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Articles

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NCU Law Review is a peer-reviewed biannual academic publication of the Centre of Post-Graduate Legal Studies (CPGLS) at School of Law (SoL), The NorthCap University (NCU), Gurugram (formerly ITM University, Gurgaon). This publication is an endeavour to serve as a forum for the promotion and circulation of views on contemporary legal issues among members of the legal profession, academicians, and students. The Law Review aims at legal research centres, policy makers and government organisations. The views expressed in this publication are those of the authors and not necessarily those of the Editorial Board of the Law Review.

EDITORIAL NOTE

Riding on the success of the first issue, we are glad to publish the second issue of the NCU Law Review with valuable contributions of scholars from India and abroad. Through a wide circulation of the first issue among the National Law Universities, prestigious government and private law colleges and universities, we have been able to reach out to the legal academia across the length and breadth of the country. Further, we have sent copies of the law review to various prominent institutions including the Law Commission of India, various National Commissions, Bar Council of India, and State Bar Councils. We are immensely proud to share that we have received appreciation letters from Vice Chancellors, Heads of Department and public functionaries. We have also started receiving copies of journals from other institutions on a reciprocal basis. We sincerely hope to continue with this issue in the same vein and increase the circulation of the Law Review. We wish that readers would appreciate the quality of the contents herein and cite them in their own research works. The Editorial Board is appreciative of active involvement of hard-working student editors, namely, Mr. Mohit Vats, Ms. Ojaswi Kulshresthra, Ms. Aasma Sachdeva and Mr. Karan Kataria at every phase of this publication process.

The current issue of the NCU Law Review has literary contributions covering wide range of issues including Tibetan refugees, artificial intelligence, disability rights, etc. The article by Prof. (Dr.) Nuzhat Parveen Khan & Manjesh Rana entitled 'Negotiations with Oneself: Locating Tibetan Youth in the Identity Discourse' focuses on struggle of Tibetans youth with respect to political and legal connotation of citizenship.

Alemnew Gebeyehu Dessie in his article titled 'Merger Control Review and Public/Industrial Policy Considerations: Catechizing the Perspectives of Ethiopian Competition Law' examines dilemma and challenges of resolving public policy questions in merger control and public/industrial policy objectives.

Dr. Manjeri Subin Sunder Raj raises a very important question of considering Nature Rights at parity with human rights and whether it should fall within the purview of other legal rights in his article titled 'Attributing Legal Rights to Nature: A Step towards Environmental Protection'.

Divya Sugand examines the challenges posed by Artificial Intelligence in the market competition by drawing insights from other countries in her article titled 'Artificial Intelligence and the Indian Competition Law: The Unacknowledged Related Associates'.

In the article 'European Union and Public Procurement: Some International Best Practices in Public Procurement', Aakriti Kohli throws light on the EU Directive on Public Procurement with an aim to set out rules to organize the manner in which public authorities purchase goods, works and provide services.

Saimy Eliza Abraham through her paper titled 'Digital Rights Management under Indian Copyright Law: An Assessment' evaluates the need and necessity of the DRM technology, its working mechanism and functions with special reference to the USA and other relevant international treaties.

Akansha Ghose in her article 'Intelligently Dealing with Artificial Intelligence: Need for Globally Accepted Legal Framework' describes the paradigm shift of role of Artificial Intelligence in assisting human beings to completely undertaking tasks for their living masters, and thus impacting upon criminal, privacy and employment laws.

In an article 'Exploring Legal Capacity of Persons with Disabilities in India', Isha Khurana explains the concept of legal capacity under the UN Convention and its incorporation in the Indian laws.

The Editorial Board is indeed grateful to the authors for their invaluable contribution and cooperation. We are indebted to Hon'ble Members of the Governing Body, NCU; Prof. (Dr.) Prem Vrat, Hon'ble Pro-Chancellor, NCU; Prof. (Dr.) H B Raghavendra, Hon'ble Vice-Chancellor, NCU; Col. (Retd.) Bikram Mohanty, Hon'ble Registrar, NCU for their continuous support in this academic endeavour. We are also thankful to the reviewers, the dedicated staff of the University and Decorpac (I) Pvt. Ltd.

Editorial Board

NCU LAW REVIEW

MESSAGE FROM THE VICE CHANCELLOR, NCU

I begin by quoting Socrates, "There is only one good, knowledge, and one evil, ignorance". Diffusion and augmentation of knowledge is constitutive of an academic institution. Higher Education Institute builds its reputation by quality research and academic scholarship. Hence, with immense pleasure, I present you with the second issue of NCU Law Review published under the aegis of the Centre of Post-Graduate Legal Studies (CPGLS) at School of Law, The NorthCap University.

Our inaugural volume was a success taking within its fold recent and global developments in the field of law. We gave wide circulation of the first issue of the law review among legal academic institutions, and other professional institutions & commissions, honourable members of the bar and the bench. Likewise, the present journal, according to me, spans across recent evolution of legal scholarship. We want to sustain the academic engagement in the similar manner. The law review would be a delight to the mind of avid readers, young and old academicians, advocates, and aspiring lawyers. The articles reflectively engage with the issues under consideration and disseminated novel ideas, suggestions and points to ponder. The journey has just begun and we have miles to travel together in the pursuit of knowledge. I sincerely appeal to all legal scholars to contribute to the future issues of the law review.

The publishing, polishing and shaping up of the law review would have been impossible without the unrelenting, and meticulous work of the editorial team. I congratulate the entire team. I place on record my sincere thanks and regards to the contributors of the journal and hope for our long and continued relationship in future.

Best Wishes!

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Prof. (Dr.) H B Raghavendra,
Vice Chancellor,
NCU, Gurugram

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NEGOTIATIONS WITH ONESELF: LOCATING TIBETAN YOUTH IN THE IDENTITY DISCOURSE

Dr. Nuzhat Parveen Khan & Manjesh Rana*

ABSTRACT

This article attempts to locate Tibetan youth amidst this state of disarray and discombobulation. It looks at the political and legal connotation of citizenship, and struggle of Tibetans with respect to the same. Further, it discusses how boundaries play an important role in preserving the collective identities of groups and communities, and how absence of them can leave them vulnerable. Furthermore, it delves deeper into the phenomenon of identity and highlights how it should be treated to have been evolved through changing dynamic relations between the people, rather than looking at it only through an individual perspective. Finally, it attempts to shed light on the different generations of Tibetans living in India, and the struggle of the youth to identify with their roots.

I. INTRODUCTION

Tsering Namgyal, who was born in India in 1971, on being asked by someone where is he from, while he was studying in Taiwan, struggled to answer this question what might appears to be a quite simple question for others. He was born in India to Tibetan parents, so, does this make him a Tibetan refugee from India? That might not be right, as it was his parents who were refugees, not him. Could he simply introduce himself as a Tibetan in exile? That would also not have been correct entirely. Since he was born in India, would that make him an Indian? Or since Tibet has been taken over by China, and is being represented as China in the world-map, would that make him a Chinese? On being told he was

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a Chinese, he replied in anger, "So then I am a Chinese-refugee, born in Himachal Pradesh, India? That doesn't make sense at all!"[1]

Tibetans throughout the world, especially Tibetan youth, appears to be struggling with their identity. It's perhaps hard for them to identify with their 'Tibetan-ness'. Consequentially, they find it hard to focus on their struggle for independence or 'autonomy'. On being asked who a Tibetan is, majority of them say that a Tibetan is the one who follows Buddhism. They are slowly losing the track of their identity and the idea of Tibet as a sovereign nation is gradually being lost in the minds of young Tibetans. What is Tibet for the ones who migrated to Nepal and India following the invasion of their lands by the Chinese in 1950s? And what is the idea of Tibet for the next generations of those Tibetans? The first generation comprises of the older Tibetans who were born in free Tibet and fled to India due to Chinese invasion in 1950s. The second generation comprises of those who were born in India to the first generation and has never seen the Tibet they know from the stories they are told about. The third generation of Tibetans are those who are born to the second generation (i.e. to the people who have never seen the Tibet they belong to) but have lived their lives under the guidance of those who belong to the first generation (i.e. the ones who are the storytellers.) At the time when there is a continuous threat to their identity and continuous fear of dilution of their culture in majority cultures, how does the new generation identifies with them? In sum, this article highlights the struggles of the young Tibetan refugees living in India in their quest for their identity and its relevance in today's world.

II. IDENTITY, CITIZENSHIP AND BOUNDARIES

Citizenship is as old as settled human community. It defines those who are, and who are not, members of a common society.[2] Citizenship is manifestly political enterprise, yet two general issues or questions arise out of its practice: The first question concerns the issue of who can practice citizenship and on what terms it

[1] RAJIV MEHROTRA, VOICES IN EXILE 54 (2013)

[2] *See* JACK BARBALET, CITIZENSHIP: RIGHTS, STRUGGLE AND CLASS INEQUALITY 1 (1988)

can be practiced.[3] It is not limited to the legal scope of citizenship and the formal nature of rights enshrined in it. Non-political capacities of citizens which derive from the social resources they command and which is also accessible to them. A political system of citizenship based on the equality is in reality unequal if there is a division in the society because of unequal conditions.[4] The second question concerns the consequences of advances in citizenship rights, especially for the social relationships of citizens (and non-citizens) and for the social and economic institutions in which they live and work.[5] In particular, disadvantaged groups in society might struggle for citizenship rights in order to improve their conditions.[6] For Aristotle, the idea of citizenship was the privileged status of the ruling group of the city-state, but in the modern democratic states of today, the basis of citizenship is the capacity to participate in the exercise of political power through the electoral process.

Today, in India, when the citizenship was offered to the Tibetans-in-exile, some of the Tibetans opted for the same, while others, perhaps in the fear of dilution of their Tibetan identity and struggle for freedom, are reluctant to do the same. In the past, earlier generations believed in not adopting citizenships of the places they were residing in, under the fear of their identities being diminished. Today, the situation is a little different, as some of the Tibetans have started opting for citizenship and do not believe this to have an effect of devaluation upon their identity. Some of them are starting to recognize the positives of dual identities.

Boundaries play very important role in determining identities of different groups of people in the world. Boundaries are not just restricted to physical or territorial sense, but also include various other elements, like language, clothing, food etc. Apart from these, political, social, cultural and economic subordination also help in determining who belongs to a particular group and who doesn't. Another unifying feature of these groups is their collective memories. Their shared memories make them feel and believe that they belong to each other. Leaders, individual religious beliefs and others, make the people of their respective

[3] *See id*.
[4] *See id*.
[5] *See id*, at 2.
[6] *See id*

groups strictly obey certain norms demanding conformity. Believers are understandably hesitant to depart from the strictures of their leaders.[7] This leads to cultural pluralism between the people and groups who share common citizenship within a particular State, which is determined by a fixed physical territory or boundary. Therefore, where the mainstream society meets, such as schools, colleges, movies and other public places or media, newspapers, books etc., fights erupt between such groups because of the varied ideas of identity, collective memories and citizenship.[8]

It is easier for a nation, which is tied to a defined territory, to maintain its identity. It is harder for those groups who are in minority, to construct their own public spaces. These public spaces, and the memories created within them, have a very important role to play in defining and preserving identities by such groups in a State. Collective memories belong to them, and strengthen the sense of belongingness amongst the members of a group. For refugees, it is hardest to preserve their identities in the spaces which are alien to them, and publicly dominated by the nationals of a particular State. In such spaces, they become outsiders or strangers struggling to claim their own public space, and protect their distinct identities. They are always at the mercy of the host nations. Failing to create a public space for themselves, they try to create a private space to safeguard their unique ethnic identity. By doing this, they try to establish the boundaries between themselves and the others. Survival of their identity depends upon such boundaries.[9]

For the minority groups who are the citizens of a particular state, maintaining these boundaries means to perform a delicate balancing act between their two identities: ethnic identity in private spaces, and identity of a citizen in public. For a refugee, in absence of any say in public matters of the host states and control of the public spaces, it is much more challenging to establish and maintain these boundaries. Political boundaries allow groups that feel their

[7] *See* SPINNER JEFF, THE BOUNDARIES OF CITIZENSHIP 168 (1994)
[8] *See* ETIENNE BALIBAR, CITIZENSHIP 24 – 25 (2015)
[9] *See generally* TAPAN K. BOSE, PROTECTION OF REFUGEES IN SOUTH ASIA: NEED FOR A LEGAL FRAMEWORK 10 – 13 (2000).

identity is threatened to gain recognition from others in the world.[10] The demand for recognition is much harder to realize for those ethnic and racial groups who lack a claim to land. For self-determination and to preserve their identity, they desire to have their own State. Therefore, in modern times, survival for all cultural and linguistic communities is a big challenge.

Tenzin Tsundue, one of the most popular Tibetan poets and activists, who resides in Dharamshala in Himachal Pradesh, says, "[T]omorrow, even if autonomy is granted, our fight for independence will continue";[11] and certainly demands much more than what His Holiness the Dalai Lama asks through his Middle-Way Approach. He, like many other young Tibetans, fails to be satisfied with the demand of autonomy compromising with the bigger demand for complete freedom. Many young Tibetans sit on hunger strikes, organize protest march and raise slogans for 'Free Tibet' in spite of being repeatedly stopped by His Holiness the Dalai Lama. Tsundue feels they are misunderstood to be violent and he writes, "…even though Tibetan Youngsters take aggressive and confrontational actions, our common credo remains non-violence."[12]

Many social groups, in absence of resistance (i.e. when they do not resist when denied rights) could be found outside of their territories and be totally excluded or displaced. For survival, resistance is sometimes necessary to continue being a member of the State where they have formal rights or a right to have a claim for the same. Such 'resistance' is important to save them from 'exclusion'. In some situations, resistance is not possible without violent protests, which can end up being counter-productive, and might reinforce the feeling of 'non-belongingness' within the members of a group, and can have a negative result of further 'excluding' them. It affects the image of the community to the world outside and the young immigrants could be seen as potential domestic enemy by the other members of the same community, threatening their cultural or religious identity. Also, the dominant system of the State can easily exploit such community justifying its safety and security policies.

[10] *See id.*, at 176.
[11] *See* MEHROTRA, *supra* note 1, at 72 – 73
[12] *See id.*, at 73.

In order to move freely in all the spaces, it is important for the people to be aware of their surroundings. Also, they should be fully aware of their placement and positioning in relation to other agents around them in a given situation. They are always in this 'given' but 'changing' situation which is 'socially constructed'. The identity, in the course of discourse, is constantly changing. The world, for a group, can be described by the things they perceive, how they are perceived by them, and the values they attach to them. This is their identity in a given situation. Such discourses can empower them and can also trap them. Since it is socially constructed, 'individuality' should be understood as 'social individuality', which has a form peculiar to the form of our surroundings within which our individuality is nurtured and developed. Therefore, instead of treating the phenomenon of identity to be central to an individual, it should be treated to have been evolved through changing dynamics among people. All the powers attributed to an individual are only by virtue of his imbedding within a particular region of social activity.

John Shotter while analyzing the nature of human beings in psychological context writes that human beings are born 'naturally' as already individuals, possessing within themselves the 'potential' for an authentic inner self, a potential which in itself owes nothing to society. And that if only our nasty, inhuman environment was changed, that potential would flower out into an authentic self of its own accord. Thus, our task then was to discover the universal nature of 'atomic' human beings (individuals), and the general 'laws' are governing their motions. The ideas governing our thinking at the time were: talk of things rather than activities; science not politics; facts rather than moralities; similarities rather than differences; harmony and agreement rather than conflict and discord; homogeneity rather than heterogeneity; order rather than chaos; structures and products rather than activities and processes; unity and stability rather than plurality and instability; already existing form rather than formative (form producing) processes; finding and discovering rather than inventing and making; shared foundations (initial conditions) rather than shared reflexive awareness, that is, shared 'methods' for negotiating understandings- in short, shared meanings rather than shared means; and so on. All the first terms played a privileged part in our discourses, while all the second terms were left

unvoiced.[13]

A free individual is the one who acts freely, and takes responsibility for his or her actions. For self-respect, it is important to act freely, i.e. to be able to execute one's own actions, and live a life of their own. If one's actions are dominated by others, and if one is dependent upon other people, especially for the things which provide self-respect, it will be hard to respect oneself. Therefore, people's identity is shaped by their actions, and they help them identify themselves in the society at large, and differentiate themselves from 'others'. It provides them with a sense of what they are and who they are in the identity discourse. The capacity to act freely, i.e., without any support from 'others' and without any intervention, help them own their individuality, and nurture, maintain and regulate the shape of their community.

Tenzin Lhadup, who studied in Tibetan Cultural Village School (TCV), Dharamshala, considers it to be the most effective institution which provided him with an education comprising the traditional learning of Tibetan culture and modernity. Many Tibetans today are trying hard to adapt to alien cultures of the groups of people they struggle to even communicate with. For Tenzin, TCV helped finding him his true Tibetan identity as a 'red-cheeked, Tsampa-eating Tibetan'.[14]

III. THREE GENERATIONS AND THE TIBETAN-NESS

The combined experiences of the three generations of Tibetans in India in exile since last six-decades have impacted the identity of a Tibetan and have presented new set of challenges for the times ahead. Of these three generations, the first were affected in 1950s, when the Chinese invaded Tibet. In 1950s, this generation comprised the youth of Tibet and were in their 20s and early 30s at that time; the next generation grew up in the years following the upheaval, i.e., during 1960s and 1970s; and the third generation was born in 1980s and 1990s,

[13] John Shotter, *Psychology and Citizenship: Identity and Belonging* in CITIZENSHIP AND SOCIAL THEORY 117 (Bryan S. Turner, ed., 1993)
[14] *See* MEHROTRA, *supra* note 1, at 68.

at times when the exiled community in India was comparatively established and stable. The responsibility of the entire community is on this generation now. This comprises Tibetan youth in present times who are in their 20s and 30s.

The first generation Tibetans has grown old now and is in their 70s and 80s. They have very strong memories of their home-land Tibet and the times when Chinese invaded their lands. They still preserve the emotional bond which they have with Tibet. This generation had an important role to play in supporting and strengthening the foundations of Tibetans during the first two decades of exile, and they also comprise the first batch of Tibetan officials to be part of the Tibetan Government in Exile set up in Dharamshala, Himachal Pradesh, India. They helped in establishing various institutions under their Government in Exile and worked hand in hand under the guidance of their leader, His Holiness the Dalai Lama. They helped thousands of Tibetans who fled Tibet along with His Holiness in 1959 and afterwards resettled and developed as a community in the foreign land. They involved themselves in the new democratic process introduced to them and worked to strengthen their education system. It was really difficult for them to establish themselves in a land where they had to confront a lot of social, cultural and linguistic challenges, along with climatic challenges they were facing. [15]

Unlike the first generation, the second generation has vague and faint memories of life before exile, as they were children when they were brought to India after Tibet's invasion. They were first to be introduced and exposed to the world outside of Tibet. The education system established by the first generation Tibetans helped them learn about the traditional Tibetan culture and also about the modern curriculum. This system tried to provide these second generation Tibetans the best of both the worlds. This generation filled the urgent need of educated man-power in the 1980's and 1990's and became the backbone of Tibetan community in exile in India. They helped maintain the institutions established by the first generation Tibetans to preserve their Tibetan identity in the foreign land. By providing support to maintain the critical institutions like

[15] *See* OBEROI PIA, EXILE AND BELONGING: REFUGEES AND STATE POLICY IN SOUTH ASIA 15 (2006)

Tibetan Institute of Performing Arts (TIPA) and Library of Tibetan Works and Archives (LTWA) located in Dharamshala, they helped Tibetan Government in Exile in preserving their roots.

The third generation of Tibetans in exile in India is in their 20s and 30s. Educationally, they are far better off than the previous generation and have much more exposure to the outside world as compared to the first and the second generation Tibetans in exile. The system of universal education, flourishing under His Holiness has helped mould Tibetan identity in exile by getting away with the traditional class-based society and transforming the same into modern society based on the principle of equity, where every Tibetan is provided with an equal opportunity. The democratic system of Tibetan Government in Exile had, this way, a huge impact in this positive transformation. This helped them being united in the foreign land and preserve their primary identities as Tibetans.[16]

The biggest challenge for the new generation of Tibetans in exile in India and other places around the world is to cautiously study, understand and analyze the concept of identity, which comprises of their language, culture, religion and much more. They need to analyze how this concept applies to them and what the latest challenges are to preserve their identity, in absence of any land or territory of their own, where they have control over the political matters. Their identity is being undermined in both Tibet, which is now in total control of Chinese government, and in exile. Unlike the previous generations they definitely lack direct historical continuity.[17]

The generation gap is unavoidable and natural in all communities of the world. It is an issue which needs to be tackled with utmost diligence in Tibetan context, as they lack a common piece of land which they can call home, and have political control over. Preserving identity in exile could be difficult when a generation undermines the efforts of the previous conditions. Tibetans, today, need to preserve their social fabric, which is the biggest challenge for them as they are spread across the world and can easily be diluted in the dominant

[16] *See id.* at 17
[17] *See id.* at 19

cultures they exist in.

IV. STRUGGLING TO PROTECT THE TIBETAN IDENTITY

"If you really want to, bring me some sand from Tibet"[18] was what Tenzing Gelek replied on being asked by his Chinese friend, who was visiting Tibet, what he would want her to get him from Tibet. He writes that with one request, he had bared the innermost feelings that he shared with most exiled Tibetans – the longing to touch a place called home, the longing to belong.[19] Tibet for him is a place he had grown up listening to his grandparents speak about while living in a refugee settlement in India. This is the place which he, and many others, have never seen, but imagined and pictured through the stories they have heard in their childhood. It pains him as well as thousands of others, to explain to the people difference between themselves and Chinese. With regard to the question of need of preserving Tibetan identity, he believes Tibet to be more than just a cause. He believes Tibet to be his way of life and the ultimate purpose like many other members of his community. It motivates him to study that extra hour each night, and he firmly believes it to be the driving force for many others making them pay extra attention teaching their children about their language and culture and who they really are and to stand true to their responsibilities that they have inherited from older generations.

Language has played a major role of custodian of Tibetan cultural heritage in the lives of Tibetans in exile. Perhaps this is one of the most crucial issues that Tibetan community is facing in the light of unintentional neglect by the Tibetan community in exile. It is really important to create a favourable environment at homes for the language which is mother-tongue for this community in exile. It is undoubtedly an essential ingredient of parenthood and childhood.

Minority groups are always under threat of being absorbed and diluted into the majority groups. In places with multi-ethnic geography, it is important for such minority groups to safeguard themselves from dominant ethnic groups. Within

[18] *See id*. at 64.
[19] *See id*.

their own land, they are purportedly being integrated and absorbed into the larger groups. Tibetan community in exile has accommodated itself quite well in their host cultures at various places, but at the same time it must be noticed that not all the transformation and adaptation has been positive for them. The new generation has a bigger challenge to save themselves from the process of subconscious acculturation which, if not taken care of, might lead them to irreversible assimilation in the future.

The language is growing unpopular among the new generation, for being economically disadvantaged. In Tibet, as well as in exile, the community is forced to learn more 'lucrative' languages like Mandarin and English. Until now, Tibetans in exile have successfully preserved their linguistic identity by providing favourable environment within their private spaces for speaking Tibetan language. Exposure of young children to the outside world, technological advancement, and increasing dependence on English is forcing youth to focus more on English compared to 'less-profitable' Tibetan.

The first generation exiled Tibetans had the responsibility of inter-generational transmission of Tibetan language. The responsibility then fell onto second generation Tibetans in exile. The present and future generations need to keep in their minds that it only takes just one or two generation gaps before a language is completely forgotten, and goes into total extinction. It is very important to have your own language to safeguard your culture. In context of Tibetans in exile, their Tibetan-ness is deeply encoded in their distinct culture, which can only be articulated through own distinct language. Therefore, it is necessary to have a distinct language and culture in order to preserve their identity in foreign land. Languages hold the cultural and traditional folklore within them. With the loss of language, ancient knowledge and wisdom are also lost. In such a situation, it is advisable for such communities to ponder over this and save themselves well in advance before subconsciously inflicting cultural and linguistic suicide upon themselves. Therefore, Tibetan youth today must work hard to safeguard, protect and revive the vitality of their language.

Yanki Tseering rightly says, "The importance of preserving our culture becomes

greater when we realize that we don't have a place to call our home."[20] Tibetan youth today will have to make extra efforts to educate themselves and to make them aware about their background and traditional identity. They need to understand what their parents' culture was, and where do they belong to as individuals and as a community. They need to be always attached to their roots, especially in the current situation, when they have been in exile since last three generations.

For majority of young Tibetans in exile in India and at other places, it is important for them to be aware of their culture as ignorance can be embarrassing for them. As admitted by many of them, they are forced to know all about their culture as they are faced with a lot of curious people from other communities who know little about them and want to know more. Therefore, it may be said, that for these people, exile could be a blessing in disguise as it has given them a keener appreciation of their roots. Moreover, when they are exposed to other cultures, it makes them aware about their own distinct culture more.

Both the Tibetan Government in Exile and the Tibetan community have made conscious efforts in the last few decades to save their religion, language and culture, all of which is under real threat of elimination and extinction in Tibet, because of occupation by Chinese. They had been successful in preserving some of the religious institutions and their religious literature, but in other aspects of the culture, the result has only been satisfactory to some extent. TIPA is one the non-religious institutions set up for the preservation of their unique culture. TCV schools have played huge role in providing Tibetan education to the young kids, along with modern education. They have played an important role in providing these young kids with a favourable 'Tibet-like' environment and strengthening their cultural understanding at a young age.

V. CONCLUSION

The Italian town of Bellagio hosted a conference for prominent western and Japanese Tibetologists in 1962, where they observed and concluded that Tibetan

[20] *See id*. at 78

culture had no chance of survival in Tibet and other parts of the world.[21] They were sure that it would not be able to survive the acculturation process around the globe, but so far, Tibetan community has shown tremendous resilience, by safeguarding Tibetan culture and keeping it alive. It is yet to see how Tibetan youth respond to the latest challenges posed by the changing environment around them. It is yet to see how they manage to preserve the age-old traditional culture of Tibet, especially amidst the technological advancement in the last decade, apart from political and legal challenges for survival.

[21] *See id*. at 62.

MERGER CONTROL REVIEW AND PUBLIC/INDUSTRIAL POLICY CONSIDERATIONS: CATECHIZING THE PERSPECTIVES OF ETHIOPIAN COMPETITION LAW

Alemnew Gebeyehu Dessie*

ABSTRACT

Merger Control and Public/industrial policy are so controversial issues posing a tense debate in competition policy and law. This is can be attributed to the blurred and obfuscated concept of public policy. The merger control system being part of the competition policy and the larger economic policy of economies, it confronts the dilemma or challenge of resolving public policy questions and achieve both its own and public/industrial policy objectives. The merger control system, part of the competition policy and law, needs to adhere to the very objectives of efficiency, consumer welfare standards and, expected to achieve public policy objectives that reflect the moral, rights, benefits, and other concerns and established interests of the society, nation, state, or principality. Developing countries have already given leeward to merger control to function based upon efficiency and consumer welfare reviewing criteria. Transitioning and developing countries with less transformed, developed economic structures so that cross-sectoral or intermingled achievement of economic and non-economic objectives across different policies is inevitable. So, in merger control, these economies allow consideration of public policy issues so that their different policies get interdependence to achieve both their ends. Ethiopia, being a developing economy and since its competition law implicates consideration of public policy, is under this club.

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I. A PRELUDE: WHY MERGER AND MERGER CONTROL?

A merger is often simply used to convey a variety of acquisition and takeover transactions; but it specifically depicts the scenario in which the assets and liabilities of the selling company are transferred to and absorbed by the buying company.[1] A true merger involves two separate undertakings merging entirely into a new entity; however, it is better to understand that the term merger as employed in competition policy, as stated above, also includes a far broader range of corporate transactions than full or true mergers.[2]

There are many justifications of why the merger is sought. Many of them are important or at least not baneful to the economy; and some others are more nocuous. To see those beneficial ones: some mergers are good to achieve economies of scale and scope; mergers are taken for efficiency reasons (backward integration is good for supplies and forward integration for taking over a distributer, and to make use of management skills of constituent parts); mergers create national champions in creating large domestic firms; mergers bring management efficiency and the market for corporate control; mergers let firms that wish to do so with an opportunity of exiting an industry via avoiding barriers to exit, and mergers increase market power.[3]

Despite the aforementioned benefits, the merger creates or reinforces a dominant position and thus depriving consumers of benefits resulting from effective competition. Mergers may cramp effective competition in redoing the market structure so that companies on a relevant market may probably coordinate and

[1] K. C. BRANCATO, MERGER TACTICS AND PUBLIC POLICY 9 (1982), *See also* B. RICHARD AND S. MEYERS, PRINCIPLES OF CORPORATE FINANCE 671 (1981). Generically, mergers can be classified into three groups: Horizontal merger (the merger of two or more competitors producing one or more of the same, or closely related products which are sufficiently interchangeable in their end use or having cross elasticity of demand), Vertical Merger (the amalgamation of two firms that previously functioned at different levels of distribution in the form of either forward vertical integration or backward vertical), and Conglomerate Merger (a mishmash or non-homogeneous class of mergers which are neither horizontal nor vertical and takes the form of product extension merger, geographic market extension merger, reciprocal dealing or leverage merger, and pure conglomerate merger).

[2] R. WHISH AND D. BAILEY, COMPETITION LAW 813 (2012)

[3] *See generally id.* at 813-816.

raise prices.[4] That is post-merger market structure facilitates collusion.[5] Plus, the other deleterious effect of merger to the competition may be a reduction of the companies' abilities and/or incentives to compete. This, in turn, causes higher prices or a lack of innovation. Therefore, Merger control policy comes to avoid the creation of a market structure that considerably facilitates the coordination of market behavior between different market players.[6]

Effective merger control, in devising preventive tools using economic simulation models, also helps to keep up competitive market structures bringing better welfare outcomes for consumers. Beyond meeting goals related to competition policy, merger control may also pursue politically defined some public interest goals for reasons of social policy or industrial policy. Thereby, merger control may be used as a tool to block or support business projects that are not necessarily efficient from a competition perspective.[7]

II. MERGER CONTROL AND PUBLIC POLICY: A DEVIATION FROM EFFICIENCY AND CONSUMER WELFARE-BASED COMPETITION ANALYSIS

First, what does mean public/industrial policy? Does it have a clear meaning and scope? Public policy is so an elusive concept lacking definitional clarity. Although it has been defined as *an unruly horse* in an original and witty way, by *Justice Burroughs*, still this definition is not helpful to understand the term.[8] The writer, *Chapman*, also had the following to say:

[4] See M. LORENZ, AN INTRODUCTION TO EU COMPETITION LAW 242 (2013). Effective competition brings low prices, high-quality products, wide selection of goods and services, and innovation

[5] See N. DUNNE, COMPETITION LAW AND ECONOMIC REGULATION: MAKING AND MANAGING MARKETS 9 (2015)

[6] LORENZ, *supra* note 4.

[7] *See id*. at 243.

[8] C. R. Chapman, *Public Policy*, 3 MICH. L. J. 308 (1894). Stemmed from the old saying about public policy and the unruly horse, and based on the truth that nobody can say for sure what public policy is or requires. However, what can be sure is that, even if we fix, or think we can fix, some standard or draw some more or less definite line, and say that everything which lies beyond it is repugnant to public policy, we cannot be sure that our legal and judicial ancestors would have agreed to the locus of the line; and still less that our judicial and legal grandchildren will accept it.

> Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from the definition in the same manner as a fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time, and contravenes any established interest of society; it is void, as being against public policy.[9]

The above paragraph portrays us that public policy is so a fluid concept which varies across time; changes as to the growth of commerce and usages of trade; and its boundary cannot be circumscribed and known. However, public policy is manifested when it is negated whenever any contract is void, conflicts with the morals of the time, and contravenes established interest of society. From this extended meaning given to public policy, we can say that public policy lies at the center of each community, nation, state and principality. That is why it is said that public policy controls each nation, state, principality; and it is part of the law of the land. Besides, each community has also public policy enforced by public sentiment, as opposed to public policy which is or part of the law of the nation, state or principality enforced through courts. Anyway, whatever kind it is, public policy is based upon the sense of justice.[10]

From the above paragraph, it is possible to deduce that if public policy has such a long-stretched and/or pervasive meaning, the scope of coverage of merger control justifications and practice as to public policy will also be so wide. Thus, inevitably, we are obliged to deviate from efficiency gains and consumer welfare analysis of competition law and policy. The traditional objective of competition law is the improvement of consumer welfare through, at least primarily, efficiency. However, as time went by, competition policy has also been generally pursued to achieve or preserve several other policy objectives

[9] *See id*.
[10] R. W. Biddle, *Public Policy*, 16 L. STUDENTS HELPER 153 (1908)

such as pluralism, decentralization of economic decision-making, preventing abuses of economic power, promoting small business, fairness and equity, and other socio-political values. And, most of the time, these non-efficiency-related objectives have no or limited role in competition analysis. For this, most appropriately, these non-efficiency objectives are considered as supplementary objectives. As said above, non-efficiency-related objectives in competition analysis or the inclusion of multiple objectives may increase risks of conflicts and inconsistent application of competition law. Especially, to pursue non-efficiency objectives risks the competition authority restricting severely its independence and may invite political intervention and to compromises.[11]

Even though efficiency and consumer welfare based competition policy and law analysis in general and merger control, in particular, are well-founded on basic tenets of neoclassical and behavioral economics[12], let efficiency and consumer welfare are also somehow not easily measurable and defined, they are not capable of satisfying many benefits of citizens. That is why the exercise of state power through ministerial or administrative policymaking is sought; though this is by the very fact, legally or politically difficult. Undeniably, the exercise of such power in the modern administrative state is essential to ensuring that the broad goals identified in legislation and adjudicated in individual cases can be translated into, or applied through coherent and sensible public policy.[13]

As to the debate on whether merger decisions to be based on public interest considerations, most OECD member countries, as opposed to arguments for the

[11] A. Capobianco and A. Nagy, *National and International Developments: Public Interest Clauses in Developing Countries*, 7(1) J. EUR. COMP. L. & PRAC. 46 – 47 (2016).

[12] Taken from all over class discussions during Competition and Consumer Protection Law class, especially during lectures 7, and 8-9, Bahir Dar University School of Law with Fitsum G. Tiche (PhD).

[13] A. Woolley, *Legitimating Public Policy*, 58 UNIV. TORONTO L. J. 154 (2008). Woolley also added that state action affecting the lives of individuals can happen without the benefit of either legislative or judicial process. And, hence, via designing and applying ministerial and administrative policy, the state passes decisions that considerably affect the interests, concerns, and rights of its citizens. Although decisions are required to be made pursuant to legislation, they require more than the implementation of legislative direction. They would rather require taking substantial consideration, evaluation, and weighing of the interests of the citizenry. Moreover, administrative and ministerial policy making is not simply normatively neutral.

wider pursuit of public policy, say that in merger assessment, only competition objectives should be considered leaving public interests to be promoted through market efficiency. There is no room or need for specific consideration of public interests in the competition system. To the opposite, others argue for increased public interest considerations, especially in times of financial and other crises. This line of argument carries more weight in emerging economies and OECD non-member countries.[14] The business community also strongly supports the assessment of mergers solely based on competition principles since the introduction of public interest considerations into the merger review analysis increases complexity and unpredictability; it is burdensome and costly for businesses and may pose a chilling effect on pro-competitive mergers.[15]

III. PUBLIC POLICY CONSIDERATIONS IN MERGER CONTROL SYSTEM: AN OPEN AND TENSE DEBATE

A. Arguments against Public Policy Considerations in Merger Control Review

ICN Recommended Practices for merger analysis says that merger review should focus exclusively on identifying and preventing or remedying anticompetitive mergers; and a merger review law should not be used to pursue other goals.[16] ICC also argues in general that non-competition factors should not be employed in antitrust merger review'.[17] As a result, this line of argument calls for a shift from non-efficiency goals and an elimination of or less frequent or more restricted use of public interest tests or political over-rides in domestic competition laws resulted. Unless otherwise, an anticompetitive merger or

[14] ORG. ECON. CO-OP. AND DEV. (OECD), PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL 2 (2017)

[15] *See id*.

[16] ICC/BIAC, COMMENTS ON REPORT OF THE US INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE 2 (2000)

[17] Thus, Canadian competition law demonstrates that the explicit inclusion of non-economic objectives as an integral part of competition law does not necessarily lead to the pursuit and attainment of such objectives. *See* Canadian Competition Act (R.S.C., 1985, c. C-34), arts. 91-96.

restrictive trade practice to proceed based on broader public interest considerations; or a pro-competitive merger or trade practice to be blocked or remedied based on such considerations would happen. Here below, there are three main lines of argument against non-efficiency criteria in merger analysis:

i) The risk of legal uncertainty and unpredictability of the merger analysis would increase.[18]

ii) Non-efficiency objectives may be achieved through market efficiency; hence no room or need for specific or special consideration of such objectives within the merger control system particularly and the competition law generally.[19] Public interests other than efficiency would rather be addressed by other more specific policies effectively.[20]

Public interest considerations beget a significant obstacle to effective cross-border merger control. Hence, the increasing trend of large, global mergers become challenging for merging parties to comply with the differing merger requirements around the world due to the difference and possibility of conflicting public interest considerations in merger regimes in different jurisdictions.

B. Arguments for Public Policy Consideration in Merger Control Review

As opposed to the above line of argument, public interest objectives continued to be employed by developing countries and transition economies where competition policy is generally not taken as a sufficient tool to address development objectives. Here, competition law and policy used as one of the different tools by governments to meet a coherent set of multiple development

[18] *See generally* D. PODDAR AND G. STOOKE, THE LEGAL FRAMEWORK FOR COMPETITION MERGER ANALYSIS 1 – 5 (2014).

[19] J.F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020 (1987). Here Brodley emphasized that the consideration of the correctly defined economic goals of antitrust will generally advance the social and political objectives of the law as well.

[20] *A. Machine, Public Interest Test and Merger Control in South Africa: The Wal-Mart Case Revisited*, AFRICAN ANTI-TRUST AND COMPETITION NEWS AND ANALYSIS, *available at* https://africanantitrust.com/2014/12/03/public-interest-merger-control-the-walmart-case-revisited (last visited Aug. 30, 2019)

policies. For this, merger control regimes in developing countries frequently comprise considerations even out of the traditional boundaries of competition law. However, here also the traditional, efficiency-based competition policy goals are pursued, including taking other considerations of the economic and social needs of a country. Given the stage of their economic development, developing countries have a greater influence of vested business interests; and a more pressing need to meet one or more public interest objectives. Besides, developing countries are generally more politically unstable with a lower level of economic development so that a higher level of government intervention to tackle barriers to trade and unemployment could affect general goals pursued by competition policy.[21] United Nations Conference on Trade and Development (UNCTAD) also added that it is inevitable for competition law to pursue other development policy objectives that could be considered public interest.[22] When we question what is behind these notions we can have the following possible reasons:

i) During transitioning from economic structures based on (state) monopolies to more open market structures, developing countries are obliged to use competition policy as an essential role in ensuring economic liberalization. And, since this stage of economic transitioning is often characterized by important social challenges;[23] there is a need to promote other public policy objectives through competition law and policy.[24]

ii) Developing countries also entertain significant pressure to conform to

[21] *See id.*

[22] *See* UNCTAD, The Importance of Coherence between Competition and Government Policies, UNCTAD Secretariat, 11th Session of the Intergovernmental Group of Experts on Competition Law and Policy (2011). Moreover, the pursuit of 'consumer welfare' or 'welfare' or 'national welfare' and the pursuit of 'efficiency' or 'efficiencies,' however can camouflage a variety of policy choices. For this many decisional standards which are described with these or similar terms lacks verbal precision so that here also politics necessarily plays a paramount role. *See* A. Renckens, *Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense*, 3(2) J. COMP. L. AND ECON. 151 (2007).

[23] *See* Capobianco and Nagy, *supra* note 11, at 48.

[24] *See id*. *See* also OECD, COMPETITION LAW AND RESPONSIBLE BUSINESS CONDUCT GLOBAL FORUM ON RESPONSIBLE BUSINESS CONDUCT 16 (2015).

international standards, which has led to the dissemination of competition laws in many such jurisdictions. And, by this time, reforms and new policies cannot be detached easily from the history and the domestic needs of each country.[25]

iii) Industrial policy is greatly used in developing economies and this leads almost inevitably to consider public interests having a much stronger weight in competition law enforcement than they have in developed economies.[26]

iv) The inclusion of public interest considerations in competition enforcement could facilitate greater credibility and legitimacy of competition authorities within the broader institutional framework of developing countries.[27]

IV. MERGER CONTROL AND INDUSTRIAL POLICY

Though the industrial policy has many similarities with public policy considerations in the merger control system, since it is a specific policy or part of public policy that is topical in competition policy and law, it needs to be discussed separately. To begin with, its meaning here below is its operational definition:

> In current use, the term 'industrial policy' denotes the promotion of specific industrial sectors rather than industriali[z]ation overall… Industrial policies are direct, micro, and selective; they are an attempt by the government to influence the decision making of companies or alter market signals; thus they are

[25] *See id*. *See* also at M.D. Davis, *The Wal-Mart Merger: Implications for Competition Law in Developing Countries*, *available at* http://www.law.nyu.edu/sites/default/files/upload_documents/DavisTheWalmartMerger.pdf (last visited Aug. 30, 2019)

[26] This means that efficiency and consumer welfare standards by which competition policy and law stands and merger control need to be reviewed are not free from public policy considerations by themselves. For the need to increase legal certainty and transparency of merger policy, proper weight should be given to the positive and negative effects of mergers and the interests of each of the market parties concerned. And, to do so, for many authors, a political rather than an economic question needs to be emphasized.

[27] *See id*.

> discriminating… Industrial policy has sometimes sought to support the losers, delaying or retarding their decline; in other cases the goal is to succor or cataly[z]e maturing sectors or to stimulate advancing sectors.[28]

Although the name industrial policy, on the face, depicts itself as a general policy across industrialization efforts, it is sector-specific, micro, and a particular attempt by government enabling to impact the decision making of companies or change market signals. In doing so, industrial policy is a decisive tool to support those uncompetitive players, or strengthen or motivating those who are advancing in the market. Here, we can also understand that unlike public policy, industrial policy has not much shouldered the wider public morals, interest and other concerns which normally vague and difficult to prove. If so, I believe that industrial policy is much easier for consideration in the merger control system with probably known variables/factors and in implementation so that it would not pose as such a Pandora box-like mischief which entails many consequential problems.

Another nature of industrial policy is that it may not be usual to be found or crafted in all countries unlike public policy. It is quite vivid that public policy is a concern of all countries, societies, or states; however, when we see an industrial policy, for example, the U.S. doesn't have an industrial policy by name. It does not have an industrial policy; rather, its broad policy is free competition and, concomitantly, vigorous antitrust enforcement. And industrial policy necessarily co-exists with other government policies. For example, as short term measures that are aimed to ease the economic shocks that affect particular industries in troubled times. At various times, measures favoring specific industries have been implemented, at both national and sub-federal levels, that some might see as constituting industrial policy. It is competition

[28] OECD, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS 37 (2009). UNCTAD has also defined industrial policy as a concerted, focused, conscious effort on the part of government to encourage and promote a specific industry or sector with an array of policy tools. *See* UNCTAD, THE RELATIONSHIP BETWEEN COMPETITION AND INDUSTRIAL POLICIES IN PROMOTING ECONOMIC DEVELOPMENT 4 (2009)

policy, not industrial policy just as special details fasten onto one form of industrial intervention or another, which is the main organizing principle of the U.S.'s economic policy.[29]

Now, from the above paragraph, it easily understood that industrial policy for countries like the U.S. would not be an issue to be dealt with in merger control cases. And, this may be attributed due to the existence of a developed economy quenched it thirsty of industrialization unlike developing and transitioning economies. Or, it may be due to the existence of robust regulatory capacity of different sectors of the economy that can consider industrialization policies as to the need and context of this arena of economic play in developed economies.

Keeping the above scenarios in mind, among the various tools used to implement industrial policy, arranged mergers and acquisitions can be mentioned. National champions may also be created or protected in different ways, among other things, by the encouragement of domestic mergers. Countries may also adopt industrial policies for many different reasons, for instance, to correct market failures, these endeavors are in line with promoting long-term consumer welfare and efficiency, there will hardly be any conflict with competition policy.[30] Anyway, here in industrial policy also, there is both a complementarity and synergy to competition policy in genera and merger control in particular; and other times a conflict. This may be because modern competition policy is inspired by the neoliberal ideas of the Chicago school that place great confidence in free markets while industrial policy induces a more interventionist approach, taking the assumption that markets are fallible and that governments should correct their imperfections. For this, it is usual to hear that sound competition law and policy is in tension with industrial policy since it promotes consumer welfare whereas industrial policy promotes government intervention for privileged groups or industries.[31]

Competition, by stimulating efficiency in production, innovation and the

[29] *See id*.
[30] *See id*. at 11
[31] D. Sokol, Tensions between Antitrust and Industrial Policy, 22(5) GEORGE MASON L. REV. 1247 (2015).

allocation of resources, in the provision of products and services ensures sustainable economic growth, employment and economic welfare generally. It is pervasive and has long-lasting effects on economic performance by affecting actors' incentive structure, by encouraging their innovative activities, and by selecting more efficient ones from less efficient ones. Therefore, competition policy which is designed to sustain competitive markets is also a key to an industrial policy by enhancing the competitiveness of the industry.[32]

In a nutshell, all the above paragraphs though they are entangled with conflicting views as to the consideration of industrial policy in merger control, conveys to us that it is possible to argue that industrial policy can easily be considered in the merger control system than public policy. For this, even competition policy may also aim to inject competitiveness in industries so that the probability of using the merger to achieve industrial policies would arise, albeit that there are opposing arguments. If it is properly regulated both industrial policy and competition policy in general and merger control system, in particular, can be synergies in that competition policy enhances efficiency by promoting or safeguarding competition; and industrial policy offsets externalities affecting production decisions by firms. In doing so, both can be mutually supportive than competing and conflicting.

V. MERGER CONTROL AND PUBLIC/INDUSTRIAL POLICY UNDER ETHIOPIAN COMPETITION LAW

Competition policy and law cannot be detached from other public policies of a socio-economic nature since the objectives are of a societal kind; and coherence between policies is required. Stemming from the interrelation between competition policy and other public policies it can be said that competition policy should be considered as the fourth cornerstone of government economic

[32] *See generally* N. Kroes, *Industrial Policy and Competition Law and Policy*, 30(5) FORDHAM INT'L L. J. 1401 – 12 (2006). The European Union has a unique combination of competition policy instruments with Industrial policy. Each contributes to the pursuit of what are ultimately industrial policy goals in the broadest sense so that competition policy contributes considerably to the realization of a modern industrial policy.

framework policies along with monetary, fiscal and trade policies. However, the existence of a strong relationship between competition policy and a country's other economic policies may not always end well; there are times when competition policy adversely collided with other policies. In the case of Ethiopia, the socio-economic policies that may affect competition either positively or negatively could include, industrial policy, trade policy, regulatory policy, investment policy, public procurement policy, and labor policy.[33] Therefore, it can be safely concluded and, naturally, merger control being is part of the general competition policy and law may have encroached with the aforementioned public policies.

When we examine the Trade Competition and Consumer Protection Proclamation (TCCP) No. 813/2013 from Arts 9-13, they are destined to regulate merger, and there, the test of merger control is '*Significant Adverse Effect on Trade Competition'*.[34] Here, the test required to be employed in the merger control system under the proclamation is part of efficiency based merger control analysis, which is the very objective of competition policy and law. However, under the same proclamation, the authority is empowered to approve a merger proposal when a merger probably brings technological efficiency or another pro-competitive gain that offsets a significant adverse effect of the merger on competition; and if it is believed that such gain cannot be obtained if a merger is forbidden. This provision gives other policies out of the purview of competition policy and law an outlet or the chance to be positively considered to allow the merger. Here, the law wants to take simply a cost-benefit analysis between the benefits to be gained in allowing the merger and prohibit the same. If so, a public/industrial policy which is believed to bring or enhance technological efficiency, or other precompetitive gain outshining the adverse effect of the merger on competition and which can bring an outweighing benefit than prohibiting a merger do have the opportunity to be prioritized and considered in favor than policy objectives of competition policy and law. In the normal course of events, especially in developing and transitioning economies,

[33] UNCTAD, A Review of Competition Policy in Ethiopia 23 (2018).
[34] *See* TCCPP No. 813/2013, art. 9(1) and art. 11

such kind of socio-economic policy intermixed application and use is expected so that they can achieve their developmental goal.

Another provision of the TCCPP that gives merger proposals the chance to be approved for the reason of public/industrial policy can be inferred from the scope of application of the proclamation. The Council of Ministers is empowered to exempt those trade activities from the application of part two the proclamation in which merger regulation is apart by regulation it deems vital in facilitating economic development.[35] Here also, it is plausible to say that the Ethiopian competition law is so kin accommodating the application other non-competition policy and law objectives which can be of public/industrial policy nature as far as they are found to be paramount to facilitate economic development. This provision is so flexible in allowing a merger even without doing cost-benefit analysis as per Art. 11 (2) of the proclamation if it is exempted from the application of part of this proclamation by a regulation in advance. So, key public/industrial policies which are believed to bring a considerable benefit to meet developmental goals of the country, they can easily be prioritized if they are of vital in facilitating economic development and given leeward from the application of part two of this proclamation including merger regulation.

Last but not least is that TCCPP may not affect regulatory functions and administrative measures to be taken by other laws.[36] Here, this is a marvelous provision, unless abused and applied inappropriately, to allow sector-specific laws to regulate merger without adhering to the very rules of the proclamation so that the merger control system can easily be handled through consideration of laws backed by another sector-specific or general public/industrial policies. So, even though there are no clear rules on how to carry out a merger in consideration of public/industrial policy, the Ethiopian competition law is so flexible that it made itself adaptable and responsive to the public/industrial policy needs of the country.

The industrial policy of Ethiopia, when it is examined by itself, it is within the

[35] *See id.*, art. 4(2)
[36] *See id.*, art. 4(3)

framework of the world environment and the free market economy and generated from the Industrial Development Strategy. The key principles of the strategy which constitutes the industrial policy are: recognizing the role that can be played by the private sector as an engine of industrial development; and identifying and avoiding obstacles that hamper the role of the private sector in the eyes of the Government; ensuring rapid industrial development guaranteeing backward and forward linkages between agriculture and industry; facilitate other concomitant sectors having additional benefits of quality improvement; emphasizing on labor-intensive industries; and coordinating foreign and domestic investment and between government and the private sector. And, these principles of the industrial policy don't seem to have an appreciable adverse impact against competition and competitiveness.[37]

Therefore, unlike the tense debates and controversies for letting public/industrial policy considerations in a merger under the merger control system, or regulation, the Ethiopian competition law has already paved avenues for considering public/industrial policies in merger review and has solved all the naggings in advance. It has not yet supported with a regulation or other soft laws having detailed rules in this regard, however. And, the industrial policy of the country, on its part, tried to make it harmonious with principles of competition and competitiveness. Still, what should be underlined is that both the competition law and industrial policy or other policies need to formulate and supported with respective regulations and soft laws on how to apply competing for competition and non-competition policies together in harmony so that merger laws and practices can be predictable and the general merger control system or regulation can proceed without problem and enforcement of competition law can be facilitated and eased.

VI. CONCLUDING REMARKS

Merger refers an instance that one company acquires assets and liabilities of

[37] Braga Gebremedhine, Competition Regime: Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa, 7up 3 Project 3 - 4 (2002)

another company via amalgamation, buying shares voting rights, pooling resources, creating backward and forward linkage in vertical markets, and bringing management under control so that the merged companies create powerful market power which can be a fertile ground to dominancy and thereby probably an abuse of the dominant position. And, nowadays merger has taken various forms and even some of which are not easily appreciable and considered as a merger. For this reason, different countries have devised merger regulation used to control mergers posing devastating effects on competition in the market.

As opposed to the prohibition of a merger, there are instances by which a merger is allowed. For this, different jurisdictions competition policies and laws have tests that will allow or prohibit merger. In this regard, most developed economies would like to review merger cases as to the very objectives of competition policy and law, in line with efficiency and consumer welfare standards. To do so, such economies due to their developed competition culture and regulatory capacity of different sectors of the economy, they don't need to employ the cross-sectoral application of socio-economic policies. However, when we come to the transitioning and developing economies, competition law, their different socio-economic policies have not yet able to stand independently and require cross-sectoral reinforced application of socio-economic objectives. Hence, even if they formulate competition policy and law, they used it also to meet objectives aspired by other public/industrial policies.

As a result of the above interface application of different socio-economic policies, a merger is usually required to be undertaken to achieve different public/industrial policies in the economy. So, merger proposals are not exclusively reviewed as per efficiency and consumer welfare standards. Regarding this practice, there is an intensified debate about whether a merger is sought to meet non-efficiency and consumer welfare objectives out of the purview of competition law and policy. And, the debate is circumscribed and to be determined as to the stage of economic development different countries achieved.

Last, when we examine merger control and public/industrial policy considerations, the TCCP No. 813/2013, first from its scope allows exemption

of trade activities believed to facilitate economic development from the application of merger and other anti-competitive practices so that there will be a scenario where merger cases to be reviewed in light of other public/industrial policy perspectives. Moreover, under part two of the proclamation, under Art. 11 (2), the merger is allowed when it is found to result in technological efficiency, or another pro-competitive gain which outweighs the significant adverse effects of a merger on competition and such gains may not be obtained if the merger is prohibited. The proclamation also tolerates regulatory functions and administrative measures taken by other laws. And, the principles of the industrial policy of the country have been made to facilitate competition and competitiveness. Therefore, pitfalls in merger control can be minimized, if merger regulation is properly undertaken to understand the very positive intents of the competition law and other public/industrial policies. To bring coherent, consistent, uniform, cost-effective, predictable, and efficient application of this proclamation regarding merger control, it would be rewarding if regulations and directives, and other soft laws in the form of guidelines and manuals are formulated

ATTRIBUTING LEGAL RIGHTS TO NATURE: A STEP TOWARDS ENVIRONMENTAL PROTECTION

Dr. Manjeri Subin Sunder Raj*

ABSTRACT

Rights have always captured the imagination of people not only because of the importance that it has, but more so, because of the rewards that it provides. The concept of standing has long been only attached to humans and even so, certain classes were not considered for long - women, children, slaves, etc. Cometh a time when they were being provided rights clamour arose so as to provide non-human entities too, rights. Asserting and attaching values to different objects have helped devise mechanisms in providing such rights. It is high time that one understands that 'Intrinsic Values' need to juxtapose morality and environment protection. Ever since the concept of 'standing' has been extended to different entities, newer avenues have opened up. Providing concretisation to this idea, currently, is the Rights of Nature movement which has been able to provide a much-needed platform to ensure that nature is provided with rights for its own sake and not for the sake of humans. This article delves into various interventions in this direction and strongly advocates for the recognition of 'Nature Rights'.

I. PROLOGUE

Law has always been seen as recourse to weed out quite a large number of problems, and environmental harm is no exception. Built on a large number of concepts that have been eulogised for many years, laws and legal systems, around the world, have helped in shaping the progress of mankind. 'Rights' and 'Duties' have always been seen as two important elements of law.[1] These help

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[1] *See generally* Stephen D. Hudson and Douglas N. Husak, *Legal Rights: How Useful Is Hohfeldian Analysis?*, 37 PHIL. STUD.: AN INT'L J. PHIL. IN ANALYTIC TRAD. 45 (1980)

understand why we need laws in the first place and create some sort of a basis for the laws that exist, by connecting them with the present-day societal needs.[2] The exact amount in which both these concepts gel is one of the factors that determine how effective a legal system is. This helps in asserting the supremacy of law and ensures that the spirit of law is never lost.

While both rights and duties have been treated as the two sides of the same coin, one cannot but help that one has been given predominance over the other; at least by the general public. Rights, provided by the state, were envisaged in such a way that they were given in lieu of one surrendering himself to the sovereign. Such surrender, however, was conditional. The state was to provide rights that are necessary and also afford protection.[3] Thus, the system was one in which there was a mutually beneficial relationship.

Different philosophers had different conceptualizations of these concepts. Hohfeld[4] dealt with only legal rights while Hart[5] looked into moral as well as legal rights. Moral rights were looked down upon by Jeremy Bentham[6] while J S Mill[7] opined that moral as well as legal rights are interconnected. The concept of right was opined to be present in law and morality by Raz[8] and Wellman.[9] While

[2] Carlton K. Allen, *Legal Duties*, 40 Yale L.J. 331 (1931), tries to answer the fundamental question as to whether law is to be regarded primarily as a system of rights or of duties. It puts forward the idea that a legal right, however so it has been defined, must mean some enlargement, or at least some guarantee of individual freedom, of action or of enjoyment. On the other hand, a legal duty denotes some restriction, necessitated by the interests of others, upon self-interest.

[3] *See generally* David S D'Amato, *The Birth of the State, available at* https://www.libertarianism.org/columns/birth-state (last visited Aug. 6, 2019)

[4] Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917)

[5] *See* H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955). *Also see* H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828 (1979) and H.L.A. Hart, *Bentham on Legal Rights*, in OXFORD ESSAYS IN JURISPRUDENCE 171 (A.W.B. Simpson ed., 1973).

[6] Jeremy Bentham, *Of Laws in General*, 65 AM. POL. SCI. REV. 342 (1970)

[7] *See generally* J.S. Mill, *Utilitarianism*, in THE COLLECTED WORKS OF JOHN STUART MILL (J Robson ed., 1969).

[8] Joseph Raz, *The Nature of Rights*, 93 MIND 194 (1984). Also *see* Joseph Raz, *Legal Rights*, 4 O.J.L.S. 1 (1984).

no consensus is there, White[10] states that this conceptualization is as basic as other conceptualizations. Dworkin [11] stated that *rights* are to be treated individually due to their significance. However, a number of philosophers suggest that rights need be looked into in relation to other concepts.[12]

While much importance has been accorded to *rights*, an equal footing needs to be provided for *duties* as well. After all, they are the co-relatives of *rights.*[13] When we do say that one has been imposed with a legal duty, it does convey the fact that a person is by law to do or not to do an act.[14] What forms the content of such a duty is the act that is to be done or not to be done.[15] This actually forms the very core of a duty.[16] The beauty of this concept is that irrespective of the fact as to whether one likes it or not, if there exists a duty to do or not to do, then the same is to be followed to the dot. This is because it is one's duty to do or not to do so![17] This is amplified by the fact that due to the rights that we possess, we owe duties as well, which we owe towards the sovereign and other people. Thus, due to this, it is said that the concepts of rights and duties are co-relative. However, it is said that all rights have co-related duties but not the other way round.[18] For any mechanism to function well, these concepts should gel and create a better legal environment. This should take into consideration the fact that both individual, as well as collective interests, need be accounted for. Thus, a mutually symbiotic relationship between rights and duties is what is envisaged and ideal.

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[9] *See generally* CARL WELLMAN, A THEORY OF RIGHTS (1985); *See generally* CARL WELLMAN, REAL RIGHTS (1995).

[10] *See generally* ALAN R WHITE, RIGHTS (1984).

[11] *See* Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057 (1975). Also *see* Ronald Dworkin, *Taking Rights Seriously*, in OXFORD ESSAYS IN JURISPRUDENCE 202 (A.W.B. Simpson ed., 1973).

[12] Joseph Raz and Carl Wellman follow this line of thought and state that rights create newer duties with changing circumstances.

[13] Arthur L. Corbin, *Rights and Duties* 33 YALE L.J. 501 (1924).

[14] *See id.* at 186.

[15] *See id.* at 172.

[16] *See* Henry T. Terry, *Duties. Rights and Wrongs*, 10 A.B.A.J. 123 (1924)

[17] *See generally* Joseph Raz, *Liberating Duties*, 8 L. & PHIL. 3- 5 (1989)

[18] Duties which do not have correlative rights are termed as 'absolute duties' by Austin.

Quite often than not, rights assume significance over duties. It is only in those rare circumstances that duties come to the forefront. For this to happen, the concerned have to cross the *right* aspect and reach the *duty* aspect. Protecting the environment is considered to be a duty that each one of us has. This is a corollary to the right to live in a healthy environment.[19] Many factors have been able to put across the distinction between rights and duties, and religion is one of them. Since it has been able to shape man's actions, from time immemorial,[20] it is considered to have great importance. The conceptualisation of religion has undergone vast changes; more noticeably so in this age of globalization.[21] All these have created newer avenues as far as environmental protection is concerned. Lynn White in 'The Historical Roots of Our Ecological Crisis', opined, "*What people do about their ecology depends on what they think about themselves in relation to things around them. Human ecology is deeply conditioned by beliefs about our nature and destiny - that is, by religion.*"[22] Law learning and imbibing from religious tenets does have a great role to play in so far as environmental protection is concerned.[23]

The very conceptual basis is put to test in the case of environmental protection as given the sorry state of affairs; one does feel that law has failed to a certain extent in ensuring its protection. The mere existence of laws has not yet been able to catapult the idea into the minds of the people and ensure that the environment is protected. The foundational basis of environmental law is on a shakier ground than ever before and a revamp of the legal regime is the only way out to ensure that it continues to exist.

[19] This right has been read as part of the Right to Life, guaranteed under Art 21 of the Constitution of India.

[20] John E. Boodin, *The Function of Religion*, 46 THE BIBLICAL WORLD 72 (1915)

[21] To know more about the changing face of religion in the era of globalization, *see* P. Radhakrishnan, *Religion under Globalisation*, 39 ECON. & POL. WKLY 1403 (2004)

[22] *All about Religion and the Environment*, *available at* http://www.uvm.edu/~gflomenh/ENV-NGO-PA395/articles/Lynn-White.pdf (last visited Aug. 15, 2019)

[23] *See generally* Andrew Greeley, *Religion and Attitudes toward the Environment*, 32 J. SCI. STUD. RELIGION 19 (1993)

By delving into the problems attached to the existing environmental legal regime, a case is made for a change in approach. This new approach is amplified and examined through some of the developments that have been taking place, for quite some time now. Even then, it is felt that the same needs more impetus to enable it to achieve its goal- *Environmental Justice*.

II. INTRINSIC VALUE AND INSTRUMENTAL VALUE

What has been able to bring about a change in the way in which man has looked upon nature are two concepts- *Intrinsic value and Instrumental Value.* This juxtaposes morality and environmental protection. While one might come to a conclusion that the environment should be protected because we owe a duty towards successive generations, there is an equal, if not a stronger argument, that the environment needs to be protected for its own sake! This is where the difference in approach as far as the earlier mentioned two concepts comes to the forefront. While *Intrinsic Value* tries to portray and attach value regardless of whether there is any use or not, *Instrumental Value* attaches value in furtherance of other ends![24] The second concept attaches a strong anthropocentric mentality and ensures that humans are better protected. Philosophers, even ancient ones like Aristotle have subscribed to this view.[25] Even so, there are a number of discussions on the disruptive approaches followed by this view.[26]

While Carson was able to start such a change,[27] Lynn White[28] took a critical view of the Judeo-Christian way of life, which he attributed to the

[24] *See generally* John O'Neill, *The Varieties of Intrinsic Value*, 75 MONIST 119 (1992). Also *see* JOHN O'NEILL, ECOLOGY, POLICY AND POLITICS (1993); DALE JAMIESON, MORALITY'S PROGRESS: ESSAYS ON HUMANS, OTHER ANIMALS, AND THE REST OF NATURE (2002).

[25] *Politics*, Bk. 1, Ch. 8.

[26] *See* JOHN PASSMORE, MAN'S RESPONSIBILITY FOR NATURE (2nd ed. 1980); MURRAY BOOKCHIN, THE PHILOSOPHY OF SOCIAL ECOLOGY (1990); and ETHICS ON THE ARK (B.G. Norton *et al.* eds., 1995).

[27] *See generally* RACHEL CARSON, SILENT SPRING (1962).

[28] *See generally* Lynn White, *The Historical Roots of Our Ecological Crisis*, 155 SCI. 1203 (1967).

environmental crisis. The *Population Bomb*,[29] for the first time, put across that the human population was growing exponentially and resources would end pretty soon. The iconic *Earth Rise*[30] photograph showcased to the world, the *world* in which we live, together! Rawls,[31] discussed as to how animals, as well as nature, can be at the receiving end of a right conduct and Tribe[32] delved into the relationship between law and ethics. Lawmakers were urged to recognise these *rights* that certain things have of their own and steps were initiated to that effect too.[33] Meadows and his research team from Massachusetts Institute of Technology (MIT) came up in his work[34] with newer concerns as regards environmental protection.

