further coupled with its fair-share of problems ranging from being labeled as ill-tempered, grumpy, emotionally unstable, and physically incapable of performing in the legal academia during pregnancy and after giving birth.[144]

There exists plenty of research encircling around pregnant women and their experiences in the academia including that of a study conducted by sociologists

[137]Ilya A. Iussa, "Pregnant Pause: The Interplay of Gendered Expectations and Pregnancy in Legal Education" 15 *SCHOLAR* 750 (2013).
[138]*Id.*
[139]Nancy E. Dowd, "Work and Family: Restructuring the Workplace" 32 *ARIZ. L. REV.* 436 (1990).
[140]*Supra* note 137 at 750.
[141]*Id.*
[142]*Cleveland Bd. of Educ. v. LaFleur* (1974) 414 U.S. 632, 645.
[143]S*upra* note 137 at 745.
[144]*Id.* at 770.

Martha Copp and Phyllis Baker.[145] The findings of Copp and Baker revealed that pregnancy diminishes standing of a professor in any classroom and can thereby pose a negative connotation on student-teacher relationship.[146] In another study, Dr. Buchanan and Dr. Bruce[147] concluded that women who choose to continue with their jobs in the academia face negative classroom ratings and adverse perceptions from their colleagues as well as supervisors resulting in lesser women holding higher decision making positions within the institution.

Forty-seven years have passed since the *LaFleur* decision, twenty-four years since Dr. Baker's study, and seventeen years since the study of Dr. Buchanan and Dr. Bruce, but the predicament of women remains the same.[148] Thus, an arduous journey awaits countless of women battling through pregnancy-associated discrimination as a subset of gender-related biases before they can stand on the same pedestal as their male counterparts.

VI. CONCLUSION

In the age of movements such as the 'Me too' and the 'times up,' women are overtly letting the world know that 'enough is enough.'[149] While these stupendous movements have accorded women with significant momentum to fight the atrocities committed against them, there is still a lot to be done in this regard before the world can eradicate the countless forms of discrimination being perpetrated against its women.

It is startling to note that pregnancy associated discrimination and other forms of harassment are not just limited to women working in corporations, but is the grim reality of almost all the women despite their area of work. In an interview, Ms. Jacinda Arden, the Prime Minister of New Zealand revealed that she was harassed with questions revolving around her desire to become a mother, as it would affect her abilities to run the country.[150] Ms. Arden believed that it was

[145]Phyllis Baker & Martha Copp, "Gender Matters Most: The Interaction of Gendered Expectations, Feminist Course Content, and Pregnancy in Student Course Evaluations" 25 *TEACHING SOCIOLOGY* 29-42 (1997).
[146]*Id.* at 30.
[147]NiCole T. Buchanan and Tamara A. Bruce, "Contrapower Harassment and the Professorial Archetype: Gender, Race, and Authority in the Classroom" 34 *ON CAMPUS WITH WOMEN* 2 (2004-2005).
[148]*Supra* note 137 at 758.
[149]*Supra* note 72 at 244.
[150]Elanor Ainge Roy, "Jacinda Arden: New Zealand Prime Minister Announces First Pregnancy", *THE GUARDIAN* (Jan 19, 2018), *available at:* https://www.theguardian.com/world/2018/jan/18/new-zealand-jacinda-ardern-pregnant. (last visited on Feb. 23, 2021).

completely unacceptable in 2017 that a woman has to respond to 'that' question at workplaces.[151]

Maternal penalty, as discussed earlier in this article has become the contemporary truth for women at workplaces today. Although legal protection accorded to such women has made remarkable changes in their condition; as it was just a few decades back that laying off, denunciation, and even firing women citing pregnancy as the rationale was not just legal but socially acceptable,[152] the global legal regime still has a lot of changes to welcome in this regard. It is high time that women's intrinsic contribution to the labour market is acknowledged by the world and that pregnancy is just one of many other roles she carries out in her lifetime. For instance, women constitute nearly 47% of the USA's labour power[153] and more than 80% of females are likely to bear a child at least once during their life term.[154] Despite the fact that the labour market cannot function effectively without the presence of women even in the short term; in the long term, the said market cannot survive without women getting pregnant, discrimination against women continues. Owing to the multitude of situations discussed thoroughly in this article, along with laws and precedents from various jurisdictions, it becomes significant to recognize that men and women are indeed diverse beings and the fact that only women can get pregnant, places them at a pedestal lower than their male and other non-pregnant female counterparts at workplaces. Consequently, at this hour, what is required for women to escape the clutches of discrimination is not 'equality' but rather 'equity' in form of legislations in their favour so that the 'penalty' associated with the concept of pregnancy at workplaces withers away for good.

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[151]*Id.*

[152]Accord Cary Franklin, "Inventing the "Traditional Concept" of Sex Discrimination" 125 *HARV. L. REV.* 1360 (2012).

[153]U.S. Bureau of Labor Statistics, "Women In The Labor Force: A Databook", *U.S. DEPT. LAB* (Dec. 2019), *available at:* https://www.bls.gov/opub/reports/womens-databook/2019/home.htm#:~:text=Women%20in%20the%20labor%20force%3A%20a%20databook,of%2060.0%20percent%20in%201999.&text=Women%20also%20have%20become%20more,full%20time%20and%20year%20round. (last visited on Feb. 19, 2021).

[154]Gretchen Livingston, "Childlessness", *PEW RES. CTR.* (May 7, 2015), *available at:* http://www.pewsocialtrends.org/2015/05/07/childlessnes. (last visited on Feb. 27, 2021).

REGULATING THE UNREGULATED VIDEO-ON-DEMAND PLATFORMS IN INDIA

Ravi Singh Chhikara & Abhinav Arora[*]

The exponential growth of popularity of video-on-demand platforms has brought a new regulatory challenge for the legislature. This paper ultimately advocates that it is high time that the government of India takes a paternalistic role and enacts a different pre-publication regulatory framework for video-on-demand platforms. The paper first clarifies the real intention behind the regulatory policies for motion pictures in the Indian context. It then throws light on the real test to determine whether the content should be regulated or not. Further, the paper elucidates how the pre-publication regulatory framework would prove better than the post-publication regulatory framework. It then examines the possibility of reasonable restrictions under Article 19(2) of the Constitution of India, 1950. It clarifies how the not regulating the VOD platforms is violative of Article 14 of the Constitution of India, 1950. In the light of this, the article gives the possible solutions to the existing loophole.

I. INTRODUCTION

It is generally believed that motion pictures relieve the stress of human beings[1]. However, they also affect our lives badly if we watch them unconsciously[2]. Some of the content available on the video-on-demand (hereinafter the 'VOD') platforms such as Netflix, Amazon Prime, Disney+ Hotstar etc. is inherently dangerous for the children[3]. Some parents are not acquainted with the fact that highly obscene material, seditious, hate literature, treasonous or the content having the potential to encourage their children to follow the immoral paths flow

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[1]How Watching Movies Can Benefit Our Mental Health, *available at:* https://psychcentral.com/blog/how-watching-movies-can-benefit-our-mental-health/ (Visited on June 18, 2020).

[2]Franklin Fearing, "Influence of the Movies on Attitudes and Behavior" 254 *AAPSS* 70 (1947).

[3]Sidneyeve Matrix, "The Netflix Effect: Teens, Binge Watching, and On-Demand Digital Media Trends" 6(1) *JYPTC* 119 (2014).

through various channels of the internet with relative ease and minimal restrictions[4]. Consider the ideas propagated through these television series: -

1) Gigolos, an American reality web series is about the lives of five male escorts. In the Episode 7 of Season 1, a character meets a client whose fetish is simulating being dead during sex. In Season 3, one of the characters meets a client and convinces her to have sex in a public restroom.

2) Game of Thrones, an American fantasy drama web series has several scenes exhibiting incest including a one where a father does sex with his own daughters[5].

3) Gandii Baat is a web series featuring a separate erotic-themed story in each episode from rural India. The web series depicts that how people of rural India are deeply affected by their dark fantasies. Apart from men, the web series shows the rural women who would go to any degree for the sake of sex.

What kind of ideas are generated when the children watch this content? Undoubtedly, the effect of motion pictures particularly on children and adolescents is extensive "*since their immaturity makes them more willingly suspend their disbelief than the grown-ups*"[6]. It has been observed that they remember the visuals of the motion pictures and try to imitate what they have seen.[7]

Despite these known facts, the central issue is that several countries[8] including India do not have any specific legislation for content regulation on VOD platforms[9]. This has created a regulatory vacuum because the very same content which is liable to be censored before exhibiting in cinemas or television can be viewed uncensored on these platforms by any person including a child of any age. Thus, technology advances today pose new and daunting questions that

[4]Michael D. Mehta, "Censoring Cyberspace" 30(2) *AJSS* 319 (2002).
[5]See Season 4, Episode 1 – "The Daughter-Wives of Craster's Keep".
[6]Movies, Media, and Children, American Academy of Child and Adolescent Psychiatry, *available at* https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-And-Movies-090.aspx (Visited on June 21 2020).
[7]*Ibid.*
[8]Suwon Kim, Daewon Kim "Rethinking OTT regulation based on the global OTT market trends and regulation cases" 20(6) *JICS* 143 (2019).
[9]Ashok Upadhyay, "No content regulation on online streaming platforms, RTI reveals" *India Today,* Oct. 10, 2019.

challenge the current state of existing regulatory laws that were enacted before the advent of VOD platforms.

