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Celebrity Woes: Locating the Publicity Rights in The Existing Laws

-Ayush Bhatia & Ruchika Baweja

Introduction

With the due passage of time, we see everybody trying to earn fame, but it leaves us baffled, how exactly do we define a 'Celebrity' and what is so distinctive about them to give them special protection of rights? Celebrity, as universally, refers to a person who has become revered in public eye. For several years, we have been seeing countless brand commodities being endorsed by our celebrities. Be it an inexpensive daily-use product such as *Vicco Vajradanti* endorsed by the actress Alia Bhatt, a higher price L'Oreal shampoo endorsed by the Aishwarya Rai, or an expensive commodity such as gold or diamonds endorsed by eminent actor Amitabh Bachchan, Celebrity brand endorsers add value by appealing to their fan following across all demographics and helps the brand in building greater awareness and attracting potential consumers as well generates higher brand recall than a non-celebrity endorse. But the public figures cannot be considered to be anyone's public property and the unauthorized use of their names, photographs or even their voices to boost up a commodity's sale or for any other purpose is a violation of privacy under Article 21 of the Indian Constitution[1]. The author aims to be focusing on the meaning and justification of celebrity rights, the incapacity of the current framework in the realm of Intellectual property law and various international conventions that recognizes such rights. The article will further suggest the few proposed solutions in order to reflect on what the development path of this right should be in India for the protection of such rights.

[1]INDIA CONST. art. 21.

Who Is A Celebrity?

The word 'celebrity' takes upon itself a sense of honour and why shouldn't it, they have put in efforts, time, and finances and have honed skills to reach where they have today. If intensive effort has been put into the creation of work, then the property belongs to the author according to the "sweat of the brow" theory.[2]In the same way, the unjust benefit gained by the use of celebrity's work such as their dubbed voice or images for advertising a product without their slightest knowledge is a violation of their right as the work belongs to the celebrity. The term "celebrity" has nowhere been defined under the Indian legislation. However, we can put a reference on the term 'performer' which given a broader interpretation may include the term celebrity within its ambit defined in section 2(qq) of the Copyright Act 1957.

In *Titan Industries Ltd. vs. Ramkumar Jewellers*[3], the Delhi High Court in 2012 defined the scope of celebrity as *"a famous or a well-known person and is merely a person who "many" people talk about or know about".* Along with the invaluable status of being a celebrity, their rights also need to get protected which are frequently hindered upon by the media. Celebrity rights are a combination of personality rights, privacy rights and publicity rights.

Personality Rights

Personality rights are associated with people who have acquired the status of a celebrity and further seek to prevent others from the unauthorized use of the name, image, and likeness including their right to privacy. Protection of moral rights is an important facet provided in our copyright law under section 57 of the said act which is based on personality of a performer. An individual's personality is how one individual recognizes others and identifies his/her status in the society. In *Tolley v Fry*[4], there was a question concerning the use of the image of a popular golf player advertising the brand *Cadbury*. Tolley's reputation was being misused as a golf player for advertising purposes, thereby the court held that the conduct of the defendant amounted to libel and awarded damages. This scenario today has changed drastically, and celebrities now claim paradoxical right, which means they claim right of privacy along with the right of publicity.

Privacy Rights

Celebrities must look out for their privacy. The public remains curious to know from what they are doing to what they are wearing to whom they are dating. Publicity rights in the form of the right to privacy were first time recognized by the Supreme Court in *RR Raja Gopal v State of Tamil Nadu*[5] where the court observed that right is said to be violated when the where the person's name or likeness is used without their consent for advertising purposes or any other matter. In another case of *Barber v .Times Inc.*[6], Dorthy Barber, a non-public figure checked into a hospital for treatment of an eating disorder. A week later, Times magazine published a humorous story under the heading "*Starving Glutton*" accompanied by Barber's photo in hospital bed. She had filed a suit of "Invasion of Privacy" against Time Inc. for unauthorized entry into the hospital room and for taking pictures despite her denial**.** The court held that media can be held liable for damages when they publish any private matters. Neither the freedom of the press nor the right to privacy is absolute, therefore privacy rights and matters of social interest are to be treated harmoniously.

[2]Fiest Publications Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).
[3]*Titan Industries Ltd. v. Ramkumar Jewellers, (2012) PTC 50 Delhi486.*
[4]Tolley v. Fry, AC 333 (1931).
[5]*RR RajaGopal v. State of Tamil Nadu, JT (1994) 6 S.C. 51(India).*
[6]Barber v.Times Inc., 159 S.W. 291(1942).

Therefore, in this case, we can see there has been a remedy available to the celebrities either in the form of an act of "invasion of privacy" or as a violation of "Right to Privacy" under Article 21 of the Indian Constitution.

Publicity Rights

The individual's right to control the commercial use of his/her name which leads to exploitation of the economic name and fame is termed as publicity right. The right of publicity has emerged from the right of privacy and can exist only in an individual's personality like his name, personality trait, signature, voice, etc.[7]Advertising requires massive amounts of money and a celebrity's public image is of great importance. Instances of such cases in the media world are very common these days. Taking the case of *Sourav Ganguly v. Tata Tea ltd*.[8] wherein Sourav Ganguly, the legendary cricketer filed a suit against the Tata tea Ltd. when he realized that the company was promoting its tea packet by offering the consumers a chance to congratulate Ganguly through a postcard kept inside each packet of tea. Indirectly, the company's intented to promote the sale of its tea packet in the Indian market. The court ruled in favour of Ganguly by accepting that his fame and popularity are his intellectual property and one cannot exploit that. Another landmark case adjudged by the Delhi High Court was of *Gautam Gambhir v D.A.P & Co.*[9], where Gambhir filed a suit against a Delhi based resto-bar for using his name as a tagline. He alleged that the use of his name would mislead the public to believe that the restaurant is associated with him. But here, in this case, the court rejected the petition as the owner of the pub shared the same name and he didn't associate his business with any kind of sports or cricket that could create confusion amongst the public. Therefore, it was held that an individual is entitled to carry on his business in his 'own' name if it was carried with a bonafide intention.

Status Quo in India

In Civil law countries, most of the countries have specific statutory provisions for the protection of any person right, image, data, or any other information. However, some countries have specific rights for celebrities. In France, protection is provided under Article 9 of the French civil code[10]. In Germany, personality rights are protected under German Civil Law[11]and in Greece, the consent is required for the Commercial use of a published picture of a person in a public space.[12]

But when it comes to India, neither the legal system is adequate enough to deal with protection of celebrity rights nor do we have any specific codified statutory provisions for their protection. Moreover, the need for statutory provisions is increasing every day, because more and more celebrities are endorsing brands through advertisements and a huge amount of money is invested in this collaboration. When we look upon the jurisprudence of celebrity rights in India, then only the precedents set are considered to be the sole authority as there is no statutory legislation on it to date. Few statutory provisions indirectly protects the personality rights such as Copyrights Act 1957, which protects the Authors or the Performers right to claim authorship of their work and also have a negative right restraining others from causing any kind of damage to their reputation under section 57 of the said act.[13]Section 14 of the act also provides the exclusive rights to performers. Then the Trademark Act 1999 also prohibits the use of personal named of personalities

[7]*ICC Development (International) Ltd. v. Arvee Enterprises and Ors, (2004) 1 RAJ 10.*
[8]Sourav Ganguly v. Tata Tea ltd, (2008) 1 CS 361.
[9]*Gautam Gambhir v. D.A.P & Co.***,** *(*2017) 9 CS 395.
[10]FRENCH CIVIL CODE, art. 9.
[11]Corinna Coors, *Celebrity image rights versus public interest: striking the right balance under German law*, 9 Intellectual Property Law & Practice L.J, 835–840 (2014).
[12]Kirsty Hughes, *Photographs in Public Places and Privacy*, 2 Media L.J. 159–171(2009).
[13]The Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012, Sec.57 (India).

under section 14 of the said act.[14]In circumstances, where the name, appearance or performance features of an individual are misused, the practice of passing off as a remedy is also used to redressal against the damage to a person's goodwill caused by misrepresentation by another person Lastly, remedy under Law of Torts can also be used to protect the rights against the tort of disparagement or defamation.

Role of International Conventions

The concept of celebrity rights or performers is changing with the passage of time across the world. There are various international conventions which are specifically related to the performer's right. Firstly, there is Rome Convention for the protection of performers right which is open to the states party to the Berne Convention for protection of artistic or literary works or to the Universal Copyright Convention[15] Secondly under Article 14 of the trips agreement, protection is granted to performers by preventing their acts such as fixation and reproduction of their performances on phonogram and broadcasting of their live performances.[16] Thirdly, there is WIPO Performance and Phonograms Treaty (WPPT) which came in existence in 1996 for the effective functioning and protection of performer's right, and helped in identifying the various problems faced by the performers at international level and tries to balance between the interest of public and Right of a celebrity.[17]

Conclusion

In India, there is no clear statutory provision within the intellectual property laws that gives protection to the personality rights of the celebrities and at present the courts while dealing with celebrity cases place reliance on the constitutional protection under Article 21 of the right to privacy and publicity. There only exists a provision for secondary rights to prevent public performances or broadcasting or recordings made without the performers' consent, whereas the exclusive right vesting with the performers to authorize public performances and broadcast them, does not exist with them. Looking at the current situation where the privacy of these celebrities is encroached upon, there is an urgent need to recognize celebrity rights within the realm of intellectual property rights and to give them protection against the substantial similarity of their work. The Government by repealing Consumer Protection act 2019[18] has realized the urgent need to protect the consumers from misleading advertisements of products endorsed by such personalities. In the light of increasing endorsement agreements involving famous personalities, the government has now imposed penalty on the endorser from promoting misleading advertisements. The author suggests that the legislature should give statutory commercial recognition in the celebrity rights aspect to fill up the lacunae in law and keep pace with high speed commercialization of celebrity status.

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[14]The Trade Marks (Amendment) Act, 2010, No. 40, Acts of Parliament, 2010, Sec.14(India).
[15]WIPO, Summary of Berne Convention for the Protection of Literary and Artistic Works (1886), https://www.wipo.int/treaties/en/ip/berne/summary_berne.html.
[16] TRIPS Agreement, art. 14.
[17]WIPO, WIPO Performance and Phonograms Treaty,https://www.wipo.int/treaties/en/ip/wppt/.
[18] The Consumer Protection (Amendment) Act, 2019, No. 35, Acts of Parliament, 2019, (India).

Post-Colonial Critique of Human Right Laws

- *Souranil Mondal*

Introduction

The idea of certain inalienable rights to protect human beings from exploitation has existed since the beginning of the crudest form of a social structure. Such rights have been held to be essential for humans to live in a society with other humans. These rights are absolute and inherent in nature and cannot be waived off.[19] Even though, they were not written or recognised as they are today, they existed in the form of ideals or morality of the society, to be followed by all, protected by a rudimentary penal system in the beginning. References can be found in the writings of the Ancient Indian scholars, such as Chanakya, on the duties of the ruler to protect the dignity of his subjects. Similarly, Plato also proposed a systematic framework to protect the people from the abuse of power by the people in power.

These rights have evolved over centuries and millennia to attain the structure of Human Rights today. This evolution of the human right laws has been made more important and further hastened in the current era, due to the exponential progress made by science and technology, which causes the concentration of power with the already-powerful. The field of Human Rights has achieved a special status in all fields, be it sociology or law, and has carved for itself a separate niche.

The importance of protecting individuals and granting them human rights has been so great that the world went through a shift from the Monarchy and / or feudalistic setups, which granted "excessive" power to the one who rules, to a democracy, that is the rule of the people through popular vote and choice, in a span of three thousand years.[20] Human rights have become an indispensable aspect of a democratic nation state, and it has been the duty of the "ruler" to protect the same.[21]

This has been further evolved into a global regime of human rights, where the global community, has come together and decided to protect the human rights and hold them to be sacrosanct in the International Law[22], evolving

[19] *Burns H. Weston, Encyclopaedia Britannica, human rights,* March 20 2014 *Retrieved August 14, 2014*
[20] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (2nd edition) Stanford University Press, 1998
[21] Barbara Unmubig, *70 Years of Human Rights. Indivisible. Inalienable. Universal*, The Green Political Foundation, 2019 Available online at https://www.boell.de/en/2019/01/09/70-years-human-rights-indivisible-inalienable-universal (last accessed on 24/05/2020).
[22] D.D. Raphael, *Human Rights Old and New-Political Theory and the Rights of Man*, Bloomington Indiana University Press, Page no. 57, (1967).

a completely new field of law, in the form of International Human Right Law, with special bodies and treaties to govern the same[23].

Human Right Laws and Third World Countries

As seen above, the human rights have been developed largely in Europe and Americas, mainly through French and American Revolutions.[24] This has led to the development of the criticism of the human rights regime from the Third-World countries, developing on the shoulders on the postcolonial approach of cultural relativism adopted by the postcolonial scholars to point out the fallacies and ignorance of the western scholars to the cultural experiences and values of the colonised and Third-World states. This is evinced from the fact that the Western literature is often seen depicting the modernisation as the globalisation and attainment of the Western culture and liberal ideals by the *Orient*, whereas the culture of the Third-World countries is seen as the orthodox and conservative way of thinking.[25]

This Euro-American-centric development and approach of the Human Rights regime is one of the first criticism levelled at the Human Rights law. The Oxford Handbook also notes that the development of international human rights regime:

> "*...[G]enerally ignore the violence, ruthlessness, and arrogance which accompanied the dissemination of Western rules, and the destruction of other legal cultures in which that dissemination resulted. […] even discards such extra-European experiences and forms which were discontinued as a result of domination and colonization by European powers […] irrelevant to a (continuing) history of international law.*"[26]

Another criticism of the human rights regime is from the impediment it poses on the development of the Third-World countries. The strict imposition of human right laws becomes a threat to the sovereignty and territorial integrity as it opens up the possibility of state secession from these countries, which are ill-equipped to deal with such movements, due to the impoverished state of their economies and administration. This leads to a failure of the governmental mechanisms, which in turn, leads to chaos-like state, resulting in further human rights violation. Thus, it becomes a vicious cycle of enforcement of human rights in Third World countries leading to even more violation of human rights.

It also affects the workforce of the Third World countries as the human rights pertaining to environment and labour laws become a hinderance in the way of the development of the industries in the Third World.[27] It also results in unemployment among the labour force of the Third World as industries are made subject to severe penalties for violation of the environmental laws.[28] This situation is one of the prime reasons of critique of the human rights regime by the Third World as they argue that the West achieved economic superiority and dominance by violating the basic human rights and environmental laws (which are considered a part of the human rights regime) in the past and now try and impose the same standard that is applicable on the developed countries on the under-developed and developing nations, derailing the developmental process, while they act as the "legitimate" custodians of the human rights of everyone on the planet.

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[23] Gordon Lauren, *The Evolution of International Human Rights: Visions Seen.* (2nd Edition) University of Pennsylvania Press, Philadelphia, Page no- 437-441, 2004.
[24] Richard Rorty. *Human Rights, Rationality, and Sentimentality*, *In Truth and Progress: Philosophical Papers*, Cambridge University Press, Vol 3, Pg. no- 172, 1998.
[25] J.K. Patnaik, *Human, rights: The concept and perspectives: A third world view*, The Indian Journal of Political Science, Vol. 65(4), pp. (499-514):512, 2004.
[26] Fass benders & Peters, *Introduction: Towards A Global History of International Law*, Oxford University Press. Retrieved 24 May 2020, https://www.oxfordhandbooks.com/view/10.1093/law/9780199599752.001.0001/law-9780199599752
[27] Richard Rorty. *Human Rights, Rationality, and Sentimentality*, *In Truth and Progress: Philosophical Papers*, Cambridge University Press, Vol 3, Pg. no- 172, 1998.
[28] Id.

The measures asked of the Third World countries to protect the human rights are also disproportionate with the resources available to these nations. The West wishes to have a similar system to protect the human rights as they have, which causes a substantial strain on the resources of these states. Further, in case of a failure to adhere to these measures, the western powers often drag them to the international courts, which are unaffordable for many nations. Scholars such as Bhupendra Singh Chimni argue for the recognition of the right of development of the Third World countries to counter this disbalance between the Orient and Occident.

