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NILIMA

A JOURNAL OF LAW AND POLICY

VOLUME ON

Explorations in Law and Reforms

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A Foreword from the Editor

Studio Nilima: Collaborative Network for Research and Capacity Building is a collective of lawyers, academics, social scientists and students, working at the intersections of law, conflicts, governance and culture. It brings together thinkers, learners and practitioners to unfold new ways of engaging with contemporary Assam, its people and politics. Our journal Nilima: A Journal of Law and Policy is an extension of these visions and seeks to create a forum to engage, reflect and dialogue on the contemporary socio-political climate of the region.

This edition of *Nilima* has explored law and its policy implications over key areas which pose some of the most important public policy questions of the decade. The contributions in this edition can be visualized in broadly four sections: *Explorations in Theory*, *Reforms*, *Rethinking Regimes* and *Notes from the Courtroom.* The writings are from a cross-section of scholars and practitioners across various areas of specialization ranging from legal theory to arbitration. The common thread weaving through them however is a critical lens on the evolution of the law. The reader will find underlying themes such as the need to uncover new theoretical frontiers and a concerted push for legislative reform recurring across sections.

The volume opens with *Explorations in Theory* which takes a deep dive into core ontological questions into foundational concepts of the law such as consent and shifting of criminal liability. Mark Dsouza in "The Power to Consent and the Criminal Law" delves into key ontological elements relating to the concept of consent in criminal law. Dsouza weaves together the existing views about some of the ontological issues regarding consent to generate a theory of consent that is coherent across the law. Apart from enumerating certain minimum conditions necessary for the grant of consent, Dsouza builds a case to argue that the concept of consent does not include ratification by referring to some general principles of criminal law. Dr. Hiren Ch. Nath in "Shifting of Criminal Liability: An Economic Analysis" delves into the issue of shifting criminal liability by one offender to another in the natural process by which they commit or intend to commit offences. He points out that there is a utility of redefining criminal liability in terms of shifting, which is already being used in an implied mode in our criminal and penal philosophy.

On the other hand, Arunjana Das in "Legal Authoritativeness of Dharma: Indian Philosophical Approaches to Language and Implications for Dharma" looks at the bearing of language on the authoritativeness of Dharma. One of Das's findings is that there is a paradox of sorts between the situation of the locus of legal authoritativeness of dharma and our understanding of language. Overall, Das finds that partly on account of varying linguistic philosophical ontological commitments, dharma as an ethical category is not a very stable one.

In the second section, *Reforms,* both the authors have explored integral areas within Indian election law which require innovative attempts at reform to ensure their continued relevance. In "Radical Overhaul of the Anti-Defection Law is a must to curb Defections in India", Arunabh Chowdhury makes a compelling argument for reforms to the current regime of anti-defection law under the Tenth Schedule of the Constitution of India. Chowdhury notes that there has been continued abuse of the provisions of the Tenth Schedule coupled with the questionable role played by Speakers of legislative bodies in several cases. To circumvent this long-standing issue, Chowdhury suggests among others that constitutional amendments to ensure that disqualified members or members who have resigned as part of an effort to topple governments should be barred from holding public office of any nature for a period of 5 years.

Shruti Sarma Hazarika in "The Recall Paradox" examines the right to recall through an interdisciplinary lens, using both political theory and an analysis of comparative practices across other jurisdictions. Hazarika finds that while giving citizens a right to recall might contribute to improving electoral representation, it should be seen as a part of a larger bundle of reforms aimed at making representative institutions more inclusive, deliberative and reflexive. The introduction of the right to recall would entail practical difficulties and repercussions which would have to be protected against by ensuring mechanisms such proper judicial scrutiny to check on institution of frivolous recall petitions apart from devising a fool proof method of recording and analyzing the performance of representatives.

The third section, *Rethinking Regimes,* goes a step further by looking at existing regimes in two different branches of law, arbitration and environment. Examining current regimes and policies in the field, both authors suggest ways to reimagine solutions to the regimes which have already received much critique. Rangon Choudhury in "Balancing the Pendulum between Confidentiality of Arbitration and Publication of Arbitral Awards to promote transparency in International Commercial Arbitration" examines the desirability and significance of publication of arbitral awards as a means to respond to the calls of enhanced transparency in arbitration. In addressing the "legitimacy crisis" as regards lack of transparency that the international arbitration community appears to be labouring under, Choudhury sets out on analysis of the legal regime for confidentiality in arbitration and how publication of awards can interact with it. In conclusion, he argues that publication of arbitral awards is necessary not just to uphold democratic virtues that states are duty bound to preserve but because publication impacts everyone involved in the process positively, including parties. In Choudhury's opinion, it is only when the public interests are fulfilled can arbitration evolve as a "transparent and accountable dispute resolution process" upon which the public can put their faith in.

Vikram Rajkhowa in "REDD+ and Indigenous People's Right over Forest in North-East India" examines REDD+ which is a voluntary climate change mitigation approach that has been developed by Parties to the United Nations Framework Convention on Climate Change (UNFCCC) in the context of

North East India. Rajkhowa argues that in practice, REDD+ schemes largely allow companies to accelerate pollution while purchasing land and resources in the developing world at bargain prices. In conclusion, Rajkhowa points out that an important omission from the REDD+ principles is that of indigenous peoples and rights, which needs to be factored in as its implementation could lead to conflicts and displacement of indigenous and tribal peoples.

In closing, the journal presents *Notes from the Courtroom* where we have reflections and critique from two eminent practitioners on the current state of affairs. Lalit Bhasin in "New Generation Lawyers" reflects upon learnings from a long and very distinguished career in the law and offers sage advice for the new generation of lawyers who are embarking upon the profession. Anshuman Singh in "Liberty at the cost of Selective Discretion and Justice: A Comment"dwells upon the recent criticism that has been faced by the Supreme Court of India in several recent cases concerning personal liberty. Analyzing the current state of affairs in conjunction with the law of the land, Singh concludes with the hope that the rule of law is monitored fervently in both letter and spirit and that discretion is judiciously applied to each and every case.

I would like to extend my heartfelt gratitude to all the contributors for their commitment, support and sharing their research and reflection with us. I would also like to express my gratitude to the team at Bhabani Offset & Imaging System Pvt. Ltd., in particular to Bidhan Dev, Bibhash Dev and Prince Choudhury. It has been a pleasure working with you and seeing your commitment in even such difficult times. I hope this edition of the journal sparks new avenues of research and thought in these areas and opens up new frontiers in the discourse.

Mr. Justice Brojendra Prasad Katakey
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January 26, 2021

Contents

EXPLORATIONS IN THEORY

The Power to Consent and the Criminal Law

Mark Dsouza

Although consent is widely accepted as one of the most important situational variables that the law confronts, and is widely theorised, many important ontological questions about consent remain disputed. Debate continues about whether consent involves a mental state of choosing or desiring; whether it consists of invitation or indifference to a boundary crossing; whether it is perfected by a subjective state of mind or a performative token; and whether it can be granted retrospectively.[1] The diversity of academic opinion on such fundamental ontological issues stems from the fact that different writers seem to use the word consent differently, referring to various related, but subtly different ideas and phenomena. As such, the question, 'What is consent?' has plausibly been answered in different ways, each shedding some light on a different characteristic of the concept. This, perhaps, is one reason that theorists such as Wertheimer abandoned that question altogether, and chose to focus instead on a different, logically subsequent, question: 'How does consent achieve what it does?' (Wertheimer, 2000). Wertheimer's approach has obvious advantages – it allows him to identify and describe features of consent that define its importance in the practical world rather than the philosophical one. With his findings, Wertheimer inductively hypothesises about the nature of consent, and suggests answers to vexed

problems of law. Unfortunately, as I will point out in this paper, there are a variety of plausible opinions about *what* consent does, and therefore answers to Wertheimer's preferred question that focus only on a limited set of cases, tend to give us only a partial picture, poorly suited to inductive theorising about consent. Instead, I suggest that there is value in asking another question, logically prior even to the question of what consent is. In this paper, I examine what it is to have the ability to give valid consent, and then study the implications of the answer for issues relating to the ontology of consent, how one may consent, and how consent is different from ratification. Given the richness of the existing discourse on these issues, many of the positions for which I argue will already have some academic support. This paper supplies a principled argument to link these existing views about ontological issues, such that they generate a theory of consent that is coherent across the law. I focus primarily on issues arising in the criminal law, although as a concept, the importance of consent transcends the civil-criminal divide in law.

The arguments I make are not meant to explain or justify the existing state of law in any jurisdiction. They are entirely normative, and describe the generalised features of consent in a liberal state. I focus on the liberal state because the features we associate with liberal theory dovetail nicely with the features we associate with consent. In the liberal tradition, the central case for the heavy-handed intervention of the criminal law is conduct that causes harm to others (Mill, 2005). Harms to the self are excluded from this category. This reflects the fact that in liberal theory, respect for an individual's autonomy requires that she be left free to decide for herself where her best interests lie (Mill, 2005, pp. 112-113). This autonomy is also the source of the moral power of consent (Hurd, 1996, p. 124; Alexander, 1996, p.165).

Liberal theory also gives us a convenient framework for understanding consent, which I adopt here. If respect for an individual's autonomy over her own interests extends to allowing her to extinguish, or adversely affect them, it must surely also extend to allowing an individual to place her interests at the disposal of another. This act of autonomously choosing to place one's interests at the disposal of another appears intuitively to be a core necessary

(even if not sufficient) attribute of valid consent. On this view, the giving of consent is one way in which a person may exercise moral autonomy over her interests. With this minimalistic working understanding of consent, I now examine ontological issues relating to consent.

1. Understanding Consent

A. The ability to validly consent is a power

Beyleveld and Brownsword, in their meticulous study of the Hohfeldian nature of consent, argue that in consenting, a person either exercises a power to change, or authors a change internal to, the baseline relationship between the parties to the consenting transaction (Beyleveld et al, 2007, pp. 64-85). The appropriate characterisation in any given case depends on how the baseline relationship between the consenting parties is drawn. For instance, where the baseline relationship between the consenter, V, and another person, D, is one of right and duty [for convenience, throughout this paper I refer to the alleged consenter as 'V', and to the person crossing V's moral-legal boundaries as 'D'], the relationship may be described in one of two ways:

1. V has a right that D do an act, Ø, and D has a duty to V to Ø. *Additionally, V has the power to consent to D not Øing, and V has a liability to D's exercise of this power*; or

2. V has a right that D Ø *unless V consents to D not Øing*, and D has a duty to V to Ø *unless V consents to D not Øing*.

For Beyleveld and Brownsword, the appropriate description of the baseline relationship between V and D depends on the context. Where the first description is appropriate, to consent is to exercise a power (external to the right-duty relationship), and where the second description is appropriate, to consent is to effect a change internal to the right-duty relationship. They make analogous findings in relation to alternate cases in which the baseline relationships between V and D involve either a privilege and a no-right; a

power and a liability; and an immunity and a disability.

Although Beyleveld and Brownsword are right that the appropriate description of the baseline relationships between V and D depends on the context, in either description of the baseline relationship, the Hohfeldian nature of the *ability* to validly consent is a power. The appropriate description of the baseline relationship between V and D changes only the situation of that power – whether it is external to the baseline relationship, or an integral part of it. For the purposes of this paper, this situation of the power is irrelevant. I focus instead on the proposition that the ability to validly consent is a Hohfeldian power, and examine its sequiturs.

Before doing so, it is useful to briefly describe the breadth of opinions offered as to the kind of jural relations an exercise of the power to consent creates. There is a plurality of views on this issue. Westen proposes that consent, insofar as it is relevant to the criminal law or tort law, creates a Hohfeldian privilege in others, although in other contexts it may create a right or power in others (Westen, 2004, p. 334). Hurd (1996, pp. 121,124) argues that consent creates rights and obligations in others and Beyleveld and Brownsword argue that depending on the terms used, consent can create either a right, privilege, power or immunity, or perhaps permutations and combinations thereof in others (Beyleveld et al, pp. 64-85). Although I tend towards Beyleveld and Brownsword's view, I need not adopt a strong stance on this issue here. For this paper, what is important is that an exercise of the power to consent alters the jural relations of the consenter with others in some context-specific way.

B. The power to consent is exercised by choosing, not desiring

If the ability to validly consent is a power, then the minimum necessary conditions for its exercise must include the minimum necessary conditions, if any, for exercising a power. There may, of course, be additional necessary conditions for exercising the capacity to grant valid consent – perhaps this specific exercise of power can only be exercised if certain special procedural

formalities are met – but any such additional necessary condition proposed must be supportable by arguments applicable to all cases of consent. Context-specific additional conditions for the grant of consent are not definitive of consent as a concept. We start then, with the minimum conditions for the exercise of a Hohfeldian power.

According to Hohfeld, when a given legal relation changes due to some superadded fact or group of facts under the volitional control of a human being, the person whose volitional control is paramount possesses the power to effect that change (Hohfeld, 2005, pp. 50-51). For him then, the exercise of power is inextricably bound up with an exercise of volition, or the making of a choice. The ability to validly consent, as a power, must therefore also be exercised by choosing. Indeed, many consent theorists including Hurd (1996, p. 126), Alexander (1996, p. 166) and Ferzan (2006, p.193, 206) adopt this position and treat consent as a mental state of choice or authorisation rather than mere desire.

Westen seems to disagree. He characterises the mental state of consent as a state of desire rather than of authorisation, and on that basis says that all instances of valid consent are not necessarily instances of authorisation (Westen, 2004, pp. 28-34). Indeed, Ferzan criticises Westen for this very assertion (Ferzan, 2006, pp. 205-8). However, it may well be that Westen's position is not as drastically opposed to the orthodoxy as Ferzan supposes, but only appears to be so, because of Westen's somewhat esoteric usage of the terms 'desire' and 'authorisation'. For instance, each of the desire states that Westen treats as instantiating consent, are cases in which V makes a subjective choice – either to welcome D's action with unconditional enthusiasm, or to accept it as a conditional preference, or to acquiesce to it with indifference (Westen, 2004, p. 29). For Ferzan (2006, p. 205) desires are mental states that we cannot directly control through the exercise of volition, and therefore a chosen desire is a contradiction in terms. Much of her criticism of Westen therefore stems from the fact that she uses the word 'desire' differently (and perhaps more appositely) than Westen. Yet it would appear that Westen is actually aligned with Ferzan, Hurd and Alexander in acknowledging the fundamental importance of choice to consent.[2]

Westen's argument that all instances of consent are not instances of authorisation also arises from his stipulation that to authorise Ø is to desire (as he uses the term) it, *while being aware of ones* (sic) *right to withhold the privilege of Ø*. This too is not necessarily the sense in which the term is invariably used in moral discourse. However, he understands Alexander to be working with this understanding of authorisation when Alexander asserts that to consent is to forgo one's moral objection to a boundary crossing. In a sense, Westen's interpretation of Alexander's assertion is understandable – surely, to forgo one's moral objection to something, one needs to be aware that one has a moral objection to it. On that basis, Westen constructs a hypothetical to demonstrate that a person who is unaware of her legal 'right' to withhold the 'privilege' of consent may still give valid consent, if in fact, she is entitled to consent.[3] From this he concludes that consent may be present even when authorisation is absent. However it seems to me that a stipulation either in favour of or against the need for awareness of one's entitlement to (grant or) withhold consent, is not integral to the argument that Alexander was making in piece that Westen cites. Alexander set out to explain why, unlike Hurd, he believes that in principle, indifference may also amount to consent (Alexander, 1996, p. 166). So while Hurd insisted that the consenter must positively invite the boundary crossing, for Alexander, the consenter could consent by indifference – by merely forgoing her moral objection to the boundary crossing. In fact Alexander and Westen agree that indifference can amount to consent. Alexander's argument against Hurd would stand even if he substituted the words 'forgo one's moral objections, *to the extent that, as a matter of law (whether or not one is aware of it), one has any*' for the words he actually uses, viz. 'forgo one's moral objections', but of course, such a cumbersome qualifier was superfluous to the argument being made. I therefore doubt that Alexander can be read as taking the stand that in order to consent one must necessarily always know of one's legal 'right' not to consent.[4] Moreover, when one chooses to forgo one's moral objections, to the extent that, as a matter of law (whether or not one is aware of it), one has any, one still makes a choice, and no doubt Alexander would say that the making of such a choice could, in appropriate contexts, amount to consenting, even

if the consenter was unaware of her entitlement to withhold consent.

But before concluding on this point, we should consider whether anything in the nature of a Hohfeldian power implies that it cannot be exercised by a person who is unaware that she has the power. Nothing in Hohfeld's exegesis of power seems to necessitate that limitation. If the exercise of a power requires only that a superadded fact or group of facts under the volitional control of a human being come into existence, then there is no reason why this superadded fact or group of facts cannot be brought into existence by a human being who does not realise the legal significance of her deliberate exercise of volition because, for instance, she makes an error as to the content of the law. When D chants racial epithets at a football match in England, believing that she is allowed to do so in the exercise of her right of free speech under English law, she exercises her Hohfeldian power to change jural relations between herself and the criminal legal system, despite not realising the legal significance of her volitional act. By her racist chanting, D creates a liability in herself, and a power in the criminal justice system, to convict her for an offence under S.3 of the Football (Offences) Act, 1991.[5] Westen's example of 'Sharon the Unwitting Adult' (Westen, 2004, pp. 31-32) also illustrates the same proposition. Clearly then, a Hohfeldian power can be exercised unwittingly. Accordingly, it is plausible to think that the power to consent may also be exercised by someone unaware that she possesses that power, provided that she forms the volitional state required to give consent. What that volitional state is exactly, is discussed in the next section of this essay.

C. The choice need not be to invite the boundary crossing

This brings us to the question: 'What is the mental state of consent?' Hurd has argued that the act of consenting goes beyond mere indifference as to whether another person crosses one's boundaries – V, must positively intend that D cross her boundaries, or at the very least, she 'must intend to aid (to allow or enable by act or omission) a defendant's actions with the intent that these actions be of the sort that must be intended by the defendant

for prima facie liability' (Hurd, 1996, pp. 130-131). Hurd makes no direct argument as to why V must necessarily intend an boundary crossing in order to truly consent to it. Her primary argument is in support of what she calls her 'first identity thesis', viz. that it is plausible to suppose that 'the mens rea of consent is essentially identical to the mens rea required for principal liability', (Hurd, 1996, p.122) and she takes it that should this thesis be correct, then 'inasmuch as a defendant must intend his own actions for prima facie liability, a literal application of the identity thesis requires the plaintiff to intend the defendant's actions as well' (Hurd, 1996, p.130) in order to grant consent. She then argues at length that it is possible to intend the actions of other autonomous moral agents in the same way as it is possible to intend states of affairs such as the death of a person, or the burning of a building. She hedges her argument by pointing out that even if one wishes to be technically correct and insist that 'intentions regarding states of affairs is always elliptical for talk of intentions regarding actions or omissions causally related to such states of affairs', then criminal liability for accomplices establishes that liability can follow if one 'intend[s] another's actions [by intending] to allow or enable those actions by means of some act or omission of one's own.' She accepts that such a modified formulation is defensible, but says that the modification is minor, and that 'if courts can elliptically equate the mens rea of accomplice liability with the mens rea of principal liability without inviting doctrinal confusion, they can elliptically equate the mens rea of consent with the mens rea of principal liability without obscuring an important conceptual distinction.' (Hurd, 1996, pp. 130-131)

Alexander, who initially set out to co-author Hurd's article, disagreed with her on this point, and this was one of the reasons that he ended up writing a separate piece on the subject. In his view, V can consent to a boundary crossing without intending that the boundary crossing take place. As he explains, 'frequently, we are relieved, not frustrated, when one to whom we have given consent to cross our moral boundary does not do so.' Alexander infers from this that '[t]o consent is to form the intention to forgo one's moral complaint against another's act', (Alexander, 1996, p. 166) and this position does seem intuitively stronger.

Surely, if while leaving University for a year's sabbatical, I were to leave my bicycle unlocked in my college for any student of the college to take, without really caring whether or not it was taken, or perhaps even imagining what a pleasant surprise it would be to find it waiting unclaimed upon my return, I have consented to its taking by a student at my college. If a student at my college does take the bicycle, I have no complaint against such taking. Similarly, when two boxers enter the ring to fight each other, we accept that each consents to being punched by the other.[6] Yet we would find it hard to believe that they actually intend that the other successfully hit them. In the absence of any context-specific posited restrictions, V's dominion over her interests includes the entitlement either to give them away, or to abandon them.

The problem with Hurd's argument is that in expanding upon the proposition that consent's 'moral magic' flows from its being an exercise of autonomy (Hurd, 1996, p.124; Alexander, 1996, p.165) she makes an unsubstantiated logical leap and therefore wrongly characterises the content of consent. She argues first that if autonomy resides in the ability to will the alteration of Hohfeldian legal relations,[7] and consent is an exercise of autonomy, then consent must be a subjective mental state – that of willing something. After characterising consent as an intentional state of mind, she concludes by a process of elimination that it is the intentional state of making a choice. She next examines what the object of the choice should be, and concludes that it must be a description of an act. So far, so good. She then states her first identity thesis – that the mental state of consenting is essentially identical to mens rea in principal liability – and on that basis identifies the operational parameters of consent by analogy with mens rea in principal liability. This is deeply problematic because even if Hurd is correct about her first identity thesis (and I doubt that she does enough to prove that she is), that implies less than she seems to think it does.

Hurd makes no direct argument to support her first identity thesis. She merely says that it is plausible, and then considers whether the implications of accepting it correspond to accepted legal notions of consent (Hurd, 1996,

pp. 127-128). To this end, she starts by considering the various ways in which the intentional state required for the offence of battery can be analysed, viz. the intention to do the act that causes harmful contact; the intention to make contact that turns out to be harmful; and the intention to make harmful contact. She then says that the criminal law does not refer to the outlying descriptions since they are over-inclusive and under-inclusive respectively. Hurd then notes that purported consent to battery could also take any of three forms, viz. consent to the act that causes harmful contact; consent to the contact that turns out to be harmful; and consent to harmful contact – and that her first identity thesis would imply that for consent too, the median description of the act would be the threshold legally adequate mental state. Since this appears to be the case in modern legal systems, she concludes that her first identity thesis is at least roughly right (Hurd, 1996, pp. 128-130).

Hurd treats this as proof of the plausibility of her thesis that in order to consent 'the victim must have as her purpose that which the defendant must have as the object of his mens rea for purposes of prima facie liability' (Hurd, 1996, p.129). However it is not just mental states that can truthfully be described in different ways that convey different amounts of information and suggest different inferences – the same is also true of other situational factors, including actus reus elements such as conduct. For instance, the same conduct can be described as 'D flexing her finger', 'D pulling a trigger' or 'D shooting V'. It is no revelation that the criminal law is interested in only certain types of descriptions, and all that Hurd's argument shows is that the criminal law is interested in the same type of descriptions in respect of the mens rea elements of an offence, and consent. In other words, even if Hurd is entirely correct in her argument, all she shows is that the victim must have as her *object* [as opposed to purpose] that which the defendant must have as the object of his mens rea for purposes of prima facie liability in order to give effective consent. The choice that she makes with respect to that object may be to invite a boundary crossing in respect of it or to be indifferent to such a boundary crossing, and nothing in Hurd's argument supports her insistence on the former rather than the latter. Hurd therefore fails to show either that 'the mens rea of consent is essentially identical to the mens rea

required for principal liability', (Hurd, 1996, p.122) or that philosophically, consent and mens rea for principal liability do, or should, function in analogous ways. In sum then, it is a mistake for Hurd to assume that her first identity thesis extends far enough to allow her to explain what mental state constitutes consent by analogy with mens rea in principal liability.

We could still accept Hurd's argument insofar as it takes us, and agree that the object of V's consent must be the same as the object of D's mens rea for principal liability.[8] Now if consent is an instance of exercise of a power derived from autonomy, then its grant must alter the consenter's Hohfeldian legal relations with others. V can, in the exercise of her autonomy, either destroy her own car, or abandon it, or give it to D. In the first case, V's exercise of autonomy has no effect on how D may deal with V's car. But in the other cases, V's exercise of her autonomy over her car (a) privileges D so that D can take V's car, and (b) gives D the power to create property rights over it. If so, then there is no philosophically sound reason to treat only the instance in which V intends D to take her car as an instance of consent. Either case – intentionality qua D's appropriation, and indifference towards it – answers to the description of forming an intentional state of mind in relation to an object – taking V's car and dealing with it as her own – that would have had to have been the object of D's mens rea if D were being prosecuted for theft. In the absence of any other morally relevant factors, either exercise of autonomy would mean that V has no complaint in respect of D's boundary crossing, provided that the boundary crossing falls entirely within the scope of V's autonomous permission. Therefore, either exercise of autonomy should ordinarily be characterised as the grant of consent. Alexander's formulation of consent as choosing to forgo one's moral complaint against another's (boundary-crossing) act better captures this conception of consent.[9] On his view, consent is present in all the cases in which Hurd treats it as being present, as well as in cases of abandonment of interest or indifference to a taking.

At this stage though, we recall that Westen's challenge to what he took to be Alexander's stipulation of the mental state of consent remains

undefeated. Although it was argued that Westen's restrictive reading of Alexander's stipulation of the mental state of consent was probably mistaken, if Alexander were to be read in the manner that Westen read him, Westen's point would stand. Accordingly, it would probably be useful to take Westen's objection on board and clarify that technically, the volitional state required for granting valid consent is the state of choosing to forgo one's moral objections, to the extent that, as a matter of law (whether or not one is aware of it), one has any, to the proposed boundary crossing. However, for the sake of convenience in the rest of this essay, I will use Alexander's shorthand – choosing to forgo one's moral objection to the boundary crossing – to refer to the technical stipulation spelt out herein.

D. Consent need not be performative

In Wertheimer's extensive study of consent in the context of rape law, he dismisses the metaphysical ontology of consent as relatively unimportant, and instead addresses himself to the conditions under which consent can be morally transformative. He says,

> *"...the important question is not whether consent is – ontologically speaking – a performative or mental state. Rather we begin by reminding ourselves that we are interested in consent because it renders it permissible for [D] to engage in sexual relations with [V], and we ask 'what could do that?' From that perspective, a suitably qualified – that is, moralized – performative view is, I think, closest to the truth. It is hard to see how [V's] mental state – by itself – can render it permissible for [D] to proceed. The fact that [V] actually desires sexual relations with [D] or would like [D] to proceed does not authorize [D] to have sexual relations with [V] if [D] proceeds before [V] has indicated her agreement. It is possible, I suppose, that [V's] mental state would be sufficient to cancel [V's] right to complain if [D] proceeds (although I think it does not), but it is hard to see how it could affect what [D] is entitled to do."* (Wertheimer, 2000, p. 568; Wertheimer, 2003, pp. 119, 146)

Wertheimer's argument is that in order for consent to have any actual effect on what D is permitted to do, D must know about it, or at least V must have made it possible for D to have known about it. To my mind, this argument stems from a flawed understanding of permission as a concept. Although a permission is forward-looking in that it renders actions acceptable ex ante rather than ex post forgiving them, it need not necessarily guide conduct. An ex ante permission that is relevant only to the evaluation of conduct is still a permission. The converse however, is not true – a permission that has no effect on the evaluation of conduct is not a permission at all.[10] Thus when V makes it permissible for D to do something, her communication need not necessarily be with D. However, it must necessarily be with the person or body that judges whether D's actions were permissible. For instance, a company may change the limit of the amount for which its signatory may sign cheques without ever telling the signatory. Such a change need not necessarily alter the signatory's duties, and it need not guide the signatory as to how she should exercise her signing authority. Nevertheless, it would change the normative status of her signing a cheque for the company *at the time that she signs it*, rather than merely at the time that she is questioned for signing the cheque.[11] In this example, the communication need only be between the company and the bank. The authorised signatory may be completely unaware of this communication, but it will still change the scope of her effective authority to sign cheques.