Considering its different nature in terms of the amount of user control, this paper ultimately urges the Government to enact a separate pre-publication regulatory framework for video-on-demand platforms.

In this light, it will be the objective of the paper to evaluate the best possible policy consideration to regulate VOD platforms in India. Part II analyses the real intention behind the current regulatory framework and then clarifies that the test for determining whether the content should be regulated or not is the 'effects test' and not the 'control test'. It then proves how courts have erred in interpreting the provisions of the Cinematography Act, 1952. The possibility of bringing VOD platforms under the Cinematography Act has been then examined. It proceeds to examine the inadequacy of IT Act, 2000 because of its post-publication censorship nature.

Part III argues that VOD platforms cannot be left unregulated in the guise of 'freedom of speech and expression' provided under 'Article 19(1) of the Constitution of India'. It can be reasonably restricted under Article 19(2) on several grounds which will be discussed in the paper. It shows that how the nature of the content displayed on platforms endangers safety, health and peace and sometimes it can have minacious consequences such as having anxiety, feeling loneliness, withdrawing from friends, having bad dreams, sleeping problems etc. Thus, in the name of creativity, it cannot be protected because it is not a suppression of the creative idea but an attempt to protect the community.

Part IV explains how the absence of any regulatory framework for VOD platforms violates Article 14 of the Constitution. It argues that the content that gets categorized as 'obscene' when shown on platforms other than VOD platforms, is made available on VOD platforms without any restrictions. It then argues that it would be violative of Article 14 if they are subjected to existing regulatory framework. It explains that the VOD platforms stand on a different footing as they, unlike other platforms, provide a complete user control on the sequence of the content. So, it will be an utter violation of Article 14, which has laid down the principle that unlike are to be treated differently. However, authors suggest that till the legislation is enacted, the courts should examine the content based on the tests propounded by the provisions of Cinematography Act, 1952 so as to fill the vacuum.

In Part V, the authors attempt to evaluate the best possible alternative to regulate the content on VOD platforms. It advocates for establishing an autonomous body and a separate Tribunal along with the provision of appeals to the High Court and Supreme Court. It also suggests for a provision which can facilitate the injured to directly approach the Tribunal for appropriate remedy. It entails the mandatory provision of parental lock security on VOD platforms.

Part VI concludes.

II. ANALYSIS IN INDIA'S CONTEXT

A. The Real Test of the Regulation – The Effect test

The primary reason for not applying the regulatory laws applicable to platforms other than VOD platforms is because of the unique feature of complete control on the sequence of content in VOD platforms as against to very limited control in other platforms. For instance, in the cable service platform, the viewer can at most change the channel when he wishes to skip the particular part of the motion picture. He cannot jump to the next part of the motion picture. However, in VOD platforms, the viewer can skip that particular part whenever he feels so. In other words, he has the option to jump to the next part of the motion picture. Authors claim that the test that whether the content provided by any platform should be regulated or not is not decided by the feature that how much control that platform offers to its viewers, instead determined by the nature of effects that its content will produce on its viewers. In other words, it is the 'effects test' which is the only deciding factor and not the 'control test'.

To understand the effects test, it is pertinent first to trace the reasons for bringing the regulatory policies for motion pictures. It is necessary first to understand that why the duty to censor the movies was delegated to authorities and not to the viewers. A report was released in 1928 on the issue of censorship and exhibition of films in India.[10] It suggested for mandatory censorship of motion pictures because of they having a substantial effect on the community than any other media.[11] Similarly, the reasons behind regulation can be traced from the

[10]CMDS Policy Paper: How to Regulate India's Video Streaming Services, *available at: https://www.ceu.edu/article/2019-11-15/cmds-policy-paper-how-regulate-indias-video-streaming-services* (Visited on Nov. 15, 2020).
[11]*Ibid.*

'Statement of Objects and Reasons' of Cable Television Network (Regulation) Act, 1995 which states that -

> "*due to cultural invasion in many quarters by the western culture, a lot of undesirable and unregulated programmes as well as advertisements are becoming available to viewers without any kind of censorship*"[12]

Thus, it was always the effect of the content on the community that mattered for regulation and not the amount of viewer's control on the content. The feature of extent of control provided by that particular platform was never taken into consideration. In fact, before the advent of the VOD platforms, the motion pictures could be watched on CDs and DVDs. Interestingly, CDs and DVDs provide the same amount of control to viewers as provided by VOD platforms. However, even then, the motion pictures downloaded in CDs and DVDs were subjected to censorship laws.

In the constitutional debates, when the issue arose as to under which list in Schedule 7 the exhibition of the film should be placed, it was agreed by all that the films are regarded as an "*important 'educational medium' and play a significant role in building the national character*"[13] Consequently, it was decided that the exhibition of the film is to be made a union subject. In the landmark judgment of *Secretary, Ministry of Information and Broadcasting, Govt. of India and Ors. vs. Cricket Association of Bengal & Others*[14], Apex Court held that -

> "*[…] most people obtain the bulk of their information on matters of contemporary interest from the broadcasting medium. The television is unique in a way in which intrudes into our homes. The combination of picture and voice makes it an irresistibly attractive medium of presentation. It has tremendous appeal and influence over millions of people. Television is shaping the food habits, cultural values, social mores and what not of the society in a manner no other medium has done so far*."

[12]Cable Television Network (Regulation) Act, 1995 (ACT 7 OF 1995).
[13] Constitutional Assembly Debates, *available at:* http://loksabhaph.nic.in/writereaddata/cadebatefiles/C31081949.pdf (Visited on Nov. 29, 2020).
[14]AIR1995 SC 1236.

Interesting to note, the courts did not observe that the regulation in Television platform is necessary because of the limited amount of viewer control on the content. Instead, it emphasized on the 'effects' it leaves in the mind of the people.

The Indian Cinematograph Committee (ICC) setup up in 1928 did not favor the view of letting the people decide on their own regarding the appropriateness of the content[15]. It indicates that the mere feature of control on the sequence of the content cannot be a reason to except that control-enabling platform. Because the viewer cannot be left to decide whether the content is appropriate or not, it is the authority which has to determine the nature of the content prior to its publication and to remove the inappropriate content.

A case study was conducted on the censorship policies in India which observed that -

> "*cinema is the most alluring-visual medium and has the maximum effect on the people. If the effect violates the prescribed norms of authority, the authority censors the effect-producing films*"[16]

Thus, the regulatory bodies were never concerned with the viewers control on the particular content. Regulatory bodies were always concerned with the 'effects' of the content on the viewer. The preceding discussion clearly shows that the stress has always been only on nature and its effect on the community and not on the amount of viewer's control on the sequence of the content. The discussion always moves around the impact of motion pictures on the viewers.

B. Failure of Courts in Interpreting the Provisions of The Cinematography Act, 1952

Currently, the Central Board of Film Certification (CBFC) censors the films which is empowered by Section 5A and 5B of the Cinematographic Act, 1952[17].

Section 5A of the said Act empowers CBFC to certify and classify the film according to its suitability for public exhibition[18]. Section 5(B) (1) lays down the grounds for non-certification by CBFC. It empowers the CBFC to stop the

[15]*Supra* note 10.
[16]Aditya Kumar Panda, "Case Study: Film Censorship in India" 4(2) *SIJBPG* 7 (2017).
[17]The Cinematography Act, 1952 (Act 37 of 1952).
[18]*Id.*, s.5A.

broadcast of the film or any part of it if it is "*against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence."*[19]

This mandatory certification acts as a regulatory framework for films to be exhibited publicly in India.

While the films shown in cinemas are subjected to certification under this Act, the video-on-demand platforms do not require such certification under the Act.

Though the authors argue for a separate regulatory framework for VOD platforms (in the latter part of the paper), the authors claim that the courts could bring them under the Cinematography Act to give the appropriate remedy until the legislature enacts a separate regulatory framework for them so as to temporarily fix the loopholes in the regulation policies. This can be inferred from the relevant case laws to be discussed hereinafter.

In the case of *Mr. Padmanab Shanker v. Union of India*[20], the issue was raised whether clause (c) of Section 2[21] of Cinematography Act, 1952 contemplates the transmission of content via the mode of internet. It was aptly argued that the definition of 'cinematograph' is an inclusive one and it will include the modern gadgets as well.

