



**AMITY**  
UNIVERSITY  
DUBAI

# AMITY LAW JOURNAL

Volume 5 Issue 1 - June 2020



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## ***From the Editor's Desk***

It is an unprecedented time that the world is going through. Covid-19 has changed the lives of people across the globe and brought many things to a stand-still. However, one thing that has remained safe from the clutches of this pandemic is the exchange of ideas and dialogue on growth, learning and education. This experience is sure to leave a mark on many, but with a different perspective, we can try to make it a positive one. With this aim in mind, we are proud to present the eighth issue of the Amity Law Journal.

This Journal provides a window of opportunity to look into the multifaceted nature of law and helps one to appreciate the versatile depth of legal matters by exploring its application in different fields. Some of these fields include subject matter such as Distributed Generation Systems, Artificial Intelligence in Market Competition, The Aviation Industry in India, The Protection of Women and Children in International Armed Conflicts, Online Dispute Resolution, and various other matters related to law.

As the Law pushes forward and crosses new boundaries, the only constant thing during this time, is change. As a part of the community, legal or otherwise, it is imperative that we keep ourselves updated on the goings-on of the world around us. It is our hope that the Amity Law Journal provides to be a medium to facilitate the same.

The editorial committee acknowledges and thanks the authors from different countries, who, even during this challenging time have shown a tremendous amount of persistence, resolve and enthusiasm for research. This journal would not have been possible without them. The editorial committee also places its deep sense of gratitude to the reviewers for their perceptive opinions that have shaped the quality of the papers and enabled the journal to be brought out in its present form.

We hope that this Journal will prove to be an invaluable reference, an interesting guide, and a rich source of notice and direction, to personalities from legal and non-legal backgrounds alike.

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# Amity Law Journal

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VOLUME 5

JUNE 2020

ISSUE 1

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## CONTENTS

### ARTICLES

|  |                                      |    |
|--|--------------------------------------|----|
| Day Zero @ Cape Town   | ..Parna Mukherji                     | 1  |
| Effectiveness of AI in market competition  | ...Smita Tyagi                       | 10 |
| Triple Talaq in the wake of SC Judgement   | ...Md Akbar Khan                     | 17 |
| National Industrial court of Nigeria   | ... David Tarh-Akong Eyongndi        | 29 |
| Assets on Divorce in England and Nigeria A Comparative Study   | ... Adekile, Oluwakemi               | 37 |
| Distributed Generation System in India   | ...Dr. Uday Sankar & Ajay Chaurasia  | 47 |
| Online Revolution in Dispute Resolution  | ...Dr. Maduri Irene                  | 55 |
| New Era of Aviation Industry   | ...Sukanya K R                       | 64 |
| Cyber Crimes in India: Judicial Approach   | Dr. Prakash Chandra Mishra           | 70 |
| Protection of Women and Children in International Armed Conflicts: Laws, Loopholes and Possibilities | Saurabh Chaturvedi and Rachel Cosmos | 79 |

# **DAY ZERO @ CAPE TOWN: A CASE STUDY OF THE CRISIS, ITS ADAPTATION AND MITIGATION MEASURES**

*Parna Mukherjee\**

## **Abstract**

*From Stockholm to Rio and from Rio to Johannesburg, consistently the world has been struggling to translate the philosophy of Sustainable Development into a reality. The scientists, policy makers and environmental activists across the globe are constantly struggling hard in trying to find mitigating solutions to combat the adverse impacts climate change. However, the year 2015, was a year of ecological jubilation when the global leaders, citizens, policy makers, governments, ecological activists and the other stakeholders all joined together to applaud the signing of the Climate Change Accord in Paris. This multi-lateral and inter-governmental agreement gave the world a re-assurance that the global crisis of climate change and its consequential adverse effects would be effectively tackled by the world community to sustain the future of life on earth. In contrast to this optimistic and affirmative backdrop, many cities of the world, including India presently are already facing severe repercussions of global climatic change and its consequential ecological disasters. The South African city of Cape Town has been famous as “The Tavern of the Seas”, known for its Victoria & Alfred Waterfront, the Table Mountain, referred as Floral Kingdom and last but not the least had been the home of iconic leader Nelson Mandela. However, in 2017, the said city grabbed sudden attention of the global media for facing the severe threat of an impending water crisis, primarily caused due to last few drought years. This might lead to a possible “Day Zero” situation when the water supply in any location eventually runs out. This paper aims to highlight the situation of Cape Town’s water crisis as a case study. The objective is to analysis this case study from multiple dimensions and highlight its various implications on the existing local society, business groups and the government of Cape Town city, which were at the forefront of tackling the said crisis. The paper also aims to draw important lessons from the aforesaid crisis, its local policy adaptations as well as its management. It explores the possibility of applying these learnings of mitigations measures to any Indian settings for avoiding such crises in future to ensure sustainable human and natural environment.*

**Keywords:** *Adaptations, Climate Change, Day Zero, Mitigations measures, Water crisis*

## **I Introduction- Climate change its effects and the global crisis**

Today the world needs no introduction for terms like; Global warming and Climate change, Melting of Icccaps, etc.; these are one of the most commonly used terms in diverse contexts across the globe. However, historically the origin of climate change dates back to as early as 1824, when the French physicist *Joseph Fourier* described the Earth's natural "Greenhouse Effect"<sup>1</sup>; since then the world has travelled a long way; in understanding, analyzing and dealing with such ecological issues and now we are at a threshold of a full-fledged climate induced global crisis.

The Stern Review, 2006 projected the climate change progression, followed by the IPCC’s fourth Assessment Report, 2007, which established more credibly that the emission of GHGs is constantly rising and have reached 8 billion tons per annum and can be said to be one of the culprit of existing climate change crisis.<sup>2</sup>

To understand from the conceptual point and better clarity, we may consider the definition of climate change which is defined as “*Climate change refers to a statistically defined change in the average and/or variability of the climate system; this includes the atmosphere, the water cycle, the land surface, ice and*

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<sup>1</sup> Richard Black, “A brief History of climate change”, Science & Environment, Sep 2013, BBC News, available at <http://www.bbc.com/news/science-environment-15874560>

<sup>2</sup> Ibid

*the living components of the earth. The definition dose not usually requires the causes to be attributed, for example to human activity, but there are exceptions.”<sup>3</sup>*

Similarly, in other terms Climate Change has been defined as *“significant changes in global temperature, precipitation, wind patterns and other measures of climate that occurs over several decades or longer.”<sup>4</sup>* Thus, we can conclude that the climatic or scientific experts in most of the common definitions have attempted to highlight the climate change as an ecological variation and phenomena, which has substantial impact on the existing weather conditions and existing climatic parameters. Having a brief idea about the climate change; it will be pertinent to note the various changes which are being manifested in the ecology since last few decades across the globe. According to a research paper published in Nature, 2005 which explained the most common impacts of the climate change as *“Extremes of the hydrologic cycle (such as floods and droughts) are projected to increase with warmer ambient temperatures. Evidence is mounting that such changes in the broad-scale climate system may already be affecting human health, including mortality and morbidity from extreme heat, cold, drought or storms; changes in air and water quality; and changes in the ecology of infectious disease.”<sup>5</sup>* The NASA, as a most premier global scientific and research organization engaged in the climatic and atmospheric studies, reveals that *“People who study Earth, see that Earth's climate is getting warmer. Earth's temperature has gone up about one-degree Fahrenheit in the last 100 years. This may not seem like much. But small changes in Earth's temperature can have big effects.”* It further, stated that *“Some effects are already happening. Warming of Earth's climate has caused some snow and ice to melt. The warming also has caused oceans to rise. And it has changed the timing of when certain plants grow.”<sup>6</sup>*

Additionally, the scientists have also clarified that the impact of climate change on the existing type of weather and environment is now observed both at regional or local and micro levels as well as at the global and macro levels. The most common impacts by the experts have been summarized as *“On local and regional scales, changes in land cover can sometimes exacerbate the effect of greenhouse-gas-induced warming, or even exert the largest impact on climatic conditions. For example, urban ‘heat islands’ result from lowered evaporative cooling, increased heat storage and sensible heat flux caused by the lowered vegetation cover, increased impervious cover and complex surfaces of the cityscape.”<sup>7</sup>* *“Floods and droughts cause perhaps the most human suffering of all climate-related events; a major goal is to understand how humans alter the incidence and severity of these events by changing the terrestrial water cycle.”<sup>8</sup>* Further, setting out few precautionary observations, experts have very aptly suggested that *“our results on ET (evapotranspiration), shows that we are much closer to these limits than previously thought.”* Here, “these limits” refer to several variable factors like; uneven spatial distribution of impacts of global change on terrestrial water flows, human activities that can exaggerate water resource problems in some areas and alleviate them in others.”<sup>9</sup>

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<sup>3</sup> As defined in Nature.Com, Macmillan Publisher Limited, 2018 available at <https://www.nature.com/subjects/climate-change>

<sup>4</sup> University of California, Davis, CA, Science & Climate, 2018 available at <https://climatechange.ucdavis.edu/science/climate-change-definitions/>

<sup>5</sup> Partz, Campbell-Lendrum, Holloway & Foley, “Impact of regional climate change on human health”, Nature, Vol. 438, pg. 310-317, November,2005, available at <https://www.nature.com/articles/nature04188>

<sup>6</sup> National Aeronautics and Space Administration (NASA) story, 2017, available at <https://www.nasa.gov/audience/forstudents/k-4/stories/nasa-knows/what-is-climate-change-k4.html>

<sup>7</sup> Ibid

<sup>8</sup> Sterling, Ducharne & Polcher, “The impact of global land-cover change on the terrestrial water cycle”, Nature Climate Change, Nature Publishing Group, October, 2012, pg. 385-390, available at [https://www.researchgate.net/publication/258783949\\_The\\_impact\\_of\\_global\\_land-cover\\_change\\_on\\_the\\_terrestrial\\_water\\_cycle](https://www.researchgate.net/publication/258783949_The_impact_of_global_land-cover_change_on_the_terrestrial_water_cycle)

<sup>9</sup> Ibid

Thus, after carefully studying the impacts of climate change, the nexus between the climate change and constantly happening frequent changes in the weather pattern and its consequential effect on ecology. Hence, it has been rightly concluded that *“There is now ample evidence of the ecological impacts of recent climate change, from polar terrestrial to tropical marine environments. Although we are only at an early stage in the projected trends of global warming, ecological responses to recent climate change are already clearly visible.”*<sup>10</sup>

## II Legal Framework of Climate Change: Its essential aspects and the scope Paris Accord

The establishment of IPCC (Intergovernmental Panel on Climate Change) in 1988 by the joint co-ordination of the WMO (World Metrological Organization) and the UNEP (United Nations Environment Programme) was a landmark global event about the climate change legal regulation. The objective was to initiate a regular monitoring and assessment of climatic aspects to support the policy formulation and devise mitigations. Thereafter, in 1992 during the Rio Earth Summit, UNFCCC (United Nations’ Framework for Convention on Climate Change), was adopted as the main climate change agreement. UNFCCC aimed to create a global network of 195 states, to deal with the reduction of global temperature and to tackle the climate change impacts. The next milestone of 1997, of the existing UNFCCC was the Kyoto Protocol, which was a binding agreement between the contracting parties for emission reduction of the Greenhouse gases. And last, but not the least the recent Paris Agreement, 2015 was signed among the parties of UNFCCC, to strengthen the global response to counter the crisis of climate change. This accord has set a modest target to reduce the average global temperature by 2 degrees globally with reference to the parameters of the per-industrial era. Apart from the global efforts, there exist several regional as well as local mitigational instruments dealing with the climate change crisis. However, we still may have to go a long way to adapt more concrete results on ground and adapt ourselves to deal with this ecological crisis of climate change.