One might counter that since the state, through the criminal justice system, decides on the rightness of D's actions, the state is the arbiter of the scope of D's actual authority. If so, then although the communication need not be with D, it must be with the state; and perhaps this is all that Wertheimer is arguing for in insisting on some performative token of consent. Even if the state is not actually made aware of the consent when it is granted, the performative token may be treated as a communication sent to the state when it is disclosed in evidence. This objection, which stems from underlying scepticism about whether an unexpressed subjective choice can have consequences in the external world, is misconceived. The vast majority of instances in which one person gives consent and another acts within the

ambit of that consent, never come to the attention of the criminal justice system. These include cases in which the consent is not evidenced by any performative token. Yet from V's perspective (and surely her perspective is of central importance), her consent is just as real in those cases as it is in cases that do reach the courts. There are several examples of a purely subjective exercise of a power (including the power to consent) altering the power-holder's legal relations with other persons, without the need for any other person's consent, knowledge or even potential knowledge. Hohfeld himself gives the example of a person exercising the power to abandon property. Doing so creates in other persons privileges and powers relating to the abandoned object. (Hohfeld, 2005, p. 51).[12] Suppose for instance, that I forget my book in an airport lounge. I retain ownership of it if I have not realised that I have forgotten it, or if I intend to go back to retrieve it. Any other person picking up the book at this time violates a duty not to interfere with my property rights over the book. However, if I realise my carelessness after boarding is completed, and instead of insisting on deplaning, I decide (subjectively) to let the book go (even if I really liked it and continue to desire it), at that moment I abandon it, and a person picking the book up thereafter exercises a Hohfeldian privilege, and violates no duty. By a subjective exercise of power then, I change the rights and privileges of all other persons. By forming the requisite subjective state of mind,[13] the person picking up the book after I abandon it will acquire property rights over it and place all other persons under a correlative duty not to interfere with the book. Neither my subjective decision to abandon the book nor the subsequent finder's decision to appropriate the book after picking it up, need be evidenced by a declaration or performative token. Yet if I subjectively abandon the book before it is appropriated, my property rights over it are *never* violated, and when the subsequent finder forms the subjective intention to appropriate the book, she legitimately, and without actual or potential notice, creates duties in all other persons in respect of it.

I suggest that for consent, the communication, such as it is, is from V as the consenter, to herself as the primary arbiter of whether D subsequently acts within the limits of the authority given to her (D) while dealing with

V's entitlements.[14] When evaluating the criminality of D's actions, the state merely takes note of the presence or absence of consent, and to the extent that the scope of the actual consent is disputed, it acts as a secondary arbiter of the scope of the actual consent granted. Principally though, the state need not be aware (or even potentially aware) of the consent in order for it to be legally valid. The fact that consent is a *communication* with the self emphasises that the grant of consent requires willed choice rather than experiential desire.

Westen approaches the question differently. He notes that the proponents of the view that consent is performative, chief among them being Feinberg (1986) who believe that their formulation does two things better than a subjective formulation of consent:

a. it protects D when she innocently acts within the scope of V's putative consent, where V's secret subjective state of mind is not one of consent; and

b. it captures the morally culpable D when she acts within the scope of V's secret subjective consent but does so despite the absence of any expression of consent by V (or indeed despite her expressed non-consent).

These concerns are also shared by Wertheimer, who argues that, '(f)rom a purely moral perspective, and without regard to any legal consequences, ...[D] acts wrongly if [V] has not tokened consent, whatever her state of mind. For similar reasons, [D] does nothing wrong if [V] indicates consent and if [D] has no reason to believe that [V] does so because she fears that [D] would harm her if she does not.' (Wertheimer, 2000, p. 568)

Westen argues that the first concern can satisfactorily be addressed, and is addressed in some jurisdictions that adopt a subjective formulation of consent, by requiring a subjective mens rea element relating to the actus reus circumstance of the victim's non-consent (Westen, 2004, pp. 141-145, 160). As to the second concern, he points out that while predicating offences of

non-consent upon the putative complainant's subjective attitude may not capture some culpable offenders, it ensures that the criminal law only intervenes where there is actual harm (Westen, 2004, pp. 145-152). Whereas D's culpability, as a function of her moral reasoning, is the same in cases of subjective non-consent and secret subjective consent, this does not mean that the moral (or legal) assessment of the occurrence (as opposed to D's choices) should also be identical. As Husak points out, what happens to V when V subjectively consents is not as harmful (if at all it is harmful) as what happens to her when she does not consent (Husak, 2006, pp. 267, 275-6). Hence it is perfectly coherent to say that D did something which was not morally bad, but which showed her in a morally poor light.

Westen also notes that even jurisdictions that prefer a subjective formulation of consent can punish D for a lesser crime to reflect D's culpability in inflicting what he calls dignitary harm – the indignity that D inflicts upon V by manifesting that she has so little regard for V that she is ready to abridge V's legitimate interests in order to aggrandise herself – and that in fact, some jurisdictions punish attempts (including presumably, those rendered impossible by secret subjective consent) as harshly as they do a completed offence (Westen, 2004, pp. 149, 161). He therefore concludes that it is legitimate for a jurisdiction to refer to either a performative or a subjective formulation of consent, and says that since there is little difference in the liability outcomes, the choice between the two is largely a matter of policy. However, as Ferzan points out when reviewing his work, despite Westen's overt refusal to take a stance on the issue, his arguments tend to support a subjective formulation of consent insofar as he seems to accept that the primary harm of rape is a function of the putative victim's *subjective* mental state (Ferzan, 2006, pp. 215-216). Moreover, for Ferzan the distinction between cases in which consent is subjectively absent and those in which it is secretly present is important because, in her view, it has implications for the permissibility of third party interventions (Ferzan, 2006, p. 216). I take no stand on whether Ferzan is correct on either of these points, but it seems to me that since Westen does recognise the moral relevance of harm to criminal liability, and accepts that a 'dignitary harm' is either not an 'actual harm' or a

lesser harm, it should follow for him that the moral liability of a person who inflicts only 'dignitary harm' ought to be less than that of a person who inflicts the harm involved in a non-consensual offence. A criminal legal system that referred to performative consent would find it difficult to accommodate such a refinement. On the other hand, a system that referred to a subjective formulation of consent would be able to take account of the defendant's culpability. It could exonerate a non-culpable defendant despite the presence of harm, and although it would not necessarily mete out equal punishment to equally culpable defendants, that would not be a matter of concern, because as Westen concedes, there are factors other than culpability that are morally relevant to criminal liability.

Westen also enumerates three other cases in which V may not form the mental state to subjectively consent, but may still be treated as having consented.[15] These are:

a. *Constructive consent:* Based on V's acquiescence to one activity or institution, the law treats her as having consented to an injury suffered in the course of her participation in the activity or institution to which she consented. Thus for example, when V consents to play a contact sport, she is taken to consent to injuries incurred in the course of the sport, even if the injury is caused by a foul – something strictly outside the scope of permissible play;

b. *Informed consent:* Based on V's informed acceptance of a risk or set of risks, e.g. the risk of complications in a surgery, or the risk of being hit in the course of a fistfight, the law treats V as having consented to whatever happens when the risk(s) fructify; and

c. *Hypothetical consent:* Based on a finding that V would have acquiesced to something if she were competent at the time, the law treats V as if she did consent (Westen, 2004, p. 271).

In both constructive and informed consent, we see that V non-

fictionally consents to one thing, which then protects D against liability for causing harms to V that were foreseeably within the scope of the thing to which V consented. While there is no getting around the fact that in these cases the law may *treat* V as having consented to injuries that she did not actually consider, I would tentatively suggest that these cases are probably best described in terms of moral luck. V consensually participates in/acquiesces to a gateway activity – a soccer or boxing match, or a surgical procedure – which carries with it the implicit or explicit risk, but not certainty, of the crossing of a boundary set by one or more of V's entitlements. Whether or not these risks materialise is a matter of moral luck, and by consenting to the gateway activity V is taken to accept without demur the luck intrinsic to it. If V does suffer some harm, then the criminal law's focus is on evaluating whether or not the harm was a matter of moral luck intrinsic to the gateway activity.[16] When playing a sport, one accepts the risk of injuries attendant to the sport, including injuries caused by foreseeable actions not strictly permissible under the rules, i.e. fouls, provided that they were committed in the course of *play*, as opposed to with an intention to deliberately injure V by going outside the rules of the sport.[17] Similarly, when consenting to a medical procedure, one accepts the risk of side effects, and the possible failure of the medical procedure, since these are intrinsic to the moral luck involved with the medical procedure. However, one does not accept risks external to the procedure, such as risks stemming from medical negligence.[18]

None of this is incompatible with Westen's characterisation of situations of constructive and informed consent as involving fictional consent to outcomes to which subjective consent was not given. However, the statement made in these cases that V's 'consented' to the harm that materialised is actually elliptical for the proposition that V's consent to the gateway risky activity or institution means that she assumes the risk of the occurrence of events intrinsic to the moral luck involved in the gateway activity or institution. Furthermore, the consent to the gateway institution, at least, is not fictional consent. The moral work of extending the morally transformative consequences of the factual consent to the gateway activity to the harms that do materialise is done by moral luck, and not by consent.

Consent to the gateway activity or institution is just a precondition for moral luck to apply, and nothing in Westen's analysis of cases of constructive or informed consent shows that the gateway consent can be granted without forming one of the subjective mental states of consent.

As for the instances of what Westen describes as hypothetical consent, I doubt they should be considered instances of consent (whether real or created by legal fiction) at all. Where ex ante permission is given by a guardian or the state to the crossing of an incompetent person's moral boundaries, there is no pretence that the incompetent person is consenting. And in cases where it is argued after the boundary crossing, that the victim would have consented had she had the chance to do so, I argue that these instances should be analysed in the manner described in §2 below.

I therefore tend to agree with Hurd (1996, pp. 124-126, 137), Alexander (1996, p. 165) and Husak (2006, pp. 267, 275-6) that subjective consent, even if unexpressed, can be morally transformative. Of course, in specific contexts like a medical procedure or the execution of a cheque, the law may demand context-specific performative signifiers of consent, but in philosophical terms, these are not *sine qua non* for consent. Furthermore, the law may also posit more general rules requiring some externalisation of the subjective consenting state of mind for evidentiary reasons. Such rules, while not necessarily incompatible with the philosophical bases of consent,[19] are not a necessary condition for consent imported by these philosophical bases.

E. Consent must be prior or contemporaneous

Westen suggests that consent can be given retrospectively and still have the same effect as contemporaneous consent. He refers to cases in which D and V are lovers, and D initiates sexual intercourse while V is asleep. V awakens during the act, and 'retrospectively consents' to D's actions. Westen cites decisions based on facts like these to say that D (in his opinion, rightly) has a defence of consent to a charge of rape in subsequent proceedings (Westen, 2004, p. 254). Referring to these illustrations, Witmer-Rich argues that these

cases may be more appropriately analysed as instances of contemporaneous consent, and that the courts considering the cases cited by Westen did not address their analysis of the facts to the question of the validity of retrospective 'consent' (Witmer-Rich, 2011, p. 393). But even if the facts were slightly different so that the question was unambiguously one of retrospective 'consent', what should the result be? Imagine that V has not previously decided that it would be alright for D to have sex with her while she was asleep. D does so, and moreover, he intends for V to remain asleep for the entire duration of the act. Upon awakening and being told by D of the events of the previous night, V retrospectively 'consents' to the act. One might intuitively tend to doubt that D would be convicted of rape on these facts, but this is not because V's 'consent' retrospectively makes D's act legal. A conviction is unlikely simply because there would be no one to initiate proceedings, and if some busybody did initiate them, the circumstances would probably call for non-prosecution, or mitigation in view of the victim's lack of interest in prosecuting. Strictly though, there seems no reason to deny that D has committed a crime, and that a conviction is possible. If V had refused to retrospectively 'consent' to D's actions, then undoubtedly D would have committed an offence. It seems strange to suppose that V's subsequent act of granting or refusing retrospective 'consent' could change the nature and criminality of D's actions ab initio.

Perhaps Westen would counter that it is an error to believe that the criminality or otherwise of D's action is fixed at the time of the action. However, this seems to fly in the face of general principles of criminal law theory. This view would require Westen to assert that D action remains innominate at the time of its commission, and that it subsequently acquires its criminal or non-criminal character, depending on V's choice about whether or not to retrospectively consent to it. But subject to limited exceptions that are not obviously applicable here,[20] the criminal law generally concerns itself with the facts that exist or are perceived to exist at the time of D's act, and not with facts that arise or are perceived to arise subsequently. Any proposed additional deviation from that principle would have to be supported by convincing normative arguments, which Westen does not offer. Moreover,

our hypothetical defence of Westen's conclusion would also raise difficult practical questions. Can a complaint be made in respect of D's seemingly criminal action until it is confirmed that V has decided not to retrospectively 'consent' to it? If the nature of D's action is innominate until a decision on whether or not to retrospectively 'consent' to it is taken, then answer would appear to be 'No'. But for how long must the system wait for V to make her decision? Answering these questions would require a theorist not only to draw a temporal line, but also to defend it on a principled basis. Since Westen does not attempt such an exercise, I take it that he does not base his assertion on the position that an action can be made criminal or non-criminal by an autonomous human being's subsequent independent decision to retrospectively grant or refuse 'consent' to it.

If, building upon the hypothetical facts described above, after initially retrospectively 'consenting' to D's act, V gives the matter some more thought over her morning cup of coffee and finding herself becoming increasingly outraged at D's presumptuousness, files a criminal complaint against D, then surely D does not have an unqualified right to rely on V's initial retrospective 'consent' as a defence in criminal proceedings. I think this result is not just defensible, it is desirable – D shows no respect for the autonomy of V, and so in principle, is morally and legally guilty. However, if the state or D were to rely upon V's retrospective 'consent' to D's act and alter their respective positions (for the state, by deciding not to prosecute D or by mitigating D's punishment; and for D, by arranging his subsequent affairs on the basis that V has no complaint), then V might be restrained from changing her mind. This flows from straightforward principles of estoppel.

2. Ratification

This leads us neatly into the question of what effect, if any, V's anticipated or actual subsequent 'consent' – which I will characterise as ratification – should have on D's criminal liability. I have argued that ratification, whether anticipated or actual, is not an instance of consent. On that basis, the option of treating anticipated ratification as a negation of the

offence's mens rea, and actual ratification as a negation of the offence's actus reus is unavailable. In my view, the moral power (to the extent that there is any) of anticipated or actual ratification can be explained by reference not to its effect on the elements of the prima facie offence, but rather, to its effect on the availability of supervening defences to the completed offence. I briefly expand on this proposition in the sections that follow.

A. Acts done in expectation of ratification

There may arise situations in which D crosses V's moral-legal boundaries in the expectation that V will thank her later for the boundary crossing. Here, D acts without actual consent, and makes no claim to believing that actual consent existed. Her claim is that she acted because she expected V to ratify her actions. Consider for instance, a situation in which D pushes a daydreaming V out of the way of oncoming traffic. V having been unaware of the threat (and possibly also of D), and having never given any thought to consenting to being pushed to safety, cannot be said to have actually consented to D's act. Yet, if once the dust settles, she thanks D profusely, she ratifies D's act. Should a particularly fastidious prosecutor lay charges against D, D's defence would not be that the actus reus of battery did not occur. Nor would she say that she truly believed that V had consented, and therefore lacked the intention to act without consent. D's defence would be that she acted in a situation of emergency, relying on the best information available to her as to V's attitude towards her interests, and so was entitled to a supervening rationale-based defence.[21] The same claim could be made with equal success even if, unknown to D, V was attempting to self-harm, and therefore resented D's boundary crossing.

B. Unexpected ratification

An interesting variation on the ratification question is the case in which D acts without V's consent, and without expecting V's ratification, and yet V does ratify D's actions. Here too, the actus reus and the mens rea of the offence are easily established. On some accounts of the justification defence, particularly strictly objectivist accounts similar to Paul Robinson's, (1975, p.

266; 1997, p. 387) it might be argued that D is entitled to claim a supervening defence here too, since there was no net social harm. But this is a fringe view of supervening defences, and it seems to me that philosophically D would not be entitled to any defence in such a situation, because she acts for reasons that do not merit exculpation. Nevertheless, for reasons not explicable within the philosophical paradigm adopted, it is possible that she may benefit from the exercise of prosecutorial or judicial discretion.

3. Conclusion

If the ability to validly consent is a power, then the necessary conditions for its exercise must include all the necessary conditions for the exercise of a power. Using this idea, I have tried to enumerate some context-independent minimum conditions necessary for the grant of consent. Thus consent may be granted by choosing to grant it; there is nothing to require that in all cases this choice must be to invite a boundary crossing rather than merely to permit one; and there is nothing to require that the choice must invariably be accompanied by a performative token. I accept that in certain contexts, more may be required, but these context-specific requirements are not intrinsic to the notion of consent.

Furthermore, I refer to general principles of criminal law to argue that consent, as we understand the concept, does not include ratification. The power to consent cannot be exercised so as to have retrospective effect. I argue that when D crosses V's boundaries in anticipation of V's ratification, she does not claim to be acting without the mens rea necessary to constitute the prima facie offence, but instead claims to be entitled to a rationale-based defence. When D crosses V's boundaries without V's consent and with no anticipation of her ratification, she commits a prima facie offence, and on a mainstream subjectivist view of supervening defences, she has no claim to a supervening defence. If V unexpectedly ratifies D's act, the best that D can hope for is that prosecutorial or sentencing discretion may operate to her benefit. She does not acquire any moral claim to a defence based on V's ratification.

Endnotes:

1 The companion essays on consent by Hurd and Alexander set out many of these ontological debates, and also exemplify the differences of opinion that exist between consent theorists. Hurd and Alexander had set out to address the subject thinking themselves aligned, but parted ways on important details, and ended up authoring separate pieces because of their disagreements on matters of detail. For instance, Hurd argues that consent requires an invitation to cross a boundary, whereas Alexander believes that indifference to a boundary crossing will suffice. Hurd and Alexander agree that consent requires the making of a choice, and that a subjective choice is necessary and sufficient for the grant of consent. However, these assertions are disputed by others. Wertheimer argues that some performative token of consent is essential for consent to have any legal and normative value, and Westen asserts that the mental state of consent is a desire rather than an authorisation. Westen also argues that consent may be granted retrospectively, but Witmer-Rich insists that consent can be granted only prospectively or contemporaneously. See Hurd (1996); Alexander (1996); Wertheimer (2003), Westen (2004) and Witmer-Rich (2011).

2 Of course, this choice needs to have been made by a person with sufficient freedom and capacity to choose for themselves. While there are plenty of interesting discussions to be had about how much capacity and freedom are sufficient, I cannot engage in them in this paper. See instead Dsouza (2006).

3 Westen (2004). I use the scare quotes to indicate that the characterisation of the entitlement to withhold consent as a right, and of consent itself as a privilege, are Westen's, and that I do not necessarily agree. Westen's hypothetical is entitled 'Sharon the Unwitting Adult', and involves a young girl who being new to a jurisdiction is unaware that in that jurisdiction girls her age can legally consent to sex. She tells her lover that although she 'knows' that she cannot legally consent, she would very much like him to have sex with her anyway.

4 This is not to say that such knowledge is never necessary. In some contexts it is imperative that the 'consenter' be properly advised of her options. For instance, when consenting to medical procedures, or when being questioned upon arrest, the fact that the consenter was not made aware of her options or rights will vitiate her consent to the medical procedures, or to answering questions after arrest. However, this is not an across-the-board rule, as Westen's 'Sharon the Unwitting Adult' hypothetical (mentioned above) itself demonstrates.

5 By the same act she also exercises other Hohfeldian powers which she possesses in respect of her jural relations with other persons, including members of the public (upon whom she confers the Hohfeldian power to make a citizen's arrest, while imposing upon herself a corresponding liability to be arrested) and the police (with respect to whom she also brings about similar changes in the pre-existing legal relations).

6 I will qualify this in §1.D, where I suggest that a better explanation of such cases may be that in consenting to a gateway risky activity (the sport concerned), the agent accepts the moral luck that comes with it, and accepts any foreseeable harms that the activity may occasion. Nevertheless, at this stage I raise this example to suggest that Hurd's

understanding of consent is incomplete insofar as it does not address such cases.

[7] Hurd actually says that autonomy resides in the ability to will the alteration of 'moral rights and duties', but she was probably using loose terminology. As Beyleveld and Brownsword have pointed out, in strict Hohfeldian terms, autonomy, at least as exercised while consenting, may create or alter rights, privileges, powers and immunities. In other words, like any Hohfeldian power, the grant of consent alters Hohfeldian legal relations. See Beyleveld et al. (2007).

[8] There are reasons to doubt even this proposition, but for the present purposes, it is not necessary to explore them.

[9] The context in which Alexander made this assertion suggests that by 'complaint', he means moral complaint, rather than the sort of complaint that is made after the act, to a judge or to the police (although consent will have obvious repercussions on the outcome of such a complaint). It is in this sense that I understand Alexander's thesis.

[10] Thus where the age of consent to sexual intercourse is 16, the purported consent of a 15-year-old (V) to sex is not consent at all, even if the person receiving the consent and acting upon it (D) had no way of knowing V's true age. If we accept that the absence of consent is an actus reus element of rape, then D may, depending on the applicable rules in a jurisdiction, have a mens rea based defence, but D will not be able to negate the absence-of-consent predicated actus reus element.

[11] I assume here that the signing instructions are not amended during the period between the signing of the cheque, and its presentation for payment. But even if this were the case, the normative status of the signatory's action is determined by her authority at the time that signs the cheque, rather than when the cheque is presented for payment.

[12] Hohfeld (2005). Walter Wheelan Cook points out in his introduction to Hohfeld's essays (p. 8) that the exercise of this power changes the legal relations of all persons in the world without their consent. Moreover, since the abandonment of property need not be proclaimed to the world at large, or indeed at all, these legal relations come to be changed without the persons affected even being aware. I treat abandonment of property or an interest as equivalent to indifference to its taking, and therefore, as consent to its taking.

[13] Characterised as the intention to appropriate the property by Walter Wheelan Cook in his introduction (p. 8) to Hohfeld's essays on Fundamental Legal Conceptions.

[14] This ties in with the view that autonomy is self-legislation (Hurd, 1996). Since consent is an exercise of a person's autonomy over her own interests, and autonomy is self-legislation, the self must be the primary arbiter of whether another person acts within the scope of one's own actual (rather than perceived) consent.

[15] In fact, Westen's analysis of these cases goes beyond suggesting that in them V's consent is morally transformative despite V not forming a subjective mental state of consent. For him, factual consent may be either subjective or expressive, but in these cases, consent is treated as being present despite the absence of either form of factual consent. Nevertheless, for the purpose of this paper, I will focus on the fact that according to Westen, in these

cases consent that is not predicated on a subjective mental state may still be morally transformative.

[16] For a useful summary of this argument, advanced in the context of liability as a principal, see Simester et.al. (2010). This analysis is easily transposed to explain constructive and informed consent.

[17] See in this context R v. Barnes [2004] EWCA Crim 3246, where D's late rugby tackle injured V, but the injury was ruled to have been within the scope of V's consent since it was caused by an action within the 'zone of toleration' for rugby, and was therefore foreseeable.

[18] I borrow the concepts of intrinsic and extrinsic luck from Bernard Williams (1981, pp. 25-26).

[19] In this, I find myself aligned with Hurd, who while refusing to rule out the possibility that the law may require consent to have a performative element for prudential reasons, maintains the moral irrelevance of such a performative element. Hurd (1996, pp.137-8).

[20] Like the continuing act doctrine and the complex single transaction doctrine. See in this connection, Simester et.al. (2010, pp. 74; 168-170).

[21] In this connection, see generally Dsouza. (2017). I argue that both justifications and the subset of exculpatory excuses that do not deny responsible moral agency, are rationale-based – they depend for their exculpatory force on the agent's reasons for acting. The claim made by D when she violates one of V's boundaries in the expectation that V will ratify her boundary crossing is of the nature of a claim to a rationale-based defence, which may be either a justification or an excuse. However, it is unnecessary for, and beyond the scope of, this paper to venture an opinion as to which.

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Shifting of Criminal Liability: An Economic Analysis

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Introduction

The most vital and sensitive issue, the criminologists as well as the penologists have so far little focused or almost overlooked, is the shifting of criminal liability by one offender to another in the natural process they commit or intend to commit offences. This practice is found to occur, though apparently invisible, in most of the cases the offences are committed, even under I.P.C. and in respect of certain socio-economic crimes, by offenders and often gets reflected in the manner in which these offences are committed, which mainly depend, to a greater extent, upon the types of offences. It is therefore felt, such an issue should receive importance and attract attention of both modern criminal and penal philosophers sothat certain aspects of criminal liability can be better understood and the system of administration of criminal justice can be made more efficient, workable and easy. For prevention and control of crimes and distribution of punishment among criminals or co-accused, it is very important to know the process of shifting criminal liability by them. This is also very important for the law enforcing agencies and policy-makers, as well as the criminal courts for determining the amount of criminal liability in prison terms or in some other form of

punishments. Because in many situations, as is often found, crimes are being committed not by a single individual, but by two or more persons venturing joint efforts in a chained concerted manner from the very beginning to the commission or omission of an act, called crime. In this process, the criminals involved in the illegal act, being rational in behavior and in thought process; and very calculative also, intend and try to shift liability to others, as much as they can, in disguise to avoid or lessen individual liability, making it very difficult on the part of the trial courts in fixing and imposing liability and also apportioning punishments among such criminals.[1] Such an issue in criminal law is the shifting of criminal liability by an offender who may be the prime accused, notbeing arrestedor brought before the court as an accused directly due to fallout of the administrative machinery; but his hand, master-minded planning or support in the commission of the offence was so important without which the accused in question, who was arrested or brought before the court, would not have committed the offence; or in other words, would not have been possible to commit. No doubt, the criminal philosophers have set principles in fixing criminal liability only on the convict in terms of punishment or certain prison terms after the guilt of the criminal is established beyond reasonable doubt through criminal procedure established by law.[2] The trial criminal court rests and relies on the doctrine of burden of proof which remains fixed throughout till the conviction is made; the liability for which is mainly on the prosecution, and does not shift it to the accused; because the accused as per criminal law principle or philosophy is assumed to be innocent till he or she is proved guilty for the purpose of imposition of punishment.[3]

But what is being attempted here in this research paper is not the liability of burden of proof; but to focus on the problems of shifting of criminal liability, or in other words, how the criminals intend to share criminal liability i.e. costs or burden if the offence is not committed by single accused; but by two or more than two accused or in a group. As it has been seen, and law also prescribes that when a crime is committed by an individual,his liability is sole and fixed under specific criminal statute or under the Indian Penal Code upon conviction. But if the offence is committed by two or more persons,

then how the criminal liability i.e., costs would be distributed, because they may not be equally liable; there is no answer.

Further, it has also been established through judicial process that the convict should be punished proportionately considering the nature, the degree of culpability and gravity of the offence at the time of its commission.The criminologists have also accepted and recognized this kind of proportionate punishment to be imposed in context of particular offence under specific situations. As we all know: "A crime may be committed by a single person, or two or more persons. When several persons are associated with the commission of a crime, the degree of culpability of each will depend on the mode of his participation in the crime, for the law recognizes gradations of guilt based on the variety of ways in which a person might be associated in the act of a crime."(Gour, 2000, pp. 969-994). This implies and points out to all of us that there is an utility of redefining criminal liability in terms of shifting, which is being used, though not apparently; but in its implied mode, in our criminal and penal philosophy.

Objectives

The main objective of this study is to make a critical inquiry about criminal liability in the present context of criminal justice system as well as the Indian Penal Code and to formulate a logical concept of shifting of criminal liability with the help of principles of Economics, thereby making the study inter-disciplinary in its approach.

Hypothesis

It is assumed that the concept of shifting of criminal liability, if properly infused in the penal philosophy, may help in just distribution of punishment among the criminals. It may act as a guiding principle in awarding punishments in specific cases and situations.

Scope of the study

Though the scope of this study is limited, it may be extended to study complex criminal phenomena to be applied in developing a formula for just distribution of punishment, in the same way the civil liability is distributed among different stakeholders under law of contract, banking and insurance law, torts and others. The principle is more or less applied to know the impacts of imposition of indirect taxes and to estimate costs and benefits of evaluation projects and also to know the economic responses of any budget allocations and re-allocations. The researcher has, therefore, strictly followed the boundary and has only those authors' works which may be partially referred to.

Methodological Framework

The present research study is mainly a doctrinal and analytical in approach. The researcher has to be more investigative in making search of relevant materials mostly collected from the secondary sources. The researcher has to be even more innovative in formulation and has to depend more on logic and original reasoning. The materials are mainly collected from legal sources like books on the relevant topic.

Assumptions

The concept of shifting of criminal liability is intended to be formulated on the basis of certain assumptions without which it would not be possible. The principal assumptions are:

1. The criminals or offenders are rational in behavior in committing crimes. By rationality, I mean that the criminals have individual capacity and are capable enough to assess costs or burden of crimes committed along with the benefits to be derived out of such commission. In other words, we assume that benefits and costs are best known to them.

2. The criminals are generally in the habit of shifting their liability in respect of crime committed by them toothers. This is one of the inherent instincts found in every normal rational human being, the offender being very calculative in mind and selfish by nature in keeping benefits with him and shifting burden or costs to another.

3. The approach towards shifting liability of crime commission under study is economic and hence inter-disciplinary in its very nature.

4. Crimes are assumed to be committed rationally. Those crimes committed out of mental disorder or psychological pressures or erratic behavior do not come under the purview of this study.

5. Shifting of criminal liability takes place only in case of certain selective category of offences and not in all types of offences committed under criminal law or the Indian Penal Code, but may be equally extended through further study with few exceptions.

6. Sometimes criminals are backed by some influential persons or groups as are often seen in case of organized crimes. Those influential persons or groups generally hide their identity or their criminal acts shifting liability or costs of crime production to others. In these cases, the shifting of criminal liability becomes an easy practice.