III. EXTENDING STANDING

While the concept holds good, the extension of the concept of standing was one of the challenges that such philosophers had to face. Humans were seen as the only entity to which standing was to be given.[35] It was concluded that even future generations can possess such rights.[36] Animals were also to be provided standing and Singer and Reagan stated it to be *sentience.*[37] Individual living organisms were said to have a *will to live* by Albert Schweitzer.[38] This was further elaborated by Paul Taylor who opined that each living thing is a

[29] *See generally* P.R. EHRLICH, THE POPULATION BOMB (1968)
[30] This was taken by Bill Anders in 1968, during the Apollo 8 mission and was published in the Scientific American in September 1970
[31] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).
[32] *See* Laurence Henry Tribe, *Ways Not To Think About Plastic Trees: New Foundations For Environmental Law*, 83 YALE L. J. 1315 (1974).
[33] *See* National Environmental Policy Act, 42 U.S.C. § 4321 et seq, (1969).
[34] *See generally* LIMITS TO GROWTH (Dennis L Meadows *et al.* eds., 1972).
[35] *See generally* JOHN PASSMORE, MAN'S RESPONSIBILITY FOR NATURE (1974). Also *see* William T. Blackstone, *Ethics and Ecology* in PHILOSOPHY AND ENVIRONMENTAL CRISIS 16 (William T. Blackstone ed., 1972).
[36] *See* Alan Gewirth, *Human Rights and Future Generations*, in ENVIRONMENTAL ETHICS 207 (Boylan, Michael ed., 2001)
[37] *See* Peter Singer, *All Animals Are Equal*, 1 PHIL. EXCHANGE 243 (1974); and TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983).
[38] *See* ALBERT SCHWEITZER, CIVILIZATION AND ETHICS: THE PHILOSOPHY OF CIVILIZATION PART II (translated by John Naish 1923).

'teleological centre of life',[39] thereby portraying the fact that whatever it does will be for its own good. This was around when Aldo Leopold came up with a *Land Ethic.*[40] He opined that "*A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.*"[41]

These philosophers tried to carve a niche of their own and give some kind of backing to the concept of standing. Even so, one cannot but help notice that the judicial system also waded into this area. In the USA, in *Scenic Hudson Preservation Conference* v. *Federal Power Commission,*[42] the court while holding that the Scenic Hudson Preservation Conference could be treated as an aggrieved party under S. 313 (a) of the Federal Power Act, laid down that it had the Right of Standing. A similar line of thought was taken in *Citizens to Preserve Overton Park* v. *Volpe*[43] as well. However, the *Sierra Club case*[44] proved to be a turning point in the sense that the previous situation was overturned. Hoping to influence the judges, Stone came up with his celebrated article,[45] which tried to reason as to why standing need be extended.

Though the majority took a view that the Club need not be given standing, the dissenting opinion of Justice Douglas,[46] wherein he quoted Stone's article, assumes much significance. In his later writings, he expands the idea and brings within its scope newer arguments.[47] Relying on *Palila* v. *Hawaii Dept. of Land & Natural Resources*[48] and *Loggerhead Turtle* v. *County Council of*

[39] *See generally* PAUL W. TAYLOR, RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS (1986).
[40] *See generally* ALDO LEOPOLD, A SAND COUNTY ALMANAC: AND SKETCHES HERE AND THERE (1949).
[41] *See id.* at 218.
[42] 354 F.2d 608 (2d Cir. 1965).
[43] 1971 U.S. LEXIS 96.
[44] *Sierra Club* v. *Morton,* 405 U.S. 727 (1972).
[45] *Should Trees Have Standing- Towards Legal Rights for Natural Objects,* 45 S.C.L.R. 450 (1972)
[46] *Sierra Club* v. *Morton,* 405 U.S. 727 (1972) at 742
[47] *See* CHRISTOPHER STONE, SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT (1996); and CHRISTOPHER STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT (2010)
[48] 649 F. Supp. 1070 (D. Haw. 1986).

Volusia County,[49] this line of thought was expanded.

IV. PROVIDING RIGHTS TO NATURE - A ROAD LESS TRAVELLED? NOT ANYMORE!!

While many countries have followed different approaches in providing rights to nature and natural entities, what is looked into are some of the latest instances of such rights being provided for. The rights of a river, Turag in Bangladesh and the rights of Lake Erie, in the USA, two of the latest developments, will be used to catalogue the *Rights of Nature*.

This is not the first time around that nature was provided rights.[50] India too has its own fair share of such decisions. In *T N Godavarman Thirumalpad v. U.O.I.*[51] the court opined that rivers were treated like goddesses and were afforded protection. In *Mohammed Salim v. The State of Uttarkhand*[52]the court held that Ganga, Yamuna and their tributaries were held as *legal persons*. In *LalitMiglani v. State of Uttarakhand and Ors*[53]Gangotri and Yamunotri glaciers and the surrounding parts including meadows, waterfalls, lakes, and forests were held to have rights. Though the former case was stayed by the Supreme Court of India in *State of Uttarakhand and Ors.*v. *Mohammed Salim and Ors.*[54]citing administrative reasons, the decision does hold great importance.

While such instances are aplenty around the world as well, a proper implementation does pose a huge challenge. In the US, the *Tamaqua Sewage Sludge Ordinance, 2006*[55] was the earliest instance of such rights being

[49] 896 F. Supp. 1170 (M.D. Fla. 1995).

[50] As regards rights being provided for rivers, *see* Sebastian Bechtel, *Legal Rights of River: An International Trend*, clientearth.org (Mar. 21, 2019), *available at* https://www.clientearth.org/legal-rights-of-rivers-an-international-trend/ (last visited Aug. 15, 2019)

[51] (2002) 10 S.C.C. 606.

[52] 2017 S.C.C. OnLine Utt 367.

[53] 2017 S.C.C. OnLine Utt 392.

[54] Petition to Special Leave to Appeal No. 016879/2017.

[55] Kate Beale, *Rights for Nature: In PA's Coal Region, A Radical Approach to Conservation Takes Root*, HUFFINGTONPOST (Mar. 27, 2019), *available at*

provided. There were a number of other states also, which took note of this development and came up with similar rights.[56] The Supreme Court of Belize in *The Attorney General of Belize* v. *MS Westerhaven Schiffahrts Gmbh & Co KG and Anr*[57] held that the Belize Barrier Reef was held to be a living thing. While constitutional rights were provided by Ecuador,[58] Bolivia came up with a specific legislation- the *Universal Declaration on the Rights of Mother Earth.*[59] Colombia provided the Atrato river as well as the basin having rights to 'protection, conservation, maintenance, and restoration'.[60] In April 2018, the Supreme Court of Justice of Colombia granted similar rights to the Colombian Amazon.[61]

New Zealand is yet another country that has provided rights to nature. Legal recognition was given to a national park by the TeUrewera Act, 2014. The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, gave the Whanganui River, after a 170-year-old battle legal rights and the river was treated as a legal entity. A mountain was also given legal recognition.[62] Mexico, in 2013, passed the *Environmental Law for the Protection of the Earth,*[63] wherein the earth is treated as a living being. The State of Guerrero, in Mexico,

https://www.huffingtonpost.com/kate-beale/rights-for-nature-in-pas_b_154842.html (last visited Aug. 15, 2019)

[56] Halifax, Hawaii and Santa Monica were some of them.

[57] Claim No. 45 of 2009, Supreme Court of Belize, (Mar. 21, 2019), *available at* https://www.elaw.org/system/files/westerhaven.26.4.10.pdf. (last visited Aug. 15, 2019)

[58] Chapter 7, Articles 71- 74, Constitution of Ecuador, *available at* http://pdba.georgetown.edu /Constitutions/Ecuador/english08.html. (last visited Aug. 15, 2019)

[59] World People's Conference on Climate Change and the Rights of Mother Earth, Universal Declaration of Rights of Mother Earth, GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE, *available at* https://therightsofnature.org/universal-declaration/. (last visited Aug. 15, 2019)

[60] Expediente T-5.016.242. The original decision, *available at* http://cr00.epimg.net/descargables/2017/05/02/ 14037e7b5712106cd88b687525dfeb4b.pdf (last visited Aug. 14, 2019)

[61]STC4360-2018. Judgment delivered by Judge Luis Armando TolosaVillabona, Original decision, (Apr. 5, 2018), *available at* http://files.harmonywithnatureun.org/uploads/ upload605.pdf (last visited Aug. 15, 2019)

[62]A Record of Understanding over Egmont National Park (Taranaki Maunga) (2017)

[63] *Environmental Law for the Protection of the Earth*, BEVERIDGE AND DIAMOND, *available at* http://www.bdlaw.com/assets/htmldocuments/Mexico-City-Law.pdf (last visited Aug. 15, 2019)

amended its State Constitution in 2014 and included Art.2 which provides such rights. The new Constitution of Mexico City has in Art. 13, included the Rights of Nature.[64] In Brazil, the Municipalities of Paudalho[65] and Bonito[66] brought about amendments to its organic law and included the Rights of Nature. Costa Rica by an Executive Decree declared April 22 as National Day of Mother Earth.[67] Australia had also provided legal recognition to River Yarra,[68] The European Citizens Initiative came up with an End Ecocide Plan[69] aimed at providing such rights. One could also see that the same was incorporated in political agenda as well, the foremost being the Green Party of England and Wales.[70] France is seeking to amend its Constitution and includes such rights along with the crime of ecocide, principle of non- environmental regression, etc.[71]

V. TREADING NEWER PATHS

The whole new conceptualization of *rights* in the light of *nature* and *natural entities* being a subject matter capable of expression has opened up hitherto unknown avenues. Nations across the world have found ways and mechanisms

[64] See *Mexico City*, EARTH LAW CENTER, (Apr. 2, 2019), *available at* https://www.earthlawcenter.org/international-law/2017/3/mexico-city (last visited Aug. 15, 2019)

[65] Municipality of Paudalho, *Amendment to the Organic Law*, HARMONY WITH NATURE UNITED NATIONS, *available at* http://files.harmonywithnatureun.org/uploads/upload720.pdf (last visited Aug. 15, 2019)

[66] Municipality of Bonito, *Amendment to the Organic Law*, HARMONY WITH NATURE UNITED NATIONS, *available at* http://files.harmonywithnatureun.org/uploads/upload658.pdf (last visited Aug. 16, 2019)

[67] Executive Order of State of Costa Rica, *National Day of Mother Earth*, HARMONY WITH NATURE UNITED NATIONS *available at* http://files.harmonywithnatureun.org/uploads/upload741.pdf (last visited Aug. 16, 2019)

[68] Yarra River Protection (Wilip-gin Birrarungmurron) Act of 2017.

[69] Objective 1. *See End Ecocide Plan*, CITIZENS OF EUROPE, *available at* http://www.citizens-of-europe.eu/articles/end-ecocide-europe-campaign (last visited Aug. 15, 2019)

[70] Green Party of England and Wales, GREEN PARTY, *available at* https://www.greenparty.org.uk/?q (last visited Aug. 15, 2019)

[71] *See generally* HARMONY WITH NATURE UNITED NATIONS, *available at* http://files.harmonywithnatureun.org/uploads/upload716.pdf (last visited Aug. 15, 2019)

in which such rights can be furthered and have pretty much come up with avenues providing such rights.[72] A few examples from across the world are looked into, which have recently given *nature- rights.*

The High Court of Bangladesh recently gave Turag River the status of a legal person.[73] The Human Rights and Peace for Bangladesh filed a Writ before the High Court to save rivers from rampant encroachment based on a report in the Daily Star.[74] There were a number of illegal structures and the same were sought to be evicted by this Writ Petition. Upon the direction of the High Court, the Gazipur CJM surveyed the area and noted that there were 30 odd illegal structures. They were directed to be demolished by the High Court. While some of the owners challenged this decision in the Appellate Division of the Supreme Court, the court had stayed the order and asked the High Court to dispose of the matter.

One of the arguments that were raised was that the appellants were owners of the land and they had bought the land on the riverbanks and that they were at liberty to construct buildings. The bench consisting of Justices Moyeenul Islam Chowdhury and Md. Ashraful Kamal heard the matter and opined that laws are being made to protect rivers, across the world.[75]

Relying on the Public Trust Doctrine, the bench declared that the state is the trustee and it has to ensure that all of its area is protected. While giving legal entity status to the river, the court asked the authorities to remove the illegal

[72] For more see, *Rights of the Nature*, HARMONY WITH NATURE UNITED NATIONS, *available at* http://www.harmonywithnatureun.org/rightsOfNature/ (last visited Aug. 15, 2019)

[73] *See Bangladesh court gives Turag, other rivers status of 'legal person' to save them from encroachment*, (Jan 30, 2019), *available at* https://bdnews24.com/bangladesh/2019/01/30/bangladesh-court-gives-turag-other-rivers-status-of-legal-person-to-save-them-from-encroachment (last visited Aug. 15, 2019)

[74] Tawfique Ali, *Time to declare Turag dead*, The Daily Star, Nov. 6, 2016, available at https://www.thedailystar.net/frontpage/time-declare-turag-dead-1310182 (last visited Aug. 16, 2019)

[75] *See Turag given legal person status to save it from encroachment*, THE DHAKA TRIBUNE (Jan 30, 2019), *available at* https://www.dhakatribune.com/bangladesh/court/2019/01/30/turag-given-legal-person-status-to-save-it-from-encroachment. (last visited Aug. 16, 2019)

structures. The court said that the same will be applicable to every river in the country as well.[76] The court also declared that the National River Protection Commission is the legal guardian of all the rivers and has to take all measures to protect rivers.[77] The court said that if rivers are not protected from encroachment, the future of the country and its citizens is in danger.[78]

Another recent victory of the *Rights of Nature* movement was the step that was taken by Toledo, Ohio[79], where they gave a lake, rights.[80] Lake Erie was voted to have rights;[81] thereby paving the way for the lake to *exist, flourish and naturally evolve*.[82] The aftermath of this victory is that people can now bring lawsuits on behalf of the lake.[83] This was the climax of a lot of regulations that tried to protect the lake and failed;[84] even after it had been termed biologically

[76]For more see, Anonymous, *He stop playing blind man bluff about rivers,* THE DHAKA TRIBUNE, (Feb. 1, 2019), *available at* https://www.dhakatribune.com/bangladesh/court/2019/02/01/hc-stop-playing-blind-man-s-bluff-about-rivers (last visited Aug. 16, 2019)

[77] See, Anonymous, *HC gives Legal Person Status to Rivers* TRUE AND IMPARTIAL DAILY SUN, (Jan. 31, 2019), *available at* https://www.daily-sun.com/printversion/details/367891/2019/01/31/HC-gives-%E2%80%98legal-person%E2%80%99-status-to-rivers (last visited Aug. 15, 2019)

[78]*See supra*, note 76.

[79] The petition can be accessed at HARMONY WITH NATURE UNITED NATIONS, *available at* http://files.harmonywithnatureun.org/uploads/upload763.pdf. (last visited Aug. 16, 2019)

[80] *See generally* Matt Hickman, *Why this Ohio city just granted Lake Erie the same legal rights as humans*, (Apr. 2, 2019), *available at* https://www.mnn.com/earth-matters/wilderness-resources/blogs/toledo-wants-grant-lake-erie-same-legal-rights-person.

[81] 61.37% voted in favour of the Lake being provided rights. *See* Pierre Bouvier, *In the United States, Lake Erie now has the legal right "to exist and prosper naturally"*, (Feb. 22, 2019), *available at* https://www.lemonde.fr/planete/article/2019/02/22/les-habitants-de-toledo-dans-l-ohio-appeles-a-donner-un-statut-juridique-au-lac-erie-pour-sa-survie_5426743_3244.html (last visited Aug. 16, 2019)

[82]*See* Lake Erie Bill of Rights, cl. 1(a)

[83] *See Lake Erie Wins Legal Rights*, LIVING ON EARTH, (Mar. 1, 2019), *available at* https://www.loe.org/shows/segments.html?programID=19-P13-00009&segmentID=1 (last visited Aug. 16, 2019); Also *see* Wesley J. Smith, *Lake Erie Now Has Rights*, NATIONAL REVIEW, (Mar. 1, 2019), *available at* https://www.nationalreview.com/corner/nature-rights-movement-lake-erie/ (last visited Aug. 16, 2019)

[84] *See* Jackie Flynn Mogensen and Mother Jones, Mother Jones: Holy, Toledo! This Ohio City Is Voting to Give Legal Rights to a Lake, COMMUNITY ENVIRONMENTAL LEGAL

dead.[85] The lake was a hotspot for toxic algae blooms.[86] This was also a victory for the citizens as the previous attempt wherein a lawsuit was filed was unsuccessful.[87] The citizens wanted to reduce the *environmental burden* that the lake carried.[88]

It was pointed out by Tish O'Dell that the whole idea stemmed from the realization that the people will have to take initiative to protect the lake.[89] The Toledo water crisis in 2014 was the catalyst to protect the lake.[90] A lawsuit was filed against this Bill by Drewes Farms and it wanted the Bill to be held unconstitutional.[91] The argument was that the farm might incur a huge liability if the fertilizers used ran off into water sources. Though there were people for and against this Bill of Rights,[92] the whole idea seems to have captured the imagination of the larger public. Echoing the historic moment, Markie Miller of

DEFENSE FUND (Feb. 25, 2019), *available at* https://celdf.org/2019/02/mother-jones-holy-toledo-this-ohio-city-is-voting-to-give-legal-rights-to-a-lake/ (last visited Aug. 16, 2019)

[85] *See* Michael Rotman, *Lake Erie*, CLEVELAND HISTORICAL, *available at* https://clevelandhistorical.org/items/show/58 (last visited Aug. 16, 2019)

[86] *See* Jason Daley, *Toledo, Ohio, Just Granted Lake Erie the Same Legal Rights as People*, SMITH SONIAN MAGAZINE, (Mar. 1, 2019), *available at* https://www.smithsonianmag.com/smart-news/toledo-ohio-just-granted-lake-erie-same-legal-rights-people-180971603/#ugOjrl6vAkAbYy3R.99 (last visited Aug. 16, 2019)

[87] *See* Malory Pickett, *Ohio Just Granted Lake Erie the Same Rights as a Human,* MEDIUM, (Mar. 22, 2019), *available at* https://medium.com/s/story/ohio-just-granted-lake-erie-the-same-rights-as-a-human-5403783279a (last visited Aug. 16, 2019)

[88] *See* Common Dreams, *In 'Historic Vote,' Ohio City Residents Grant Lake Erie Legal Rights of a Person*, ECOWATCH (Feb. 28, 2019), https://www.ecowatch.com/lake-erie-bill-of-rights-2630261411.html (last visited Aug. 16, 2019)

[89] *See* Jackie Flynn Mogensen, *Holy Toledo! This Ohio City Is Voting to Give Legal Rights to a Lake*, MOTHER JONES (Feb. 27, 2019), *available at* https://www.motherjones.com/environment/2019/02/toledo-ohio-lake-erie-bill-of-rights-ballotmeasure/ (last visited Aug. 17, 2019)

[90] *See* Jesse Higgins, *Lake Erie first lake to be granted same rights as a human,* UPI (Feb. 27, 2019), *available at* https://www.upi.com/Top_News/US/2019/02/27/Lake-Erie-first-lake-to-be-granted-same-rights-as-a-human/1661551286456/ (last visited Aug. 17, 2019)

[91] *See* ArisFolley, *Ohio city votes to give Lake Erie same legal rights as a person*, THE HILL (Feb. 28, 2019), *available at* https://thehill.com/policy/energy-environment/431859-lake-erie-becomes-first-lake-to-be-granted-the-same-legal-rights-as (last visited Aug. 17, 2019)

[92] *See id.*

Tolodeans for Safe Water opined that this is the beginning of a new era.[93]

The Lake and its watershed were to be treated as an ecosystem. Since the ecosystem had suffered a lot, the idea was to provide its rights. It suffers from algae blooms every summer and this threatens the various avenues to which the water is put to use.[94] The Bill makes it unlawful for any corporation or government to violate the rights that have been given to the lake.[95] It also makes it clear that even if permits, licenses, privileges, or any kind of authorization that has been accorded to the corporation, by the state or any federal agency, will not be valid in Toledo if it violates the rights given to Lake Erie.[96] Fines are provided for[97] and actions can be raised by Lake Erie as the real party in interest.[98]

VI. MUSINGS OVER 'NATURE RIGHTS' AND THE WAY FORWARD

Providing *rights to nature* obviously have had its own share of fair criticism.[99] While those *for* such rights argue that it is an absolute necessity, others do criticise that providing such rights does have its own ramifications as well. Connecting it with the *duty* aspect that was discussed earlier,[100] naysayers opined that if *rights* are provided, then *duties* should also be present. This would, in all certainty, open up litigation floodgates wherein *nature* will be on the receiving side! Imagine if a person sues a river for flooding his property!

[93] Simon Davis Cohen, *Toledo Residents Vote to Recognize Personhood for Lake Erie*, THE PROGRESSIVE, (Feb. 28, 2019), *available at* https://progressive.org/dispatches/toledo-residents-vote-to-recognize-personhood-for-lake-erie-davis-cohen-190227/ (last visited Aug. 16, 2019)

[94] Yessenia Funes, *A U.S. City Just Granted Legal Rights to a Lake*, GIZODO, (Feb. 28, 2019), *available at* https://earther.gizmodo.com/a-u-s-city-just-granted-legal-rights-to-a-lake-1832960779 (last visited Aug. 17, 2019)

[95] Lake Erie Bill of Rights, cl. 2

[96] *Id.*, cl. 2(b)

[97] *Id.*, cl. 3.

[98] *Id.*, cl. 3(d).

[99] Wesley J Smith, *The Return of Nature Worship*, Religion and Liberty 28 (3) ACTON INSTITUTE (Apr. 2, 2019), *available at* https://acton.org/religion-liberty/volume-28-number-3/return-nature-worship (last visited Aug. 17, 2019)

[100] *See supra*, prologue

Seems scary, but then these are possibilities that are sure to happen!

All said and done, the current is stronger in favour of providing rights, exemplified by steps that are taken in various countries who want nature to be provided with rights. Gavin Barker argues that the UK for example, where there is no written Constitution, needs to provide recognition to such rights. He argues that constitutional considerations should include within it 'responsibility to nature', harmony and balance, amongst others, as complimentary to individual rights.[101]

The innovative remedies, discussed earlier, that were provided for by the court, does actually go a long way in ensuring that the rights which are given to such entities do hold good. It is up to the courts to figure out ways in which such rights can be provided for. Do these rights fall in the same bracket as those human rights that we possess or are these rights to be treated as a different class? The answer is a bit difficult and cannot be answered at one go.

The concept has been able to demolish the very crux of a basic tenet which held the human being as an exceptional creature. By providing rights to non-human entities, this line of thought has been done away with. There is absolutely no need and necessity to provide an elevated status to humans! It is high time that we understand that we are only a part of the thread that binds this world together. Arguments put across to the effect that the *value* of *rights* will fall down if different entities are provided rights too falls flat because, by building a strong basis of *rights* as well as *duties*, one should be able to do away with this notion. Therefore, the onus is to create a balance of these two concepts and not give prominence to one over the other. While it can be argued that such rights do interfere with the Right to Development, as human activities would be seen as an attack over the environment, this line of thought too need be dispelled as we are to be seen not as opposing parties but rather as partners.

While it is true that the *Rights of Nature* Movement has been able to galvanize various nations into coming up with specific legislations, how far it is practical

[101] *See id.*

need to be analysed.[102] This, for sure, is because the movement is still in its stage of infancy. Whether providing such rights will make a difference or not in affording standing and protection to nature and natural entities is something that time alone will be able to answer. While it is said that the conceptualization of *rights* has changed over time, the world does agree that many of the rights that have been specifically provided for by numerous international instruments have not yet been fully realised.[103] Similarly, it has been argued that *nature rights* too, albeit being a little vague and limited will come into prominence in the near future.

The million-dollar question therefore is and always should be -***WHY NOT 'NATURE RIGHTS'?***

[102]Sigal Samuel, *Lake Erie just won the same legal rights as people*, VOX, (Apr. 2, 2019), *available at* https://www.vox.com/future-perfect/2019/2/26/18241904/lake-erie-legal-rights-personhood-nature-environment-toledo-ohio,

[103]See, Guillaume Chapron*et al*, *A Rights Revolution for Nature*, 363 SCI. 1392 (2019).

ARTIFICIAL INTELLIGENCE AND THE INDIAN COMPETITION LAW: THE UNACKNOWLEDGED RELATED ASSOCIATES

Divya Sugand*

"The world is changing incredibly fast and some say we are living in the 4th industrial revolution, and much of it is propelled by the phenomenal force of computing, and the biggest driver of change is AI"

- *Fei Fei Li, director of the Stanford Artificial Intelligence Lab, AI*

ABSTRACT

Machine intelligence has reached to such a height where it is in a position to trace, forecast and influence nearly all facets of the human intelligence. Its disturbing omnipresence has led to a contention that it is an 'Orwellian' measure for competitors in market. Pursuant to enlisting challenges posed by it in market competition and substantiating it with worldwide real life anti-competitive examples, the author thus makes pre-legislative and legislative recommendations that shall be adopted. Insights have also been drawn from the countries like, USA, UK and some parts of Europe. Finally, the author makes a critical analysis and concludes the research with the current Indian position and solutions in hand.

I. ARTIFICIAL INTELLIGENCE AS A CONCEPT

The notion that Pablo Picasso gave to the computers at his time was "useless" because all they could do was to answer.[1] Since then, computer and its working have undergone metamorphosis to such an extent that it has challenged the wits of us, the humans. World's most exceptional chess player Garry Kasparov, when defeated for the first time by the IBM super-computer Deep Blue was the

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[1] *See* Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1326 (2015).

"watershed moment in the history of technology."[2] It was just the beginning of an ever-augmenting credence in data, models and analytics collected by these self-learning machines. The sector where it emerged as a hidden weapon is the market competition. As a tipping point, the gut feelings/predictions/hit and trials are now replaced by precise, faultless, estimated decisions.[3] These smart machines also predicts, "to further enhance our more immediate living environment – the way we commute, shop and communicate."[4] Its presence in today's business competition has thus become inescapable and most noteworthy. The phenomenon which makes it possible for these machines to surpass all the limits of intellect is popularly known as 'Artificial Intelligence' (AI).

AI is poised to unleash the next wave of digital disruption.[5] The term was first coined in 1956 by John McCarthy as "the science and engineering of making intelligent machines."[6] As per Haugeland, it is "the exciting new effort to make computers think…machines with minds, in the full and literal sense."[7] Other theorists like Bellman defined AI as "the automation of activities that we associate with human twhinking, activities such as decision-making, problem-solving, learning…"[8] Charniak and McDermett defined it as "the study of mental faculties through the use of computational model."[9] For Winston, it is the study of the computations that make it possible to perceive reason and act.[10] An English mathematician named Alan M. Turing also brought forth a test to judge the intelligence of a machine called the 'Turing Test'. Thus, current scenario

[2] *See generally* GARRY KASPAROV, DEEP THINKING: WHERE MACHINE INTELLIGENCE ENDS AND HUMAN CREATIVITY BEGINS (2017).
[3] *See* Mehra, *supra* note 1, at 1331.
[4] *See* Ariel Ezrachi and Maurice E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, 267 U. ILL. L. REV. 1776 (2017).
[5] *See generally* Jacques Bughin, Eric Hazan, et al, *Artificial Intelligence the Next Digital Frontier?* (Mckinsey Global Institute's Discussion Paper, Jun. 2017)
[6] *See* AISB Staff, *What is Artificial Intelligence?*, THE SOCIETY FOR THE STUDY OF ARTIFICIAL INTELLIGENCE AND SIMULATION BEHAVIOUR, Sept. 5, 2014, *available at* https://www.aisb.org.uk/public-engagement/what-is-ai. (last visited Aug. 20, 2019)
[7] *See* RAJAKISHORE NATH, PHILOSOPHY OF ARTIFICIAL INTELLIGENCE: A CRITIQUE OF THE MECHANISTIC THEORY OF MIND 21 (2009).
[8] *See id.*
[9] *See id.*
[10] *See id.*

perceives AI as the study and design of intelligent agents where an intelligent agent is a system that perceives its environment and takes actions which maximizes its chances of success.[11] AI is based on 'Artificial Neural Networks' (ANNs), which are modelled upon the architecture of human brains.[12] Though its origin can be traced back in1950s, it has attracted much vogue relatively recently. While developed economies are researching and trying to mine out most out of it, India and its laws continue to display a torpid approach towards it.

II. AI IN LAW: A BLESSING OR A CURSE?

A recent study conducted by Jomati Consultants points out that, technology can suddenly race ahead at astonishing speed[13] and "legal sector is the latest outpost for AI to tear down."[14] Considered as one of the least technologically advanced sector and dominated by copious paperwork, this field is on the cusp of a transformation embracing AI wholeheartedly.[15] According to Fox Rodney & Search, "AI does not change the nature of legal work. Instead, it assists by automating tasks such as due diligence, document drafting and performing legal research." AI is the future of law and it works by applying sample data to a cognitive system that then helps in analyzing large amount of data and delivers an accurate outcome.[16] From IBM's AI Ross hired by law firms like Baker Hostetler, Salazar Jackson, K & L Gates, etc., to Canada-based Kira Systems

[11] *See* Prakhar Swarup, *Artificial Intelligence*, 2 INT'L J. COMP. AND CORP. RES. 9 (2012)
[12] *See* Gintare Surblyte, *Data-Driven Economy and Artificial Intelligence: Emerging Competition Law Issues*, 67 WIRTSCHAFT AND WETTBEWERB 120-127 (2017).
[13] *See generally* JOMATI CONSULTANTS LLP, CIVILIZATION 2030: THE NEAR FUTURE FOR LAW FIRMS (2014).
[14] *See* Richa Bhatia, *Will Artificial Intelligence become the 'new normal' in Indian Legal Sector*, ANALYTICS INDIA MAGAZINE, Mar. 24, 2017, *available at* https://analyticsindiamag.com/will-artificial-intelligence-become-new-normal-indian-legal-sector/ (last visited Aug. 21, 2019)
[15] See Dan Mangan, Lawyers could be the next profession to be replaced by computers, CNBC.COM, Feb. 17, 2017, *available at* https://www.cnbc.com/2017/02/17/lawyers-could-be-replaced-by-artificial-intelligence.html (last visited Aug. 22, 2019)
[16] *See* Bhatia, *supra* note 14.

hired by Indian law firm Cyril Amarchand Mangaldas.[17] No doubt, AI is gradually bringing a serviceable revolution for legal profession.

Much has been discussed now as to how AI will revolutionize this sector, but what about the fracas it has particularly created in the field of competition law? AI is a self-learning self-improving child, which is nourished and grown by data feeding via technique called 'deep learning'[18]. Primary purpose is to overpower future markets "so that a snapshot analysis of the issues related to current data-driven markets would show only one side of the coin of the market dynamics." If these tools merely used for collecting data and setting prices aligned with social goals, and not otherwise exploited for private interests to alter market outcomes, they would not have been anti to the competition and its law. The next segment of the paper duly explains the same in detail.

III. AI AND COMPETITION LAW: THE RELATED ASSOCIATES

Not surprisingly, the prospect of AI has long fuelled human imagination. Challenges raised resultantly are also relevant to the area of antitrust enforcement. Broadly, Anti-trust advocacy is a protection to consumer's trust/interest and free market. However, the very purpose of its existence is nullified when competition 'exploit consumers' bounded rationality or willpower.[19] AI has given an exorbitant acceleration to such practices, making the dark side darker, and darkest in the long run.

What makes the two associates related, is the writings given on 'Antitrust and AI' (AAI) which brings three averments. *First*, algorithms will widen instances in which known forms of anticompetitive conduct such as 'explicit and tacit collusion',[20] almost perfect behavioural discrimination will be more common.

[17] *Id.*

[18] Deep learning, a subset of machine learning, is one of the functions in AI which works like neural networks in human brain i.e. by processing of given data and creating patterns, it formulates decisions.