## III Illustration “Day-Zero” Crisis @ Cape Town

In contrast to this optimistic and affirmative backdrop the Paris Accord, 2015, the ground reality is that presently many countries of the world, including India are already facing severe ecological repercussions of global climatic change and its consequential climatic disasters. Since ancient times the South African city of Cape Town has been famous as *“The Tavern of the Seas”*, and has been known for its landmark Victoria & Alfred Waterfront, the scenic beauty of the lofty Table Mountain, etc. It also emerged as an ecological and biodiversity attraction for being the “Floral Kingdom” and last but not the least had been the home of iconic leader Nelson Mandela. In 2017, the said city suddenly grabbed attention of the global media for facing the threats of a severe impending water crisis. It was primarily caused due to prevailing prolonged drought since 2015 leading to a possible “Day Zero” situation, when the existing water supply eventually runs out. The local Climate Systems Analysis Group (hereinafter referred as CASG) team at the Cape Town University stated that *“the term Day Zero refers to a situation where the city’s water reserves reach such a low level that the continuation of what is considered to be a “normal” supply to all users is no longer possible, and the whole system is shut down. Instead, water would have had to be provided through several distribution points, with individuals restricted to collecting a daily ration of perhaps only 25 liters (just over six-and-a-half gallons) of the precious liquid.”*<sup>11</sup> It was a rare summer season in Cape Town in the month of June 2018, when Piotr Wolski began converting his residential swimming pool into a water storage tank for his domestic consumption. It was very interesting to observe that by September

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<sup>10</sup> G.R Walther, Et.al, “Ecological responses to recent climate change”, Nature, 2002 March, 2002 March, Vol. 416, pg. 389-95., available at: <https://www.ncbi.nlm.nih.gov/pubmed/11919621>

<sup>11</sup> Ibid CSAG blog

2018, he had connected all outlets from his rooftop to flow into the pool. Wolski also fitted a pump to draw this stored water into the house, to fulfil the daily water needs of his family of four. Incidentally, Wolski who works as a hydrologist has been engaged in studying the local regional rainfall patterns at the University of Cape Town. Prima facie, it may appear that he is trying this retrofitting all these as research experimentation, but, that's not the case. Wolski was just simply trying to be adapting himself to the worst impending drought of this region looming large at the city of Cape Town. It was recorded that from 2015, the average rainfall of the Cape Town city has plunged to less than 15 inches per annum, whereas the global average has been around 30 inches' per year. Wolski now runs most of his home appliances and water utilities off the pool, including washbasins, kitchen sink and a dishwasher, thus he has become completely self-sufficient for water use. Now, having adapted to this crisis, Wolski confidently maintains that "But if the need arises, I can put everything on the pool water."<sup>12</sup> Thus, "Day Zero" became the recent most climatic catastrophe looming on this Cape Town's local life.

The graph below illustrates the existing climatic and geographical factor which has been pinned down as one of the potential factors that has led to this impending water crisis in Cape Town.<sup>13</sup>



Above graph is released by CSAG, showing the total water stored during the period of 2013-2018 in the Western Cape's town's largest six dam reservoirs. The graph *ipso facto* depicts that the constant declining water resources at Cape Town were heading towards the *Day Zero* Crisis.<sup>14</sup> It was recorded that since 2015, the total rainfall in Cape Town region was in the range of 50-to-75 percent of the long-term average, with 2017 total at many locations, being the lowest since the first written records were made in the late 1880s. This three-year drought is estimated to be an event that occurs as rarely as once-in-311 years, but possibly even less frequently.<sup>15</sup> A careful analysis of the last four decades of climatic data including the satellite ones of rainfall variability reveal the WRZ (Winter Rainfall zone of Cape Town), has experienced significant drying.

Does that mean that climate change is the only responsible factor for such crisis? The answer may be 'No'. According to Dr Piotr Wolski "Droughts are a natural phenomenon in the Western Cape and the effect

<sup>12</sup> "What Cape Town learned from its drought" Piotr Wolski, (Hydrologist CASAG Cape Town University), CSAG blog, available at: <http://www.csag.uct.ac.za/2018/04/18/what-cape-town-learned-from-its-drought/>

<sup>13</sup> Laura Poppick, "What's Behind Cape Town's Water Woes", Smithsonian.com, Feb, 2018, available at <https://www.smithsonianmag.com/science-nature/day-zero-looms-cape-town-water-crisis-may-signify-new-normal-180968128/>

<sup>14</sup>Ref:[https://en.wikipedia.org/wiki/Cape\\_Town\\_water\\_crisis#/media/File:Cape\\_Town\\_water\\_graph\\_Jan\\_2018.svg](https://en.wikipedia.org/wiki/Cape_Town_water_crisis#/media/File:Cape_Town_water_graph_Jan_2018.svg)

<sup>15</sup> Ibid CSAG blog

*of climate changes is that it magnifies all weather events – both drought and flooding – and makes them less easy to predict,”<sup>16</sup>*. Thus, he has concluded that the said crisis of Cape Town, is a possible by-product of a complex interplay between climate and other drivers of the water crises; for example, both agricultural and formal residential water consumption tend to increase during periods of low rainfall and high temperatures, as happened during the first summer of the drought of 2015, before water restrictions were imposed, when water consumption was about two times as higher than the present levels.<sup>17</sup> According to Professor Mark New, who engaged with Climate Research at the Cape Town University, held that *“The effects of global warming are now interwoven with this natural variability. Climate change can have significant impact on the any existing of cyclic drought both by changing rain levels and temperature. While it is difficult to draw firm conclusions while the disaster is still ongoing. A tentative preliminary analysis by Professor New suggests that “the once-in-a-millennium dry spell Cape Town is currently experiencing was made five times more likely by global warming.”<sup>18</sup>* Additionally, the locals have also put the blame on the existing breweries and wine-yards, who have been engaged in the luxury business of wine making, which primarily an intensive water consuming industry and hence, are considered to be one of the potential reasons for depleting local water resources and consecutively we can say, that it has a clear nexus with this ongoing water crisis.

#### **IV Its impact on the local- Social life, Business, Policy and Governance**

Various studies and observations were made to highlight the diverse local adverse effects of the said water crisis on the people’s social, economic life as well as on the state, its functioning and governance. In an article published in the Guardian, February 2018 stated that, In ten-week engineers will turn off water for a million homes as this South African city reacts to a one-in-384-year drought. The rich are digging boreholes, more are panic-buying bottled water, and the army is on standby.<sup>19</sup> Further Dr. Wolski added that *“Incidentally, one of the positive outcomes of this drought was that the general population developed a sensible and better understanding of the linkages between climate and day-to-day life as well as an improved saving mentality and awareness of the value of water”.*<sup>20</sup>

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<sup>16</sup> “Why is Cape Town running of water?” by Willem Stefaan Conradie, CSAG blog, Frontpage, Feb, 2018, available at: <http://www.csag.uct.ac.za/2018/02/21/cape-town-running-out-of-water/>

<sup>17</sup> Ibid

<sup>18</sup> “Cape Town is approaching drought, ‘Day Zero’, and climate change could be blamed”, by Josh Gabbatiss, Science Correspondence, Independent, March, 2018, available at <https://www.independent.co.uk/environment/cape-town-drought-day-zero-climate-change-global-warming-south-africa-a8236511.html>

<sup>19</sup> “Cape Town faces Day Zero: what happens when the city turns off the taps?” Jonathan Watts, The Guardian, Feb, 2018, available at <https://www.theguardian.com/cities/2018/feb/03/day-zero-cape-town-turns-off-taps>

<sup>20</sup> Ibid



Source: <https://www.independent.co.uk/environment/cape-town-drought-day-zero-climate-change-global-warming-south-africa-a8236511.html>

The above image illustrates a measure that was adopted for conservation and reduction in its per capita water uses in the city. This ecological crisis having adverse effects on residents' social and daily life, in turn also affected the local business, trade and economic sphere of Cape Town. According to an estimate it was observed that *"This will be a major burden on municipal coffers. The estimated cost of installing and running the new system for three months is 200m rand (£12m). Instead of selling water, it will be given away for free, which will mean R1.4bn in lost revenue."*<sup>21</sup>

Apart from the state exchequer, the said water resource crisis also impacted the existing business and trade opportunities. In an interview Paul Furstenberg, a restaurant manager at a famous local The water Sports Club, explaining gloomy financial situation held that *"The change is visible by the week,"*<sup>22</sup> Most of the people like Paul, who were engaged in livelihood in such recreational outlets, have now gone mostly unemployed due to force shutdown of business facilities owing to this ongoing crisis. The supermarkets which had initially minted money by selling large numbers of bottled waters were later forced to set a *per capita* limit as plastic waste was also a rising repercussion. *"This apocalyptic notion prompted water stockpiling and panic, caused a drop-in tourism booking, and raised the spectra of civil unrest."*<sup>23</sup>

## V Mitigation Plans and Measures and Adaptations

It has been rightly quoted that *necessity is the mother of all inventions*. On similar lines, the Cape Town city also churned out many such innovative adaptations and applied several mitigation measures to deal with the worst ecological crisis. For example, instead of pipe water supply the city adapted to common water supply and collection points. The local government also planned and launched public information campaign to increase the mass awareness among the locals to conserve the precious resource and reduce the impact on human lives. Local entrepreneurs adapted several strategies to save their business and earnings. One such adaptation story was reported from local horticultural sector stated that *"Esperanto is one of hundreds of fruit farms in South Africa's Western Cape Province that has had*

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> "How Cape Town was saved from running out of water", Crista Mahr, The Guardian, May, 2018, available at <https://www.theguardian.com/world/2018/may/04/back-from-the-brink-how-cape-town-cracked-its-water-crisis>



*to get creative to cope with the drought. Despite Esperanto's dams being at 28% capacity as of last October, most of its orchards have been luckier than these bedraggled Pink Lady's, thanks to water-saving hacks like night-time irrigation, mulching and concentrating water around the trees' roots systems."*<sup>24</sup>

Eventually, combining all the efforts together, Cape Town was able to avert the said crisis to some extent. They concluded that certain measure like *"Reusing shower water, limiting toilet flushing and night-time irrigation was among measures that saved South Africa's second city from running dry."*<sup>25</sup> Further *"Neilson, local Deputy City Mayor stresses that Day Zero can be avoided. A lowering of pipe pressure and a public information campaign to conserve water have cut the city's daily water consumption from 1,200 million liters to 540 million liters. If this can be pushed down another 25%, the taps should stay open to the start of the rainy season in May."*<sup>26</sup>

This impending crisis has also left a deep impression and has created a positive influence in the minds of the locals instituting tremendous learning for a sustainable future. A local expressed very sensitively that *"The day zero campaign made us all think twice about water," says Sue Fox, after collecting several liters of drinking water for her household from a natural spring in Newlands, an upmarket Cape Town enclave. "We'll never, ever, ever take water for granted again."*<sup>27</sup> It seems that Cape Town has been successful to some extent to push the Day Zero and now it has been delayed upto 2019. Simultaneously, the city has also adopted several remedial measures; such as initiation of revamping of the existing water supply infrastructure, allowing of bore-well for increasing the access to water, initiating the desalination facilities to promote the methods of reuse and recycle and on the other hand waiting impatiently for the winter rain of this year and hoping to boost the supply naturally.