Rémi Bachand, a leading TWAIL scholar, has given his three-point critique of the Human Rights regime, calling into question the applicability and universality of this system. His first critique is based on the Euro-centric nature of the regime.[29] He also questions the universality of the human rights law on the basis that it is "neutral, objective and apolitical" and therefore is devoid of any relativism for the Third World countries.[30]

His second criticism is that the human rights is that they are a tool to civilise the "savage barbarians" of Third World, by imposing the European ideals and values.[31] This flows from the historical evidence of the colonial era, when the European powers colonised numerous nations "to civilise the savages" in these colonies. This idea of Europeans civilising the Third World has been named as the SVS metaphor, or the Savage, Victims, Saviours metaphor by Makau Mutua.[32] Following Rémi Bachand's second criticism, Andrew Sunter has made an epistemological challenged the human rights regime, that it seeks to justify itself rather than emerge from the experience of the people and societies. Human rights are *a priori* knowledge, and not *posteriori* which is prescribed to by the Post-Colonial and TWAIL scholars.[33]

Rémi Bachand's third criticism is that the human rights are used as tools for imposing the European political form and style across globe.[34] This European form of government is the liberal, representative democracy. Human rights are essentially civil and political rights such as the right to free speech, which are considered the foundation of a democratic political organisation.[35] Makau Mutua argues that these human rights do not afford any relief from the economic and social inequalities, which is the main problem faced by the Third World. [36]Rémi Bachand is of the opinion the mere fact that the human rights originate from Europe is sufficient for them to be inconsistent with the Third World ideology and therefore cannot be adequate to protect the violation of same rights in Third World. They are the reason for the dominance of the West over the Third World, terming it to be neo-colonialism and imperialism.[37]

With the criticism of the human rights by Post-colonial scholar, there exists a dichotomy. The human rights so vehemently criticised by Post-colonial academics, these rights are used by the Third World to challenge the western domination. There have been numerous instances of disputes reaching international forums, challenging the actions of western powers on the basis of violation of human rights and international law. One of the many instances is the case of *'Nicaragua v USA'* [38]where Nicaragua successfully challenged the United States of America in the International Court of Justice, claiming on the grounds of violation of human rights, which were caused by the action of USA. Therefore, the human rights that are questioned by TWAIL, at times is the only

[29]Ramina Larissa, *TWAIL -Third World Approaches to International Law" and human rights: some considerations,* Revista de Investigações Constitucionais, Volume 5(1), ISSN 2359-5639, Online version available at http://www.scielo.br/scielo.php?script=sci_serial&pid=2359-5639&lng=en&nrm=iso

[30] Id.

[31] Id at Page 264.

[32] Makau Mutua. *Savages, Victims and Saviours. The Metaphor of Human Rights.* Harvard International Law Journal, Cambridge, Vol. 42 (1) Pg. no. (201-245): 234, 2001.

[33] Andrew F. Sunter, *TWAIL as Naturalized Epistemological Inquiry*. Canadian Journal of Law & Jurisprudence, Cambridge, Vol. 20 (2), Pg. no. 474, 2007.

[34] Supra note 12, Pg. 265

[35] Id.

[36] Makau Mutua. *The Ideology of Human Rights*. Virginia Journal of International Law, Vol. 36, pg. no. (589-658):636, 1996.

[37] Supra note 12, Pg. 267.

[38] Nicaragua Vs USA, 1986 I.C.J. 14

mechanism to protect Third World countries from the interference and "invasion" of the West.

This dichotomy can be understood, or played down, by the words of Rémi Bachand:

"*Nevertheless, the criticisms made by TWAIL, interpreted in the light of our own comments, reveal that a subalternist theory of international law can only take human rights as strategic tools, if not tactics from the struggle for emancipation, and that it would be a mistake to raise them to the level of the ultimate goal to be attained.*"[39]

Therefore, for the post-colonial and Third World scholars, human rights exist only as a set of tools to defend them from the neo-colonial powers, which these very human rights, intentionally or unintentionally, consolidate.

Conclusion

In the light of the discussion above, it can be very clearly seen that the human rights regime cannot be universal in nature as it exists solely in the realm of European ideology and experience. Therefore, the human rights are largely created from the perspective of a coloniser and are imperialistic in nature. This severely hinders it applicability and effectiveness in the Third World, as these nations have mostly been the colonies, and thus their experience is the polar opposite of the European nations. The universality of the human rights regime is furthered questioned by the homogenising effect it has on the Third World, mutating the political and social systems in these countries to resemble the European model. And lastly, the human rights regime is seen as restricted or local by TWAIL scholars as it has become a tool, in the hands of the West, to bully the Third World to meet their needs and promote their own economic interests.

This flaw in the human rights regime can be corrected by levelling the playing field in the international law arena. This can either be done by either taking away the powers from the West or granting the Third World powers to counter this imbalance. This bestowing of power on the Third World can be done by including their narrative and experience into the fold of human rights. This inclusion would involve the application of human rights on relative considerations, based on the cultural, social and economic conditions in these nations. Furthermore, the human rights will have to be increased in their ambit to embrace the economic, cultural and social rights into their fold. This would effectively mean that the cultural and social identities of the Third World, which are under serious threat in the current regime, will be protected. Furthermore, the inclusion of economic rights would grant them an added protection from the torment of the West, which leads to the drainage of resources of the Third World, pauperising them even further.

The framework to implement this already exists in the international law in the form of the two covenants, viz, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). These covenants though enacted in the same year, have not achieved the same status in the International Law, with ICCPR attaining a greater importance as it aligns with the western ideology. Thus, to effectively end the hegemony of the West over human rights regime, there has to be a shift from absolute standards of the West, a culturally relativistic approach. It would require bringing the ICCPR and ICESCR to the same pedestal, granting legitimacy to the experiences of the population of the Third World.

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[39]Remi Bachand, *Les Third world approaches to international law*: *Perspectives*, pour une approche subalterniste du droit international, 2013; Supra note 12, Pg. 267.

Human Trafficking in India And Corona

- *Ankita Shukla*

Abstract

Human trafficking is the world's third prominent offence. Human trafficking means exploitation of person either sexually or economically. Its refers to buying or selling of person for immoral purposes by using threat, inducement and lure. This article represents many forms of human trafficking and the laws which govern and prohibit such an offence like Constitution of India, Indian Penal Code, POCSO Act and many more. It also presents the challenges faced due to the COVID-19 pandemic.

Keywords: Human Trafficking, Exploitation, Prohibition, Covid-19, Pandmic.

Introduction

Trafficking refers to the economic and sexual exploitation of humans by their movement from one place to another through force, threat, inducement or deception. Human trafficking is trading humans mostly for the purpose of forced labour, sexual slavery, commercial sexual exploitation or extraction of organs. It is a crime which violates human rights by means of exploitation and coercion. Human trafficking is the world's third largest organised crime after drugs and the arms trade.

Children are the future of any country and sexual exploitation of the children is worst than any other offence against them. Article- 51-A(e) of the Constitution of India imposes the duty on every citizen of India in mandatory form which says that "it shall be the duty of every citizen of India, to renounce practices derogatory to the dignity of women."[40] But in practice the position is different from the spirit of the Constitution. Children and women are the most vulnerable for human trafficking. There is high demand for children in both sex and labour trafficking, as they are easy to handle, resilient and vulnerable for any type of exploitation and can be paid much less.

Basically, there are three types of trafficking and that is trafficking for commercial sexual exploitation, trafficking for exploitative labour and trafficking for other types of exploitation including organ trade. However, on ground, all are mixed up.

Human Smuggling v. Human Trafficking:

Most oftenly, Human trafficking is confused with human smuggling. According to U.S. Immigration and Customs Enforcement (ICE): "Human trafficking involves exploiting men, women, or children for the purposes of forced labor or commercial sexual exploitation. Human smuggling involves the provision of a service—typically, transportation or fraudulent documents—to an individual who voluntarily seeks to gain illegal entry into a foreign country."[41] Moreover, consent is immaterial in human trafficking as it is not informed consent while in human smuggling consent is a material fact. The smuggled person is a part of the problem, as he/she agrees to be smuggled. In contrary, the trafficked person is unaware of the fact that he/she is being trafficked.

Causes of Human Trafficking:

There are some conditions that create a toxic cocktail of vulnerability that makes it easier for traffickers to exploit their victims. These are poverty, lack of education, immigration policy, social and cultural conditions, fractured families and lack of good job opportunities and many more. Now let's consider how they are causing human trafficking:

- **Poverty:** Hunger and lack of money is the prime reason for anyone to be a criminal or force them to suffer the wrong. So poverty is the utmost reason for any person to become trafficker. Poverty drives the parents to sell their children for slavery or prostitution. It brings null chances to get education and becoming aware of their rights. Poor people are the easy targets for traffickers as they are offered money.[42]
  Even poor people consider sex as their mode of entertainment as for them there is no other means of enjoyment which leads to sex trafficking of women in their own house by their own relatives.

- **Lack of education:** Lack of education brings basically two outcomes which can cause people to be at greater vulnerability. The first one is that they didn't get proper wage work and secondly, they don't know their rights and that results in trafficking.

- **Social and cultural practices:** social and cultural practices are another major causes of human trafficking. At many places, bonded-labour is considered as an effective and acceptable way to pay off debts. People are slaves from generation to generation to their masters. This practice is common in Mauritania. In Uzbekistan, forced labour is institutionalized where adults and children are forced to work in

[40] A*rticle-51-A(e), Constitution of India*
[41] *Available at:* https://www.ice.gov/sites/default/files/documents/Report/2017/CSReport-13-1.pdf
[42] *Available at:* https://www.humanrightscareers.com/issues/10-causes-of-human-trafficking/

the cotton field until the cotton is harvested.[43] In such situations, people take it as normal to be slave as they have never thought of seeing the second face of the coin i.e. they are unaware of their rights.

Human Trafficking and Law in India:

Constitutional Provisions:

Trafficking in human beings is prohibited under Article-23 of the Constitution of India. 'Traffic in human beings' means selling and buying men and women like goods and includes immoral traffic in women and children for immoral or other purposes.[44] Though "Slavery" is not expressly mentioned in Article-23, it is included in the expression 'traffic in human being'.[45]

Article-23 reads: "Prohibition of traffic in human beings and forced labour

(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

Article-23 protects the individual not only against the State but also private citizens. It imposes a positive obligation on the State to take steps to abolish evils of "traffic of human beings" and beggar and other similar forms of forced labour wherever they are found. Second part of this Article declares that any contravention of this provision shall be an offence punishable in accordance with law. It prohibits the system of 'bonded labour' because it is a form of force labour within the meaning of this Article.[46]

Legislative Provisions:

Indian Penal Code, 1860: Indian Penal Code, 1860 under its Section 370-374 deals with prohibition of trafficking for immoral and unlawful purposes. Section-370 defines what trafficking amounts to. According to this section, "Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbors, (d) transfers, or (e) receives, a person or persons, by (i) using threats, or (ii) using force, or any other form of coercion, or (iii) by abduction, or (iv) by practicing fraud, or deception, or by abuse of power, or (vi) by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harbored, transferred or received, commits the offence of trafficking."[47]

This section is inserted by the Criminal Law Amendment Act, 2013 in the place pf previous section with the recommendation of Justice Verma Committee after the tragic Delhi gang-rape incident. This Act also inserted Section-370 A. Vide the Criminal Law (Amendment) Act 2013 (Act 13 of 2013), the entire section has been changed so as to enlarge the scope of the offence and include within its purview not just the mischief of slavery, but trafficking in general - of minors as also adults, and also forced or bonded labour, prostitution, organ transplantation and to some extent child-marriages.[48]

This section expressly provides under its explanation 2 that the consent is immaterial in the offence of trafficking.[49] It in its further sub-sections provides for the punishment of trafficking in its all forms as well as in its aggravated form. They can be summarised as:

1.Trafficking of persons - 7 to 10 years + Fine

[43] *Ibid*
[44] *Raj Bahadur v. Legal Remembrancer, AIR 1953 Cal. 522.*
[45] *Dubar Goala v. Union of India, AIR 1952 Cal. 496.*
[46] *Dr. J.N. Pandey, Constitutional Law of India, p.g. 365, (Central Law Agency, 54th Edition, 2017)*
[47] *Section-370, Indian Penal Code, 1860*
[48] *Available at:* http://www.legalserviceindia.com/legal/article-171-human-trafficking-prevention-under-section-370-of-ipc-1860.html
[49] *Explanation:2 to Section-370, Indian Penal Code, 1870.*

2.Trafficking of more than one person - 10 years to life imprisonment + Fine

3.Trafficking of minor- 10 years to life imprisonment + Fine

4. Trafficking of more than 1 minor- 14 years to life imprisonment + Fine

5. Persons convicted of the offence of trafficking of minor in more than one occasion- Imprisonment of Natural-life + Fine

6. Public Servant or police officer involved in trafficking of minor-Imprisonment for Natural -Life + Fine.

Section- 370-A deals with sexual exploitation of minor as well as major and endorses a punishment of 5 years to 7 years+Fine (in case of minor) and 3 years to 5 years+Fine (in case of major).

Indian Penal Code, 1860 through its Section-171 penalises the person who is involved in habitual dealing in slaves i.e. whoever habitually imports, exports, removes, buys, sells, trafficks or deals in slaves, shall be punishable with imprisonment for life or upto 10 years+Fine.

Section- 372 and 373 prohibits trafficking of minors for its another major immoral purpose i.e. prostitution or illicit intercourse and make it punishable with an imprisonment upto 10 years+Fine. It includes buying, selling, hiring or obtaining possession of person otherwise.

Section-374 deals with another purpose of human trafficking and i.e. forced labour and comments that the labour against the will of a person is an offence and shall be punishable with imprisonment upto 1 year or Fine or both.[50]

The Immoral Traffic (Prevention) Act, 1956 (ITPA): ITPA is the premier legislation for prevention of trafficking for commercial sexual exploitation. Under the Act, trafficking a minor (below 16 years) for prostitution is punishable with imprisonment of 7 years up to life imprisonment, and fine. ITPA, though a major reform in the area of prevention of human trafficking but has a negative drawback that it talks about a women as a prostitute who would be arrested for soliciting with imprisonment upto one year but the pimp only for three months. It's a major discrimination on the basis of sex.

Protection of Children from Sexual Offences (POCSO) Act, 2012: The Act which came into force on 14 November, 2012 is a special law to protect children from sexual abuse and exploitation.

The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018: The Bill which was introduced in Lok Sabha on July 18, 2018 and passed on July 26, 2018 creates a law for investigation of all forms of trafficking and rescue, protection and rehabilitation of trafficked victims. Bill provides for establishment of such authorities at national, state and district level and also the establishment of anti- trafficking units for the proper working in this area.[51]

Challenges Faced Due to COVUD-19:

The outburst of the insidious pandemic Covid-19 has shook the whole world. This pandemic has affected the people in all the spheres and make them quarantine. While according to many views due to lockdowns the offences must have reduced in society but this is not the case with human trafficking and its various forms. Following are the outcomes:

- It increases child sexual abuse at home.
- Increased number of online child abuse.
- High demand in pornography.
- Suppression of exploited and frustrated victims who are not able to communicate with peers.
- Due to no real outside world, everyone is totally dependent on internet which increase the scope of abuse.

[50] *Prof. S.N. Mishra, Indian Penal Code, p.g. 732-733 (Central Law Publications, 20th Edition, 2017).*

[51] *Available at:* https://www.prsindia.org/billtrack/trafficking-persons-prevention-protection-and-rehabilitation-bill-2018#:~:text=ITPA%3A%20Trafficking%20a%20minor%20(below,to%2010%20years%2C%20and%20fine

- Traffickers make their best in disaster.