Moreover, there are few more assumptions like that (a) the criminals always aim at maximizing their benefits over costs of crime committed by them; (b) they are always selective as regards commission of crimes and are influenced by choice or preferences between crimes; (c) they are guided by the principle of Marginal Benefits and Costs or by their equality ; (d) the principle of *cateris paribus* i.e., other things remaining same is being taken into account while committing crimes, and finally, (e) work–leisure choice of the criminal, i.e., how to spend the limited time available for working and not working.

Defining the keywords

In this study, certain specific terms called Key Words are used which need a little explanation, as most of them are borrowed from economics and bear specific meanings, and are used to explain the most difficult legal issue under study. A few of them are:

Criminal Liability

Liability means legal responsibility or accountability for one's own acts or omissions. It is that liability which arises when an offender is held legally responsible for breaking the provisions of criminal laws. The liability is mainly for any illegal behavior that causes harm or damage to someone or something. In other words, it may be defined as the liability of a person towards another person or the State for commission of a crime. One who commits a crime knowingly willfully and maliciously is criminally liable and may be sentenced to imprisonment or fined. Criminal liability, as it has been observed, may be either potential or actual meaning thereby, say, that you have actually committed the crime, or that you are simply suspected of committing it. If your liability is proved in the trial by the criminal Court, you will be held responsible or accountable for that crime; you have committed and sentenced accordingly.

In criminal law, a person is held liable for a crime committed only when he or she has acted with a criminal intent, as opposed to acting accidentally or lacking the ability to act deliberately. A person may be punished for a crime only if he or she has been convicted of a crime that is, found criminally liable. A person may be found criminally liable if the prosecution proves that he or she (1.) committed the criminal act, such as taking away the property belonging to another person; and (2.) had the required intent to hold him or her accountable; such as, for a theft, an intent to deprive the legal owner of the property. In case of criminal liability, the Government or the State believes that you may have committed a criminal act and hence, it prosecutes the case in the criminal court.

In most cases (not all), criminal liability hinges on two elements: (a) the *Actus Reus* (the actual act or omission that violated the law), and (b) the *Mens Rea* (the guilty state of mind, the intention to commit). This means, in order to prove that you are criminally liable, the prosecution must prove "beyond a reasonable doubt" not only that you have committed the crime, but also that you intended to do it. In Common Law, criminal liability is tested by *Actus Reus* (guilty act) and *Mens Rea* (guilty mind). This indicates that a criminal act alone does not warrant criminal liability. The prosecution is also required to prove that the person committing the crime was mentally sound enough to realize that the act was an illegal act or a public wrong.

In this context, one thing is to be noted. As per law of crime, a crime is an offence committed against the State which affects the society at large, and criminal liability is the liability for the crime and for the penalty, the society exacts for the crime. Thus, a person who has committed a crime must "pay his or her debt to society". A crime is always viewed as harm to the society that has cost it something, not necessarily in money terms; and the criminal incurred the debt for that cost. Society accounts for the debt by imposing a penalty upon the criminal, such as prison time. Thus, a person found criminally liable, by being convicted of, or pleading guilty to, may be sentenced to serve time in jail or prison, or to pay fine or both.

Shifting of Criminal Liability

There is no definition of criminal liability provided till now. This aspect of criminal law has remained untouched so far. As we feel, and do constitute a definition of it, we may put it thus: *Shifting of Criminal liability* regards that every crime carries with it a cost of crime-production; and therefore, it enters into the price, that price the offender has to face or pay for it, either in prison terms or fine imposed by way of penalty. Punishments or fines are mandatory impositions, payable in the line with whatever criminal statute has been legislated. They are not different, in essence, from taxes. Although these statutes in the end are a reflection (more or less imperfect) of voters' preferences, once legislated they become mandatory levies, imposing burdens

which the individual taxpayer will try to avoid or pass on to others (Musgrave et al, 1983, p. 259). No doubt, tax liability or tax shifting is not similar to that of criminal liability and shifting. But there is something common except that tax shifting takes place directly through pricing and shifting of criminal liability through adjustment of sales and purchases of crime production thereby affecting the position of others – individuals as well as firms. Just as to determine who pays, we must look beyond the tax statutes and the pattern of statutory incidence, i.e., beyond those on whom the legal liability for payment rests, in the same way, we have to see the criminal statutes and the pattern of criminal liability (statutory incidence), i.e., beyond those on whom the legalliability (better we call it legal incidence, who is actually to face punishment for the crime committed apparently) for payment rests. Thus, the final burden distribution may differ from that of statutory liabilities, (Musgrave et al, 1983, p. 259) and legislators are quite aware of this. Thus, determining the actual distribution of burden requires the transmission of the burden from its impact point (the place of statutory incidence) to its final resting point (the place of legal incidence). In economics, this process is called "shifting the tax burden", the resulting chain of adjustment which may lead to a final distribution of the burden or economic incidence which differs greatly from the initial distribution of liabilities or statutory incidence. As a matter of ultimate policy concern, it is obviously the distribution of burden after shifting that counts. The same logic may be applied in case of shifting of criminal liability under IPC and in respect of other criminal statutes since the legislators have already chosen and fixed the amount of punishment which give the desired result in terms of statutory incidence, i.e., punishment; but not the legal incidence, i.e., the actual amount of punishment imposed on the convict by the court within the maximum limit prescribed, which ensues only after the trial of the accused who either pleads guilty or whose guilt is proved by the prosecution beyond reasonable doubt .

Elasticity of Demand

Another important concept, the very idea of which is borrowed from Economics, to use here in this research paper is the concept of Elasticity of

Demand and Supply. Here, the concept of Elasticity of Demand is explained. The concept of Elasticity of Demand refers to the degree of responsiveness of quantity demanded of a good to a change in its price, depending *on market conditions*, income or prices of related goods, i.e. *other crimes*. Accordingly, there are three kinds of demand elasticity: Price elasticity, Income elasticity and Cross elasticity. Price elasticity of demand relates to the responsiveness of quantity demanded of a good (*crime*) to the change in its price. Income elasticity of demand refers to the sensitiveness of quantity demanded to the change in income. *If income is high enough, then it might be that the tendency to commit crime may be low, due to fear of facing the cost situation, in terms of fine or imprisonment if caught red-handed.* Cross elasticity of demand means the degree of responsiveness of demand of a good to a change in the price of a related good, which may be either a substitute for it or complementary with it (Ahuja, 1981, pp. 242-243).

There is another type of elasticity of demand called elasticity of substitution which refers to the change in quantity demanded of a good in response to the change in its relative price alone, real income of the individual (*criminal*) remaining the same. "The elasticity or responsiveness of demand in a market is great or small according as the amount demanded increases much or little for a given fall in price, and diminishes much or little for a given rise in price." (Ahuja, 1981, p. 243).

It seems that this concept of economics along with elasticity of supply, which is not explained here, is more relevant to the present topic under discussion. The criminals, usually being rational and calculative in minds to estimate benefits and costs of crime production determined by the forces of demand and supply, are very sensitive to changes in the market situations. If they find the relevant market conditions conducive and favorable to their operation, they might be encouraged to go for shifting of criminal liability, producing more crime as the benefits are higher than their estimated costs, in terms of fines or imprisonment.

A supply Curve for Crime

With an understanding of the elements involved in a rational decision to commit or not to commit, we can proceed to develop the concept of a supply curve for crime. The supply curve will show, as any economic supply curve does, the relationship between the price of a good or service and the quantity that producers are willing to supply per time period. "In our case", says Daryl A. Hellman, "the supply curve will show the number of crimes (quantity) per time period that criminals (producers) are willing to commit (produce) at various levels of average gain (price)." (Hellman, 1997, p. 44).

For derivation of supply curve for crime, we must assume, as said above that criminals or potential criminals, behave rationally. That is, they compare the gains from criminal activity with costs involved before choosing whether or not to commit a crime. Obviously, this argument holds up better as an explanation for some crimes than for others, e.g., crimes against property and crimes against persons.

Like any typical supply curve shows a positive relationship between price and quantity supplied, the supply curve for crime must also show the number of crimes per time period that criminals as a group are willing to commit at various levels of average gain (i.e., price). It describes the relationship between the price and the quantity of crime.

However, for an individual criminal, the direction of the relationship between price and quantity is not immediately clear. As average gain (price) increases, the individual may commit more crime or less. Because it depends upon the work-leisure choice of the criminal which is determined under an assumption that all the costs of committing crimes are constant. Under this assumption, it is possible that when a criminal produces more crime per time period, the probability of punishment or its magnitude may increase. If this happens, the criminal would have to be able to realize a larger gain from crime to be induced to commit more crime per time period. This means that the criminal would supply more crime only if the gain increases.

It generally slopes upward from left to right.

Demand Curve for Crime

The Demand Curve for Crime simply shows the number of crimes per time period demanded at various levels of average gain (or price), remaining other things like tastes, income and prices of related goods, etc., equal or constant. Normally, the demand curve shows that there is an inverse relationship between the price and quantity demanded of a product. Higher the price of the commodity, less of it will be demanded, i.e., a typical demand curve has a negative slope; it slopes downward from left to right. Like the ordinary demand curve, the Demand Curve for Crime may also be of different shapes: it may be elastic, more elastic, and perfectly inelastic depending on the nature of crimes committed. For example, the demand for murder is somewhat different than that of the demand for drugs in the drugs market.

Crime –Production function

Production of crimes, like any other production, involves certain costs (burdens) and benefits or gains. The criminals inclined to the habits of committing crimes have some mental calculations, except under exceptional situations in physical terms or in terms of resources available in their hands and used to produce certain level of output (i.e. crimes) causing harms to the society. Like ordinary production function which shows combinations of various inputs, given the state of technology, to produce a stipulated output, in case of production of crime also, certain factors or inputs are well used. For instance, for sale or purchase of stolen goods or property, certain land space or building as well as capital must be used besides employing the efforts of the organizers. They have to pay prices for hiring these inputs for production of the crime. They will also combine the least-cost factors in their production process, being a rational producer of crimes to maximize their profits.

Gains from and Costs of Criminal Behaviour

Most of the criminals commit crimes with a view to gain or to make some profits out of his or her criminal activity. Being rational, he or she compares the anticipated gains from a crime with the anticipated costs. If the gains exceed the costs, then it is rational to commit the crime. This implies that if the monetary and psychic gains are sufficient to cover the material and psychic costs, as well as what the criminal's time is worth (i.e. *time costs*), and a compensation for risk (expected-punishment costs), then the rational crime will be committed. Thus, if *expected-gains>expected-costs*, crimes are likely to be committed; and if *expected-gains<expected-costs*, the rational criminals will refuse to commit any crime. However, this will not apply to irrational criminals who commit crimes under certain exceptional circumstances.

The kinds of gains derived from a criminal act vary depending on the type of crime and the individual criminal. Apart from monetary gain, Daryl A. Hellman talked of yet another category of gains called psychic gains which may include lots of possibilities – the thrill of danger, or value of risk, a feeling of getting back at the system, a sense of accomplishment and so forth. The psychic gains also depend on the crime and the individual who commits the crime. For e.g., the psychic gains derived from a rape are different from those derived from a theft.The psychic gains to a juvenile from auto theft are likely to be higher than those of an adult professional (Hellman, 1997, p. 39).

Similarly, the rational criminal criminals are also more conscious about the costs involved in commission of crime, which are varied and more complicated. Among the different costs involved are the *material costs* (i.e. costs of tools and equipment used for commission of crime), the time costs (the criminal prefers to do something to earn legal wage by working in a legal market instead of committing an illegal act or crime), and the psychic costs, which include fear, anxiety, dislike of risk and guilt etc.

The costs which are even more complicated and need an explanation for analyzing criminal behavior are the *Expected- Punishment Costs*. These

costs are included to account for the possibility that the criminal will be caught and punished. If this were to happen, it would impose costs on the criminal in the form of fines, a prison term, or both. Punishment is not certain to happen, but there is possibility of it. For this reason, a cost must be included to compensate for the risk involved in criminal acts.

Justification for the New Concept

If we look to the modern scenario of the criminal world, the new emerging kinds of crimes and their pattern or modes of committing such crimes in addition to the traditional ones, it would be easily clear that a crime can be committed by himself or herself without hiring or with hiring other criminals, i.e., engaging some other persons to get the desired result, the actual crime commission. *Today, a crime is like a stone falling into a lake and making a circle, till one circle produces and give motion to another, and the whole circumstance is agitated from the Centre.*

Generally, a crime may be committed by a single person, or two or more persons. When several persons are associated with the commission of a crime the degree of culpability of each will depend on the mode of his participation in the crime, for the law recognizes gradations of guilt based on the variety of ways in which a person might be associated in the act of a crime (Gour, 2000).

According to Hindu textual criminal law, when a crime, say murder is committed, besides the actual murderer, i.e., the one who with his own hand gives the fatal blow, several others might also be liable to punishment as accessories (helpers) The text also prescribes that the person who hires the assassin and pays him for commission of a crime is to be awarded four times the punishment prescribed for the offence (Gaur, K.D, 2008).

P.N. Sen (1984) also talks about three degrees of the offence states quoting from ancient Hindu text that although a Sahasa or a violent offence involves either theft, or verbal abuse, or personal violence, or outrage of the modesty of a woman as an element in its constitution yet it differentiates

itself from them by the adjunct of aggressive violence which gives it a peculiar shape, and this differentiation marks out that the offence should be visited with a heavier punishment. Here, he further states: "There are three different degrees of this kind of offence, *Prathama* (of the first degree), *Madhyama* (intermediate) and *Uttama* (grave), and different degrees of punishment were prescribed as appropriate to them. It was also laid down that if several persons combined in striking another, they should be visited with double the ordinary punishment and furthermore he who struck at the vital part was to receive the severest sentence." (Sen, 1984) This is where the researcher justifies some ideas about the backward shifting of criminal liability.

Under the English law also, a distinction is made, with reference to participants in a crime, between Principals who may be of the first or second degree and the accessories before and after the act. Principal in the first degree is one who commits or actually takes part in the commission of a crime. Principal in the second degree is one who aids or abets the actual commission of a crime. Here, a difference is found between the English law and Indian law. The Indian Penal Code makes no distinction between Principals in either the first or second degree. All those who are present at the scene and participate in the commission of a crime are liable either as the actual offender under the specific sections of the Code, or under the provisions governing joint and constructive liability (Sections 34 and 149, I.P.C.). However, for certain offence like abetment and criminal conspiracy, the Indian Penal Code makes a broad distinction between a principal and an abettor, who correspond roughly to accessories before the fact. Moreover, under Sections 107 to 120, the I.P.C. provides for a substantive offence in such cases when the role played by an individual is that of an accessory after the fact.

Here, some demerits are apparently found to have included in the I.P.C. The present researcher does strongly agree to the basic principle that many crimes would be impossible, but for the support and encouragement received from others who, though not actively cooperating in the crime, still prepare the ground and facilitate its commission. Even, it is observed that in almost all the cases, like murder, bride burning, etc., persons may be hired, or assistance

may be sought for completion of the crime. There is definitely a difference in punishing the prime or principal offender (in a case the abettor) or the helper (in case of abetment, the person abetted), though, as mentioned above, many of them have been made the substantive offences under the Indian Penal Code, as because the Code penalizes all those who may have lent only their support and assistance in one form or the other to the commission of a crime. In all such cases, attempts have been knowingly made to shift statutory criminal liability (statutorily fixed) to other persons the helpers who may even act under some compulsions (or directions to be followed under certain situations or threats, etc. if the crime is political or organized crime) being the principal criminal rational in his estimation of costs and benefits. Because, in most of the cases , the principal offender (in case of abetment, the abettor) and hired offender (for offence of abetment, the person abetted) may not have the same intention or knowledge; but committed under situational circumstances. There is a great difference between an active participation and passive participation or forced participation. If this distinction is not taken into account, it will be like that to assume the mere presence of a person at the sight of the offence as conclusive proof or evidence that he is a part of the offence or the conspiracy to it.

For this it is very essential to find out and determine who are the actual primary or principal offender behind the scene and who are the prompted or abetted offender i.e., the potential and actual offender or, in other words, who make the shift or attempts to make the shift, including their actual and tempered motives and intentions; so that criminal liability may be shared by the trial courts justly distributing punishments or fines or both. In this connection, it is very important to note that:

1. The impact, being initial burden of the offence, which is imposed as per statute should be felt by the master-mind or the planner of the offence himself as the chief producer of the crime and the ultimate burden of the offence i.e., the legal incidence which the court actually imposes fall upon the person (or persons) who is spotted at the sight of the offence;

2. The impact should be felt by the offender at the point of imposition of burden (statutory punishment or fines) if imposed, while incidence by the offender actually faced with punishment or imposition of punishment,or fines or both at the point of settlement or rest of the trial;

3. The impact of imposition of punishment (costs) is felt by the offender, not initially and actually committing the offence; but planning it and if committed, would face the statutory punishment; while the incidence is felt by the convict alone who actually faces the burden or is punished;

4. The impact of an offence, though not committed, may be well-planned for shifting by an intelligent rational offender considering costs and benefits of crime production; but the incidence cannot be shifted, and hence, ultimately rests on the convict, who cannot avoid it in any way.

The method is considered to be an indirect one of committing an offence, when the wise cunning criminal instead of committing a crime himself, tries to get it committed by others through shifting of criminal liability, rather casting such liability upon himself than that other.

Explanation and Analysis

The principle of economics holds good and is well-established that whenever gains exceeds costs, it is beneficial to produce and supply goods to the market to be sold; because it will bring profits to the producer, if the demand conditions are favorable. The producer would produce more if the profit margin is high or does not fall short of the costs of production.

The same thing may be argued that whenever an expected gain exceeds expected costs, criminals would like to commit a crime. According toBecker's model (1968) (and that of Ehrlich) (1973), individuals decide whether or not to engage in crime by carrying out a cost-benefit calculation under

uncertainty. To do so, they evaluate whether the expected benefits from crime (the economic benefits that accrue from the criminal act netting out the probability of being caught) outweigh the expected costs (normally given in terms of an opportunity cost of some sort). This clearly indicates that criminals derive benefits out of production (commission) of a crime and face with costs in committing it. Costs are, in fact, implied burden that law has imposed in terms of consequences resulted out of unlawful activities (crime) when committed. There is every probability that criminals are caught red-handed, arrested by police, dragged to the court of law and punished for a certain prison term and fined. These burdens or costs give rise to criminal liability which the criminal cannot usually shift to others. The general principle is that the person who commits the crime is made criminally liable. However, there are certain exceptions. In case of some crimes like abetment and criminal conspiracy in our country, the burden (liability or costs) and benefits (gains) arising out of them are distributed or shared in such a way that criminal law has made them liable to varying degrees depending upon the nature of their behavior towards the commission of actual crime. This implies that the burden of criminal liability does not always lie on the person who commits a crime. In many cases, it is borne by other people also. Thus, the person who initially bears the liability may not actually be bearing the total liability as such. Therefore, it is necessary to know who bears the immediate burden of liability and who bears the ultimate burden of liability of the crime production. The problem of determining the ultimate burden of criminal liability is the problem of determining the incidence of the liability.

In the process of determining liability in crimes, three concepts are involved. Firstly, criminal liability may be imposed on some person. Secondly, it may be transferred by him to second person. Thirdly, it may ultimately be borne by this second person or transferred to others by whom it is finally assumed. Thus, the person who originally bears the burden of criminal liability (statutory liability), but does not bear the ultimate burden (legal incidence), bears the impact of criminal liability. The process of the transfer of a criminal liability in terms of burdens (punishment or penalty) may be termed as the shifting of criminal liability and the settlement of the burden on the ultimate

criminal (convict or convicted co-accused) may be called the incidence of that liability. Thus, the incidence of criminal liability is the result of shifting.

The shifting of criminal liability is not similar to the shifting of burden of proof in a criminal proceeding which almost remains fixed and mainly lies on the prosecution, till the guilt of the accused is proved and convicted. They differ from each other in terms of content, assumptions, approach and procedure.

The shifting of criminal liability refers to the process by which the burden of liability in crime production is transferred from one person to another. Whenever there is a shifting of criminal liability, the shifting may be forward (or backward).

Thus, a producer of crime upon whom the entire liability has been imposed, may shift it to another producer of that crime (co-accused) who due to the instigation made by the first producer has actually committed that crime instigated or inspired. In this case, the liability is shifted forward. On the other hand, if the second person who has actually committed the crime due to instigation or in certain relation to the first person, shifts liability to that first person, the shifting is backward. Shifting of liability results in out of production of variety of crimes in the society, though they are invisibly done.

It is important to note that the distribution of burdens of criminal liability should be made in a more equitable manner by the law enforcing agencies so that the criminals may be punished or penalized proportionately to the amount of crimes they produced in chains, i.e. jointly or severally. Otherwise, they will gain more benefits as per their design of production of crime, with less cost faced in terms of punishments.

The shifting of liability in crime production can be represented easily through a diagram with the help of supply curve of crime production and demand for it. In the following Fig., let DD be the demand curve and SS the supply curve of a particular crime production. PM (or ON) is the amount of liability (price) per unit of crime, while OM (or PN) is the amount of crimes offered to be produced.

Now, a liability (price) equivalent to P'R has been imposed on crimes to be produced. Let S'S' be the new supply curve of crime production after the imposition of amount of new liability. P'M' will be the total liability or the new price; P'N' (= OM') the new amount of crimes produced after the imposition of new liability and P'R the liability per unit of crime produced.

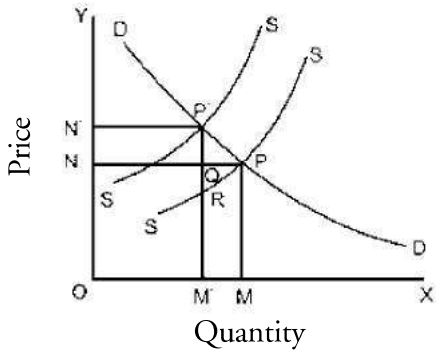

Fig: Shifting of criminal liability

Source: An Introduction of Legal Economics, by the same author, (2007), p. 449

Thus, the price (burden or liability) rises by P'Q and the production of crimes fall by PQ (= M'M) on imposition of criminal liability. The incidence of the liability, P'R is divided between the first person and the second person supposed to produce OM' amount of crimes. Thus, P'R = P'Q+ QR.

Obviously, shifting and incidence of burden (in terms of liability) depend upon the process of pricing (cost of punishment, etc.) determined by the forces of demand and supply. Hence, shifting of criminal liability and its incidence depends upon the behavior of the person who bears the impact (i.e. the immediate burdens) and the person who bears the incidence (i.e. the ultimate burdens). Therefore, to understand the nature of shifting of criminal liability as well as to determine its incidence, the factors which affect the behavior of the two persons i.e. the factors which affect the conditions of demand and supply, should be analyzed.

However, the most important factors which affect the conditions of demand and supply are the elasticity of demand and elasticity of supply and

the laws of returns. Besides, it should also be noted that the final shifting of criminal liability is conditioned by the relative strength of the various tendencies at work facilitating and preventing shifting.

Let us now prove that the incidence or the burden of criminal liability is divided between two persons (or group) in the ratio of the elasticity of supply to the elasticity of demand. Applying the principles of economics to this field, we can put the formula as:

$$\text{Elasticity of demand } (e_d) = \frac{\text{Proportionate change in demand}}{\text{Proportionate Change in price}}$$

This can be expressed in mathematical terms as :

$$\frac{\frac{\Delta Q}{Q}}{\frac{\Delta P}{P}} \quad \frac{\Delta Q}{Q} \times \frac{P}{\Delta P}$$

Where Q denotes either the quantity demanded and supplied; Δ an increase, and P for price (or liability).

$$\text{Now, the elasticity of demand } (e_d) = \frac{\frac{MM'}{OM}}{\frac{P'Q}{PM}}$$

$$= \frac{MM'}{OM} \times \frac{PM}{P'Q}$$

$$\text{Similarly, the elasticity of supply } (e_s) = \frac{\frac{MM'}{OM}}{\frac{QR}{PM}}$$

$$= \frac{MM'}{OM} \times \frac{PM}{QR}$$

$$\therefore \quad \frac{e_s}{e_d} \quad \frac{\left(\frac{MM'}{OM} \times \frac{PM}{QR}\right)}{\left(\frac{MM'}{OM} \times \frac{PM}{P'Q}\right)}$$

$$= \left(\frac{MM'}{OM} \times \frac{PM}{QR}\right) \times \left(\frac{OM}{MM'} \times \frac{P'Q}{PM}\right)$$

$$= \frac{P'Q}{QR}$$

$$\therefore \quad \frac{\text{Elasticity of supply}}{\text{Elasticity of demand}} = \frac{\textit{Burden of the the liability upon the person who bears the incidence}}{\textit{Burden of the liability upon the person who bears the impact}}$$

The shifting of criminal liability by one criminal to another seems to bear important significance in administration of criminal justice within a particular legal system. We may have many instances of crimes (offences) committed under the Indian Penal Code in Indian system in which there is enough scope of shifting the burdens (liability) by the prime accused to the fellow accused or co-accused. This is evidently possible when certain crimes (offences) are abetted and committed under Ss. 107 and 108 I.P.C. Accordingly, the person abetted along with the abettor shall be punished jointly and severally as per provisions contained in the I.P.C. particularly in Ss. 109 to 120. The abettor generally tries to shift the criminal liability from him to the persons abetted to commit the crime. They, in such cases, simply share the impacts and incidences of criminal liability to the extent, they are liable to be punished or fined depending upon the nature of the crimes and degree of involvement in such crimes.

In the Indian Penal Code, after critical analysis of the nature of various crimes (offences), it can be said that almost all the offences can be committed by a single person; but at the same time, many persons may get involved in committing the same offence. Take the example of murder under section 300 IPC which may be committed by X himself or he may commit it in association with some other persons or through abetment or instigation or hiring. In Bigamy also, it is committed by the husband alone at his own volition or he may come under the influence of others too to commit it (Sec. 494 IPC). Thus, the I.P.C. crimes have two important aspects: (1) either to take or bear the liability by the criminal himself, or (2) to shift the liability, at least to some extent, to others or share between or among them.[4] When the criminal himself takes or bears the liability himself, law fixes costs or burden in terms of punishment on him; but when its liability is shifted to others, the question of imposing or fixing punishment becomes or stands as very complex how to be shared or fixed and imposed on the convicted criminals, though by declaring such illegal acts substantive offence and penalty has been fixed under the statute; but without taking any cognizance that the result of these offences are the consequences of shifting or sharing criminal liability. The IPC is silent on it and has not placed upon any considerations

for, though there is every possibility of having such an element inherently in each of them, if properly analyzed.

The present researcher neither believes nor accepts that the ancient mode of punishment was all true or correct, because the system was quite discriminatory and caste- based; but the important point which the ancient Hindu jurists failed to interpret, though realized its importance in a different sense is that "Punishment varied with the relative position of the parties" definitely indicates and directs towards shifting or dividing of criminal liability, not only on the basis of caste system; but on the basis of degree of crimes committed as well as the criminals involved in committing those crimes. Thus, the meaning of relative position may be well-extended to include the persons committing offences under different relevant situations or at levels, i.e. the criminals are positioned and market conditions.

The present researcher also neither believes or accepts the present mode of fixing criminal liability or punishment as accurate and perfect; because there exists a difference between the theory and practice due to which the criminal courts have been facing great problems in deciding the exact amount of punishment to be imposed upon conviction and have been left to exercise discretion within the statutory minimum and statutory maximum. Something is yet necessary to fill up this gap and therefore, the concept of shifting of criminal liability, may well be considered to be incorporated, being one important factor for it.

Limitations

There are, however, certain limitations in formulating a precise model or formula in context of shifting of criminal liability. First, criminal phenomena are very complex to be explained in concrete terms like that of purescience. Criminality and its determination, being objective considerations depend mainly on the mental state of the person committing an illegal act. It is not an easy task on the part of criminologists or penologists to define and impose; even psychologists many times fail to determine and come to

arrive at an absolute solution. The decisions arrived at are mostly logical conclusions. Arguments and counter arguments, debates and logic, situations and evidence of different kinds enter into the process or generally work in it, which may vary from person to person depending on the personal experience and depth of knowledge, attitude,philosophy, place and position and so on.

Secondly, law is such a social science which gets a link with all sciences and has its foot-hold in all places and at all times, past, present and future. Because it is human-made; made by our popular representatives now-a-days reflected through a determined political and legislative process. That is, our limitation is that our statutes fix the liabilities; I mean they are pre-determined, based on certain known factors or possibilities, which are not enough to meet the actual situations. We should not be too hypothetical and fancy; but real; real in our attitude, behavior and approach.

Thirdly , this very narrow framework prescribed beforehand by our criminal statutes like our Indian Penal Code creates a hurdle in infusing a new philosophy in it through research unless the ingress is being tolerated, to make some improvements to keep pace with the changing time and changing technology. We do believe that we will be graced for that providing a good space in the very old fashioned statute, which came into force since 1860, the days of British colonial rules till today. Since the Indian Penal Code has already prescribed the maximum amount of punishment against the various offences, yet within this framework, the concept of shifting of criminal liability would provide a clue or form a good base for formulating a just sentencing policy while imposing punishment on offenders by the sentencing courts.