## **VI Indian Context- Comparative Analysis & Lessons Learnt**

Now having discussed various dimensions of the Cape Town's *Day Zero* crisis, it will be interesting to draw a comparative analysis between the Cape Town said water crises with any such similar crisis existing anywhere else in the globe. Incidentally, one of such recent water crises in the city of Shimla, India fits well in this comparative analytical context. In summer of 2018, the city Shimla which is otherwise famous as *"Queen of Hills"* for its scenic beauty just like Cape Town; grabbed sudden media attention for its depleting water supplies. Several news articles were published in local and national daily with panicking headlines such as *"Shimla runs out of water, residents and tourists sweat"*<sup>28</sup> As the situation kept growing critical, the adverse impacts water crisis started affecting the lives of locals, their daily needs and business, tourism, etc. With the depleting day by day water supply, the residents Shimla, who are generally tourists friendly; out of anxiousness turned hostile in their expressions and started agitating.<sup>29</sup> Thus, keeping in mind the case of Shimla's present water crisis, it would be pertinent to know whether Shimla only Indian city facing

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<sup>24</sup> Supra note 24

<sup>25</sup> Ibid

<sup>26</sup> Ian Nelson Deputy Mayor of Cape Town quoted in "Cape Town faces Day Zero: what happens when the city turns off the taps?" by Jonathan Watts, The Guardian, February 2018, available at <https://www.theguardian.com/cities/2018/feb/03/day-zero-cape-town-turns-off-taps>

<sup>27</sup> "How Cape Town was saved from running out of water", by Crista Mahr, The Guardian, May, 2018, available at <https://www.theguardian.com/world/2018/may/04/back-from-the-brink-how-cape-town-cracked-its-water-crisis>

<sup>28</sup> Gaurav Bisht, "All water channels in Shimla and its suburbs have dried up this summer owing to less snowfall in the past winter and less rains thereafter", Hindustan Times, Shimla, May 29, 2018, available at <https://www.hindustantimes.com/india-news/shimla-runs-out-of-water-residents-tourists-sweat/story-gmz2RtkLEYzKkrUzdbVYKI.html>

<sup>29</sup> As reported in Hindustan Times "Shimla residents ask tourists to stay away as water crisis worsens", many netizens also voiced fears of the Heli-taxi service between Chandigarh and Shimla, set to be launched on June 4, further increasing the tourist burden on the hill town. Shimla received just 18 million liters of water per day against the demand for 45. H T Correspondent, Shimla, May, 2018, available at <https://www.hindustantimes.com/india-news/shimla-residents-ask-tourists-to-stay-away-as-water-crisis-worsens/story-10RFnCuGUifxoXaTO6lslM.html>

such water crisis or similar water crisis also exists in other cities of India. The answer is shockingly affirmative; akin to Shimla, many other cities in India are also currently reeling under similar ecological crisis. Hence, very aptly editorial headlines published that *“The water crisis in Shimla is a warning for India.”*<sup>30</sup>

The said article also sent out a strong precautionary warning stating that *“India will have to get its act together on urban water. Otherwise, Shimla-like incidents will recur across the country”*.<sup>31</sup> The local administration failed to take any precautionary measure to counter the crisis and did not even bother to declare *Day Zero* as a preventive measure, eventually looking into the apathy the local judiciary had to intervene to issue judicial directives to uphold the right to life of locals of Shimla. Thus, the local High Court issued strict guidelines to solve the crisis by initiating reduce and reuse measures to manage the water crisis.<sup>32</sup> The weather scientists and experts suggested that there are significant fluctuations observed in the local climatic pattern of Monsoon in India. Hence, the pertinent question before us is that firstly, are we ready to adapt ourselves for a *“Daily Fix”* quota of water usages if water crisis like Shimla persists? Secondly, are we politically transparent enough to blow whistle and as precaution declare a *“Day Zero”* in such situations in India? The water crisis of Cape Town, its precautionary adaptation of *Day Zero* measures and other mitigational efforts can be closely observed to draw lessons for India to deal with water crisis of Shimla.

Let’s look at some of the guidelines that were issues to the tourists to avoid the *Day Zero* in Cape Town at a glance<sup>33</sup>:

1. Choose accommodation carefully. Make sure you call and ask before booking, so you know exactly what to expect.
2. Re-use your towels instead of asking for a new one daily
3. Try to flush the toilet as little as possible.
4. Use a cup to rinse your mouth when you brush your teeth rather than letting the taps run.
5. Limit your showers to under 90 seconds and avoid bathing.
6. Report leaking taps and toilets as soon as you notice them.
7. Avoid washing clothes until you have a full load’s worth of laundry or make use of water-wise laundry services such as Green Planet Laundry.
8. Take a dip in the ocean and tidal pools instead of swimming pools, and maybe even spare yourself a shower.
9. If possible, use a dishwasher to clean dishes. Just make sure you only run it when it is full.
10. Use this water calculator to make sure you’re helping to save water.

Taking a cue from the aforesaid guidelines of Cape Town, it will be pertinent add that in case of Shimla no similar mitigational guidelines were issued for its tourists to deal with the ongoing water crisis. Similarly, an interesting precedent was laid by the famous local hotel *Tsogo Sun Cullinan’s* at Cape Town; which shared its experience of adopting several small steps but reaching to an effective water use. It adopted multiple measures to reduce, reuse and conserve water. For example, *Tsogo* fitted a small cost-effective

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<sup>30</sup>An editorial article “The Water Crisis in Shimla is a warning for India”, Hindustan Times, May, 2018, available at <https://www.hindustantimes.com/india-news/shimla-residents-ask-tourists-to-stay-away-as-water-crisis-worsens/story-10RFnCuGUifxoXaTO6lslM.html>

<sup>31</sup> Ibid

<sup>32</sup>Scroll.in “Shimla water crisis: Himachal Pradesh HC bans construction activity, washing of cars for a week The court said tankers should not be allowed to supply water to anyone, including judges and ministers.” by Scroll Staff, Published May, 2018, available at <https://scroll.in/latest/880783/shimla-water-crisis-himachal-pradesh-hc-bans-construction-activity-washing-of-cars-for-a-week>

<sup>33</sup> “Cape Town’s drought has shown us the future of travel – even if it means not flushing the toilet,” Hugh Morris Travel News Editor Published in Telegraph, UK, March, 2018, available at <https://www.telegraph.co.uk/travel/comment/cape-town-drought-new-normal-responsible-travel/>

gadget in the showers which helps to cut down the flow by 50%, similarly they also accumulated all the waters left in the water bottles served to their guests and later reused the same for the plants. Interestingly, even a dash board was installed to maintaining and monitor energy load of its water meters and also to achieving reduction their total water consumption and usage up to 60,000 liters a day.”<sup>34</sup> However, comparatively we saw no such adaptations and innovative measures initiated in case the Shimla facing similar water crisis. Last, but the not another noteworthy innovate gadget was introduced in Cape Town to solve this water crisis known as “Air Water”<sup>35</sup>. Similarly, Brendan William a local entrepreneur, also invented another device known as “Rainmaker”, which uses air and make air up to 1000 liters<sup>36</sup>. Thus, we say definitely say that Cape Town laid several convincing presents for dealing with water crisis.

## VII Conclusion

Thus, we can conclude saying that as Cape Town city evolved tremendously through its recent critical journey from this ecological drought and has left strong impacts on the sand of time to share its valuable adaptations and sustainable lessons for the world to follow for a better future. It’s not a case alone of Cape Town in Africa, or Shimla in India, recently similar crisis was highlighted whether is Australia heading towards a *Day Zero* crisis? It’s interesting to note that three different cities located across three different geo-political locations were at the brink of facing similar ecological crisis! Thus, we can clearly see that there is an emerging trend across different locations of the globe where similar water crisis is looming large due to erratic weather patterns by virtue of recent climate change. Hence, we need to adopt adequate policy framework and adapt more water conservation practices dealing with such crisis, before it’s too late. Thus, time has come for us to move ahead from merely celebrating the iconic days like; World Environment Day, Earth Hour, World Water Day, etc., as annual rituals and rather adopt more consistence and rational practices in our day to lives by takes small but sustainable steps, making eco-friendlier choices not just always blaming and waiting for the state and government to do something to save the earth and ecology.

We do not certainly need any more proof or debate and delay our preventive and mitigational actions on such common ecological and climatic calamities. It is time for devoting urgent attention to observe such climatic trends, analysis them and draw adaptation policies to for timely recues.

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<sup>34</sup> “Is conserving water the new normal for Cape Town?” CNN Home, March, 2018, available at <https://edition.cnn.com/videos/world/2018/03/19/marketplace-africa-cape-town-water-shortage-day-zero-a.cnn>

<sup>35</sup> AIRWATER™, see details at homepage <http://airwater.co.za/>

<sup>36</sup> “This entrepreneur is making 1,000 liters of water a day from Cape Town's air”, reported by Jay Caboz, Business Insider, SA, available at <https://www.businessinsider.co.za/video-of-water-from-air-in-cape-town-2018-2>

# EFFECTIVENESS OF ARTIFICIAL INTELLIGENCE IN MARKET COMPETITION

*Smita Tyagi\**

## **Abstract**

*This article tries to analyse the role of Artificial Intelligence wherein its technologies is used to enforce secret agreements, collude or discriminate in the business environment. In such cases, it would come into the realm of Competition Law. Competition enforcement agencies globally would have to investigate and punish those practices which are anti competitive in nature. The legal industry would have to be ready for this kind of challenge wherein artificial intelligence would amount to anti competitive practices.*

**Keywords:** *Artificial Intelligence; Competition Law; Algorithms; Cartellisation; Collusion*

## **I Introduction**

The new buzzword nowadays is Artificial Intelligence (AI) which is emerging as a game changer in today's economy. AI uses sophisticated machines to reduce human effort and give faster and more accurate results. AI technologies can be used in all important sectors like media, medical sciences, air transport, heavy industries etc. While the advantages of AI are many fold, the major critique surrounding AI is for relying just, on a lot of sophisticatedly computed aspects of behaviorism, maybe often independent of scientific insight and human intervention.

In this paper, some of the legal aspects for AI are being analysed. Just like in the real world, it is possible that AI technologies are being used to enforce secret agreements, collude or discriminate. Competition enforcement agencies around the world are discovering the potential impact of AI on market competition. As these competition related agencies dig deeper and study AI-related activities within the market, there are queries regarding its impact and the resulting competition uncertainty. Questions on whether or not it's attainable for firms to use AI as a method of colluding, with restricted or no human involvement, will most likely proliferate. As queries multiply, indepth scrutiny into competition-related risks to businesses would be the need of the hour.

Artificial intelligence (AI) systems are growing at an exponential rate nowadays, with a lot of subtle varieties of features being incorporated into them. AI enabled systems have transcended from being used in straightforward calculations to collecting data, analysing market trends and algorithms which can alter competition in markets. Therefore, the coming together of AI and Competition Law is bound to create more market risks that put in jeopardy the free market economy that the governments around the world are looking to build.<sup>37</sup>

## **II Why AI matters?**

The development of 'machine-learning', advanced algorithms and systems capable of processing large quantities of knowledge have provided the platform to enable innovative industrial applications for AI. One such application that has received attention from competition authorities is 'algorithmic pricing'. That is, the machine-controlled re-calibration of costs supporting internal or external factors in business, like offer and demand variables, competitors' costs and pricing of products. Competition law prevents anti competitive agreements, abuse of dominance and practices which unfairly reduce competition in the

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<sup>37</sup> Russell, Stuart J. and Peter Norvig, Artificial intelligence: a modern approach. Malaysia; Pearson Education Limited, 2016

market.<sup>38</sup> However, 'algorithmic pricing' under AI may enable traders to form cartels and affect pricing of goods adversely after obtaining relevant data knowledge.

The European Commission's E-commerce Sector Inquiry (2017) found that, after the UN agency had actively monitored competition costs of the net retailers surveyed, sixty seven per cent of the retailers had used automatic algorithmic code programs to trace and report on competitors' costs. Most of these businesses later on adjusted their costs manually. However, many of the retailers had additionally relied on the algorithmic code to implement automatic changes.<sup>39</sup>

A number of different international authorities, including the United Kingdom Competition and Markets Authority, have recognised the potential of businesses engaging algorithms to facilitate coordinated behaviour. General use of algorithms to increase consumer base is not illegal. However, when such algorithmic codes are developed which encourage secret agreements, collusion or cartel behaviour and are agreements between traders or operators for carrying out anti competitive behaviour, then such algorithmic code or pricing will come under the purview of anti competitive behaviour.

Some cases of the misuse of AI and resulting in anti-competitive behaviour in markets have been discussed below.