Suggestions:

To overcome this rising issue, following can be done:

- Identify the victims and vulnerable and help them in their prevention.
- Inform and help police and prosection in identifying hotspots.
- Locate missing children and help them in their rehabilitation.
- Blow the whistle when identify any trafficker.
- Help to establish the anti-human trafficking units effective.
- Spread awareness among people at family level as well as social level.

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Sedition and Freedom of Speech, Journey from Cognizance to Framing of Charges

-Ayush Mittal & Ashna

Introduction

Freedom of speech is a bulwark of democratic government. This freedom of speech is essential for the pope functioning of the democratic process. Speech is regarded as first condition of liberty. Freedom of speech has been described as the "basic human rights" or "a natural rights" by various apex courts throughout the world. This embraces within its scope the freedom of propagation and interchange of ideas, dissemination of information which would help formation of one's opinion and view points and debates on matter of public concern.

The significance of freedom of speech and expression was appointed by the Bhagwati J.in ***Maneka Gandhi v union of India***[52] that: If democracy means government of the people, by the people and for the people, then it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to efficiently exercise his rights of making a choice, free and general discussion of public matter is absolute essential. Thus, freedom of speech and expression is considered as the biggest pillar of the democracy.

Talking about the first amendment to US Constitution which guarantees freedom of speech in the USA. The US Supreme Court has observed that: "it is the purpose of the

[52] (1978) 1 SCC 248.

first amendment to preserve and an inhibited marketplace of ideas in which truth will ultimately prevail, rather than to contravene monopolisation of that market whether it be by government itself or a private licensee"[53].

The constitution of India: Article 19(1)(a)

'Freedom Of speech and expression' has been guaranteed to all the citizens of India under article 19 (1)(a). Article 19(1(a) includes the right to express one's opinion and opinion to any issue through any medium such as by word of mouth, writing, printing, picture, film, movie etcetera. Thus, we can see that it includes freedom of communication and right too propagate or publish opinions. The phrase 'Freedom of speech and expression' has a very broad meaning under article 19(1)(a). The right to paint or sing or dance or to write poetry or literature is also covered by article 19(1)(a) because the common basic characteristics of all these activities is freedom of speech and expression. We could suggest that phrase 'Freedom of speech and expression' should be read with words "liberty of thought, expression, belief, faith and worship" of preamble and as it is linked with Preambulary thoughts does it is the duty of the court to progressively adhere to the values of the Constitution.

Article 19(1)(a) also covers the right to choose one's personal appearance or dresses subject to article 19(2). Thus, the LGBTQ community has right to express their self identified gender through their speech dress appearance and mannerism. It is considered that gender identity lies at the core of one's personal identity, gender expression and presentation and, therefore it will have to be protected under article 19(1)(a) of the Indian Constitution. A member of LGBTQ community could express their personality by the behaviour and presentation. The State cannot prohibit, restrict or interfere with a expression of such personality which reflects their inherent personality character. There for it was held that values of privacy, self identity, autonomy and personal integrity or fundamental rights guaranteed to the LGBTQ community under article 19(1)(a) of Indian constitution.[54]

Freedom of speech and expression given to the press and other media sources is not for the benefit of the press or media houses itself. This has been given for the benefit of the general community of the country because every citizen of the country has right to be fully informed with the information and what government owes a duty to educate the people within the limits of its resources. Thus, freedom of press has always been a cherished right in all the democratic countries and the press has been rightly been described as the fourth estate. Further, credential of a democratic states are always judged by the extent of the freedom given and inspired by the press of the country.[55]

Whenever the Constitution provides any fundamental rights it is always accompanied by the fundamental duties of the citizens towards the Constitution of the country. Similarly, to maintain and preserve the freedom of speech and expression in a democratic country, so also it is important to maintain social law and order by placing some curbs on the use of the freedom of speech and expression.

No Freedom Is Completely Absolute Or Unrestricted: Public Order

Accordingly, under article 19(2) state has formed a law imposing 'reasonable restrictions' on the exercise of the freedom of speech and expression 'in the interest of' the security of the state, friendly relations with foreign states, public order, decency, morality, sovereignty and integrity of India. There has been two conception under the article 19(2) that is 'public order' and 'security of state'. Further, the concept of public order is considered as more wider

[53] American Press v US, 326 US 1
[54] National Legal Services Authority v Union of India, (2014) 5 SCC 438
[55] Printers (Mysore) Ltd. v. CTO, (1994) 2 SCC 434

than the concept of security of state as it includes public peace, safety and tranquility[56].

Provision under section 124A of the IPC is know as 'Sedition' that is the category of the offence against the state. Jury by Fitzerald, J., in the case of ***Reg v. Alexander Martin Sullivan*** [(1867-71) 11 Cox's Criminal Law Cases, 44 at p. 45] has observed that: "Sedition is a crime against society, nearly allied to that of treason. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the empire. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm, and generally all endeavours to promote public disorder."

Section 124A imposes restrictions on the fundamental right of freedom of speech and expression, but these restrictions cannot be said to be violative of the freedom of speech and expression. But when section 124A is clearly reed as a whole along with the explanations, make it reasonably clear that the section aims at rendering penal only such acts which would be intended or have a tendency to create disorder or disturbance of the public peace by any kind of violence. The explanation adjoined to the main body of the section makes it very clear that criticism of public measures or comment on government action (strongly worded), within some reasonable limits would be considered consistent with the fundamental right of freedom of speech and expression. However, when the words, written or spoken etc., which have tendency or intention of creating public disorder or disturbance of law and order, then the law under section 124A of IPC will prevent such activities in the interest of public order. Thus, the section strikes the correct balance between the fundamental rights and the interest of public order. Further, it is also well settled that in interpreting any enactment the court should not merely regard itself to the literal meaning of the words used, but should also take into consideration the history of the legislation, its purpose and after effects if it is seeks to suppress[57].

How law for sedition works?

The offences which are mainly the offence against the state or nation and conspiracy to commit such offences are of a serious and exceptional nature. Thus, the legislature has provided us with a special provision in Code of Criminal Procedure, 1973. Under section 196 of Code of Criminal Procedure, 1973 there has been a conditional precedent in which no court can take cognisance until and unless they has the prior sanction from the central government or state government or the district magistrate.

While providing the sanction it has to be kept in mind that sanction lifts the bar for prosecution. Therefore, it is not an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. Further, it is a weapon to discourage vexatious prosecution and is a safeguard for the innocent, though not a shield for the guilty. Thus, the authority must apply its complete mind to the facts of the case and it is the duty of the prosecution that they have to submit each and every detail or material to the authority for the sanction so that there will be no chance of mistake and failure of justice.

[56] O.K. Ghosh v. E.X. Joseph, AIR 1963 SC 812

[57] Kedar Nath Singh v State of Bihar, AIR 1962 SC 955

Conclusion

The law of sedition as provided in Section 124A is quite clear in its meaning and intention, and a person with reasonable prudence would not see it as an obstacle to freedom of speech and expression but as a legal instrument to monitor anti-state activity.In addition, judicial pronouncements in this regard have clearly set out the principle that anyone can fairly criticise government policies and actions and demand reforms as long as they do not incite or attempt to incite violence, rebellion, hatred or contempt against the established state government.

An analysis of the Supreme Court's judgment in Kedar Nath itself shows some shortcomings in how the law is being understood today. There has been a shift in how we understand 'state security' as a ground for restricting freedom of expression and speech.Furthermore, a change in the nature of government and the vulnerability of ordinary people to being incited to violence by an inflammatory speech also greatly reduced. Even maintaining 'public order' cannot be used as a justification for these laws, as it is intended to address issues of local law and order rather than actions affecting the very basis of the State itself.

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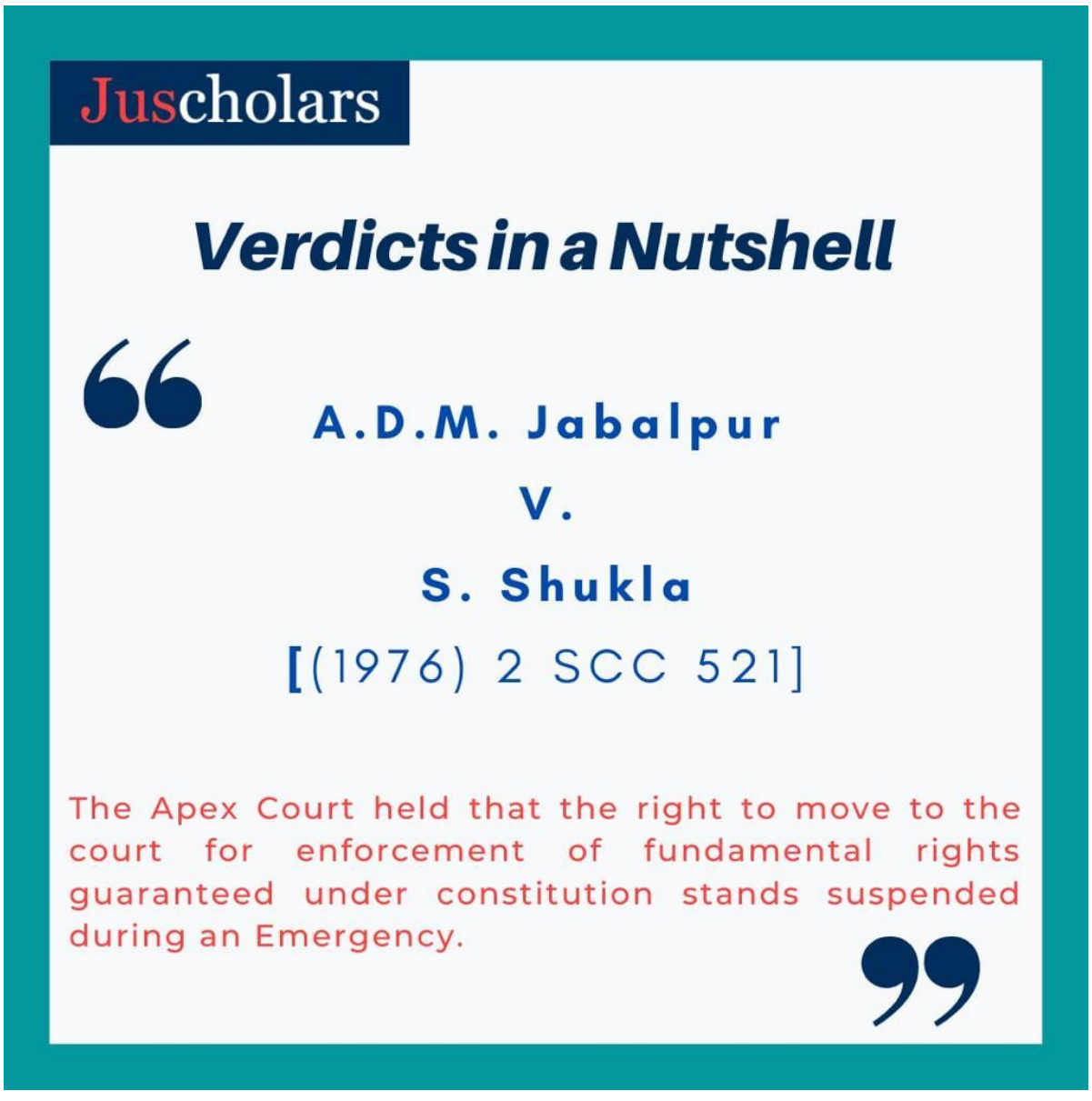

Corporate Governance: Succession Planning & Continuity During COVID-19

- *Devika A. Gadgi*

"Corporate governance is the system by which companies are directed and controlled."

-The Cadbury Committee (U.K.)

The current crisis of COVID-19 is unprecedented and marked by uncertainty. The present situation has adversely impacted the world economy and continuity of most of the business organisations is under radar and the sustainability of the business organisations is under grave uncertainty. The board of directors of a company ("*Board"*) need to ensure that the crisis is tackled in a proper and an organised manner. In such a scenario, the corporate governance practices play a key role. It is imperative that the Board adopts the best corporate governance practices to ensure the sustainability and continuity of the business and effective crisis management. For instance, the companies need to ensure that there is accurate and transparent review of the financial forecasts as well as the earning disclosure owing to the current scenario and financial environment.

Scope

The present article analyses the concept of succession planning and continuity in terms of corporate governance in the backdrop of COVID- 19 scenario. The Section I deals with the importance of corporate governance in the present scenario. The Section II deals with the importance of emergency succession plan in case a Key Managerial Person (*KMP*) contracts COVID- 19. The Section III deals with the measures to be taken to ensure smooth

functioning of the Board and. whether a company can substitute virtual meetings in place of physical meetings.

Analysis

Section I: Corporate Governance: A Key Player During Covid-19?

A. Corporate Governance in India

Corporate Governance has always been an issue of paramount importance in the Indian economy. [58]The Indian corporate governance framework focuses mainly on protection of the shareholders, accountability of the board and management of the company, timely reporting and disclosure requirements, corporate social responsibility[59], etc. Securities and Exchange Board of India ("*SEBI"*) and Ministry of Corporate Affairs ("*MCA"*) are the regulators in this regard. The COVID-19 outbreak has created multiple hurdles and challenges for the Indian companies. There are several corporate governance issues to be dealt with in order to effectively tackle and respond to the challenges posed by COVID-19.

B. Why is Corporate Governance important during COVID-19?

In the backdrop of current pandemic, there is a dire need of risk identification and assessment resulting into effective management of the same. The Board need to be in constant close contact with the management to ensure the security and well-being of the workforce and the stakeholders. A proper strategy needs to be devised paired with constant monitoring for management of the risks and minimising and mitigating the adverse consequences. The Board needs to take into consideration the financial health of the company and stress on the factors such as the indebtedness of the company, the financing policy, the liquidity risk (short term and long term), etc. amongst others.

During the present scenario, the need for complete disclosure is of utmost importance. The Board needs to be in compliance of the various mandatory disclosure requirements such as under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (as amended from time to time) ("*LODR"*)[60]. It is imperative for the companies to provide full and fair disclosure to ensure that the investors' and the shareholders' interest are not being compromised[61]. The mechanism with regard to succession, appointment, etc. needs to be updated. The corporate governance policies need to be updated and modified in light of the current scenario for the efficient functioning of the company.

Section II: The Need for An Emergency Succession Plan During Covid-19

A. Provisions relating to succession planning under law

Succession Planning is an important element of corporate governance in a company. It is an on-going process and there needs to be a planned mechanism in place to ensure the continuity of leadership in key positions as well as securing the future of the company. The Board is entrusted with the responsibility of overseeing the succession planning. The recent Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018 **("*Amended LODR"*)** brought about amendments in the board and

[58] D. GEETA RANI & R.K. MISHRA, CORPORATE GOVERNANCE: THEORY AND PRACTICE 74-78,(1 ed. Excel Books, 2008)

[59] *Report of Expert Committee on Company Law*, MANAGEMENT & BOARD GOVERNANCE MINISTRY OF CORPORATE AFFAIRS (May 27, 2020, 10.30 A.M.), http://www.mca.gov.in/MinistryV2/management+and+board+governance.html

[60] M.Y. KHAN, INDIAN FINANCIAL SYSTEM (10 ed. McGraw Hill Education, 2018)

[61] A.C.FERNANDO, CORPORATE GOVERNANCE: PRINCIPLES, POLICIES AND PRACTICES 17 (1 ed. Dorling Kindersley (India) 2006)

their strategies with a view to strengthen the aspect of succession planning. The definition of the term ***"senior management"*** was mended vide the Amended LODR so as to include one level below chief executive officer/managing director/whole time director/manager (including chief executive officer/manager, in case they are not part of the board) and specifically include company secretary and chief financial officer. Thus, it states that the Board of the listed entity shall satisfy itself that plans are in place for orderly succession for appointment to the Board and senior management[62]. This amendment has ensured that the succession planning needs to be undertaken by the Board for a wide array of employees and is not limited in its application.

Further, under section 178 of the Companies Act, 2013 ("Act"), the Company is required to constitute a nomination and remuneration committee which amongst other things is entrusted with the responsibility of development of a succession plan for the Board and senior management.[63] Countries such as United Kingdom, Japan, Italy, etc. have similar corporate governance policies regarding succession.