However, the court found the cinematograph as an equipment having a camera and a machine which perform the function of creation and exhibition of the film respectively. The Court observed that the internet works differently and thus, found it difficult to include the content exhibited via the mode of internet within the meaning of Clause (dd) of Section 2[22] of said Act. It held that there cannot be any "exhibition" through internet. The internet provides the content only on the request of the users.

The Court added that the provisions of the IT Act could take care of content objected by the petitioners. Thus, the Court denied to provide any remedy.

[19] *Id., s.*5(B)(1).
[20] ILR 2019 Kar 4630.
[21] s.2(c) - "cinematograph" includes any apparatus for the representation of moving pictures or series of pictures.
[22] s.2(dd) - "film" means a cinematograph film.

However, the court did understand the height of the issue. It can be inferred from the fact that the Court in the hearing as well as at the time of giving the final order, expressed the concern that this matter should invite the State to examine the issue and find a solution.[23]

The authors claim that the decision was based upon the wrong interpretations of the provisions of said Act and thus, the decision is patently erroneous. It is not even a sound decision. For instance, if pornography or any content which endangers the national security is made available on VOD platforms, then the observation that the internet works only upon the request made by users and thus, it cannot be regulated seems unsound. What matters is not whether the content is being provided on the request of the users, but the nature of the content and its effects on the users. Take another example. Suppose a user requests a particular DTH service such as Tata Sky a specific film on its own subscription-based channel specially created only for its own customers. Then observation that the content was provided on the request of the user and thus, it cannot be censored seems unsound.

Since, the Act does not expressly state about its application on specific mediums only, it is crucial to examine the legislature's intention behind its enactment for its correct interpretation.

The intention of enacting the Cinematography Act is clear from its Preamble which says

> "*An act to make provision for the certification of cinematograph films for exhibition and for regulating exhibitions by means of cinematographs*".[24]

Section 3 provides the intention of constituting the board. It says that the board has been constituted "*for the purpose of sanctioning films for 'public exhibition*'"[25] Section 4 provides that "*any person wanting to 'exhibit' any film has to apply to the Board for the certificate*". The board has then the duty to examine the film. It may then

> "*sanction the film for unrestricted public exhibition*", or
> "*sanction the film for public exhibition restricted to adults*", or

[23]*Supra* note 20.
[24]The Cinematography Act, 1952 (Act 37 of 1952).
[25]*Id.*, s.3.

> "*sanction the film for public exhibition restricted to members of any profession or any class of persons*", or "*direct the applicant to carry out modifications in the film before sanctioning the film for public exhibition*"; or "*refuse to sanction the film for public exhibition*".[26]

It is clear from these provisions that the interpretation of terms 'exhibition and 'public exhibition' determines the applicability of the Act. However, neither the Act nor any judgment clearly define these terms.

So, now the central issue is what should be the possible and ideal interpretation of the term 'exhibition' and following that, whether the video-on-demand platform 'exhibits' the films?

The relevant landmark case to find the answers for these questions is *Super Cassettes Industries v. Central Board for Film Certification*[27] wherein issue that was framed was whether the DVDs or VCDs produced by the Petitioners for watching privately only require prior certification by the CBFC under Section 5A CG Act. The petitioners contended that the films produced by them were not being sold for 'public exhibition' within the meaning of the Cinematographic Act. So, since they are being sold for private home viewing, they do not require certification by the CBFC.

However, it was held that the words "*any person desiring to exhibit any film*" in Section 4 under CG Act should be understood as "any person desiring to publicly exhibit any film". Court took the notice of the case *Garware Plastics and Polyesters Ltd. v. Telelink*[28] in which two tests were propounded to ascertain whether the film is being offered for public viewing or private viewing. Firstly, "*by determining the character of the audience*" and secondly, "*by determining the nature of the relationship between the owner of the copyright and the audience*".

The court applied the second test and held that -

> *"....an audience that pays for watching the film cannot be considered as domestic viewers of the owner of the copyright. They must be considered as members of the public." Further, it*

[26] *Id.,* s.4.
[27] 2011(46) PTC1(Del).
[28] AIR 1989 Bom 331.

> *was held that mere watching a movie behind closed doors of homes does not disqualify those viewers as public. Moreover, the express condition "for private viewing only..*"

mentioned on labels cannot take out the films from purview of Section 5A of CG Act.

It was held that -

> "*once it leaves the shop where the film is purchased, neither the maker of the film nor its seller, has any control on whether it is viewed by one person or by a hundred, or whether it is viewed in a place to which the public is invited or in the private confines of a home. Therefore, the interpretation of the words 'public exhibition' has to necessarily be contextual keeping in view the essential purpose of the CG Act. Even if there is no audience gathered to watch a film in a cinema hall, there are individuals or families watching a film in the confines of their homes, such viewers would still qualify as members of the public and at the point at which they view the film that would be an 'exhibition' of such film*"

The same jurisprudence can be applied to the nature of the exhibition of films by VOD platforms. The audience that pays for viewing content available on the platforms constitutes a section of the public. The mere assertion by platforms that the content is for private viewing only cannot take the content out of the purview of Section 5A of CG Act. Further, the moment the content gets available on the platform, neither the maker not the platform has any control over it. It can be viewed by one person or by many and it can be viewed by people gathered by invitation in halls or in the private confines of a home (since content can now be easily viewed on T.V[29]). Thus, the individuals or families watching a film on T.V having installed with the Netflix app in the confines of their homes perform it as the members of public and the viewing of that film can be safely called as 'exhibition' of film. Thus, the motion pictures exhibited through VOD platforms will constitute 'films within the meaning of Clause (dd) of Section 2 of the said Act'.

[29]"How can I watch Netflix on my TV?", *available at:* https://help.netflix.com/en/node/33222 (Visited on Aug. 21, 2020).

A look at the provisions of Draft Cinematograph Bill, 2013[30] also reveals the same jurisprudence. Section 2(l) of the bill provides that[31] -

> "*"exhibit" or "exhibition" shall include the audio or visual dissemination of a film or part thereof or making available a film or part thereof through use of a public medium, to persons not directly connected with the production, distribution, promotion or certification of that film*"

Section 2(t) of the Bill provides that[32]-

> "*'public medium' includes a medium forum or place to which members of the general public have access to with or without the payment of a fee or charge*"

Here, the Internet constitutes a public medium. The public having internet access by paying required subscription amount to platforms can easily view the content available on their platforms. Thus, it would constitute 'exhibition' under the said Draft Bill.

Additionally, under the Cable Television Network (Regulation) Act, 1995 the films shown to viewers at homes are required to be certified by CBFC. This is a strong inference that the term 'exhibition' includes the exhibition of films for watching it privately at homes.[33]

C. Incompetence of Information and Technology Act (hereinafter the 'IT'), 2000

Section 67, 67A, and 67B of IT Act punishes for "*publishing or transmitting obscene material, or material containing the sexually explicit act, or material depicting children in the sexually explicit act in an electronic form*"[34]. However, the major problem with the IT Act is that it does not regulate the expression prior to its publication. Rather, it regulates it after the expression has been published.

[30]The Cinematograph Bill 20I3.
[31]*Id.,* s.2(l).
[32]*Id.,* s.2(t).
[33]Japreet Grewal, "Netflix — is the film censorship law there yet?" *Observer Research Foundation,* Oct. 27, 2016.
[34]Information and Technology Act, 2000 (Act 21 of 2000).

Authors claim that the need of the hour is pre-publication censorship (prior restraint) and not post-publication censorship (subsequent punishment). While prior restraint is an authorities' required action on objectionable expression before its publication[35], subsequent punishment, on the other hand, is an authorities' required action on objectionable expression *after* its publication. Thus, under a subsequent punishment, the harmful expression would have already been published before the authorities take action, whereas under the system of prior restraint, the harmful expression, if banned, never reaches the audience[36]. The problem with the post-publication censorship is that it takes several days to get an injunction order from courts against the expression. The final order granting an injunction against the broadcasting of such expression becomes redundant as it would have reached to viewers already till then. After that, it becomes impossible to undo the damage completely. IT Act empowers only the subsequent punishment. Thus, they cannot remedy the injury caused to the viewers.

Additionally, the system of prior restraint affords public greater certainty about the limits of the law with a lesser risk of severe consequences[37]. In other words, under the prior restraint system, the public would know what is permitted and what is forbidden in law without incurring the consequences of criminal or similar sanctions in the event an erroneous interpretation is made. Under a regime of criminal or civil sanctions, creators can test the limits of freedom of speech and expression only by making that content and risking themselves. Whereas in the pre-restraint process, they have definitive rules to know what is constitutionally protected. Thus, pre-publication censorship is to be preferred over post-publication censorship.