### **III Cartelisation using AI**

The use of artificial intelligence and algorithms have been commonplace in markets in the bid to attract more customers and have profitable businesses. However, these practices have drawn the attention of competition authorities in India and abroad. Under ordinary circumstances, humans form cartels among themselves and then implement them through price cutting or price fixing among their cartel members. As now AI has replaced human knowledge, the data implementation can be done by AI through its automatic recalibration. It is seen that where businesses merely implement or conceal their 'offline' anticompetitive agreement by the misuse of AI, the United Kingdom and EU competition authorities have clearly noted that this may be treated as a component of an anti competitive agreement.

In prominent cases in the United Kingdom and the United States, there were on-line sellers who cartelised and decided to fix prices at a certain level so that the customers would only buy goods from the members of the cartel. It was found by the Competition authorities that the online sellers used machine-controlled re-pricing code to implement an agreement to not undercut the prices of other online sellers. This AI technology involved collectively calibrating the online sellers re-pricing code to watch every other online sellers costs and respond consequently. Therefore, irrespective of the instruments used for forming and maintaining cartels in businesses, there would be anti competitive practices if the components of competition law have been flouted.

### **IV Collusion**

Collusion through AI may gain ground if there is a misuse of AI technologies. Business industries are shifting from an evaluation setting of fixing prices for products wherein store clerks once sealed costs/prices on products, to a dynamic, differential evaluation wherein refined computer algorithms quickly calculate and update costs. Dynamic evaluation is not necessarily or per se illegal—one example where dynamic evaluation is helpful is in exploring Virtual Competition in 'smart' parking meters in cities around the world.

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<sup>38</sup> Peritz, Rudolph J. "The Rule of Reason in Antitrust Law: Property Logic in Restraint of Competition." *Hastings LJ* 40 (1988), p285

<sup>39</sup> Petit, Nicolas. "Antitrust and artificial intelligence: A research agenda." *Journal of European Competition Law & Practice* 8, no. 6 (2017), p361-362

This feature helps drivers as they are updated real time about the availability of parking space. Moreover, this helps in saving time and resources. However as evaluation shifts from humans to computers, there are possibilities of various kinds of collusion by which firms could misuse AI to minimise or eradicate competition in the market. For instance, the utilization of one algorithmic rule numerous competitor who have interacted with each other, may establish a hub-and-spoke system consortium. Algorithms codes can also encourage implicit collusion, given their ability to adapt and quickly react to cost changes during an extremely volatile market.<sup>40</sup>

## **V Discrimination**

AI technologies can also be used for segregation of customers. However, this segregated data of customers can be used discriminately to further products of certain businesses and attain a dominant position to the detriment of others.

The strategy involves corporations gathering the personal information of customers shopping for a particular product, the place where he/she tends to buy the product and the highest amount the customer is willing to pay for the product. After analysing this data, businesses will tailor their advertising and selling to focus on the customers at the right moments with the proper price and emotional pitch. Therefore this kind of activity discrimination would increase profits of certain businesses, using AI to analyse such data, by increasing the overall consumption of customers and cornering customers. This use of AI may not allow proper competition in the market and new entrants to markets will reduce.

## **VI 'Apps'**

Another risk of the misuse of AI arises wherever there is a relationship of competition and cooperation existing between super-platforms and independent apps. For example, in the case of mobile operational systems, where two super-platforms exists, it is noticed that the Apple's iOS and Google's android mobile software package platforms dominate every super-platform. These super-platforms host a number of mobile apps which are constantly increasing their base in the market. A growing and apparently appealing part of this marketplace is free merchandise and services. The proliferation of free mobile apps adds customers to its database (as well as advertisers, smartphone makers, mobile carriers, and freelance application developers) by offering initial free services, reducing search prices and thereby increasing demand. The anticompetitive risks, however, arise once these apps work to extract information from customers and promote asymmetrical data flows to foster activity exploitation.

## **VII Measures to combat misuse of AI**

In view of the above risks that AI poses, it is important to analyse the legal regime's readiness. The two important aspects that the competition authorities need to deal with is the readiness to investigate such matters and the readiness to impose sanctions for the misuse of AI.

### *Readiness to investigate*

AI practices leading to anti competitive behaviour would be very difficult to detect. AI often works with minimum or no human intervention. Therefore the issue is whether or not competition authorities are able to investigate business mistreatment of AI technologies. AI technology and mechanisms need to comply with the legal tenants of transparency, fairness and legality. In this scenario, investigatory tools and

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<sup>40</sup> Ezrachi, Ariel, and Maurice E. Stucke. "Artificial intelligence & collusion: When computers inhibit competition." U. Ill. L. Rev.(2017), p1775.

methodologies need to be broadened.<sup>41</sup> It is important to engage technology specialists who have specialised AI technology knowledge and a knowledge of Competition laws. For example, The United Kingdom Competition and Markets Authority recently started a knowledge unit, which is able to explore, inter alia, how corporations use algorithms in their business models and therefore the implications for customers.

#### *Readiness to impose sanctions for misuse of AI*

Accountability in Competition law for misuse of AI to indulge in anti competitive practices is also important. Competition law enforcement agents need to be trained as to who ought to be ultimately accountable for anti-competitive conduct. In the case of misuse of AI for anti competitive behaviour -can a corporation be liable for the conduct of its staff or directors? Can a parent company bear responsibility for the conduct of its subsidiary? Can the partners of an autonomous venture be accountable for infringements by the venture business?

When attributing liability in the the case of misuse of AI, there are two eventualities to contemplate. The primary one is wherever AI is simply being used to implement the parties' real-world agreement. The second is wherever the anti competitive practices have been carried out by the use of AI itself, with the consent or knowledge of a business' human staff. In the former case AI use is legal, while in the latter, there would sanctions imposed under Competition Law.<sup>42</sup>

### **VIII Advantages of AI in competition Law**

There are many advantages that artificial intelligence has on competition which cannot be ignored and it is important to accept that the future of virtual competition isn't essentially bleak. The innovations from machine learning and large information will be transformative—lowering search prices to find a product or parking spot, lowering entry barriers, making new channels for growth and entry, and ultimately stimulating competition.

However, these technological developments won't essentially improve customer welfare if they are not within the legal framework. A lot depends on how businesses use the technologies and whether or not their usages aligned with the customer's interests.

Technological advances or roaring on-line businesses are here to stay and they will be promoted as they provide convenience to the customers. However, it is important to understand the legal issues and go to the core of the new market dynamics—where market entry is prohibited, where growth is controlled by super-platforms; where competition is eliminated through acquisitions or exclusionary practices and where turbulent innovative threats emerge.<sup>43</sup>

Data-driven on-line markets won't essentially correct themselves. As power shifts to the hands of the few, the risks this may seemingly have for competition, our democratic ideals, and our economic and overall well-being can increase consequently. Firms will be a step ahead in developing refined ways and technologies that distort the perceived competitive setting. Therefore anti competitive practices have to be identified and rectified even in complex technologies like AI.<sup>44</sup>

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<sup>41</sup> Vladeck, David C. "Machines without principals: liability rules and artificial intelligence." Wash. L. Rev. 89 (2014), p117

<sup>42</sup> Hill, Tim, Leorey Marquez, Marcus O'Connor, and William Remus. "Artificial neural network models for forecasting and decision making." International journal of forecasting 10, no. 1 (1994), pp5-15

<sup>43</sup> Goertzel, Ben. Artificial general intelligence. Edited by Cassio Pennachin. Vol. 2. New York: Springer, 2007.

<sup>44</sup> Elliott, E. Donald. "Holmes and evolution: Legal process as artificial intelligence." The Journal of Legal Studies 13, no. 1 (1984), pp 113-146.

Accordingly, competition authorities should devote resources to understand the impact of refined computer algorithms and their effects on the markets. Larger coordination of competition agencies is important with privacy and client protection officers to assess the preconditions for a good, welfare-enhancing competitive environment. Competition agencies need to empower customers, dissuade mavericks to enter and expand in problematic markets and deter abuses by data-opolies.<sup>45</sup>

Otherwise, with a slumberous competition agency, there would be an increase in collusions (beyond the reach of enforcers), many refined varieties of worth discrimination and an array of abuses by data-driven monopolies that, by using dominant key platforms (like the OS of the smartphone), would dictate the flow of personal information.

## **IX The legal challenges posed by AI**

The legal challenges posed by AI hinge on the interface between man and machine. A lot will depend on the flexibility of humans to regulate the 'deep-learning' algorithms in the areas of business.<sup>46</sup> AI is led by knowledge and it will test the liability of humans for taking responsibility for machine activities. Taking, as an example, the case of algorithms being employed by industrial giants in an on-line platform markets. It can raise a possible risk of silent collusion however on the other hand they may also be contributing to data-driven business models that aid in predicting markets verticals.<sup>47</sup>

According to legal principles, therefore it is the "intent" and the "agreement" between operators which become important to establish anti competitive behavior when AI is involved. These two legal principles may become even more important as in most cases, there is no human intervention at all. Another legal principle that need to be explored is the concept of "agency". Are AI methodologies adopted by businesses "agents" of those who have conceptualised them?<sup>48</sup>

Analysing the legal provisions, general data regulations adopted in countries may not be enough to deal with the adverse circumstances in which AI technologies may be used. In circumstances where operators are colluding and using the AI platform to undercut competition, fix prices or restrict supplies, then in such circumstances, it is important that competition agencies should be able to detect such collusions and take action.<sup>49</sup>

AI would also challenge the traditional methods of Intellectual Property Rights. It would be difficult to analyse who is an "author" or who is an "inventor".

Legal services have not kept pace with the rapid advances in AI technologies and uses. It is important for the legal services to study the legal implications and be technologically savvy to understand the many aspects of AI.<sup>50</sup>

## **X Premise in India**

Earlier, the Competition Commission of India (CCI) imposed a hefty penalty on Google, for abusing its dominant position, within the on-line search media market. The corporate was suspected of promoting its

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<sup>45</sup> Nilsson, Nils J. Principles of artificial intelligence. Morgan Kaufmann, 2014

<sup>46</sup> Mehra, Salil K. "Antitrust and the robo-seller: Competition in the time of algorithms." Minn. L. rev. 100 (2015), p1323

<sup>47</sup> Asaro, Peter M. "Robots and responsibility from a legal perspective." Proceedings of the IEEE (2007), pp20-24.

<sup>48</sup> Li, Deyi, and Yi Du. Artificial intelligence with uncertainty, CRC press, 2017

<sup>49</sup> Peppin, John C. "Price-Fixing Agreements Under the Sherman Anti-Trust Law." J. Reprints Antitrust L. & Econ. 2 (1970), pp481

<sup>50</sup> Mountain, Darryl R. "Could new technologies cause great law firms to fail." Syracuse L. Rev. 52 (2002), p1065



own verticals at the expense of its oppositions. This is one of the most important cases in AI technologies and competition law.

Essentially, the regulatory challenges posed by AI could fall in three broad categories: market exclusionary practices; new methods of collusion; and new ways to implement worth discrimination. Concepts of “technological sovereignty” and “wealth differences” created by the use of AI would also arise. In matters relating to public policy these concepts would need to be fair and transparent.

Finally, in the age of AI, “worth discrimination” could also possibly become the largest bone of contention. Worth discrimination would apply wherever a firm, rather than charging one uniform worth for one service or product, charges totally different costs from different customers, counting on their disposition to pay. Besides overcharging by creating an artificial deficiency, worth discrimination is in a different way, a dominant firm inflating its profit at the consumers’ expense.

Differential valuation is pervasive even in brick-and-mortar businesses, usually in refined and disguised forms. However brick-and-mortar businesses and on-line retailers decide pricing to be charged from customers in terms of their ability to cost discriminate. Typically, a web business has refined data processing tools and large informational information on the customers. Consequently, it is in a position to predict shopper base far more finely and predict shopper choices with far more precision.

Economists and regulators have historically neglected worth discrimination. A consumer’s loss is producer’s gain and vice-versa. This argument is but unreasonable, specifically in the case wherever the service-provider and customers aren't placed within the same national jurisdiction. It is important for competition enforcement agencies to scrutinize ways of differential valuation far more closely.