In case of a private company, the LODR and provisions under Section 178 is not applicable. However, it is advisable for a private company to have a succession policy in place. In case of an unforeseen situation, if the private company does not have an emergency succession plan, the operation of the company might come to a standstill. A private company cannot ignore succession planning just on the ground of lack of regulatory compliance. The consequences of lack of a succession policy resulting in vacancy in the office of key personnel will have an adverse impact on the company's ability to achieve its targets and ensure sustainability and survival. The Tata Group has been a prime example of the need of a proper succession plan on the backdrop of sudden departure of Mr Mistry as the chairman.

B. Succession Planning on the backdrop of COVID-19

In the current scenario, it is of utmost importance that the company (both private and public) has an efficient succession policy. The Board is responsible for the succession of the CEO and the other KMP's. If in case of an unfortunate event wherein the CEO or any of the KMP is contracted with COVID-19, the Board needs to have a well-planned succession policy so as to tackle any unforeseen situation. The succession risks pertaining to the entire senior management needs to be considered. The Board can incorporate a separate team to oversee the change in leadership, if any. The roles and responsibilities for the management team needs to be demarcated in a proper and well-defined manner. The company needs to have a robust emergency succession plan in case of any unforeseen situation.

As discussed in the above paragraphs, there are legal provisions under the Act as well as several regulations dealing with succession planning. The importance of succession planning in case of private companies has also been discussed above. However, the implementation of the same is a major hurdle even in today's time.

Section III: Continuity During Pandemic: A Key Challenge

A. Measures for continuity of the Board

During the current pandemic, it is imperative that the Board remains intact and functioning if such a situation arises wherein the continuity is

[62] SECURITIES AND EXCHANGE BOARD OF INDIA (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS) (AMENDMENT) REGULATIONS, 2018 regulation 17 (4)

[63] G K KAPOOR & SANJAY DHAMIJA, COMPANY LAW: A COMPREHENSIVE TEXT BOOK ON COMPANIES ACT 2013 (20 ed, Taxmann, 2017)

threatened[64]. The Board needs to be proactive while dealing with such a scenario.

1. Adoption of succession plan and emergency by laws

   The Board can ensure that an effective succession plan as discussed above is in place. Further, a set of emergency rules can be adopted by the company during such an unforeseen situation.

2. Regular meeting via virtual mode

   The Board needs to ensure that meetings are conducted on weekly basis or more frequently as required, via video conference or telephonic medium.

3. Undertaking critical functions

   Even though the companies are being managed remotely, the company needs to undertake the critical functions such as IT system, cyber security, regulatory compliance, functioning protocols in a proper manner. The key support mechanisms such as IT services need to be operative since the entire workforce including the Board are working remotely and need access to the files and data to function[65].

4. Formation of a monitoring committee and expert advisory committee

   A committee can be set up for the purpose of monitoring the entire situation. The committee can evaluate the situation and adopt necessary measures to prevent and tackle the impact of the pandemic.

B. Virtual Meeting: A Substitute For Physical Meetings

There is a set of legal framework in India which governs the regulations pertaining to board meetings as well as shareholders meetings, namely as:

1. The Act and Rules thereunder
2. The SEBI Regulations
3. The Standard Listing Agreement
4. Secretarial Standards issued by the Institute of Company Secretaries of India (ICSI)

There are many policy decisions which require the approval of the Board or the shareholders, for which it is essential to conduct the meetings.[66] In the present scenario due to the pandemic, it is not possible for the Board or the management or the shareholders to be physically present for any of the meetings. However, in the judgments of "*Wagner v. International Health Promotions*[67]" and "*Byng v. London Life Association*[68]*",* the English Courts have held that virtual meeting via telecommunication or other modes are considered to be valid.

The Ministry of Corporate Affairs vide circular dated April 08, 2020 and a clarification issued on April 13, 2020 has permitted companies to convene their Extraordinary General Meetings ("EGM") through video conferencing or other audio-visual means. Such relaxation is available until June 30, 2020. The decisions can be taken through e-voting or simplified voting (as the case maybe). E-voting[69] is mandatory in prescribed companies only[70]. As per the circular, the companies which are required to provide e-

[64] William Kucera, Jodi Simala, and Andrew Noreuil, Mayer Brown LLP, *COVID-19 and Corporate Governance: Key Issues for Public Company Directors*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (May 22, 11.00 A.M.), https://corpgov.law.harvard.edu/

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[67] (1994) 5 ACSR 419

[68] (1990) 1 Ch 170

[69] The term "e-voting" refers to remote e-voting or voting by electronic means.

[70] Companies Act, 2013 s.108;

voting[71] or have opted for it shall conduct the voting via video conferencing ("VC") or other audio visual means ("OAVM").However, in other cases, the shareholders can approve or reject the resolutions by sending emails at the registered e-mail ID provided by the companies. The detailed procedure has been mentioned in the circular pertaining to convening of the EGMs. Further, the MCA vide circular dated March 19, 2020 amended the rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 thereby permitting the companies to conduct board meetings via video conference or other visual means until June 30, 2020. Thus, it is permissible that the companies can hold board meetings and the general meetings via video conferencing or other modes.

The Board must ensure that the ability of the shareholders or the Board members to put forth resolutions and give opinions at the virtual meetings or vote on such matters or raise concerns should not be hampered in any manner. Virtual meetings can be a way of life in the near future rather than just an exception.

Conclusion

Corporate Governance plays a key role in ensuring the sustainability of the companies. It will play a vital role in the near future and will emerge as an essential mechanism to tackle the crisis. This will help in effective planning, reassessing the goals, long term sustainability, risk mitigation, etc. The Board plays a major role during the current crisis since it is entrusted with the responsibility of implementation of the corporate governance rules. The Board needs to adopt various techniques to ensure that the financial well-being and continuity of the company is not threatened. For attaining this purpose, it is imperative that the Board functions in a proper manner and the functioning of the Board is not disrupted. There are certain regulations in place with regard to same. However, even in case of companies such as a private company, wherein there are no regulatory compliances in place, the company should adopt the corporate governance polices such as succession planning for the effective and efficient functioning and continuity of the company. A company can ensure the continuity, crisis management and sustainability only if it focuses on adoption of the best corporate governance practices.

[71] Companies (Management and Administration Rules), 2014 rule 20

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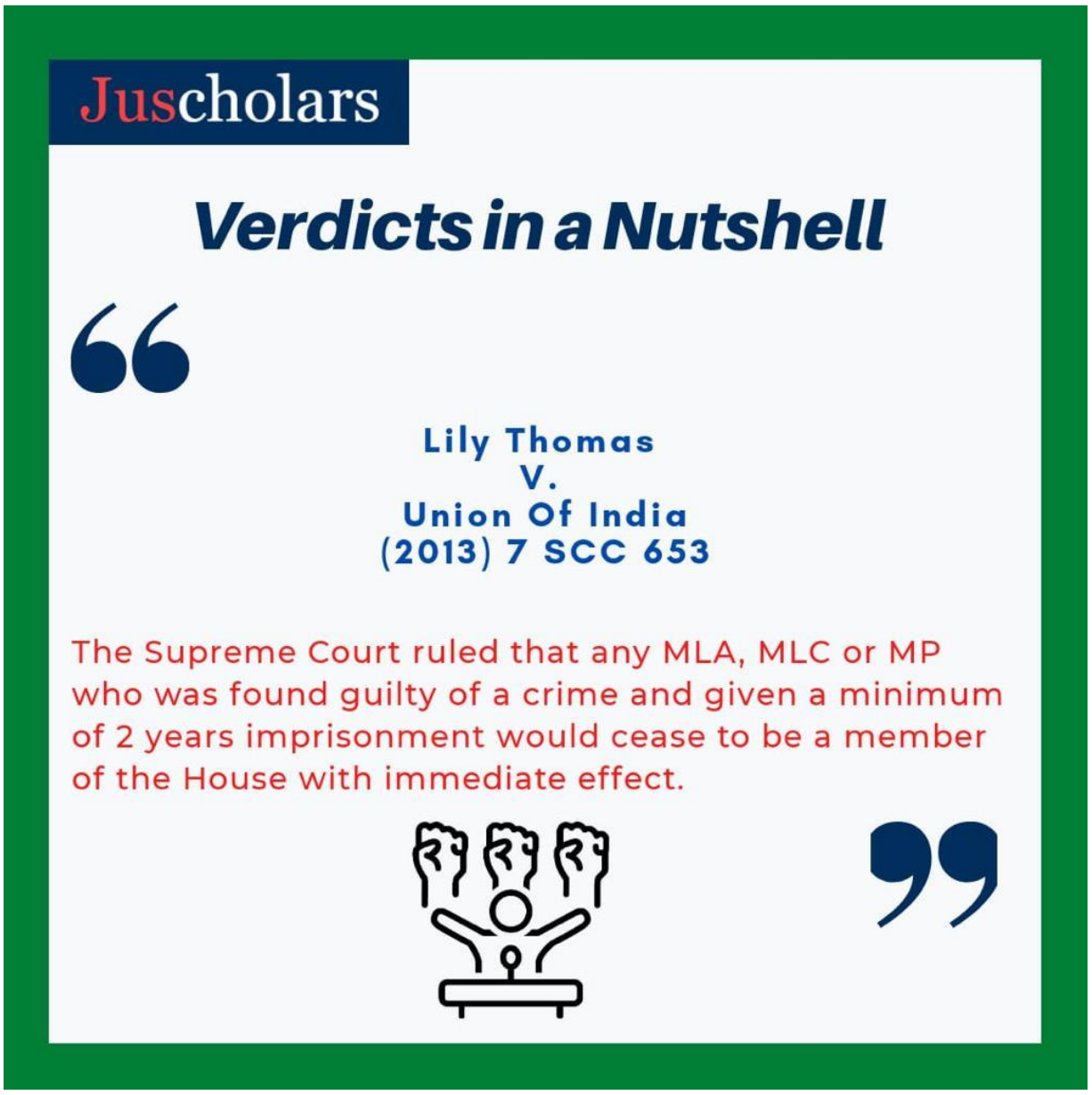

Smell Marks- A Stumper in India?

- Kashish Yadav

"Delightfully fresh and mild with a little zestness of lime". Can you feel the smell or do you try to think about it in your mind or it starts fading away after sometime? These are the questions faced by most of the trademark registries in the world when there is a question of registering a smell trademark.

Trademark defined under Section 2(zb) of the Indian Trademarks Act, 1999 which is in compliance with the TRIPS provisions says that a mark which is capable of being represented graphically and capable of distinguishing the goods or services of one person from those of others and it may include the shape of goods, packaging or combination of colors. This definition is not inclusive of non-conventional marks like smell, sounds, tastes, silhouettes,etc. The invasion of these marks from the definition of the trademark is due to the abstract nature of the definition. The Trade Mark Rules, 2017 ("The Rules") has provided a distinct acknowledgement to the non-conventional marks by validating the registration of some definite kinds of colors or sounds as long they are able to be represented graphically. It still follows the traditional approach of representing the graphical

representation of a trademark which is not possible in case of smell marks.

One of the first cases for giving reasons for the graphical representation of trademarks was European case of *Ralf Sieckmann v German's Patent Office (Case C-273/00)*. The reasons for graphical representation given in this case were:

- Precise subject of protection given by registration can be determined;
- Competent authorities must know what the mark is with clarity and precision so that they can fulfill obligations;
- Economic operators must be able to by consulting the register should be able to find out with clarity the registrations and applications made by any potential competitor or getting information for any 3rd party.

In the case ECJ elaborated upon the criteria for graphical representations of trademarks, that the marks should be:

- clear,
- precise,
- self-contained,
- easily accessible,
- intelligible,
- durable and
- objective.

The result of applying these criteria in this case was that smell or scent marks can be registered in theory but unlikely to be successful in practical scenarios.

In this case. Ralf Sieckmann applied to the German trademark registry for the registration of a scent mark for various services. The ECJ ruled that the methods of representation given by the applicant were problematic. The description of the scent as *"balsamically fruity with a slight hint of cinnamon"* was easily accessible and intelligible but it was not clear, precise or objective as it was not able to answer the questions that what is a fruity scent or how much cinnamon does 'hint' refers to. A chemical formula was given by the applicant which was objective but it was not intelligible to a layman and not self-contained as it required external reference to understand it. It also referred to the substance and scent so it was not directly represented.

These standards adopted under this case for graphical representation were strictly implemented under the Indian Draft Manual of Trade Marks, 2015, which although lacked the force of law noted that smell marks cannot be represented graphically under the Indian Trademark law.

Under the Trademark Rules, 2002 it is mandated under Rule 25(1)(2)(b) that a trademark registration application must include graphical depiction of mark. Rules 28 and 30 require it to be represented on paper in durable form. As compared to a sound mark, an olfactory mark cannot be identified visually - so this acts as an hindrance to the registration of such marks in India.

One of the most basic challenges that is faced by the smell marks is the availability or accessibility of the smell to the person purchasing the product. If the person is not able to recognize the smell then the whole purpose of using the smell as a trademark gets defeated as the person is not able to connect the smell to its origin which is one of the reasons for that smell to be used as a trademark. Another challenge that can be faced by the purchaser is that even though he recognizes the smell he might not be able to connect it with its identity to its manufacturer or basically the product and so, it leads to confusion in the minds of the consumers.

The most important limitation that is associated with smell marks is the functionality doctrine. This doctrine says that protection is not available to those marks which are entirely functional. The doctrine is an anti-competitive measure taken for preventing a single producer to get monopoly over a useful product feature that the products in the same domain of competition might be sharing. It is reflected under Section 9(3) of the Indian Trademarks Act, 1999 which states that in the context of shape marks a shape which results from the nature of the

good or for obtaining a technical result is prohibited from registration.

We can say that these non-conventional marks like smell and sound marks can be made to cater those consumers in society which are visually impaired or illiterate i.e. which have difficulties in having a visual recognition of these marks. These marks help to adopt and develop new ways of advertising and branding their products, making these companies reaching out to newer markets and sets of consumers. There have been very few registered smell marks till now like a Dutch company's tennis balls with a scent of *"newly cut grass"*, U.K. registrations of tires with *"a floral fragrance/ smell reminiscent of roses"* and darts with *" a strong smell of bitter beer".*

There is no doubt that smell or scent marks seem to be very innovative, new and appealing in their approach for branding and selling products still there has always been difficulty for the traders to get it registered under the trademark law because of the difficulties associated with it like to not be able to be represented by the traders on paper in the trademark registries, lacking to be as the basis for identifying the origin, the theory that smells start depleting or fading and being of subjective nature it changes from person to person so, every person perceives it differently. These difficulties impact these marks negatively and affect the efficeincy of these marks.

The registration of smell or scent marks in India is still at an early stage in India and Indian trademark law being modelled in compliance with TRIPS agreement there is highly a chance for Indian law to provide recognition to these smell or scent marks by Indian law without giving it an international precedent.

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Interview: Siddharth Chapalgaonkar (Advocate at Bombay High Court) on Career Options in Law

Recognition of Foreign Divorce Decrees – Legal Position in India

-M.Sri Nikila and S.Mohamed Abbas

Introduction:

"Marriages are settled in heaven and they are performed on earth."

The matrimonial laws are not same around the world and it differs from country to country. When marriages and their dissolution were performed in the same country, then it poses no threat with regard to the validity of them. But the present day scenario is that the parties have their domicile in one country and one of them obtains matrimonial relief in a foreign country. So, it becomes significant to know the legislative position in India as to the recognition of foreign divorce decrees.

The Concept of Domicile:

The word 'domicile' is defined as," The country that a person treats as their permanent home, or lives in and has a substantial connection with."[72] The concept of domicile plays a role of paramount importance in the shoes of validity not only of divorce decrees but also all other

[72] (Jan 13,2020,17.05 PM) en.oxforddictionaries.com › definition › domicile

decrees. The general principle is that a person, who has got domicile in a particular country, is governed by the laws of that country. Though this sounds as a normal paradigm, it turns itself to be a complicated picture, when a person who is domiciled in one country obtains a foreign divorce decree and claims for an execution. It all depends upon the consent of the parties. Even though, the divorce decree is passed by a foreign Court without the jurisdiction in accordance with the provisions of the Matrimonial law of the parties it would not be invalidated when the wife consents to the jurisdiction.