[19] Aditya Chhabra, My Advo's Blog on Competition Law, My Advo (July 25, 2018),

[20] *Explicit collusion* is a direct way for the firms to achieve collusion by way of explicit agreements either oral or written for optimal output and profit maximization.

Second, algorithmic markets will display new forms of anticompetitive conduct in non-price dimensions like data capture, extraction, and co-opetition (between 'super-platforms' and applications developers) which challenge the established antitrust doctrine. *Third*, deception is a design feature of algorithmic markets. Behind the facade of competition, consumers are nudged in exploitative transactions.[21]

The working of the two can be explained as follows: Economic theory shows that AI has brought algorithms (configurations) to entirely an advanced level, by improving market transparency and enabling high-frequency trading, increase the likelihood of collusion in market structures that would traditionally be characterized by fierce competition, exceling human efficiency.[22] Algorithms are so pervasive that they track, predict and influence how individuals behave in nearly all aspects of life, thereby creating income constraint and shifting demand curve inwards.[23] This, in turn, reduces the sales opportunities of other producers, and shrinks a range of irrelevant markets, which is a deadweight loss for competition authorities.[24] Algorithm increases this risk in the form of collusion in ways that were not possible before. This is known as 'algorithm collusion'. The exploitation of AI has widened the cracks in competition law caused by collusion especially 'tacit collusion' where no agreement *per se* exists.

There are some attention-grabbing brief challenges[25] posed by AI in anti-trust advocacy has been wonderfully explained by Nicolas Petit, in his research work.[26]

Tacit collusion is achieved without any explicit agreement. The firms maintain mutual interdependence while formulating its strategies independently. This typically occurs in transparent markets with few market players, where firms can benefit from their collective market power without entering in any explicit communication.

[21] Nicholas Petit, *Antitrust and Artificial Intelligence: A Research Agenda*, 8 J. EURO. COMP. L. & PRAC. 361 – 62 (2017)

[22] ORG. ECO. CO-OP. AND DEV., ALGORITHMS AND COLLUSION ON THE DIGITAL AGE 7 (2017)

[23] *Id.*

[24] *See* Nicholas Petit, *supra* note 20.

[25] *See infra* note 55.

[26] *See* Nicolas Petit, *Antitrust and Artificial Intelligence - A Research Agenda*, J. EURO. COMP. L. & PRAC. 1-2 (2017)

It starts when algorithms lead to tacit collusion scenarios as it supplement these collusions to become more stable, durable, and versatile by facilitating detection and retaliation a lower level of market concentration.

This aggravates due to the deficiency in focus and strategies for AI affected antitrust areas. Currently, the focal point is just on B2C markets, with no regard to B2B markets. Even after cybersecurity's measures, such as, Data Perturbation, Masking, and Randomisation Software, we have witnessed varied countermeasures. The dieselgate is a bitter reminder of the automotive industry's technological capabilities.[27]

There arise another need to address robust circumstances and ascertainment of liability. Since, unlike humans, these algorithms do not fear detection and resultant penalties. The AAI literature is based on strict assumptions, such as, homogeneity in algorithms. Dynamic and vast range of competitive consequences will arise if it becomes heterogeneous. EU search case against Google is an ideal reminder to this need.

However, shortfall and complexity of evidences in this field make it even more labyrinthine. A poking example of Amazon selling book, The 'Making of a Fly' for $23 million (detail discussion in the next segment) shows how consumers themselves make bad deals and make it difficult to decide whether it actually justify anti-trust remediation. On this, prominently known as American AI Judge, Richard Allen Posner, once highlight this complexity by stating whether AAI literature denote a brief perturbation in competitive conditions or constitute emerging proof of a market failure worthy of agency interest is still unsettled.[28] Furthermore, there is a requirement of minimum evidence to prove any collusive agreement to be anti-competitive. It can only be proved by showing 'intent' or meeting of minds. However, as the automation grows, the proof of intention shortfalls and the need of inter-dependency to meet and decide becomes next to nil.

[27] *Id.*

[28] *See* Ariel Ezrachi and Maurice E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, Working Paper CCLP (L) 40, Oxford University Centre for Competition Law and Policy 5, *available at* https://www.law.ox.ac.uk/sites/files/oxlaw/cclpl40.pdf (last visited Aug. 20, 2019)

Therefore, topics such as the concept of agreement and intent in a computer dominated environment, the boundaries of legality and collusion, the antitrust liability of algorithms' creators and users, the ability to constrain AI, the relationship between humans and computers, and the possibility of creating ethical, law abiding, machines[29] are some primary moot-prepositions posed by AI against competition jurisprudence.

IV. AI EXPLOITATION: PRACTICALITY IN WORLDWIDE COMPETITION

After an in-depth theoretical discussion on how A-AI, the two associates are actually related, let us now explore their range of exploitation in a practical world of competition. Automatic repricing softwares are one such tool that enable sellers in a marketplace to set pricing strategy based algorithm using which their software would update the price of the product multiple times in a day based on specific set of data like competitors pricing, time of the day, number of sales, storage inventory, etc.[30] For example, Amazon implements more than 2.5 million automated price changes every day to stay competitive. Best Buy and Walmart change their prices around 50,000 times (aprox.) each month.[31] Yesterday's impractical level of discrimination can very well be achieved today, as smart AI systems can collect data on your situations, events, states and time; causes and effects; knowledge about knowledge (what you know about what other people know) and can process them quickly to determine how much value a customer would attribute to a product to determine on what price should it be sold to him. And the worst part is that the customer would never know. Even if he has his doubts, they can always be attributed to the repricing software.[32] Some real life algorithms' exploitative impact on worldwide competition are:

[29] *See id*. at 3.

[30] *See* Saumik Mishra, *Tacit Collusion Leading to Conscious Parallelism*, SOC. FOR EXCELLENCE IN COMP. LAW 74 (2016).

[31] *Profitero Price Intelligence: Amazon makes more than 2.5 million daily price changes*, PROFITERO BLOG, Dec. 10, 2013, *available at* https://www.profitero.com/2013/12/profitero-reveals-that-amazon-com-makes-more-than-2-5-million-price-changes-every-day/ (last visited Aug. 22, 2019)

[32] *See* Mishra, s*upra* note 30 at 76.

First perfect instance of tacit collusion and conscious parallelism is the Peter Lawrence's book, 'The Making of a Fly'. As documented on Eisen's blog[33], it was discovered that two venders on Amazon, Profnath and Bordeebooks had been utilizing repricing programming that followed each other's costs. Consistently Profnath's repricing programming would set its cost at 0.9983 times the Bordeebooks' cost, and inside a couple of hours Bordeebooks' repricing programming would consequently change its cost to 1.27059 times the value set by Profnath.[34] Clearly neither algorithm had any price bounds and the combination of frequent updating and premium discount asymmetry resulted in prices quickly spiralling out of control.[35] The comical automated price war goes to show how retailers need to put pricing parameters in place when employing these sorts of algorithms.[36]

Another instance came to be the first case of cartelisation amongst sellers in the e-commerce sector and first prosecution against the accused for conspiring with other poster sellers to manipulate prices and selling them at 'collusive, non-competitive' prices in the case of *United States of America v. David Topkins.*[37] According to the Antitrust Division of US Department of Justice, conspirators adopted specific pricing algorithms for the sale of certain posters with the goal of coordinating changes to their respective prices and wrote computer code that instructed algorithm-based software to set prices in conformity with this agreement.[38]

Furthermore, is the first-ever market manipulation case announced by the US Securities and Exchange Commission (SEC) on October 16, 2014. It was against

[33] Michael Eisen, *Amazon's $23,698,655.93 Book About Flies*, MICHAELEISEN BLOG, Apr. 22, 2011, *available at* http://www.michaeleisen.org/blog/?p=358.
[34] *See* Olivia Solo, *How A Book About Flies Came To Be Priced $24 Million On Amazon*, WIRED.COM, Apr. 27, 2011, *available at* https://www.wired.com/2011/04/amazon-flies-24-million/ (last visited Aug. 20, 2019)
[35] *See* Mishra, *supra* note 30 at 75.
[36] *See* Solo, *supra* note 34.
[37] U.S. Dist. Ct., N.D. of Cal., No. 15-cr-00201 WHO
[38] Dep't. of Jus., U.S. Fed. Gov., *Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution*, Apr. 6, 2015, *available at* https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace (last visited Aug. 20, 2019)

high frequency trading firm settlement for the amount of US$1 million with Athena Capital Research LLC involving Athena's use of complex trading algorithms to manipulate the closing prices of thousands of stocks by flooding the market with massive numbers of buy or sell orders during the final seconds of the trading day, a manipulative practice typically known as banging the close."[39]

Risk that arises from the dynamics of 'Frenemy' is yet another way of exploitation. It works in the following way – A den of lions cooperates to circle the gazelle and they then compete over which of them gets the choice cuts. They all benefit from the combined effort, yet the dominant lion gets the best cut, which further enhances its power. Two biggest operating systems of the world - Apple's iOS and Google's Android mobile software survive the market with the same strategy.[40]

Last instance is something everyone will relate to. Have you ever noticed that if you do a search for one of the FMCG products then Google AdSense bombards you with e-commerce websites selling those products? A web page saving cookies to your browser to enhance your experience on their page is one of the ways how they can track your online activities though only to a limited extent.[41]

From the above discussed few instances, it is clear that, with the present usage of computers and anticipated technological advancements, more prosecutions involving pricing algorithms are likely.[42]

V. INTERNATIONAL COUNTRIES' STANCE ON AI

Developed economies like United States of America, United Kingdom and European Union have expressly come up to call AI a threat to competition advocacy.

[39] *USA v. Athena Capital Research LLC, Securities and Exchange Commission*, Adm. Proceed. No. 3-16199.
[40] Ariel Ezrachi and Maurice E. Stucke, *Virtual Competition*, 7 J. EURO. COMP. L. & PRAC. 585-86 (2016).
[41] *See* Solo, *supra* note 35.
[42] *See* Ezrachi and Stucke, *supra* note 4.

Isabelle de Silva, President of the 'French Competition Authority', has out rightly declared digitalised economy as the No. 1 problem in competition policy.[43]

Similar threat has been expressed by the President of Germany's cartel office 'the Bundeskartellamt', Andreas Mundt, stating that the impact of digital technology companies on the economy is 'new land' for competition agencies.[44]

UK's 'Competition and Markets Authority' (CMA) is on a full swing to tackle this complication. In early 2017, in an AI conference held in London, CMA's chairman, David Currie expressed his concern in the conference, stating that the current antitrust legislation, though not completely defenceless but inefficient to deal with dynamism unveiled by algorithmic economy which may in near future lead to worst case scenario of automatic price co-ordination. Thus, the major muddle arises when there is non-involvement of human agency in such violations. "Does that represent a breach of competition law? Does the law stretch to cover sins of omission as well as sins of commission? Whether the retailers should be pursued for failing to build in sufficient constraints on algorithmic behaviour so that the algorithm doesn't adopt anticompetitive outcomes? Another scenario is that the constraints are built in, but they are inadequately designed and the algorithm ultimately learns a way to coordinate prices. How far can the concept of human agency be stretched to cover these sorts of issues? The message from these challenges for competition authorities was that regulators needed to keep up with fast-moving technology." Thus, research and detailed study by CMA has already been in process.[45]

Margrethe Vestager, European Commission Antitrust Chief, alerted the enforcers and warned the AI exploiters of their strict investigations and hefty fine impositions for anti-competitive activities. In March, 2017, in an AI

[43] *See* Leah Nylen and Matthew Newman, *Views on algorithms and competition law expose EU-US divide*, MLEX MARKET INSIGHT, May 36, 2017, *available at* https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/cross-jurisdiction/views-on-algorithms-and-competition-law-expose-eu-us-divide (last visited Aug. 20, 2019)

[44] *See id.*

[45] *See id.*

Conference in Berlin, she said "Competition enforcers need to be suspicious of everyone who uses an automated system for pricing. Automated systems could be used to make price-fixing more effective. That may be good news for cartelists. But it's very bad news for the rest of us. We need to make it very clear that companies can't escape responsibility for collusion by hiding behind a computer program."[46]

Even US 'Federal Trade Commission' (FTC) also showed their concern for the same, although they were more inclined at highlighting AI's benefits. Recently in May 2017, US FTC's Commissioner, Terrell McSweeny said, "If pricing algorithms are found to reduce barriers to coordinated interaction under certain conditions, then enforcers may need to consider stepping up our aggressiveness with respect to coordinated effects analysis. Continuing research will be incredibly valuable in this area."[47] However, when the first prosecution was made in the David Topkins' case[48], the country clarified its stance when Assistant Attorney General Bill Baer, of the department's antitrust division, stated "we will not tolerate anticompetitive conduct, whether it occurs in a smoke-filled room or over the internet using complex pricing algorithms."[49]

It may be concluded, "while the US enforcers are taking a more wait-and-see approach, their European counterparts are clearly much more suspicious of algorithmic pricing." While EU Competition Commissioner Vestager said "We certainly shouldn't panic about the way algorithms are affecting markets." Judge Posner's approach saying "antitrust is dead" shows a direct contrast between the stance of two greatest powers.[50] Thus, it is clearly observable how much of an impact AAI literature has created on antitrust authorities around the world, though it may underscore varied approaches by some.[51] Resultantly, early

[46] *See id.*
[47] *See id.*
[48] *See United States of America v. David Topkins*, *supra* note 37.
[49] *See* Jonathan Stempel, *U.S. announces First Antitrust E-Commerce Prosecution*, Reuters, Reuters.Com, Apr.7, 2015, *available at* http://www.reuters.com/article/usa-antitrust-ecommerce-plea/u-s-announces-first-antitrust-e-commerce-prosecution-idUSL2N0X31S020150406 (last visited Aug. 22, 2019)
[50] *See United States of America v. David Topkins*, *supra* note 37
[51] *See* Leah Nylen and Matthew Newman, *supra* note 43.

lessons of AI success in the United States, China, South Korea, and elsewhere offer public and private funding models for AI research that India should consider.

VI. INDIA'S LEGISLATURE'S STANCE ON AAI

Recently in August & October 2017, the 'Ministry of Commerce and Industry'[52] and the 'Ministry of Electronics' & 'Ministry of Information Technology'[53], respectively, has set up a taskforce/committee on AI. While former is chaired by Dr V. Kamakoti with an aim of economic transformation, latter has consequently "drawn up a 'seven-point strategy' that would form the framework for India's strategic plan to use AI." If we try to look at India's earlier efforts on it, from 1986's Centre for AI and Robotics (branch of Defence Research & Development Organisation) to 2009's non-profit scientific society named Artificial Intelligence Association of India (AIAI), there is no other suchlike that govern the field. In fact, there is no specific law or regulation in India, which has ever accommodated provisions for AI.[54] It is now evident from the detailed aforementioned discussion on AAI that much technological turbulence has been caused in competition advocacy, consequently created an alarming need for the law enforcers to act and take legislative action. Thus, the author herein has introduced a model plan for the law enforcing body in two stages, namely, pre-legislative stage and the legislative stage, explained below.

[52] *See generally* PRS, PRS India Monthly Policy Review, Aug. 2017, *available at* http://www.prsindia.org/uploads/media/MPR/MPR-%20August%202017.pdf (last visited Aug. 20, 2019)

[53] P Suchetana Ray and Sarika Malhotra, *Govt Sets Up Expert Group For Suggestions On Artificial Intelligence Policy*, THE HINDUSTAN TIMES, Oct. 20, 2017, *available at* https://www.hindustantimes.com/india-news/govt-sets-up-expert-group-for-suggestions-on-artificial-intelligence-policy/story-R4VnrCufgm7xhh1fVlz9IL.html (last visited Aug. 20, 2019)

[54] Sakshi Jain, *From Manpower to Artificial Intelligence*, THE LAW BLOG, Feb. 19, 2017, *available at* https://thelawblog.in/2017/02/ (last visited Aug. 20, 2019)

A. Pre-Legislative Stage

Considering the above challenges,[55] unquestionably, it will be a testing-ground for legislature to identify a clear, enforceable triggering event for intervention, which would prevent the alteration of market dynamics to such an extent and meet these daring challenges from a legal perspective. However, before competition agencies reach to any enforcement decisions, following pre-requisites are required to be initiated, to supplement the next stage of legislative approach. If this stage is not followed and gets abridged, such that legislative steps are pursued directly, the law-makers would consequently become adrift and directionless.

Firstly, it shall start from resource allocation for control mechanisms. Before concluding any policy decision, the foremost requirement is that of research and resource building. Competition authorities must unite and invest in research and resultant control mechanisms to provide a holistic protection. Competition authorities must devote resources to understand how the rise of sophisticated computer algorithms and the new market reality can significantly change our paradigm of competition, either for the better or the worse. Greater coordination is necessary with privacy and consumer protection officials to assess the preconditions for an effective, welfare-enhancing competitive process. They may consider a range of dimensions, including ways to empower customers (including data mobility), foster incentives for mavericks to enter and expand in problematic markets, and deter abuses by data-opolies.[56]

Then arise the need to collect both factual and statistical data about diverse, frequently repeated algorithmic activities, under specific market conditions, by particular competitive entities. However expensive this way might be, though this method cannot give a blanket protection from AI exploiters, nevertheless it will help legislators setting a checkpoint upon competitors and thus optimising their performances.[57]

[55] *Supra* note 24.
[56] *See* Ezrachi and Stucke, *supra* note 40.
[57] *See* Ezrachi and Stucke, *supra* note 4, at 1810.

Subsequently, there is an utmost requirement of ascertaining the level of intervention, law fraternity actually need to make, while dealing with these challenges of price transparency and conscious parallelism. This is because inadequate interference may lead to adverse consequences like undermining competition. Therefore, "intervention would require careful technological and policy fine tuning to avoid pitfalls." However, this would not suffice unless an optimum balance is created between law making and technology building.[58]

B. Legislative Stage

This stage is all about legal planning and consequent changes by legislature. Having fulfilled the pre-legislative requirements, it is now imperative that some amendments and enactments should be made in the law contingent upon pre-legislative statistics. The author having restricted this issue to antitrust concern, the primary and paramount focus is thus put on the Indian antitrust legislation, which is embodied in the Competition Act, 2002[59], amended by the Competition (Amendment) Act, 2007[60]. However, the code is not that efficient in providing a full-proof remedy to face this emerging issue. Ergo, the author would first give an answer to the 'why' as arose in reader's mind in regards to statute's ineffciency and establish the reason as to why Indian Competition law has to step in. Before this act came into existence, a high level 'S.V.S. Raghavan Committee' on competition law and policy was constituted by the Central Government in 1999. The report has clearly stated that the ultimate raison d'être of competition is the interest of the consumer as the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969[61] and Consumer Protection Act (CPA), 1986[62] are not sufficient to deal with anti-competitive practices.[63] Competition law should cover all consumers who purchase goods and services, regardless of

[58] *Id.*
[59] The Competition Act, 2002 (Act 12 of 2003).
[60] The Competition (Amendment) Act, 2007 (Act 39 of 2007).
[61] The Monopolies and Restrictive Trade Practices Act, 1969 (Act 54 of 1969).
[62] Consumer Protection Act, 1986 (Act 68 of 1986).
[63] GOV'T OF INDIA, REPORT OF THE HIGH LEVEL COMMITTEE ON COMPETITION POLICY AND LAW (2000) (Committee was formed under the Chairmanship of S.V.S. Raghavan)

the purpose for which the purchase is made.[64] This is indeed what we can see through the dynamic algorithmic activity, a violation that is essentially anti-competitive and infringing the very freedom of trade and fairplay among all the competitors, which is the soul and heart of the competition law, as enshrined under the preamble of the said act too. AI has been alleged to have influenced the demand rather than depicting it, by way of anti-competitive measures such as collusion, where the decision of a few firms to collude has significantly impacted the market as a whole, it excludes the firms dealing in a fairplay and ultimately consumers are the ones who get exploited out of it. Salil K. Mehra in his research work[65] befittingly hit this point in the following words: "It will increase the risk that oligopolists will coordinate prices above the competitive level, thereby harming consumers. Antitrust law contains a well-known gap in its coverage under which oligopolists that achieve price coordination interdependently, without communication or facilitating practices, may escape enforcement, even when their actions yield supra-competitive pricing that harms consumers. Because robo-sellers possess traits that will make them better than humans at achieving supra-competitive pricing without communication, all things being equal, they will increase consumer harm due to this gap.

Thus, the Competition Law requires multi-disciplinary inputs in its implementation and enforcement and an intensive economic analysis that goes beyond just interpreting the language of the law, which are still missing in the code. With pre-legislative measures being supplementary fallout to what the competition act will execute to address this issue, the author would like to provide following suggestive features that could supplant this issue with a legislative protection:

Nani Palkhivala has referred Preamble as the "identity card of the Constitution"[66] and so is true for the preamble of competition act too. The basic

[64] *See* KRISHAN KESHAV AND DIVYA VERMA, COMPETITION AND INVESTMENT LAWS IN INDIA 7 (2012).
[65] *See* Mehra, *supra* note 1, at 1330.
[66] G. L. Batra, *The Being of Indian Constitution*, SPEAKING THREADS, Apr. 11, 2017, *available at* https://speakingthreads.com/2017/04/11/the-being-of-indian-constitution/ (last visited Aug. 20, 2019)

aim of the said act, enshrined in its preamble, is "to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."[67] However, it can be observed, that the preamble is given a wider and general meaning. The author see this rider as paving way for extreme interpretations. It may even lead to vague interpretations due to non-mentioning of discrete words. The intention is thus to supply specific indications to shift the conventional meaning and mould the very structure of the antitrust law into a technologically friendly code. Thus, it must be mentioned that the term 'adverse effect' in the preamble, can be on any competition whether discernible or not, whether express or implied. Also, the very objective of promotion and sustenance of such competition shall be remarked to be made not only in physical markets but also in abstract (online) markets. This way the very prologue of the code can express its intent and reach.
Another problematic pre-requisite with the present competition law, in order to bring the law into consideration, is that there must be some already existing competition during the commission of an anti-competitive activity. Consequently, the activities which are likely to affect competition in the future making present situation remains unaffected, will be able to escape the scope of present law. However, it must be understood that such conduct has the effect of preventing potential competition and places a barrier at the entry itself, making it difficult for newbies to even enter into the arena of its concerned industry competition.[68] So what is required is the enlargement of current scope of the law.

Speaking of which, recently, American Professor *Louis Kaplow* criticized the narrow interpretation given to the term 'agreement' in their antitrust law. The courts therein include only the express communication under its ambit, determining liability "unconnected with the modern theory of oligopoly." Oligopolist will be the one who gets blanket protection in such case on the mere

[67] *See* Competition Act, *supra* note 59, preamble.
[68] *See* J.H. AGNEW, COMPETITION LAW 71 (1985).

ground of interdependence.[69] On the other hand, it is one of the most applaudable feature of the Indian competition law that the author, indeed, would like to mention, in this paper. Section 2(b) of the act has given an ever expanding scope to the definition of agreement as it includes not only the formal arrangements but also all kinds of informal arrangements too, both in writing as well as in oral. Besides it, this provision additionally includes those acts also which were not even intended to be enforceable by law. "To address these intermediate forms of co-ordination, India has stretched the concept of 'agreement' for antitrust purposes and looked at whether an agreement can be inferred from evidence suggesting that competitors have not acted independently."[70] The ambit of the definition of agreement in the Competition Act, 2002 is so vast that it even blankets the meaning given under Section 2(e) of the Indian Contracts Act, 1872. Moreover, in several other jurisdictions such as USA, the presence of explicit agreement is not a prerequisite for collusion "if evidence of parallel conduct accompanied by 'plus factors' such informational exchange is proved." "Some jurisdictions, in particular those in the European Union, also rely on the concept of 'concerted practice', which allows them to deal with practices that do not amount to an agreement but nevertheless have the effect of replacing effective competition with practical co-operation between competitors."[71]

Concurrently, we need to emphasis on other definitions as well, given under the act. Section 2 of the act contains the definition clause. First definition to be discussed is given under Section 2(h) i.e. 'enterprise'. The meaning attached to it holds importance because this term has been referred in almost every provision of the act. Resultantly, if any entity ever can escape, from the ambit of enterprise's definition, then it would be conveniently feasible for the anti-competitive party, that it can substantially avoid the liability under the said act too. Consequently, it is paramount that the definition shall be as extensive as definition of agreement given under the said Act. The scope of the word

[69] *Supra* note 1 at 1342.
[70] *Supra* note 21 at 18.
[71] William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 395 (2011)

'person' used in the said provision shall be enlarged and defined under the explanation given for it, so that the term may include all abstract, legal, juristic and other responsible persons like accomplices. Furthermore, the definitions of 'goods'[72] and 'services'[73] given in the said Act, shall provide specific inclusion of online available goods and services provided by way of e-services, to extend its scope explicitly. All other existing definitions must also give a meaning that support a computer dominated environment, so that the definitions can itself make the subsequent provisions of the act technology-friendly. Apart from amending the existing definitions, there is a necessity that definition of the terms like AI, algorithms, pricing algorithm and other technology related terms that aids in introducing the concept of AI in the competition law, should be inserted. It would further help in inserting subsequent provisions.

Along with it, Indian legislature can introduce the concept of Intra Regulatory Competition (IRC) in the market. "IRC suggests the imposition of different competing regulatory regimes on substantially identical constituencies of subjects within a given jurisdiction, for a limited duration, such that at the end of the competitive process a superior regulatory regime will emerge and then be imposed on the entire market as the sole regulatory regime."[74] "IRC can be particularly justified in cases of new regulatory challenges which have no conclusive existing regulatory solutions, or in rapidly changing markets in which existing regulatory answers have become obsolete."[75] Thus when "the threatened social interests are crucial" and when the "speed of growth of human knowledge far exceeds the capacity of law makers and regulators" to constantly keep up the pace, IRC shows the way in midst of such a dead end.[76]

The efforts shall be synchronised by the establishment of Standard Setting Organizations (SSOs). These Organizations can prove to be most prominent entities in facilitating "technological interoperability, commercialization, and

[72] *See* Competition Act, *supra* note 59, sec. 2(i).
[73] *See* Competition Act, *supra* note 59, sec. 2(u).
[74] *See* Ido Baum, *Innovative Regulation through Competition: A Response to Rapidly Evolving Markets*, 49 ISR. L. REV. 198 (2016).
[75] *See id*. at 199.
[76] *See id*. at 236.

downstream competition." This is because, "within these entities, rival companies meet to establish industry-wide compatibility with given technologies." This process is known as 'de jure standardization' which allows all industry participants to market harmonious goods."[77]

The algorithmic activities all over the virtual world of internet has caused ever-increasing turbulence for law officials to cope with it. As discussed above, competition law is one of the field most questioned for it. Thus, it is necessary that not only amendments in the existing provisions are made but additional provisions are also inserted to strengthen it enough to tackle the trouble AI has created. The author thus wants to make the following suggestions pertaining to the same:

The primary requirement is to initiate an evidence based antitrust policy. That will enable to introduce the concept of intention in AI dominated environment. Intention is one chief way-out that can establish the liability of algorithms' creators and users. To make most of the anti-competitive AI operators liable under the said Act, the first and foremost requirement is the formation of such provision that can establish the required *mala fide* intent of the accused. If intention is proved, then even if there is no agreement, the accused can be trapped under this act.

In instances, where there is an explicit agreement between the parties to the collusion or any other anti-competitive activity and/or intention is proved for the same, an algorithmic manipulation may become accountable via the vicarious liability concept. It is true that unlike humans, a computer cannot be incarcerated. But if we follow the assumption that an algorithm does not register losses, then there is no basis to consider that it can register the profits of anticompetitive activity.[78] The point here is that a utilitarian algorithm is an agent that necessarily operates on behalf of someone else." "And, therefore, a reasonable assumption is that a profit-maximising pricing algorithm will specify a fiduciary duty towards its vicarious governors, which will integrate constraints

[77] Alan Devlin, Standard-Setting and the Failure of Price Competition, 65 N.Y.U. ANN. SURV. OF AM. L. 218 (2009)
[78] *See* Petit, *supra* note 20.

like antitrust compliance."[79] So a provision for vicarious liability of the operator of algorithm shall be inserted.

Along with it, the concept of strict liability if inserted in the form of provision in the competition act, then it will take care of the cases that are not competent enough to come under preceding discussed provisions under this section of the paper. Thus, it may work as a residuary provision to catch those rats that may escape the other provisions of the act. This provision will emerge as the biggest obstacle for those who will be successful in disproving their intention and proving their reasonable care to avoid anti-competitive activity. Especially, big scandals such as amazon selling book 'The making of a fly', will get tracked down to the stricter liability to set antitrust alarm for other hidden and potential accused companies.

Over and above it, to avoid the situation that may reach to anti-competitive state, the competition act shall in advance provide for a general provision that may limit AI to the extent of creation of ethical, law abiding, machines and its functions only. Additionally, along with the extent of usage, standards for interoperability may also be set forth in the act, e.g., setting standards for pricing policy of online companies, setting standards for algorithms' creators and users separately, etc. This feature will in turn provide a check and balance system to the ability of computer systems or software to exchange and make use of information, using algorithms and other AI strategies.

The very objectives of the said act are sought to be achieved by CCI as their prime duty.[80] CCI Chairman, Mr. Ashok Chawla, lists the following as the major challenges faced by CCI: "Weak competition culture; inadequate business awareness; exemption seeking by some sectors; a strategic focus."[81] As a result, it's stricter and more stringent approach only, can trap the escapists into punitive and compensatory liability. The approaches that need to be followed by law enforcers as discussed above, must be taken into consideration by CCI as well.

[79] *Id.*

[80] *See* Competition Act, *supra* note 59, sec. 18.

[81] CXOtoday News Desk, *Most Indian Firms Not Aware Of Competition Law*, CXOTODAY.COM, Feb. 9, 2015, *available at* http://www.cxotoday.com/story/80-pc-of-indian-firms-unaware-of-competition-law-ernst-young/ (last visited Aug. 21, 2019)

Additionally, CCI should collaborate with 'AIAI', 'Centre for AI and Robotics' and other similar entities discussed above, to keep an umbrella tab on anti-competitive activities taking place through technological exploitation.

VII. Critical Analysis: AI and Its Impact on Competition Policy

Having discussed the main issue, the challenges posed by it and the way-out to it, the author would now like to critically analyse it on two grounds namely, 'Unsolvable Enigma' and 'Doubting the intelligence of AI'.

A. Unsolvable Enigma

There are some basic factors that are still like a mystery posed in front of law enforcers with no answerable explanation in hand. This is because, these factors are dynamic in nature and go hand in hand with the aforesaid discussion made in this paper about the solution to tackle it.

The paramount factor behind effectual competitive spirit is its varying levels of transparency benefitting consumers after all. However, in a digitalised environment, greater price transparency may reduce the sellers' ability to price discriminate and buyers' search costs in finding the best deal. This may be particularly challenging when the information and data are otherwise available to consumers and traders and it is the intelligent use of that information which facilitates conscious parallelism.[82] Only if strong evidences are against it, the fish may be catched. If the executives, for example, boast about this in their internal e-mails – as was the *SEC's case against Athena Capital Research*[83], then liability is likely.[84] Another danger that lurks is that of the self-learning through AI. Between the creation and death of various algorithms, the computer can undertake many strategies.[85] Bruno Salcedo a researcher in Pennsylvania State University has proved mathematically that in the long run repricing

[82] *See* Ezrachi and Stucke, *supra* note 4, at 1801.
[83] *See USA v. Athena Capital Research*, *supra* note 39.
[84] *See* Ezrachi and Stucke, *supra* note 4, at 1802.
[85] *See id.* at 1808.

algorithms would not only facilitate collusion but will inevitably lead to it.[86] Here comes the next conundrum - what and what not to ignore? There are some 'commercially sensitive information' that if the computer is programmed to ignore a particular data set then, on one hand it may boost the efficiency, but on the other hand it may raise anti-trust concerns too; e.g., customers sharing their inventory data with suppliers. However, the problem may lead to vice versa situation too. It thus becomes problematic because part of the value of big data is data fusion, whereby computers link data sets from which new insights emerge.[87]

Thus it is now clear that integrating ethics and legality together to combat this technological monster is in itself an enigma, difficult to unlock.