Artificial Intelligence can most likely become one amongst the largest wealth-creating sectors in this century. Whether or not this wealth can raise general well-being or simply generate common backlash, continues to be an open question. Intelligent regulations and sturdy legal establishments are the key to harness its potential.

## **XI Recommendations for Industries employing AI**

In the case of AI technologies being used in businesses it would be important for businesses and enforcement agencies to analyse (e.g., through AI programming instructions) whether or not a specific outcome may have fairly been predicted, even if there has been no human agreement. Some enforcement agencies (notably, the EU Commission) have expressed that AI remains beneath a firm’s direction and management and, therefore, the firm is answerable for the actions taken by the formula or algorithm used in AI technologies – even though it may not have been totally understood by the people who developed or used it. Competition law enforcement agencies would have to answer the question regarding the selections and actions of AI in each business. Regarding this, it'll rely on the factual context of every case that will vary in different jurisdictions applying different legal tests.

A mechanism needs to be developed to provide business-oriented solutions to mitigate antimonopoly risks and to disentangle the pro-competitive effects of AI from its anti-competitive effects. Some of the recommendations in this regard would be :

- Awareness to numerous technology firms about the international competition compliances regulations
- Conducting antimonopoly compliance audit programs and providing remedial reprogramming choices for non-compliant algorithms.
- Review of international transactions engaged by businesses with the assistance of competition law experts

- Assisting businesses using AI technologies on regulative and policy reforms associated with the application of antitrust legislation

A new market is emerging with companies providing solutions including:

- Defending and conveyance complaints against firms in reference to international competition law investigations, as well as the productive closure of an investigation by Competition and Markets Authority into an alleged worth fixing apply by approach of in agreement commitments • Advising numerous technology firms in with success production international antimonopoly compliance ways, as well as
- Coordinating international merger management filing ways in several high-profile transactions, as well as negotiating settlement reciprocally for merger management clearance.<sup>51</sup>
- Advising numerous personal and government purchasers on regulative and policy reforms associated with the appliance of antitrust legislation to the utilization of computer science

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<sup>51</sup> Duong, Wendy. "Effect of Artificial Intelligence on the Pattern of Foreign Direct Investment in the Third World: A Possible Reversal of Trend." *Denv. J. Int'l L. & Pol'y* 36 (2007), p325.

# TRIPLE TALAQ IN THE WAKE OF SC JUDGEMENT

*Md. Akbar Khan\**

## Abstract

*On 22 August 2017, the Indian Supreme Court deemed instant triple talaq (talaq-e-biddah) unconstitutional. Three of the five judges in the panel concurred that the practice of triple talaq is unconstitutional. On 30 July 2019, Parliament of India declared the practice of Triple Talaq as illegal, unconstitutional and made it punishable act from 1 August 2019 which is deemed to be in effect from 19 September 2018. In this article the author deals with the question of triple talaq in the light of the recent practices of triple talaq which is treated as talaq-ul-biddat and is not acceptable in accordance with the injunctions of Quran and Hadis and this article throws light on how it is not a good form of custom. This article explains the forms of talaq laid down under the holy Quran and the procedure for the same. This article analyzes one of the hottest and most tricky issues of the Muslim personal Law. The whole triple talaq issue has become a battleground for the culture versus modernity debate.*

**Keywords:** *ṭalaq, triple ṭalaq, divorce, three repudiations, Ibn Taimiyah, Ibn al-Qaiyam, gamhur, Shia, Zahirite*

## I Introduction

India is a country where there is unity in diversity. There is a diversity of religious beliefs, culture, languages and practices. People follow different religions and faiths. These religions lay out different sets of personal law which govern marriage, divorce, succession, etc. The sources of the laws come from their religious books, customs, jurisprudence, digest and commentaries, etc. which are then codified into statutes. Personal laws play a vital role in the society as well as in the religious community. These laws have acquired special position in the present age.<sup>52</sup>

In Islam, the word Quran which is the divine communication and revelation to the Prophet of Islam is the first source of Muslim Law. It contains the revelation of God to His Prophet Mohammed, through angel Gabriel. It is the paramount and universal authority of Muslim Law. Apart from Quran, the other sources of Islam and the most legitimate one after Quran is the Sunnah. The personal laws are laid down in Quran which deals with marriage, divorce, succession, etc. Quran does not approve of divorce but lays down the forms of divorce which were approved by the Prophet.

The other two important sources are Ijma and Qiyas. Ijma has been defined by Sir Abdul Rahim as “agreement of the jurists among the followers of Prophet Mohammed in a particular age on a particular question of law”. Wilson defines it as concurrence, meaning propositions shown to have been accepted as indisputable under the first four “rightly directed”, Caliphs or in the time of the companions and of the generation immediately succeeding them.<sup>53</sup>

Maulana 'Usmani points out that Hazrat 'Umar had enforced triple divorce as triple divorce and it had become law. It is within the power of the caliph of the time to enforce certain ordinances in view of the prevailing situation, or to meet some crisis situation and no one can question it. It is, therefore, possible that Ibn Abbas might have given a fatwa accepting triple divorce after Hazrat 'Umar enforced the

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<sup>52</sup> Dr. S. R. Myneni, Muslim Law, Asian Law House, Hyderabad, 2015.

<sup>53</sup> Aqil Ahmad, Mohammedan Law, Central Law Agency, Allahabad, 2016.

ordinance. The original hadith, accepting three divorces as one, therefore, is not affected, maintains 'Umar Ahmad 'Usmani. Thus it is proved by this hadith that during the time of the Noble Prophet triple divorce, if pronounced by someone, was accepted as one divorce only.

It is well known that Hazrat 'Umar, after the initial two years of his Khilafat, had enforced triple divorce and no one will be permitted to take his wife back after pronouncing three divorces in one go. To substantiate his point the Maulana refers to the noted Egyptian historian Muhammad Husain Haykal's book 'Umar al-Farouq in which the author says that 'Umar made such an ijtihad (interpretation) in what is well established Qur'anic injunction in 2: 229-30 (Divorce is twice ... which we have discussed in detail above) that until today we are opposing him in this matter. The Qur'an requires all attempts for reconciliation before a divorce (4:35)

Then Maulana 'Umar Ahmad further quotes from Haykal's book to show why Hazrat 'Umar was constrained to enforce triple divorce despite the Qur'anic injunction contrary to it. Muhammad Haykal says that when the Arabs conquered Iraq, Syria, Egypt, etc., the women prisoners from these regions were brought to Mecca and Medina. These women were very attractive and charming and the Arabs were captivated by their charm and wanted to marry them. But these women insisted on the men giving irreconcilable divorce to their former wives. To satisfy them they would pronounce triple divorce and pretend to have divorced their wives for good.

According to a report, Abdullah bin Abbas, a companion of the Prophet said that triple talaq in one sitting was considered as only one talaq during the Prophet's time, the period of the first caliph Abu Bakr and during the early years of the second caliph Umar (Sahih Muslim, 1482).

Once Rukanah bin Yazid, a companion of the Prophet, had divorced his wife thrice in one sitting. Regretting what he had done, he approached the Prophet, who asked him how he had divorced his wife. Yazid answered that he had done so by pronouncing the word talaq thrice. The Prophet asked him if he had pronounced it in a single sitting, to which he replied in the affirmative. The Prophet then said that it had the effect of one divorce and that he could take his wife back.

Some Indian Muslims, if not all, follow the system of triple talaq in one sitting based on the practice from the time of Umar, the second caliph. Umar thought it appropriate to enforce triple talaq in one sitting as men had made talaq a joke by taking back their wives even after uttering the word 'talaq' several times. As a result of men's recklessness, wives suffered, often getting stuck in a vicious circle, unable to gain their freedom. However, the intention by the second caliph was aimed to ensure the welfare of society in that particular socio-historical context.

Here is a summary of what the Quran says about divorce:

1. If a couple insists on divorce, then the wife and husband are to remain together in the same home until an 'interim-period' is complete (Quran 65:1)
2. The 'interim-period' is a waiting period of about 3 months which allows the husband and wife to cool down, discuss things, and change their minds if possible.
3. If the couple reconciles during this period, then divorce may be cancelled at any point. (Quran 2:229)
4. The divorce is automatically cancelled if sexual intercourse takes place between the husband and wife during the interim period. (Quran 65:1)
5. There is no interim period required if the divorce takes place while no sexual intercourse has ever taken place between the couple. (Quran 33:49)

6. If the couple still wishes to follow through with the divorce after the end of the interim period, then two witnesses are required to complete the process. (Quran 65:2)
7. If this is the 3rd divorce between the **same husband and wife**, then the couple may not remarry each other unless the woman has been married to another man and then divorced. (Quran 2:230)
8. The interim period required is three menstruation periods. The interim for women who no longer menstruate is three months. The interim period for pregnant women is until they deliver (Quran 2:228, 65:4)

## II The practiced modes of 'talaq' amongst Muslims

Since the issue under consideration is the dissolution of marriage by 'talaq', under the Islamic law of divorce, it is imperative, to understand the concept of 'talaq'. In this behalf, it is relevant to mention, that under the Islamic law, divorce is classified into three categories. Talaq understood simply, is a means of divorce, at the instance of the husband. 'Khula', is another mode of divorce, this divorce is at the instance of the wife. The third category of divorce is 'mubarat' divorce by mutual consent.<sup>54</sup>

'Talaq', namely, divorce at the instance of the husband, is also of three kinds – 'talaq-e-ahsan', 'talaq-e-hasan' and 'talaq-e-biddat'. The 'talaq-e-ahsan', and 'talaq-e-hasan' are both approved by the 'Quran' and 'hadith'. 'Talaq-e-ahsan', is considered as the 'most reasonable' form of divorce, whereas, 'talaq-e-hasan' is also considered as 'reasonable'. The 'talaq-e-biddat' is neither recognized by the 'Quran' nor by 'hadith', and as such, is to be considered as sacrosanctal to Muslim religion. The controversy which has arisen for consideration before us, is with reference to 'talaq-e-biddat'.

It is necessary for the determination of the present controversy, to understand the parameters, and the nature of the different kinds of 'talaq'. 'Talaq-e-ahsan' is a single pronouncement of 'talaq' by the husband, followed by a period of abstinence. The period of abstinence is described as 'iddat'. The duration of the 'iddat' is ninety days or three menstrual cycles (in case, where the wife is menstruating). Alternatively, the period of 'iddat' is of three lunar months (in case, the wife is not menstruating). If the couple resumes cohabitation or intimacy, within the period of 'iddat', the pronouncement of divorce is treated as having been revoked. Therefore, 'talaq-e-ahsan' is revocable. Conversely, if there is no resumption of cohabitation or intimacy, during the period of 'iddat', then the divorce becomes final and irrevocable, after the expiry of the 'iddat' period. It is considered irrevocable because, the couple is forbidden to resume marital relationship thereafter, unless they contract a fresh 'nikah' (-marriage), with a fresh 'mahr'. 'Mahr' is a mandatory payment, in the form of money or possessions, paid or promised to be paid, by the groom or by the groom's father, to the bride, at the time of marriage, which legally becomes her property. However, on the third pronouncement of such a 'talaq', the couple cannot remarry, unless the wife first marries someone else, and only after her marriage with other person has been dissolved (either through 'talaq' - divorce, or death), can the couple remarry. Amongst Muslims, 'talaq-e-ahsan' is regarded as – 'the most proper' form of divorce.

'Talaq-e-hasan' is pronounced in the same manner, as 'talaq-e-ahsan'. Herein, in place of a single pronouncement, there are three successive pronouncements. After the first pronouncement of divorce, if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. The same procedure is mandated to be followed, after the expiry of the first month (during which marital ties have not been resumed).<sup>55</sup> 'Talaq' is pronounced again. After the second pronouncement of 'talaq', if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. It is significant to note, that the first and the second pronouncements may be revoked by the husband. If he does so, either expressly or by resuming

<sup>54</sup> Dr. Mohammad Nazmi, *Mohammadan Law*, 3<sup>rd</sup> ed., Central Law publication, Allahbad, 2012.