Recognition under English Law:

Before focussing on the position of Indian Law in recognising foreign divorce decree, it is more logical to look into English Law, since Indian Law had been taking up roots from English Law in this regard. English law had regulated the recognition of foreign divorce decrees by enactment of the Recognition of Divorces and Legal Separations Act, 1971. Prior to the enactment of the said act, the general practice of the English Courts was that the Courts would not accord the status of recognition to the decrees passed by the foreign court unless the parties where domiciled in the Country whose Court passed the divorce decree[73]. But after the passing of the 1971 Act this state of affairs has been modified. Accordingly, the Act has laid down additional two grounds under which a foreign divorce decree is recognised in English Law. So, the grounds under which a foreign divorce decree would be recognised under English Law are:

- Both the parties were domiciled in the country where divorce was obtained at the time of the institution of the suit,[74]
- One of them was domiciled there and the other country in which the other party domiciled recognised it as a valid divorce.[75]
- The divorce is recognised as valid in the country of the common domicile of the parties, or where the parties have different domicile in the country of domicile of each party
- At the time of the institution of the proceedings either spouse was a national of the country where divorce was obtained.

Grounds for Refusal:

Also, the 1971 Act has laid down two exhaustive grounds under which a foreign divorce decree would be denied recognition under English Law. They are:

- When there is violation of principles of natural justice[76], or[77]
- When the recognition would manifestly be contrary to public policy[78].

Indian Law:

Foreign divorce decrees have become widespread phenomenon in India in recent times. Once the divorce decree is obtained, either parties or both of them may approach Indian authorities to make necessary changes in the legal documents like passport so that they can either remarry or avail the benefits of being a single and unmarried individual. However, the Indian Law has implemented stringent measures as to rules pertaining to change or deletion of the name of a spouse. Now, for removing the name of a spouse from the passport of the other spouse can be done only if the foreign divorce decree has been first recognised by an Indian court. Henceforth, it has become immensely important to get the foreign divorce decree to be legally recognised in India so as to avail the benefits conferred in India. But there has been no specific legislation devoted toward the recognition of foreign divorce decrees in India.

[73] PARAS DIWAN& PEEYUSHI DIWAN, PRIVATE INTERNATIONAL LAW INDIAN AND ENGLISH 280-290 (4 ed. Deep and Deep Publications 1998)
[74] Le Mesurier v. Le Mesurier, (1895) A.C. 517
[75] Armitage v. A.G., (1906) p.135
[76] S.8(2)(a) of the Recognition of Divorces and Legal Separations Act, 1971
[77] Vardy v. Vardy (1932) 48 T.L.R. 661
[78] S.8(2)(b) of the Recognition of Divorces and Legal Separations Act, 1971

Civil Procedure Code, 1908:

In general, section 13 and 14 of the Civil Procedure Code, 1908 governs the recognition of foreign judgement. Section 13 of the CPC renders a foreign judgement unenforceable and inconclusive in 6 circumstances, when the judgement or decree is;

- pronounced by a court of incompetent jurisdiction;
- not based on the merits of the case;
- founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
- obtained in the proceeding which has violated the principles of natural justice;
- obtained by fraud;
- based on a claim founded on a breach of any law in force in India.

On a plain reading of this section, it reflects that a foreign judgement become conclusive and enforceable when it complies with all the above-mentioned conditions. Even if any one of these grounds has not been fulfilled then the decree would be inconclusive and ultimately would be legally invalid and not binding.

For instance, in the case of *Satya v. Teja*[79], while dealing with a matrimonial dispute, the Supreme Court held that the challenge under S. 13 cannot be restricted to disputes in civil nature but also to disputes in criminal nature. In this case a foreign decree of divorce was obtained from the Nevada State Court in USA by the husband in absentum of the wife without her submitting to its jurisdiction was held to be not binding and valid upon a criminal court in proceedings for maintenance[80]. This case categorizes itself lucidly under s.13 (a) in which the Court is not competent and thereby the decree was denied recognition.

Whereas in the case of *Anoop Beniwal v. Jagbir Singh Beniwal*[81] recognition was granted on the ground that the decree is in accordance with law of the land. This case relates to a matrimonial dispute between the parties. The suit was filed under S. 1(1)(2)(b) of the Matrimonial Causes Act, 1973 before the English Court on the ground that the petitioner cannot be reasonably expected to live with the respondent due to his behavior. When the decree was obtained in England, it was subsequently brought before the Indian Bench for enforcement. The contention of the respondent was that the Indian court should refuse enforcement as the decree was based on English law. The Court denied such contention and held that under the Indian Hindu Marriage Act under S. 13(1)(ia), there is a similar ground which is "cruelty" on which the divorce may be granted, and the decree of the foreign court is entitled to recognition under the Indian Court.

In general terms, a decree of a foreign Court is recognised by a Court in another jurisdiction as a matter of comity[82] and public policy. But this principle of comity would not compel any country to recognise the decree of a foreign court if it is repugnant to its own laws and public policy. When it comes to the concern of India, a judgment of a foreign Court creates estoppel or res judicata between the same parties, but with a prerequisite that such judgment is not attacked under any of the Clauses (a) to (f) of section 13 of the Code.

Classification of Foreign Divorce Decree:

Divorce decree granted by Foreign Courts can be split into two types:

1. Divorce which was obtained by mutual consent, granted by foreign Courts.

2. Decree granted in Contested Divorce.

[79] AIR 1975 SC 105.
[80] *Ibid.* at p. 117 para 49.
[81] AIR 1990 Del. 305 at 311.
[82] This principle was first laid by the Court of England and subsequently approved by the Supreme Court of India in *Elizabeth Dinshaw v. Arvand M. Dinshaw (1987) 1 SCC 42, 47'"* The Court recorded the observation that: *9.* … it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing"

The divorce decree granted by a Foreign Court which arouse out of mutual consent is considered to be legal, valid and binding in the Indian Courts by the virtue of Section 13 and Section 14 of the Civil Procedure Code. A decree which is not hit by section 13 necessitates no separate validation as it will be considered conclusive under Section 14[83] of the Civil Procedure Act.

However, when a divorce decree is granted by a Foreign Court which was contested by either of the parties, then it will lead to the question of validity which varies in different circumstances.

The Cases in Which the Foreign Divorce Decree Would Not Be Contemplated as Conclusive:

i. Firstly, when an ex-parte decree is passed by a Foreign Court which was intentionally left to go ex-parte i.e. no summons are served on the opposite party then the Indian Courts would not permit this fraud and would not recognise such decree.
ii. Secondly, divorce obtained on grounds other than the grounds enumerated under the Hindu Marriage Act if the parties were married under Hindu Law, as a divorce matter is governed by the law under which one gets married and does not be governed by the law of the land in which one resides.

A Foreign Divorce Decree Shall Be Contemplated as Valid and Conclusive In The Following Case:

i. It is a general rule that if one of the partners contests divorce filed in Foreign Land it would be said that he/she consented to the jurisdiction of that Court, in such a case that would lead to a conclusive decree.
ii. Where the wife consents to the grant of the relief by the foreign Court although the jurisdiction of the foreign Court is not in accordance with the provisions of the Matrimonial Law of the parties, the judgement of such foreign courts will be deemed as valid and conclusive.

Conclusion:

Though, the need for recognition of foreign divorce decrees in India has been on a boom, yet the legislation remains silent as to regulating the same. What is the need of the hour is a separate enactment with regard to the recognition and execution of the foreign divorce decrees in India. With Private International Law being a subject of underdeveloped affair, this branch of the law though demanding a rapid development still continues to be at back in the queue. Henceforth, even when a separate enactment is not possible it is of utmost importance to the amendment of the existing laws so as to properly regulate the recognition of the foreign divorce decrees in India.


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[83]Section 14 of the Code of Civil Procedure,1908: **Presumption as to foreign judgments.** The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

Immigration Ban in US in times of COVID-19 Pandemic: An abuse of Presidential Authority?

- Manu Sharma

Abstract

In the time of Covid pandemic, the World Health Organization in pursuance to the provisions of International Health Regulations (IHR), an international agreement which has been adopted internationally to prevent, protect against and provide a public health response to the international spread of disease without unnecessary interference with international traffic and trade, on January 20, 2020 issued temporary guidelines to help the member states at this time of crisis, which included its advice against the application of travel or trade restrictions for countries that are suffering from Covid- 19 pandemic. However, these guidelines are merely guiding and non binding in nature and hence, US, a member state imposed restrictions on travel and immigration operations. Though the ban is legal in stuatory terms but its rationality in such a critical situation is questionable. The author reviews the same with help of stuatory framework and points out the loopholes in the current framework.

Introduction

On the night of April 20, 2020, US President Donald Trump tweeted about his signing of an executive order, temporarily suspending immigration to the States in response to the invisible enemy of Coronavirus. This tweet turned into headlines that the US was about to end all the immigration services. However, the formal proclamation issued two days later was considerably narrower in scope, even to the apparent disappointment of

some of his conservative allies. The actual proclamation calls for a 60-day ban on new permanent residents entering from abroad, other than those who are spouses or children of US citizens. There have been reports from various experts which suggest that presidential advisors have big plans to expand on this proclamation in the coming time, thus advancing their agenda to transform the US from a country of immigration to a demographically altered, fortress walled off from the world. The article aims to review and discuss the legality of this proclamation and whether it's an abuse of the US presidential authority.

Critical Analysis

Legality of the Proclamation

The question of legality arises from the fact that this latest presidential proclamation is quiet unprecedented in American history. Even the far narrower restrictions actually announced assert presidential power over immigration in ways never seen before. It can be concluded that the president long has been the immigration policymaker in chief. But no president has ever attempted to suspend immigration on the scale that Trump just proclaimed. Instead most of the US presidents have pushed back against movement to sharply limit or end immigration by opposing or vetoing restrictionist legislation or exhorting the public to see the benefits of immigration.

But the simple fact that this proclamation is unprecedented does not make it illegal. To support this proclamation the president relied on the very same statutory authority he invoked to bar the entry of nationals from several Muslim- majority states[84]. Section 212 (f) of the Immigration and Nationality Act (INA)[85] which provides that ' whenever the president finds that the entry of any aliens would be detrimental to the interests of the United States' he has the power by proclamation to suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants". Whereas the 2017 entry was justified on the grounds of security concerns and prevention of terrorism, the COVID-19 proclamation is called on the grounds of economic catastrophe, justifying that immigration must be suspended temporarily to protect the American workers from fierce competition in the labor market due to the pandemic and aggressive mitigation measures. No matter what we think of the proclamation as an economic policy, there can be no denying to the fact that it certainly differs in one key aspect from other immigration orders which is public health emergency that US is facing as it is the worst hit country in the world and the same has given rise to a severe economic crisis whose shape has not been fully developed. Trump's past declaration of crisis to justify extraordinary immigration action have been fabricated and grossly overbroad.

Enacted in the early days of the cold war as part of the landmark INA, section 212 (f)'s suspension power was understood as a breathtaking delegation of power in the hands of president. By its very term, the provision appears to contemplate scenario in which the president might literally seal all borders to all the non- citizens. Though the provision does require the president to determine the injury to the interest of US before banning the entry of immigrants, it does not require him to provide for any evidences, material on which his proclamation is based.

In the fierce litigation against the 2017 entry ban that challenged the validity of president' action under Section 212 (f) of INA, the Supreme Court of USA read section 212 (f) as exuding deference to the president in every clause and upheld the validity of the provision. Here we should note one crucial caveat about the provision, that it does not permit the president to attempt to suspend immigration adjudications for individuals already inside the United States. Through a process called adjustment of status, tens of thousands of temporary immigrants already

[84]Executive Order 13768, 'Protecting the Nation from Foreign Terrorist Entry into the United States',82 FR 8977 (2017)

[85] Immigration and Nationality Act, § 212, cl. (f) [8. U.S.C. §1182 (f)] (1952).

inside the United States can petition to become permanent residents, and 212(f) simply does not permit the president to suspend these processes (though they may be delayed if immigration officers are shuttered for health reasons). In fact, we can consider it likely that the case is the driving force behind the administration's latest efforts. Emboldened by the broad reading of the provision by the Supreme Court, Trump administration has begun treating it as an easy vehicle for the president's restrictionist agenda. Not long ago, in October 2019, a proclamation was issued under the same section, suspending the entry of would- be green card holders who cannot show they would have or could afford health insurance once they arrives in the US to prevent them from financially burdening the health care system of the country. Now, the president has invoked his presidential authority to limit large categories of legal immigration altogether.

Loopholes in the Administration's Statutory Framework

The case of Trump v. Hawaii[86] has left the potential opening as a matter of stuatory interpretation. In this case the court rejected the claim of the respondents (Hawaii) that 2017 entry ban conflicted with the elaborate stuatory scheme Congress had created to screen for security risks when admitting immigrants. However, in doing so, it observed that the entry ban could be harmonized with the stuatory framework for individual vetting which means that the court treated the entry ban as complementing the INA's security screening processed by suspending the entry of nationals from countries that were not providing reliable security information as kind of incentive to those countries to do better. On the same line, to defend the COVID- 19 proclamation on similar terms, the administration would have to show that its suspension of immigration through certain labor and family categories would somehow complement the processes by which immigrants in those categories are otherwise screened or admitted.

Moreover, there are still arguments based on the historical practice and statutory history of US that call into question the legal viability of the proclamation as when enacted. Section 212 (f) had its foundations on the pretext of national security. In nearly seven decades since its passage, the provision has never been used for the sole purpose of protecting the domestic labour marker and job prospects of US workers or to guard against public dependency for health care for that matter. Presidents such as Clinton, Bush and Obama invoked it to target specific or groups of individuals who might pose serious security threats or because of their involvement in blatant human rights violations. Even if we assume combating the virus as a matter of 'national security', the use of 212 (f) for that reason would still amount to a significant departure from the past practice.

And yet, statutory text itself does not contain a national security limitation. Remember, president needs to be satisfied of the fact that the entry of the immigrants would be detrimental to the interest of the nation. Member of Congress opposed the passage of this provision on the ground of its over- broadness. The clear misuse of the same for the very first time was done by President Ronald Reagan when he suspended the entry of Haitian migrants fleeing dictatorship and economic collapse through the Caribbean basin, to prevent them from arriving on the coast of Florida.[87] The impact of this history is ambiguous, underscoring how difficult it can be to build an argument based on the past practice. On one hand, far from responding to a sudden uncontrolled influx, as what President Reagan did, Trump's order purports to halt a very orderly process of legal immigration that already involves extensive screening, including to ensure that non- citizens being sponsored by employers would not be displacing American workers.

[86] Trump v. Hawaii, 4. 138 S. Ct. 2392 (2018).

[87] https://www.washingtonpost.com/news/made-by-history/wp/2018/07/02/line-donald-trump-ronald-reagan-tried-to-keep-out-asylum-seekers-activists-thwarted-him/

But in Trump v. Hawaii, the Court rejected the argument that the INA's orderly system for individualized screening of immigrants for security risks meant the president had abused his 212 (f) authority.[88] More to the point, given that the rationale president for his new suspension is economic, the Haitian example could even provide some quasi- precedential support for Trump. President Reagan's proclamation noted that the Haitian outmigration was straining law enforcement resources and threatening the "welfare and safety" of communities in South Florida. More generally, the interdiction policy was arguably motivated by political opposition to the fiscal and other burdens many people believed at the time a mass influx would impose. As Court emphasized in Trump case that the he "argument about historical practice is a double-edged sword." As more and more different sorts of orders, with different justifications and scope, pile up, the harder it becomes to contend that the statutory power has been used in one particular way that should be treated as probative of the statute's meaning.

Rational or the Abuse of Presidential Power?