B. Doubting the Intelligence of AI

A meticulous thought over AI has made the author doubt on its intelligence. The very word 'artificial' denotes something created by us and not occurring naturally. Indeed, it is mankind's programming skills that transform them from a mere dumb hardware box to a smart device. Above that, it is pertinent to note that not only their intelligence is artificial but specific too. So even though it can perform one task better than any human can, but only that one task. Any task that it is not specifically programmed for, howsoever simple it may seem to us, such a system would find impossible to undertake. The much vaunted AlphaGo, for instance, would find it impossible to pick out a cat from a data set of animal pictures, unless it was reprogrammed completely and made to forget how to play Go." [88] However, since the intelligence is fed by gigantic data generated everyday by its users, our restrictions over it have been repeatedly raptured by the system. Consequent to human greed and selfish motives, this was anyway bound to happen. Recent plan released by China's state council to make China an Artificial Intelligence superpower by 2030 says all about it. Thus, while the

[86] *See* Solo, *supra* note 34.
[87] *See* Ezrachi and Stucke, *supra* note 4, at 1805.
[88] R. Shashank Reddy, *Should we fear Artificial Intelligence?*, LIVEMINT.COM, Aug. 7, 2017, *available at* http://www.livemint.com/Opinion/41pHBAFL5kSavHHJ4hJToN/Should-we-fear-Artificial-Intelligence.html (last visited Aug. 23, 2019)

dangers are still surrounding the market competitiveness, the basic phenomenon behind the system's intelligence may be managed to a great extent, if humans will think rationally and not hoggishly. Otherwise it is not going to go rogue and turn on humans (at least in the near future), and talk of such a theoretical existential risk must not blind policymakers, analysts, and academics to the very real issues raised by Artificial Intelligence.[89]

VIII. CONCLUSION

The development of sophisticated computer algorithms has radically changed our social, economic and political environment, and has transformed the competitiveness of present and future markets. The Indian government should identify public sector applications like detecting tax fraud, preventing subsidy leakage, and targeting beneficiaries, where current advances in AI could make a significant impact. India must view machine intelligence as a critical element of its national security strategy and evaluate models of defence research in collaboration with the private sector and universities.[90]

In regards to the implications of Big Data and Big Analytics on competition policy, Big Data and the development of sophisticated computer algorithms and AI is neither good nor bad nor neutral. Their nature depends on how firms employ them, whether their incentives are aligned with our interests, and certain market characteristics.[91]

It is still a critical question for courts to decide when oligopoly behaviour crosses the line into price fixing and deserves the treble damages and criminal penalties that such cartel behaviour entails. As discussed, the problems with applying current antitrust enforcement techniques to the new challenge of robo-sellers suggest that a new regulatory dialogue is required in competition law.[92]

[89] *Id.*

[90] Shashi Shekhar Vempati, India and the Artificial Intelligence Revolution, CARNEGIEINDIA.ORG, Aug. 2016, *available at* http://carnegieindia.org/2016/08/11/india-and-artificial-intelligence-revolution-pub-64299 (last visited Aug. 20, 2019)

[91] *See* Ezrachi and Stucke, s*upra* note 40.

[92] *See* Mehra, *supra* note 1 at 1374.

The existing concepts of abuse, dominance and appreciable adverse effect on competition are not defined quantitatively but are established based on the competition in the market. However, the novel discussion of the possible welfare harms which can result from autonomous operation of algorithms, without human involvement, opens the door to consideration of new enforcement tools, and the adequate level of antitrust intervention.[93]

In light of all the factors discussed, contemporary situation analysed and demand of the hour realised, it is probably fair to say that AI is currently in a shape of a cocoon. In an academic legal research, AI is still pretty much '*terra incognita*'. The Competition Law of India shall initiate the acceptance of AI in the legal field as the first revolutionary baby step. The required amendments and additions as discussed above in antitrust law can accelerate its acceptance and divulge its path to a more ethical and competitive behaviour.

[93] *See* Ezrachi and Stucke, *supra* note 4, at 1790.

EUROPEAN UNION AND PUBLIC PROCUREMENT: SOME INTERNATIONAL BEST PRACTICES IN PUBLIC PROCUREMENT

Aakriti Kohli*

ABSTRACT

Public Procurement is a process undertaken by government authorities to avail goods or services for building public utility services. In European Union ("EU"), the contribution of procurement among the member nations amount to 14 per cent of its GDP. The European Union enacts various directives that are revised from time to time. The core principles of these directives are transparency, equal treatment, open competition and sound procedural management. The European Parliament and the Council has recently enacted Directive 2014/24/EU on Public Procurement with an aim to set out rules to organize the manner in which public authorities purchase goods, works and services. These directives are further implemented as national legislations by member nations. The EU procurement regime has also developed the provisions of Ethical and Social Public Procurement qua Article 18.2 of the Directive and also provided recommendations on Professionalization of Public Procurement, which have been elaborated in this article. Article 18.2 of the Directive casts a duty on the contracting authorities to treat the economic operators without discrimination and in a transparent manner. The member nations ought to take appropriate measure to ensure compliance of environmental, social and labour law obligations. The European Commission on October 3, 2017, gave certain recommendations to its member nations in order to enable professionalization in the Public Procurement system, whereby stating that the public funds ought to be put to efficient use to ensure that the buyers are in position to procure goods as per the highest standards of professionalism. The present article seeks to throw light on the aforesaid concepts of Ethical Public Procurement and

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Professionalization of Public Procurement along with the brief salient features of Directive 2014/24/EU on Public Procurement.

I. INTRODUCTION

The United Nations Convention on Climate Change defines public procurement as, "*the purchase of goods, services and works by public authorities or civil service organizations using public funds.*"[1] However in India, the draft Public Procurement Bill, 2012 (lapsed) defined Public Procurement as acquisition of goods, works or service or any combination including PPP Projects through purchase, lease, license or any other method by a procuring entity, either directly or through an agency with which a contract for procurement services is entered.[2]

The European Commission defines Public Procurement as a process by which public authorities i.e. the government departments or local authorities purchase work, goods or services from companies.[3] In other words Public Procurement is a process of purchasing of goods or availing services for a government ministry, department or agency.

The Public Procurement process is a complex process starting from the determining the need of a certain service and issuing the invitation to register the bid and granting the award or contract, which further extends till ensuring the execution of contract[4] and also assuring timely payment till finality of work or contract whichever comes first.

[1]Definition of Public Procurement, *UNFCCC Public Procurement Process, 2017,* UFCC *available at* https://unfccc.int/files/secretariat/procurement/application/pdf/unfccc_procurement_process_2017.pdf (last visited Aug. 23, 2019)

[2] *See* Public Procurement Bill, 2012, cl. 2(r).

[3] *See generally* Eur. Comm., PUBLIC PROCUREMENT POLICY, *available at* https://ec.europa.eu/info/policies/public-procurement_en#objectives (last visited Aug. 23, 2019)

[4] Public Procurement Bill, 2012, cl. 2(t), "Procurement process" means the process of procurement extending from the assessment of need; issue of invitation to pre-qualify or to register or to bid, as the case may be; the award of the procurement contract; execution of contract till closure of the contract.

In India, Public Procurement's share in the Gross Domestic Production amounts to 26 per cent.[5] As per OECD an average of 29 per cent of the total government expenditure was spent on public procurement in 2013 by the member countries as compared to an average of 30 per cent in 2009.[6] Further considering EU's perspective in Public Procurement, over 2,50,000 public authorities in EU incur 14 per cent of GDP in the procurement of services works and supplies.[7] Moreover, the same is done with an objective to create a level playing field for all businesses in Europe.[8]

As the Procurement process reaches in its advance stages and as economies witness technological changes, certain innovations and changes are also essential for the smooth functioning of the procurement process. Therefore, various economies worldwide have developed certain innovations and best practices in public procurement in the form of Sustainable Public Procurement, Green Public Procurement, Ethical Public Procurement, E-Procurement and Market place, Professionalization in Public Procurement etc.

The author in this article aims to discuss certain international best practices as enumerated by the European Union in its directive 2014/24/EU on Public Procurement. Moreover since the public procurement is considered as one of market based instruments to achieve sustainable growth while ensuring the optimum use of public funds, the said directive has been enacted to simplify the procedures for small and medium enterprises and to enable procurers to make a better use of public funds.[9] The primary aim of procurement directives and rules promulgated by the EU Commission is to set out rules to organize the manner in which public authorities purchase goods, works and services. These directives

[5] Economic Times Editorials, *Public Procurement As Agent of Change*, ECONOMIC TIMES March 25, 2018, *available at* https://economictimes.indiatimes.com/blogs/et-editorials/public-procurement-as-agent-of-change/ (last visited Aug. 22, 2019)

[6] *See* OECD, GOVERNMENT AT A GLANCE 2015 136 – 37 (2015).

[7] *See generally* EUR. COMM'N, PUBLIC PROCUREMENT STRATEGY, *available at* http://ec.europa.eu/growth/single-market/public-procurement.

[8] *See id.*

[9] *See* EUR. UNION, DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PUBLIC PROCUREMENT AND REPEALING DIRECTIVE 2004/18/EC, pream. para. (2), Feb. 26, 2014, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN (last visited Aug. 23, 2019)

are further implemented as national legislations in member nations and are facilitated in such a manner whereby they apply to tenders whose value exceeds a certain threshold.[10]

The current regime of public procurement in European Union is vested with a mission being less bureaucracy and higher efficiency and aims to create sustainable provisions for ethical, social and environmental public procurement. Moreover, the EU regime has recently developed the concept of professionalization of Public Procurement, which is also discussed in this article. Further Article 18.2 of the said Directive provides for the provisions qua Ethical and Social Public Procurement, which is emphasized in this Article.

Through this article, the researcher seeks to limit her research underlining the concepts of ethical public procurement and professionalization of public procurement in EU regime. The EU Directive on Public Procurement, concepts of Ethical Public Procurement and Professionalization of Public Procurement as model best practices are discussed in the article, which is followed by concluding remarks.

II. DIRECTIVE 2014/24/EU: A BRIEF INTRODUCTION

The European Union, forms its basis through the principles of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'), which regularly sets out various directives, regulations, recommendations, decisions and opinions to be followed by its member nations and institutions.[11] The regulations enacted by EU have a binding effect and are directly applicable in member states, whereas the directives are binding, but the member nations are required to transpose them into their legislative system. Moreover, a decision is binding on the institution to which it is addressed, whereas the recommendations and opinions are not binding.[12]

[10] *See id.*

[11] *See generally* EUR. UNION, REGULATIONS, DERIVATIVES AND OTHER ACTS, *available at* https://europa.eu/european-union/eu-law/legal-acts_en (last visited Aug. 23, 2019)

[12] *See* TFEU, art. 288

The European Parliament had enacted the directives a) Directive 2014/24/EU on Public Procurement, b) Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, and c) Directive 2014/23/EU on the award of concession contract.

However, for the purpose of this article, the author shall focus on Directive 2014/24/EU on public procurement. The EU in compliance to the principles of TFEU and with an intent to achieve the objectives of free movement of goods, freedom of establishment and freedom to provide services and ancillary principles such as fair and equal treatment, mutual recognition, proportionality and transparency, has enacted the aforesaid directive.[13]

The primary aim of procurement directives and rules promulgated by the EU Commission is to set out rules to organize the manner in which public authorities purchase goods, works and services. Additionally, these directives are further implemented as national legislations in member nations and are facilitated in such a manner whereby they apply to tenders whose value exceeds a certain threshold.[14]

Initially in EU, following directives with regard to public procurement were promulgated i.e. Directive 2004/18/EC on coordination of procedures for the award of public works contract, supply contracts and public service contracts, Directive 2004/17/EC for procurement procedures for entities in water, energy, transport and postal service sectors and Directive 2009/81/EC establishing procedures for award of works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security.[15]

However, despite an elaborate procedure regarding public procurement, the EU in 2011 had decided to revise the aforesaid directives i.e. 2004/17/EC and 2004/18/EC. Further in February, 2014 the new directives were approved being a) Directive 2014/24/EU on Public Procurement, b) Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal

[13] *See* Directive 2014/24/EU, pream. para. (1)
[14] *See id.*
[15] Popescu Ada *et al.*, *An Overview of European Good Practices In Public Procurement*, 7(1) EAST. J. EUR. STUD. 83 (2006)

services sectors, and c) Directive 2014/23/EU on the award of concession contracts.[16] The member nations were duty bound to transpose the aforesaid new directives into their national legislation by April 18, 2016.[17]

The aforesaid new directives were enacted to simplify public procurement procedures and make them more flexible. These directives have introduced various provisions through which the contracting authorities will obtain better value for money. Further, the new public procurement procedures will also help public purchasers to implement environmental policies, as well as those governing social integration and innovation. Through limiting the turnover criteria and option of dividing tender into lots, SMEs will gain easier access to public procurement.[18]

The said directives also focus on the vulnerable areas such as utilities sector which includes water, energy, transport etc.[19] Further the said directives have simplified the rules of contracting and made to increase the competition in respective sectors and enhance the innovation in public procurement in form of ethical public procurement, professionalization of public procurement, e-procurement, etc.[20]

The aforesaid directives and their implementation in national legislations by EU Member nations are one of the examples of international best practices on public procurement.

III. EU DIRECTIVE 2014/24/EU: SALIENT FEATURES

The Directive 2014/24 EU on Public Procurement was enacted by the European Parliament and the Council on February 26, 2014, after repealing Directive

[16] *See generally* CROWN COMMERCIAL SERVICES, A BRIEF GUIDE TO THE 2014 EU PROCUREMENT DIRECTIVES (2016).
[17] *See generally id.*
[18] *See generally* EUR. COMM'N, PUBLIC PROCUREMENT, LEGAL RULES AND IMPLEMENTATION, *available at* http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation (last visited Aug. 23, 2019)
[19] *See* EUR. COMM'N, *supra* note 3
[20] *See* EUR. COMM'N, *supra* note 7

2004/18/EC on coordination of procedures for the award of public works contract, supply contracts and public service contracts.

The EU Commission communication dated March 3, 2010, entitled Europe 2020, a strategy for smart, sustainable and inclusive growth stated public procurement as an important facet used to achieve smart, sustainable and inclusive growth while ensuring optimum use of public funds.[21] Therefore, the aforesaid directive was promulgated with an intention to increase public spending efficiency, facilitating participation of SMEs, and to facilitate the procurers to make better use of public procurement to achieve common societal goals.[22]

The Directive 2014/24 EU on Public Procurement establishes rules on procurement procedures by contracting authorities qua public contracts as well as design contests, having an estimated value not less than the thresholds as laid down in Article 4.[23]

The term 'Procurement'[24] within the meaning of the Directive has been defined as the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose. The 2014 directives have changed things in four main areas: reducing administrative burden, increasing efficiency and helping SME's, creating a culture of integrity, addressing societal challenges, modernising public administrations, and obtaining better value for money .

A. European Single procurement Document (ESPD) and E-Certis

Article 59 of the Directives [25] provides for European Single Procurement Document (ESPD), which is an updated self-declaration, used as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfills the various

[21] *See* Directive 2014/24/EU, pream. para. (2)
[22] *See id.*
[23] *See id.*, art. 1(1)
[24] *See id.*, art. 1(2)
[25] *See id.*, art. 59

situations including the selection criteria[26] and is not under any of the situations providing for Grounds of exclusion[27]. This self-declaration form enhances competition through greater participation, as only the winner entity has to produce the documents to prove its credentials. The Commission's E-Certis service lists these documents.[28]

The ESPD further identifies the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.[29]

E-Certis is the information system that helps identify different certificates requested in procurement procedures across the EU. It helps in understanding what evidence is requested or provided by the other party. The tool contains the description of documents for proving the fulfillment of selection criteria or exclusion in a given procedure as tenderers bidding for public contracts may be required to prove their financial and technical capabilities/ not being charged of any professional or criminal misconduct or have sufficient resources to fulfill the contract. The types of evidence produced i.e. self-attested / affidavit on oath/ any other form, as well as the issuer of the evidence i.e. the authority or the administrative entity issuing the document needs to be specified.

Since different documents are requested for different types of procedures in different countries, e-certis is an innovative tool which assists the contracting authorities and economic operators to clarify the differences that exists. The user friendly tool would go a long way in paying a way towards digital transformation of public procurement in Europe.

B. Criteria for Qualitative Selection and Grounds of Exclusion

The Directives lays down the criteria to evaluate the technical, financial,

[26] *See id.*, art. 58
[27] *See id.*, art. 57.
[28] *See generally* Eur. Comm'n, E-CERTIS, *available at* https://ec.europa.eu/tools/ecertis/#/overview.
[29] *See* Directive 2014/24/EU, art. 59

economic and professional standing of the economic operators. [30] The requirements as to the minimum turnover, the assets and liabilities statements, details as to the contracts performed in the past etc.. have been provided for in the directives and the means of proof [31]which the contracting authorities can accept as sufficient evidence have also been laid down.

Further, the Directives also lay down an exhaustive list indicating the grounds for exclusion of the economic operator from the tendering process.[32] The means of proof or evidences required to demonstrate that the economic operator does not fall under any of the grounds of exclusion has also been provided for under the directives.

Broadly the exclusion grounds of economic operator enunciated under the directives are participation in criminal organization, corruption, fraud, terrorist offences, Money Laundering or terrorist financing, child labour or other forms of trafficking in human beings, breach of obligation relating to payment of taxes or social security obligations, violation of applicable obligation under Article 18(2)[33] of the directives, grounds for professional misconduct, collusion, conflict of interest etc. exists, and where economic operator has shown significant deficiencies in performance of any previously awarded public contracts etc..

The contracting authority may ask for sufficient evidence in support of absence of the grounds of exclusion as provided under Article 57 of the directives. These grounds cover wide range of circumstances which may exclude the economic operator from bidding for public contracts. These directives leave very less room for the procuring entities to exercise their discretion while evaluating tenders and thereby, bringing in greater transparency in procurement process. Since these directives have to be adopted by the nation states in their national laws,

[30] *See id.*, art. 58 and annex. XII
[31] *See id.*, art. 60 and annex. XII, pt. I & II
[32] *See id.*
[33] Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

uniformity at every stage of public procurement is ensured.

C. Innovative Partnerships and Competitive Dialogues

The new directives provide for various procedures[34] which can be resorted to by the contracting authority when awarding public contracts. The directives provide that member states may resort to open/restricted procedures of tendering. The contracting authorities may also apply innovative partnerships/ competitive dialogues/ competitive procedure with negotiation. The directives have introduced these procedures in order to achieve the best value for public money and the European Union's goals of development and innovation.

Competitive Dialogues [35] or Competitive procedures with negotiation is generally applied by contracting authorities where the needs of the contracting authority cannot be met without adaption of readily available solutions, design and innovative solutions are required, because of the complex legal and financial make-up of the contract involved, technical specifications cannot be established by the contracting authority with sufficient precision, with response to an open or restricted procedure only irregular or unacceptable tenders[36] are submitted etc. For example, if a contracting authority has to create a connection between shores of river, whether a bridge or a tunnel would be the best solution? It is quite difficult to ascertain. Although the authority would be able to decide upon the specifications for bridge (i.e. Suspended metal in pre stressed concrete etc.) or the tunnel (with one or more tubes, to be constructed under or on the riverbed, etc.), use of competitive dialogue would be very beneficial and justified in this

[34] *See* Directive 2014/24/EU, art. 26

[35] *See id.*, art. 30.

[36] *Id.*, art. 26(4)(b): In particular, tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low, shall be considered as being irregular. In particular tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable.

case.[37]

Other examples of projects that most often justify recourse to the competitive dialogue is where the contracting authority is not sure what the end result of the contract would be i.e. whether it would be a public contract simpliciter or a concession arrangement due to legal and financial complexities involved. For example, these could be projects in which the contracting authorities wish to have at their disposal a facility (school, hospital, prison, etc.) to be financed, built and operated by an economic operator (i.e. the latter would take care of maintenance works, maintenance services, guard services, catering services, etc.), often for a fairly long period.

Broadly there are five stages of Competitive Dialogue. First, submission of request to participate in response to contract notice, second, selection of participants for dialogues, third, conducting Competitive Dialogues at successive stages to reduce the number of solutions, fourth submission of final tenders on the basis of proposed solutions, and fifth, assessment of tenders received on the basis of award criteria laid down in the contract notice or in the descriptive document and the assessment to be based on most economically advantageous tender.

Article 31 of the directives provide for Innovation Partnerships. The innovation partnership had been introduced in Europe as a new way of realizing the objective of a smart, sustainable and inclusive growth that characterizes the Europe 2020 strategy. [38] The new innovation [39] partnership allows for the combination of development and purchase elements tailored to public

[37]See Eur. Union, DOCUMENTS DETAIL, *available at* https://ec.europa.eu/docsroom/documents/15473/attachments/1/translations/ (last visited Aug. 25, 2019)

[38] Commission's Communication Europe 2020 on a strategy for smart, sustainable and inclusive growth, Brussels COM (2010) 2020 final.

[39] *See* Directive 2014/24/EU, art. 2(22): 'Innovation' means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth.

requirements, with specific rules in place to ensure equal treatment and transparency. It aims towards at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works.[40]

Generally, the contracting authorities may opt for Innovation Partnerships if the product, work or service to be procured does not exist in the market and consequently requires research and long-term partnership for its development.

The innovation partnership process takes place in three phases: The Competitive Phase, Research and Development Phase i.e. Pre- Commercial Phase, and Commercial Phase. In the Competitive Phase, the most suitable partner(s) are selected on the basis of their skills and abilities. The contracts are thereof awarded on the basis of the best price-quality ratio proposed. Thereafter, the Pre-Commercial Phase which can be construed as single procurement contract for the R& D managed in three stages. The first stage is a solution exploration phase, the second stage revolves around prototyping and, the third stage is a test series. The final stage covers the development of a first lot of pre-commercial pre-products.

After the pre-products are tested, the commercial development of innovation starts i.e. pre-commercial phase transfers into commercial procurement. The Commercial development phase will include volume production of the end product, or supply to create commercial validity or to recover the amount invested in R&D. The innovation partnerships have more specifically been beneficial in providing health care solutions in EU.[41]For example, under the procurement platform HAPPI, coordinated by Resah (a central purchasing body in France), and financially supported by the European Commission, 20 European healthcare organizations participate in the joint purchase of innovative products and services. Over 150 medical solutions have been developed so far with the help of this procurement strategy. It comprises of early market studies

[40] *See id.*, art. 30(5)

[41] Eur. Comm'n, *Innovative Public Procurement Can Lower Pressure on Health Budgets*, Sept. 28, 2016, *available at* https://ec.europa.eu/growth/content/8945-innovative-public-procurement-can-lower-pressure-health-budgets_en (last visited Aug. 25, 2019)

and communication of the tender to a multitude of companies including small and medium-sized enterprises (SMEs). The use of functional instead of technical specifications in the tender notices was crucial in this project.

The main objective of the innovative procurement project *Ecoquip*, organized by the Polish hospital of Sucha Beskidzka, was to improve the thermal comfort of patients (shades reducing excessive sunlight in a building facing South). In the procurement procedure, a solution was found in the installation of fixed outward stores covered with solar panels which also led to energy self-sufficiency with zero exploitation costs. The project was co-funded by the European Commission.[42]

D. Professionalism in Public Procurement

The European Commission on October 3, 2017, gave certain recommendations to its member nations in order to enable professionalization in the public procurement system.[43] In the recommendation, it is stated that the public funds ought to be put to efficient use to ensure that the buyers are in position to procure goods as per the highest standards of professionalism. The Commission suggested that the objective of professionalization of Public Procurement is to enhance the professional skills, competencies, knowledge and experience of the officials conducting or buyers participating in procurement process. It includes the policies and infrastructure to be developed for the procurement process at central, state, regional and sectoral levels. In other words, it means to define express responsibilities of all the officers involved in the procurement process. It also includes securing, improving, training and career management of procurement officers as well as of the professional staff involved in review of procurement cases. The said officers and professionals ought to be vested with right qualifications, skills, training and experiences. Further, it aims at developing systems to provide tools and support system to support professional procurement, i.e., developing online tools, such as, e-procurement system,

[42] *See* Directive 2014/24/EU, art. 30(5)

[43] Commission recommendation of Oct. 3, 2017 on the professionalization of public procurement, C(2017) 6654 final

guidelines, manuals, templates and cooperation tools with training materials for experts.

The member nations are expected to follow the five directions to implement the professionalization of public procurement. The first direction appertains to defining the policy of professionalization**.** The member nations ought to develop and implement long term strategies to enable professionalization in public procurement as per the administrative structure of the respective countries. Moreover, these strategies should aim to attract, develop and retain skills, focus on performance and strategic outcomes and the same should address all the participants at procurement process and must coordinate with other policies in the public sector.

Second, direction is on strategizing. The member nations should also encourage and support the contracting authorities in executing the strategies qua professionalization of public procurement and help in facilitating an appropriate institutional set up for an efficient strategic base for public procurement. Next direction is on 'enabling training'**.** Proper training to the human resources should be given and the procurement practitioners should be trained and proper framework to train the skills and support the career management process must be made. Moreover, appropriate training programs ought to be developed for supporting development of the training officer at graduate, PG level and other entry levels. Fourth direction digitizes the system. Proper IT Tools, systems and methodologies to enable access to information ought to be developed through facilitating online portals for professionalization of public procurement. Moreover, IT tools for training should also be developed and standards should be set down for digitalization of the system. Lastly there is a transparency directive. Member nations ought to ensure transparency and equality in the system by establishing codes on professional ethics, integrity and develop specific guidance to prevent and detect fraud and corruption.

European Commission has also published a library of good practices[44] and tools for infusing professionalisation in public procurement. It provides for practical

[44] Building an architecture for professionalization of public procurement, Library of good practices and tools accompanying the European Commission Recommendation

case studies and good practices that member states have adopted/ can adopt to achieve holistic public procurement regime that is in consonance with EU development goals.

E. Social, Ethical, Sustainable and Green Public Procurement

The new EU directives have introduced various innovative concepts. Member nations need to ensure that their procurement policies are compliant with social, environmental and labour law obligations.[45]

Article 11 TFEU, requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts. A general principle is also introduced into the directives, requiring the member states to ensure that, in the performance of public contracts, suppliers comply with applicable obligations in the fields of environmental, social and labour law, which also links to rules on rejecting abnormally low tenders.

Ethical Public Procurement is a strategy to ensure that, the contracting authorities through public tenders purchase ethical products and services in order to ensure productive employment and fostering of equity, security and human dignity. [46] In other words engaging in socially responsible public procurement by the contracting authorities amounts to Ethical Public Procurement.

[45] Directive 2014/24/EU, art. 18. Principles of procurement: . . . 2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X., Article 18(2), Directives 2014/24.

[46] *See generally* NAT'L AGENCY FOR PUBLIC PROCUREMENT, MAPPING INITIATIVES FOR ETHICAL PUBLIC PROCUREMENT IN EUROPE (2017), *available at* https://www.upphandlingsmyndigheten.se/globalassets/publikationer/rapporter/rapport_2017_6_mapping_initiatives_webb.pdf (last visited Aug. 22, 2019)

The EU Member nations, in order to focus on ethical public procurement have formulated the European Working Group on Ethical Public Procurement (EWGEPP). EWGEPP is formulated as an agency comprising of association of representatives from goverment bodies, public officials, NGOs, etc., from European nations with intent to work and implement Ethical Public Procurement.[47]

The EWGEPP is vested with four key objectives. First, to promote public procurement policy as social sustainability tool; second, to support public procurement practice in a manner to incorporate labour rights consideration and henceforth facilitate market growth in social sustainability; third, to share best practices in ethical public procurement; and fourth, to ensure and enable protection of human rights and decent working conditions in global supply chains for public goods and services;[48]

As discussed earlier, the present research is focused on the Directive 2014/24/EU on public procurement. The concept of ethical procurement in the aforesaid Directive has been imbibed in Article 18.2 of the Directive which specifies principles to be upheld *vis-à-vis* social and environmental standards and provide directions on how contracting authorities can procure goods and services in an ethical manner. The said Article casts a duty on the contracting authorities to treat the economic operators without discrimination and in a transparent manner. Moreover, the member nations are duty bound to take "appropriate measures" to ensure that during the performance of any public contracts, there is a compliance of obligations as enumerated in the environmental, social and labour law of the member states.

The principles of public procurement as enumerated in the said article[49] provides for treatment of equality and non-discrimination of economic operators by contracting authorities in public procurement by competitive tender design. Further, member states are required to take appropriate measures to ensure that

[47] *See generally* Etiskhandel, *Presentation on European Working Group on Ethical Public Procurement*, *available at* https://etiskhandel.no/om-oss/ (last visited Aug. 23, 2019)
[48] *See* Directive 2014/24/EU, art. 18
[49] *See id.*

while performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.[50]

The above stated principles have been imbibed throughout the provisions of the Directives, covering all stages of public procurement. Broadly these principles can be identified in the five provisions of the Directive.

First set of provisions relate to technical specifications found in Article 42 and evaluation of technical abilities solidified in Article 58. The tender specifications set out the characteristics of the required works, supply or services. Article 42 of the Directives lays down the rules for formulation of technical specifications by the member states and general principles to keep in mind while formulating the same. It provides that the contracting authorities while formulating technical specifications shall take into account accessibility criteria for persons with disabilities or design for all users.[51] In order to promote transparency, competition and non-discrimination, it provides that technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.[52] The provision also provides for considering the environmental characteristics while

[50] The Conventions referred to in Annex X are (a) ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise; (b) ILO Convention 98 on the Right to Organise and Collective Bargaining;, (c) ILO Convention 105 on the Abolition of Forced Labour, (d) ILO Convention 138 on Minimum Age, (e) ILO Convention 111 on Discrimination (Employment and Occupation), (f)ILO Convention 100 on Equal Remuneration and (g) ILO Convention 182 on Worst Forms of Child Labour, (h) Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer; (i) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention); (j)Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention); (k)Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols.

[51] *See* EU Directive 2014/24, art. 42 r/w Annex VII

[52] *See id*., art. 42(2)

formulating technical specifications for the product/ work / service. [53] In evaluating the technical ability of an economic operator the contracting authority may solicit proof by means of documents/otherwise an indication of environmental management measures that the economic operator will be able to apply when performing the contract.[54]

The second provision on labels ad third party certification is outlined in Articles 43 and 44 of the directive. Where the contracting authorities intend to purchase goods with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics subject to conditions [55] mentioned in the Article. Contracting authorities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body, such as Nordic Ecolabelling, TCO Certified or KRAV, as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions. [56] It is common for third-party certifications that include environmental criteria also to meet the criteria in the standard ISO 14024 – Type 1 environmental labelling. ISO 14024 relates to criteria from a life cycle perspective that is reviewed by an independent third party, with the criteria development based on scientific principles and involving stakeholders in an open development process.[57]

[53] *See id.*, art. 42(3): Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:
(a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract.
[54] *See id.*, annex. XII Part II (g).
[55] *See id.*, art. 43 (1) (a to e).
[56] *See id.*, art. 44.
[57] *See generally* KRAV ET AL., SUSTAINABLE PUBLIC PROCUREMENT FROM RHETORIC TO PRACTICE: DISPELLING MYTHS AND EXPLORING EFFECTIVE SOLUTIONS. A CASE STUDY FROM SWEDEN (2016), *available at* https://tcocertified.com/files/2016/04/2016-04-14-

The third provision in Article 57 specified the exclusions. As discussed previously, the contracting authorities may exclude the economic operators from participation process if it is established that the economic operator has breached the conditions laid down under the said Article. One of the grounds of exclusion is where the economic operator has been the subject of conviction by final judgement, for violation of child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council.[58] Further, where there has been breach of obligations related to payment of taxes or social security contributions by an economic operator and which has been established by judicial or administrative decision of that country and having final binding effect[59]. Also, where it is established by appropriate means that the economic operator is in violation of obligations laid down under Article 18(2), they can be excluded from participation.

The fourth provision relating to Contract Award Criteria finds place in Article 67. The contracting authorities under the European regime have to base their award criteria on Most Economically Advantageous tender (MEAT). The MEAT criteria are identified on the basis of various factors using a cost effectiveness approach such as life cycle costing, Qualitative, Environmental, and/ social aspects linked to subject matter of the contract.[60]

The fifth provision on Life Cycle Costing is contained in Article 68 the directive. Life cycle costing provides for the costs over a life cycle of a product, works or services procured by the contracting authority. The Contracting Authority while assessing the costs using the life cycle approach shall take into consideration various costs to be borne by the contracting authority or other

Sustainable-public-procurement-from-rhetoric-to-practice.pdf. (last visited Aug. 24, 2019)

[58] *See* EU Directive 2014/24, art. 57(1)(f).