<sup>55</sup> Dr. M. A. Qureshi, *Muslim Law*, 5<sup>th</sup> ed., Central Law Publication, Allahbad, 2015

conjugal relations, 'talaq' pronounced by the husband becomes ineffective, as if no 'talaq' had ever been expressed. If the third 'talaq' is pronounced, it becomes irrevocable. Therefore, if no revocation is made after the first and the second declaration, and the husband makes the third pronouncement, in the third 'tuhr' (period of purity), as soon as the third declaration is made, the 'talaq' becomes irrevocable, and the marriage stands dissolved, where after, the wife has to observe the required 'iddat' (the period after divorce, during which a woman cannot remarry. Its purpose is to ensure, that the male parent of any offspring is clearly identified). And after the third 'iddat', the husband and wife cannot remarry, unless the wife first marries someone else, and only after her marriage with another person has been dissolved (either through divorce or death), can the couple remarry. The distinction between 'talaq-e-ashan' and 'talaq-e-hasan' is, that in the former there is a single pronouncement of 'talaq' followed by abstinence during the period of 'iddat', whereas, in the latter there are three pronouncements of 'talaq', interspersed with abstinence. As against 'talaq-e-ahsan', which is regarded as 'the most proper' form of divorce, Muslims regard 'talaq-e-hasan' only as 'the proper form of divorce'.

The third kind of 'talaq' is 'talaq-e-biddat'. This is effected by one definitive pronouncement of 'talaq' such as, "I talaq you irrevocably" or three simultaneous pronouncements, like "talaq, talaq, talaq", uttered at the same time, simultaneously. In 'talaq-e-biddat', divorce is effective forthwith. The instant talaq, unlike the other two categories of 'talaq' is irrevocable at the very moment it is pronounced. Even amongst Muslims 'talaq-e-biddat', is considered irregular.<sup>56</sup>

### III Why do most of the Indian Muslims seem to support triple talaq?

Mostly the issue is regarding the Instant Triple Talaq which is rigorously followed today and not regarding Triple Talaq which is mentioned in the holy Koran. The Instant Triple Talaq is a practice in which a man says talaq to his wife three times in succession which is considered as their divorce. The bad part about it is most of the time men do this while under the influence of alcohol. It may seem funny but there are some cases in which man uses Whatsapp to take instant triple talaq which is completely baloney. It is clear that this practice is unethical but many Muslim institution defend this by saying this is their religious matter and religious matters are protected by our constitution. Hence even the Supreme Court once said that the Instant triple talaq is good in law but bad in theology.

The Triple Talaq according to holy Quran is much different than the one followed today. According to the Quran, initially the couple should try to solve the disputes by reconciliation including arbitration at least for four times. While this reconciliation the man should try to explain his wife the bad side of their divorce. The couple should try involving two person from each of the spouse side for arbitration if initial reconciliation doesn't work. After trying for reconciliation for four times then and then only the man is liable of uttering the first talaq in her purity period which is called *tuhr*. After uttering the first talaq a period called "iddat" in Quran starts, which is a period of three mensuration cycle in case of women who is not pregnant and it is till the birth of baby in case of pregnant women. During this period the couple should stay together and try to resolve the issue. If the dispute is solved then no need of marriage again and the couple can continue their life happily again but if the issue is still not solved then the man can utter the final irrevocable talaq in presence of two witnesses and this will act as a divorce for the couple. This is basically the procedure mentioned in Holy Koran for triple talaq.

The Quran advises the husband to settle differences through a mutual conversation as the first step. This step is known as the 'Faizu Hunna'. Then there is a step of physical separation, known as the 'Wahjuru Hunna'. And if that fails, then the husband must attempt to talk to the wife, make peace with her and talk about the gravity of the situation. This third step is known as the 'Wazribu Hunna'. If the third step fails, the fourth step of 'arbitration' must be followed. In this step, there is arbitration by members from families

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<sup>56</sup> Sir Dinshaw Fradunji Mulla, Mulla Principles of Mahomedan Law, 20<sup>th</sup> Ed. Lexisnexis Publication New Delhi, 2015.

of both parties. It is only after all four steps have failed that a husband pronounces the first talaq. The husband has to compulsorily wait for a wife's iddah (three menstrual cycles) to complete before pronouncing another talaq.<sup>57</sup>

Unfortunately, in spite of mentioning triple talaq very clear in holy Koran some Muslim people in India still follow Instant Triple Talaq. The Instant Triple Talaq has been derived from the authentic book of Hanafi law for Islam. The Instant Triple Talaq is banned in some of the Muslim countries including Pakistan seeing its unethical and inhuman nature.

#### **IV The Holy Quran – with reference to ‘talaq’**

Muslims believe that the Quran was revealed by God to the Prophet Muhammad over a period of about 23 years, beginning from 22.12.609, when Muhammad was 40 years old. The revelation continued upto the year 632 – the year of his death. Shortly after Muhammad’s death, the Quran was completed by his companions, who had either written it down, or had memorized parts of it. These compilations had differences of perception. Therefore, Caliph Usman - the third, in the line of caliphs recorded a standard version of the Quran, now known as Usman’s codex. This codex is generally treated, as the original rendering of the Quran.<sup>58</sup>

The Quran is divided into ‘suras’ (chapters). Each ‘sura’ contains ‘verses’, which are arranged in sections. Since our determination is limited to the validity of ‘talaq-e-biddat’, within the framework of the Muslim ‘personal law’ – ‘Shariat’, we shall only make a reference to such ‘verses’ from the Quran, as would be relevant for our above determination. In this behalf, reference may first be made to ‘verses’ 222 and 223 contained in ‘section’ 28 of ‘sura’ II. The same are reproduced below:

*“222. They ask thee  
Concerning women’s courses.  
Say : They are  
A hurt and a pollution :  
So keep away from women  
In their courses, and do not  
Approach them until  
They are clean.  
But when they have  
Purified themselves,  
Ye may approach them  
In any manner, time, or place  
Ordained for you by God.  
For God loves those  
Who turn to Him constantly  
And he loves those  
Who keep themselves pure and clean.*

*223. Your wives are  
As a tilth unto you ;  
So approach your tilth  
When or how ye will ;  
But do some good act*

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<sup>57</sup> Sir Dinshaw Fradunji Mulla, Mulla Principles of Mahomedan Law, 20<sup>th</sup> Ed. Lexisnexis Publication New Delhi, 2015.

<sup>58</sup> Abdullah Yusuf Ali, ‘The Holy Quran: Text Translation and Commentary’, Kitab Bhawan, New Delhi, 14<sup>th</sup> edition, 2016.

*For your souls beforehand ;  
And fear God,  
And know that ye are  
To meet Him (in the Hereafter),  
And give (these) good tidings  
To those who believe."*

The above 'verses' have been extracted for the reason, that the Quran mandates respectability at the hands of men towards women. 'Verse' 222 has been interpreted to mean, that matters of physical cleanliness and purity should be looked at, not only from a man's point of view, but also from the woman's point of view. The 'verse' mandates, that if there is danger of hurt to the woman, she should have every consideration. The Quran records, that the actions of men towards women are often worse. It mandates that the same should be better with reference to the woman's health, both mental and spiritual. 'Verse' 223 postulates, that sex is as solemn, as any other aspect of life. It is compared to a husband-man's tilth, to illustratively depict, that in the same manner as a husband-man sows his fields, in order to reap a harvest, by choosing his own time and mode of cultivation, by ensuring that he does not sow out of season, or cultivate in a manner which will injure or exhaust the soil. So also, in the relationship towards a wife, 'verse' 223 exhorts the husband, to be wise and considerate towards her, and treat her in such manner as will neither injure nor exhaust her. 'Verses' 222 and 223 exhort the husband, to extend every kind of mutual consideration, as is required towards a wife. Reference is also necessary to 'verses' 224 to 228 contained in section 28 of 'sura' II of the Quran. The same are extracted below:

*"224. And make not  
God's (name) an excuse  
In your oaths against  
Doing good, or acting rightly,  
Or making peace  
Between persons;  
For God is one  
Who heareth and  
knoweth All things.*

*225. God will not  
Call you to account  
For thoughtlessness  
In your oaths,  
But for the intention  
In your hearts;  
And He is  
Oft-forgiving Most Forbearing.*

*226. For those who take  
An oath for abstention  
From their wives,  
A waiting for four months  
Is ordained; If then they return,  
God is Oft-forgiving,  
Most Merciful.*

*227. But if their intention  
Is firm for divorce,  
God heareth*



*And knoweth all things.*

*228. Divorced women  
Shall wait concerning themselves  
For three monthly periods.  
Nor is it lawful for them  
To hide what  
God Hath created in their wombs,  
If they have faith  
In God and the Last Day.  
And their husbands  
Have the better right  
To take them back  
In that period, if  
They wish for reconciliation.  
And women shall have rights  
Similar to the rights  
Against them, according  
To what is equitable;  
But men have a degree  
(Of advantage) over them  
And God is  
Exalted in Power Wise.”*

‘Verse’ 224, has a reference to many special kinds of oaths practised amongst Arabs. Some of the oaths even related to matters concerning sex. These oaths caused misunderstanding, alienation, division or separation between husbands and wives. ‘Verses’ 224 to 227 are pointed references to such oaths. Through ‘verse’ 224, the Quran ordains in general terms, that no one should make an oath in the name of God, as an excuse for not doing the right thing, or for refraining from doing something which will bring people together. The text relied upon suggests, that ‘verses’ 225 to 227 should be read together with ‘verse’ 224. ‘Verse’ 224 is general and leads up to the next three ‘verses’. These ‘verses’ are in the context of existing customs, which were very unfair to married women. Illustratively, it was sought to be explained, that in a fit of anger or caprice, sometimes a husband would take an oath in the name of God, not to approach his wife. This act of the husband, it was sought to be explained, deprives the wife of her conjugal rights, and yet, keeps her tied to the husband indefinitely, inasmuch as, she has no right to remarry. Even if this act of the husband, was protested by the wife, the explanation provided is, that the husband was bound by the oath in the name of God. Through the above verses, the Quran disapproves thoughtless oaths, and at the same time, insists on a proper solemn and conscious/purposeful oath, being scrupulously observed.

The above ‘verses’ caution husbands to understand, that an oath in the name of God was not a valid excuse since God looks at intention, and not mere thoughtless words. It is in these circumstances, that ‘verses’ 226 and 227 postulate, that the husband and wife in a difficult relationship, are allowed a period of four months, to determine whether an adjustment is possible. Even though reconciliation is recommended, but if the couple is against reconciliation, the Quran ordains, that it is unfair to keep the wife tied to her husband indefinitely. The Quran accordingly suggests that in such a situation, divorce is the only fair and equitable course. All the same it is recognized, that divorce is the most hateful action, in the sight of the God.

## V Legislation in India, in the field of Muslim personal law

The personal law dealing with the affairs of those professing the Muslim religion, was also regulated by custom or usage. It was also regulated by 'Shariat' the Muslim 'personal law'. The status of Muslim women under customs and usages adopted by Muslims, were considered to be oppressive towards women. Prior to the independence of India, Muslim women organisations condemned customary law, as it adversely affected their rights, under the 'Shariat'. Muslim women claimed, that the Muslim 'personal law' be made applicable to them. It is therefore, that the Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to, as the Shariat Act), was passed. It is essential to understand, the background which resulted in the enactment of the Shariat Act. The same is mentioned in the statement of objects and reasons, which is reproduced below:

“For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer inasmuch as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simply disgraceful. All the Muslim Women Organisations have therefore condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law.”