Conclusion and Suggestions

The concept of shifting of criminal liability is not embodied in explaining any substantive offences either in any criminal statute or in the Indian Penal Code itself. The philosophy behind just hints out that there is such an undercurrent forceworking. It is true that the statutory liability, once fixed by legislation to be imposed on the criminal upon conviction, cannot be

shifted to other criminals due to different nature of the crime committed; though there may be some link or chain to result in commission of a particular offence; or one may be hired by the other not spotted; but remains in shadow who does not come to light or take active part in the act; but a master mind in causing the result. It is also to be noted that the person hired or instigated may not have the same or common intention and motive. So, it seems to be just to analyze the process how criminal liability is intended to be shifted and the act resulted is achieved. If in a criminal justice system, the process or mechanism of shifting of criminal liability can be far more predicted beforehand or well-understood, then, it is felt, the punishment can justly be fixed by law or statutes; imposed or apportioned accordingly as per plan or plane-wise of the first and second degree offender, as is evident even from the I.P.C. offences including abetment, criminal conspiracy, etc. It would definitely be helpful to make an improvement of the present day criminal as well as penal philosophy finding out the very roots of the offences with clear distinction between mental state of the criminal (*Mens Rea*) and resultant act (*Actus Reus*). *Mens Rea* (the guilty mind) may result only planning the whole thing, though mere planning or the *Mens Rea* is not punished by law; but it may continue till the act takes place or executed by placing weapons upon the shoulders of another who might be only the carrier of *Mens Rea* of the original or principal offender, not in actual scenario; but hiding himself behind, in the crime market operation. Thus, intention of one, the prime offender may get transformed into a criminal act (*Actus Reus*) through a helper or helpers upon whom ultimately the criminal liability for *Actus Reus* lies and rests upon who face the legal consequences i.e. legal incidence. Thus, the role of the planner having *Mens Rea* of the shadow criminal is more important than the final executor with *Mens Rea* or no *Mens Rea* giving effect or result in *Actus Reus*.This would help in differentiating the criminal behavior of first degree offender and second degree offender.

The Indian Penal Code, while defining the offences and prescribing respective punishments, is silent on shifting of criminal liability. The present researcher feels that there is one inherent force of shifting criminal liability working behind the apparent and relevant provisions of the I.P.C. crime,

though liability has been fixed on the statutory principle; but without giving any consideration to this aspect which seems to be a great demerit, if we consider the ongoing all round development taking place around us in terms of socio-economic, political, psychological, technological and other scientific ones.

Further, in the light of the above, it is required that there should be a little modification in the common traditional practices in the line of scientific logic or reasoning so that mental state of the criminals involved in a crime can clearly be located on just point of its turning; because criminal phenomena being more complex, the intelligent literate and educated criminals equipped with modern sophisticated devices may take advantage in terms of costs, not being caught and punished or may allow other accessories to suffer the punishment. Therefore, it would be just and proper if this very element of human nature of the criminals is inducted at least for consideration, which may provide sufficient guidance and relief to the criminal trial courts and the judges in determining the immediate legal impact of crime and the ultimate legal incidence of crime making a difference in between persons who instigated and who committed the crime or in whatever way, they get involved, may be proved, convicted and punished. The present researcher again feels that this may also form a good ground of defense, if properly pleaded as a mitigating factor, which may be result in lessening in the amount of punishment to be imposed on the convict offender upon whom the ultimate legal incidence lies or falls, in case the shifting is a forward shifting. The criminal courts should have a look into it.

Endnotes:

[1] However, there is no such provision in the criminal law and also in the Indian Penal Code where the elements of shifting of criminal liability, though seems to be working inherently are highlighted; but remains apparently silent. The amount of punishment prescribed against each offence is statutorily fixed only.

[2] See Articles 20, 21 and 22 of the Constitution of India.

[3] See also The Indian Evidence Act, 1882.

[4] Such provisions for sharing or shifting the criminal liability are not specifically provided in the IPC; because the Code has fixed statutory punishment against each of the substantive offences independently considering each of them to constitute to be a separate offence.

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Legal Authoritativeness of Dharma: Indian Philosophical Approaches to Language and Implications for Dharma

Arunjana Das

The six Indian philosophical schools, darśanas, have different views on the epistemic sources of dharma, or the dharma-pramāṇas. Since dharma is a language-based notion of how we live our lives, our understanding of language bears significantly on the authoritativeness of dharma. For example, whereas Mîmāṃsākas see dharma as imperative and authoritative stemming from the Vedas, Buddhists argue that dharma are conventional rules of conduct and not authoritative. I find that there exists a paradox of sorts between the situation of the locus of the legal authoritativeness of dharma and our understanding of language. Although the Mîmāṃsākas and otherssubscribing to the Brahmanical tradition in language, i.e., believing language to be of divine origin, sought to defend the infallibility of the Vedas, historical research, suggests in finding and applying dharma to specific cases, the locus of authority has moved from the Vedas to social and human sources, such as ācāra (roughly translated as normative practice or custom). On the other hand, those subscribing to a naturalistic tradition of language, i.e., believing language to be arbitrary and based on convention, either reject the Vedas as sources of dharma, or put more emphasis on other sources. The relationship of dharma to law becomes more tenuous in the naturalistic tradition of language as dharma assumes a more conventional nature as opposed to normative in

their conception. Overall, I find that partly on account of varying linguistic philosophical ontological commitments, dharma as an ethical category is not a very stable one – this is the case not only across the philosophical traditions but also within a tradition.

Introduction

Reflection and theorization on language and the philosophy of linguistics in Indian philosophy pre-dates recorded history. The earliest treatises on language in the Indian philosophical canon dates back to 200 BCE or earlier. In contrast, the turn to the study of linguistics in the west has been a recent one (Coward, 1980). The long and rich tradition of thought and debate on the philosophy of linguistics in the Indian canon is situated within a larger environment of political and social dynamics that motivated or influenced, to some degree, the nature of the discourse. The various theories of language that were shaped by this discourse had wider implications on how various actors looked at a fundamental concept in the tradition – that of dharma. Since dharma is a language-based notion of how we live our lives, our understanding of language bears significantly on the authoritativeness of dharma. In this paper, I explore the moral and ethical implications of these approaches to language and look particularly at how these discussions of the relationship between language and ultimate reality relate to the authoritativeness of dharma in the Indian philosophical canon.

Theories of language in Indian philosophy can be categorized into three major traditions: the Brahmanical or classical school that claims that language has a divine origin and there is an inherent relation between the word and the object; the naturalistic tradition that claims that no such relation exists and that the relationship between the word and the object is arbitrary and based on human convention; and the empirical tradition that claims an intermediary position between the two. In developing these theories, schools such as the Mîmāṃsā, the Philosophy of Grammar, and the Nyāya school, played a significant role. In theorizing on the philosophy of linguistics, these schools were motivated by not only philosophical considerations, but also political and social conditions.

The views of the respective schools on language and its origin also had implications on their views on the sources of dharma, i.e., dharma-pramāṇas – potentially, vice-versa as well. There is some degree of plurality among the schools in their views on dharma-pramāṇas. Whereas the Vedas are considered to be the primary and only source of dharma by some, other sources such as ācāra (conduct or custom) and atmatusti (self-satisfaction or conscience) are also mentioned.[1]

Since Mîmāṃsākas fall in the Brahmanical tradition and were primarily motivated by the desire to uphold the authoritativeness of the Vedas, they considered the Vedas as the source of divine revelation, eternal and without a creator (*apauruṣeya*), and, hence, the only legitimate source of dharma. Ācāra is a valid source only in so far as it is the conduct of those who know the Vedas. The schools of Yoga, Samkhya, Vedānta, and Vaisesika also fall in this category. The schools in the naturalistic tradition, such as the Cârvākas and the Buddhists, challenged the Brahmanical view on the infallibility of the Vedas as the only source of dharma.

Their view regarding the sources of dharma also influenced how the schools defined and conceptualized dharma and its authoritativeness. I find that there exists a paradox between the situation of the locus of authoritativeness of dharma and our understanding of language. Although the Mîmāṃsākas and others prescribing to the Brahmanical tradition in language, sought to defend the infallibility of the written and spoken word in the form of the Vedas, historical research suggests that in finding and applying dharma to specific cases, the locus of authority has somewhat moved from the Vedas to social and human sources, such as ācāra. In case of those prescribing to a naturalistic tradition of language, who either reject the Vedas as sources of dharma, or put more emphasis on other sources, dharma assumes a more conventional nature as opposed to normative in their conception. The Nyāya and Jain schools that fall in an intermediate position also have a different conception of dharma and sources of authority. Perceptions regarding the authoritativeness of dharma, hence, tend to vary among different traditions.

This paper explores how the above perceptions manifest in Indian philosophical discourses and what, if anything, we can learn about dharma itself and how it could be applied in contemporary times. In attempting to do this, the paper is divided into the following three parts: the first part discusses the various Indian philosophical approaches to language. The second part discusses the epistemic sources of dharma according to the various schools, including the indebtedness of the Dharmaśāstra to Mîmāṃsā philosophy. The third part discusses the status of "law" in the Dharmaśāstra, and the specific subject that the law is concerned with: dharma and ethics. The paper concludes with a brief discussion of how conceptions of language helps us think about dharma and its application in contemporary times and an articulation of a future research agenda.

Theories of language in Indian philosophy

In looking at the nature and function of language, Coward (1980) starts his book, the *Sphota Theory of Language*, by quoting the Bible and the Rig Veda:

> *"In the beginning was the Word, and the Word was with God, and the Word was God." (Oxford Annotated Bible, 2001)*
> *"Many who look do not see language, many who listen do not hear it. It reveals itself like a living and well adorned wife to her husband. (Staal as cited in Coward, 1980)*

By quoting the Bible and the Rigveda on language, Coward (1980) seeks to outline the importance of language, or speech, in philosophical and theological discourses in a way that transcends religious traditions. This is very much evident in Indian philosophical discourses where theories of language are intimately connected with their ontological views on reality and more.

Indian philosophical discourses on language include three traditions of linguistic theories: Brahmanical or classical tradition, the naturalistic tradition,

and the empirical tradition. The Mîmāṃsā school made significant contributions to the Brahmanical school of linguistic theories, which also includes Saṃkhya, Yoga, and Vedānta. Since Mîmāṃsākas were primarily motivated by the desire to uphold the authoritativeness of the Vedas as the only legitimate source of dharma, their theory of language reflected this. Language and speech, for the Mîmāṃsākas and others in the Brahmanical tradition, is of divine origin. The Vedas contained all speech and language since all speech is equivalent to Brahman, and the Vedas contain the Brahman.

T.R.V. Murti (1963) says, "The Brahmanical tradition stemming from the Veda takes language as of divine origin (Daivi Vāk), as Spirit descending and embodying itself in phenomena, assuming various guises and disclosing its real nature to the sensitive soul."

The sages who wrote and brought the Vedas into being are attributed to be the sensitive souls and the seers in this case. According to the Brahmanical tradition, the eternal truth and reality always existed in the form of Brahman. The wise sages are able to see this reality and manifest it in the form of speech and language, i.e., the Vedas. This equation of the entirety of Brahman manifested in the form of language, which, in turn, is equated with the Vedas, is a key characteristic of the Brahmanical school of language. The Mîmāṃsākas, however, also claim that although speech is of divine origin, the Vedas themselves are eternal; they do not have an origin or a creator – *apurasuya*. They have always existed and simply brought to manifest through the seers, or *rsis* (Coward, 1980).

Having established the divine origin of language, the Brahmanical school argues that the word is the smallest sense-making unit of language, and there exists an inherent relation between the word (the denoter) and the object (denoted). This relation does not change with time and is eternal. When one hears the Vedic word, therefore, its meaning becomes immediately evident to the hearer. Since the Vedas encompass all reality that there is, they impart true nature of reality.

Challenging the above claims from the Brahmanical tradition, the naturalistic tradition argued that language evolved in arbitrary ways based on human convention through the ages. The Cârvâkas and the Buddhists belong to this tradition. They challenged the Brahmanical view of the infallibility of the Vedas and their view of language. For the naturalistic tradition, the origin of language is very much human as opposed to divine. They agree with the Brahmanical school that the word is the smallest sense-making unit of language, but they argue that the relationship between a word (denoter) and object (denoted) is not inherent and is dependent on human linguistic conventions. This relationship is also not eternal as language continues to evolve through the ages and among human societies. Language, in the naturalistic tradition, creates our sense of the reality and helps us articulate our experience to ourselves and others. How the reality appears to us may be different from how reality actually exists. True knowledge, in this tradition, is to know the true nature of reality as opposed to how it appears to us (Coward, 1980).

The empirical tradition, claimed by the Nyāya school and Jains, occupies an intermediate position between the Brahmanical and naturalistic traditions of language. This tradition claims that language by itself cannot provide us true knowledge of reality. The Vedas have a divine origin but by themselves they do not provide a complete view of reality. Our experience of the Vedas needs to be substantiated and added to through other means in order to get a full picture of reality. Language, hence, is of divine origin for this school, but in itself it does not provide a complete picture of reality as it is. Language can convey meaning only in the sense of the words in a sentence conveying meaning to the hearer as opposed to directly invoking a referent object (Coward, 1980). Similar to the Brahmanical and the naturalistic traditions, the word is the smallest sense-making unit of language for the empiricists.

The Grammarian school that coined the Sphota doctrine aligns with the Brahmanical school in claiming that language and speech are of divine origin and they encompass the Supreme Brahman. They, however, are different from the other schools in arguing that it is the sentence and not the

word that is the smallest sense-making unit of language. According to them, understanding of language bursts forth in an instant of insight, the *sphota*. According to Bhatṛhâri, the renowned grammarian, the external *sphota* is the *sphota* of language – the smallest sense-making unit of language, which for him, was a sentence. There is also an internal *sphota* which gets illumined and uncovered as the external *sphota* is manifested in the form of a sentence. Comprehension of meaning occurs for the hearer as the external *sphota* reveals the internal *sphota*, i.e., inherent meaning of the sentence, in the hearer. (Coward, 1980)

In understanding and knowing reality, language, therefore, plays a varying role among different traditions. The degree to which language is considered to be representative of reality and how this representation and manifestation is thought to occur among the various traditions is intimately related to what each tradition accepts as a valid evidence of reality. This brings us to the question of pramāṇas and what the Indian schools of philosophy accept as pramāṇa for knowing reality and dharma.

A pramāṇa is a unique cause of what we know, i.e., the epistemology of a theory of cognition. The object of cognition can be empirical reality or (drstârtha) or non-experiential reality (adrstârtha). Each of the Indian philosophic schools falling within the Brahmanic tradition accept particular pramāṇas. Saṃkhya and Yoga accept three pramāṇas: pratyakṣa (perception), anumāṇa (inference), and Śabda (testimony).[2] The Mîmāṃsā and Vedānta schools accept six: Pratyakṣa, anumāṇa, Śabda, upamāṇa (analogy), arthapatti (presumption) and abhava (non-apprehension) (Jha, 1942). Cârvâkas, and Buddhists accept only pratyakṣa (perception) as a pramāṇa and reject Śabda pramāṇa and other pramāṇas completely.

Coward (1980) says, "Śabda-pramāṇa is rejected by the Cârvāka on the grounds that it must first be established by other verbal testimony resulting in an infinite regress unless at some point there is an appeal to direct sensory experience. In addition to this logical reason for rejection Cârvāka also holds that Śabda is unacceptable on epistemological grounds—that it is impossible

for perceptual knowledge to be communicated. The argument offered here is that a man knows only what he perceives, and not what someone else says he has perceived. In this view the only referents are material, and direct sensory perception of such material referents is the only valid knowledge of reality."

The Cârvāka school also accepts anumāṇa as a conditional pramāṇa.The Nyāya school and Jains accept Śabda-pramāṇa but only when complemented by pratyakṣa (perception), anumāṇa (inference) and upamāṇa (comparison).

Dharma and Its Pramāṇas

The task of attempting to conceptualize dharma is not unlike the ordeal of Sisyphus. Many definitions of dharma exist along the lines of moral, ethical, and good conduct that creates order and harmony on a social and cosmic level.

Commenting on extant attempts at defining dharma, Glucklich (1994) says, "the subject of dharma eludes almost every attempt to develop a system of conceptualization. This may be due to the fact that dharma is not a "subject" at all. Dharma is not a what, it is a how: there is dharma of conduct, of course, and this we usually understand as law and morality. But there is also the dharma of stealing and robbing, the dharma of painting and making music, the dharma of laying cornerstones, plowing, and everything else." (7)[3]

Rocher (2014) breaks down the constituent elements of the word, dharma, thusly: "Dharma is a noun formed with the suffix *ma* from a root *dhar* or *dhṛ*. The root expresses actions such as to hold, bear, carry, maintain, preserve, keep. Hence, dharma is the way in which, or the means by which, oneholds, bears, carries, or maintains, and, in accordance with semantic development common in Sanskrit, it means not only the way of doing these things, but also the way of doing them." (40)

Rocher then goes on to make a consequentialist conceptualization of dharma. He says, "Dharma, then, is the way in which one ought to hold, bear,

carry, or maintain. On a cosmic level, dharma is the way in which one maintains everything, the way in which the cosmos or the balance in the cosmos, is maintained. At the micro-level, dharma is the way in which every constituent element of the cosmos contributes its share to maintaining the overall balance. Each element has its own dharma, its *svadharma*. As long as each element of the cosmos performs its specific *svadharma*, the overall balance does not suffer. As soon as an element, however, deviates from its own dharma, that is, commits adharma, the balance is disturbed" (40, 41). (Rocher, 2014).

Various schools in the Indian philosophical tradition have different views on dharma. Part of the reason for this is the varying sources that each school accepts as valid pramāṇa for dharma. In classical Brahmanism, we find mention of four major sources of dharma with varying degrees of authority placed on each source: the Vedas (srutis), the texts of recollection (smrtis), agreed-upon normative practice (ācāra), and satisfaction of oneself (atmatusti). Buddhists, Jains, Cârvākas, and the Nyāya school contest these sources to a degree. As a result, they also see the nature of dharma in terms of its authoritativeness and juridical character in ways that vary from the classical Brahmanical traditions.

In the Indian canon, the Dharmaśāstras are the primary texts that deal with issues related to dharma and law in the Hindu canon. Whereas the Apastamba Dharmasutra (ÂpDh) and Gautama Dharmaśāstra (GDh) considered srutis, smṛtis, and ācāra as valid epistemic sources of dharma, Manava Dharmaśāstra (MDh) considered atmatutsi as an additional source. Irrespective of this plurality of views on the epistemic sources of dharma in classical Brahmanism, the status of the Vedas was held as supreme, but other sources were not ruled out.

MDh says,"The root of dharma is the entire Veda, the tradition and practice of those who know it, the standards of good people, and what pleases oneself." (University of Calcutta, 1922)

Similarly, Yajnavalkya smṛti says, "The Veda, tradition, the standards

of the good, what is pleasant." (The Collection of Hindu Law Texts, 1940).

Commenting on this plurality, Olivelle remarks, "The upshot is that in these early sources, even though the Veda figures prominently in the discussions of dharmapramāṇa, we do not find an unambiguous statement that the Veda is the only source of dharma, or even that dharma has a single epistemic source. Several sources are presented without a concerted effort to reduce them all to a single source" (Olivelle, 2013).

The question of pramāṇas becomes important when it comes to the question of dharma and where and how it is to be known. The Mīmāṃsākas and rest of the Brahmanical tradition accepts only Śabda-pramāṇa, proof of the word, or revelation, when it came to knowing dharma. Dharma being an adrasta reality cannot be perceived by the sense organs, inferred, analogized, or presumed. It can only be found through the testimony that is to be found in the Word, or the revelation in the Vedas. Since Vedas are the complete and sufficient repository of all true knowledge and manifestation of Brahman, for this tradition, Śabda-pramāṇa is the only and sufficient valid pramāṇa needed to establish dharma. In other words, revelation of the Vedas is the only legitimate epistemic source of the adrasta reality of dharma. No other evidence is needed.

In a critical note on the Mīmāṃsāka view, Junankar (1982) says, "This is the well-known doctrine of Isvatahprâmânya. This argument really means that those who are authorized to study the Veda have direct and immediate apprehension of meanings on hearing Vedic injunctions... In a sense this is similar to the role of perception in the scheme of empirical knowledge. In the theory of cognition, the Mīmāṃsaka is primarily concerned with the Śabda pramâna because his main theme is action in conformity with the Veda...The Vedic programme of action can only be implemented by human beings in a work-a-day world. The Mīmāṃsaka is concerned with the theory of meaning in so far as it enables him to install the authority of the Veda on a pedestal where no foibles of human beings or their language can reach but which guarantees all the merits that human ingenuity can offer" (54) (Junankar, 1982).

For the naturalistic tradition, since pratyaksha-pramāṇa is the only valid way of getting true knowledge, this also applies in the case of knowing dharma. For Buddhists, perception leads to knowing what is good. For the Buddhists, since language is arbitrary and based on convention, the Vedic seers could not have known the ultimate reality in the form of the Vedas simply based on language without using their sense-perception. The Vedas are, hence, not a valid source of dharma (Coward, 1980). As a result, their perception of dharma is different from that of the Brahmanical tradition. Not only are the Vedas not an authoritative source of dharma for the Buddhists, dharma itself, for the Buddhists, become a set of conventional rules of conduct and not normative. Dharma, in a purely Buddhist sense, comprises various elements of existence (dharmas translated as elements of existence) (Stcherbatsky, 2003). Getting true knowledge of these dharmas required the usage of one's sense-perception as opposed to accepting revelation or the Vedas (or other written or spoken corpus) as self-evident or authoritative.

Belonging to a skeptical tradition, the Cârvākas reject categories of dharma and mokṣa as ends that are to be aspired for by humans. For them *artha* and *kama* are the only ends that need to be aspired for in this life. They also reject the notion of afterlife, re-birth, and re-incarnation, which occupy the philosophical and theological vocabularies of other Indian traditions (Koller, 1977).

Koller (1977) cites the early scholar Madhava on Cârvākas in the *Sarva-darśana-samgraha:*

"The efforts of Cârvāka are indeed hard to be eradicated, for the majority of living beings hold by the current refrain: While life is yours, live joyously; None can escape Death's searching eye: When once this frame of ours they burn, How shall it e'er again return? The mass of men, in accordance with the Sastras of policy and enjoyment, considering wealth and desire the only ends of man and denying the existence of any object belonging to a future world, are found to follow only the doctrine of Cârvāka. Hence another name for that school is Lokayata,-a name well accordant with the thing

signified. ['Lokayata' means 'philosophy of the people' and also 'worldly philosophy" (155).

The Cârvākas, hence, do not consider dharma to be authoritative at all. In determining rules of conduct, they are guided by the end goals of *artha* and *kama* and knowing these rules they are guided by sense-perception as the only valid means of knowing what is right and good.

The empirical school holds that Śabda pramāṇa is valid and is the testimony of a reliable person. Coward (1980) says, "As the only means of expressing knowledge is through a sentence, Śabda as testimony occurs in the form of a group of words syntactically and significantly connected. As long as the meanings of the words composing the sentence are known, then the meaning of the sentence will be known as it is heard. Thus, the cause of understanding relating to Śabda is the knowledge of the meanings of words and not the referent object and its qualities. The Nyāya opposes the Prabhakara Mīmāṃsā contention that Śabda must take the form of an injunction... the Nyāya in his theorizing that the objects of reality exist independent of any knowing mind. Knowledge, therefore, is simply the discovery by a conscious mind of the objects already existing. Just as the light of a lamp reveals or shows physical things, so knowledge manifests" (56).

For the empirical school, hence, more than the Vedas themselves, it is the reliable testimony of an enlightened person that is a source of dharma.

Dharma, law, and the role of interpretation

The Dharmaśāstras are seen as the expression of the one, eternal dharma. In early scholarship by western scholars on the Dharmaśāstras, there was an assumption that the Dharmaśāstras were law-books that represented, to a large degree, the law of the land in the form of juridical and legal institutions and statutes. This is undergirded by an underlying equation of dharma with law as law is conceptualized in the western canon; this was largely a colonial legacy.[4] Later scholars, however, corrected this notion and sought to study

the Dharmaśāstras on their own merit and drawing the lines between dharma and law, wherever possible, and at the same time, acknowledging their intertwined nature. This is very much evident in the works of Glucklich (1988), Davis (2006), Davis (2010), Rocher (2014), and others.

Rocher (2014) says, "Hindu law is, together with every other aspect of a Hindu's activities, part of Hindu *dharma*. Hindu rules of law are to be found in the Dharmaśāstras, but these texts also contain a variety of other rules which have little or nothing in common with law... A first important consequence of the concept of *dharma* is that, in Hinduism, law, religion, and all other topics dealt with in the Dharmaśāstras are inextricably intertwined. All attempts to disentangle the various categories and to label particular concepts or institutions as essentially religious or essentially legal, are bound to force upon them categorizations which are foreign to the Hindu way of thinking." (41)

The Dharmaśāstras and the scholastic commentaries that comprise its hermeneutic tradition constitutes more of a scholarly tradition rather than a legal system strictly in the sense of juridical structures and statues. There is some degree of law to be found, as Rocher (2014) remarks, but there are no distinctions being made per se between law, dharma, and religion.

Rocher (1978) conceptualizes the relationship between Dharma and law in the Dharmaśāstras thusly: "Dharma in Dharmaśāstra encompasses the prescriptions for, the acts of, and the effects of ritual, purification, diet, statecraft, and penance in addition to rules for legal procedure, contracts, property, corporations and partnerships, inheritance, marriage, and crimes of various sorts. However, no distinctions are made between these rules and acts that would correspond to a distinction of law and religion—they are the same; they are dharma." (1285).

The hermeneutical tradition, especially the Mīmāṃsā school, played a significant role in interpreting how rules of the Dharmaśāstras are to be applied. The objective of the interpreter is to discern and articulate the rules of this dharma.

Lingat et al (1975) argued that the objective of interpretation in the context of the written tradition in Hindu philosophy is to offer the "society the means whereby it can rediscover itself" (144). Interpretation in this context, hence, is a dynamic process that enables commentators and exegetes an opportunity to consider, critique, and reconcile precepts, that are sometimes in conflict with each other, within the tradition, and offer an interpretation that addresses questions regarding dharma and custom, among others. (Lingat et al, 1975).

The task of Hindu interpretation includes not just a literary exegesis of a text, but also a determining the rules that have an obligatory character, the violation of which will amount to a violation of dharma. The doctrine of consensus is seen as an important and vital characteristic of Hindu interpretation. The *Mīmāṃsā* school of interpretation provides rules that enable a scholar to extricate what are "true injunctions," and what is their significance. In doing so, an interpreter is, hence, engaging in a kind of scoring of the obligatory nature of a rule; the nature of this obligation is juridical not in a western sense, but in the sense of dharma. In the early written tradition, hence, the nature of juridical content is intermixed with that of religious in ways that are similar (e.g., in terms of natural law being the root of positive law) and dissimilar (e.g., in terms of the nature of obligation associated with law and the consequences of violating that law) to the western concept of law. (Lingat et al, 1975).

The emergence of commentaries and digests on the sastras is seen as a turning point in the trajectory of juridical thought in India. The nature of the juridical component found in the written tradition of commentaries is intermixed with religious components. The concept of positive law is not articulated in this tradition in a sense that could be similar to the western legal tradition. Instead, there are injunctions that are discerned to represent dharma, and interpreters seek to interpret dharma in light of the custom practiced by groups in contemporary times.

This brings us to the question of the role played by custom(ācāra), and evolution of customary rules on dharma, how dharma is interpreted, and

how conflicts between the two are addressed. When it comes to dharma and ācāra, the understanding prevalent in Hindu thought is again different from that in western thought. As mentioned earlier, Âcārais cited by many Dharmaśāstras as a key source of dharma in addition to the Vedas; the Mīmāṃsākas also see this as a source of dharma conceptualizing it as conduct of people who know the Vedas.

Regarding ācāra, Davis (2004) says, "To be clear, the Vedas as scripture are the starting point for all Mīmāmsā, but it is also clear from the tradition as a whole that the Vedas have power and authority only in so far as it is known, understood, and followed by human beings. Part of this grounding of authority in human beings relates to dharma's foundation in reason, as well as on the Veda" (815).

There is a certain degree of tautology associated with the conceptualization of ācāra by the Mīmāṃsākas. It is only those actions of good people who know the Vedas and who carry out those actions thinking them to be dharma that we are to accept as dharma. For the conduct or behavior of a group of people to become ācāra, there needs to be some sort of legislation from an authority or consensus among the group of people. Davis (2004) calls ācāra dharma in practice, "the practical, 'real' life of dharma that acts as a normative precedent for future action, even though in practice it may sometimes differ from place to place and time to time" (815). It is a practical dharma.