D. Insufficiency of Self-Regulatory Code Signed by Video-On-Demand Players

In a bid to protect themselves from severe regulations, video-on-demand platforms have recently signed a 'self-regulatory code'. [38] . They have undertaken to not to show any content "disrespectful to national symbols and religions". Further, the players are required to ensure that they do not make available any content which shows "*children engaged in real or simulated sexual activities*", or promotes "terrorism" or "*has been banned for distribution*

[35]Thomas I. Emerson, "The Doctrine of Prior Restraint", 20(4) L&CP 648 (1955).
[36]*Id.at* 657.
[37]*Id. at* 659.
[38]PTI, "Netflix, Hotstar, 7 other streaming platforms sign 'self-regulation code'" *The Week*, Jan. 18, 2019.

by online video service by any court or under any law". It also provides a mechanism for consumer complaints.

There are many unwarranted issues associated with the self-regulatory codes. Sometimes, creators might even remove the content that possibly is even protected by Freedom of Speech and Expression, simply because of having over cautious or say, to prevent themselves from going into the unlawful zone[39]. This would keep the viewers away from the content which might be useful for it. For instance, some creators are afraid to produce the content which speaks against the government. Some may remove only that content which is prohibited but may fail to raise the constitutional challenge in courts. Some may even want to pursue the constitutional challenge but eventually alter or abandon their content due to fear of indulging in the process of litigation.

Thus, it should be the authorities who should be given the task to decide the nature of the content. Aggrieved by the decision of the authorities, the creator of the expression should have the opportunity to appeal in the courts. This will protect the viewers and expression if the court decides in favor of it.

III. REASONABLE RESTRICTIONS CAN BE IMPOSED UNDER ARTICLE 19(2).

Article 19(1)(a) of the Constitution of India, 1950[40] guarantees 'Freedom of Speech and Expression.'[41] However, this right is subject to certain reasonable restrictions provided under Article 19(2)[42]. These restrictions can be imposed "*in the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence*".

Authors claim that the creators of content available on video-on-demand platforms cannot claim the protection of freedom of speech and expression and creative freedom. In fact, the Judiciary has also always emphasized on maintaining a balance between the legitimate excision of the right of freedom of speech and expression and the abuse of freedom of speech and expression. In

[39] *Speiser v. Randall*, 357 U.S. 513, 526 (1958).
[40] The Constitution of India, 1950.
[41] *Ibid.*
[42] *Ibid.*

the remarkable case of *S. Rangarajan and Ors v. P. Jagjevan Ram and Ors*[43], Court emphasized on the importance of pre-censorship and admitted that -

> "*Even though one movie relating to a social issue may not significantly affect the attitude of an individual or group, continual exposure to films of a similar character will produce a change. It can, therefore, be said that the movie has a unique capacity to disturb and arouse feelings. It has as much potential for evil as it has for good. It has an equal potential to instil or cultivate violent or good behavior. With these qualities and since it caters to mass audience who are generally not selective about what they watch, the movie cannot be equated with other modes of communication. It cannot be allowed to function in a free market, place just as does the newspapers or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary*".

The Court further held that "*censorship is permitted mainly on social interests specified under Article 19(2) of the Constitution with emphasis on maintenance of values and standards of society*".

A. Why Does It Not Hamper Creative Freedom?

To answer this question, we must ask ourselves whether we want to protect the content showing creativity or the content which corrupts the minds of the young children in the guise of creativity. Consider this. Most of the violent acts shown go unpunished in their shows or films and sometimes even presented as humor. Further, the consequences of human suffering and loss are rarely depicted[44]. It has been observed that children of age eight or below are unable to differentiate between reality and fantasy. [45] It makes them learn and adopt as reality whatever they watch. It, in turns, make them believe that the world is a mean and scary place. Consequences include anxious feelings, loneliness, withdrawing from friends, bad dreams, sleeping problems etc. It has also been observed that "*children aged between 8 and 12 years who view violence are often frightened that they may be victims of violence or a natural disaster*"[46].

[43](1989) 2 SCC 574.
[44]Television and Children, a*vailable at:* https://nanopdf.com/download/television-and-children-5aded7e791b95_pdf (Visited on Aug. 2, 2020).
[45]*Ibid.*
[46]*Ibid*.

It has also been observed that alcoholic drinks are the most commonly portrayed products on VOD platforms. Rather than showing them in a bad light, they are shown as substances of enjoyment and power. For instance, a British drama series 'Peaky Blinder' has in fact, glorified the usage of alcohol and cigarettes. Studies show that "*exposure to drinking in movies increases the likelihood that viewers themselves will have positive thoughts about drinking*."[47]

Foregoing discussion rather shows that the content available on these platforms endangers safety, health and peace. Would it be a sound policy to protect every content despite its perilous nature? Thus, the regulation of the video-on-demand platforms would filter out the inappropriate content along with the protection of the actual creativity which adds value to the community and protect children from every disturbing content. This kind of content weakens the "*children's moral consciousness and pollute children's soul and consequently, affects healthy growth of children or even cause adolescent crime*"[48].

Additionally, the same view that the immoral content cannot be protected in the guise of creative freedom was explicated in the case of *K.A Abbas v. Union of India*[49]. In this case, censorship of films was challenged in the Supreme Court on that ground that it violates the right to freedom of speech and expression. Petitioner contended that "*Freedom of expression cannot, and should not, be interpreted as a licence for the cinemagnates to make money by pandering to, and thereby propagating, shoddy and vulgar taste*."

Court held that the classification of films "*according to their age groups and their suitability for the unrestricted exhibition is regarded as a valid exercised of power in the interests of public morality, decency etc. This does not violate the freedom of speech and expression*". Most importantly, the court propounded "that the social interest of people overrides individual freedom." Court further held -

> "*Further it has been almost universally recognized that the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism),*

[47]*Ibid.*
[48]The Advantages of Internet Censorship Media Essay, *available at*: https://www.ukessays.com/essays/media/the-advantages-of-internet-censorship-media-essay.php?vref=1 (Visited on July 13, 2020).
[49]AIR 1971 SC 481.

> *and its coordination of the visual and aural senses. The art of the cameraman, with trick photography, vista vision and three-dimensional representation thrown in, has made the cinema picture more true to life than even the theatre or indeed any other form of representative article. The motion picture is able to stir up emotions more deeply than any other product of article. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to emulate or imitate what they have seen.*"[50]

Thus, it has to be admitted that censoring a vulgar or disturbing content cannot always be considered as an act of suppression of creative ideas. They are sometimes necessary for human flouring.[51] Moreover, studies show that the policy makers cannot trust the individuals to determine what's better for them.[52]

Even the Hon'ble Supreme Court held in the case of *S. Rangarajan and Ors. vs. P. Jagjevan Ram and Ors*[53] that the "moral values, in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation". It further clarified that-

> "*Our country has had the distinction of giving birth to a galaxy of great sages and thinkers. The great thinkers and sages through their life and conduct provided principles for people to follow the path of right conduct. There have been continuous efforts at rediscovery and reiteration of those principles. Besides, we have the concept of "Dharam" (righteousness in every respect) a unique contribution of Indian civilization to humanity of the world. These are the bedrock of our civilization and should not be allowed to be shaken by unethical standards.*"[54]

[50]*Id. at para* 22.
[51]On the Role of Censorship, *available at:* https://www.theschooloflife.com/thebookoflife/on-the-role-of-censorship/ (Visited on Aug. 19, 2020).
[52]Censorship and Secrecy, Social and Legal Perspectives, available at: https://web.mit.edu/gtmarx/www/cenandsec.html (Visited on July 26, 2020).
[53](1989) 2 SCC 574.
[54]*Id.* at para 21.

IV. ARTICLE 14

A. VOD platforms form a different class than other platforms

Article 14 of the Constitution of India provides that *"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"*. [55] It ensures that 'equals are treated alike'.[56] However, "*it does not mean that 'unequals ought to be treated equally*'".[57] Treating the persons equally who are unequal is violative of Article 14 as this would itself result in inequality.[58] Therefore, Article 14 allows the classification. However, this classification "must be rational" which means "*it must be based on some qualities and characteristics which must have reasonable relation to the object of the legislation*"[59].

The authors argue that the VOD platforms are different from other platforms. The creators who express their ideas through the VOD platforms form a different class than the creators who express their ideas through other platforms. The distinguishing factor is the amount of control on the sequence of the content available on platforms. On VOD platforms, viewers have complete control on the sequence of the content. While watching, the viewers have full control to skip any part(s) of that specific content. A viewer can watch only that part of the content which he wants to watch at that point of time. On the other hand, other platforms do not provide any control on the sequence of the content. Viewers are bound to watch the content in the sequence in which it was directed by its creators. The existing regulatory framework contemplates the features available on other platforms only. It does not contemplate this distinguishing factor. Thus, subjecting VOD platforms to existing regulatory framework would be violative of Article 14 as it would be equivalent to treating unequals alike.