Section 2 the Shariat Act mandates that Muslim 'personal law' (Shariat) would be exclusively adopted as "*the rule of decision*" in matters of intestate succession, special property of females, including all questions pertaining to "personal property inherited or obtained under contract or gift or any other provision of 'personal law', marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, gifts, trusts and trust properties, and wakfs". It is relevant to highlight herein, that under Section 5 of the Shariat Act provided, that a Muslim woman could seek dissolution of her marriage, on the grounds recognized under the Muslim 'personal law'.<sup>59</sup> It would also be relevant to highlight, that Section 5 of the Shariat Act was deleted, and replaced by the Dissolution of Muslim Marriages Act, 1939.

In the above context, it would be relevant to mention, that there was no provision in the Hanafi Code, of Muslim law for a married Muslim woman, to seek dissolution of marriage, as of right. Accordingly, Hanafi jurists had laid down, that in cases in which the application of Hanafi law caused hardship, it was permissible to apply the principles of the Maliki, Shafii or Hanbali law.

## VI Constitutional morality and 'talaq-e-biddat'

The constitutional validity of the practice of 'talaq-e-biddat' i.e. triple talaq, is in breach of constitutional morality. The question raised before us was, whether under a secular Constitution, women could be discriminated against, only on account of their religious identity? It was asserted, that women belonging to any individual religious denomination, cannot suffer a significantly inferior status in society, as compared to women professing some other religion. The Muslim women were placed in a position far

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<sup>59</sup> Mohhammad Kannu v. Kasim Beevi (54) A. Trav.-Cochin 219.

more vulnerable than their counterparts, who professed other faiths. The Hindu, Christian, Zoroastrian, Buddhist, Sikh, Jain women were not subjected to ouster from their matrimonial relationship, without any reasonable cause, certainly not, at the whim of the husband; certainly not, without due consideration of the views expressed by the wife, who had the right to repel a husband's claim for divorce.

The 'talaq-e-biddat', vests an unqualified right with the husband, to terminate the matrimonial alliance forthwith, without any reason or justification. The process of 'talaq-e-biddat' is extra-judicial, and as such, there are no remedial measures in place, for raising a challenge, to the devastating consequences on the concerned wife. The fundamental right to equality, guaranteed to every citizen under Article 14 of the Constitution, must be read to include, equality amongst women of different religious denominations. The gender equality, gender equity and gender justice, were values intrinsically intertwined in the guarantee assured to all (citizens, and foreigners) under Article 14. The conferment of social status based on patriarchal values, so as to place womenfolk at the mercy of men, cannot be sustained within the framework of the fundamental rights, provided for under Part III of the Constitution. Besides equality, Articles 14 and 15 prohibit gender discrimination. Discrimination on the ground of sex is expressly prohibited under Article 15. The right of a woman to human dignity, social esteem and self-worth were vital facets, of the right to life under Article 21. Gender justice is a constitutional goal, contemplated by the framers of the Constitution. According to Article 51A(e) of the Constitution, one of the declared fundamental duties contained in Part IV of the Constitution, is to ensure that women are not subjected to derogatory practices, which impact their dignity. Gender equality and dignity of women, are non-negotiable. Women constitute half of the nation's population, and inequality against women, should necessarily entail an inference of wholesale gender discrimination.

In the case of *Sarla Mudgal v. Union of India*<sup>60</sup> the following observations were made by the supreme court of India:

*44. Marriage, inheritance, divorce, conversion are as much religious in nature and content as any other belief or faith. Going round the fire seven rounds or giving consent before Qazi are as much matter of faith and conscience as the worship itself. When a Hindu becomes a convert by reciting Kalma or a Muslim becomes Hindu by reciting certain Mantras it is a matter of belief and conscience. Some of these practices observed by members of one religion may appear to be excessive and even violative of human rights to members of another. But these are matters of faith. Reason and logic have little role to play. The sentiments and emotions have to be cooled and tempered by sincere effort. But today there is no Raja Ram Mohan Rai who single handedly brought about that atmosphere which paved the way for Sati abolition. Nor is a statesman of the stature of Pt. Nehru who could pilot through, successfully, the Hindu Succession Act and Hindu Marriage Act revolutionising the customary Hindu Law. The desirability of uniform Code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change."*

The Constitution seeks to establish a secular socialist democratic republic in which every citizen has equality of status and of opportunity, to promote among the people dignity of the individual, unity and integrity of the nation transcending them from caste, sectional, religious barriers fostering fraternity among them in an integrated Bharat. The emphasis, therefore, is on a citizen to improve excellence and equal status and dignity of person. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism

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<sup>60</sup> (1995) 3 SCC 635.

has been held to be one of the basic features of the Constitution<sup>61</sup> and egalitarian social order is its foundation. Unless free mobility of the people is allowed transcending sectional, caste, religious or regional barriers, establishment of secular socialist order becomes difficult.

In *State of Karnataka v. Appa Balu Ingale*<sup>62</sup> the Supreme Court held that:

*“34. Judiciary acts as a bastion of the freedom and of the rights of the people. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity and formlessness in the seamless web of life. A Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future to decide objectively, disengaging himself/herself from every personal influence or predilections. The Judges should adapt purposive interpretation of the dynamic concepts under the Constitution and the Act with its interpretative armoury to articulate the felt necessities of the time. Social legislation is not a document for fastidious dialects but means of ordering the life of the people. To construe law one must enter into its spirit, its setting and history. Law should be capable to expand freedom of the people and the legal order can weigh with utmost equal care to provide the underpinning of the highly inequitable social order. Judicial review must be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are required to be removed readjusting the social order through rule of law. In that case, the need for protection of right to take water, under the Civil Rights Protection Act, and the necessity to uphold the constitutional mandate of abolishing untouchability and its practice in any form was emphasised.*

The Constitution through its Preamble, Fundamental Rights and Directive Principles created a secular State based on the principle of equality and non-discrimination, striking a balance between the rights of the individuals and the duty and commitment of the State to establish an egalitarian social order. Dr K.M. Munshi contended on the floor of the Constituent Assembly that “we want to divorce religion from personal law, from what may be called social relations, or from the rights of parties as regards inheritance or succession. What have these things got to do with religion, I fail to understand? We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If, however, in the past, religious practices have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation”.<sup>63</sup>

Article 44 provides that the State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within

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<sup>61</sup> S.R. Bommai v. Union of India (1994) 3 SCC 1

<sup>62</sup> State of Karnataka v. Appa Balu Ingale [1995 Supp (4) SCC 469]

<sup>63</sup> Vide: Constituent Assembly Debates, Vol. VII, pp. 356-58.

the ambit of Articles 25 and 26 is a suspect legislation, although it is doubtful whether the American doctrine of suspect legislation is followed in this country. In *Sarla Mudgal v. Union of India*<sup>64</sup> it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country.

Union law minister Ravi Shankar Prasad on 31st May 2018 brought to the fore the issue of 'triple talaq', saying it is still being practiced in Telangana even after it is made unconstitutional by the Supreme Court of India. "The triple talaq issue is not about faith. It is about gender equality and justice. When 22 countries including Pakistan have regulated it, why is there a hue and cry in India, despite a law that had been passed to stop this practice? When a three-year jail term was included in the law as punishment; arguments put forward by those opposing it were how the family will survive if the man goes to jail. Are people not jailed in domestic violence cases, irrespective of their religion? Article 15 of the Constitution provides for gender equality, so one should not look at triple talaq as a religion or faith issue, but as a law that comes to their rescue. This article analyzes one of the hottest and most tricky issues of the Muslim personal Law. The whole triple talaq issue has become a battleground for the culture versus modernity debate. It is important to realize that women's experiences cannot be understood in these reductive binaries as "she" is produced from the very power relations which subordinate them. The legislations were silent upon the practice of triple talaq. Judicial interpretations have also been looked into wherein the courts have laid the procedure of valid divorce by interpreting holy Quran. On 22 August 2017, the Indian Supreme Court deemed instant triple talaq (talaq-e-biddah) unconstitutional. Three of the five judges in the panel concurred that the practice of triple talaq is unconstitutional. On 30 July 2019, Parliament of India declared the practice of Triple Talaq as illegal, unconstitutional and made it punishable act from 1 August 2019 which is deemed to be in effect from 19 September 2018. In this article the author deals with the question of triple talaq in the light of the recent practices of triple talaq which is treated as talaq-ul-biddat and is not acceptable in accordance with the injunctions of Quran and Hadis and this article throws light on how it is not a good form of custom. This article explains the forms of talaq laid down under the holy Quran and the procedure for the same.

## VII Conclusion

The order given by Hazrat Omar for validating triple talaq was for that particular period of time to restrain the evil practice and misuse of three utterances of talaq by the Arabs then. After the conquest of Iraq, Syria, Egypt and Persia, the Arabs wanted to marry the beautiful women of the said countries as well as wanted to retain their Arab wives. It was as good as eating a cake and having it too. This infuriated Hazrat Omar and so he validated triple talaq. The order thus promulgated forms the Ijma, the third source of Islamic law. Ijma of the companion of prophet is accepted as an incontrovertible source and as such it has also been approved of by Imam Abu Hanifa. Hence the Muslims feel that it is but inevitable to follow the concept of triple talaq and feel that it would be irreligious to do away with. On 22 August 2017, the Indian Supreme Court deemed instant triple talaq (talaq-e-biddah) unconstitutional. Three of the five judges in the panel concurred that the practice of triple talaq is unconstitutional. The remaining two declared the practice to be constitutional while simultaneously asking the government to ban the practice by enacting a law. On 30 July 2019, Parliament of India declared the practice of Triple Talaq as illegal, unconstitutional and made it punishable act from 1 August 2019 which is deemed to be in effect from 19 September 2018. India's Muslim neighbours are among 23 countries that have banned triple talaq already. The Muslim Women (Protection of Rights

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<sup>64</sup> *Sarla Mudgal v. Union of India* (1995) 3 SCC 635

on Marriage) Act, 2019 passed on 26 July 2019 after a very long discussion and opposition finally got the verdict (the Indian Supreme Court judgement of August 2017) to all women.<sup>65</sup> It made triple talaq illegal in India on 1 August 2019, replacing the triple talaq ordinance promulgated in February 2019. It stipulates that instant triple talaq (talaq-e-biddah) in any form – spoken, written, or by electronic means such as email or SMS – is illegal and void, with up to three years in jail for the husband. Under the new law, an aggrieved woman is entitled to demand maintenance for her dependent children

The question remains that in the case of announcing the act of triple talaq unlawful would improve the state of Muslim ladies more than the negation has done. Further such a move would pit the privileges of a Muslim lady against her social and social accepts. Understand that personality subversion is an exceptionally complex marvel. Drawing upon the post-current grant the subjectivity of the Muslim ladies must be comprehended to be built inside the same socio-social setting. For example, pious Islamic women may contest patriarchal regimes of Quranic interpretation home, while at the same time articulating a sort of global solidarity.<sup>66</sup> It has to be understood that the identity of a Muslim woman is intrinsically linked to her Muslim-ness and cannot be divested from it. Therefore the law reforms cannot take into account the linear narrative of victimisation through the patriarchal Muslim community but rather have to provide space for assertion of multilayered identities like these. Here we stand confronted by some of the most intractable problems of the conflict of rights where self--chosen sedimentation of identity within a religious tradition is at odds with forms of universalistic modes of de-traditionalisation of the politics of difference demanding gender equality and justice.<sup>67</sup> Thus it would have been better if the Muslim Community itself had come forward to bring the reforms within in accordance with the tenets of Quran and sunna, instead of giving away the opportunity to the secondary sources or other mechanisms. In order to bring in reforms as desired by the community in accordance with the social requirement under its progressive thinking and in the light of Quran and Hadis should have taken recourse to Ijma and Qiyas that form the other two important sources of Islam.

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<sup>65</sup> The Muslim Women (Protection of Rights on Marriage) Act, 2019 became law on 31 July 2019, replacing the earlier ordinance

<sup>66</sup> Upendra Baxi, *Future of human rights*(Oxford University Press, NewDelhi, 2008).

<sup>67</sup> Ibid.