The concept of ācāra as a source of dharma is a key one since it shifts the locus of authority from the word or texts to people. Since the Mīmāṃsākas seek to defend the infallibility and sufficiency of the Vedas in finding dharma, they argue that ācāra as a source is indeed rooted in the Veda since it is the *Veda-vids* or those who know the Veda whose collective conduct determines ācāra, and, hence, dharma. If a rule of smrti or ācāra is not found in the Vedas, Mīmāṃsākas have claimed the existence of a lost Veda (Davis, 2004). This contention, however, walks on thin ice, especially given several instances when ācāra goes against textual sources.

Davis (2004) argues, "The key point here is not the doubtful historical validity of this lost Veda' doctrine, but the hermeneutical gymnastics performed by the Mīmāṃsākas to permit or recognize, in the first place, the authority of humanly constructed norms and to connect that authority, in the second place, with the authority of the Veda... The authority of the person provides Dharmaśāstras with an apparatus of change and adaptability, one that can meet the challenges of historical developments while preserving an orthodox theological view of the 'roots' of dharma as uniformly Vedic" (817).

Since custom changes over time and dharma is supposed to be one and eternal, custom in a locale may evolve in a way that creates conflicts between custom and the written tradition. When there are such conflicts in a time and among peoples, kings also become crucial in this task as under certain circumstances, they can issue a royal decree to re-establish an element of dharma if a custom is seen to be in conflict with it. This is an instance of a positive imperative of law, which relates to the legislative function of the king. At other times, the custom is interpreted to hold precedence. This is because on one hand, the ancient authors of the sastras are seen to have written the rules keeping in mind contemporary and future alignment of such rules of dharma with customs of the times and people of those times. On the other hand are groups of people who engage in traditions that become custom and are seen to influence how dharma is interpreted in light of them. This establishes a dynamic relationship between dharma and custom wherein certain rules of dharma are abrogated when custom is seen to be stronger or more popular among groups of people, or when such rules of dharma are seen to be "contrary to reason," or "odious in nature" over time. As certain rules of dharma are abrogated by local custom or laws, the rules may fall into desuetude. (Lingat et al, 1993). As Jackson (1975) commenting on Lingat (1973) asserts, however, "The real problem of desuetude in the texts is whether the custom abrogates or suspends the religious duty and the consequent penance for it." (500)

In addition to ācāra, atmatusti is also cited as a source of dharma by the Manava Dharmaśāstra. Lingat (1973) describes atmatusti thusly, "It is only when

all the other sources are silent that the rule of dharma may be sought in the approval of one's conscience. The commentators on Manu add the hypothesis that where one has a choice between two ways of acting conscience will show which is to be preferred. They believe, moreover, that the approval of conscience, as a rule of life, is not to be admitted except in the cases of individuals of great virtue.... When the Mīmāṃsā method came to be applied to the texts of the smrti it left very little room for atmatusti" (6).(Lingat et al, 1993).

Davis (2007) articulates atmatusti as "a legal sensibility, a cultivated proficiency to discern what is both right and good" (294). It is the good judgment exercised by sophisticated and educated persons in religious and legal matters, which over time accumulates and results "in a recapitulation of the spirit of the Veda through the medium of human feeling" (294).

Since dharma is considered to be a foundational concept for Hindu legal theory, the indeterminate nature of dharma in terms of its epistemological sources also creates some degree of legal indeterminacy in the Hindu legal system.The authors of the Dharmaśāstras and the Mīmāṃsākas sought to remove this indeterminacy by establishing a system of sorts in terms of the epistemology of dharma by articulating a successive set of sources to be consulted to find dharma.Over time, however, certain sources such as empirical practice or ācāra grew more in prominence – at times, getting more emphasis than the written word in determining dharma.

Articulating this trend of appealing to empirical practice in Hindu jurisprudence as a legal positivism in the Western sense, Davis (2006) says, "The appeal in Hindu law to empirical solutions for the problem of legal indeterminacy suggests that a realist perspective on Hindu law may sympathetically frame this tradition in accessible categories. As with my use of realism in general, this way of characterizing Hindu law also relies on a broader view of Hindu law as committed to legal positivism" (299).

This legal positivism is evident in the case of royal ordinances establishing positive law when custom and the written word are in conflict.

There is, hence, an intimate relationship between the multiplicity of views on the dharma-pramāṇas among the various darśaṇas on account of their linguistic philosophical commitments and how Indian jurisprudence developed and continues to develop. This has implications for jurisprudence in thematic areas in contemporary times and could form an agenda for future research.

Conclusion

Indian linguistic philosophical commitments have a deep relationship with conceptions of dharma and its sources. The subject of dharma that is taken up by the Dharmaśāstras does not have an easy hermeneutical equivalence to law and rules of conduct. Even though the Dharmaśāstras are considered to be law-books, there, hence, is no one-to-one relationship between Indian jurisprudence and the sastras. In fact, as an ethical category, the conceptualization of dharma is not a stable one as there is a great deal of indeterminacy built into it. On one hand, whereas the Brahmanical school of language seeks to defend dharma as rooted in the Vedas and, hence, authoritative, the naturalistic school contests the authority of the Veda and sees dharma merely as conventional rules of conduct. The empirical school occupies an intermediate position. More importantly, this paper finds that although their respective views on language influences what pramāṇas the various schools are willing to accept as valid in knowing dharma, the locus of authority tends to be moving to the human person in some way or the other. The Mīmāṃsākas seek to justify this by arguing that it is only the normative behavior of good people knowledgeable in the Vedas who are an authority for dharma tracing it to a lost Veda, whereas the Cârvākas and Buddhists seek to find what is good and right through their sense-perception as opposed to language and textual sources – language for them being based on convention. This trend of a gradual movement of the locus of *dharmic* authority from textual sources to human and social sources ostensibly connected in some way to textual sources is worth future investigation.

Endnotes:

1 Translating ācāra as good conduct or custom and atmatusti as self-satisfaction or conscience comes with its own challenges. For a discussion on this, see Davis, D. R. (2004)and Davis Jr, D. R. (2007).

2 See Sankhya Karika of Isvara Krishna, Karika IV; The Sankhya Aphorisms, 1:88, Yoga Sutras of Patanjali, 1:7.

3 See Gokhale, P. (1993)

4 See Rocher (2014) for a discussion on this aspect.

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REFORMS

Radical Overhaul of the Anti-Defection Law is a must to curb Defections in India

Arunabh Chowdhury

"If our poll rating drops anymore I'll have to defect back to the other side."

What is the law, if those who make it become the forwardest to break it?

James Beattie- The Wolf and the Shepherds- 1776

Introduction

The term "defection" is derived from the Latin word "defectio" meaning an act of abandonment of a person or a cause to which such person is bound by reasons of allegiance or duty or to which he has fully attached himself. In Parliamentary parlance, defection is also referred to as "crossing the floor" by a Member of the Legislature.

Many mature democracies like Australia, France, United Kingdom and the United States of America do not have anti-defection laws and yet defections are not rampant. Prominent political stalwarts like William Gladstone, Joseph

Chamberlain and Winston Churchill had defected during their political career. However, in India, despite a law in place, defections have assumed alarming proportions and unless checked and controlled will annihilate the democratic principles and values.

The act of defection is by its very nature unscrupulous, unethical, opportunistic and self-serving. It is a betrayal of the voters mandate and a perversion of the democratic process. The malaise of unprincipled and unethical political defection has long been a matter of concern for our democracy. The case of the legislator from Haryana, Gaya Lal[1]gained notoriety for him having switched party thrice within a span of 9 hours after the elections of the first Haryana State Assembly in 1967 – wherefrom the phrase "*Aaya Ram Gaya Ram*", emerged in our political jargon to refer to political turncoats.

In the Malaysian political vocabulary, "defectors" are referred to as "frogs" – it conjures images of treachery, betrayal and immorality. The Penang High Court[2] in a defamation case (instituted by a Defector for calling him a 'frog' by Ng Wei Aik, Member of Parlimanent from Tangong) observed that the term "frog" or "political frog" was merely a moniker or label for politicians who keep changing parties, which was not actionable defamation. The Court held: *"To call a politician frog is a benign label as it referred to a politician who hops from Party to Party. The words were not complimentary, they were certainly not defamatory.*"

I. The Anti-Defection Law

After numerous unsuccessful attempts to bring in a law to curb defections in India, eventually, Parliament by the Fifty-Second Amendment[3] to the Constitution of India for the first time introduced the anti-defection law by amending Article 102(2) and Article 191(2) and adding the Tenth Schedule to the Constitution of India. The Statement of Objects & Reasons appended to the Bill described 'defection' as an evil and spelled out that ***"The evil of political defection has been a matter of national concern. If it is not combated, it is likely to undermine the very foundation of our***

democracy and the principles which sustained it… This Bill is meant for outlawing defections…"

The Supreme Court[4] has described "defection" as a threat to democracy "which has assumed menacing proportions undermining the very basis of democracy". The Court in *Rajendra Singh Rana's case* (supra) has held that if a Member is found to be disqualified, his "continuance in the Assembly even for a day would be illegal and unconstitutional and their holding office as Minister should also be illegal…"

In the recent *Madhya Pradesh Assembly's case*[5], the Supreme Court noted with dismay how elected MLAs are whisked away to private resorts by observing that *"we increasingly see a breakdown in the composition and allegiances of the political party due to private allurements offered to Members as opposed political parties whisking away their political flock to safe destinations does little credit to the state of our democratic politics. It is an unfortunate reflection on the confidence which political party hold in their own constituents and a reflection of what to public policy considerations, the law may have to evolve to address these burgeoning evils."*

The Tenth Schedule

The Tenth Schedule recognised defections as unethical and immoral and declared the following acts to fall within the ambit of "defection" :

(i) if a Member belonging to a political party voluntarily gives up the Membership of the political party {Para 2(1)(a)};

(ii) if a Member belonging to a political party votes or abstains from voting in violation of the whip/direction issued by the political party – provided such voting or abstention has not been condoned by the political party within 15 days of such voting or abstention {Para 2(1)(b)}; and

(iii) if an independent Member (elected as such otherwise than as a Candidate set up by any political party) joins any political party {Para 2(2)}.

The original Tenth Schedule by virtue of Paragraph 3 exempted 'split'[6] in a political party while Paragraph 4 exempted 'merger' from disqualification on the ground of defection – where not less than 2/3rd of the Members of the Legislature Party concerned agrees to the merger where his original political party merges with another political party.

The constitutional validity of the anti-defection law was upheld by the Constitution Bench of the Supreme Court of India in *Kihoto Hollohan v. Zachillhu & Ors.* wherein it was held that the Speaker is the sole authority to adjudicate on issues of disqualification and the 'Speaker' while exercising powers and discharging functions under the Tenth Schedule act as a Tribunal and their decisions are amenable to judicial review. The Court held that[7]:

> "49. Indeed, in a sense an anti-defection law is a statutory variant of its moral principle and justification underlying the power of recall. What might justify a provision for recall would justify a provision for disqualification for defection. Unprincipled defection is a political and social evil. It is perceived as such by the legislature. People, apparently, have grown distrustful of the emotive political exultations that such floor-crossings belong to the sacred area of freedom of conscience, or of the right to dissent or of intellectual freedom. **The anti-defection law seeks to recognise the practical need to place the proprieties of political and personal conduct — whose awkward erosion and grotesque manifestations have been the bane of the times — above certain theoretical assumptions which in reality have fallen into a morass of personal and political degradation.** We should, we think, defer to this legislative wisdom and perception. The choices in constitutional adjudications quite clearly indicate the need for such deference. "Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are adopted

to that end …" are constitutional. [*Katzenbach v. Morgan*, 384 US 641 : 16 L Ed 2d 828 (1966)]."

The majority judgment in *Kihoto's case* inter alia ruled that "the underlying premise in declaring an individual act of defection as forbidden is that lure of office or money could be presumed to have prevailed. Legislature has made this presumption on its own perception and assessment of the extant standards of political proprieties and morality".

The Court in *Kihoto* drew a caveat namely that *"judicial review should not cover any stage prior to the making of a decision by the Speaker/Chairman" and "no quiatimet actions are permissible"* – the only exception for any interlocutory interference be in cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequence.

The minority view of Justice J.S. Verma (as his Lordship, then was) seriously questioned the authority of the Speaker to decide on questions of disqualification and held that *"entrustment of this adjudicatory function fouls within the constitutional scheme and, therefore, violates a basic feature of the Constitution"*.[8]

II. How effective has the Tenth Schedule been in curbing defections?

There is no doubt that the object of the Anti-Defection law is laudable, but it has failed to achieve the desired objective from the very inception. The law rather than curbing defections has become a Defector's delight.

The Law Commission of India in its 170th Report submitted in May, 1999 on reforms on Electoral Laws[9] recommended the deletion of Paragraph 4 relating to mergers on the ground that it will lead to several complications and unnecessary disputes.

The National Commission to Review the Working of the Constitution headed by Justice M.N. Venkatachaliah (Former Chief Justice of India) in its

Report submitted on 31.03.2002 made extensive recommendations to make the Tenth Schedule more effective and suggested that:

> "The provisions of the Tenth Schedule of the Constitution should be amended specifically to provide that all persons defecting - whether individually or in groups - from the party or the alliance of parties, on whose ticket they had been elected, must resign from their parliamentary or assembly seats and must contest fresh elections. In other words, they should lose their Membership and the protection under the provision of split, etc. should be scrapped. The defectors should also be debarred to hold any public office of a minister or any other remunerative political post for at least the duration of the remaining term of the existing legislature or until, the next fresh elections whichever is earlier. The vote cast by a defector to topple a government should be treated as invalid. Further, the power to decide questions as to disqualification on ground of defection should vest in the Election Commission instead of in the Chairman or Speaker of the House concerned."[10]

The recommendations of the National Commission to Review the Working of the Constitution was partially implemented by the Constitution (91st Amendment) Act, 2003 by deleting Paragraph 3 by the Constitution (91st Amendment) Act, 2003 and adding Article sub-article (1B) to Article 75 and sub-article (1B) to Article 164 of the Constitution of India whereby, a disqualified Member shall stand disqualified to be appointed as a Minister for the duration of the period commencing from the date of his disqualification till the date on which the term of his office as such Member would expire or where he contests an election before the expiry of such period till the date on which he declared elected, whichever is earlier. Likewise Article 361B was inserted into the Constitution declaring that a Member disqualified under Paragraph 2 of the Tenth Schedule shall also be disqualified from holding any remunerative political post for the duration of the period commencing from the date of his disqualification till the date on which the term of his office as such Member would expire or till the date on which he contests an election to the House and is declared elected, whichever is earlier.

Despite the law in place, incessant and unethical defections continue unabated and experience has shown that the anti-defection law in India has been misused to permit rampant horse trading and political defections raising serious questions on the efficacy of the law. The provisions of the Tenth Schedule has been abused and continues to be abused to permit unprincipled defections whereby elected Members on a party ticket conveniently shift their allegiance within no time. This abuse has been further accentuated by the questionable roles of Speakers on whom vest the sole authority to decide on issues of defection and on whom the majority judgment in *Kihoto's case* placed immense faith with the attribute of impartiality. Over the years, our democracy has seen how the Speaker has abused his powers and jurisdiction while deciding on issues of disqualification – one common strand being that either the Speaker unduly delays his decision under the Tenth Schedule thereby permitting rampant horse-trading and rendering the proceedings infructuous or the Speaker has passed orders with utmost haste without granting a fair opportunity.

Recent events have shown how despite the anti-defection law in place, elected Legislators have brazenly shifted allegiance to bring down elected Governments either by engineered, orchestrated and contrived resignations or by questionable mergers. In February 2019, 14 Indian National Congress (INC) MLAs and 3 Janata Dal (Secular) MLAs resigned leading to the fall of the H.D Kumaraswamy led coalition Government in Karnataka. In June 2019, 12 out of 18 Congress MLAs in the Telangana Assembly defected to the Telangana Rashtra Samiti (TRS) and claimed a merger. Similarly, 4 out of the 6 Telugu Desam Party (TDP) MPs in the Rajya Sabha joined the Bharatiya Janata Party (BJP) in June 2019. In July 2019, 15 INC MLAs in Goa joined the BJP claiming it as a merger.[11] In August 2019, 10 out of 13 Sikkim Democratic Front MLAs defected to the BJP and thus, the BJP without winning a single seat in the Assembly Elections became the principal opposition party in the State of Sikkim. In March 2020, the Kamal Nath led Indian National Congress Government fell after 22 of the INC MLAs shifted their allegiance to the BJP and resigned to avoid disqualification.

The nation has seen the spectacle of how elected Legislators are herded

in chartered flights to five-star resorts and kept captive till they eventually bargain and submit their resignations to the Speaker. The said events disclose a sordid state of affairs and how the mandate of the electorate has been completely undermined – bringing down duly elected Governments through engineered resignation of Legislators in the Assembly. This is a novel method adopted in recent times to avoid disqualification and yet topple the legitimately elected Government. The MLAs who have tendered their resignations have immediately contested the By-elections on the ticket of another political party and after being elected, few have even been appointed Ministers – thereby establishing that it was the lure of office which led to the resignation drama. In all such cases, the resignations were choreographed to avoid disqualification. This is against constitutional morality and norms and is nothing short of a fraud on the Constitution.

No matter how well intentioned the law is, ultimately its effective implementation and efficacy will depend on the how the law is administered and by the men who administer the law. The resounding words of Dr. B.R. Ambedkar in the Constituent Assembly Debates[12] very aptly sums it up and I quote:

> "Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good, if those who are called to work it, happen to be a good lot…"

A similar warning was also sounded in the Constituent Assembly by Dr. Rajendra Prasad.[13]

It is but apparent that the makers of the anti-defection law have themselves debilitated the law.

III. Questionable Role of Speakers

The efficacy of the proceedings under the Tenth Schedule has been greatly

undermined by the conduct of the designated Tribunal i.e. 'Speaker/ Chairman', the Sole Adjudicating Authority[14] to decide on questions of disqualification on the ground of defection.

The Report of the Committee on Electoral Reforms[15] had recommended that "the power of deciding the legal issue of disqualification should not be left to the Speaker or Chairman of the House but to the President or the Governor, as the case may be, who shall act on the advice of the Election Commission, to whom the question should be referred for determination as in the case of any other post-election disqualification of a Member".[16]

We have seen Speakers deliberately delaying adjudication of the disqualification proceedings and playing a blatantly partisan role. Take for instance, the Tamil Nadu case where 11 AIADMK MLAs voted against the party whip in February 2017 and the Speaker by delaying his decision (with the Courts not fixing a time limit to the Speaker to give his decision) has virtually defeated the Tenth Schedule.

Recently, when the Speaker of the Manipur State Legislative Assembly was unduly delaying the proceedings under the Tenth Schedule, the Supreme Court in *Keisham Meghachandra Singh v. Hon'ble Speaker, Manipur Legislative Assembly & Ors.*[17] disapproved the conduct of the Speaker and ruled that :

> "the Speaker in acting as a Tribunal under the Tenth Schedule is bound to decide disqualification petitions within a reasonable time. What is reasonable will depend on the facts of each case, but absent exceptional circumstances for which there is good reason, a period of three months from the date on which the Petition is filed is the outer limit within which disqualification petitions filed before the Speaker must be decided if the constitutional objective of disqualifying person who have infracted the Tenth Schedule is to be adhered to. This period has been fixed keeping in mind the fact that ordinarily the life of the Lok Sabha and the Legislative Assembly of the States is 5 years and the fact that persons who have incurred such disqualification do not deserve to be MPs / MLAs even for

a single day, as found in *Rajendra Singh Rana*'s case (supra), if they have infracted the provisions of the Tenth Schedule."

The Supreme Court in *Keisham Meghachandra Singh's case* in strong admonishment of the conduct of the Speakers in proceedings under the Tenth Schedule stated thus :

"30. In the years that have followed the enactment of the Tenth Schedule in 1985, this Court's experience of decisions made by Speakers generally leads us to believe that the fears of the minority judgment in *Kihoto Hollohan* (supra) have actually come home to roost.

"31. It is time that Parliament have a rethink on whether disqualification petitions ought to be entrusted to a Speaker as a quasi-judicial authority when such Speaker continues to belong to a particular political party either de jure or de facto. Parliament may seriously consider amending the Constitution to substitute the Speaker of the Lok Sabha and Legislative Assemblies as arbiter of disputes concerning disqualification which arise under the Tenth Schedule with a permanent Tribunal headed by a retired Supreme Court Judge or a retired Chief Justice of a High Court, or some other outside independent mechanism to ensure that such disputes are decided both swiftly and impartially, thus giving real teeth to the provisions contained in the Tenth Schedule, which are so vital in the proper functioning of our democracy."

Even in *Jagjit Singh v. State of Haryana & Ors.*[18], the Supreme Court taking note of the conduct of the Speakers under the Tenth Schedule and the recommendations of the National Commission to Review the Working of the Constitution observed that:

"86. Whether to vest such power in the Speaker or Election Commission or any other institution is not for us to decide. It is only for Parliament to decide. We have noted this aspect so that Parliament, if deemed appropriate, may examine it, bestow its wise consideration

to the aforesaid views expressed also having regard to the experience of last number of years and thereafter take such recourse as it may deem necessary under the circumstances."

Recently, in *Shrimanth Balasaheb Patil v. Karnataka Legislative Assembly*[19], the Supreme Court deprecated the role of the Speaker under the Tenth Schedule and stated thus:

> "153. In the end we need to note that the Speaker, being a neutral person, is expected to act independently while conducting the proceedings of the House or adjudication of any petitions. The constitutional responsibility endowed upon him has to be scrupulously followed. His political affiliations cannot come in the way of adjudication. If Speaker is not able to disassociate from his political party and behaves contrary to the spirit of the neutrality and independence, such person does not deserve to be reposed with public trust and confidence.
>
> 154. In any case, there is a growing trend of Speakers acting against the constitutional duty of being neutral. Additionally, political parties are indulging in horse trading and corrupt practices, due to which the citizens are denied of stable governments. In these circumstances, Parliament is required to re-consider strengthening certain aspects of the Tenth Schedule, so that such undemocratic practices are discouraged."

IV. What can be done to achieve the laudable object of the Tenth Schedule?

The Constitutional provisions relating to the anti-defection law under the Tenth Schedule of the Constitution of India has become a farce. The law needs to be suitably amended to discourage defections by making it more deterrent. We have seen how Speakers have abused their adjudicatory powers under the Tenth Schedule. We have also seen the questionable role of Governors (who act as their political master's voice) who intervene to fish in troubled waters. The Supreme Court in *Nabam Rebia & Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*[20] has warned the Governor to stay away from the

political thicket and keep clear off political horse trading. The Court has held that the Governor has no role whatsoever in proceedings under the Tenth Schedule.

In the recent case of a foiled attempt to dislodge the Government in Rajasthan, the Governor was seen unduly delaying the summoning of the Rajasthan State Legislative Assembly for seeking a confidence vote by the Chief Minister and thereby permitting rampant horse trading.

Thus, the anti-defection law needs more teeth to deter defection.The only disability/disqualification which befalls on a disqualified Member as per the law, as it stands today, is provided in sub-article 1(B) of Article 75, sub-article 1(B) of Article 164 and Article 361B of the Constitution of India which debars the disqualified Member to be appointed as Minister – holding any remunerating post for the duration of the period commencing from the date of his disqualification till the date on which the term of his office of such Member would expire or till the date on which he contests an election and is declared elected, whichever is earlier.This is hardly of any consequence and is definitely not acting as a deterrent to discourage disqualification.

In the *Karnataka Assembly's case* where 15 MLAs of the Indian National Congress had tendered their resignations, the Speaker had rejected the resignation of the Members as not voluntary or genuine and disqualified the said MLAs till the end of the 15th Assembly Legislative Assembly Term i.e. the remaining term of the Legislative Assembly- the Supreme Court[21] held that "the Tenth Schedule of the Constitution while dealing with disqualification on account of defection, does not specify the consequences or period of such disqualification" and that "a Member who has been disqualified under the Tenth Schedule is not barred from contesting re-election" and "the Speaker has no power under the Constitution to disqualify the Members till the end of the term."

V. Suggested Amendments to the Tenth Schedule

The Constitution of India [Article 75(1B), Article 164(1B) and Article 361B] should be amended to debar the disqualified Member and the Member

who has resigned (provided that the resignations have been engineered to topple the Government) from holding any public office of any nature for a particular duration of time which may be for a period of 5 years. Secondly, a disqualified Member should be debarred from seeking re-election (both direct and indirect election) for a particular period of time which may be for a period of 5 years for which appropriate amendments be made in the Representation of the People Act, 1951 by inserting a new Section 8B to the said Act providing for disqualification on the ground of been disqualified under the provisions of the Tenth Schedule. Thirdly, in terms of the law laid down in *Ravi S. Naik v. Union of India*[22], paragraph 2 (1) (a) of the Tenth Schedule be clarified to state that the act of "voluntarily giving up membership" can be inferred from the acts of omission/ commission and from the conduct of the Member in or outside the House". Fourthly, it should be emphatically clarified that for the purposes of a valid claim for "merger" under paragraph 4 (2), the factum of actual merger of the Original Political Party outside the House shall be a condition precedent. Fifthly, the adjudicatory power and jurisdiction of the Speaker to decide on questions of disqualification be taken away and be conferred on an independent permanent Tribunal to be called the "Tribunal under the Tenth Schedule" comprising of a three Member Tribunal headed by a retired Chief Justice and two retired Judges of the High Court in the case of a State/ Union Territories and a three Member Tribunal headed by a retired Chief Justice of India and comprising of two retired Judges of the Supreme Court to deal with cases of disqualification pertaining to the Lok Sabha and Rajya Sabha. The Members of the Tribunal should have a fixed tenure of 5 years.

If the law is disregarded with impunity then such a law is "more mocked than feared."[23] The only way to engender respect for the law and to make it more effective is to ensure that the law is something more than a scarecrow. The effectiveness of a law is measured by the degree of compliance and whether the law has been able to achieve its objective. The anti- defection law has failed on both counts and therefore, requires an urgent revamp.

Endnotes:

1 In the first Haryana State Legislative Assembly Elections held in the year 1967, Gaya Lal was elected as an Independent MLA from Hassanpur Assembly Constituency and within hours of being elected, he joined the Indian National Congress and after a few hours, joined the United Front and by evening, Gaya Lal re-joined the Congress Party – thus within a span of 9 hours, Gaya Lal switched party thrice. Presenting him in a press conference in the evening, Rao Birender Singh in his imitable style said that "Gaya Ram ab Aaya Ram hai" – giving rise to the political jargon "Aaya Ram Gaya Ram" to refer to political turncoats.

2 Judgment of Judicial Commissioner S. Nantha Balan in *Lim Boo Chang v. Ng Wei Aik* (2014).

3 Constitution (Fifty-Second Amendment) Act, 1985.

4 *Rajendra Singh Rana v. Swami Prasad Maurya*, (2007) 4 SCC 270.

5 *Shivraj Singh Chouhan & Ors. v. Speaker, Madhya Pradesh Legislative Assembly*, 2020 SCC Online SC 363.

6 Prior to omission, paragraph 3 stood as under:

Where a member of a House makes a claim that he and any other members of his legislature party constitute the group representing a faction which has arisen as a result of a spill in his original political party and such group consists of not less than one third of the members of such legislature party,—

(a) he shall not be disqualified under sub-paragraph (1) of paragraph 2 on the ground-

(i) that he has voluntarily given up his membership of his original political party; or

(ii) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorised by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority within fifteen days from the date or such voting or abstention; and

(b) from the time of such split, such faction shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this paragraph.

7 Paragraph 49 at p. 686.

8 Paragraph183 at p. 743.

9 Under the Chairmanship of Justice B.P. Jeevan Reddy.

10 Paragraph 4.18.2 of the Report.

11 The claims of merger are not in consonance with paragraph 4 of the Tenth Schedule and questionable as, under Paragraph 4, the merger must be of the original political party – not the Legislature Party. Thus, in the case of Indian National Congress, the merger must be of

the party at the National level. In *Rajendra Singh Rana*'s case, the Supreme Court had debunked the "two hat theory" albeit in the case of a split. Even in *Jagjit Singh*'s case, the Supreme Court in Paragraph 72 held that "if a Member is set up by a national party, it would be no answer to say that events at national level have no concern to decide whether there is a split or not. In case a Member is put up by a national political party, it is split in that party which is relevant consideration and not a split of that political party at the State level. However, there is a decision of the Division Bench of the Gauhati High Court in *Speaker, Nagaland Legislative Assembly v. Imtilemba Sangtam MLA & Ors.* (2015) 1 GLR 391, which holds to the contrary, the Special Leave Petition against which been SLP(C) No.10060/2019 is pending before the Supreme Court.

[12] Constituent Assembly Debates dated 25.11.1949 - Vol.XI/ p. 975.