B. Existing classification fails to achieve the required goal.

Every legislation comes with a specific goal to achieve. Article 14 empowers the legislative bodies to make classification so as to achieve the required goal. However, the classification, which although can be reasonable, if falls short of achieving the required goal of the legislation would be said to be violative of Article 14 of the Constitution of India because of not having any reasonable

[55]The Constitution of India, 1950.
[56]*M Jagdish Vyas v Union of India* (2010) 4 SCC 150.
[57]*Ibid.*
[58]M.P Jain, *Indian Constitutional Law* 909 (Lexis Nexis, Gurgaon, 8th edn., 2018).
[59]*Vikram Cement v State of MP* (2015) 11 SCC 708.

nexus with the objective of the legislation. The current regulatory framework is to be examined on this premise only.

Here, the underlying purpose of the regulation on motion pictures should be the protection of "*sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or to prevent contempt of court, defamation or incitement to an offence.*"[60]

As has already been discussed that VOD platforms and other platforms form a different class because of the factor of the amount of user control on the sequence of the content. However, authors argue that even after classification, which although is reasonable, the goal of the classification is not being achieved. The purpose of the regulatory laws is to protect the interests provided under Article 19(2). However, this goal is not being achieved by this classification. Complete denial of bringing VOD platform under the regulatory laws indicates the contemplation by the legislature that (a) motion pictures available on VOD platforms don't have the potential to harm the interests that State ought to protect under Article 19(2), and (b) motion pictures available on platforms other than VOD platforms have the potential to harm the interests that State ought to protect under Article 19(2). However, as illustrated in this paper in the 'Introduction' section, the content available on VOD platforms does have the potential to harm the interests ought to be protected by State. This can be understood by answering to this question: Whether the Television service providers would be allowed to show the web series as illustrated by authors in the 'Introduction' section.

The foregoing discussion shows that the legislature has rightly demarcated the line between VOD platforms and other platforms on the factor of the amount of user control on the sequence of the content being shown on respective platforms. However, the objective of the classification would be fulfilled only when both the classes are regulated differently.

V. RECOMMENDATIONS

History shows us that when the technology is reached to its extremes, the government will definitely attempt to introduce legislation for its regulation. Platforms may have accepted the self-regulatory code but it is the government that would ultimately formulate the regulations and not these platforms.

[60]The Constitution of India, 1950.

No doubt, that the regulations on video-on-demand platforms can possibly trigger a snowball effect in the sense that it can force the states to regulate other content available on internet[61]. Thus, the policy has to be drafted with a long-term approach[62].

While drafting the policies, the authors believe that the technology or medium, cannot be taken as the sole consideration to determine the policy of regulation because of the reason of they having the different 'effects' on and different 'responses' by different societies.[63]

Therefore, the authors refute the theories which advocate for technology or medium as the sole consideration to determine the regulation policies. The theory called 'Technological Determination', says that it is the 'technology' which is a major driver for change and thus, it should be the technology only which should be considered while framing policies.[64] Another theory called 'Media Determinism' established by Marshall McLuhan propounded that it is the 'medium' through which content is disseminated and affects the viewers rather than the content itself[65]. These theories erred in not considering the fact that different technologies have different 'effects' on and different 'responses' by different cultures.[66] Thus, a holistic view of both the technological and sociological factors is required[67].

A. Age Classification Scheme

The objective of the regulations should not be to curb artistic expression and creative freedom. The objective should be the certification of a film or series and not the censorship of the content except when the content seriously damages the "*sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order or is a contempt of court, defamation or incitement to an offence*".[68] In this regard, a guiding principle can be extracted

[61]*Supra* note 10.
[62]Over-the-Top Content and Content Regulation, *available at:* http://dx.doi.org/10.2139/ssrn.2708278 (Visited on Dec.21, 2020).
[63]*Supra* note 10.
[64]Bruce Bimber, "Karl Marx and the Three Faces of Technological Determinism" 20(2) *SSS* 333 (1990).
[65] Marshall McLuhan, *Understanding Media: Extensions of Man* (MIT Press, Cambridge, 1994).
[66]Technology Shapes Cultures, *available at*: http://web.colby.edu/st112wa2018/2018/02/16/technology-shapes-cultures/ (Visited on Aug. 29, 2020).
[67]Ian Hosein, Prodromos Tsiavos & Edgar A. Whitley, "Regulating Architecture and Architectures of Regulation: Contributions from Information Systems" 17(1*) Int Rev Law Comput Tech* 85 (2010).
[68]The Constitution of India, 1950.

from the case of *Charan Shukla v. Provincial Government*[69] wherein it was held that the content would be adjudged from the viewpoint of a "*reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds*". It was held that it should be suppressed only when "the community interest is endangered". Further, "*the anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to public interests*". These should be the exceptional cases. Otherwise, the viewers should have the complete freedom of choice in terms of the content they wish to watch.

Authors believe that to achieve this objective, the scheme that would perfectly work is 'Age Classification Scheme' which provides that the content should be classified on the basis of the age suitability.

The idea of classifying the content properly can be taken from the Singapore's regulation policy. In 2018, its regulatory body 'Infocomm Media Development Authority' (IMDA), issued a code of practices for video-on-demand platforms to be followed.[70] Under these rules, platforms are required to follow the same classification rules which offline service providers follow. For instance, G stands for General, b) PG stands for parental guidance etc. These strict rules provide that NC16 content which stands for 'no children below 16 years of age' can be provided only with a parental lock function on their platforms. Further, the R21 content which stands for 'restricted to people of 21 years and above only' has to be provided with a default parental lock function and there must a reliable age verification process. Platforms are also required to display the ratings and elements such as theme, nudity, sex, violence, drugs, language etc. Content hosted by these platforms must comply with the prevailing laws and must be properly scrutinized so as to protect the national interest, national security and religious harmony.

The advantage of creating an age classification framework is that along with the protection of creative freedom of creators, it protects the mind of the younger children which are open to immoral influence.

[69]AIR 1947 Nagpur 1.
[70]Codes of Practice – Media, *available at:* https://www.imda.gov.sg/regulations-and-licensing/Regulations/Codes-of-Practice/Codes-of-Practice-and-Guidelines---Media (Visited on 21 November 2020).

B. Creation Of an Autonomous Body

In 1968, a committee called Khosla Committee was formed to deal with the issues of censorship[71]. It was meant to recommend the improvements in censorship laws so as to create a balance between creative freedom and censorship. The report suggested for an autonomous and independent body[72]. The report also suggested a few factors which have degraded the efficiency of the existing CBFC body such as constant fear of interference, lack of responsibility, lack of flexibility etc. This necessitates the creation of an autonomous body which can be free from these factors.

Inspiration can be taken from the self-regulatory body called the 'British Board of Film Classification' (formerly the British Board of Film Censorship) set up by the film industry in United Kingdom. It is an autonomous body. It takes charges from film distributors for the service of classification of films. Its relationship with the government is based upon a 'gentlemen's understanding'. In other words, it classifies the films with the terms acceptable to the government. In return, the government promises to not to interfere in its decisions. In 1984, parliament delegated the duty of classification of videos to BBFC. Resultantly, most of the issues that arise revolve around the age classification only rather than censorship[73]. It has successfully maintained the creative freedom of artists.

Thus, it is suggested that CBFC is to be delinked from the State and an autonomous body created by a statue should be established. The body, just like BBFC, would be eligible to make cuts but openly and with reasons. It would have to keep a balance between morality and creativity.

C. Constitution of a Tribunal

Legislature has constituted various tribunals for the adjudication of rights of the respective industries and their employees. The tribunals are preferred because of speedy and cheap adjudication.[74] Absence of any separate tribunal for the film industry compels the injured to knock the doors of the courts. Constitution of a tribunal would not only release the burden from the courts but also protect the content from getting obsolete. It has been observed that the decision of a court

[71]G. D. Khosla, Report: *Report of the Enquiry Committee on Film Censorship* (1969).
[72]Arpan Banerjee, "Political Censorship and Indian Cinematographic Laws: A Functionalist Liberal Analysis" 2 *DLR* 557 (2010).
[73]*Ibid*.
[74]Hazel Genn, "Tribunals and Informal Justice" 56(3) *MLR* 393 (1993).

regarding the particular expression takes years and the idea of the content gets obsolete till the final decision of court comes.

D. Appeals

An appeal against the decision of tribunal should lie to the High Court under Article 226/227 and then to the Supreme Court under Article 32/136 of the Constitution of India.

E. Consumer Complaints framework

The viewers should also be given the option to file complaints before the Tribunal. It would help to maintain the trust between the viewers and the platforms. For instance, if any parent believes that the obscene content has been erroneously classified under a particular class group, he/she should be allowed to submit it to the Tribunal. Similarly, if the government feels that the content having the potential to harm the national security has been published, it should have the option to submit it to the Tribunal.

F. Parental Lock Security

Undoubtedly, parents are considered to be the best judges to decide as to what is appropriate and inappropriate for their children. It is only the parents who are aware of their children's maturity. So, by providing the mandatory option of parental security on every platform, parents can easily manage access to many aspects of inappropriate content by using this control.