Even if the president's proclamation does not exceed the statutory authority under 212 (f), there still remains question as to whether the suspension order is a rational policy response to the COVID- 19 crisis. There is a fair reason to question the connection between the suspension of immigration by new permanent residents and the protection of US workers during a severe and protracted economic crisis. Even if the policy makes little sense as a matter of labour economics, it is skeptical that the Supreme Court would engage in any serious rationality review of suspension proclamation. There are two serious obstacles to the same. The first one is the precedent laid down in Trump' case itself. In that case, the court was very clear that any request for searching inquiry into the persuasiveness of the president's justification was inconsistent with the broad text of the provision. Now this obstacle flows from the fact that under 212 (f), the suspension orders are issued by the president himself rather than other executive branch officials.

While rationality review is relatively common in many administrative law contexts, it is extremely rare in this domain as the provision of Administrative Procedure Act does not apply to the president.[89] And hence it won't matter that the proclamation is likely to have a vanishingly effect on any recovery, if it save any jobs for American workers. Hence, demand of president engaging in evidence- based- decision making before exercising his enormous power could help foster doctrinal evolution over the long haul will help. Even if there are good reasons to resist the application of the ordinary administrative standard of review to presidential actions, there are plenty of reasons when the president has invoked emergency powers, for the judicial branch not to retreat to deference but instead to demand more than a veneer of rationality. Even if courts refuse to test the rationality of the president's reason for suspending the immigration of most of the permanent residents, it is still crucial to understand why such a policy will have very little effect on our economic recovery or on the well being of US workers. The policy's like trivial labour market consequences highlight the truth that the order is a transparent political stunt- one intended to exploit a real crisis in order to advance President Trump's restrictionist immigration agenda. Indeed, even if all permanent immigration to the US were stopped, the notion that closing the US off to foreign labour is the answer to economic devastation seems like a self- destructive form of missing the point or a cover for a far more sinister point, in keeping with the twin objectives of exploiting immigrant labour without creating a path to permanent status and integration for mostly non- white immigrants.

Such clarity could even come through failed litigation, which would force the administration like no other process to justify its actions.

[88] *Id*., ¶ 20.
[89] Valerie C. Brannon, 'Protecting the Nation from Foreign Terrorist Entry into the United States', Congressional Research Service (July 18, 2018), https://fas.org/sgp/crs/misc/LSB10172.pdf

The Way Forward

In absence of a heightened standard of review, are there ways to resist the now steady and unprincipled flow of broad- ranging 212 (f) orders coming out of this White House? This latest order, and potential further attempts to expand it to other forms of immigration, still seems too audacious to be sustained. The notion that the president has the authority to swallow one of the major streams of immigration contemplated by Congress seems shocking and dramatic. The author emphasis that this COVID- 19 proclamation and any similar crisis inspired policies must be met with more than legal and constitutional analysis. Indeed, one of the key lessons of our book is that we should be wary of over- reacting to political crises by elaborating legal doctrines that hamstring the presidency when the underlying problem is deep political disagreement.

The COVID- 19 proclamation gives one more reason to call for an amendment to section 212 (f) and to realize that the threat comes not just from the president himself, but from the absence of congressional response. In a recurring theme of the Trump administration, it can be understood as to how many statutory schemes contemplate a wide ranging policy role for the president with little but the weight of past practice and self imposed restraint to limit the power's exercise. But 212 (f), by its terms, and as it has been read by the Supreme Court, comes as close as any to a presidential suspension power. This delegation of power ought to be radically revised—both to narrow its substantive reach and to impose procedural requirements of the sort that we have come to expect from the administrative state when executive branch officials adopt hugely important policies that affect the lives of so many.

The response to the COVID-19 order must also entail a political repudiation of restrictionism and isolationism. Getting the facts straight about how the proclamation is unlikely to achieve its purported goals will be part of that conversation. But much of the immigration debate is impervious to facts. The debate at its core is about values, ideology, and cultural struggle.

More generally, among the big questions coming out of the COVID-19 crisis will be whether the country and its political system still appreciate the advantages that come with global interdependence, and indeed its necessity. The politics of immigration, in the United States and around the world, could shift ever more toward harsh restrictionism, as part of the gathering nationalist authoritarianism that has marked the last several years. Or, we could shift toward greater solidarity with people across borders. Immigration and asylum restrictions being put into place around the world during the Coronavirus crisis will require us to think hard about how we are going to conceptualize the border once we come out of our public health isolation.

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Trial by Social Media - A New Threat to The Administration of Justice

- N. Asmitha

Could a well written paragraph, so full of accusations on an individual, fly in the face of centuries of Black letter law? Can an individual act as the judge, jury and the executioner in the courts of Instagram and Facebook? If this practice goes unrestricted, the laws of the land will be dragged down the streets with utter disrespect. Is this the development in technology and youth that Abdul Kalam envisaged for India in 2020?

A recent incident over a group conservation on Instagram triggered various controversies throughout all social media platforms. It was alleged that a group of boys were involved in sharing obscene content and making derogatory remarks about women. Following which, police complaints were lodged against various members of the said group. In a surprising turn of events, it was found that a girl had created a fake profile and was involved in one of the conversations that surfaced in the group.

This incident had seen a steep rise in various young women expressing horrid sexual abuse encounters of the past. Various individuals and mental health organisations, took to share these stories, preserving identities, in most cases. One of them was an ostensible victim, who claimed to have been abused by a minor boy, few years ago. Following this, many, in a show of support to the victim, abused the boy behind the incident. As a result of the threats that followed, the boy, only 17 years old, committed suicide. What was pathetic was post his death, a few insensible users had the gall to comment ‘Justice delivered’.

The definition of justice in the 21st century is evolving, pitifully.

Article 14(2) of the International Covenant on Civil and Political Rights, 1966 and Article 11 of the Universal Declaration of Human rights confer a legal right of *presumption of innocence* to the accused. The Indian constitution too, reiterates this as a principle of Fair trial, guaranteed under Article 21. This golden thread of criminal jurisprudence is essential in preserving the integrity of the courts and the dignity of the accused person. The public's agitation over such sensitive issues often fails to approach the accused with a presumption of innocence. The downside of allegations on social media, is the absence of evidence. To believe baseless claims of one and demean another is a pathetic frolic of these platforms.

De Smith gave that "no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the case against him". *Audi Alteram Partem* - no man should be condemned unheard, is an essential principle of natural justice. For justice to be done, both sides at conflict should be allowed to explain their stance. This principle found its place for the first time in Bagg's case[90]. Since then, it has been an inalienable aspect of any prosecution.

If at all someone had reached out to that boy, to hear his side of the story, he would've probably been breathing today. But the sheer ignorance of the fact that the victim's story isn't the only one side and that the flip side of the coin beholds something else, has caused the death of this boy.

To quote jurist John Salmond: "It is public justice that carries the swords and the scales, not private justice". If two individuals were to pronounce justice for their conflict, it would result in bias and chaos. Such would render the purpose of an established judicial system, redundant. Today, more than ever, our courts strive best to serve as a safe haven for the peaceful resolution of conflicts. At such a time, taking the laws in our own hands, is a complete mockery of the age old systems.

The purpose of this article was not to condemn those who have ably supported the survivors, not to scrutinise the women who claim to be victims, but to ponder upon the fact that social media has clouded our judgements to an extent that we find justice in the death of one, without ever getting a chance to hear his side.

Nobody on social media is a judge to another's cause. We shall not take the authority to decide the authenticity of a claim. A matter as sensitive as this, cannot be thoughtlessly branded as true or false. Yes, an evidence for such a ghastly incident is almost impossible at most cases. But does that mean, mere accusations on another shall be considered sufficient proof?

In my opinion it is time we rephrased an important legal maxim: *Nemo iudex in causa sua***,** which translates to – "No-one is a judge in his own cause", into something that shall translate to "Everyone shall not act judge for another's cause". We as a society, should always be aware that any claim, however sensitive in nature, is not proven until a judge declares so. Although it is natural to be carried away and sympathise with the victim, as educated torch bearers of this glorious nation, we should always keep our highest faith in the judiciary and respect its principles.

Yet another aspect to be concentrated on is, a limited, yet sufficient regulation system that keeps a constant check on these platforms. The tendency of some content tends to deprave and corrupt the minds which are open to such immoral influences. These regulators shall have to apply the test of obscenity adopted by the Supreme Court in Ranjit D. Udeshi v. State of Maharashtra[91], thereby not curtailing the fundamental right to free speech. The jurisprudence behind free speech and is so robust that it at

[90] Bagg's Case (1615) 11 Co. Rep. 93b.

[91] AIR 1965 SC 881.

times, has taken a toll on justice itself. This mandates reasonable restrictions to accommodate varying social interests, especially on social media platform.

The only hurdle in the entire issue will be the global presence of the internet and social media, which makes it onerous to control, regulate and fix accountability for material uploaded from abroad and viewed in India.

Although the Indian Penal Code, under section 292 and the Information Technology Act, under Section 67, and various other legislations discuss the punishments for sharing of obscene content, there is no statutory body that governs the same on social media platforms. Print media is governed by the Press Council of India, TV Channels by the National Broadcasters Associations, and Advertisement agencies by Advertising Standards Council. What does the social media have? Self-regulation?

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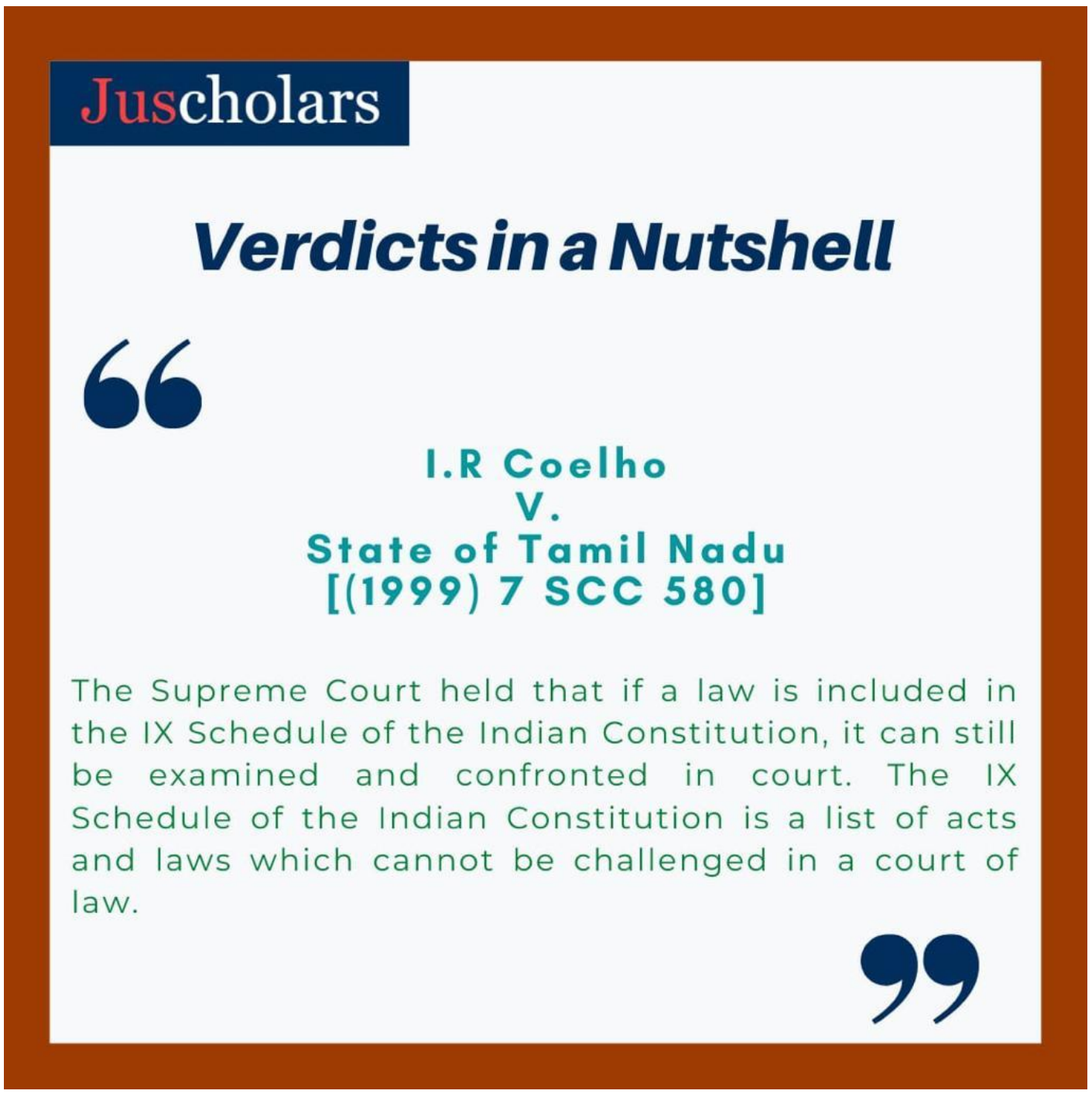

The Legal Aspect to The India-Nepal Border Dispute

-Neha Mishra & Vibhu Raj Gupta

Abstract:

Borders that were meant to bring peace, today stand as the major reason of contention between the nations. This led to the international community realize the importance of boundary treaties that provided for a legal and juridical framework to manage and account for the cross border flow, trade of goods and services and to protect their own. The demarcations were decided at a time when there existed no reliable instrument to provide for a definite demarcation especially when it states for the dynamic demarcations made using geographical features. This invoked the usage of international law as it had a direct affect on the sovereignty of the nation.

This article tries to analyse the possible solutions for dynamic boundaries in the light of India-Nepal border dispute as an ironical case of alleged sovereign infringement by nations while they maintain an open border agreement.

Introduction:

The arrival of British in the sub - continent served with itself the Euclidean concept of static, two dimensional border while the Asians believed boundaries to be a fluid construction by the geographical features of earth. This disagreement led to the inevitable Anglo - Nepalese war of 1814[92] that constricted the territory of Nepal with British India troops on the three sides. The defeat was officiated by signing and ratifying the Sugauli Treaty of 1816 which endowed a third of the Nepal territory including the essential lands of Kamaon and Sikkim to British India. Though it was officiated with the motive to resolve the differences between their political thoughts regarding boundaries; the British India was even favoured by the geographical advantage of the confiscation. The no *firangi* policy of Kathmandu had always been a barrier to British India trade with Tibet where Sikkim was seen as an option. The treaty saw peace without cordiality between the nations but Bhimsen Thapa subdued the uproar fearing the British aggression might put the freedom of Nepal at stake. He even provided British with military assistance during the 1857 war which the British saw as an act of loyalty and awarded Nepal with another treaty of 1857 that freed the confiscated lands of Nepalgunj and Kapilvastu[93]. With time, the dependency of Nepal on the Government of British India escalated[94] and became deep rooted for generations untill the rise of independence movement in India. The loyal of British India; the Ranas failed to cease the affect of the same in Nepal and by 1945, both the Indians and Gorkhas participated for total independence. Hence, the end of British colony in India saw Nepal as a quasi - constitutional State under the monarch. But the changed political scenarios weakened the deep rooted dependency of both the nations on each other.

Background of The Dispute:

[92] Amish Raj Mulmi, Why did the British not colonize Nepal, The Record, (June. 5, 2020, 1:26AM), https://www.recordnepal.com/wire/features/why-did-the-british-not-colonize-nepal/.
[93] Dr. Satyabhavan Saurabh, The Nepal uneasiness over Kalapani, TheHills Times, (June. 20, 3:07 PM), https://www.thehillstimes.in/featured/nepals-uneasiness-over-kalapani/#:~:text=As%20a%20reward%20for%20the,Nepal%2C%20including%20the%20Kalapani%20region.
[94] Treaty of Perpetual Peace and Friendship (1923).