[13] Constituent Assembly Debates dated 26-11-1949- Vol.XI/ p. 993.

"*Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it*. It is a trite saying that a country can have only the Government it deserves. Our Constitution has provisions in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. *If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country*. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them."

[14] See Para 6 (1) of the Tenth Schedule.

[15] Committee headed by Dinesh Goswami in its Report submitted in May, 1990

[16] Chapter X Page 60 of the Report

[17] 2020 SCC Online SC 55

[18] (2006) 11 SCC 1

[19] (2020) 2 SCC 595

[20] (2016) 8 SCC 1 – a Constitution Bench of 5 Judges

[21] *Shrimanth Balasaheb Patil v. Karnataka Legislative Assembly*, (2020) 2 SCC 595

[22] 1994 Supp. (2) SCC 641, at paragraph 11, p. 649

[23] Duke Vincentio in Measure for Measure – Act II Scene 3 (William Shakespeare).

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The Recall Paradox

Shruti Sarma Hazarika

Introduction

The cumulation of a blatant disregard for ethics and in the absence of an agency for accountability, has catalysed into an apparent *danse macabre* of the democratic fundamental of holding elections in India. This disenchantment of *we the people*, when viewed through the prisms of expectations vis a vis performance of the elected representatives of our country, has only but manifested into a roaring debate, calling for the implementation of stringent recall laws in India, on several occasions.

According to the Black's Law Dictionary, 'recall election' means an election in which voters have the opportunity to remove a public official from office.[1] Recall *in extremis* constitutional jargon, is an enhanced machinery for accountability towards political fidelity over the conduct or misconduct of political incumbents in power, through citizen involvement for the removal of such elected representatives deemed unfit to continue in office and thus, oust them before the completion of term in power. It is a quintessential of universal democracy built on the foundations of direct democracy and is often described as an instrument of empowered representative democracy. The

procedure usually starts with a petition and if a defined threshold of signatures are reached, either a popular vote (also called "recall referendum" or "recall election," or "by-election") is organized (often with a required threshold of participation), or the representative is automatically recalled (Venice Commission, 2019). Its aim is rather to improve representation as Cronin (1989, p. 133) himself acknowledges, by making it more responsive to citizens' aspirations. Historically, dating back in origins to the Roman model of the democratic Republic, rolling through the centuries and continuing to be in practice to be adopted in different countries such as Peru, the US, Japan, Poland, Columbia and Bolivia, the right to recall in India, however, remains in the realms of theoretical arguments in Indian democratic practice and procedure.

Whereas, a state of utopia is possible only in the figment of one's imagination, a dystopian state is a minacious malice to the very essence of democracy. A multitude of debates and deliberations have proposed embracing the right to recall to be a truer reflection of the popular will of the collective, especially in India. However, its exclusion as a constitutional provision by the constituent assembly remains a bewilderingly unclear reality. Contesting that a legitimate metamorphosis of democracy through a process of elections can perhaps, be better evaluated with an efficacious mechanism for accountability rather than with a lack of it, this article attempts to trace the implications, the necessity as well as the absence of Recall Laws in the Indian democratic system, while simultaneously attempting to understand the concept and workings of the provisions of Recall by deconstructing the various connotations associated with the Right.

Understanding Recall through the Lens of Political Thought and Theory

Lord Acton, is perhaps best remembered for his aphorism on Power and its correlation with corruption, his dictum however, is essentially correct. In an ideal libertarian society, absolute power would be vested in one, the necessary checks and balances to countervail the abuse of power would balance competing interests. It could continue indefinitely, at least in theory, albeit such societies seldom exist in reality.

The General Will as expressed by Hobbes-Locke and Rousseau in The Social Contract Theory is embedded in the establishment of the Indian State. In terms Right to Recall, John Locke's interpretation, is perhaps best suited to understand the Indian Constitution and its relation with the people. The establishment of the Indian State upheld by the Constitution is as advocated by Locke, a State of liberty and not of license, in his *Second Treatise of Civil Government,* where Locke argues that the people are also possessed with executive rights as opposed to and in reversal to the ideal that only the King, being a representative of God is vested with rights to be distributed by him to the people of his land.

Whereas, a referendum is different from a recall, as it is different from an initiative in its application, however, taking liberty to draw parallels in understanding from Dicey's Referendum as a comprehensive theory of Democracy, the Right to recall can also be taken into consideration in its conceptual construction to make "democracy itself a check on party tyranny[2]...by a body of men who do not clearly represent the final will of the nation."[3] It is however, apposite to note herein, that A.V. Dicey's Theory of the Referendum did not explicitly speak on Recall.

The concept of Recall was first championed by Karl Marx in his account of The Paris Commune in 1871, however, Marx's lack of theoretical elaboration on Recall, contrary to the characteristic rigour reflected in *The Capital* or *Grundrisse* led to Lenin's reconstruction of the Marxist theory of the State in his *State and Revolution.* In the conception of a Bourgeois Recall in Marxist advocacy, its origins can be found in the political writings of Marx which was later developed into a more systematic theory by Gramse and above all by Lenin, who made the Recall into a central theme in his theory of the Communist State. The Short Life of the Commune, *The Bloody Week – La Semainee Sanglante,* contained the provisions for the Recall. Lenin explicitly spoke of an electoral system comprising of proportional representation with an established mechanism for Right to Recall. Lenin's Report on Recall (Lenin, 1917) stated that the question of re-election is one of actually implementing the democratic principle which is the accepted

practice in all leading countries that only the elected are entitled to speak in the language of state legislation. But having allowed the right of summons for the conduct of affairs of state, the bourgeoisie intentionally withheld the right of recall – the right of actual control. In all revolutionary periods in history, as Lenin stated, a prominent feature in the struggle for constitutional changes has been the fight for the right of Recall (Qvortrup, 2011, 2020). Moreover, Rosa Luxemburg in her original statement of *"What does the Spartacus League want?,"* elucidated the right of Recall as a weapon of the masses to revolt a Totalitarian Capitalist State and emphasised the role of the masses for political and social change.

The speculations on recall in the Indian context have not been isolated events either, conceptually its inclusivity prospectives in the democratic structure have cropped up several times over, including the Constituent Assembly debates, as again in popular discourses of M.N. Roy and J.P. Narayan. Roy, with the defeat of the facist powers in the war shifted his attention to post-war reconstruction of India with the preparation of two basic documents in 1943 and 1944, "The People's Plan for Economic Development of India" and the "Draft Constitution of Free India". The Indian State, according to the Draft Constitution was to be organised on the basis of a country wide network of People's Committees having wide powers such as initiating legislation, expressing opinion on pending bills, recall of representatives and referendum on important national issues. The idea of people's Committees subsequently popularised by Narayan was mainly derived from Roy's Draft Constitution. Given Narayan's absolute revulsion towards mis-governance and political corruption which characterised independent India's rule by the Congress, as asserted by him that *in the kingdom of dialectical materialism, fear makes men conform, and the party takes the place of God*, he plainly believed that *government by consent... is not an adequate enough concept*. The people he argued, had been *left out of the democratic way of life... even though they had the vote*. Nearly 15 years later and into the heart of the Bihar Movement, as he poured scorn in 1974 on the abuse of democratic institutions in India, he once more made the classical democratic demands, for the preselection of candidates not by parties but by

people's committees, for the accountability of the elected to the electors and for the right of the latter to recall the former. (Selbourne, 1981)

Comparative Practices

Several jurisdictions across the world, such as the United States (US), Canada, Venezuela, Philippines, Switzerland and British Columbia for instance, have adopted the system of recall, followed by Sweden, New Zealand, Germany, and United Kingdom (UK), who are trying to bring in place a systemic process of recall. But the only major international document which makes a direct reference to the right to recall is the Inter- Parliamentary Union (IPU) Resolution in the 98th Inter- Parliamentary Conference held in Cairo in the year 1998 titled 'Ensuring Lasting Democracy by Forging Close Links Between Parliament and the People'. It calls upon the States to strengthen representative parliamentary democracy with constitutional instruments, including petitions and referenda, parliamentary recall and the right to initiate legislation, wherever these may be appropriate and feasible in the light of the constitutional system and established political culture. Though the right to vote is treated as a human right in international law subject to reasonable restriction, the same cannot be said regarding the right to recall elected representatives (Shiva K. B., 2018).

If one looks at any of the existing recall processes or the envisaged ones, there is a fundamental procedure which is followed across the board. For instance, such commonality of procedure can be demonstrated by comparing the existing recall process of United States against the one enumerated in the Recall of elected representatives Bill, 2012-13 of the United Kingdom.The recall process in US commences with the filing of a notice of intention to circulate a recall petition, however, eight states requires certain grounds to be shown before the filing of such notice. Similarly, in UK the recall would commence only when the Speaker gives the notice to the returning officer indicating that a 'condition' triggering recall has occurred.The next step involved in a recall process is the circulation of the recall petition and getting it signed by a 'minimum number' of voters within a 'specific time'. Once

the requisite percentage of signature has been collected, the process of the verification of these signatures is undertaken. After the said gamut of events, the seat of the recalled representative is automatically vacated and a by-election is held (Venice Commission, 2019).

It is worth noting that between 1997 and 2013, an astounding number of more than 5000 recall referendums were activated against democratically elected authorities from 747 Peruvian municipalities (45.5% of all municipalities). This makes Peru the world's most intensive user of this mechanism of direct democracy which is designed to remove elected authorities from office before the end of their term (Welp, Y., 2015).

Whereas, countries such as North Korea, China and Cuba have provisions for recall in their Constitutions, although in practice they are not exercised. (Law Report on Imperial Mandate, 2009). Provisions on recall have existed since the 19th century in a limited number of Swiss cantons. In (still rather few) other European countries, as well as in other parts of the world, recall has been introduced– in particular since the 1980s – as one of the possible responses to "*a demand for reinvigorating democracy through more direct citizens' participation*" and the examples of effective application of the mechanism are only growing (Ruth, S., et al, 2017). In **Switzerland**, although not on a federal level, Recall of municipal executives is possible in two cantons: Uri and Ticino. However, recall procedures in Switzerland do not target individual elected politicians, but the local body as a whole. Therefore, they function more as a no-confidence vote rather than an instrument to sanction elected individuals. In **Croatia**, (apart from the county prefect) the municipal prefect, mayor, as well as their deputy who has been elected jointly with them, may be recalled through a popular vote, which may be proposed by 20% of the total number of local voters or 2/3rd members of the local representative body.[4]

Article 170 of the Constitution of Poland explicitly states that "*Members of a self-governing community may decide, by means of a referendum, matters concerning their community, including the dismissal of an organ of local government*

established by direct election. The principles of and procedures for conducting a local referendum shall be specified by statute." Further, Article 24[5] of the federal legislation in Russia, lists recall by voters as one of the cases of early termination of the mandate of elected heads of a municipal entity. In Argentina- Buenos Aires, Catamarca, Corrientes, Chaco, Chubut, Entre Rios, La Rioja, Misiones, Neuquén, Rio Negro, San Luis, San Juan, Santiago del Estero and Tierra del Fuego regulate the recall at provincial and municipal level.[6]

The Indian Scenario

The procedure and laws in relation to elections can be found in Part XV of the Constitution of India which elaborates on matters relating to elections. Recall in itself, has been a recurring debate to be included within the Constitutional framework, however, oddly enough it has been refused space in the larger mandate of procedure and practice, other than provisions of the Recall prescribed for local elections, at the Panchayat level in the states of Uttar Pradesh, Uttarkhand, Bihar,[7] Jharkhand, Chattisgarh, Madhya Pradesh,[8] Rajasthan,[9] Maharashtra, Himachal Pradesh and most recently in the State of Haryana. The law further, applies to the municipalities and municipal corporations also in several states, however, the State Assemblies and the Lower House of the Parliament have been kept outside the purview of the Recall.

A bare perusal of the trajectory calling for provisions of Recall Laws in India reveal that the Right to Recall of elected representatives have been discussed in the Constituent Assembly Debates[10] over Article 8 A(3) which revolved around the central belief that the Right to Elect must be accompanied by a Right to Recall and that the voters ought to be provided with a remedy lest *"if things go wrong,"*[11] however, the Amendment was refused by Dr. B.R. Ambedkar. Whereas, on one hand several members believed the Amendment would would encourage voters to apply thought[12] and understand political education, several others expressed apprehension given the infancy of the Indian Democracy. It was felt that Recall would render the Constituencies a battleground between candidates and unnecessarily make

them victims of political rivalry.[13] The concerns for maintaining responsibility and accountability of the elected representatives towards voters[14] was proposed to be addressed through a sense of collective responsibility (Kumar, 1971) of the elected House, failing which there would be a no confidence vote against the incumbent.[15]

Further, The Representation of People's Act, 1951[16] talks about the Right to Recall, however, the Act in itself only provides for the vacation of Office upon the commission of certain offences and does not take into the account the ground of incompetence neither does it account for dissatisfaction of the electorate as a ground for recall and vacation.

From the Judiciary's perspective, the Hon'ble Supreme Court of India in *Mohan Lal Tripathi v. District Magistrate, Rae Bareilly and Ors.*, *(1993 AIR 2042)* in Paragraph 5, opined that "An elected representative is accountable to the electorate. That is the inherent philosophy in the policy of recall. When a President who is elected by the entire electorate is removed by such members of the Board who have also been elected by the people, it is in fact removal by the electorate itself. Such provision neither violates the spirit nor the purpose of recall of an elected representative. Rather it ensures removal by a responsible body." Further, however, the Hon'ble Allahabad High Court in *Smt. Ram Beti versus District Panchayat Raj Adhikari and Ors.(AIR 1998 All 80)* advised that the provisions of removal of the representative could be made more stringent by restoring the old provisions of recall by Gram Sabha i.e. by the electors themselves. The position taken by the Supreme Court appears to be quite dangerous considering the ample scope created for arbitrariness and bias in such recalls, and therefore, the advice given by the Allahabad High Court indeed holds substance. Therefore, the interests of justice and fairness demand that the *de facto* power to remove the representatives should be with the electorate itself and not the representatives of the electorate. In 2013, the Hon'ble Supreme Court of India, in order to preserve the essence of democracy, recognized the citizens' right to reject by way of 'None of the Above (NOTA)' in *Peoples Union for Civil Liberties v. Union of India*. Surprisingly, this right has also been rendered toothless by legislative drafting

and policy making. Even if a significant section of the electorate chose NOTA, there are no repercussions because our First Past the Post Method disregards the discontent of the electorate (Khurana, 2019).

On the political front, The House of People speaker Somnath Chatterjee, while inaugurating the 72nd Conference of Presiding Officers of Legislative bodies, has said that the Right to Recall representatives for their failure in discharging their duties is necessary for dealing with the growing indiscipline among legislators as well as for their failure to serve the electorates. (Sakthivel, 2008). Further, Varun Gandhi in 2016, had introduced a Private Members Bill, "The Representation of the People (Amendment) Bill" in the Lok Sabha for inclusion of the Right to Recall of MPs and the MLAs within two years of being elected provided 75 percent of those who voted for them were not satisfied with their performance, however, the proposition did not see the light of the day.

Balancing the Scales

Amongst the multitude of issues plaguing Indian Democracy, is the non-fulfilment of the electoral promises where the voters are abandoned in hapless turmoil, as victims of political propagation. There have been several occasions calling for electoral reforms and making the existent form of democracy more participatory, specifically in the Indian context, however, none of the proponents have been able to tip the scales in favour of introducing Recall laws in the form of Amendments in the Indian Constitution. While on the other hand, a significant spectrum debates on the ramifications that could percolate from implementing recall laws in the Indian political and democratic structure. Adumbrating revelations from a critical analysis of arguments against and on behalf of implementing Right to Recall laws in India, it appears to exhibit a trepidation of an out of the frying pan into the fire stitch.

The legislators' role in the decision-making process is becoming more marginal than it was in the country's early years, which is frequently reinforced

by their lack of knowledge, interest, competence, training, discipline and decorum. There have been several long-standing reform agendas to revitalise the parliamentary institutions, but unfortunately, these attract hardly any attention. We have adopted the Westminster model of parliamentary system. It was claimed that this was no pale imitation of the British model, but that the success of India's experiments in parliamentary democracy would have immeasurable influence throughout Asia and other countries (Bhanu, V., 2018). The ex-Chief election commissioner S. Y. Quraishi, had opined that an increase in informed participation in elections would increase the quality of representation. Therefore if the quality of representatives elected has a direct nexus with the quality and the quantity of voters present, the main focus should be on enhancing the political awareness of masses by various means possible and on ensuring a better turn-out of voters in the elections respectively (Quraishi, 2019).

In the process of dissecting the purpose of the recall device, it is essential to put forward Cronin's comprehensive study of so called direct democracy mechanisms (in the US) which expresses that recall provides for continuous accountability, so that voters need not wait until the next election to rid themselves of an incompetent, dishonest, unresponsive, or irresponsible public official (Cronin, T. E., 1989). While, all the arguments that recall elections can generate a form of accountability and more frequent opportunities to sanction elected representatives essentially appear plausible in theory, in practice however, it does not hold true. Especially, in the Indian context, several barriers such as errors in effective appreciation, lack of relevant information while voting, difficulty of establishing credibility of the recall mechanism, prove fatal to electoral accountability. Further, the apprehension that recall elections could lead to a permanent state of campaigning and the daunting burden of cost implications, along with the possibility of instrumentalising partisan politics, thereby, increasing political conflicts and polarisation, make it a procedure too cumbersome to be enacted. If we are to accept that accountability through recall mechanisms would strengthen representation, we also have to consider the possible adverse effects of the same. Therefore, institutionalising recall as a corrective measure for a decaying political

accountability, also appears to be rather symbolic, without any clear empirical evidence that it will necessarily be a beneficial tool to increase accountability and responsiveness. While, discussing the moral constituency objection, the majority's degree of satisfaction, however, is not the only criterion based on which democratic decisions should be evaluated. One of the arguments for the independence of representatives from public opinion was based on fairness and the necessity to represent minorities as well. If representatives become so to speak "slaves" of the majority, the minorities are clearly at risk. (Pierre-Etienne, V., et al, 2020). Further, it is also argued that there would be an apparent violation of the Principles of Natural Justice as it would not provide elected representative sought to be recalled, a reasonable opportunity of being heard. As Mr. Sorabjee, Former Attorney General of India, had observed that recall is fraught with serious consequences for the representative being recalled – for instance, will (and should) the MP/MLA be given an opportunity to be heard, in consonance with the principles of natural justice, and to respond to the allegations in the recall petition (Sorabjee, 2011).

Opponents of the Recall mechanism, moreover, also refer to practical objections such as excess of democracy (Bajpayee, S. 2013) or alternatively, that it would incentivise elected representatives to focus on vested local issues instead of public interest at large. In this context, Mr. S. Sorabjee, had also pointed out that recall subjected the elected members to the supervision and control of his constituency and that would impair the free and independent discharge of his function (Sorabjee, 2011).

The question of expenditure, time and feasibility of conducting such a mammoth exercise, especially in India has led to the predicament of the Law Commission of India negating the suitability of Right to Recall in India. The biggest practical challenge in implementing the recall has been articulated by the Mr. Quraishi who points out that populated state and parliamentary constituencies in India (unlike in Switzerland or even the US) will result in a large number of signatures required to initiate a recall petition, going into lakhs. Not only will the Election Commission of India have to verify the authenticity of every single signature to prevent fraud, it will also have to

determine whether the signatures are genuine and consensual or obtained via fraud or coercion (Quraishi, 2014).

Thus, introducing the Right to Recall might have unintended effects in increasing corruption and the use of money and influence if representatives liable to be recalled try and ensure that a recall petition is not initiated against them. The Law Commission of India in its summary of Conclusions and Recommendations has explicitly stated that is not in favour of introducing the Right to Recall in any form because it can lead to an excess of democracy, which undermines the independence of the elected candidates, ignores minority interests, increases instability and chaos, increases chances of misuse and abuse, is difficult and expensive to implement in practice, especially given that India follows the first past the post system (Law Commission of India, 2015).

Conclusion

It is worth reminding here that bringing representatives closer to the preferences of the majority might be desirable, but that it will not suffice to improve the quality of representation. Firstly, because democracy is not reducible to majority rule and secondly, because the fairness of democratic decisions also heavily depends on their capacity to take account of the legitimate interests all parties concerned. The recall might therefore contribute to improving electoral representation (and not only its perceived legitimacy), but provided it is part of a larger bundle of reforms aiming at making representative institutions more inclusive, more deliberative and more reflexive. Maybe the time has come for rethinking the representative relationship and giving citizens a sense of their democratic responsibilities and opportunities (Law Commission of India, 2015).

Right to Recall, as attractive as a theoretical notion might seem to be, its introduction would entail several practical difficulties and repercussions and if introduced in the foreseeable future, it would require devising a robust recall procedure with a statutory recognition, effectuated in clear and unambiguous terms. Perhaps, with a proper judicial scrutiny to check on the

institution of frivolous recall petitions by losing parties, including a method of recording and analysing the performance of representatives, as a cautious formulation to minimise and reduce the potential risks poised by recall, in addition, to increasing political awareness could substantiate the effective introduction and formulating the process of recall in India. Unfortunately, India is torn between the rise in unethical behaviour on the part of elected representatives and is seen as hesitant in maturing into a participatory democracy.

Endnotes:

[1] Bryan A. Garner (2006), Black's Law Dictionary, 9th Ed. 381

[2] Dicey, A.V. to Maxse (1909, October 12). Quoted from *Richard A. Cosgrove, Albert Venn Dicey: Victorian Jurist london*, 1981. 107

[3] Dicey, A.V. to Maxse, (1984, February, 2). Quoted from *Richard A. Cosgrove, Albert Venn Dicey: Victorian Jurist London*, 1981. 109

[4] The Local and Regional Self-Government Act and the Act on Referenda and Other Forms of Personal Participation of Citizens in Managing the Affairs of State Authorities and Local and Regional Self-Government. Official Gazette nos. 33/1996, 92/2001, 44/2006, 58/2006, 69/2007, 38/2009, 100/2016 and 73/2017.

[5] Russian Federal Law No. 131-FZ- On Basic Principles of Organization of Local Self-Government in the Russian Federation

[6] The Constitution of Buenos Aires *Article 67*

[7] Bihar allows no confidence provision against the Sarpanch at the and Municipal levels. Section 17 of the Bihar Municipal Act, 2007 applies to Recall of councillors through secret ballot by a majority of the total number of voters in the area and Section 18 of the Bihar Panchayat Act, 2006 applies to Recall of the Sarpanch through a no confidence motion passed by simple majority of voters of the Gram Panchayat at a special meeting)

[8] See Section 24 and 47 of the Madhya Pradesh Municipalities Act, 1961 as amended in 2000 to introduce the provision for Recall

[9] In Rajasthan, the Municipal Act, 1959 was amended in 2011 to provide for Recall of and No confidence Motion against the Chairperson and Vice-Chairperson of Municipal Bodies. Rajasthan Legislative Assembly, (2011). Retrieved from http//rajassembly.nic.in/BillsPdf/Bill16-2011.pdf

[10] "If there are any stray instances or some black sheep who have lost the confidence of their constituency still want to continue to represent that constituency in the House, for some such bad instances we should not disfigure our Constitution. We should leave it as it is, to the good sense of the members concerned." Sardar Vallabhbhai Patel on 18th July, 1947 while discussing the proposed amendment on power to recall in Constituent Assembly Debates: Official Report, 2009, Volume IV, New Delhi: Lok Sabha Secretariat

[11] Lok Nath Mishra on Nov 29, 1948 while proposing Amendment in Article 8A(3) in The Constitution of India, Constituent Assembly Debates: Official Report, 2009, Volume VII, New Delhi: Lok Sabha Secretariat

[12] Debate on July 18, 1947 in Constituent Assembly Debates: Official Report, (2009), Volume IV, New Delhi: Lok Sabha Secretariat

[13] Debate on July 18, 1947 in Constituent Assembly Debates: Official Report, (2009), Volume IV, New Delhi: Lok Sabha Secretariat

[14] N.V. Gadgil's speech on July, 17, 1947 in Constituent Assembly Debates: Official Report, 2009, Volume IV, New Delhi: Lok Sabha Secretariat

[15] See Article 75 (3) of the Constitution of India.

[16] Section 8 talks about disqualification on conviction for certain offences, while Section 8A talks about disqualification on ground of corrupt practices.

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RETHINKING REGIMES

Balancing the Pendulum between Confidentiality of Arbitration and Publication of Arbitral Awards to promote transparency in International Commercial Arbitration

Rangon Choudhury

Introduction

Nemo judex idoneus in propria causa est, which translates to "not only must justice be done; it must also be seen to be done"[1] is not just a fundamental principle of natural justice, but constitutes the foundations of any justice dispensation system. The application of this principle has never been more relevant than the present times when the private adjudication of disputes through arbitration, which is otherwise accepted as a more effective means of dispute resolution than national courts has come under immense scrutiny for being too opaque. In fact, this (perceived) lack of transparency is viewed as the main cause for the emergence of the so-called "legitimacy crisis" (Shirlow, 2016, p. 622) that the international arbitration community appears to be dwindling under.

To a large extent, this crisis can be attributed, *inter alia*, to the uncertainties generated by the contentious role of confidentiality.[2] The veil of secrecy that obligations of confidentiality imposes over arbitration has reduced the entire institution into a virtual black box that no one, apart from the participants have access to, thereby justifying the calls for increased transparency. Despite the internationally recognized importance in publishing

arbitral awards (Brown, 2001, p. 988) (in the attempt to make the process more transparent) the current practices with regard to publication do not adequately represent the aforesaid recognition.

This paper is therefore an attempt to study the desirability and significance of publication of arbitral awards as a means to respond to the calls for enhanced transparency in arbitration. Before doing so, it is however imperative to understand the legal basis for confidentiality and to what extent would publication of arbitral awards impede on the relevance of the former. This is attempted in the first part of the paper. The second part thereafter addresses thearguments that necessitates publication of awards to achieve the larger goal of transparency in arbitration.

I. Part One – Legal Basis for Confidentiality

There seems to be a consensus that confidentiality is an essential feature of arbitration. Parties can ensure that their sensitive business secrets are kept away from the public domain and secure their "private interest" in arbitration. However, whether the duty of confidentiality is absolute and/or implicit or subject to agreement between parties is a question that the international arbitration community is yet to answer one way or the other unequivocally. Secondly, the idea that arbitration is private is also presumed to imply that arbitration "must be confidential". Accordingly, it needs to be seen if these presumptions qua confidentiality are based on legal considerations or merely emanate from the desire to trump private interests over any public interests that arbitration is intended to serve. This part therefore endeavors to undertake the aforesaid exercise by studying the "legal basis for confidentiality".

A. Treatment of Confidentiality by Arbitral Institutions

The *UNCITRAL Arbitration Rules 2013* are silent on confidentiality of an arbitral award. Article 28(3), which provides for hearings to be held in camera, at best can be construed as protecting the privacy of parties and not the confidentiality of the proceedings and the award.

The *International Chamber of Commerce (ICC)* has refrained from incorporating an express provision mandating the confidentiality of arbitral proceedings or an award even though it publishes sanitized versions of some awards and procedural orders. The 1998 Rules merely provided that a tribunal may take measures to protect trade secrets and confidential information. The 2017 Rules[3] (the position remains unchanged in the latest 2021 amendments) expanded the jurisdiction of the tribunal to all aspects of the arbitration proceedings including making orders on confidentiality subsequent to a request by a party. This provision however does not provide that the award and the proceedings are *per se* confidential.

The *Stockholm Chamber of Commerce (SCC)* has a practice akin to the ICC's. Despite the 2010 Rules requires the SCC to maintain confidentiality of the arbitration and the award[4], the SCC publishes a multi-volume set of sanitized awards with the approval of parties similar to the ICC Bulletin.

Article 37 of the *American Arbitration Association (AAA)* Rules of 2014 requires arbitrators and the administrator of the arbitration to keep all matters pertaining to the arbitration confidential. This restriction however is not imposed explicitly on the parties meaning that there is a limited scope for publication of awards if the parties' consent to the same. In fact, the AAA does publish sanitized extracts of some of the awards.

The *London Court of International Arbitration* (LCIA) was one of the first institutions to formulate a sophisticated provision on confidentiality. Article 30.1 of the LCIA Rules 2014 expressly provides that arbitration awards, amongst other things are to remain confidential. Article 30.2 extends this obligation to deliberations of the arbitral tribunal. These provisions are however regarded as controversial by arbitration practitioners and academicians in London (Winstanley, 1998, p. 993). In fact, in what can be perceived as a welcome move aimed at generating more transparency, the LCIA, in recent times, has diverted from its own rules and published decisions on challenges to arbitrators and press reports in trade publications that publicize *pendente lite* international trade disputes (Karton, 2012, p. 456).