VI. CONCLUSION

Video-on-Demand (VOD) is a platform which offers the content directly to audience via the mode of internet. There are several different VOD platforms currently working in India such as Netflix, Amazon Prime, Hotstar, Voot, etc. The VOD platforms have no regulatory body above them to govern the content provided to its audience as against the presence of respective regulatory bodies for cinemas and televisions.

Through this article, the significance of censorship of the content provided by VOD platforms is explored in various aspects. The two landmark cases in the Supreme Court of India namely *K.A Abbas v. Union of India*[75] & *S. Rangarajan*

[75]AIR 1971 SC 481.

and Ors v. P Jagjevan Ram and Ors[76] build up a foundation for the importance of censorship and pre-censorship of VOD content in India. Both the cases were subjected to be in the matrix of hampering and violation, respectively of our Fundamental Right [Article 19(1)(a)]. In the case of *K.A Abbas,* it was held that "*the classification of films according to the age group and their suitability for the unrestricted exhibition is regarded as a valid exercise of power in the interests of public morality, decency etc*".[77] Similarly, in the case of *S. Rangarajan,* the Court emphasized on the importance of pre-censorship and admitted that "*Censorship by prior restraint is not only desirable but also necessary in a country like India*".[78] The Court further held that "*censorship is permitted mainly on social interests specified under Article 19(2) of the Constitution with emphasis on maintenance of values and standards of society*".

Even before these two landmark cases were brought to light, a report in 1928 suggested mandatory censorship of motion pictures because of they have a substantial effect on the community than any other media. Keeping this in mind, the article analyzed the implication of the unregulated content on the viewers. It established that it is the 'effects test' and not the 'control test' to decide on the question that whether the platform should be regulated or not.

The type of content available on the VOD platforms is of all kinds and of multiple genres. The content available on these platforms is chosen by an individual and watched on demand. Basis this premise there should be a balance of an individual's choice and autonomy factors. An autonomy-rich formulation of dignity and educational value, in certain situations, will enable the individual to choose among a pool of more distinguished content. In this sense, the balancing exercise is a combination of subjective (choice) and objective (autonomy) factors, both of which have to be taken into account by the Court.

By viewing the present scenario, the presence of an unbiased autonomous body is a must. A total censorship of the content will do more harm than benefit as it could increase the case of film piracy and other violations of the IT Act. Moreover, it would turn a VOD platform into a television or mainstream cinema.

[76](1989) 2 SCC 574.
[77]*Supra* note 49.
[78]*Supra* note 43.

After all, the audience today needs nothing more than the truth about the society that we live in and is searching for that content, however, the content presented to the public requires some scrutiny from an autonomous regulatory body.

APARNA BHAT AND OTHERS V. STATE OF MADHYA PRADESH AND ANOTHER: SOLEMNIZING MASCULINITY THROUGH RAPE THE QUEST FOR JUSTICE

Dr. Gireesh Kumar J [*] ***& Arjun Philip George*** [**]

I. INTRODUCTION

The judicial branch of administration of justice in a country is essentially serving as the reservoir of hope and faith for the society especially for the oppressed, exploited and violated. The social, political and economic vulnerability of the individual citizen could be properly cured by a just, fair and reasonable judicial process when it comes to violation of basic rights guaranteed by the constitution and other laws of the country.[1] The recent controversial judgments of the Indian courts in cases of sexual offences expose India's vulnerability in ensuring dignity and integrity of women due to cumbersome and insensitive legal process.[2] The "rakhi for bail"[3] order of the Madhya Pradesh High Court, the Karnataka High Courts observation that "it is unbecoming of an Indian women to fall asleep after being ravished"[4] by the accused and the recent controversial "marry your rapist"[5] comment allegedly made by the Chief Justice of India in a case of rape are the most recent incidents raising concerns.[6] The societal and judicial stigma against the victims of rape and sexual harassment often makes its flurry appearances through the general comments and observations of those holding power. These comments though may appear to be innoxious and unintended lack the sensitivity and apathy that are that are expected from the representatives of

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[1]Hon'ble Mr. Justice F.M. Ibrahim Kalifulla, *Rule Of Law & Access To Justice*, NJA South Zone Regional Judicial Conference on "Role of Courts in upholding Rule of Law", *available at:* https://www.latestlaws.com/wp-content/uploads/2015/04/Role-of-Courts-in-upholding-Rule-of-Law.pdf (Visited on March 31, 2021).
[2] ANUPRIYA DHONCHAK & NAMITA BHANDARE, *COURTS' MISOGYNISTIC RULES FOR RAPE SURVIVORS*, *AVAILABLE AT:* HTTPS://WWW.ARTICLE-14.COM/POST/THE-INDIAN-COURTS-MISOGYNISTIC-HANDBOOK-FOR-RAPE-SURVIVORS (LAST MODIFIED JUNE 29, 2020).
[3] *Vikram* v. *The State Of Madhya Pradesh*, MCRC-23350-2020.
[4] *Granting Bail to the Rape Accused, HC Says Womxn ' Didn't React' Like She was 'Ravished'*, *available at:* https://thewire.in/law/ karnataka-high-court-rape- accused-bail-womxn-reaction (Last Modified June 25, 2020).
[5]Geeta Pandey, *Indian Supreme Court: Calls for Justice Sharad Bobde to Quit Over Rape Remarks*, *available at:* https://www.bbc.com/news/world-asia-india-56263990 (Last Modified March 4, 2021).
[6] *Id.*

modern India's justice delivering agencies toward the rape victims. The strict special laws designed by the Indian legislature with the intention of addressing the bodily offenses against women prove to be largely ineffective due to its distortion by society and justice delivering agencies as the judgments of the courts and comments of people's representatives often may reflect the patriarchal sentiments of society to strengthen and extent male dominance.

II. FACTS OF THE CASE

On 18th February 2020, the Madhya Pradesh High Court in the case of *Vikram* v. *State of Madhya Pradesh*[7] passed a controversial rakhi for bail order that attracted severe criticism from the public. The court in this case issued bail to the accused with a condition that he along with his wife shall visit the complainant at her home on Raksha Bandhan and request her to tie rakhi band to him and hand over a sum of rupees eleven thousand to her and rupees five thousand to her son as part of the customary occasion and seek her blessings.[8] In the words of the Court:

> "*Applicant along with his wife shall visit the house of the complainant with* ***Rakhi thread / band*** *on 03rd August, 2020 at 11:00 am with a box of sweets and* ***request the complainant-Sarda Bai to tie the Rakhi band to him*** *with the promise to protect her to the best of his ability for all times to come. He shall also tender Rs.11,000/- (Rs. Eleven Thousand Only) to the complainant as a customary ritual usually offered by the brothers to sisters on such occasion and shall also seek her blessings. The applicant shall also tender Rs.5,000/- to the son of the complainant-Vishal for purchase of clothes and sweets."*[9]

Following this judgement, a group of nine women lawyers led by Aparna Bhat approached the Supreme Court through a special leave petition challenging this order that has the capability of setting a bad precedent.[10] Further, the petitioners also pleaded before the Supreme Court for issuance of directions to

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[7] *Supra* note 3.
[8] *Id*.
[9] *Id*.
[10] Ananya Srivastava, *Personal Experiences, Helplessness Spurred us to Fight for Judicial Reforms, say Petitioners ahead of SC Verdict on Sexual Assault Cases, available at:* https://www.firstpost.com/india/personal-experiences-helplessness-spurred-us-to-fight-for-judicial-reforms-say-petitioners-ahead-of-sc-verdict-on-sexual-assault-cases-9030101.html (Last Modified November 20, 2020).

the High Court and trial courts that restricts them from making observations and conditions that are insensitive to the rights and dignity of the survivors of sexual offences.[11] Through their submissions the petitioners brought before the notice of the Supreme Court various decisions and orders of High Courts and trial Courts that deviated the basic principles of law.[12] The Court after hearing the petitioners and the respondents held the decision of the High Court to be void and it also prescribed guidelines to be followed by the Courts while dealing with sexual offence cases.[13]

III. JUDICIAL INSENSITIVITY TOWARDS SURVIVORS OF SEXUAL OFFENCE CASES

Rape was traditionally understood as a means to establish the authority of man over women who add to an immeasurable labour force which satisfies his biological and personal needs without any monetary expenses.[14] This understanding can be clearly inferred from the texts of Abrahamic and Hindu religions that places man as the ruler and women as the subject, which is in turn justified through the interpretation that such a rule was drawn by the personal laws with due consideration for protecting women. The recent judgments of the Nagpur bench of the Bombay High Court on POCSO cases and the observations made by the apex court in numerous similar judgments have a character of placing the victim under strict scrutiny of institutional morality, while the liberty of the accused person is handled with utmost care and caution.[15] This pattern shows a clear lack of insensitivity by judges through the application of theological patriarchal reasoning in understanding and interpreting laws dealing with offenses against women. Thus, there arises a need for gender sensitive beneficial interpretation of laws and facts by judges, which accommodates the concerns and subjectivities of victims.