[59] *See id.*, art. 57(2)

[60] *See id.*, art. 67(2)(a): Such criteria may comprise, for instance:(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions.

users such as costs relating to acquisition, cost of use such as consumption of energy and other resources, maintenance costs, end of life costs, costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.[61]

The sixth provision on conditions for performance of contract is in Article 70. The contracting authorities may lay down special conditions pertaining to performance of contracts that are linked with the subject matter of the contract and indicated in the call for participation or procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

Lastly, the seventh provision - Principles of awarding contracts is pinned in Article 76. The provision provides for the general principles which member states shall incorporate in their national rules while awarding a contract. These principles shall amongst others provide for taking into account quality, continuity, accessibility, affordability, availability and comprehensiveness of the services. This would also include the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.[62] From the above provisions it is evident that the principles of ethical, social, environmental and labour law obligations have been duly enshrined in the new directives. The inclusion of these principles will go a long way in achieving a sound and responsible public procurement wherein the public procurement and development goals of EU would go hand in hand. The need of an hour is to introduce these procurement principles in the Indian regime as well.

[61] *See id.*, art. 68(1)(a-b)
[62] *See id.*, art. 76(2)

IV. FEW EU MEMBER NATION CASE STUDIES

A. Sustainability Criteria by Swedish National Public Procurement Agency

Under current legislation, public procurement is governed by the Public Procurement Act (LOU) and the Act on Procurement in the Water, Energy, Transport and Postal Services (LUF), which aim to implement prevailing EU law, including the five fundamental principles for trade in EU law. Since 2010, Sweden has also had what is termed a "should" rule, requiring that contracting authorities "should" apply environmental and social considerations, on the condition that they are relevant, that they are justified by the nature of the procurement, that they comply with the principles in the general regulatory framework, that the criteria can be monitored and verified and that they actually are monitored and verified.[63]

A comprehensive social responsibility criteria to help the contracting authorities to award tenders is published by the Swedish National Public Procurement Agency. The said criterions are either organized by product type and also through an online medium that helps the contracting authorities to identify specific criteria for their products. The agency publishes a downloadable supplier declaration form that contracting authorities can use to check the documents in consonance with the social criteria and further follow up on the verification processes.

B. Sustainability Compass by German Federal Government

It provides the contracting authorities and suppliers with the information and facilities on ethical public procurement practices. It provides practical examples on sustainable procurement for all German states. The Sustainability Compass[64] with the integrated Sustainability Standards Comparison Tool provides an overview of the world of labels and creates transparency. Moreover, the authorities can search or browse the product types and issue guidelines on specific labour standards, risks, labeling schemes, guidelines on procurement

[63] *See generally* KRAV ET AL., *supra* note 57.

[64] *See generally* Kompass-Nachhaltigkeit, *Sustainability Compass*, *available at* https://www.kompass-nachhaltigkeit.de/en/basic-information/ (last visited Aug. 24, 2019)

criteria and examples from other local contracting authorities. The authorities can also partner with other local authorities and other ethical suppliers selling socially responsible products in the vicinity. Moreover, the authorities can also enumerate guidelines on how socially responsible sourcing can be enabled during the pre-qualification, qualification, award and monitoring stages of the contractt

V. CONCLUSION

The author concludes that the aforesaid best practices lay down a detailed mechanism to address the issues concerning smooth functioning and implementation of public procurement. The Directive 2014/24/EU for Public Procurement has been implemented by 23 of 29 EU Countries and specifically the provision of ethical public procurement has also been implemented by different EU Countries either directly or by certain modifications. Moreover, the EU Directive provides a fair choice to the member nations to choose different award procedures for public authorities to award contracts as mentioned in Articles 27-32. Moreover, the concept of Ethical public procurement is an innovative method to ensure that the contracting authorities engage in a socially responsible procurement by imposing conditions on the suppliers to adhere to the social, environmental and labour laws of their countries thereby, minimizing the misuse of corporate position in the procurement system. Further establishment of European Working Group on Ethical Public Procurement to ensure the protection of labour and human rights at procurement level is a welcoming step.

Implementation of the obligations under Article 18.2 whereby the member nations are bound to take “appropriate measures” to ensure the compliance of environmental, labour and social laws by the suppliers and implementation of the same by 23 EU Member nations in their system as mentioned by the research also states the seriousness in executing the EU Directives.

The concept of professionalization of Public Procurement through the recommendation of EU Commission dated October 3, 2017 is again an

innovative model to provide training to the existing and newly appointed officials dealing with public procurement. Further the said recommendation ought to ensure that highest standards of professionalism are ensured while framing the procurement procedures and imparting training to the officials.

The stated recommendation also proposes the member nations to create a professional infrastructure to define the policy qua professionalization of public procurement and develop strategies in their administrative structure to facilitate an institutional set up for public procurement. Moreover, it also proposes proper training and development of the officials in order to enhance their career management. Further the recommendation also proposes to develop a digital infrastructure to manage the public procurement at central and local levels of the administration of the member nations.

DIGITAL RIGHTS MANAGEMENT UNDER INDIAN COPYRIGHT LAW: AN ASSESSMENT

Saimy Eliza Abraham*

ABSTRACT

The concept behind the Digital Rights Management (DRM) under the Indian Copyright Act, 1957 is to mainly focus on the issues that an author faces in the digital domain whereby his work is copied without getting prior permission from him. Earlier in our society when there was no printing press, authors used to write the books in their own handwriting and there were limited number of copies produced in that particular work. With the advent of printing press, people started to realize the commercial value of the books which were produced by the authors and thereby led the people to copy the work of authors without their prior approval. It is in this background that the Copyright Act, 1957 was enacted which restrains a person from using the work of author without his permission. However, at the same time due to the technological developments of the internet, people started copying the work of authors over the internet without leaving traces whereby it was difficult to identify and locate infringer. It is in this background the DRM technologies were incorporated by Copyright (Amendment) Act, 2012. DRM technology restrains a person from copying any kind of work over the internet. Hence, this article evaluates need and necessity of the DRM technology, its working mechanism and functions in the light of law in the USA and other relevant international treaties.

I. INTRODUCTION

With the increasing development of the technologies, the protection of authors over the internet is being challenged due to illegitimate exploitation of their works by the houses of printing presses and infringers. The copyright owners

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started to face many challenges in digital world as the barriers of communication have been reduced to a greater extent and production, dissemination and modification of the copyrighted works has become easier without any cost.

Due to the technological advancements, the reproduction of the copyrighted material has become easier and cheaper.[1] As the copyrighted works were available to the society instantly when it was put over the internet on the peer to peer sites and which was made easily accessible to the public at large.. People started copying the work of copyright owners without paying any royalty or fees for their works as a result of which it causes huge financial losses to the authors. Besides, it started effecting on their reputation as the people started copying and modifying their works without the knowledge and acquaintances of these authors.[2] Since internet is chain of networks as it has made globe a single village and person can reach to any corner of world at any point of time without any barriers or hindrances. It has become easier for a person to download any work without the consent or permission of owner and reproduce the same by making the pirated copies. It also led to sell illegal copies of same. Therefore, a need to protect the works of authors which are published in digital medium was felt. So the new concept was introduced in the Copyright Act, 1957 (hereinafter 'Copyright Act')[3] by virtue of Copyright (Amendment) Act, 2012,[4] i.e. Digital Right Management (DRM). It was introduced for the protection of copyrighted works in the digital medium to avoid the illegal reproduction and distribution of same. The system of DRM technology was first introduced in the 1990s, but the problem during that period was that not much of the users were aware of its technical intricacies and the methods of using it.

[1] *See generally* S. RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 (1987).
[2] *See generally* R.K. Gulla, Digital Transformation of Copyright Laws and the Misty Indian Perspective, 6 ICFAI J. INTEL. PROP. RTS. 1 – 26 (2007)
[3] No. 14 of 1957
[4] No. 27 of 2012

The DRM system was much more complicated when it was compared with the economic and moral rights provided under the Copyright Act. The DRM at that point of time could not have been used with any technology as its use was dependent on other technologies which were still in a nascent stage.

The protection given by the DRM system was to control the duplication of the original copyrighted works from getting modified, reproduced, unauthorized access and the illegal distribution of the copyrighted works in the digital medium. Although the Copyright Act gives protection to the copyrighted works under the category of subject matter of copyright in which the works involves literary, dramatic, artistic, sound recording and cinematographic films are protected from any sort of modification, translation, and reproduction or from the illegal distribution of the copies of works to the public.[5] However, the Copyright Act was silent on the protection of authors when the same work could have been published in the digital medium. So it was thought to give protection to the owners of the copyrighted works in digital domain. It is in this background that Section 65A, 65B and other relevant provisions under the Copyright (Amendment) Act, 2012 were introduced.[6]

[5] See Copyright Act, sec. 13

[6] Copyright Act, sec. 65A. Protection of Technological Measures: (1) Any person who circumvents an effective technological measure applied to protect any of the rights conferred by this Act, to infringe such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. (2) Nothing in sub-section (1) shall prevent any person from (a) doing anything referred to therein for a purpose not expressly prohibited by this Act: Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or (b) doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy.

Copyright Act, sec. 65B Protection of rights management information: Any person, who knowingly; (i) removes or alter any rights management information without authority, or (ii) distributes, imports for distributions, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights

In simple words, DRM is used to prevent unauthorized access and control over the works in the digital media. So it includes a complex form of technology in which the number of controlling features is provided for the control on the accessor for the use of that particular copyrighted works in the digital world, by this it wouldn't be easy for the public to copy the works of others without the owner's permission. Thus an effective step should be taken to protect copyrighted work from being infringed. DRM system thus has the authorized power to works in several ways to afford such protection. Some of the most common modes are encryption, digital certificate, digital signature, etc. The DRM system has now been used in several spheres like in film industries, television, music industry, computer games, e-books, etc.[7] Hence, this article evaluates need and necessity of the DRM technology, its working mechanism and functions.

II. DIGITAL RIGHTS MANAGEMENT: MEANING AND CONCEPT

A. Fair Use and Fair Dealing

Before understanding the concept and working of DRM, it is necessary to understand the doctrine of 'fair use' or 'fair dealing' concept under the Copyright Act. It is a doctrine which allows the use of copyrighted work by a person in a certain circumstances without obtaining prior approval from its owner and would not constitute infringement. In USA, the doctrine of fair use is defined under Section 107[8] of the US Copyright Act of 1976 and it mentions

management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine: provides that if the right management information has tampered with any work, the owner of copyright in such work may also avail of civil remedies provides under Chapter XII against the person indulging in such acts.

[7] *See generally* ROSS ANDERSON, SECURITY ENGINEERING 679 – 80 (2ND ED., 2008)

[8] US Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541, § 107 provides the statutory framework for determining whether something is a fair use and identifies certain types of

certain grounds for use of copyrighted works. Fair use is a copyright guideline dependent on the conviction that the users can freely use the copyrighted works for the purposes mentioned under the Section 107 of US Copyright Act, such as commentary, criticism or parody.[9] Some generally accepted conditions for Fair Use are:

a) Analysis and Comment: citing or excerpting a work in an audit or analysis for reasons for delineation or remark is viewed as reasonable use.
b) News Reporting: abridging an address or article, with brief citations, in a news report is reasonable to use.
c) Research and Scholarship: citing a short section in an academic, logical, or specialized work for delineation or then again explanation of the creator's perceptions isn't an infringement of reasonable use.
d) Non-benefit Educational Uses: photocopying of restricted parts of composed works by educators for study hall use is reasonable to use.
e) Spoof: a work that disparages another, normally notable, work by impersonating it comically doesn't damage reasonable use.
f) Non-business Use is Often Fair Use: the way that a work is distributed essentially for private business gain regularly weighs against a finding of reasonable use.
g) The advantage to the Public might be Fair Use: the reasonable use decide perceives that society can regularly profit by the unapproved utilization of a copyrighted work if the outcome is an educated open or it serves the finish of grant or training.

In India certain acts, which would not amount to infringement of copyright if a person is using protected work under copyright. In India, the doctrine is known

uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use. *See generally K. Mumari v. Muppala Ranganayakamma*, 1987 (2) A.L.T. 699 (718).

[9] *See* AJAY SAHNI, LAL'S COMMENTARY ON THE COPYRIGHT ACT 6 (3RD EDN., 1995)

as 'fair dealing' and a person can use any literary, dramatic, musical or artistic work not being a computer program without obtaining prior approval from author for:[10]

a) Private or personal use, including research;
b) Any kind of criticism or review of any work;
c) Reporting of current events and current affairs, including lectures delivered in public;
d) Broadcasting or in a cinematographic film or using photographs;[11]
e) Reproduction of any work for the purpose of a judicial proceeding or for a report of a judicial proceeding;[12]
f) Reproduction or publication of the works prepared by the Secretariat of a legislature; and
g) Reproduction of any literary, dramatic or musical work in a certified copy made or supplied by any law for the time being in force.[13]

The term DRM[14] was introduced in 1990s in USA with the consolidated endeavors of the few merchants and other people engaged in the marketing. Even though the DRM was a development towards the Conditional Access

[10] The three amendments brought to Section 52 have been *via* Copyright (Amendment) Act, 1983 (No .23 of 1983), Copyright (Amendment) Act, 1994 (No. 38 of 1994), and Copyright (Amendment) Act, 1999 (No. 49 of 1999)
[11] *See Civic Chandran v. Ammini Amma*, 996 P.T.C. 670 (Ker. H.C.)
[12] *See* Copyright Act, 1957, sec. 52(d)
[13] *See* Copyright Act, 1957, sec. 52(g)
[14] Originally, this was used exclusively by the entertainment industries: by adding DRM to DVDs, they could prevent companies from making DVD players that accepted DVDs bought abroad. It's not illegal to bring a DVD home from an overseas holiday and watch it, but if your DVD player recognizes the disc as out-of-region, it is supposed to refuse to play it back, and the act of altering the DVD player to run out-of-region discs is unlawful under the DMCA's section 1201. It could even be a crime carrying a five-year prison sentence and a $500,000 fine for a first offense (the act of offering a region-free DVD player for sale, or even the neighbor's kid helping you to regionalized your DVD player, can be criminal acts).

System (CAS), it provided various protections in the computers for security reasons and broad understanding of the innovations and the purpose of business [15] which includes the specialized technologies such as the Watermarking, Public Key Infrastructure (PKI) and Encryption[16] and association with different fields of business.

DRM is an orderly way to deal with copyright security for computerized media. The purpose behind the introduction of DRM is to restrict the unauthorized access and control of the users in the works which are produced by some other person i.e. original owner of that work. Also, it restricted the unauthorized distribution of works in computerized media and confines the manners in which user can duplicate the substance they've obtained. DRM items were created because of the advent developments occurring in the digital field for the piracy of commercial works.[17] Ordinarily, DRM is executed by inserting code that prevents copying indicates such as timeframe in which the substance can be accessed or as far as possible the number of devices in which it can be used.

DRM system was facing the issues mainly for the standard definitions for its functioning.[18] Following are couple of interpretations which are involved in the DRM:

a) "DRM refers to controlling and managing rights to digital intellectual property."[19]

[15] *See generally* B. ROSENBLATT ET AL., DIGITAL RIGHTS MANAGEMENT - BUSINESS AND TECHNOLOGY (2003)

[16] Encrypt/Scramble means to convert into unreadable form (without the right Decryption key).

[17] *See generally* Primavera de Filippi, *Copyright Law in the Digital Environment: Private Ordering and the Regulation of Digital Works*, HAL (2012) *available at* https://hal.archives-ouvertes.fr/hal-00713403/document (Aug. 25, 2019)

[18] *See generally M.* Martin et al., *DRM Requirements for Research and Education*, Discussion Paper, The NSF Middleware Initiative and Digital Rights Management Workshop (2002)

[19] *See* ROSENBLATT ET AL., *supra* note 15.

b) "DRM is the "digital management of rights" not the "management of digital rights".[20]

It can be said that the DRM is a wide term that is used by the various techniques so that it prevents the owners right to use them, to restrict the use of the unauthorized access to their copyrighted works and the works of the rights holders are used by others in the public i.e. using of the creative works of the right holders. Even the DRM does not restrict to the single means of the copyrighted works but it's also a single technological method of achieving the goals of the right holders. For example, a film studio may utilize the DRM to keep a user from avoiding the ads that have been played in start of the video or in the middle of the recordings or in the event of the music organization that can keep the utilization of DRM from their purchasers tuning in to the tunes that are played in the computerized mediums or in other advanced substance.[21] It implies that it prevents unauthorized duplication of the works or distributing extra items between the recordings or between the music. So, at last, it can be said that the DRM is utilized in various closures and the principle reason for is to keep it away from the unauthorized utilization of the copyrighted works of the proprietors from people in public.

B. Digital Right Management: Operation and Running

DRM allows publishers and authors to access an account of user and that too at times when certain media, content, or software was used. For instance, owner can see when his e-book was downloaded or printed and who have access to it.

[20]DRM is "the description, identification, trading, protection, monitoring and tracking of all forms of rights usages over both tangible and intangible assets including management of rights holder's relationships" as defined by
Renato Iannella, *Digital Rights Management (DRM) Architectures*, 7(6) D-Lib Magazine (2001) *available at* http://www.dlib.org/dlib/june01/iannella/06iannella.html (last visited Aug. 24, 2019)

[21] *See generally* Viktor Mayer-Schönberger, *Beyond copyright: Managing information rights with DRM*, 84(1) DENVR U. L. REV.181 – 98 (2006)

More often, DRM Board incorporates codes that deny duplicating or codes that limit the time or number of devices on which a specific item can be accessed. Distributors, writers, and other substance makers utilize an application that encodes media, information, digital book, substance, programming, or some other copyrighted material. Just those with the decryption keys can get to the material. They can likewise utilize instruments to restrain or confine what users can do with their materials.[22]

There are numerous approaches to ensure the substance, programmes, or items of the author. DRM enables a person to:

a) restrict or keep users from altering or sparing your substance;
b) restrict or keep users from sharing or sending your item or substance;
c) restrict or keep users from printing your substance. For a few, the record or fine art may just be printed up to a predetermined number of times;
d) disallow users from making screen captures or screen snatches of your substance;
e) set an expiry date on your archive or media, after which the users will never again have the capacity to get to it. This should likewise be possible by constraining the number of employments that a client has. For example, a report might be repudiated after the users have listened multiple times or opened and printed the PDF multiple times;
f) lock gates to just to certain IP locations, areas, or gadgets. This implies if your media is just accessible to US inhabitants, at that point it won't be open to individuals in different nations;
g) watermark fine arts and records to set up proprietorship and personality.[23]

The basic purpose of DRM is to prevent or restrict or have a control over

[22] *See Code of Best Practices in Fair Use for Media Literacy Education*, NCTE.ORG, *available at* https://ncte.org/statement/fairusemedialiteracy/ (last visited Aug. 26, 2019)
[23] *See generally* D.S.K. Boon, *Copyright Norms and the Internet: The Problems of Works Convergence*, 2 SING. J. INT'L AND COMP. L. 76-116 (1998)

copyrighted works by the holders from getting its work modified or reproduced by others. There are two groups in a society one which Support DRM and other which contradict it. One group says that the DRM gives them a route for the blockage of their works which in turn keep their works protected from being stolen or being modified or appropriated by any unauthorized users openly. While as the second group contradicts DRM on the ground that it restricts access over the work to the people which debars them from right to know. Further, it damages the privileges of the people for free discourse and articulations.

The main objective behind the DRM is to offer security to the owner's having protected rights under copyright law in the digital books or on other things that are accessible to public in general in this advanced structure. Its purpose is not to encroach the rights of owner over his copyrighted work but to keep his work secure in the digital medium. The DRM comprises of two essential components for distinguishing proof for use and the authorization from owner. The recognizable parts of proof comprises of different models of specific books in a digital manner or whatever other materials that are engaged with the advanced field and the authorizations dependent on the encryptions and the key administrations by guaranteeing that the digitized substance of the legitimate holders are in an experimental mode from others being utilized as their very own material and encroaching the genuine proprietor of the work.[24]

There have been penalties imposed by the Copyright Act for infringement of the work of author. However, the protection provided by DRM is more than protection provided under the Copyright Act for copyrighted works in the digital medium. By this, the user or the person having access to the copyrighted works

[24] *See generally* Corynne McSherry and Cindy Cohn, *Digital Books and Your Rights: A Checklist for Readers*, ELECTRONIC FRONTIER FOUNDATION, *available at* https://www.eff.org/files/eff-digital-books_0.pdf (last visited Aug. 25, 2019)

of authors can get the materials without any cost.[25] DRM although prevent certain forms of violations that are committed by the users which may not be adequate but with the fear of the penalties that the federal laws are imposing on the users or the public for the infringements that are caused by using the copyrighted materials of the right holder. This makes the DRM controversial for its potential to be prevented from the unlawful interferences of the public, non-infringing uses of protected contents in the copyrighted materials.[26]

The basic feature of DRM is to control the downloading or copying the work of the owner's without their permission in the digital medium. It also controls the use of the technology and enquires whether the materials in the digital formats are used by the users having *bona fide* intention or using fairly.[27]

Therefore, the publishers and the owners of the copyrighted works have the right to restrain the others from infringement. Their works are being protected both under the Copyright Act and DRM system which gives the owner double protection by which the illegal distribution or unauthorized selling or modification is avoided. By this method, it also means that the works of others shouldn't be used without the permission or consent of the actual owner of the copyrighted works. It has been observed that at times that when we visit a particular website to have access to their contents they are asking for our user name otherwise they won't allow us to have access. This can be an example of a DRM system in the digital medium in which users are also asked to open an account and pay certain amount only then they can have access.

Despite the fact that Digital Millennium Copyright Act in USA have

[25] For a more sophisticated assessment of the behavioral incentives underlying the adoption of DRM technologies and the use of DRM-protected products, *see* John A. Rothchild, *Economic Analysis of Technological Protection Measures*, 84 OR. L. REV. 489 (2005).

[26] *See* ROSENBLATT ET AL., *supra* note 15.

[27] L.T.C. HARMS, A CASEBOOK ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS 159 – 60 (4th edn., 2018)

incorporated the arrangements for unlawful utilization of copyrighted materials of others by any buyers which can be restricted by the DRM technology by meddling in the lawful or unlawful access. The real proprietor of the copyrighted works effects to prohibitive exploitation of the DRM amounts that the users in the open search won't reserve the option to have power over the advanced substance or the computerized programming instead of getting them.[28]

So at the end of the day, we can say that the DRM is a wide term that is utilized by the numerous innovative techniques to keep the copyright holders to confine the utilization of the unapproved access towards it copyrighted works and crafted by the correct holders by utilizing them by others in the general population

C. Functioning of Digital Right Management

In general sense, we can say that the DRM is the arrangements which are used for the management of rights digitally, i.e. using the advanced technologies for the protection of the unauthorized use or control the others in intervening in the rights of the others.[29]

Therefore, the DRM is the managements that are utilized for the administrations of rights of owners carefully, for example, utilizing the development advances for the security of the unapproved use or control over others in unlawful access. Basically it intends to state that the working of DRM is to keep away others from utilizing works of others in any computerized substance and which may promptly encroach upon the rights of the real copyright holder. So the DRM controls the using of works from being changed, dispersed or replicated.

[28] *See* Mai-Trang D. Dang and Esther H. Lim, *IP Rights and DRM: The Copyright Holder's Guide to Navigating DRM Technology through Hostile Territory*, FINNEGAN, Nov. 2006, *available at* https://www.finnegan.com/en/insights/articles/ip-rights-and-drm-the-copyright-holder-s-guide-to-navigating-drm.html (last visited Aug. 26, 2019)

[29] *See* D.L. Burk, *Legal and Technical Standards in Digital Rights Management Technology*, FORDHAM L. REV. 537 – 38 (2005)

Under the Copyright Act, the privileges of the rights holders are overseen and controlled carefully by various innovative components. So the DRM accommodates the extra assurances to the copyrighted materials of the proprietors from getting encroached, and the copyright law furthermore guarantees the use of the works in any structure for example education works, masterful works, sensational works and so forth. So the DRM gives an extra guarantee for the works. For instance, we can say that if an individual have produced the work and the individual have picked up an apprehension for a similar work in the specific field of work then the creator would have the privilege for the security of his work under the Copyright Act as produced by him, just as the creator would reserve the choice to protect his works from getting infringed by another individual.

The recently presented arrangement ought to give another sort of guarantee to the creator from keeping his works protected from the unlawful access from others. Indeed, even under this recently presented arrangement furthermore gave punishments to the individuals who try to use the work of the genuine proprietor. So it is understood that an owner of the work would get two folds of guarantees for his works that is under the general copyright laws and the arrangements that are recently passed under the Copyright Amendment by virtue of DRM.

Furthermore, it gave restricted access and control over others work in the advanced configuration with the goal that other individuals do not infringe work of copyright owners. So the DRM is having genuine ramifications on the shopper's rights which ought to be paid attention in the light of the fact that the protection of the works a specific mechanism ought to be furnished with the particular administrations to the suppliers which can't be utilized by others in any advanced form so it prompts any sort of encroachment or infringement of the privileges of the creator of the real proprietors. At last, we can say that the working of the DRM protects a superior choice for the guarantee of the works in

the computerized form, even though works created by the creators or others are ensured under the Copyright Act. It accommodates the two overlap assurances for the works from getting infringed.

III. CHALLENGES AND ISSUES RELATING TO DIGITAL RIGHTS MANAGEMENT

Not everyone agrees with DRM. For example, users who pay for music on iTunes would like to certainly tune in to the tune on any gadget or use it in the manner in which they wish. Moreover, the organizations which pay a compensation in large amount for a high-esteem industry report is eager to utilize DRM with the goal that their rivals can't get a similar report for anything.

Be that as it may, DRM is not an innovation which is an ideal arrangement. Regardless of whether copyright holders own progressive rights the official's code into their item, the infringers may find an approach to work around it. For example, if they make their creation playable just on one player, a few users will endeavor to make sense of the decoding keys and after that makes another player that can play the copyrighted matter. Users at that point download the new player with expectations of dodging the DRM encryption. There are likewise free instruments to evacuate DRM codes, which – while untrustworthy – are promptly accessible on the web.[30]

The copyright issues that are related to the advanced time can be grouped into different classes as indicated by the idea of the works. The issues that are connected in the computerized time can be with the entirely different arrangement of works that are given under the computer programs databases, and mixed media groups. Different issues can be related to the change, circulations, and interchanges of works with the general population through any

[30] *See supra* note 14.

computerized medium. Aside from these issues, there can be another issue that is identifying with the working of the Digital Environment.[31]

The idea of advanced technologies under the copyright law incorporates different works that are given by the techniques for new works, such as, computer programs, databases, media designs and so on which dependably made uncertainty about the idea of computerized inventions that is what is incorporated under the copyright law. The issues that are connected with the new works of innovation have made another type of inventive expressions that are brought under the purview of copyright law. There were five classes of works that were ensured under the copyright law, for example, the scholarly works, creative works, sensational works, sound chronicle, and cinematography. The works which included innovation and furthermore incorporated the craftsmanship, expertise and so forth of the individual who is creating the works would get protection for his works under the subject matter of the copyright law. The fundamental matter for the assurance is that the work produced by the individual ought not to be the reproduction of the others' works. The innovation of the work would get guarantee under the law. The different advancement of the computerized technologies has regularly offered to rise to specific kinds of recognizable news that are delivered by the technique for computer programs, databases, sight and sound configurations and so forth.[32]

A. Protection of Computer Programs

The concept of computer programs is a program which is capable of being understood when it is included in a machine having the capability of been readable medium and which also capable of performing or achieving particular

[31] *See Copyright*, MIN. OF ELECTRONICS AND INFORM. TECH., GOV'T OF INDIA, *available at* https://meity.gov.in/content/copyright (last visited Aug. 26, 2019)

[32] Mahendra Kumar Sunkar, *Copyright Law in India*, LEGALSERVICEINDIA.COM, *available at* http://www.legalserviceindia.com/article/l195-Copyright-Law-in-India.html (last visited Aug. 26, 2019)

functions, task or result.[33] The basic components of a computer are hardware and software which is an instruction for the working and functioning of a computer. The concept computer program and software are synonymous. The legal protection for the Computer Programs being since the 1980s itself and the ideas for the working of the *sui generic* system emerged as the issue for protection of intellectual property right regime began for the protection of Computer Programs which was exercised by the international community's which lead to the emerging concept of *sui generic* system. This system protected all the elements that are covered by the computer programs i.e. source code, complier and the object code. So there was an issue regarding whether the protection of literary work should be given to the source code or the object code was raised under the Berne Convention. It was subsequently changed by the WIPO Copyright Treaty that the protection should be given to computer programs whatever may be the mode of expression.[34] So the law provided for the protection of the computer programs being infringed by copying of any forms of new works that are associated with the author or the person. The Copyright Act provides for the mandatory punishment for the person who commits an offence. Even the newly introduced provisions of DRM also provide the punishment for the same which may be extended to 2 years and shall be liable to pay fine.[35]

[33] According to Copyright Act, sec. 2(ffc), computer programme means a set of instructions expressed in words, codes, schemes or in any other form including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result.

[34] Article 4 of WCT Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression. The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

[35] See Copyright Act, 1957, sec. 65(1)

B. Protection of Computer Database

The database work was another mechanism which was influenced by the developments over the period of time. In the digital context, the concept of database[36] is almost same in every nation. In the computerized setting, the idea of the database was a tedious process that made it a less demanding and over a period of time by continuous improvements through progressive innovations. It became more demanding compared to the past. Before the idea of the database was protected by the researchers through different arrangements of work yet gradually it expressed to ensure the progression in computer programs database which controlled and dealt with the information. Under the TRIPS Agreement, it was provided that the collections of information or any materials which are available in digital domain, a protection of the same must be provided to copyright owner under the copyright law. To get the guarantee for the protection under copyright law, it was essential that the materials ought to have achieved the dimension of innovation than just the work. Although, the computer programme databases are secured under the Indian Copyright Act in this way, it appreciates extraordinary assurance to the authors of computer programmes under the Indian laws. Therefore, the idea of originality is essential to claim protection under Copyright Act.

C. Protection of Multimedia

The works under the Copyright Act comprises of different categories, for example, research works, original works, dramatic works, and it incorporates the works connected to sound recording and cinematographic films. Presently the users in the computer have the choice to associate with the existing works and reserve the option to make any sort of changes and adjustments on the existing works and make it as other works without encroaching upon the rights of the

[36] Database means a collection of independent works, data or other materials arranged systematically or methodically and capable of being accessed individually by any electronic medium or others means.

real proprietor. Interactive media works are essential including every work that are connected to the literary, sound, visuals or any sort of sounds that are identified with the works produced by an individual. The ultimate work would describe the existing arrangements of work.[37]

The works produced by an individual would get the guarantee depending upon which class of work is being created. For instance, the work produced by any artist won't get the rights or assurance related to other subject-matters of copyright law. Indian laws have recognized the rights that are connected with the distinctive class of works created by the creator or the copyright owner. The WIPO Copyright Treaty has a critical job in the development of the computerized condition. The Copyright Act likewise protects the originator from the modification or appropriation of his works without his consent which would amount to infringement of his rights and which could be a culpable offense under the law. So rights related to the original owner ought not to be disregarded by another individual who might prompt the infringement of their rights. The Copyright Act prescribes certain grounds which does not amount to infringement if a person uses the same without prior approval from original

[37] It is illuminating to read the following intervention by Paul Vandoren of European commission in the Second Working Session of WIPO World Forum on the Protection of Intellectual Creations in the Information Society held in Naples on Oct. 18 – 20, 1995: "Now, to come back to the question of definition of multimedia products and its characterization, I am inclined to say that it is now a new type of work to the extent that a multimedia product can fall under one or several, already existing categories. I would like to refer to these different categories. In the first place, there seems to be the possibility of considering and treating multimedia products as works similar to audiovisual works in the sense of Article 2(1) of the Berne Convention. It seems possible to classify and to treat multimedia productions as collections of literary or artistic works in the sense of Article 2(5) of the Berne Convention and they might also fall under the category of compilations of data or other material in the sense of Article 10(2) of the TRIPS Agreement. I think that the actual classification of a particular multimedia product will depend on the type of work and the different and specific characteristics of each multimedia product. Therefore, we will have to decide on a case-by-case basis." WIPO Publications No 751(E)

owner, e.g. for research purposes or for other purposes were the aim is not to commercialize it. It implies that the works ought to be utilized in a way that it ought not to amount to fair use under the Copyright Act. Amid the 1990s there was a requirement for the assurance of copyright laws for the media.[38]

The copyrighted works in digital technology have brought revolutionary changes. The newly developed technology has made the administration and protections of the copyrighted works difficult because now the mode of reproduction, modifications, distributions, and communication of works were not remained easy. In the digital era the copying or the reproduction of works can be done swiftly compared to past, even the works in any digital content can be spread all over the country within no time as the digital technologies have been developed in such a way that any person from anywhere of the country have the access to the system. But the issues related to such a drastic change or development of the digital environment lead to unauthorized copying or distribution of works of the right holder which leads to the infringement of their rights and also would affect the profitable interest of the owners. Such activity can lead to the piracy of the works. However, the solutions were set up for the issues that were faced by the developed technologies through access control or copying control mechanism such as the encryption technology or the watermarking which was incorporated into the works that were distributed over the digital network to provide a protection for them from any kind of illegal exploitation of the works by the right holder. So the access control and the copying mechanism would help to avoid such kind of illegal interaction of the other person on the copyrighted works by the right holders.[39]

[38] New copyright protection for multimedia has emerged as the WIPO treaties or the protocol of the Berne Convention becomes a shield for the protection of art from any sort of piracy activities. On the other hand, the WIPO performance and phonogram treaty also adopted similar provisions regarding the performers and producers of the phonograms.