The Indian arbitral institutions also broadly provide for confidentiality. While Rule 68 of the Rules of the *Indian Council of Arbitration* allows the sanitized publication of arbitral awards subject to written consent of the parties, Rule 35 of the *Mumbai Center for International Arbitration* (MCIA) *Rules* and Rule 36 of the *Delhi International Arbitration Center* (DIAC) *Rules 2018* which are identical in their text requires the strict observance of confidentiality qua the arbitral proceedings and the award.

B. Treatment by National Laws/Arbitration Statutes

In what appears to be an inadequate statutory representation of the acceptance of confidentiality as a worldwide principle in arbitration, national laws differ significantly on the issue. The framers of the UNCITRAL Model Law which provides the foundation for several national arbitration statutes refused to deal with confidentiality in this text deeming it fit to be left open to the parties to decide for themselves. In line with this approach, most national legislations, while legislating extensively on their arbitration law have chosen not to address the issue of confidentiality at all and those who have done so "often fail to delineate the nature and extent of its application", or clarify its scope (Trakman, 2002).

Costa Rica[5] and *Norway*[6] are the only two jurisdictions that allow publication of awards statutorily, subject to approval of parties. There is no implied duty of confidentiality to be maintained with respect to the awards in these two jurisdictions. Very few jurisdictions provide for broad confidentiality obligations explicitly in their national laws. *New Zealand*, *Spain* and *Romania* are a notable few.[7]

Hong Kong has built a sophisticated regime on confidentiality through a default opt-out system. All arbitrations in Hong Kong are to be presumed confidential unless the parties decide to opt out of such a system and expressly provides so in their arbitration agreements.[8]

The *Indian Arbitration Act 1996* (Act of 1996) was silent on confidentiality until the enactment of the 2019 Amendments to the Act of

1996. Section 42A of the amended Act now provides that all arbitration proceedings will remain confidential, minus the award.

Some countries, while not expressly providing for confidentiality of the entire proceedings including the award imposes obligations only on the Tribunal or require that certain aspects of the arbitration remain confidential. Two notable examples are *France* and *China*. While the former seeks to protect deliberations between the arbitral tribunal, the latter protects all hearings.[9]

C. Judicial Perspectives

Considering the inconsistent positions adopted by different countries as observed above, one would expect that national courts would provide more clarity on the subject. An analysis of judicial perspectives across a range of diverse jurisdictions however presents a different picture. In his piece on the "Unwarranted presumption of confidentiality", Fortier has argued that expectations of parties about privacy and confidentiality of the arbitral proceedings are often disappointed or even negated by the courts (Yves Fortier, 1999, p. 131). National Courts have not only refused to honor the presumed expectations of parties about confidentiality but have displayed a wide difference of judicial attitudes to that extent.

Australia appears to be the leading jurisdiction in rejecting an implied duty of confidentiality inarbitration. In a seminal decision in the case of *Esso v. Plowman*[10], the Australian High Court had observed that confidentiality, unlike privacy is not a part of the inherent nature of the "arbitration contract and of the relationship thereby established". Even if a duty with regard to confidentiality exists, it is not absolute. The Court also went on to state that any duty of confidentiality is vulnerable to a clear public interest exception. The Chief Justice Masonard, in this regard noted (*Esso v. Plowman*, p. 402):

> *"Why should the consumers and public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which*

will affect, in all probability, the prices chargeable to consumers by the Public Utilities?"

A similar position has existed in the United States. The Federal Arbitration Act has no reference to any provision on confidentiality. The US Courts, in many cases have also been reluctant torecognize any implied duty of confidentiality in arbitration, thus leaving the matter to the parties' agreement. In *United States v. Panhandle E. Corp*., a United States federal district court held that, absent explicit agreement by the parties or institutional rules on point, arbitration proceedings are not necessarily confidential.[11] In a more recentcase of *Lawrence v. Household International*, the Court compelled the production of documents from a former arbitration, notwithstanding an explicit confidentiality agreement between the parties covering all documents disclosed in connection with the arbitration[12].

On the contrary, most civil law jurisdictions have traditionally maintained confidentiality of arbitral proceedings despite the general absence of a statutory framework mandating such a duty. Sweden however seems to be an exception in this regard. In the well-publicized *Bulbank case*[13], the Swedish Supreme Court held that there is no implied duty of confidentiality in private arbitrations.The Court also enquired whether there was any international consensus regarding confidentiality and, upon determining that there was none, concluded that it was free to come to its own negative decision on the existence of such an implied duty.

The jurisprudence of the English Courts with respect to confidentiality seems to be far more engaging than any other jurisdiction. Even though the English Arbitration Act of 1996 is silent on the scope of confidentiality in an English seated arbitration, the Courts in England appear to have interpreted this silence as requiring the imposition of a duty of confidentiality over arbitration in England. In *Ali Shipping v. Shipyard Trogir*[14], the Court of Appeal reiterated the position in English common law that there is an implied obligation of confidentiality in international arbitration and that confidentiality is a necessary incident to "the essentially private nature of arbitration". The last

time this principle was confirmed by the English Courts was in 2008 in the *Emmott Case*[15]. Even though the Courts on numerous occasions have carved out exceptions to the rule and permitted disclosure to some extent, the rule as last confirmed in the *Emmott Case* remains that arbitrations in England are to be deemed confidential unless parties agree otherwise.

D. Treatment by Parties

Even though it is widely accepted that confidentiality of arbitration proceedings is one of the factors behind parties choosing to have their disputes resolved through arbitration, very often arbitration agreements or contracts containing arbitration clauses do not contain any stipulations, express or implicit on confidentiality. In light of the same, it becomes imperative to evaluate where do parties' truly stand on confidentiality.

The surveys conducted by Queen Mary University of London in conjunction with White and Case LLP over the years provide useful information in this regard. According to the 2010 survey, 62% of respondents said that confidentiality was "very important" to them, and a further 24% said it was "quite important". 50% considered arbitration confidential even in the absence of an express agreement to that effect, whereas 30% considered that it was not. 38% said that they would still use arbitration even if it did not offer the potential for confidentiality.

In the 2015 survey, respondents were asked to cite their three most valuable characteristics of International Arbitration. With only 33 percent of the total respondents voting for "Confidentiality and Privacy", it was placed in the fifth position in the rankings after factors such as enforceability, avoiding specific legal systems, flexibility and arbitrator selection. In the 2018 survey, Respondents were asked to rate the degree of importance they attach to confidentiality in international commercial arbitration. Only 40% deemed it to be very important, 33% consider it to be quite important, 9% thinks that it depends on circumstances and no one thought that it is completely unimportant.

1. Interim Conclusion

The treatment accorded to confidentiality by arbitral institutions, national law, domestic courts and parties in arbitration clearly demonstrates that there is a difference between the presumption that confidentiality is an intrinsic aspect of arbitration and the legal representation of this presumption in rules, statutes and judgments.

As far as institutional rules are concerned, while some are silent on confidentiality, some allow limited publication with the consent of parties and very few do not allow publication at all, thereby imposing an express duty of confidentiality. The ones that impose blanket confidentiality obligations however do so in such a broad and vague manner that the same do not prove to be of any practical significance. Furthermore, they do not address whether information remains confidential *after* the arbitration is concluded.

National Law does not provide a very different picture either. Notwithstanding the divergence of opinions across jurisdictions, national courts have contributed to the conundrum by refusing to read any express duty of confidentiality in arbitration agreements in the absence of an intention to the contrary. Jurisdictions that have done so have been criticized. The current framework in the English Courts, for instance has come under scrutiny in the recent years for its adverse impact on the scope of publication awards and consequently on the general transparency of English Seated arbitrations (The BAILII Lecture, 2016). It has been argued the increased use of arbitration to settle commercial disputes has adversely affected the development of commercial law by the English Courts, especially given that all the jurisprudence that develops in arbitration remains under closed curtains.

On paper, parties also do not seem to express the importance they allegedly attach to confidentiality. According to the aforementioned surveys, the percentage of people who consider confidentiality to be very important has actually gone down from 2010 to 2018 by 22%. To this extent, the

below quoted conclusion in the 2018 survey regarding parties' perceptions towards confidentiality is very pertinent:

> *"…as discussed in the 2010 survey and confirmed by the current study, confidentiality is not of itself the single biggest driver behind the choice of arbitration by the parties who use it."*

It can therefore be reasonably inferred that, confidentiality while being important for the survival of international arbitration is not grounded on any universal legal basis or an international consensus in the arbitration diaspora. As such, the requirement to observe the same strictly seems not just ambitious but also counterproductive to the larger goal of achieving transparency in international arbitration. Therefore, confidentiality ought to be subject to reasonable disclosures and limitations so that the goal of transparency can be actualized. The next part of the paper therefore focuses on achieving the aforesaid goal by presenting an argument in favour of publication of domestic and international arbitral awards.

2. Role of Publication of Arbitral Awards in achieving the goal of transparency

Despite of a general understanding that an increased publication of awards will benefit the arbitration community at large, the interests of parties in keeping their business secrets confidential often trumps the public interests that publication is associated with. As a result, an overwhelming majority of arbitral awards arisingout of commercial arbitration remain unpublished.

The debate surrounding confidentiality and publication of awards in international commercial arbitration, as it happens is not a new one. One of the first comprehensive attempts to argue in favour of publication of awards was made by Dr. Julian DM Lew in an essay titled "The case for the publication of arbitral awards" (Lew, 1982). Various commentators have continued to make the argument ever since. While some have argued for a more systematic publication of arbitral awards led by arbitral institutions, they have been

sceptical of a similar requirement at the national level.This chapter outlines in detail, the inherent public interests associated with publication of arbitral awards in international commercial arbitration that necessitates arbitral institutions, states andparties to agree on the scope and extent of confidentiality of arbitration so as to pave the way for increased publication of awards, thereby enhancing the transparency in the process.

A. Rule of Law and Public Interest

While it is true that the core features of arbitration are fundamentally different from conventional litigation before courts, it would be far-fetched to argue in the same breath that the process of adjudication in arbitration is different from the judicial determination of a dispute. Even though arbitrators can be regarded as service providers who derive their powers from a private contract, the role they perform is remarkably similar to that of a judge. Arbitrators are expected to apply law to a set of facts, akin to a judge in a court of law. In doing so, they must first identify the policy behind a given statute and interpret it to further the policy envisaged by the drafters. Despite the flexibility that an arbitrator may have while determining the applicable rules, he is bound by the limitations prescribed by mandatory law of the seat and must ensure strict adherence to the same. The principles of natural justice and due process, considered to be sacrosanct elements of the rule of law in any justice dispensation system, applies to arbitration with the same vigour akin to adjudication before national courts. Arbitrators are duty bound to ensure that parties are treated equally and given the same opportunities to be heard and defended. Furthermore, arbitrators much like judges routinely call upon and review evidence presented by parties in an arbitration.

Therefore, arbitration, much like litigation before national courts is very much grounded in the rule of law and as such, must be consistent with it. In other words, if judges are held to perform important public functions and held accountable for the decisions rendered by them there is no reason to not hold arbitrators accountable to a similar standard. The public at large at the very least has an interest in seeing that arbitration operates as a legitimate

means of dispute resolution and that arbitrators ensure compliance to the rule of law at every step.

With an increased reliance on private sectors to perform public functions in virtually every industrialized state through private-public contracts and the gradual collapse of the doctrine of non-arbitrability, arbitration plays an ever-important public function today. International arbitral tribunals routinely review disputes associated with public policy, including (in investment law) disputes arising out of the exercise of sovereignty of host states, and as such directly affect community interests. Coupled with the fact that national courts have limited powers to review arbitral awards, it becomes even more important to render the work of arbitrators visible so that the legitimate interests of the public are preserved and the legitimacy of arbitration as an institution is strengthened.

B. Development of Commercial Substantive Law

The precedential potential of arbitral awards in contributing to the development of commercial law and jurisprudence (even though arbitration is not subject to any formal rule of *stare decisis*) is best captured by the words extracted below (Cremades et al, 2013, p. 35):

> *"the role of the arbitrator is [generally] undertaken by highly qualified jurists with experience in the matters under consideration", and thus arbitral awards "constitute, in many cases, highly noteworthy juridical works and keeping them private deprives the [law] of the opportunity to benefit from their content."*

While arbitral precedent may not be of much value in so far as procedural law is concerned, it can prove to be of significant value in so far as development of substantive law is concerned. In an arbitration governed by national law pursuant to a choice of law clause, it is not always the case that the tribunal will find the guidance required to determine a particular issue or interpret a statutory provision. This could be because the aforesaid issue has not been

dealt with by that jurisdiction at all or that the same has not been subject to interpretation by national courts, but only by arbitral tribunals.

Publishing awards and using them as a source of interpretation for legal or contractual provisions, as interpreted by tribunals not only assists the courts in developing domestic commercial law but also provides the information required by the business community to make sound business decisions. Equally when there is no stipulation as to applicable law, a tribunal might choose to apply an autonomous body of transnational commercial law under labels such as *lex mercatoria*[16] or *General Principles of Law*. Consequently publication of awards and their application as persuasive precedent therefore has the tremendous potential of developing and expanding *lex mercatoria* given that international arbitration is the primary platform of resolution of international trade and business disputes and arbitral awards are a rich source of *lex mercatoria*.

C. Consistency in Decision Making

Consistency in decision making is not just essential for ensuring transparency in a justice dispensation system but is indispensable to ensure that the faith of the stakeholder is not eroded from the system. This assumes significance in a dispute resolution mechanism like arbitration where predictability of result was identified as a challenge as early as 1965 (Domke, 1965).

In this regard, publication of awards would allow arbitrators to draw from a broad corpus of previous decisions and see how the law is applied in specific situations. The persuasive value that a homogenous body of well written and reasoned body of arbitral decisions will have can coalesce into a collective arbitral wisdom offering guidance to future parties and tribunals as to how disputes with similar factual or legal backgrounds ought to be decided. The limited publication of awards by the ICC stands as an example of this argument.

Furthermore, in the absence of publication, there is an inherent risk that different tribunals may produce different conflicting results based on similar issues of facts and law. It does not just lead to uncertainties for the parties involved but also threatens the reliability of the entire adjudicatory process. Notwithstanding the res judicata effect of international arbitral awards, if any, publication would therefore reduce the likelihood of different tribunals reaching inconsistent decisions in related disputes.

D. Predictability in making business decisions

Considering that the idea of making an award public clashes with the interest of a party to keep the same confidential on principle, it is generally perceived that publication will likely be detrimental to parties' interest. What parties however often fail to realize in the process is that confidentiality obligations often prevent parties from assessing the possible risks they may face while submitting their disputes to arbitration. As a result, the best they can do is gamble and hope for the results to work in their favour. In this regard, giving parties access to previously published decisions and allowing them to understand how issues of a certain type, for instance – security of costs are decided in arbitration can have a significant, but positive impact on business decision making.

By increasing the foreseeability of outcomes, parties can decide for themselves whether a claim is worth pursuing. Instead of spending resources in tracking down precedents or reacting to untimely discovery of precedents, parties can study previous awards (where analogous issues have been decided) to determine their chances of succeeding in a given arbitration. They are likely not to pursue a claim (and thereby save on time and costs) if similar claims have been dismissed by previous tribunals in the past. This will also bring down the number of frivolous claims filed in arbitration.

Further, if a more systematic publication were to occur, depending on the degree of sanitization required, parties contemplating arbitration get the opportunity to assess the suitability of an arbitrator[17] for a particular dispute.

Experience of allowing publication of awards in the maritime industry has shown how published awards, by giving an insight into the practices and customs of the industry not only has served as a guide for the resolution of disputes, but also as a means of avoiding disputes when negotiations fail.

Predictability of outcomes therefore seems to be the most obvious incentive for parties to consent to publication of awards. By enabling parties to make well informed business decisions, publication allows the harmonization of the costs of pursuing arbitration against the actual loss suffered. This predictability is not just restricted to outcomes but also choosing business partners. By shielding the past dealings of commercial parties in arbitration, confidentiality to a large extent increases counterparty risk and chills contracting. Parties often do not have enough information about a prospective business partner before contracting with her. Publication will give parties this valuable information and enable them to understand whether a business entity is worth contracting with. For instance, if a party is found to have breached similar contracts in the past, it is not likely to be chosen to do business with in the first place.

E. Quality of Awards rendered by Arbitrators/Tribunals

Publication of awards can be said to have a direct and positive correlation with high quality decision making by arbitrators. In the absence of any external scrutiny over awards due to non publication, arbitrators do not have any incentive in status quo to draft high quality awards and even if they do so, much of the creative work of tribunals is generally not known.

In this regard, publication of awards with the names of arbitrators included in them will encourage arbitrators to be more sincere in drafting awards in the knowledge that their decisions would be available publicly and therefore be open to scrutiny within the arbitration community. Arbitrators are therefore likely to clarify their analysis and justify their decisions with precision. This is also likely to encourage arbitrators to articulate coherent legal and factual bases for their findings and develop

novel and creative legal solutions that will make awards less prone to challenges in national courts.

The improved quality of awards has the potential of contributing to scholarly commentaries that will fill in the gaps between theory and practice and allow the collection of important data through empirical research.[18] This can lead to the development of a coherent doctrine of authoritative writings that can be used as guidance in future disputes, thereby streamlining the discourse on any point of law. Publication will also aid arbitrators in keeping up with prevailing commercial practices and rendering decisions taking into consideration the prevailing trends in a certain industry or market.

3. Conclusion

Confidentiality, without a doubt, holds an important position in International Arbitration. This, however, does not mean that International Arbitration would stand to collapse in its absence. While it is important to preserve the private interest of parties, it is also imperative to consider the community interests that arbitration as a platform for rendering justice is meant to serve and the dangers that accrue to those interests when the former is allowed to trump the latter.

This paper has argued that publication of arbitral awards is necessary not just to uphold the democratic virtues that states are duty bound to preserve but because publication impacts everyone involved in the process positively, including parties. It is only when the public interests, as identified in this paper are fulfilled can arbitration evolve as a transparent and accountable dispute resolution process that the public can put their faith in.

The Balancing Act therefore seems to be the need of the hour. Meeting the public interests must be achieved in a manner which is cognizant of the competing interests of parties to arbitrations, namely confidentiality of business information, and the time and cost efficiencies of arbitration so that the larger goal of transparency is achieved.

Endnotes:

[1] This oft-quoted aphorism was introduced by *R v. Sussex Justices*, Ex parte McCarthy, [1924] 1 KB 256

[2] Arbitration is generally perceived to be confidential in nature. The decisions of arbitral decisions including information on the substantive issues in a dispute and the details of the parties involved are not available in the public domain unlike decisions of national courts.

[3] Article 22.3

[4] Article 46

[5] Article 38 of the Costa Rican Arbitration Law 2011

[6] Section 5(1) of the Norwegian Arbitration Act 2004

[7] Article 14 of the New Zealand Arbitration Act 1996; Article 24(2) of the Spanish Arbitration Act 2003; Article 353 of the Romanian Civil Code of Procedure.

[8] The Hongkong Arbitration Ordinance 2013

[9] Article 1469 of the French New Code of Civil Procedure; Article 30 of Chinese Arbitration Law

[10] *Esso Australia Resources Ltd v. Plowman,* 128 A.L.R. 391 (1995).

[11] *United States of America v. Panhandle Eastern Corp*, 118 F.R.D. 346, 350 (D.Del. 1988)

[12] *Lawrence E. Jaffee Pension Plan v. Household International Inc.*, 2004 WL 1821968 (D. Colo. Aug. 13, 2004)

[13] *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Fin. Inc* (2001) XXVI YB Comm. Arb [291] [298]

[14] *Ali Shipping v Shipyard Trogir* 1 Lloyd's Rep. 643 (Eng. C.A. 1998).

[15] *Emmott v. Michael Wilson & Partners* [2008] EWCA Civ 184

[16] Lex Mercatorian is generally understood to mean a body of legal principles, based on customs and trade usages, which has acquired the force of law consequent to recognition by courts and tribunals over the years.

[17] The lack of published decisions in status quo prevents the market of arbitrator services to be fully competitive. Publication of awards will allow the lessor known and arbitrators to show their expertise and bridge the asymmetries created by the small pool of big arbitrators who keep on getting appointed on face value.

[18] There are various areas of research in arbitration which need further elaboration, but they cannot be studied due to lack of published sources. See Drazohal, C. et al (2005).

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REDD+ and Indigenous People's Right over Forest in North-East India

Vikram Rajkhowa

Introduction

REDD+ is a voluntary climate change mitigation approach that has been developed by Parties to the United Nations Framework Convention on Climate Change (UNFCCC). It aims to incentivize developing countries to reduce emissions from deforestation and forest degradation, conserve forest carbon stocks, sustainably manage forests and enhance forest carbon stocks.

The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries – or UN-REDD Programme – is a multilateral body. It partners with developing countries to support them in establishing the technical capacities needed to implement REDD+ and meet UNFCCC requirements for REDD+ result-based payments. It does so through a country-based approach that provides advisory and technical support services tailored to national circumstances and needs. The UN-REDD Programme is a collaborative initiative of the United Nations Food and Agriculture Organization (FAO), the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP), and harnesses the technical expertise of

these UN agencies. Other examples of REDD+ multilaterals include the Forest Carbon Partnership Facility and Forest Investment Program, hosted by The World Bank (UN-REDD Programme, 2016).

National REDD+ Strategy India

The National Reducing Emissions from Deforestation and Forest Degradation (REDD+) Strategy for India prepared by Indian Council of Forestry and Education, Dehradun for the Government was released in New Delhi by Union Minister for Environment, Forest and Climate Change Harsh Vardhan. Reducing emissions from deforestation and forest degradation, conservation of forest carbon stocks, sustainable management of forests, and enhancement of forest carbon stocks in developing countries' (collectively known as REDD+) aims to achieve climate change mitigation by incentivising forest conservation. The Paris Agreement on Climate Change also recognises the role of forests in climate change mitigation and calls upon the party countries to take action to implement and support REDD+.

Speaking on the occasion of release of India's national strategy of REDD+ Vardhan said that India is committed to the Paris Agreement on Climate Change. In its nationally determined contribution to the Paris Agreement, India has communicated that it will capture 2.5 to 3 billion tonnes of carbon dioxide through additional efforts. India's national REDD+ strategy is one of the tools to further supplement India's commitment to the Paris Agreement. India's first biennial update report to UNFCCC reveals that forests in India capture about 12 per cent of India's total GHG emission. Thus, forestry sector in India is making a positive contribution for climate change mitigation.

He further stressed that well-being of forests is essential for healthy environment, sustainable livelihood of local communities and also for conservation of biodiversity. REDD+ attracts attention in a developing country like India where local communities and forest dwelling tribal communities have high dependency on forests for their livelihoods. The strategy will support empowerment of youth cadres as community foresters

to lead the charge at the local level. Green skill development programme for imparting forestry related specialised skill will also be implemented (The Pioneer, 2018).

Relevant portions of National REDD+ Strategy India: (MoEFCC, 2018)

General

India is a vast country with a rich biological diversity. Forest is the second-largest land use in India after agriculture. Roughly, 275 million rural people in India depend on forests for at least part of their subsistence and livelihood (World Bank, 2006). As per the India State of Forest Report (FSI, 2017), the forest cover of the country stood at 708,273 sq.km., while it was 701,495 sq.km. in 2015 updated assessment (FSI, 2017), recording an increase of 6778 sq.km. within two years. The National Forest Policy of India envisages 33% of its geographical area under forest and tree cover. The total forest and tree cover of the country is 24.4% of its geographical area.

Concept of REDD+

Globally anthropogenic emissions from land use, land use change and forestry contributes 9-11% of Green House Gases (GHG) emissions owing to large scale deforestation and forest degradation in developing countries (IPCC, 2014). The agenda of "Reducing emissions from deforestation and forest degradation in developing countries (REDD)" was first introduced in United Nations Framework Convention on Climate Change (UNFCCC) as a climate change mitigation option to address the emission from deforestation and forest degradation in 2005.

With India's intervention for inclusion of policy approach of conservation and sustainable management of forests, the concept of "forest conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries" was added and the concept is now collectively referred as 'REDD+'.

Scope of REDD+

In the REDD+ Decision at Cancun (COP16), Governments agree to boost action to curb emissions from deforestation and forest degradation in developing countries with technological and financial support. Developing country Parties, in accordance with their respective capabilities and national circumstances are encouraged to contribute to mitigation actions in the forest sector by undertaking the following activities, as deemed appropriate by each Party:

1. Reducing emissions from deforestation;
2. Reducing emissions from forest degradation;
3. Conservation of forest carbon stocks;
4. Sustainable management of forest; and
5. Enhancement of forest carbon stocks

Broad Elements of National REDD+ Strategy

In accordance with the Conference of the Parties (COP) decision the National REDD+ Strategy or action plans, should address, inter alia, the drivers of deforestation and forest degradation, land tenure issues, forest governance issues, gender considerations and the safeguards identified, ensuring the full and effective participation of relevant stakeholders, inter alia indigenous peoples and local communities.

Rationale for REDD+

All five activities of REDD+ being aligned with the precepts of the National Forest Policy (NFP), constitute a common thread running through all programmes, schemes and projects of forestry sector in the country. REDD+ brings all actions and activities by all stakeholders on a common platform making it feasible to ensure a comprehensive monitoring and assessment of the performance of forest management and development at different levels of administration. REDD+ implementation with its coverage of natural forests as well as trees outside forest (TOF), synergizes well with

the socio-economic development of local communities, raw material requirement of wood-based industry, need for conservation of biodiversity including plants and animals, providing a green environment for people, and enhancing the forest carbon sink.

Involvement of Local Communities in REDD+

In India, tribals, forest dwellers and other local communities have always enjoyed legal safeguards to exercise their customary rights and traditions. Acknowledging the importance of indigenous communities in maintaining forest ecosystems, the Government of India has recognized the forest rights of the indigenous communities by enacting the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. The Act bestows on the local indigenous communities the responsibilities and authority for sustainable use of forest, conservation of biodiversity and maintenance of ecological balance. This is intended to strengthen the conservation regime of the forests, along with ensuring the livelihood and food security of the forest dwelling Scheduled Tribes and other traditional forest dwellers.

REDD+ as a solution to Climate Change

REDD and its new avatar REDD+ has received criticism and protest across the globe, primarily from indigenous people's organizations, who are terming it as a false solution to climate change and a new form of colonialism. According to them, REDD+ actually means REAPING profits from EVICTIONS, land grabs DEFORESTATION and DESTRUCTION of biodiversity. In a video on REDD+ published by the Indigenous Environmental Network, on the 'deceptive climate solution' (The Mending News, 2012) being proposed in California and being implemented within the U.N. climate negotiations and the World Bank, says:

> "*REDD and its link to Assembly Bill 32 or in short AB-32, California's Climate Law is a scam for the biggest polluters of California to get out of its reducing their emissions at source. Carbon trading is a scheme*

to privatise the sky and set-up a trading mechanism, whereby polluters can buy and sell permits to pollute even more. Specifically REDD is an off-set mechanism which uses the forests in the global South (financially poorer or so-called developing countries, mainly in Africa, Asia-Pacific and Latin America) as sponges for the global North (financially wealthy and so-called developed countries in the Northern Hemisphere).

So the idea is that if I grab these forests in the global South as sponges for my pollution, I can keep polluting, in say California. REDD is the pillar to what is being called the 'Green Economy', which is nothing more but capitalism of life. For e.g., Chevron, California's biggest polluter is doing REDD in the Atlantic forests of Brazil in conjunction with General Motors and Nature Conservancy. This REDD project uses armed guards, called the Green Force, who have resorted to violence on indigenous people to keep them off their land".

A news report titled 'World Bank and UN Carbon offset scheme complicit in genocidal land grabs – NGOs' published in The Guardian on July 3, 2014, (Ahmed, 2014) states:

"Between 2000 and 2010, a total of 500 million acres of land in Asia, Africa, Latin America and the Caribbean was acquired or negotiated under deals brokered on behalf of foreign governments and transnational corporations. Many such deals are geared toward growing crops or bio-fuels for export to richer, developed countries – with the consequence that small-holder farmers are displaced from their land and lose their livelihood while communities go hungry."

It further states:

"In west Kenya, over a thousand homes had been torched by the government's Kenya Forest Service (KFS) to forcibly evict the 15,000 strong Sengwer indigenous people from their ancestral homes in the Embobut forest and the Cherangany Hills. The World Bank's Natural Resource Management

Programme (NRMP) with the Kenyan government, launched in 2007, has involved funding for projects in the Cherangany Hills under the UN's REDD programme, including financing REDD+ readiness activities, some of which began in May 2013. One examples of the harm caused by the project was that it changed the border of the Cherangany forest reserves, such that Sengwer families, without any consultation or notice, found themselves on the inside of the forest reserve and therefore automatically subject to eviction by the KFS, evictions effectively funded by the World Bank."

In an article titled "REDD-plus a new mantra, despite divisions" published in The Hindu, (Menon, 2010) it was reported as follows:

"Some groups of indigenous people in Oaxaca are set to file a case against the Mexican government for forcibly extending the REDD project for another 30 years, said Silvia Ribeiro, Latin America director of ETC (Action Group on Erosion, Technology and Concentration). People who had accepted the Environmental Services Programme (ESP) in Mexico, part of the REDD projects, were slowly finding out that while ownership of land was preserved with them, they lost control over it.