IV. GUIDELINES LAID BY THE SUPREME COURT TO PROTECT SURVIVORS OF SEXUAL VIOLENCE

The Supreme Court observed that even after 70 years of Independence India as a nation that is influenced by patriarchal misogynistic attitude and is

[11] *Id.*
[12] *Aparna Bhat and Ors.* v. *State of Madhya Pradesh and Anr*., MANU/SC/0193/2021.
[13] *Id.*
[14] Dr. Swati Banerjee, *Radical Feminism*, https://www.youtube.com/watch?v=Eo1qBsANz5M (Last Modified August 1, 2017).
[15] HILAIRE BARNETT, *Introduction to Feminist Jurisprudence* 23 (Cavendish Publishing Ltd 1998).

still striving for achieving equality for all.[16] The Court went on to observe that insensibility of the High Courts and trial Courts towards this problem are reflected through its judgments and orders.[17] Thus, on the basis of these observations and realising the gravity of the issue, the Apex Court provided for certain guidelines for protection of survivors of Sexual Offences during the stage of judicial process. The recommendations of the Attorney General and Bangkok General Guidance for Judges on Applying a Gender Perspective in South East Asia, by the International Commission of Jurists were relied on by the Court for formulating the guidelines.[18] The guidelines laid down by the Apex Court are as follows:

With regard to issuance of bail order:[19]

1. Courts shall not mandate, require or permit bail conditions that ask for contact between the accused and the victim. Rather the bail conditions shall intent for protecting the complainant from further harassment of the accused.

2. If there exist circumstances for the court to be believe that potential threats of harassment or when a concern of the same exist after considering the police report nature of prosecution shall be separately considered and appropriate order has made accordingly in addition to the direction to the accused to not contact the victim.

3. When bail is granted in a case the complainant should be informed about the same immediately and a copy of the order shall be made available to the complainant in two days.

With regard to the judicial sensitivity in sexual offence cases:[20]

4. The bail conditions or orders shall not reflect the patriarchal notions about women and about their place in the society. The requirements laid down by Criminal Procedure Code have to be strictly followed. The

[16] *Supra* note 12.
[17] V Venkatesan, *SC Must Stop Courts From Asking for Compromise Between Parties in Sexual Assault Cases, available at:* https://thewire.in/law/sc-courts-bail-compromise-cases-sexual-assault-rape (Last Modified Oct. 12, 2020).
[18] *Supra* note 12.
[19] *Id.*
[20] *Id.*

conduct, dressing or the morals the prosecutrix shall not form the basis of the bail order.

5. The Courts while dealing with Sexual offence cases shall not suggest, consider or entertain compromise, marriage or mediation that is beyond their jurisdiction.

6. Sensitivity shall be maintained by the judges throughout the trial to ensure that prosecutrix is not traumatised during the trial or due to anything said during arguments.

7. Judges shall not use any words, whether written or spoken that undermines or disturbs the confidence of the survivor in the fairness or impartiality of the Court. As they are expected to play an important role in the society as role models and thought influencers in ensuring and promoting equality fairness and impartiality.

The above guidelines laid by the Supreme Court are not exclusive in itself but are directive in nature as it intent to ensure that the judiciary maintain gender sensitivity in sexual offence cases that often place the life and character of the complainant under scrutiny and in fact on trial. These guidelines were laid down by the Apex Court out of the realisation that judges who merely reflect the sentiments of a patriarchal society set dangerous precedents that challenges the role of judiciary as a watchdog of justice. The guidelines emphasis the impact that use of inappropriate language, words or phrases can have over the ideals of equality, fairness and impartiality that is ultimately aimed to be achieved through the judicial process. However, the Supreme Court failed to give specific guidelines as to how the judges have to be trained and sensitised about the issue of mishandling of sexual offence cases.

V. CONCLUDING REMARKS

The inherent tendency of man to discipline and confine women to ensure and preserve sexual morality and thus enjoy her ornamental value should be recognised for its immoral nature. The seminal blindness shown by the judges towards members of particular section of the society is nothing but a resistance to women who struggle to achieve liberty by keeping them behind the shackles of institutionally sanctioned patriarchal morality. Understanding of decisions and reasoning's that violate the inherent dignity of women as legally binding principles violates the constitutional ideals of equality and dignified life

guaranteed under the constitution. Elimination of man's liability from the offence of rape by punishing him to marry the violated in turn perpetuates legally sanctioned gender violence against the victim. The social notion that integrity of women depends on the observance of the societal sanctions needs to be firmly challenged. As observed by Catharin MacKinnon judges should understand that a women's dignity is not a thing that can be stolen, sold, bought, battered or exchanged by the men.

The inability of the courts to realise judgments that order tying a rakhi or marrying a rapist as punishment for the offence of rape in essence promotes such violence's against women must be immediately dealt with. Such attitude of the courts not only shows a complete disregard to the survivors of these crimes but also do down the concept of progressive and transformative constitutional morality which in effect pulls the society back into the dark ages. Regardless of the effect that these judgments can have over the societal progress the extent to which these judgments reaffirm the role of outdated patriarchal religious ideologies in modern jurisprudence is unideal for guaranteeing the gender equality in the spheres of personal and political life of the citizens. Knowingly or unknowingly the constitutional courts of the land shall not act as an agent of patriarchy, which affirms that anti-human ideology by controlling women's sexuality that underlies the institutional notions of family and marriage. The judiciary shall never be encouraged to take the role of a patriarch who enforces forced female fidelity through curtailment of sexual autonomy as a punishment or compensation for the violations committed against them.

Societal progress and the resultant changes in the perceptions and aspirations of the people shall be judged by every organ of the government including the judiciary which discharges the important function of interpretation and validation of laws, rights and justice. The judicial process hence shall not be the arbitrary gesture of an insensitive big brother discharging pseudo-justice and misplaced reason. An act of rape, the ever-condemned encroachment to the mind, body and dignity of a woman cannot be validated or simplified by forcing or directing the victim of such a heinous crime to spend the rest of her life under the feet of the inhuman perpetrator. Similarly, a rapist shall not be allowed to continue to dominate the dignity of the unfortunate victim and rest under the feeling that by marrying or by tying rakhi to the rape victim he has compensated for the injury caused by his heinous act. The dynamics of justice shall never lose the essential sensibility of reason, sensibility and good conscience.

BOOK REVIEW: *A DEFENSE OF RULE: ORIGINS OF POLITICAL THOUGHT IN GREECE AND INDIA* BY STUART GRAY (PUBLISHED BY OXFORD UNIVERSITY PRESS, 2017)

Aakash Singh Rathore[*]

I. BETWEEN ANCIENT DHARMA AND MODERN LAW

The majority of human history's 7000 or so years has witnessed state formations not legitimized by constitutions but instead by metaphysical ideas like god or nation or else simply by dominance. The legitimizing constitution of the democratic state, flourishing only some 70 years or so, is rare and precious because it interrupts the long-standing priority of the natural right of the dominant to rule, replacing it with the inalienable dignity of the human person. In the Preamble to the Indian Constitution, the dignity of the individual is even lexically prior to the unity of the nation. Important things follow from this. For example, each time democratic state power violates a citizen's dignity, it oversteps its mandate – that is, it is acting illegitimately. This is unique to democratic constitutions whose source of sovereignty is the people. Today as we rethink the history, status, and even viability of the modern constitution, it would be edifying to look back to earlier historical forms of legitimacy and statecraft. A recent book that undertakes this in a spectacular way is Stuart Gray's *A Defence of Rule*. Although some three years old now, the work has not received adequate attention in Indian academia. Thus, I undertake to review this significant book with attentive detail – a scrutiny that it unquestionably merits.

Besides jurisprudence, the scope of the emerging field of Comparative Political Theory (CPT) has been significantly broadened by the appearance of Stuart Gray's sophisticated and highly rewarding *A Defense of Rule*. Whereas the majority of work in CPT focuses on modernity up to contemporary times, Gray's area of research is fixed upon – as the subtitle makes explicit – the origins of political thought in Greece and India. By "origins" Gray is referring *not* to the hackneyed comparisons or trite associations of classical Greece (i.e. Athens' golden age) and Mauryan India (i.e. the era of Kautilya's *Arthashastra*), but instead to the true origins and foundations of the political and legal thought of the classical era, which is to be excavated from the epic and religious literature preceding it, usually referred to as the archaic period in Greece and the Vedic and epic ages of India. For historians, or those with a background in religious

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studies/theology, or comparative literature/mythology, the time period under Gray's scrutiny would not be alien; however, this is totally new terrain for CPT and I believe for both legal and political theory more broadly. And yet, to his great credit, Gray skillfully manages to guide readers through it as though it had already been done a thousand times before.