[39] *See* C P Dayananada Murthy, *Copyright in the Digital Media: A Critical Analysis With Reference to India*, Ph.D. Thesis, submitted to Sri Krishnadevaraya University 283 – 84

IV. CONCLUSION

Besides discussing the idea of DRM and the issues associated with the different subject matters under copyright law, through this article, the author attempted to explain the concept of the doctrine of fair use and it's balancing with infringement, which is the most important concept to be understood in the digital medium. This doctrine gives the users the right to use the copyrighted material in the proper manner by which it does not lead to copyright infringement. So should be fair balancing for the copyrighted materials to avoid any kinds of infringements to the authorized author of that particular work. Mainly the Indian Copyright Act is very much prepared to confront any sort of issues or difficulties which may arise by the unexpected developments of the computerized innovations in future. In the past there were no such arrangements to provide the guarantee to the copyright owner in his copyrighted works which was utilized by the infringers without permission or approval in the digital domain. No doubt law was sufficient to protect traditional copying but same was not enough for copying in digital domain. Therefore the Government was compelled to incorporate the provisions in the Copyright Act, 1957 to restrain a person from copying the content in the digital domain without approval by virtue of Copyright Amendment Act, 2012 and DRM technology. The digital technological developments are the components of the digital works and offer security to the owner of a work in digital domain by restricting others from copying his work. Lastly if these provisions are properly implemented and applied to every kind of works available over internet, piracy can be reduced to a larger extent. The government should take appropriate steps to monitor and supervise the infringement and whosoever will intercept the technological protections extended to copyright works should be severally dealt in the same way as information Technology Act, 2000 is dealing with.

(2011), *available at* https://shodhganga.inflibnet.ac.in/handle/10603/64184 (Aug. 25, 2019)

INTELLIGENTLY DEALING WITH ARTIFICIAL INTELLIGENCE: NEED FOR GLOBALLY ACCEPTED LEGAL FRAMEWORK

Akansha Ghose*

ABSTRACT

The new age technology is striving to make every task easy for humankind. Earlier technology was easing basic tasks such as simple calculation on the computer or documentation. The recent years have seen advent of Artificial Intelligence ("AI"). AI has evolved from earlier only assisting human beings to now completely undertaking tasks for their living masters. With this vision, AI is taking over the globe. AI is installed in automatic cars, machines and other equipment guiding humans to a life where they have to exercise least effort. However, such ease is accompanied with perils; cutting edge technology may glitch any time without notice, raising debatable questions regarding liability. If the technology itself is held liable, it shall be conferred with some legal identity. Some thinkers argue that AI can only work under the control of a human being and therefore, no purpose may be achieved by attributing personhood to them. Another set of thinkers believe that AI has evolved; humans are dependent upon such technology more than ever. Use of AI also comes with its own set of socio-legal consequences for example, with respect to Right to privacy and labour safeguards. The article deals with the impact of AI upon criminal, privacy and employment laws respectively, attempting to showcase legal lacuna vis-a-vis AI. It concludes by suggesting mandatory reforms in the field of AI so as to bring obligatory legal accountability when technology surpasses human interests.

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I. INTRODUCTION

A motorcycle company in Japan faced a horrific incident in 1981. A surprised worker was smashed by the hydraulic arm of a robot. The robot targeting the worker as a "threat" to itself eliminated him. Thereafter the robot resumed its duties. The question of this robot's liability serves as a starting point of discussion on legality and criminality of AI. It is pertinent, at this conjecture, to mention Asimov's law of robotics. Isaac Asimov in his science fiction I, Robot (1950) talked about the fundamental law of robotics according to which: *Firstly,* a robot shall not injure a human; *Secondly,* a robot shall always adhere to the directions given by human beings, provided that it does not conflict with the first law and; *Thirdly,* a robot shall preserve himself unless it does not violate the first two laws. These laws, while they appear to be the solution of any qualm regarding increased dependence upon robots/ AI, in reality brings forward a rudimentary question: Is the AI (or robot) intellectually and emotionally stable enough to understand these laws? If not, then is it a good idea to confer personhood upon such non-human, at all? If personhood cannot be conferred upon AI, should the manufacturer be made liable for the wrongdoings of AI? If the manufacturer is held liable, should the liability be absolute? That is to say, can the manufacturer be held liable for glitches in AI that are beyond the foreseeability of the manufacturer himself or when the manufacturer took all necessary steps ensuring that the AI does not cause any harm to humans and his environment? These questions are vital in forming an elementary understanding of AI that it is not purely concerned with science and technology but also has legal underpinnings.

Conferment of criminal liability is not the only concern that crops up in context of AI; certain schools of thought regard AI as a threat to privacy as well as employment of people. The question of AI's interface with privacy emerges when people share their personal information with mobile or computer applications. India has experienced various landmark decisions mulling over right to privacy; the constitutional right to privacy was upheld by the Supreme

Court of India in the matter of *Justice K.S. Puthuswamy (Retd.) v. Union of India*.[1]

Converging this concern to the bearing of AIs upon present labour laws and safeguards, put forth a perplexing issue of throbbing unemployment and obsoleteness of human power which is being replaced rapidly by the cutting edge technologically advanced AIs. Even though AIs and robotics were invented and brought into our lives to make things easier for us, there exist unresolved legal issues vis-à-vis such technology, that need to be addressed at the same pace as the development of technology.

II. EUROPEAN UNION GUIDELINES ON ETHICAL STANDARDS GOVERNING AI

Major countries of Europe are heavily dependent on AI for carrying out their everyday routine responsibilities. It wouldn't be an exaggeration to say that semi-automatic and automatic cars are (figuratively) seen in every nook and corner of major roadways of European countries like Germany. The interface between human beings and AI is not rare subject in these countries and thus, guidelines governing AI becomes an imperious issue. 25 European countries on April 10, 2018 signed the Declaration of co-operation on Artificial Intelligence (AI)[2]. Apart from the research and development related clauses agreed between the nations under this Declaration, some noteworthy clauses discuss the ethical use of AI as well as the effect of AI on labour market (such as loss of jobs) and mitigating measures. The Declaration is promising and futuristic and sets a precedent for alliance of technology and law. This powerful covenant comes in the backdrop of an open letter to European Commission by AI and robotics experts as well as legal, medical and ethical experts and professors[3] that compelled the Commission to not view AI and robotics purely as a technological or economic component, but to emphasize its impact on the society vis-à-vis its

[1] (2017) 10 S.C.C. 1

[2] *EU Declaration of Cooperation on Artificial Intelligence, available at* https://ec.europa.eu/jrc/communities/en/community/digitranscope/document/eu-declaration-cooperation-artificial-intelligence (last visited Aug. 10, 2019)

[3] *Open Letter to the European Commission Artificial Intelligence and Robotics, available at* http://www.robotics-openletter.eu/ (last visited Aug. 10, 2019)

criminal and ethical liability. Further, it advocates against conferring legal personality upon AI or robots; the letter vehemently disagrees to making a human being, in fiduciary capacity, responsible for the actions of the AI or robot. The letter concluded by beseeching the Commission to start dialogue on the aforementioned issues and choose a suitable legal model for AI regulation.

III. CRIMINAL LIABILITY OF AI

The fundamental rule of criminal liability i.e. the conditions necessary to make a person criminally liable are that such person must have committed some act (*actus reus*) and shall have a guilty mind (*mens rea*). Making an AI criminally liable becomes problematic since even though the *actus reus* on the part of the AI can easily be established, *mens rea* cannot be attributed to an entity which is not a human. Essentially machines work in accordance to the commands of the human being and do not have a brain of its own. The same cannot be said about an AI. Even though it does not have a mind similar to that of a human being, it would be unfair to compare its cognitive skills to that of a basic machine. Therefore, even if AI works on human instructions, it does have mental ability to take fundamental decisions.

In *Bountal* case (2015),[4] an employer at Volkswagen's production plant in Germany was killed by a robot. It was established in this case that the harrowing incident took place due to human negligence. Such a case is not afflicted with legal convolutions because the in such matters, erring human(s) as well as the company can be held liable, the latter being made liable vicariously.

Legal uncertainty arose in a case such as the *Aschaffenburg* case (2012).[5] In this case, a man driving an Audi automated car suffered a stroke and fell unconscious losing his balance over the vehicle, as a result of which the car proceeded towards the surrounding bushes. As the car was about to crash into

[4] *Robot kills worker at Volkwagen plant in Germany,* THE GUARDIAN, (Jul. 2, 2015), *available at* https://www.theguardian.com/world/2015/jul/02/robot-kills-worker-at-volkswagen-plant-in-germany (last visited Aug. 12, 2019).

[5] Based on interaction with Prof. Richard Susskind, IT adviser to Lord Chief Justice of England and Wales.

the hinging bushes, its AI brought back the car to the driving lane. This function was incorporated in the AI of the vehicle in order to avoid accidents due to disbalance by the driver. Because the car was brought back on the lane it started moving forward while the driver was still unconscious and ran over two people killing them. This case raises a tricky situation of criminal accountability. There was no glitch in the AI and hence, the company cannot be held liable. Since the driver could not foresee the stroke that rendered him unconscious, liability cannot be fixated upon him. The last resort is making the AI accountable. Because the AI functioned the exact way it programmed to, it question of its liability becomes vague. Expecting the AI to make a more pragmatic decision in such a situation is futile because at the end the AI cannot make advanced decisions as in essence, it is a program doing everything under the supervision of a human being. The Court in this case due to lack of options, held the company civilly liable for the loss of lives and directed it to pay damages to the beneficiary of those who were run over by the car.

There are few criminal liability models for AI:

a) Perpetrator liable

According to this liability model, AI is always innocent as it is not mentally capable to take decisions that may cause harm to others. The actions of AI that may cause any harm to a person is actually done at the discretion of a human (programmer) and therefore such human shall be held responsible for the aftermath of the damaging actions of the AI.

b) Programmer liable

This model inspects the knowledge of the human (programmer) i.e. whether the human had any foreseeable knowledge about the criminal act committed by the AI. If the human was directly responsible for the act i.e. he programmed the AI in such a manner so as to cause him to commit an offence, both *actus reus* and *mens rea* would be deemed to be established and the human will be held liable for the offence committed by the AI. However, if the AI malfunctioned and committed an offence on account of negligence of the human i.e. the human did not have an intention to commit crime through AI but due to his negligence, the

AI has caused irreversible injury, the human shall be held accountable but to a lesser degree. This is because there was no intention on part of the programmer to commit an offence; the programmer although was negligent hence must be held answerable.

c) AI liable

This model lays all criminal responsibility upon the AI. It presumes that even though the AI cannot possibly possess any emotions such as jealousy, greed, happiness, anger, sadness etc. but is capable of making fundamental cognitive decisions. This capacity of the AI makes it possible to establish *mens rea* (the establishment of *mens rea* is the only complex issue). As regards *actus reus*, proving it is fairly simple; the very act of the AI that caused harm to another, forms *actus reus*; for example- if AI uses locomotive arm of a robot to crush a human, *actus reus* stands proved.

This model however, has been criticized on the ground that if certain categories of persons such as children and insane are exempted from criminal liability because they are *doli incapax* i.e. incapable of forming criminal intention, so should AI. This criticism is rebutted by saying that AI does make decisions more than simple decisions (it is programmed to do so) and hence, they cannot be conferred with the title of *doli incapax*.[6]

Nevertheless, the third model is widely refuted on the ground of "lacking motive"; the criminality models that punish human beings seek to reform them through punishments (reformative model of punishment), but an AI essentially is a set of codes with no scope of developing human emotions as has been discussed before. It is futile to expect an AI to feel remorse and to reform itself (the same way that it can be expected from a living person). This criticism takes away the option of putting AI behind bars if it commits an offence to which the third model applies.

Criminal sanction in such case may lead to destruction of AI and/or penalty. Penalty upon the manufacturer cannot be justified in a situation where the

[6] *See generally* Gabriel Hallevy, *The Criminal Liability of Artificial Intelligence Entities-from Science Fiction to Legal Social Control*, 4 AKRON INTELL. PROP. J. 177-193 (2010).

programmer (or the company) has done every possible thing to avoid the AI from malfunctioning or causing harm to another (third model situation). Rationality must ensue in such cases to make the programmer(company) absolutely liable. The concept of Absolute Liability may assist in affixing penalty in such scenarios. The concept of Absolute Liability which was given birth by the Supreme Court of India held the owner of any inherently hazardous entity liable, without any limitations; the owner would be "absolutely" responsible for any damage caused by such hazardous entity even if he could not, using any possible means, foresee such damage or not was, in no manner, responsible for the harm caused by it (escape of hazardous element). The concept accepts no defenses including Act of God[7].

Even though, AIs are aiding humanity in almost every field right from banking, healthcare, education, locomotion to defense, it shall not be forgotten that AI just like any other decision making entity may make uninformed decisions causing harm at times. Criminal liability mechanism should, in such cases, be strengthened by introducing concepts such as e-person (and bestowing legal personality to the AI) enabling it to be sued in a court of law. AI can also be granted some form of remuneration in the form of monthly salary. No matter how obnoxious the foregoing sentence may sound, such financial arrangement plays a crucial role when an AI has been sued in a matter where damages have been prayed for. Such monthly allowance may not have any other utility and is not comparable to remuneration granted to a living person, yet may potentially solve legal predicament pertaining to damages/compensation for a misconduct/negligent act committed by an AI. Such monthly allowance or any other form of monetary remuneration (actually belonging to the AI) shall be credited to an account that may be used for paying damages to the opposite party on behalf of the AI for any harm caused by it.

IV. Socio-Legal Consequences of AI

AIs pose other socio-legal concerns relating to privacy and employment laws.

[7] *M.C. Mehta v. Union of India*, 1987 S.C.R. (1) 819

Since dependence on AI is directly proportional to virtual handling of sensitive information belonging to individuals, robust data privacy laws taking into consideration- the latest scientific development, become significant. However, data privacy laws shall not affect AI's autonomy as that would deprive AI of its utility. Therefore, law and science in this regard shall not overpower instead must complement each other. The scientific advancement is also replacing humans with AIs in conducting basic decision making tasks. Unlike criminal and privacy law, there is hardly any legal development in the field of employment laws from this perspective. There is need for legal development to keep up with scientific evolution.

V. RIGHT TO PRIVACY AND AI

India other than China and United States of America, is a leader in global AI research and initiative[8]. AI is instrumental not only in the defense and automobile sector but also assists in virtual monetary transactions. The technical revolution has diverted people from standing in bank queues, relying on the paper based transactions such as drawing a cheque or sending a money order, moving from one desk to another in search of a helpful banker, to the omnipresent, ever-helping banker that we often carry with us everywhere we go such as on a smart phone. The smart phone uprising has made us dependent on it for plethora of tasks such as making or receiving payment. Payment gateways have eased transactions, where everything can be done with a click. This ease must be attributed to AI. AI, however, just like our erstwhile human banker, possesses sensitive information pertaining to us, that creates a doubt in many minds as to whether such information will remain safe with the AI? Of course, the human banker shall not be looked upon as an ideal and he/she are vulnerable to data leakage as well, but pinning the blame upon a human and subsequently suing him/her for consequent damages is not a compound task; same cannot be

[8] Rishi Iyengar, *These three countries are winning the global robot race*, CNN BUSINESS, (Aug 21, 2017), *available at* https://money.cnn.com/2017/08/21/technology/future/artificial-intelligence-robots-india-china-us/index.html (last visited on Aug. 13, 2019).

said in a comparable scenario involving an AI. Moreover, there remains a constant fear in trusting a non-human entity with sensitive information. This dilemma may be countered by building strong data privacy laws vis a vis AI. A leaf can be turned out from European Union's chapter which boasts having the strongest data protection laws surpassing international standards. Article 8 of the E.U. Charter on Fundamental Rights is quoted below:

> 1. Everyone has the right to the protection of personal data concerning him or her.
>
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
>
> 3. Compliance with these rules shall be subject to control by an independent authority.

Inspired by the aforementioned aspiration (under Article 8) the General Data Protection Regulation (E.U.) 2016/679 ("GDPR") was implemented by the E.U. on 25th May 2018. The essential features of GDPR are as follows:

a) Extra territorial jurisdiction: Privacy shall be guaranteed in processing data of any natural person regardless of his/her residence or nationality.

b) Free flow of Data: Right to privacy of an individual shall be harmonized with their freedom to process information and shall not act as a hindrance to free flow of data between member States.

c) Strong systems: The Regulations acknowledge the heavy dependence on technology and recommends strengthening of data protection systems which allows every natural person to remain the owner of his own data.

d) National laws: Member States shall make efforts to incorporate the Regulations into their national legal systems.

e) Transparency: National laws shall ensure that there is transparency in data handling and processing by public and private enterprises

f) Supervision: Supervisory authorities shall be established to ensure that data is handled with care and remains unsusceptible to leakage, amongst others.

Even though the Regulations are coherent and deals with data protection seriously, there are several provisions that attack AI development viz; *Right to Consent* that places onus on the data controller to prove that the owner of data consented to his data being handled by such data controller; *Right to Erasure* that ensures that the data belonging to the individual be erased not only from the system of data controller but any other associated or linked entity that may also be in possession of such data, as soon as the data owner withdraws his consent; *Right to Data Portability* that allows the data subject (owner) to erase or transmit his data to other controllers- this provision is extremely beneficial for the customers owing to the ease of data transaction; it also leads to data parity however, it may result to losses to AI company that spend handsomely on data collection processes, negatively influencing AI development; and lastly, *Right to Explanation* that allows the data owner to intervene in the data collection process and seek explanations from the data controller limiting AI autonomy; but if the AI is not allowed to make decisions without recurring interventions, it deprives it of its very potential[9].

The underpinning purpose of AI is to ease human activities. AIs are not simple machines that require continued human supervision but possess the ability to decide and act. Under the garb of data protection and privacy, AI may become subject to more than required human intrusion that reduces its value depriving it of its very intrinsic ability.

VI. BLACK BOX AND PRIVACY LAWS

One compelling issue doing rounds in United Nations is the retrieval and use of black box information by police in the event of automobile crash. In a matter

[9] *See generally* Mathew Humerick, *Taking AI Personally: How the E.U. must learn to balance the interests of Personal Data Privacy and Artificial Intelligence*, 34 SANTA CLARA HIGH TECH. L.J. 405-413 (2018).

before the Florida State Court- *State of Florida v. Worsham*[10], similar question pertaining to privacy infringement vis-à-vis black box information was posed. In this matter, the respondent was involved in a car crash. While investigating the crash, the police personnel retrieved black box information and found out that he was driving under the influence of alcohol. The respondent claimed that such information should not have been retrieved without his consent. The Court in its majority view (2:1) held that since the police was undertaking search, it wasn't mandatory for them to obtain the consent of the respondent. Hence, privacy laws with regard to software or AI must be weighed carefully. Some passes with privacy shall be allowed in the interest of public, however, care must be taken that such pass does not turn into infringement.

VII. PERSONAL DATA PROTECTION BILL, 2019

The Committee chaired by Retd. Justice B.N. Srikrishna paved way for the domestic data protection laws. It regulates data handling and processing by the Government as well as companies who may be entrusted with such tasks. Bookmarking certain data as sensitive persona data, the proposed legislation mandates the entities handling or processing data to make sure that all security protocols are in place. The Bill also directs setting up of a grievance redressal mechanism to deal with data related complaints and queries of persons. The rights of persons under this Bill includes the *right to know* if their data is processed, *right to get their private data corrected* and *right to discontinue exposure* of their private data. The Bill does stand relevant for software programs, more importantly AI (in the context of this article) and its relationship with privacy laws, yet falls short of resolving and concretizing criminal liability of AI.

VIII. LABOUR LAWS AND AI

The distinctive feature of AI that differentiates it from other machines is its ability to make decisions without human intervention, as a result of which, AI is extensively utilized in factories- in manufacturing products, automatic cars etc.

[10] No. 4D15-2733 (Mar. 29, 2017)

This creates a potential fear amongst people that AI may overtake their employment opportunities- such as a cab driver in a German town, (Germany is one of the countries showcasing cutting edge technologically equipped automatic cars). With development of AI, automatic cars may become accessible to masses and German roads may see automatic cabs on a large scale. This may potentially drive the cab drivers out of business or at least instill the fear of same. This quandary perhaps touches the public more than the other two predicaments related to Criminal Liability and Privacy. Sadly, this pugnacious concern occupies the back burner and while there is certain progresses in shaping Criminal Liability and Privacy related laws vis a vis AI, not much has been done in the labour sector to guarantee that human held posts are not substituted by AI on a large scale or to sensitize public about AI.

What is needed at this juncture is that *firstly*, there should be public awareness regarding AI, its benefits more than the manipulated perils that has a tendency to make people antipathic to the concept and evolution of AI and *secondly*, a paradigm shift in skills set of people is warranted that allows people to master high level tasks other than the menial decision making that can be delegated to the AI; employers may play a key role in training their ground level employees in tasks such as AI handling, maintenance and supervision such that the society may benefit from the AI without suffering its calamitous repercussions.

IX. CONCLUSION

"By far the greatest danger of Artificial Intelligence is that people conclude too early that they understand it"

The profound wisdom quoted by Eliezer Yudkowsky may be interpreted both ways. Development in the field of AI shall be accompanied with complimentary development in laws regulating it. Scientific developments with legal lacunas pose a threat to the society and if the idea is to co-exist then one sided development is hazardous. Any product of utility that remains unsupervised may be exploited for illegal activities ultimately, placing the society at risk. The European Union is perhaps the only association that has started with legal

development in the arena of AI, mainly because the European countries are accelerating their dependence upon AI. Such legal development is next to negligible in countries such as U.S.A and absent in most developing Asian countries. It is also apposite at this point of technical revolution to educate the masses about AI and introduce it, not as villainous conquerors but as assistants and accomplice of humanity. Sci-fi movies are the sole source in creating impression about AI in minds of laymen and such contorted image must be eradicated.

AI is an unavoidable phenomenon. Human mind is creative and will always invent a product of efficacy. The Industrial Revolution saw the rise of machines and similarly, this era may be termed as Technological Revolution. Instead of opposing AI, every society must welcome it with open minds. Before making uninformed conclusions about AI, it is crucial for us to study the subject impartially. AIs have been developed to promote the cause of humanity and in order to do so successfully, AIs shall be regulated (like human beings are); which is why legal development is indispensable even in pure science

EXPLORING 'LEGAL CAPACITY' OF PERSONS WITH DISABILITIES IN INDIA

Isha Khurana*

ABSTRACT

Every human is born with 'inherent dignity' and 'individual autonomy'. 'Individual autonomy' which includes but is not limited to right to make one's own decision and it encompasses within its ambit the 'right to take risks'. Countries all over the world, with firm belief in 'protectionist policies'; have neglected this Legal Capacity of Persons with Disability, especially of persons with intellectual and developmental disability. United Nations Convention on Rights of Persons with Disabilities make a paradigm shift with recognition of Legal Capacity along with support needs and urges the member nations to incorporate the same. The author has tried to explain the concept of Legal Capacity as incorporated in United Nations Convention on Rights of Persons with Disabilities along with the General Comment No.1. Thereafter, an attempt has been made to map the incorporation of the legal capacity principles along with support service, both in letter and spirit, in the recent legislations of India namely, Rights of Persons with Disabilities Act, 2016 and Mental Healthcare Act, 2017. The author also wishes to bring forth the dilemma faced while recognizing the legal capacity of mentally disabled.

I. INTRODUCTION

TIn the year 2006, United Nations adopted the first international treaty exclusively dealing with the human rights of the disabled in the form of United Convention on Rights of Persons with Disabilities (hereinafter 'CRPD'). The CRPD was a product of intensive political and legal background struggle and was negotiated in a span of four years by the working group, which included

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member states, regional organizations along with the organizations representing the disabled groups.

Prior to enactment of CRPD, there was a vacuum with respect to the rights of the persons with disability as there was no explicit mention of the rights, obligations, disadvantages and vulnerabilities faced by them in the hard law treaties, this was further supplemented with the non-binding character of the soft law.[1] This led to setting out of a normative framework for promotion and protection of the human rights of persons with disabilities. CRPD being a holistic human rights treaty combines civil and political rights provided by anti-discrimination legislation with the full spectrum of social, cultural and economic measures conceded through the substantive equality measures of inherent dignity and self-determination.

Respect for 'inherent dignity', 'individual autonomy' including the freedom to make one's own choices, and independence of persons[2] along with full and effective participation and inclusion in society[3] are the guiding principles of CRPD. We have embarked on a journey of recognizing the people with disability as 'subjects' with legal rights rather than mere 'objects' of charity and medical treatment. In this journey[4]from a Medical Model[5] to a Human Rights

[1]International Year of Disabled Persons, 1981; International Decade of Disable Persons, 1982-1991; World Programme of Action, 1982; Declaration on the Rights of Mentally Retarded Persons; United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993.

[2] *See* CRPD, art. 3(a)

[3]*See id.*, art. 3(c)

[4]Initially persons with disability were treated merely as objects. This was followed by a transition to social model, wherein social constructs were considered to be an impediment rather than the medical condition of the disabled person. In CRPD, we have recognized the human rights model, which considers persons with disability as subjects as well participants in the recognition of the rights of disabled persons, *see infra*, para. 2.3 for details.

[5] Medical Model of disability "reduces" persons with disabilities to their impairments and treats them as mere objects of charity and pity. Under this model the discriminatory or differential treatment is seen as a norm and there is exclusion further normalized with medical incapacity approach to disability.

Model[6] of disability, we have acknowledged and recognized the inherent rights of people with disability, including the freedom to make their own choices.

Right to equality and non-discrimination is a fundamental principle of International Human Rights Law; it solidifies the idea that all humans are born equal and irrespective, of their status or affiliation to any group they are beholder of same set of rights. Various scholars have debated the inclusion of right to equality and non-discrimination as *jus cogens* norm.[7]

The equality principle is a basic, indispensable human rights principle, which is preemptory for enforcement of other rights. Equal recognition before the Law means non-discrimination in the policies and regulations of the State. The Convention explicitly mentions them as guiding principles[8] and subsequently as rights[9].

Various International human rights treaties such as, International Covenant on Civil and Political Rights,[10] Convention on the Elimination of All Forms of Discrimination Against Women,[11] Convention on Rights of Child[12] *et al.* also talk about equality principle in detail. All these documents categorically mention that Right to Equal Recognition before all is operative 'everywhere' and there are no permissible circumstances in which digression[13] from the same is acceptable. Despite them, the members of the disabled community have continued to face barriers in their participation as members of the society[14] that

[6] Human rights model recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It goes on to stress the point that disability is just one of many layers of disability. Disability is not an identity of a person. It further reinforces that human rights are interdependent, interrelated and indivisible in nature.

[7] Inter-Am. Ct of Hum. Rts., Advisory Op. OC-18/03 of 17 September 2003, Juridical Condition and Rights of Undocumented Migrants, para. 101

[8] *See* CRPD, s*upra* note 2, art. 3

[9] *See id.*, art. 5

[10] *See* art.16

[11] *See* art. 15

[12] *See* art. 2.

[13] No person can be deprived of the Right to Recognition before law neither can they have a limited identity in the eyes of law nor this provision is not subject to progressive realization.

[14] *See* CRPD, s*upra* note 2, preamble, para (k)

led to formulation of the Convention. They are the bedrock for all other principles and rights, which have been further elaborated upon, in the embodied provisions of the Convention.

It is pertinent to note that the threshold right to exercise all rights as enshrined in the Convention is 'right to legal capacity'. Legal capacity is a pre-requisite for exercise of all other rights such as right to equality and non-discrimination. Article 5 and 12 are interconnected as the enjoyment of equality before law necessarily includes enjoyment of legal capacity by all persons; irrespective of disability.

Also, the realization of legal capacity is dependent upon achievement of various other rights, such as Right to Health[15]; Right to Independent Living[16] and Accessibility[17] to name a few. The author wishes to explore the ambit of article 12, in this attempt it is expressed at the outset that many other provisions of the Convention may overlap or be inter-related in the understanding the true impact of legal capacity.

CRPD and the Indian legislative framework relating to disabled, both seek to outlaw disability-based discrimination by prohibiting both active and passive discrimination against individuals with disabilities.

Erstwhile Indian legislation on Rights of People with Disabilities 1995 was majorly enacted on an affirmative platform. With the adoption of CRPD in 2006 by United Nations and India being one of the signatories to the same, there was a need for neoteric legislation. Thereafter, a new legislation titled as the Rights of Persons with Disabilities Act, 2016[18] was enacted. It was categorically acknowledged in the legislation that the conceptual understanding of the rights of persons with disabilities has become clear and there has been a worldwide change in the approach to handle issues concerning people with disability.[19]The 2016 legislation is based on the premises of strong anti-discrimination and

[15] *See* CRPD, s*upra* note 2, art. 25
[16] *See id.*, art. 19
[17] *See id.*, art. 9
[18] Act No. 49 of 2016.
[19] *See id.*, statement of objects and reasons.

human rights basis. It puts forth the constitutional premise of furthering substantive equality by way of positive discrimination in the form of reservation for persons with disability.

The preamble to the 2016 legislation mentions the guiding principles of the Convention and reaffirms that the enactment is specifically to give effect to the Convention and the matters connected or incidental to it. There is explicit mention of respect for inherent dignity, individual autonomy including freedom to make one's own choices and independence of persons[20], which as discussed above is achievable through recognizing legal capacity and providing support for exercise of the same.

Since CRPD had recognized that People with Disabilities also include people experiencing various intellectual and developmental impairments along with mental retardation, the Mental Health Act of 1987 was also repealed by Mental Healthcare Act, 2017. The new legislation of 2017 aims at the protection, promotion and fulfillment of rights of people with mental illness during the delivery of mental healthcare and services.

Earlier legislations relating to mentally ill persons have always been focused on 'laws relating to mentally ill' but the 2017 legislation marks a shift from this approach and talks about mental healthcare. It departs from the charity model and recognizes the right of self-determination thereby paving way for exercise of legal capacity. Various provisions have been devoted to nitty-gritties of non-discrimination during treatment services and insurance thereby concreting the equality and dignity of rights. Enhancing and building capacity through support services has also been majorly stressed upon.

The author wishes to explore the concept and meaning of Legal Capacity in tune with art. 12 of CRPD read with general comment no. 1. Thereafter, attempt will be made to explore Indian legal position with respect to the concept of Legal Capacity. An analysis of the relevant provisions of present day disability laws in India, namely Rights of Persons with Disability Act, 2016 and Mental Healthcare Act, 2017 will be done for the same.