The departure of British colony had left Indian governance in shatters while Nepal suffered the same fate with their people protesting against the autocratic Ranas. It was evident of India having a considerable influence on Nepal and in 1950, India renewed the Treaty of Sugauli as Peace and Friendship Treaty of 1950 with the Government of Nepal under the monarch. Within three months of ratification, India suspended its support to the monarch which led to the return of Shah family as monarch and since then the dependency turned into a state of territorial disputes with Nepal questioning the authority of India in 1969 regarding its mutual security management and dispute over the kingdom of Sikkim in 1975. It was in 1990 that the disputes were formally addressed by the Nations but with the restoration of democracy in Nepal, the relation became sourer and hit its peak when the controversial Nepalese citizenship bill was passed and had infuriated its citizens on the grounds of their culture and sovereignty being at threat as it allowed Nepalese citizenship to the stateless immigrants.[95] Finally in 2005 the Treaty of 1950 was renewed and in 2007 the first meeting of the Joint Technical Level Nepal-India Boundary Committee (Henceforth referred to as JTLNIBC) was held since its establishment in 1981[96] after the Maoist Youth Communist League protested for Greater Nepal.

Issue:

The JTLNIBC had settled 97% of the border disputes between India and Nepal excluding the territory of Kalapani and Susta[97] but neither India nor Nepal have ratified the maps provided for the same. It is the stand of Nepal to not ratify it untill the committee resolves all the existing border disputes while India states to ratify the map if only Nepal endorses the map first as a sign of confidence building measure in resolving the left out disputes.

In November 2019 India had published a new map providing for which Nepal saw an outrage that alleged inclusion of Kalapani in the Indian map while claiming the territory under Nepal sovereignty. Nepal reverted India by publishing a new map that included Kalapani as its own and even commenced the process of amending its Constitution. Hence, it is evident that the issue revolves around the territory of Kalapani where the dispute is both the territory per se and also the definiteness of the demarcation that decides the authority over the land of Kalapani I.e. the origin of the river Kali.

Hypothesis:

The borders are the protective measure of a State's sovereignty because it imposes certain limitations on the arrival and departure of both humans and goods. The India Nepal treaty of 1950 provides the two countries to share an open border I.e. free movement of humans and goods during cross borders and having a minimal Border Security force and management. This system per se negates the concept of boundary. Hence, the border dispute in the name of sovereignty seems irrelevant as long as the open border system is acknowledged.

Present Scenario:

Nepal claims the river Kali originates from a stream at Limpiyadhura, north west of Lipu Lekha. Thus, claiming Kalapani to fall at the east side of the river as a part of the Dharchula district of Nepal.

In case of India, it claims that river Kali originates in the springs located below the Lipu Lekha and there lies

[95] The Nepal Citizenship Act, 2006, Act of Parliament, 1948 (Nepal).
[96] Annual Report 2007 - 2008, Ministry of External Affairs, GOI, pg. 204.
[97] *Supra*. note. 6.

demarcation only in respect of east and west of the river and not in the north of the same.

Argument:

The State is a form of human association distinguished from other social groups by its purpose, the establishment of order and security; its methods, the laws and their enforcement; its territory, the area of jurisdiction or geographic boundaries; and finally by its sovereignty[98]. It is nothing more than an agent of its citizens. Thus, the sovereignty of a State indirectly is read with the understanding of the freedom of humans or their fundamental rights whose adherence forms jus cogens[99] within the international community. This is where the concept of border is realized as it provides for the commencement and end of a Nation. The concept of border has existed since time immemorial where countries have demarcated their sovereignty in the name of land by a static line using pillars or a dynamic line using the natural demarcations of the earth.

India; a State of territories has always had the concept of borders both internally and externally since its first civilization[100]. The invasion of British demarcated the sub-continent in a a legal and juridical framework to have border management. The same need was realized in relation with Nepal which is today's international mayhem.

Applicability of International Law:

International law is an amalgamation of various sources that lays down the obligations of international community in order to protect the fundamental interest of every State and any suppression even of the slightest nature, contrary to the same shall be considered a crime against the whole community. This upholds the sovereignty of a State at its highest priority. Thus, border disputes find its relevance as it questions the sovereignty of a State which as per the law shall be resolved by peaceful means and respect to other sovereign States[101]. The jurisprudence behind international law provides for collective security and the lack of universal law or opinio juris on border disputes does not negate the delivery of justice as it also inculcates the concept of posteriori. The precedents provided by the International Court of Justice might not be the law but it definitely provides the practice that shall be inclusive of becoming an international law.

Applicability of a colonial treaty after independence:

The jurisprudence established by international law that the treaty lies unaffected even after succession by any State[102]. Moreover, there lies no other law of demarcation between the nations and the fact that the same treaty was renewed in 1950 endows an obligation of adherence on both the nations[103] and on India as it enshrines the fulfillment of the same[104].

Legal analysis of the possibilities:

The territorial dispute arises on the foremost due to the demarcation being dynamic in nature which is called as the shifting border. These kind of borders create problem in defining the law as well as managing the usage of it as a resource. The International Court of Justice provides for the application of avulsion if the river changes its course rapidly and application of accretion if the river changes its course gradually with time that is negligible to human

[98] Sovereign political entity, Encyclopedia Britannica, (June. 5, 2020, 9:35PM) https://www.britannica.com/topic/sovereignty
[99] Vienna Convention on the law of treaties, 1969, art. 53, (1969).
[100] Artha philosophy, Shodhganga, (June. 5, 2020, 9:45PM) https://shodhganga.inflibnet.ac.in/bitstream/10603/67077/8/08_chapter%201.pdf

[101] UN Charter, art. 2, cl. 3, (1945).
[102] Wadlock, Report on Succession of States and Governments in Respect of Treaties, 1968, pg. 112, (1968).
[103] *Supra.* note. 11.
[104] INDIA CONST, art. 51

eyes[105]. In the case at hand, river kali has gradually changed its course due to the environmental factors that has dissolved lands or created new ones. Thus, the concept of avulsion could resolve the new lands that are in contention but not that of the origin of the river or the territory as a whole.

The traditional international law provides for border dispute resolution on the following basis of treaties and the existing practice of the nations regarding the same. The originally drafted and renewed treaties between the nations neither have exclusive maps nor have any evidence regarding Kalapani being returned to Nepal[106]. These dispositive[107] treaties provide with certain rights that are not invalidated with the in-applicability of the treaty. It is even seen that the Constitution of India till today inculcates Kalapani as its territory unlike Nepal[108].

A territory claimed as per practices shall have sufficient evidence of occupational existence and local authority presence. The existing practices in regard to the territory of Kalapani has been backed by both the nations under the administrative control with the help of population census reports and tax return filings. The claim that India has military hold over the area does not stand as a relevant consideration but recognizing the welfare activities by the administrative bodies in Kalapani gives India an extra edge over Nepal. Above all, the jurisprudence considers the welfare capability of the nations to decide on territorial disputes because nothing stands over the need of human rights which includes a dignified standard of living.

Conclusion:

Nepal shares border with five States of India that creates cultural and economic exchanges for both the nations while creating strategic benefits and role perception on an international platform. India is Nepal's largest trade partner and the largest source of foreign investments. The open border provides 10 million Nepalese citizens residence and livelihood in India along with citizenship availability. There are 7 *Gorkha* regiments in the Indian army with almost 40 battalions. Most of the soldiers are recruited from Nepal as of today and at least 25,000 Nepalese soldiers are on active duty in the Indian army. Apart from all these, Nepal is the highest receiver of humanitarian assistance from India. The importance of Kalapani for India is its geographical essence that prevents Chinese infiltration. Thus, being an actual threat to the sovereignty of India.

The border dispute does arise on the note of sovereignty being affected but the larger story hides behind the political will of the States. The countries have lived as one irrespective of the borders which in here is nothing more than an imaginary demarcation for the people around the boundary. The disputes could always be solved through the doctrine of self-determination[109] which in reality is the meaning of democracy.


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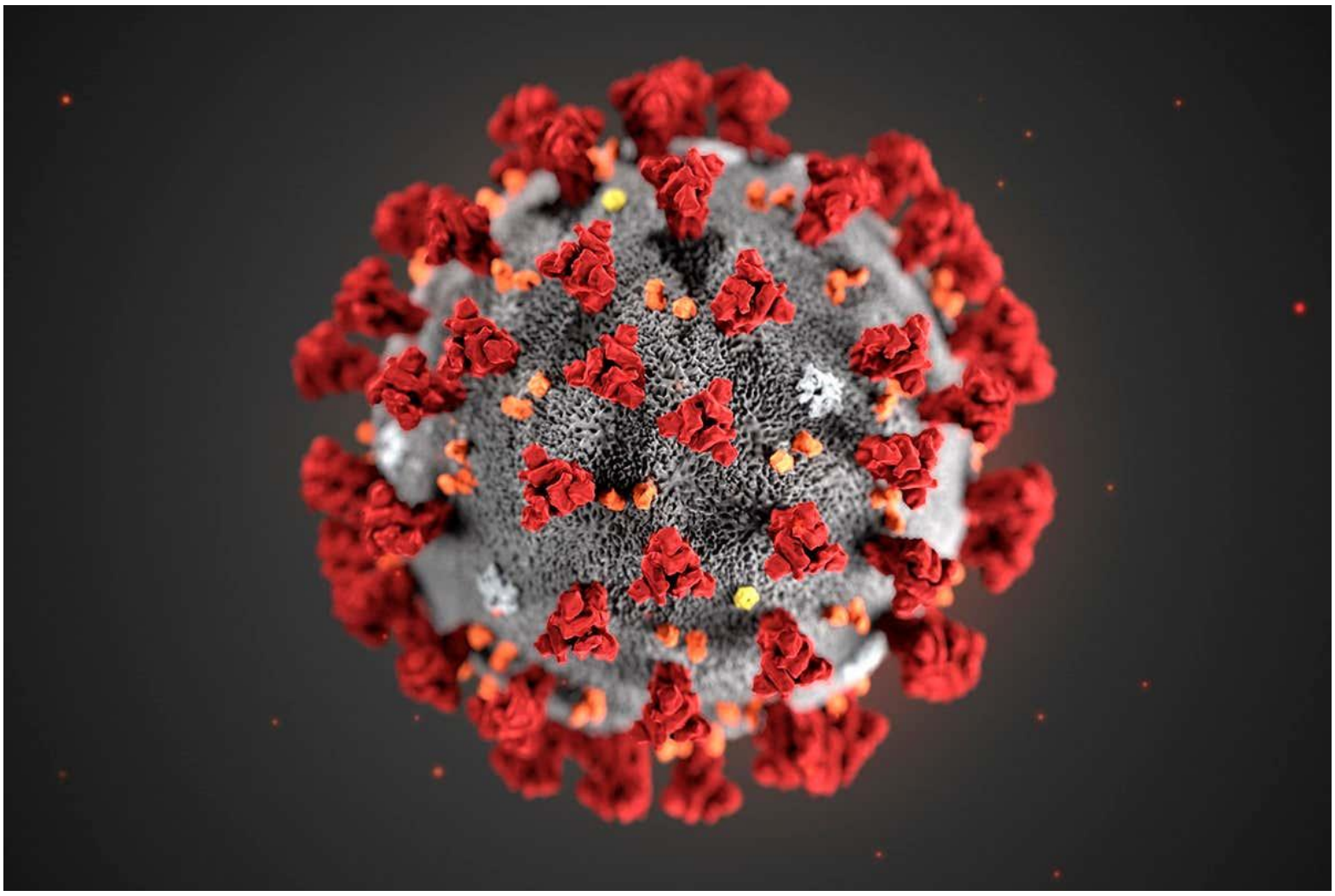
[105] Arkansas v. Tennessee, 246. U.S. 158, (1948).
[106] *Supra*. note. 4.
[107] McNair, Exception to Doctrine of Clean Slate, pg. 93.
[108] NEPAL CONST, art. 2, cl. A.
[109] Maganbhai Ishwarbhai Patel vs Union Of India, (1969) 254 S.C.R. 3 (India).

What role does Aristotle's theory of Human Nature play during the COVID-19 Pandemic?

- Pahul Wadhwa



Our hon'ble Prime Minister Mr. Narendra Modi announced a complete lockdown for 21 Days in the country due to the deadly outbreak of Novel Coronavirus Disease (COVID-19) on 24th March, 2020.[110] This has affected the public at large and especially the daily wage workers since this has left many delivery services and vendors of essential services unprepared, leading to confusion and clashes between police and their staff in many areas.[111] They can do nothing but sit at homes as anyone can be found infected out there. After the announcement of the lockdown suddenly, the spark of panic spread widely amongst the general public and people rushed to various places for various purposes; this continued for the next and the first day of lockdown which was followed by the Police brutality on the migrant workers who were their way home.[112] This is what pushed the student to relate it with the theories given by Aristotle.

[110] *India will be under complete lockdown for 21 days: Narendra Modi*. 24th March, 2020. The Economic Times. https://economictimes.indiatimes.com/news/politics-and-nation/india-will-be-under-complete-lockdown-starting-midnight-narendra-modi/articleshow/74796908.cms. Date of Access: 25th March, 2020.

[111] *Coronavirus lockdown in India: 'Beaten and abused for doing my job'*. 28th March, 2020. BBC News. https://www.bbc.com/news/world-asia-india-52063286. Date of Access: 30th March, 2020.

[112] *How India plans to put 1.3 billion people on a coronavirus lockdown.* Suparna Chaudhry and Shubha Kamala Prasad. March

Human being possesses a unique capacity for moral choice and reasoned speech. Not only reason distinguished humans from other social species, but they alone had a perception of good and evil, right and wrong, just and unjust, implying that these faculties could be developed only in company with others, not in isolation.[113] What is important to note is, individuals could cultivate reasoned speech and moral choice with a view to achieving their full potential; the absence of these qualities would mean that human beings were worse off than animals.[114] Aristotle asserted that education was an effective way to produce political unity and for him, education was more than merely acquiring skills and common beliefs as it symbolized a way of life.[115] The aforementioned philosophy of Aristotle can be related to today's condition in our country. He says that humans would be worse off than animals if they wouldn't have the capabilities to cultivate reason and speech. This quality is highly needed today. One can easily come across various incidents of people deliberately infecting people around themselves by coughing or spitting.[116] Not only this, but we also come across news articles which clearly shows how the citizens of our nation are violating the laws which have been invoked not for anything but for the protection of the citizens themselves. Many FIRs have been lodged and people are beaten because they think that since they are not infected, they can roam around freely.[117] These are all the examples of the absence of reason or the moral choices which Aristotle talks about. He says that *"if he be without virtue, he is an unholy savage being, and worse than all others are the indulgence of lust and gluttony".*[118] The line was crossed when the medical officials were attacked and harassed in Indore city of Madhya Pradesh, India.[119] Aristotle clearly states that the quality of life within a state would depend upon those who constitute it and the end they wished to pursue. But the condition clearly suggests the lack of wisdom, reasonability and moral virtues in the citizens of our country. True it is that Aristotle explains; the desire for human company, a basic and universal human need, is so deeply entrenched that even saints and monks who otherwise renounce normal society and human relationships, form their own community! But this does not defy, in any sense, that this tendency of the people would bring them outside their homes when it is not allowed so. This activity is just opposite to a practically and wisely carried out activity.

Happiness, for Aristotle, was not a state of mind or feeling. The good, we are told, is happiness, which is an activity of the soul.[120] Happiness was attained by the exercise of two types of virtues, the ethical and the intellectual. Intellectual virtue was the knowledge of final causes and that included "practical wisdom", whereas, the Ethical virtues involves the moral virtues which according to Aristotle, could never be taught as it was a product of right actions instilled through habit, training and discipline. The emphasis was to acquire excellence by *doing* rather than *knowing* the right thing. Now, one can very conveniently understand how both of these virtues have consequentially become highly substantial in times of this pandemic. Here we need the practical wisdom in order to protect ourselves as well as our friends, family and other closed ones from this deadly disease as well as we need to support, appreciate and motivate everyone and especially the frontline soldiers i.e. the medical officials and the police officials who are working day and night hard to protect the citizens of the country. Every measure taken to support the state either

30, 2020. The Washington Post. https://www.washingtonpost.com/politics/2020/03/30/how-india-plans-put-13-billion-people-coronavirus-lockdown/. Date of Access: 1st April, 2020.