The subtitle evoking the archaic and epic era (which each of the five chapters of the book cover) does not mark the only innovation of this work. The title, too, indicates a radical departure from the mainstream of legal and political theory – indeed, a movement struggling upstream against the current. That is, the primary burden of *A Defense of Rule* (as we learn in the Introduction, and as gets executed in the Conclusion) is to oppose the overwhelmingly negative attitude that theorists of law and politics have long held against man's rule over other men (pardon the gender specificity, employed to capture the usage of the era under analysis). Man's rule over man is associated with hierarchical domination, and thus legal and political theorists express nearly universal preference for the rule of law instead. By means of a systematic, comparative return to the origins of political thought in archaic Greece and Vedic India, Gray assumes a contrarian position to most contemporary legal and political theory and comes to a robust defense of rule.

This is not to say that the author eccentrically champions the arbitrary or even discretionary power of those persons who rule; that is, who hold positions with prerogative to command obedience from the rest of us. Quite the contrary, what Gray aims to achieve is no less than to cancel and overcome this very conception of rule itself, a conception that academic legal and political theory have inherited from the origins of its political thought in ancient Greece. This is thus the utility, according to Gray, for the comparative turn to ancient Indian political thought: it is meant as a corrective, as a resource for a very different, more choice worthy, and even more sustainable conception of rule altogether. This is at bottom because the ancient Indian conception of rule entails a normative duty for *stewardship*.

II. SOVEREIGNTY, STEWARDSHIP, SUSTAINABILITY

Now, just before mentioning the term "stewardship," I used the word "sustainable." This hints that there is yet a third thing going on in this book, another level of operation beyond what is indicated by the subtitle (A comparative analysis of archaic Greek and Vedic Indian political thought) and the title (A reconceptualization and consequent affirmation of political rule as

stewardship.) This third thing comes as a surprise because of the *prima facie* incongruity between the disciplinary fields. I am referring to environmental – or perhaps better, ecological – ethics. Gray argues that the nature of the relationship between humans and the nonhuman world is already packed into the concept of rule[1]. The regnant concept of rule in western modernity (which, again, finds the origins of its main contours in archaic Greek thought) is an instrumental one: it conceives of human-human rule as hierarchical and of human-nonhuman rule as instrumental, where the nonhuman is regarded as a resource for the human, void of inherent value and thus subordinate, there to enhance human comfort and experience[2]. By contrast, the Vedic Indian conception of rule as stewardship entails no such prioritization of the human over the nonhuman, but rather obligates us to act as stewards for the interests of nonhuman entities[3]. Reinvigorating this aspect of the ancient Indian conception of rule, then, could aid us in dealing with the serious trouble humanity currently finds itself in.

Thus are the three distinct strands of comparative/analytical classical studies, the normative legal/political theory of rule, and ecological ethics almost seamlessly woven together in this captivating book.

III. BREAKDOWN OF THE CHAPTERS

Despite the ambition of the argument and all its moving parts, the book remains neatly organized. The Introduction addresses the field of Comparative Political Theory, and lays out the ways that this work contributes to it. Here Gray establishes the long-standing preference of political theory toward the rule of law over the rule of man, citing passages as evidence from Aristotle to Max Weber to Hannah Arendt up to Raymond Geuss and other contemporaries. The first two chapters cover Greek thought (with Chapter 1 on Homer and Chapter 2 on Hesiod). In these chapters Gray labours to identify the essence of the archaic Greek concept of rule as *distinction*; that is, rulers in this tradition establish their legitimacy by hierarchically distinguishing themselves from those whom they rule, by enhancing their prestige, glory, honor, reputation, and the like. This conception builds in to the history of western thought a hierarchical distinction between the human and non-human realms that continues to steer political conceptions of rule even to this day. The third and fourth chapters cover

[1] Stuart Gray, *A Defense of Rule: Origins of Political Thought in Greece and India* 194 (Oxford University Press, United States of America, 2017)
[2] *Id.* at 197.
[3] *Id.* at 200.

Indian thought (with Chapter 3 on the Vedas and Chapter 4 on the Brahmanas). Here Gray argues that the Vedic/epic conception of rule, with its emphasis on the intertwined and connected human and non-human realms, is essentially one of stewardship; that is, the Indian understanding locks the political ruler into a larger cosmology where his function is to guard, protect, and sustain everything he rules. The last chapter[4] ties together the retrieved conception of rule that Gray champions; that is, a conception of political rule enriched by the concept of stewardship but evacuated of any stifling metaphysics. The book closes with a Conclusion serving to lay out the implications of the study in relation to normative questions in ecological ethics. Specifically, here is where Gray brings to bear the benefits of his retrieved and augmented conception of political rule upon the apparently intractable environmental problems we face today. He suggests that a new conception of rule offers a new foundation for ecological thought and action and that could move us beyond crisis.

Thus far I have been all praise and not without reason. There are, however, two rather serious reservations that I have regarding Gray's project. The first concerns the pragmatics of rule as stewardship. The second concerns Gray's interpretation of human-human relations within the purview of Vedic cosmology. Both of these are related, and rooted in the discrepancy between theory and practice throughout Indian political history.

IV. TWO POINTS OF CRITICISM

Let me start with rule as stewardship. While Gray is correct to assert that the ancient sources of Indian traditions have given rise to markedly different conceptions of rule than that to be found in ancient Greece, I am puzzled about the practical effects or impacts. There is scarcely a body of open water to be found in India that is non-toxic, and you have to hold your nose as you cross most rivers because the stench is overwhelming. This is despite a state High Court declaring, on account of the Vedic bent of its judiciary, that Indian rivers enjoy the same constitutional rights as persons, not to mention an earlier judgment that Himalayan glaciers, lakes, and even forests are legal persons[5]. It should be noted that the Supreme Court of India has since stayed the decision clarifying that rivers cannot enjoy human rights.[6] It may be worth adding that Indian cities routinely top the World Health Organization's ambient air pollution lists year after year. Where within South Asia has the normative conception of

[4] *Supra* note 1, ch. 5.
[5] *Mohd. Salim* v. *State of Uttrakhand & Others*, 2017 SCC OnLine Utt 367.
[6] *State of Uttrakhand & Others* v. *Mohd. Salim*, 2017 SCC OnLine SC 903.

rule as stewardship borne fruit, or where has it been robust enough to function prophylactically against the globally hegemonic instrumental conception? This is not a small quibble insofar as Gray's work has the explicit motive of rescuing us from the "serious trouble" humanity faces, "including deforestation, global warming, rising sea levels, species loss, and peak oil".[7]

Things fare even worse with human-human relations. The Vedic thought that Gray champions is constituted above all by the brahminical redactions appearing throughout the body of that literature. Brahminical thought – in contrast to numerous rival traditions of Indian thought and practices – is characterized by an aggressive inegalitarianism and unapologetic patriarchy. For example, untouchability and widow burning are byproducts of brahminical thought. These inegalitarian and patriarchal social systems are justified through cosmologies and stabilized through metaphysics. While it is true that the implications of these cosmologies and metaphysics do entail a conception of stewardship possessing precisely the virtues that Gray identifies, this comes at a high price. Gray seems to be well aware of this, as he notes that "the status of *Dalits* and untouchability are related to *varna* [i.e. caste] distinctions that are initially delineated in the [Vedas] and Brahmanas"[8]. These distinctions do not occur just anywhere in the Vedas, but precisely at those points that Gray choses to illustrate the political cosmology wherein stewardship gets embedded – e.g., the redacted Rg-Veda creation myth. Within this scenario, stewardship is at best paternalism; at worst, it is a euphemism for a system of oppression.

It is not enough to say that the theory is sound but the practice perverted. Gandhi tried this with respect to justifying the caste system for decades, but even he eventually came to side with his political-theoretical rival on this issue, B.R. Ambedkar, and realized that the caste system was irredeemable. For Indian political theorists such as myself, brahminical anti-humanism would never be a viable option, even if its thought held an insight of unparalleled ecological boon. To be fair, Gray seems to believe that we could have brahminism free of paternalism and patriarchy, and that the environmental existential challenges that we now face make this a risk worth taking, a gambit. But let's be realistic. Brahminical thought has failed South Asia for two millennia; it seems unlikely that it could suddenly alter its nature and well serve us in the 21st century.

That said, I cannot close without returning to praise. I want specially to call attention to the comparative analysis of Greek and Sanskrit texts. Gray's

[7] *Supra* note 1, Preface (vii).
[8] *Supra* note 1 at 109.

performance is so exemplary that it might even manage to nudge Anglocentric and monoglot political theorists to begin to explore beyond the confines of their canon. In the end, irrespective of my own reluctance to play along with Gray's gambit, there is no doubt that this is an innovative and important contribution not just to Comparative Political Theory in particular but to legal and political theory as such.

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