Shankar Gopalakrishnan from the Campaign for Survival and Dignity, India, said REDD threatened the rights of indigenous people and forest dwellers, and it could exacerbate conflict. It could become a way of locking down forests by the government and private interests. In the jungles of Ecuador, where REDD was being touted as a saviour, people protested as it violated their collective rights."

Who benefits from REDD+

"Today, just 100 corporations produce 71% of greenhouse-gas (GHG) emissions. (The Guardian, 2017). The wealthiest 10% of people are responsible for around 50% of GHG emissions, while the poorest 50% produce 10% of emissions," (OXFAM, 2020) according to an article titled "Who Benefits

from False Climate Solutions?" published in the news magazine 'Project Syndicate' dated September 13, 2019 (Nansen, 2019).

The above mentioned article further states as follows:

"Unwilling to stand up to those who are destroying our planet, political leaders have latched onto technological solutions, including geoengineering approaches that promise to suck already-emitted carbon out of the atmosphere. Even the Intergovernmental Panel on Climate Change (IPCC) included assumptions about such technologies in many of its modeled pathways for keeping global temperatures from rising more than 1.5 °C above pre-industrial levels.

But geoengineering technologies are unproven, unsafe, and unrealistic. Consider bio-energy with carbon capture and storage (BECCS), the leading proposed path to "net-negative" emissions. BECCS entails growing certain crops as biomass, burning the plant material for energy, capturing the CO_2 emitted during combustion, and storing it underground.

That sounds promising until one recognizes that growing biomass on the necessary scale would require an estimated three billion hectares – twice the Earth's currently cultivated land. Any attempt to implement BECCS would thus be impossible without mass deforestation and soil degradation in the tropical belt of the Southern Hemisphere, where most fast-growing biomass is produced. Land grabs are virtually guaranteed. Moreover, as agricultural land was transformed to produce biomass, food prices could rise, fuelling hunger and malnutrition. And the destruction of vital ecosystems would eliminate the livelihoods of local communities and indigenous peoples.

Hyping BECCS and other misleading promises – such as Reducing Emissions from Deforestation and Forest Degradation (REDD+) initiatives and carbon-trading schemes – is expedient for rich countries, corporations, and elites, because the technology charade enables them to continue profiting from the climate crisis they have created. But, by distracting from real

imperatives, it allows the crisis to deepen and disproportionately affect those who have contributed the least."

International Forum of Indigenous Peoples on Climate Change on REDD

In its first statement to the United Nations on REDD, the International Forum of Indigenous Peoples on Climate Change, the indigenous caucus to the United Nations Framework Convention on Climate Change, (IFIPCC, 2007) warned that:

"REDD will not benefit Indigenous Peoples, but, in fact, it will result in more violations of Indigenous Peoples' Rights. It will increase the violation of our Human Rights, our rights to our lands, territories and resources, steal our land, cause forced evictions, prevent access and threaten indigenous agriculture practices, destroy biodiversity and culture diversity and cause social conflicts. Under REDD, States and Carbon Traders will take more control over our forests."

Implication of REDD+ for North-East

The North-Eastern states are home to many tribal and indigenous communities and has large areas under forest cover. Its importance can be underlined from the fact that the North-Eastern region, with just 7.98 percent of the geographical area of the country, accounts for nearly 25 percent of the country's forest cover (Aggarwal, 2020). This makes the region the natural choice for implementation of REDD+ programmes.

It has been observed that in most cases whenever the boundaries of protected areas are altered and new additions are being created or the boundaries of eco-sensitive zones of protected areas are being demarcated, the areas wherein industries, coal mining, oil and gas exploration, etc, are operating are mostly left out of such alterations or additions or demarcations, even if such harmful activities are carried out in close proximity to protected areas and forests. Whereas the hammer usually falls on the land of indigenous and tribal people.

The same is the case in regard to compensatory afforestation and other such plantation programmes shown as forests, as an offset to setting up big industries, dams, etc. in forests areas are found to be mostly carried out in community lands affecting rights and livelihood of indigenous people, tribal people and forests dwellers. Furthermore plantation of ecologically destructive trees like rubber, teak, eucalyptus etc., are introduced as monoculture for the commercial benefits of big corporates at the cost of the environment.

Indigenous Environmental Network (https://www.ienearth.org/?s=climate+change) and Carbon Trade Watch (http://www.carbontradewatch.org/home.html), raise some pertinent questions, which can be helpful to indigenous and tribal communities when confronted with REDD+ programmes in their areas, namely:

(i) **Will REDD+ help us protect our forests?**

REDD+ aims to generate a profit from the carbon stored in the trees, however, this can very well be a monoculture plantation even though plantation threaten water supplies, the biodiversity in the forests and our health;

(ii) **Can we still live here?**

That is very confusing. Some projects have allowed communities to stay and others have not. It depends on the contracts that each community signs. We also do not know exactly how REDD+ money will affect the rights to our lands and forests;

(iii) **Why would we want to do this?**

Project developers and carbon brokers promise us money, jobs, including schools or hospitals, if we give them our rights to the carbon in forests;

(iv) How much money would we make?

It is not clear and each project is different. But without the use of our forests it may not be enough for everyone in our communities. It is impossible to calculate in monetary terms all that the forests give us;

(v) How often and where would we receive the money?

This also depends on each project. Some communities get monthly payments;

(vi) Can we still collect and use our medicinal plants?

If we sign a contract giving away our rights to use the forests then we cannot collect or harvest plants anymore. We will not be able to do a lot of things the same way.

Conclusion

Under the REDD+ scheme, companies in the developed world purchase carbon credits to invest in reducing emissions from forested lands. Those credits turn up on the companies balance sheets as carbon reductions. However, in practice, REDD+ schemes largely allow those companies to accelerate pollution while purchasing land and resources in the developing world at bargain prices.

Unless REDD+ creates a mechanism of cutting emissions at source, instead of using Nature as a sponge for greenhouse gas pollution, it cannot be called a true climate solution. Furthermore, indigenous people and their rights needs to be factored into REDD+ principles, otherwise its implementation could lead to much conflicts and displacement of indigenous and tribal peoples.

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NOTES FROM THE COURTROOM

New Generation Lawyers

Lalit Bhasin

Jokes on and Lawyers

The young and new generation of lawyers will not be (hopefully) judged as the following lawyer jokes reflect:

Lawyer: A legal gentleman who rescues your estate from your enemies, and keeps it himself.

Where there is a will, there is a lawyer.

Lawyers are the only persons in whom ignorance of law is not punished.

Remember, if there had never been any lawyers, there would never have been any need for them.

In 'Poor Richard's Almanac' for 1742 Benjamin Franklin commented as under:

> *"In some Countries the Course of the Courts is so tedious, and the Expence so high, that the Remedy, Justice, is worse than, Injustice, the Disease.*

> *In my Travels I once saw a Sign call'd the Two Men at Law: One of them was painted on one Side, in a melancholy Posture, all on rags, with this scroll, I have lost my Cause. The other was drawn capering for joy, on the other Side, with these Words, I have gain'd my suit; but he was stark naked."*

A beggar posted himself at the door of the Chancery Court, and kept saying: "A penny please, Sir! Only one penny, sir, before you go in!" "And why, my man?" inquired an old country gentlemen. "Because, sir, the chances are, you will not have one when you come out," was the beggar's reply.

Said a lady to her friend, "When we got our divorce, we divided everything we has equally between us. Two children stayed with me, two went to my ex-husband."
"What happened to the property?" asked a friend.
"That was shared equally between his lawyer and mine."

Lawyer's creed: a man is innocent until proven broke.

Two lawyers, while bathing at Santa Cruz the other day, were chased out of the water by a shark. This is the most flagrant case of want of professional courtesy on record.

New Generation

The new generation of lawyers would dispel these erroneous impressions about the legal professionals including that a lawyer would do anything to win a case – sometimes, he will even tell the truth. The young law students being representative of the present generation are sure to take the legal profession to its glory of being a noble profession.

How would you achieve that? Eminent lawyers since last century have highlighted certain norms of ethics, professional etiquette, integrity, fair-mindedness and deep commitment to be an instrument of Justice. To these I would add the emerging norm of Professional Social Responsibility. Not that it was unknown earlier. We the lawyers in India have a unique and noble

heritage of lawyers since 1890s. Our Father of the Nation Mahatma Gandhi, our First President Dr. Rajendra Prasad, our First Prime Minister Pt. Jawarharlal Nehru among many others were our worthy and great predecessors, Dr. B.R. Ambedkar who played a pivotal role in the drafting of our Constitution was also a lawyer. Post 1950, lawyers continued to play a crucial role in the Parliament, the Government and the Judiciary. Some of the Presidents of India, Prime Ministers, Cabinet Ministers and leaders in the Opposition belonged to our profession and even today we find eminent lawyers holding senior positions in the Ministries and in the Opposition.

You, the young students have not only to preserve this heritage but have to also strengthen our institution building efforts. The most significant feature of the Preamble to our Constitution is its emphasis on JUSTICE. The Constitution was adopted by "We The People of India" and among the first objectives it provided that we shall "secure to all its citizens", "JUSTICE, SOCIAL, ECONOMIC AND POLITICAL".

This emphasis on securing Justice has to be achieved by the citizens and it is obvious that the lawyers will be at the forefront in attaining this ultimate objective as enshrined in the Constitution. Accordingly, the role of a lawyer is much more than just being a legal practitioner. It is the duty of every citizen of the country but more particularly of the members of the legal profession that they should ensure adherence to other basic objectives as set out in the Preamble, such as Liberty, Equality and Fraternity. We as lawyers have to look beyond our legal practice and strive to be good and responsible enlightened citizens. It is significant to note that in the Constitution, it is only the legal profession which is mentioned specifically as for instance in Article 22, Article 76 and Article 124(3)(b).

We, the lawyers are also 'officers of the court'. This puts an added responsibility on the members of the legal profession that their conduct, their submissions and their dealings should not derogate from the important position that they hold in our system of administration of justice by virtue of being officers of the court. While protecting the interests of their clients

before the courts we are also expected to be honest, fair and diligent in our approach.

Professional Behaviour and Conduct

During my long period of practice of law for the last 58 years I have learnt that certain basic and fundamental principles of professional behavior and conduct should be adhered to. I am reinforced in highlighting some of the important features in this regard which have been practiced by the greatest names in the legal profession such as Sir Jamshedji Kanga, Bhulabhai Desai, MC Setalvad, Dr. Kailash Nath Katju, Niren De, Lal Narain Sinha, Vishwanath Sastri and presently Fali S Nariman.

Some of the "do" and "don'ts" for practicing lawyers and particularly the new entrants in the profession are set out by me as under:

The foundation of being a good lawyer is to acquaint oneself firstly with the facts of the case. Once the factual matrix is clear then one should acquaint oneself with the relevant law, including case law on the subject. Law should be applied to the facts and not vice versa.

Clarity of thought, mind and expression is most relevant for making submissions before the court. One has to be clear and precise and not confused. To achieve this one has to be well equipped and well prepared. As one eminent lawyer has put it "Think like a lawyer and not like a philosopher. Your head may not be in the clouds and respond to the courts question promptly even if the question puts you off the track of your argument."

While dealing with a client your advice and opinion should be honest and responsible. Never advise a client to begin legal proceedings unless one is satisfied that the client has evidence to substantiate his claim in a court of law.

You have to keep yourself abreast with contemporaneous developments in the field of law not only in your jurisdiction but also on global basis. As a

part of this you have to keep yourself well informed and updated with judgments of the Supreme Court and of the High Courts.

Constant learning is a continuous feature in the practice of law. My advice to lawyers particularly the young ones is that whenever you do not have much work in the court do not spend your time in the cafeteria but utilize that time to watch the proceedings of other matters in the courtroom. My personal experience is that one learns a lot by fruitfully utilizing the spare time observing the proceedings in court rooms.

It is generally observed that the less work there is, the less inclination there is to put your mind to it. In the case of lawyers there is no question of less work for the reason that there is scope for continuous learning by study of case law. In the case of lawyers, 'work' means being 'occupied' not necessarily paid work.

We should never try to mislead the court or even the opposing counsel. It is one's duty to bring to the attention of the court a case already decided on the issue which is the subject matter of the proceedings. This is particularly so if the case already decided is against your proposition of law. It is good advocacy to then distinguish your case from the decided case and make an attempt to convince the court that your case is not covered in the judgment of the decided case. It is also your duty not to cite a case which to your knowledge is already overruled.

Constitution of India

My parting advice to the young students is to study deeply the Constitution of India. This year we are celebrating Seventy Years of the Constitution of India. The Indian Constitution has all the attributes of Constitutionalism. According to one of the most eminent judges of the Supreme Court of India, Justice AK Sikri, our Constitution like the common law ensures the separation of powers. And most uncommonly it relies on the Judge to ensure that all power in India delivered, in letter and spirit, the kind of India that the Constitution mandated. Its guardians are the judges.

They have preserved and protected this pillar through consistent renewal to meet the needs of the time and circumstance. From the year 1950 onwards, the Judge became the centerpiece of the Indian State not only as the testing point of Parliamentary Sovereignty and Executive Authority but also the agency to ensure that institutions delivered Justice, political, economic and social, to all Indians. The Indian judiciary was the common law guardian armed with the power of Judicial Review to make it function according to Constitutional Ethos, morality and values to ensure Constitutional fraternity. The Fundamental Rights Chapter empowered it to enforce equality and reasonableness as spelt out in it. The Directive Principles Chapter informed it about the reasonable Indian society as a fundamental principle of India's governance, of which the judiciary constituted a critical part.

Some eminent citizens of the country like Dr. Vishvanath A Pai Panandiker have critically examined the Constitution of India. They recognize that Seventy Years of a successful democracy of about 1.4 billion citizens since 1950 when the Constitution became the Basic Document is a truly outstanding historic human achievement. Yet according to them the Constitution at work today is basically only a transition from long British Colonial rule to continuing Colonial System of government where the Democratic Rights of the Sovereign Indian Citizen are still more on paper than on effective operation. According to Dr. Panandiker, our democracy as envisaged in the Constitution is still a distant dream. The Constitution of India reflects the basic values of the Democracy Dream of the people of India. The basic features are truly reflective of the great Indian Dream, as of many countries for "Freedom" within the Rule of Law and yet after Seventy Years many questions are being raised not about the Fundamentals of the Indian Constitution but for its actual working to enforce the rights of the Sovereign Indian Citizen. According to this school of thought, this has adverse impact on our political, social and economic life, especially economic growth, which is vital for our future.

I would urge all of you to make an in-depth study and analysis of the Constitution of India which is a great document but possibly its implementation is tardy.

Liberty at the cost of Selective Discretion and Justice: A Comment

Anshuman Singh

"When histories of nations are written and critiqued, there are judicial decisions at the forefront of liberty. Yet others have to be consigned to the archives, reflective of what was, but should never have been."

Dr. Justice D.Y. Chandrachud while overruling *ADM Jabalpur* in *K.S Puttaswamy v. Union of India,* (2017) 10 SCC 1.

The right to life and personal liberty as guaranteed under Article 21 of the Constitution of India is paramount, overriding and dominant and one of the most fortified and celebrated fundamental rights guaranteed to every citizen as well as non-citizens. The sweep of right to life is eclectic and far reaching which emanates from the ever-expanding doctrine of Article 21, pronounced by the Hon'ble Apex Court from time to time. Life is not merely animal existence or continued drudgery through life, it means more than that, the right to livelihood, hygienic conditions and leisure, natural justice, protection from police atrocities, right to fair trial, speedy trial, right to education, right to privacy, etc. are some vigorous facades of this ever-mounting fundamental right.

The term liberty and freedom may seem interchangeable at first but are distinct in concepts. Liberty comes from the Latin word "libertatem" which means "freedom" or "condition of a freeman", and "freedom" comes from the Old English word "freedom" which means "state of free will, charter, or deliverance."

Specifically speaking, liberty is a political construct that allows people to enjoy freedoms such as property rights, free speech, freedom of association, etc. It is the state of being free within society from oppressive restrictions imposed by authority on one's way of life, behavior, or political views.

Freedom is more inherent to humans. It exists within them by virtue of their humanity. The word "freedom" is more concrete than the word "liberty" which is more associated with the notion of liberty in connection with the state. Freedom usually pertains to a person's choices in everything that he or she does.

Let us now try and understand the aforesaid concepts specifically in context of certain Judgements pronounced by the Apex Court.The recent undertakings of the Supreme Court in a host of judgements reveal some sort of a selective justice mechanism whereby the Hon'ble Apex Court has meted out differential treatments to different individuals. The case in point is the recent judgement in granting interim bail to Arnab Goswami in the case of *Arnab Manoranjan Goswami v. State of Maharashtra,* Crl. Appeal No. 742/ 2020 relating to the abetment to suicide of interior designer Anvay Naik in the year of 2018. The top court also allowed the interim release of the co-accused Neetish Sarda and Firoze Mohammed Sheikh in the case. The Supreme Court in the aforesaid matter further held that courts should ensure that criminal law does not become a weapon for selective harassment of citizens. The aforesaid words of the Supreme Court is prudent and is the revered sentiment of every conscious citizen having veneration for the Rule of Law.

The issue, however is not this. Many critics in recent times have adumbrated that the court now has metamorphosed from an institution that used to defend the rights and freedoms and liberties of the hoi polloi into an institution that now seems to defend the handpicked few. At the inception, it has been pointed out by many jurists that the Supreme Court was right to grant bail to Mr. Arnab Goswami. There is no dispute, whatsoever, as far as the legality of the reprieve provided to Mr. Goswami is concerned. Justice Chandrachud's remarks – that '*we are a Constitutional court, if we as a Constitutional court do not lay down law and protect personal liberty, then who will*?' – are both reassuring and uplifting. The concern, however, is whether the Supreme Court follows the same aphorism and precept in every matter irrespective of any other contemplation. It is the uniformity in standards that is of exacting emphasis.

It may be interesting to very briefly glance at the historical perspective. When Lord Macaulay was tasked with drafting criminal law for India sometime in early 19th century, he said, "*The principle is simply this: uniformity when you can have it; diversity when you must have it; but, in all cases certainty.*"

With law being subsequently codified in precise black and white, India was handed over a precise syntax in consonance with the goals of equality and justice, being supplanted with certainty and uniformity in standards, being the desired goal of every established procedural law. The early framers of the criminal code felt that in establishing the principle of Rule of Law and execution of certainty, discretion should be kept at its marginal application. Macaulay had noted that judicial discretion was also a problem under English law. However, he believed that this evil was allayed by a higher standard of morality and goodness, the existence of legal traditions grown over the centuries, the presence of democratic institutions, and the ever-observant and critical eye of a learned legal community and the use of reported cases.

The evocative disquiet and apprehension in meting out the superior treatment given to Mr. Arnab Goswami, or for that matter, to anybody else

raises a reasonable concern over this aspect of certainty and equality which is the cherished aspiration of every pursuer of justice. Before delving into the merits, it would be worthwhile to understand the legal factual matrix. Mr. Arnab Goswami filed a *habeas corpus* petition before the Bombay High court under Article 226 of the Constitution. Courts generally do not grant interim bail in an Article 226 petition; and secondly, as a matter of hierarchy, the accused is required to go to a lower court first to seek redressal of his grievances. The Bombay High Court followed the practice and asked Mr. Goswami to approach the Sessions Court and asked the Sessions Court to decide the matter in a span of four days. This too, was an extraordinary direction, however, looking at the glaring violations in law in exercising the arrest of Mr. Goswami, the urgency shown by the Bombay High Court can perhaps be substantiated. Subsequently, Mr. Goswami filed a petition before the Sessions Court and simultaneously before the Supreme Court, thereby approaching the lowest court and the highest court concurrently. Under the Supreme Court Rules, the petitioner is required to make a statement that he has not filed proceedings claiming similar reliefs. This aspect however was ignored.

There is an important legal aspect in respect to issuance of a writ of habeas corpus that warrants due deliberation at this very juncture. The established principle is that the writ of *habeas corpus* can be issued only if the detention is illegal– meaning that if the detenue has been remanded to custody on a valid judicial remand, no writ can be issued. In the present case, we see Goswami's remand to judicial custody by the magistrate was valid in law. Veteran lawyers know that there are many situations when the arrest/detention is illegal on the date a petition has been filed but by the time the petition is heard, the remand is valid. This frustrates the prayer for habeas corpus to be issued.

In a recent full bench Judgement of the Patna High Court in the case of *Shikha Kumari v. State of Bihar*, W.P. (Crl.) No. 1355/2019 by an Order dated 5.3.2020, the Hon'ble High Court held that, "writ of habeas corpus would not be maintainable, if the detention in custody is pursuant to judicial

orders passed by a Judicial Magistrate or a court of competent jurisdiction. It is further evident that an illegal or irregular exercise of jurisdiction by a Magistrate passing an order of remand cannot be treated as an illegal detention. Such an order can be cured by way of challenging the legality, validity and correctness of the order by filing appropriate proceedings before the competent revisional or appellate forum under the statutory provisions of law butcannot be reviewed in a petition seeking the writ of habeas corpus." The consistent view of the Hon'ble Apex Court also is that in the event of detention on account of the valid judicial order, the writ of habeas corpus is not maintainable.

Mr. Dushyant Dave, President of the Supreme Court Bar Association (SCBA), has said that the registry is selectively listing cases. Justice Deepak Gupta, a very distinguished judge who retired recently, said that how certain priorities are accorded in cases involving big money and fancy lawyers. The agitation therefore, is the unequal treatment meted out to different persons by the top Court of this Country. It is known to all that there are many concerning matters pending in front of the Supreme Court which have been repeatedly postponed or is still pending adjudication. They include matters such as Article 370, the Citizenship Amendment Act, a whole series of petitions about electoral funding, a whole succession of *habeas corpus* cases which touch on the fundamental rights and life and liberty of the individual, denial of internet to J&K, cases involving political detenues in Kashmir, etc. It is only natural that when Arnab Goswami is heard out of turn and given primacy, eyebrows are raised. This cloudy selection criteria has been disparaged in recent times, especially regarding bail pleas involving academicians like Professor Anand Teltumbde, lawyer Sudha Bharadwaj, and activists and social workers such as 84-year old Stan Swamy and 79-year old Varavara Rao, all of whom are in prison under the UAPA.

The President of India's Supreme Court Bar Association highlighted the subjectivity in hearing pleas in a letter on November 10, 2020. He says, "*In April this year as well, Goswami had received almost instant hearing at the Supreme Court and got relief as well. I am not against the latest verdict or*

Goswami. I just want that every lawyer and his/her client receive the same access to judicial remedy."Dushyant A. Dave told Al Jazeera, "*Selective treatment for the high and mighty like Goswami only lowers the credibility of the judiciary as an institution.*" (Al Jazeera, 2020).

It would not be extraneous at this juncture to state that in the 4G case, the Supreme Court refused to follow its own previous decision in *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637. In the *Anuradha Bhasin* case, the Apex Court held that, *"Liberty and security have always been at loggerheads. The question before us, simply put, is what do we need more, liberty or security? Although the choice is seemingly challenging, we need to clear ourselves from the platitude of rhetoric and provide a meaningful answer so that every citizen has adequate security and sufficient liberty. The pendulum of preference should not swing in either extreme direction so that one preference compromises the other. It is not our forte to answer whether it is better to be free than secure or be secure rather than free. However, we are here only to ensure that citizens are provided all the rights and liberty to the highest extent in a given situation while ensuring security at the same time."*

Again in the *Siddique Kappan* case *(Kerala Union of Working Journalists v. Union of India*, W.P. (Crl.) 307/2020), the Supreme Court tried to relegate the matter to the High Court and the Chief Justice declared in open court that he wanted to discourage petitions under Article 32. Article 32, it may be worthwhile to note, provides a very important safeguard for the protection of fundamental rights of the citizens of India. In the case of *Prem Chand Garg v. Excise Commissioner, U. P,* 1963 Supp (1) SCR 885; P. B. Gajendragadkar, J. held that Article 32 is the cornerstone of democracy. However, it seems that the present view taken by the Hon'ble Chief Justice of India in context of Article 32 is contrary to his predecessors. What is further astounding is that only a few weeks back, the CJI said that it was perfectly legitimate for Mr. Arnab Goswami to invoke Article 32 against the show-cause notice issued by Maharashtra Legislative Assembly and to quote the words of the CJI himself, '*no authority of the country can penalize somebody for coming to the court*'.

To quote A.P. Shah, J. former Chief Justice of the Delhi and Madras High Court, "*to a large extent the Supreme Court is letting down the people of India.*" He adds that there has been a clear decline in the Supreme Court's functioning as a sentinel on the *qui vive*. This essentially means that the Court should be permanently on vigil and guard – that is what the phrase 'qui vive' means (The Wire, 2020).

It may be pointed out that the Supreme Court has set a new doctrine in the decision of *National Investigation Agency v. Zahoor Ahmad Shah Watali*, Crl. Appeal No. 578/2019. The court held that an accused must remain in custody throughout the period of trial if he or she is charged under the Unlawful Activities Prevention Act (UAPA). It was said that, 'courts must presume every allegation made in the FIR to be correct and the burden is on the accused to disprove the allegation'.

This decision delivered by Khanwilkar, J. and Rastogi, J. in considering bail application under the UAPA, lays down that the courts must presume every allegation made in the FIR to be correct. Bail can be obtained only if the accused produces material to contradict the prosecution. In other words, the burden rests on the accused to disprove the allegations, which is virtually impossible in most of the cases. A corollary may be drawn in this context to the verdict of the Supreme Court in the case of *ADM Jabalpur v. Shrikant Shukla,* (1976) 2 SCC 521, where the court dealt with these draconian preventive detention laws. This also may be seen as being completely violative of the essence of Article 21. The verdict, however in the recent *K.S Puttaswamy vs. Union of India,* (2017) 10 SCC 1, is a landmark and a noteworthy one and a welcome departure from the verdict given in the *ADM Jabalpur* Case.

It may be remembered Krishna Iyer, J. one of the most illustrious judges of all times, laid down the principle that bail is the rule and jail is an exception. The likes of Pratap Bhanu Mehta, the Contributing Editor of Indian Express, says that the Supreme Court was never perfect, but the signs are that it is slipping into 'judicial barbarism' (Mehta, 2020). While the same may seem

to be an amplification, however, the mawkishness based on the phenomenon of Selective preference is certainly bothersome.

It would seem most appropriate to state that the above views are not being presented to critique the verdicts being passed by the Apex Court but are being stated to very objectively look at the mechanism, the very process of Justice Dispensation. Oliver Wendell Holmes observed "*The life of the law has not been logic; it has been experience*."

Justice Y.K. Sabharwal, Ex- Chief Justice of India has said in one of his publications that, "*A law that is healthy and vital is shaped from the context in which we live. It is in the individual cases where the hard choices are made, our legal principles crystallized, and our faith in justice reaffirmed. If people do not have access to the courts at all levels of the judiciary then we are missing voices, problems, and perspectives that enrich the ideals of the law enunciated at the top or at any other level of the judiciary. Our ideals of justice are not so much created and refined by logic as they are by experience.*"

Further, integrity, impartiality and fairness of judiciary are the main sources of public acceptance of its authority. The very existence of judicial institutions depends upon the judges, who constitute the system. They should never forget that they hold the office of a judge as a public trust and therefore, should continuously strive to retain the confidence reposed in them by the people. No system of justice can rise above the ethics of those who administer it. Lord Denning has stated "when a judge sits to try the case he himself is on trial before his fellow countrymen. It is on his behavior that they will form their opinion of our system of justice."

More than fifteen years back, the Supreme Court in *Delhi Judicial Service Association v. State of Gujarat*, (1991) 4 SCC 406 held that: "*… In interpreting the Constitution, regard must be had to the social, economic and political changes, need of the community and the independence of judiciary. The court cannot be a helpless spectator bound by precedents of colonial days, which have lost relevance. …* "

Lord Denning have beautifully said "*every new decision or every new situation is a development of law. Law does not stand still. It moves continually.*" It would only be fair to mention some of the recent momentous judgements passed by the Apex Court, in keeping with the times, such as the right to privacy, decriminalization of homosexuality, rights of transgenders, *Shreya Singhal* case, whereby Section 66A was struck down by the Supreme Court, etc.

While the Supreme Court has itself said that liberty is not the gift for the selected few and we feel indulged to the Apex Court for upholding such epitomes, it can only be hoped that the Rule-based system, where there is no place for discretion is judiciously applied to each and every case and the Rule of Law is monitored fervently in both letter and spirit.

It would be finally apt to conclude in the words of Chinappy Reddy, J. in the case of *Randhir Singh v. Union of India*, (1982) 1 SCC 618, that, "*The judges of the Court have a duty to redeem their constitutional oath and do justice no less to the pavement dweller than to the guest of the five star hotel…*"

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