[113] Mukherjee, Subrata, and Sushila Ramaswamy. *History of Political Thought: Plato to Marx.* 2nd ed., PHI Learning, 2019.

[114] Ibid.

[115] *Supra Note* 4 at 115.

[116] Jackie Solo. *Man, with coronavirus spits in train passenger's face, then drops dead.* New York Post. April 2, 2020. https://nypost.com/2020/04/02/man-with-coronavirus-spits-in-train-passengers-face-then-drops-dead/. Date of Access: April 3, 2020.

[117] *Coronavirus: FIR against 66,000 people for violating lockdown, informs Delhi Police PRO.* April 4th, 2020. The Economic Times. https://economictimes.indiatimes.com/news/politics-and-nation/coronavirus-fir-against-66000-people-for-violating-lockdown-informs-delhi-police-pro/videoshow/74987912.cms. Date of Access: April 4th, 2020.

[118] *Supra Note* 4 at 117.

[119] *Coronavirus: India doctors 'spat at and attacked'*. Vikas Pandey. April 3rd, 2020. BBC News. https://www.bbc.com/news/world-asia-india-52151141. Date of Access: April 4th, 2020.

[120] Russel, Bertrand. *History of Western Philosophy.* Simon and Schuster, 1945.

morally or financially in this current situation is a moral good in the words of Aristotle.

We now come to the famous doctrine of the *Golden Mean.* Every virtue is a mean between two extremes, each of which is a vice. This is proved by an examination of the various virtues for example Courage, Temperance, Generosity etc.[121] When we examine the present condition, we come across some societal elements who are either too confident about themselves or are too scared/frustrated regarding the condition. The police are compelled to take strict action against those who think they are safe and can roam around easily.[122] Whereas, on the other hand there are people who are highly frustrated and scared of the current scenario that some have even committed suicides.[123] This is where it can be compared that somewhere it has to be a balance in order to maintain harmony amongst the lives of the people. And this is where Aristotle says that, the middle path, or the via media, was the one to be established as the general rule of right conduct and moral virtue.

This makes very clear that in this time where the humanity as it grave risk, we have to be ideal in ourselves and make the best out of whatever we have. We can fight it with grace and dignity!

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[121] *Id.* at 174.
[122] *Many mock govt lockdown, go roaming on roads.* Times News Network. March 24th, 2020. The Times of India. https://timesofindia.indiatimes.com/india/many-mock-govt-lockdown-go-roaming-on-roads/articleshow/74784064.cms. Date of access: March 26th, 2020.

[123] *Frustrated at not being able to get liquor during lockdown, 2 commit suicide in Karnataka.* Press Trust of India. March 29th, 2020. India Today. https://www.indiatoday.in/india/story/frustrated-at-not-being-able-to-get-liquor-during-lockdown-2-commit-suicide-in-karnataka-1661060-2020-03-29. Date of Access: April 2nd, 2020.

Fake News and COVID-19: A Reality Check

- Sachet Makhija

"We are not just fighting epidemic; We are fighting an Infodemic: Fake news spreads faster and more easily than this virus and is just as dangerous"

-Dr TedrosAdhanom Ghebreyesus

(Director General, W.H.O.)

Abstract

With the increase in the number of corona-virus cases in India, there is also an increase in the number of fake news that is spreading throughout the country. The Central government has been dealing with the critical situation to implement lockdown in the country and is also required to face another major challenge of imposing regulation on the media so as to restrict the spread of fake news. The key aspects on the issue is whether imposing restriction on the media would be violative of Article 19 of the Constitution and whether imposing such restrictions is reasonable to maintain the public order considering the prevailing circumstances. It is also important to assess whether the prevailing laws in India are capable of punishing the offenders who spread the fake news.

Harassment caused to the migrants due to the fake news

The inevitable lockdown brought with it several hurdles to be faced by the Central and State Government, such as, providing basic amenities of food, shelter, drinking water

to poor people, controlling people to stay indoors, restricting the transport and movement of people, allowing basic necessity shops to be opened, convincing the labour class to maintain lockdown, etc. However, despite making endeavours the Government has proved short of providing food and shelter to the humungous number of migrant workers in each State. The people deprived of these necessities were roughly estimated to be around 80 crore citizens throughout India. One of the other major challenges faced by the Central Government and State was to provide financial assistance and to stop movement of 4.14 crore migrant workers/employees. These migrant workers had started travelling barefoot in groups and were thus defeating the social distancing norm which is the sole purpose of the lockdown. Such groups of people travelling barefoot in groups were extremely prone to the possibility of carrying the infection of Covid-19 and therefore it was required to stop them from travelling to their villages.[124]

In such critical circumstances, some fake news was spread that the lockdown would continue for three months, which created a panic driven situation as the migrant workers believed in the news and started to migrate again. As workers were in number of thousands, it was impossible for the police force to control as the mob was agitated by the fake news of three months lockdown. All of them wanted travel to their hometowns/native places desperately. This entire situation created tremendous panic and numbers the workers ultimately lost their lives in the stamped and chaos at the spots of gathering.. Hence the menace caused by fake news could not be overlooked and if it continued it would have created an irrepressible condition. Therefore, the Supreme court passed an order in the case of Alakh Alok Shrivastav vs Union of India, the Court held that "In particular, we expect the Media (print, electronic or social) to maintain a strong sense of responsibility and ensure that unverified news capable of causing panic is not disseminated. A daily bulletin by the Government of India through all media avenues including social media and forums to clear the doubts of people would be made active within a period of 24 hours as submitted by the Solicitor General of India. We do not intend to interfere with the free discussion about the pandemic, but direct the media to refer to and publish the official version about the developments." It is least expected that the media owes a sense of responsibility in such a critical situation in India. The workers are bound to be terrified by such fake news as they are not in physiological states of mind to verify the news if correct. It is much expected that they will react in an impulsive manner to such fake news. Therefore it is mandatory to avoid the fake news being spread in the society.

Communalisation and Hate Speech in The Amidst of Lockdown

Some days before the lockdown in India, the Tablighi Jamaat, a small Islamic organisation, conducted a religious congregation in the Nizamuddin area of New Delhi where thousands of people from India and all around the world had gathered between 12thMarch'20 to 22thMarch'20. The Government of Delhi by that time had already issued an order on 13thMarch, which prohibited more than 200 people to assemble at any place. On 16th march '20, another order was passed, to prohibit more than 50 people from assembling at any place. Both these orders have been violated by the members who attended the Markaz event of Tablighi Jamaat organisation. Soon a news spread in the media that most of the members who attended the Markaz event are infected with Covid-19. This created havoc in Delhi, wherein more than 9000 people were tested and quarantined. In the midst of lockdown, it further led to spread of fake news, hate speeches, communalisation of Markaz event wherein the members of Tablighi Jamaat were blamed for spread of

[124]Status Report filed by Union of India in Alakh Alok Shrivastav vs Union of India, Supreme Court 31st March 2020.

Covid-19 virus and were even considered as Terrorist & members of Jihad.[125]

A report by 'Media Scanner' had published a long list of 94 fake news which was spread against Muslim community to communalize the issue of Markaz event. This even led to antagonism between Muslim community and other religious groups as the Muslim community claimed that the media was selectively broadcasting the 'Markaz event' and was not broadcasting other similar events like the festival in Karnataka's Kalburgi district, which reported India's first Covid-19 death on 10th March 2020. The same place is now an outbreak hotspot. Another meeting, on March 23rd , held by the Bhartiya Janta Party in Madhya Pradesh, to celebrate their return in power was not broadcasted. Dismayed by the unwarranted attention provided to the Markaz event, a petition was filed before the Supreme Court in the name of Jamiat Ulama-I-Hind &Anr. Vs Union Of India &Anr wherein a ground was raised that communalisation of Markaz event was violative of Article 21 as it was taking away their Right to live with dignity. There were other crucial legal grounds like such an act by media is violative of section 5 of Cable Television Network (Regulation) Act 1995 which states that "no person shall transmit or re-transmit a cable service any programme unless such advertisement is in conformity with the prescribed code" read with the rule 6 (1) (c) of Cable Television Network which "prohibits any programme which contains attack on religious or communities or visuals or words contemptuous of religious groups or which promote communal attitudes".[126] Needless to say that such news is not only violative of fundamental right to live and dignity but is also highly treacherous for the society.

Freedom of Speech and Expression: Legal and Ethical checks and balances on the Freedom of Press

Under Article 19(1)(a) of the Constitution of India, all the citizens have the right to freedom of speech and expression. This freedom of speech and expression includes freedom of propagation of ideas[127] The right to freedom of speech and expression also includes the right to get information. The right to get information is also enshrined in the Article 19(1) and (2) of the International Covenant on Civil and Political Rights which states that everyone shall have the right to hold opinions without interference. The sub-clause (2) of ICCPR further states that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in form of art or throughout any other media of his choice.[128] One of the integral parts of the right to freedom of speech and expression is the freedom of press. In today's free world, freedom of press is the heart of social and political intercourse. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. The news articles which are published in the newspaper have to be critical of the actions of the Government in order to expose its weaknesses. Such articles are a threat to the power of the Government. Thus the Government naturally takes recourse to suppress the news in different ways.[129] But it has to be remembered that this freedom of press is not absolute, unlimited and unfettered at all times in all circumstances, as giving an unrestricted freedom of speech and expression would amount to an uncontrolled license. If reasonable restraints, it would led to disorder and anarchy in the society. The freedom is not to be misunderstood as to make the press free of any responsibility. In fact, the element of responsibility must

[125]https://scroll.in/article/959806/covid-19-how-fake-news-and-modi-government-messaging-fuelled-indias-latest-spiral-of-islamophobia

[126]Petition by Jamiat-ul-hind vs Union of India

[127]RomeshThappar vs state of Madras AIR 1950 SC 124

[128]Union of India vs Assn. For Democratic Reforms (2002) 5 SCC 294

[129]Indian Express Newspaper (Bom) Pvt. Ltd vs Union of India (1985) 1 SCC 641

be the conscience of every journalist. The protective cover of freedom of press must not be thrown open for. If a newspaper publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by the court of law.[130] Therefore the media though has fundamental right of expression, it is least expected that the same should use and exhibited with professional responsibility, prudent intelligence, and the collective impact of the said news in the society at large.

Other Legislation to control Fake News

Disaster Management Act, 2005

Section 54 of the Disaster Management Act provides for punishment to a person who makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic. Such a person shall be punished with imprisonment which may extend to one year or with fine[131].

Indian Penal Code

Section 505 of the Indian Penal Code deals with statements conducing to public mischief wherein anyone who makes, publishes or circulates any statement or rumour with a intention to cause false alarm in public or act against public tranquillity or with intention to incite any class or community to commit an offence shall be punished. It also provides for whoever makes, publishes or circulates any statement creating enmity or hatred or ill will between classes on grounds of religion, race, case or community etc shall be punished[132].

The Press Council Act, 1978

Section 14 sub clause (1) deals with Power to censure wherein on receiving any complaint the council believes that the newspaper or journalist has offended standards of journalistic norms or committed professional misconduct they may warn, admonish or censure the newspaper, editor or journalist[133].

Conclusion

Considering the prevailing scenario, it can be said that the right to freedom of speech and expression including the freedom of press is a double-edged sword. The right to freedom of speech and expression is an indispensable part of any democracy and can be easily misused to spread rumour, fake news etc. Therefore, restrictions need to be placed on the spread of fake news in crucial times of lockdown, as otherwise unchecked use of this right can lead to innumerable problems creating pandemonium and turbulence in the country. The citizens of the country should also act responsibly and reasonably before believing and acting on such fake news. It is imminently demanded in this crucial phase of Covid-19 that each citizen discharges his duty with conscientiousness so as to protect people from any untoward incident and at the same time preserve harmony in the society at large.

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[130]IN RE: Harijai Singh And Anr. IN RE: Vijay Kumar (1996) 6 SCC 466
[131]Disaster Management Act,2005
132Ibid.
[133]The Press Council Act, 1978

Interview: Siddharth Chapalgaonkar (Advocate at Bombay High Court; LLM, Mumbai University)

Mr. Siddharth Chapalgaonkar is an Advocate at Bombay High Court. He has done Masters in Law from Mumbai University and Bachelors from ILS Pune. We managed to ask himout following questions.

Tell our readers about yourself?

I am a civil engineer turned lawyer currently practicing as a junior advocate primarily in Bombay High Court and other courts in Mumbai. After my engineering education I briefly pursued Civil Services Examination and while preparing for the same, I developed an interest in law and started my law education at ILS Law College Pune.

How was your experience at ILS Pune?

My three years at ILS were excellent. We had a resourceful faculty who taught us basics of law which definitely strengthened our base. I got equally wonderful friends, juniors and colleagues in a lush green campus with a hill in the background. ILS is known for its legacy of almost 100 years and has an enriched law library. I tried to spend most of the time in library reading legal as well as non-legal resources.

You have done Masters in Law from Mumbai University. Please share your experience

I am pursuing a Masters in Law in Human Rights Specialisation. It is a 2 years course and I am able to pursue it because the lectures take place in the evening and students can attend the same after Court hours.

Tell us about your experiences after law school as a professional.

One year of my experience as a professional has been a great learning experience. I have got an opportunity to be a junior of a very upright, strict and cordial senior Adv.

Nitin Deshpande, who tries to ensure that his juniors are learning. He even entrusted me a very important criminal appeal to argue where I argued for 7 appellants who were convicted for a murder of a man. The High Court overturned the conviction and set aside the conviction of the appellants. The Judgment also got reported in SCCOnline as well as AIROnline. Apart from it I realised that we get to learn more from our mistakes than where we do the things correctly. More than a professional, I tried to observe the happenings of Court from a human perspective. Be it Bar room, library, canteen, clerks, other court officials and most importantly parties(clients). I realised that being part of administration of justice is truly worthy experience and all this is setup for welfare of parties. These are the experiences which won't be written in any book but will have to be taken on own.

What are your views on career choices after law?

In 21st century with a technology driven and globalized world there are many career choices that a law graduate can have. Here are few of them apart from litigation.

Working as a consultant: A lawyer can work as an independent consultant and advice clients on various areas of law.

Alternate Dispute Resolution: With increasing burden of cases on Courts, the reliance on ADR mechanisms like Arbitration, mediation etc. has definitely increased and a law graduate seek opportunities in the same.

Civil Services and Public Policy: A lawyer can contribute immensely if he is interested to work in field of public policy. This can be done by writing civil services exam and clearing it or lawyer can work in public policy domain independently or with an organization.

Legal Tech: This is very new and fast developing area of law where a lawyer can chart a very different career path. Interface of technology and law is being explored to solve the various problems in legal sector.

You are an advocate at Bombay High Court. How would you explain Litigation as a career to law students. What are the hardships one has to face?

Litigation is a tough choice indeed and it demands consistent efforts for improving ourselves. Once the gestation period ends and your start showing some fruits there is no other career like litigation. As senior counsel Arvind Datar mentions it took eleven years for him to purchase a new car, that too a second hand one. From his example we can understand how challenging is the profession.

About hardships it depends upon how an advocate takes those. The hardships can be in any form, from understanding perspective, drafting perspective, arguing or getting briefs. Hence one needs to be patient and enjoy the learning process. That is why it is called practice!

Any parting advice for the law aspirants?

The most important advice from my side would be that increase your learnability. As a lawyer we need to be inquisitive about every possible thing around us. It helps us in all foundation development which is useful for our law career.

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Jus Weekly:

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Eligibility:

The invitation is open to all students (not restricted to law students), academicians, lawyers and other esteemed members of the legal fraternity.

Topic:

The participants can select any topic related to law.

Guidelines for Contributions:

- All articles must be submitted in English Language only.
- Length of the article must not exceed 1500 words. (Relaxation as to word limit may be permitted)
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- All submissions must follow the uniform style of citation.
- All submissions shall be made to ***jusweekly@gmail.com.***
- Details of the author(s) shall be provided in the body of the email or as a cover letter.
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