[20] *See id.*, preamble (a)

II. CRPD, ARTICLE 12: MEANING AND SCOPE

Marginal heading to article 12 reads as 'Equal recognition before the law' and the roots for the same can be traced to the guiding principles[21] of the Convention read along with article 5. It starts with reaffirming the right to recognition before the law for persons with disabilities and goes on to talk about legal capacity along with accessibility principle. The safeguards have also been laid down in the provision along with the clause for financial autonomy.

A. Meaning

Article 12, paragraph 1, guarantees that every human being possesses a legal personality and respects the same. In other words, it recognizes the 'personhood' of individuals and reaffirms their dignity.

Paragraph 2 of the provision acknowledges the right to enjoy legal capacity on equal basis with others. Legal capacity here in very broad terms means the legal standing to be a holder of rights and duties along with the legal agency to enforce them and create legally binding relationships. It talks about Universal Legal Capacity and recognizes a person's rights, free will and preference to make their own decisions, including the right to take risks and make mistakes.

Paragraph 3 illustrates it further by imposing obligations on State Parties to ensure accessibility to support to people with disabilities to promote effective exercise of their legal capacity. It urges the State Parties to facilitate supported decision making rather than substituted decision making.

Paragraph 4 outlines the safeguards that the State Parties must undertake for exercise of Legal Capacity. These safeguards should be in place to provide protection from abuse of "best interests" determinations rather propagating the "best interpretation of will and preferences"[22]. Explicit mention has also been made to protect those who rely on support of others for their decisions from 'undue influence'.

Access to property and finance has traditionally being denied to those with

[21] *See* Inter-Am. Ct of Hum. Rts., *supra* note 7

[22] General Comment No. 1 to CRPD (2014) *available at* https://daccess-ods.un.org/TMP/2758516.66927338.html

disabilities, paragraph 5 talks about support to exercise the legal capacity in these matters, in accordance with paragraph 3 of the article 12. State Parties should take mandatory legislative, administrative, judicial and other practical measures to guarantee realization of these rights. A parallel can be drawn from article 15 Convention on the Elimination of Discrimination against Women, which prohibits discrimination in exercise of authority over property and finance based on gender, similarly disability should not be a basis for such discrimination.

The core edicts that emerge from Article 12 are:

a) Recognition that persons with disabilities are equal before the law and possess legal capacity on an equal basis with others.

b) State Parties are under an obligation to provide support for effective exercise of the legal capacity and put in place safeguards to ensure that the exercise of the will and preference is devoid of undue influence and coercion.

c) Financial and property rights of persons with disabilities are at an equal platform with that of others.

An analysis of the provision highlights that underlining theme for article 12 lies in recognizing the legal capacity of people with disabilities, which is at par with 'everyone', and emphasizing that all the State parties should acknowledge and take positive steps to ensure effective realization of the same. Self-direction is at the core of the provision with a requirement to support decision-making and a move away from substituted decision-making.

B. Concept of Legal Capacity

Though legal capacity has found its mention in various International law documents and soft laws in disability regime, it has been noted not much international attention was given to inherently discriminatory regimes of legal capacity along with incapacity due to the paternalistic attitude of States to the issue of disability. The disability community also was more focused on questions of discrimination, i.e., equal protection of the law rather than on equal

recognition before the law.

The Convention details the rights that all persons with disabilities should enjoy, and the obligations of States and other actors to ensure they are respected including recognition the Right to Legal Capacity.

There is an explicit mention, recognition and reaffirmation of Legal Capacity of persons with disabilities under Article 12, paragraph 2. In recent times, there has been an increasing awareness about the negative impact of denial of legal capacity thereby leading to serious intrusions on personal integrity. Article 12 explicitly states that persons with disability have right to make their own decisions and further imposes obligations on State parties to ensure that barriers to effective decision making are removed so as to further full, effective and inclusive participation in the society which in turn will ensure *de facto* equality.

Legal capacity includes both, to be 'holder of rights' (Legal Standing) and 'actor under law' (Legal Agency).[23] 'Holder of rights' implies that a person holds certain rights and the legal system is under obligation to protect those rights. Whereas an 'actor under law' means that the person is bound by law and has power to engage in transactions and create, modify, amend and end legal relationships.

Legal capacity enables a person to sculpt their own universe- a web of mutual rights and obligations entered into with others[24], which are devoid of coercion. It encourages uninhibited interactions. It encompasses daily errands such as operating a bank account[25], purchasing groceries for oneself[26], viable access to

[23] *See supra* note 22

[24] *See* Gerard Quinn, *Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD*, HPOD Conference, Harvard Law School, Feb. 20, 2010 *available at* http://www.nuigalway.ie/cdlp/documents/publications/Harvard%20Legal%20Capacity%20gq%20draft%20 2.doc (last visited Aug. 15, 2019)

[25] *See* Reserve Bank of India (RBI), *RBI had issued a notification*, DBOD. No. Leg BC. 91 /09.07.005/2007-08, dated Jun. 4, 2008 *available at* https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=4226&Mode=0 (last visited Aug. 15, 2019), whereby mandating all scheduled commercial banks of providing banking facilities to the visually challenged. This was done in the pursuance of the order by Honorable Court of Chief Commissioner for Persons with Disabilities in Case No. 2791/2003. Prior to this RBI notification the banks were not inclined on opening accounts

internet[27] and information, rowing your own wheel chair to visit a medical practitioner[28] and so on. This is a bright way to affirm and enjoy the freedom of making one's own life decisions, which has been denied due to the paternalistic attitude of States to the issue of disability.

On the flip side, legal capacity has also been employed as a shield against the decisions taken against or 'for' people by third parties[29]. Both these aspects together aid in exhibiting the 'free will' of the persons concerned.

Nonetheless, it has been observed that the fact of having a disability often results in a presumption of incapacity, based primarily on the status approach, leading others to take decisions based on the "best interests" approach.[30] This is evident

solely for visually impaired persons. Despite of this notification, bank has tough rules for issue of cheque book and various procedures for issuance of the same. For further reference, *see generally Procedure for Account of Illiterate/Blind Person*, HDFC BANK.COM, *available at* https://www.hdfcbank.com/aboutus/citizens_charter/Account_of_Illiterate_Blind%20Person.htm (last visited Aug. 15, 2019)

[26] Accessibility has been a major concern. People with locomotor disability face various impediments due to non-accessible public transport or non- existent ramps to wheel their own chair. In groceries stores there is space crunch to move the wheelchair or to walk with support. Thanks to the online delivery services, buying groceries for disabled people has actually eased of but that does not absolve the state and citizens from the responsibility to make infrastructure accessible.

[27] Access to Internet has been recognized as a Human Right and further; CRPD also recognizes it as an invaluable component of inclusive growth. Internet can be made accessible to persons with disability by ensuring infrastructure support in terms of availability, culturally and affordability. Technical advancements should be encouraged wherein software for visually impaired people can be created, smart assistant or deaf and dumb people can be made available.

[28] *See id*. However, it is important to mention that people with disabilities especially intellectual and developmental disabilities have been presumed to incompetent to make their own medical decisions. It is based on the premise that they are not judge of the 'best interest'. However, this 'best interest' theory *per se* is very problematic due to its vague meaning.

[29] *See* RBI, *supra* note 25. It has been observed that there is a blatant abuse of the capacity to make choices and the decision-making power based on the label of 'mentally ill' and the same is entrusted to the third person based on the 'best interest'. This negates the legal capacity of the person suffering with intellectual disability. The Punjab and Haryana High Court had negated the legal capacity to make reproductive choices of the mentally ill patient. Though this was overruled by the Supreme Court in appeal in *Suchita Srivastava* v. *Chandigarh Administration*, Civil App. No. 5845 of 2009

[30] *See id.*

especially, in the mental health legislations where the focus is on admission and medical treatment paying less or no heed to the consensus based approach respecting the person's will and preference. This in turn leads to loss of control and self-esteem, in short there is a social and legal harm resulting from a judgment of incapacity.[31]

With this backdrop in view, it is apropos to mention that article 12 is one of the basic, non-derogatory and non-progressive right, enshrined in the Convention.

B.1. Distinction between Legal Capacity and Mental Capacity

At this juncture, it is important to stress that legal capacity and mental capacity are two different concepts. Legal capacity[32] is the ability to hold and exercise rights and duties, to create legally binding decisions. Whereas, mental capacity[33] is the ability to make decisions, which are very subjective in nature and vary from person to person and are dependent on environmental, social and economic factors. This mental capacity can be termed as 'competence' also.

During the negotiations of the Convention, legal capacity was one of the most controversial articles especially for people with psychosocial and intellectual disabilities or significant communication difficulties. The conflict was on whether certain categories of persons with disabilities should just be holder of rights but not permitted to exercise them.[34] The concern was majorly as to how

[31] *See generally* MICHAEL BACH, AND LANA KERZNER, A NEW PARADIGM FOR PROTECTING AUTONOMY AND THE RIGHT TO LEGAL CAPACITY ONTARIO, LAW COMM. OF ONTARIO, 2010 *available at* https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf

[32] There have been three traditional approaches to legal capacity a) Status approach, b) Outcome approach and c) Functional approach. These approaches are closely linked to the social stigma and labeling. General Comment no. 1 has strongly recommended that the member states should do away with exclusive reliance on these approaches.

[33] Mental capacity is majorly linked with competency to make decisions. This is a realm of psychiatry and various psychiatric scholars have suggested use of biomarkers to assess the competency of a person thereby giving them capacity to make their own choices, though this comes across as the legal capacity is dependent on the competence of a person but a complete compartmentalization of both the concepts is not practical viable also.

[34] AD HOC COMM. ON A COMPREHENSIVE AND INTEGRAL INTERNATIONAL CONVENTION ON THE PROTECTION AND PROMOTION OF THE RIGHTS AND DIGNITY OF PERSONS WITH DISABILITIES, REPORT OF THE AD HOC COMM. ON A COMPREHENSIVE AND INTEGRAL

will they fit in the universal concept of legal capacity and avoid hierarchy[35]. However, it was argued that legal incapacity is not solely attributable to people with disability and therefore, selective legal capacity will lead to discrimination.[36] After a lot of deliberations it was finally decided that all people irrespective of their disability have legal capacity.

Under article 12, it was unanimously agreed among the working group that perceived or actual deficits in the mental capacity must not be used as justification for denying legal capacity.[37] Meaning thereby that mental capacity *per se* cannot be a reason for discrimination in exercise of legal capacity of an individual rather support should be provided for exercise of legal capacity.

To illustrate the mental capacity of a person does not *per se* deprive an individual of the legal capacity to enjoy reproductive health and make reproductive choices.[38] Legal capacity being solely dependent on mental capacity negates the 'will and preference' thereby impinging on the 'dignity and autonomy' of that individual. Further, a study on electoral behavior of schizophrenic patients bears out that the mental disorder simply has not operated as a ground for disenfranchisement.[39] The study also highlighted that the control

INTERNATIONAL CONVENTION ON THE PROTECTION AND PROMOTION OF THE RIGHTS AND DIGNITY OF PERSONS WITH DISABILITIES ON ITS FIFTH SESSION, 5th session, Jan. 24 – Feb. 4, 2005, *available at* http://www.un.org/esa/socdev/enable/rights/ahc5.htm (last visited Aug. 17, 2019); Egypt has made a reservation that the persons with disabilities are the holders of right but cannot effectively exercise them under the Egyptian Law *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=_en&clang=_en (last visited Aug. 17, 2019)

[35] There is a social hierarchy observed which finds its genesis in gender norms, status and physical deformities. Women and children are considered to be at a more vulnerable position and suffer from multiple inter-sectoral disabilities, same as been recognized by United Nations Convention on Rights of People with Disabilities in article 6 and 7 respectively.

[36] *See* Amita Dhanda, *Universal Legal Capacity as a Human Rights* in M. Dudley et al (eds.) MENTAL HEALTH AND HUMAN RIGHTS, VISION: PARAXIS AND COURAGE (2012)

[37] *See supra* note 22

[38] *See* CRPD, art. 25 recognizes the right to health for all persons with disabilities including agency to make treatment and reproductive decisions. Supreme Court of India also upheld the same in *Suchita Srivastava* v. *Chandigarh Administration*, Civil App. No. 5845 of 2009.

[39] *See* A. Ramanathan, *Electoral Behavior of Schizophrenia Patients*, 2(1) IND. J. PSYCHOL. MED. 51 (1980)

group of ordinary electors was not significantly better than the electors with schizophrenia in its political knowledge or political participation.

C. Access and Need of 'Support' to exercise Legal Capacity

Initially, disability was viewed from the perspective of medical sciences; therefore 'medical model' was used to determine the capability of a person. The medical model's primary aim was to reintegrate the person with disability into mainstream and this required change in the person with the disability. It was believed that the root cause of the hardships and inconvenience faced by people with disabilities results from their impairments. [40]

Subsequently, 'social model' was developed in critique to the medical model. Social model merely explains disability as all things that impose restrictions on people with disability in exercise of their basic rights. These restrictions are impeded by the social, economic or legal structure of the society on the individual.[41] Both these models rest on the premise that while making any decision, the 'best interest' of the person with disabilities should be of paramount consideration. The 'best interest' approach entails delegating the decision-making power to others, subject to guardianship or wardship legislations, thereby fructifying 'substituted decision-making'.

Convention for Rights of People with Disabilities is based primarily on the 'human rights model'[42]. One of the core principles of human rights model is person autonomy that is the legal capacity to make its own decisions. The exercise of this legal capacity might at times require support from the State and

[40] *See generally* JAYNA KHOTARI, THE FUTURE OF DISABILITY LAW IN INDIA (2012)
[41] *Id.*
[42] The human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics. It places the individual at the centre in all decisions affecting him/her and, most importantly, locates the main "problem" outside the person and in society. The "problem" of disability under this model stems from a lack of responsiveness by the State and civil society to the difference that disability represents. It follows that the State has the responsibility to tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons. For further reading refer: Gerard Quinn, Theresia Degener*et al.* *The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 14 (United Nations, New York and Geneva, 2002)

the society. Support in decision-making process, which broadly involves infrastructural, institutional, administrative, legislative and judicial support. This support includes things that are as basic as accessibility of documents in braille to having ramps for ease movement for people using wheelchairs.

Article 12 clause 3 of the Convention mandates the State parties to make provisions for adequate support in exercise of legal capacity. It proposes a change in approach by advocating 'substituted decision-making' in place of 'supported decision-making'. It also proposes to promote training of persons providing support for decision-making.

"Support" is a broad term that will encompass both formal and informal support arrangements, of varying types and intensity.[43] Supported decision-making respects the rights, will and preference of the person. It has been defined as:[44]

> "a series of relationships, practices, arrangements and agreements of, more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions that the person chooses to make."

Aristotle has once remarked that "Man is by nature a social animal" keeping that in mind the idea of a totally independent, autonomous human being is alien. Lives of human beings are interconnected and intertwined with each other. Therefore, support to in decision-making process is a part of ordinaries and hence should not be seen as an exclusive domain for people with disability.

Support maybe required from individuals and state in different aspects to exercise their legal capacity and may call for support in terms of communication, peer support, advocacy, and investigational support etc. but this support also includes measures to ensure 'universal design' and 'accessibility'.

For instance, in the matter of reproductive choices, let the individual make their own choices, only support should be provided for effective exercise of those

[43] *See* Dhanda, *supra* note 36

[44] Robert D. Dinerstein, *Implementing Legal Capacity under Article12 of UNCRPD: The Difficult Road from Guardianship to Supported Decision-Making*, 19(2) HUM. RTS. BRIEF (2012)

decisions. Every individual is entitled to their own decision, in order to effectively make a choice, there should be availability of information and that information should be readily accessible in all formats like braille, audio-visual and gesture-language to name a few. Mobility of an individual should not be restricted because of infrastructural design, there should be a universal design that ensures that it is accessible for all such as construction of ramps along with stairs for people with locomotor disability; tactile paths for visually impaired people; reserved spaces for wheelchairs in public transport; provision of handrails alongside stairs; lifts with wide access doors to name a few.

One of the major initiatives advocated as 'support' in decision making is 'advance directive'.[45] These directives are not limited to decisions relating to treatment issues but include broader perspective of life planning also. It has been observed that psychological effect of advance directive includes greater sense of control and longer periods of wellness. The State parties were at a liberty on whether to incorporate them or not in the domestic sphere.

In short one can summarize that supported decision-making recognizes:

a) Freedom to make one's own decision is a fundamental legal principle and should not be transferred to another individual.

b) Individuals are empowered to 'dignity of taking risks' provided they are balanced by proper information and awareness.

c) All individuals are dependent on others to a certain extent and hence are subject to influence.

Though, there may be circumstances and situations wherein some people who would like to exercise their right to legal capacity as mentioned under article 12(2), may not wish to avail the support services being offered via article 12(3) of the Convention.

[45]Fiona E. Morrissey, *Advance Directives in Mental Health Care: Hearing the Voice of the Mentally Ill*, 16(1) MED. L. J. IRELAND 21(2010)

III. CONTEMPORARY LEGISLATIONS ENABLING LEGAL CAPACITY AMONG PERSONS WITH DISABILITIES IN INDIA

N In the Indian context, equality within disability has found some ground but concept of legal capacity is still at infancy. The underlying theme of the legislation is the human rights approach to the entire narrative of disability and freedom. Right to make one's own choices based on will and preference, i.e., legal capacity is the very core of this approach.

Recent Indian disability legislations, namely, the Rights of People with Disabilities Act, 2016, (hereinafter 'RPWD Act'), and the Mental Healthcare Act, 2017, (hereinafter 'MHC Act'), have recognized and incorporated provisions for the legal capacity of persons with disabilities. The author has attempted to analyze if the spirit of legal capacity has been captured in true sense in the new disability legal regime in India.

A. The Rights of People with Disabilities Act, 2016

There has been recognition of legal capacity in the preamble[46] to the enactment and it has been recognized in dealing with the property and financial matters[47] but this capacity is not unlimited in its exercise. Positive obligations have been imposed on the appropriate government to ensure the enjoyment of legal capacity on equal basis with others in all aspects of life and also right to equal recognition before law.[48]

Legal capacity in the sense of holder of rights has been recognized and appropriate government has been mandated to ensure enjoyment of right to equality, life with dignity and respect for integrity, which is at par with 'everyone else'. [49] 'Everyone else' mentioned in the provision reflects the equality principle along with the non-discrimination principle. It advocates that there should not be any discrimination in the legal standing on the basis of disability. Non-discrimination is not unqualified in its exercise; appropriate

[46] As the guiding principles of the Convention are mentioned as the object and reason for the new legislation.
[47] *See* RPWD Act, sec.13(1)
[48] *See id.*, sec.13(2)
[49] *See id.*, sec. 3(1) and 3(4)

government can infringe the same for a legitimate aim.[50]

Implicit references have also been made to legal capacity in various provisions of the RPWD Act, by facilitating voting process,[51] ensuring access to justice,[52] recognizing the autonomy to make reproductive choice,[53] etc., by people suffering from disabilities.

However, at this point there is a need to know that there exists a distinction between Intellectual Disabilities, Mental Illness, and Mental Retardation. The same has been subtly referred and recognized in the Indian Legislations also. Intellectual Disability refers to hurdles experienced by people with learning, understanding, processing information and at times problem-solving. It is usually a birth defect and manifests itself it before adulthood. Support services can ease off the experiences associated with the disability. Mental Illness in turn affects the emotions, mood, perceptions and behavior and can be experienced at any stage in life irrespective of the intellect. It is inclusive of conditions associated with abuse or drugs and alcohol.[54] It can be corrected through appropriate medication and care. Mental retardation is a condition of incomplete or arrested development of the mind characterized by sub normality of intelligence.[55] One can also say that intellectual disabilities may also include mental retardation.

It is important to mention that RPWD Act, 2016 deals with intellectual disabilities[56] and therefore, the reference to 'people with disabilities' in the legislation also refer to people with intellectual disability. By necessary corollary, it means that the legal capacity with people with intellectual disability is also recognized under section 13 of the enactment.

[50] *See id.*, sec. 3(3)
[51] *See id.*, sec. 11
[52] *See id.*, sec. 12
[53] *See id.*, sec. 10
[54] *See* RPWD Act, sec. 2(s)
[55] *See id.*
[56] *See id.*

A.1. Support Services

There is a growing demand for accessible and effective support needs in order to ensure a fruitful exercise of right to legal capacity. It is a basic right to demand support in order to make well informed and reasoned choices and the obligation to provide them rests on public as well as private players, both alike. Support is necessary in the form of educational services, health services, accessibility, communication needs, insurance schemes, research and development, accommodation and mobility to name a few.

Ordeal experiences have been narrated by persons with disabilities highlighting the dearth of basic infrastructure for mobility like absence of ramps, low adherence traffic signals, neglect of zebra crossing, nonexistent footpaths or footpaths occupied by street vendors. Though public at large is sensitive about disabled person but there comes a charity thought whenever help is given to them. Independent living should be encouraged through support services so that this charity model does not make the disabled individual feel dependent.

Though on paper, insurance schemes should be non- discriminatory in its approach but an informal interaction with the insurance agents brings the grim reality to light. Persons suffering with disability especially with a history of intellectual and developmental disability are not provided with insurance on some or the other pretext. Since a blatant negation of the law is not possible, the refusal to provide insurance is in implied terms by quoting a very high policy premium or low coverage with high exclusions and so on.

Chapter III of RPWD Act recognizes the educational needs of persons with disabilities of both children and adults alike. It further imposes a duty on various educational institutions to provide inclusive education. It should always be borne in mind that certain children have higher support needs like children with autism or cerebral palsy and hence they need extra care and effort at initial stages and then maybe they can have inclusive education. Support services should also be provided for visually impaired students or those who have severe hearing and speaking disabilities.

Skill development and non-discrimination in employment has been recognized

in the Chapter IV of the Act. Support should also be extended in terms of communication and accessibility of information [57] and technological development should be encouraged for the same. However, it should be borne in mind that support must 'always' respect the rights, will and preferences of persons with disabilities and should not amount to substituted decision making. The fact that the support is being sought could not be a basis of denial of legal capacity.

A.2. Limited Guardianship

To have a smooth and effective transition from substituted decision making to supported decision-making, a legal fiction was created, whereby all plenary guardianship was converted into limited guardianship.[58] The Indian legislation on Rights of Persons with Disability has moved a few steps forward by envisaging and thereafter creating provision for limited guardianship [59] in circumstances where the person with disability is unable to exercise legal capacity. This however is preceded with the condition that adequate and appropriate support has been provided and the person is unable to make legally binding decisions.

Impliedly, section 14 provides for grant of limited guardianship by designated authority for mentally ill persons. This is further exhibited in the Form IV attached to The Rights of Persons with Disabilities Rules, 2017, wherein there is a requirement of signature of thumb impression of the person applying for the Certificate of Disability. An explicit mention has been made of signature/ thumb impression of the guardian of with respect persons with 'intellectual disability', 'autism', 'cerebral palsy' and 'multiple disabilities', thereby furthering plenary guardianship.

B. The Mental Healthcare Act, 2017

In India, there is a *lex specialis*, namely Mental Healthcare Act, 2017, which was enacted to protect and promote the rights of persons with mental illness. At

[57] *See id.*, sec. 42

[58] *See generally* Amita Dhanda, *Making up the Indian Mind on the Legal Capacity of Persons with Disabilities*, 14 J. NAT'L HUM. RTS. COMM. IND. 53 – 71 (2015).

[59] *See* RPWD Act, sec. 14

the very outset itself it has been mentioned that this new legislation is to harmonize the domestic legislation with the international commitments. With this 2017 legislation we have departed from our initial legislative attempts at 'law for mentally ill' to 'healthcare needs for mentally ill'.

Various provisions of MHC Act provide for the care and treatment of mentally ill persons. It goes beyond institutional care and imposes an obligation on the government to make available treatment facilities in the community.[60] There has been paradigm shift in this legislation wherein now access to mental healthcare has been considered as an essential[61]; authorities have been directed to maintain equity in insurance between mental and physical illness[62]; the need to reduce institutionalism is recognized[63] and many more. This laudable piece of legislation also gives due emphasis on Legal Capacity.

Section 4 of MHC Act talks about the capacity of people who are mentally ill, to make mental healthcare and treatment decisions which is a form of legal capacity. It is *prima facie* presumed as per the legal provision that everyone has legal capacity.[64] Bearing in mind the distinction between legal and mental capacity, it elucidates that every person shall be deemed to have mental capacity to take decisions regarding his own healthcare and treatment, irrespective of the disability[65]. Besides, it includes for the right to take risks and makes mistakes[66],

[60] *See* MHC Act, sec. 19
[61] *See id.*, sec. 18
[62] *See id.*, sec. 21(4)
[63] *See id.*, sec. 19
[64] Initial drafts of MHC Act had placed the burden of establishing capacity on the person with mental illness. The standing committee took note of it the disproportionate burden of establishing capacity on the person with mental illness and thereafter the burden was reversed.
[65] MHC Act, sec. 4(1) reads as: "Every person, including a person with mental illness shall be deemed to have capacity to make decisions regarding his mental healthcare or treatment if such person has ability to-
(a) understand the information that is relevant to take a decision on the treatment or admission or personal assistance; or
(b) appreciate any reasonably foreseeable consequence of a decision or lack of decision on the treatment or admission or personal assistance; or
(c) communicate the decision under sub-clause (a) by means of speech, expression, gesture or any other means."
[66] *See* MHC Act, sec. 4(3)

in other words it recognizes a 'dignity of risks'.

B.1. Support services

As has been recognized, in order to effectively exercise individual autonomy, support is essential at various levels. MHC Act echoes Irish essential principles of legal capacity[67], where supported decision-making has been envisaged and provisions for access to legal aid, information, communication, community living, to name a few have been mentioned. Minimal support forms a part of supported decision-making under the Indian legislative framework. Facilitated decision-making has found prominence in the provisions for admission and treatment of person with mental illness with high support needs[68]. These support services have been recognized as a right in the MHC Act.

A useful decision-making tool that has been incorporated in the MHC Act is 'advance directive'[69] for mental healthcare. 'Advance directive is a part of advance planning that has been encouraged in the general comment no. 1. This marks as an affirmative move towards collaborative relationships. Every person, except minor, is entitled to make an advance directive in writing as to how he wishes to be cared for and treated in situation of contracting mental illness. It further legitimizes the preference of the person to be appointed as 'nominate representative'[70] in accordance with the provisions of advance directive during the periods of incapacitation. The support in decision-making process can be envisaged in provisions for appointment of nominated representative for anyone except a minor.

[67] Irish essential principles of Legal Capacity propose that the legislation should envisage following levels of support:

a) Minimal Support, for example: to read information.
b) Supported decision-making; where an individual is supported by another individual to make decisions.
c) Facilitated decision-making; it refers to a situation where a representative has to determine what the individual would want, based on what they know about that person and on their best understanding of the individual's wishes.

[68] *See* MHC Act, secs. 89 and 90

[69] *See id.*, chap. III.

[70] Nominated Representative can be appointed by anyone who is not a minor in accordance with Sec. 14 of MHC Act.

Advance planning including advance directive, though considered to be an invaluable support services, are primarily based on the model of competence. It insinuates that the choices and preferences of an individual when they were competent should override the choices and preferences when incompetent. The UN committee expressly acknowledges that 'to plan in advance is an important form of support but it also impliedly makes a reference to 'competency of an individual'.

It is pertinent to note that though general comment no. 1 encourages supported decision-making but a complete replacing of substituted decision making has not been feasible for any nation. India has retained only in situations of high support needs where an individual has either recently threatened or attempted to cause bodily harm to him or others.[71] Further, health conditions such as coma or violent attacks require substituted decision-making.

B.2. Exclusive Reliance on Supported-Decision Making

Various scholars such as Scholten, Gather and Kong[72] have advocated that exclusive reliance on the supported decision-making has some adverse impacts[73] and therefore a complete forego of competence of an individual can act to the determinant. The same has been impliedly recognized in the CRPD also in the form of advance planning. Facilitative decision making as mentioned in the Irish

[71] *See* MHC Act, sec. 89

[72] *See generally* Camillia Kong, The Convention for the Rights of Persons with Disabilities and Article 12: Prospective Feminist Lessons against the 'Will and Preferences' Paradigm, LAWS 709 – 28 (2015)

[73] *See generally* Matthé Scholten and Jakov Gather, *Adverse consequences of article 12 of the UN Convention on the Rights of Persons with Disabilities for persons with mental disabilities and an alternative way forward,* 44(4) J. MED. ETHICS 226 – 33 (2018). The authors explain:

a) Autonomy is consisting of more than having the ability to live one's own life according to one's own conception of good and well-being at a given point of time.
b) Substantial impairment of decision-making capability will pose as an impediment to determine best-suited treatment alternative for the individual.
c) It aggravates the problem of undue influence. A fine balance of facilitating self-expression without compromising decision-making freedom has to be maintained while providing decision- making support.
d) It complicates the distribution of responsibility for treatment decisions.

principles of legal competency also reflect the same sentiment.

CRPD duly acknowledges the legal capacity of all individuals and thereafter also acknowledge that there can be situations wherein the person is not capable to express his will and preferences. The same has been brought adopted in MHC Act also in the form of advance directive, nominated representative and provisions for admission and treatment of persons with high support needs.

A blanket incompetence labeling has grave implications for the mental health law and works as an impediment in acknowledge and thereafter exercise of the rights[74] nonetheless a fair balance has to be maintained between competence and autonomy. Labeling of mental incapacity should be avoided at all material times as it has various adverse effects such as low self-esteem; rather through support, individuals should be encouraged to develop skills. It should be borne in mind that labeling of mental incapacity should not *per se* deprive an individual of legal capacity to make decisions. There is a distinction between legal and mental capacity and conflation of same should be avoided.

However, there can be situations where an individual is not competent to make healthcare decisions but that does not negate the capability to make choices pertaining to food and clothes. In short, one can have limited capacity that is competency to make certain decisions. To illustrate, persons housed in mental asylums are administered medicines based on their healthcare needs, sometimes by mixing it with food or other beverages. These persons are not even made aware of the intake of these medicines because of their lack of capacity to make these decisions. But they are capable of making choices pertaining to quantity of food, clothes they wish to wear, people they want to interact and so on. Though in some cases of mental retardation, individuals are not able even effectively exercise this capability.

Attempt have been made to shed off plenary guardianship in PWD Act, 2016 but the same has been retained in the form of 'nominated representative' and provisions for individuals requiring 'high support' needs in the MHC Act, 2017.

[74] *See generally* Brue J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1(1) PSYCHOL. PUB. POL'CY, AND L. 6-42 (1995)

This differentiation can be attributed to genre of disability as in circumstances of violent attacks or threat to life of an individual or another person; decision-making cannot be left at the discretion of the individual suffering from ailment. It is at this point that substituted decision-making also known as facilitative decision-making is employed.

This provides us with an opportunity to understand the need for these protectionist policies and also whether in the garb of the safeguards and protectionist policy if we are taking away the 'dignity to take risks' through MHC Act?

IV. CONCLUSION

The CRPD has embarked on the journey from medical/charity model towards human rights model. Our domestic legislative framework is also reflected of this paradigm shift. The concept of legal capacity has evolved in that backdrop. It aims to negate the social construct that certain groups of people lack capacity and autonomy to assert their will and preferences.

Article 12 of the Convention clearly sets out that individuals with disabilities irrespective of their disability must be presumed capable to have a legal standing along with legal agency. It further challenges the notion of substituted decision-making as a primary regime for persons with disabilities especially with mental and intellectual impairments.

Notwithstanding the legislative endeavours, the disability legal regime in the country is now reflective of this respect and dignity for autonomy and legal capacity. The RPWD Act along with MHC Act have incorporated provisions for the same and have given impetus on support services to enable effective exercise of legal capacity. Attempts have been made to undo the negative impact of labelling and presumed incompetence.

The RPWD Act has made affirmative steps in recognizing the legal capacity of the individuals and has also incorporated the concept of limited rather restricted

guardianship. MHC Act has inducted the provisions for autonomy but has retained the protective standpoint.

Owing to larger implications of exclusive supported decision-making along with diminished capability (in certain situations), India has not been able to completely forego the paternalistic attitude of the State. Certain provisions for guardianship and nominated representative and high support needs have been retained in the legislations. However, article 12 provides the impetus for exploring new methods through which persons with disabilities can be supported to make health care and lifestyle choices and the researchers and policy makers are exploring the same.

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