# THE CIVIL JURISDICTION OF THE NATIONAL INDUSTRIAL COURT UNDER THE 1999 CONSTITUTION OF THE FEDERAL OF NIGERIA (THIRD ALTERATION) ACT 2010 AND PRE-2010 FUNDAMENTAL RIGHT LABOUR SUITS

David Tarh-Akong Eyongndi\*

## Abstract

This reviews the Court of Appeal decision in *Standard Chartered Bank v. Adegbite* where the court held that the jurisdiction of the National Industrial Court (NIC) in Sections 254C(1)(a)(d)(g) of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act and 7(1) (a) (i) and 11 of the National Industrial Court Act, 2006, the NIC does not have exclusive original jurisdiction over fundamental right enforcement proceedings arising from employment disputes commenced at the High Court prior to the enactment of the 1999 CFRN (Third Alteration) Act. Thus, such matters, in the absence of Sections 254C of 1999 CFRN (Third Alteration) Act providing for abatement, do not abate and the Courts specified in Sections 251, 257 and 272 of the 1999 CFRN pursuant to Section 46 of the same Constitution notwithstanding Section 254C (b) the 1999 CFRN (Third Alteration) Act have jurisdiction. This paper adopts the doctrinal methodology, it argues that this decision clearly defeats the intendment of the draftsmen, and has created a specie of labour cases known as “pre-1999 CFRN (Third Alteration) Act 2010 fundamental rights labour cases” “appealable to the supreme Court contrary to the Supreme Court decision in *Skye Bank v. Iwu* where all labour matters ought to end at the Court of Appeal. it recommends that Section 254C should be further amended to include abatement of all pending suits and same transferred to the NIC to give effect to the intention of the legislature in enacting the 1999 CFRN (Third Alteration) Act 2010.

**Keywords:** Jurisdiction of Court, Decree, Court of Law, Justice, National Industrial Court, Nigeria

## I INTRODUCTION

Dispute is an inevitable aspect of human existence and it transcends all areas of human relations.<sup>68</sup> However, the occurrence of dispute should not be the end of human interaction.<sup>69</sup> Thus, disputes must be settled for continuous human interaction. The State as the regulator of human affairs having executive, legislative and judicial powers, have set up the courts as institution for the settlement of disputes arising from human interactions be it political, social, contractual, employment, religious, etc. The State through the instrumentality of the law, create court and the law (statute) which in turn, creates the particular court provides its jurisdiction. Section 6(5) of the 1999 CFRN contains a list of courts described as superior court in Nigeria.<sup>70</sup> Prior to the enactment of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010, the NIC was not listed as one of the superior courts under the 1999 Constitution which had generated a lot of judicial controversies. Several legislative efforts (such as the promulgation of the Trade Dispute (Amendment) Decree No. 47 of 1992 and the enactment of the NIC Act 2006) had been taken to cure this defect yet the controversies persisted. As a result, in 2010, the National Assembly pursuant to its constitutional powers and function, enacted the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 which *inter alia*, listed the NIC as one of the superior courts of records in Nigeria, gave it exclusive civil original jurisdiction notwithstanding sections 251, 253 and 272 of the 1999 CFRN over labour disputes and matters pertained in chapter IV of the Constitution. Despite this clear provision explicating the intention of the legislature that the NIC as opposed to any other court, should have and exercise original civil jurisdiction in all labour matters including those pertaining to chapter IV of the 1999 CFRN this position has been unsettled. Thus, the Court of Appeal in *Standard Chartered Bank*

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<sup>68</sup> The fact that humans have various interests there is bound to be a clash of interests from time to time leading to conflicts.

<sup>69</sup> Lew, J. D. M., Mistelis, L. A. and Kroll, S. M., *Comparative International Commercial Arbitration* (London, Kluwer Law International, 2003) 1.

<sup>70</sup> Some of these courts included the Supreme Court, Court of Appeal, Federal High Court, High Court of the Federal Capital Territory, Abuja, State High Court, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of the States, Customary Court of Appeal of the States, etc.

*Nigeria Ltd. v. Ndidi Adegbite*<sup>71</sup> held that cases that commenced before the enactment of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010<sup>72</sup> involving labour disputes pertaining to chapter IV of the 1999 CFRN, (1999 CFRN (Third Alteration) Act) 2010 the NIC does not have exclusive original jurisdiction. The rationale is that the amendment does not include a provision that all such commenced matters before courts other than the NIC abates and should be transferred to the NIC, hence the prevailing substantive law as at the time of the accrual of the dispute is what prevails. Since section 46 of the 1999 CFRN enjoins anybody whose fundamental human right is about to be infringed or has been, to apply to a High Court within the State for its enforcement, section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act cannot revoke that right without an abetment of proceedings provision despite the fact that where there are two conflicting provisions in a statute the later prevails. The issues are, has this pronouncement not defeated the intention of the legislature in enacting the 1999 CFRN (Third Alteration) Act and a setback to the exclusive original civil jurisdiction of the NIC? Would a further amendment of section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act be a possible way out of the quagmire precipitated by the decision of the Court of Appeal on the civil jurisdiction of the NIC? These issues form the crux of this article.

This article is divided into four parts. Part one contains the general introduction. Part two examines the civil jurisdiction of the NIC along its developmental process. Part three discuss the decision in *Standard Chartered Bank Nig. Ltd. v. Ndidi Adegbite*<sup>73</sup> with regards to its effect on Nigeria's labour jurisprudence. Part four juxtaposes the Supreme Court decision in *Skye Bank Ltd. v. Victor Iwu*<sup>74</sup> and the Court of Appeal decision in *Standard Chartered Bank Nig. Ltd. v. Ndidi Adegbite*<sup>75</sup> contending that the later has created a specie of labour cases known as "Pre-Third Alteration Act labour cases" which contrary to the SC decision in *Iwu's Case*, could be appealed to the Supreme Court instead of terminating at the Court of Appeal. Part five contains the conclusion and recommendations based on the findings in the preceding sections.

## II THE EVOLUTIONARY JOURNEY OF THE NIC AND ITS CIVIL JURISDICTION

The NIC as a court of special jurisdiction has gone through a tumultuous evolutionary journey since its inception as a tribunal. The advent of Europeans in the area now known as Nigeria brought about paid labour as various business concerns were established. The establishment of these business concerns such as Leventis Group, Royal Niger Trading Company, Chanrai Group, etc. necessitated the creation of a legal and institutional framework for dealing with workers agitations.<sup>76</sup> In recognizing this fact, the colonial government in 1941 promulgated the Trade Dispute (Arbitration and Inquiry) Ordinance for settlement of trade disputes within Lagos. This Ordinance was only applicable in Lagos and there was no permanent structure for settling trade disputes rather, there was only *ad-hoc* and the government could only intervene in trade disputes upon the invitation of a party or parties.<sup>77</sup> In 1957 another Ordinance which was aimed at mending the defects in the earlier Ordinance was promulgated and it was known as Trade Disputes (Arbitration and Inquiry Federal Application) Ordinance.<sup>78</sup> This 1957 Ordinance became applicable within the whole country. In its effort to improve on the trade dispute settlement mechanism, the Federal Military Government (FMG) promulgated two decrees in 1968 and 1969. These are the Trade Disputes (Emergency Provisions) Decree 1968 and Trade Disputes (Emergency Provisions) (Amendment)

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<sup>71</sup> [2019] 1 NWLR (9t. 1653) 348.

<sup>72</sup> 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 settled the hitherto jurisdictional quagmire that had trailed the NIC.

<sup>73</sup> [2019] 1 NWLR (Pt. 1653) 348.

<sup>74</sup> [2017] 6 SC (Pt. )1.

<sup>75</sup> [2019] 1 NWLR (Pt. 1653) 348.

<sup>76</sup> Oji, A. E., and Amucheazi, O. D., *Employment and Labour Law in Nigeria (Lagos, Mbeyi & Associates (Nig.) Ltd., 2015)* 253.

<sup>77</sup> *Ibid.* p. 254.

<sup>78</sup> Akintayo, J. O. A., and Eyongndi, D. T., "The Supreme Court of Nigeria Decision in *Skye Bank Ltd. v. Victor Iwu: Matters Arising*" 9(3) *The Gravitas Review of Business and Property Law*, September, 2018) 110.



Decree 1969.<sup>79</sup> The 1969 Decree expressly prohibited strike and lockout and punished partakers with a term of imprisonment without an option of fine, and made it mandatory for parties to report within fourteen days of its occurrence to the Inspector General of Police (IGP) The Decree interestingly, established a permanent tribunal for the settlement of trade disputes known as Industrial Arbitration Tribunal.<sup>80</sup> In 1976, the Trade Dispute, Decree No. 7 was promulgated to address certain inherent shortcomings in the 1969 Decree.<sup>81</sup> This Decree per sections 19 and 20 thereof for the first time established a permanent court known as the National Industrial Court to adjudicate over trade disputes.

The 1979 Constitution of the Federal Republic of Nigeria came into force and by virtue of section 274 thereof, the Trade Disputes Decree was deemed an existing law and continued to exist as an Act of the National Assembly and concomitantly metamorphosed into the Trade Disputes Act. This Act was amended by the Trade Dispute (Amendment) Decree No. 47 of 1992 which ostensibly elevated the NIC to a Superior Court of Record.<sup>82</sup> Pursuant to its purported elevation to the status of a superior court of record with exclusive jurisdiction in labour matters; the Decree held-sway because under the military, Decrees supersedes the unsuspending part of the Constitution. However, when the 1999 Constitution like its 1979 counterpart was made; the NIC was conspicuously omitted among the Superior Courts of Records listed in section 6(5) thereof. This led to the querying of the constitutionality and superior status of the NIC vis-à-vis the State High Court. Thus, disputes that ought to be ordinarily litigated at the NIC were still taken to the regular court as in the cases of *Maritime Workers Union of Nigeria v. Nigerian Labour Congress*<sup>83</sup> and *Kalango v. Dokubo*.<sup>84</sup> In 2006 in a bid to settle the protracted jurisdictional challenges that have trailed the NIC, the National Assembly enacted the National Industrial Court Act (NICA). This Act fortified the jurisdiction of the NIC; its section 7 gave it exclusive original civil jurisdiction over labour matters. In order to finally seal the jurisdictional debacle of the NIC, the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 was enacted. Section 254A (1) of the Act established the NIC, section 254C gave the NIC exclusive original civil jurisdiction over labour matters notwithstanding the provisions of section 251, 257 and 272 of the 1999 Constitution. By section 254C (1) (d) the NIC has the exclusive jurisdiction to adjudicate over labour disputes pertaining to Chapter IV of the Constitution.

Section 254C of the 1999 CFRN (Third Alteration) Act provides the exclusive original civil jurisdiction of the NIC. It has and exercises exclusive original civil jurisdiction over every labour, employment, trade dispute, industrial relations, workplace matters, condition of service such as health, safety, welfare of labour, etc<sup>85</sup>, matters pertaining to the administration and application of any labour legislation such as Trade Dispute Act, Labour Act, Employees' Compensation Act, etc.<sup>86</sup> It also exercise this jurisdiction over any dispute relating to or connected with the interpretation and application of the provisions of Chapter IV of the Constitution as it relates to any employment, labour, industrial relations, trade unionism, employer's association etc.<sup>87</sup> it also exclusively adjudicates over any issue relating to national minimum wage of the federation or any part thereof, unfair labour practice or international best practices in labour, employment and industrial relation.<sup>88</sup> Any matter relating to or connected with any personnel matter arising from any free trade zone in the federation or any part thereof as well as disputes relating to the determination of any question as to the interpretation and application of any collective agreement; award or order made by an arbitral tribunal in respect of a trade dispute or trade union dispute, terms of settlement of any trade dispute; trade union dispute or any trade dispute, trade union Constitution, the constitution of an

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<sup>79</sup>Ibid.

<sup>80</sup>Oji, A. E., and Amucheazi, O. D., (No. 8) Op. cit. P. 254.

<sup>81</sup>Ibid. P. 255.

<sup>82</sup>Ibid.

<sup>83</sup> [2005] 4 NLLR (Pt. 10)270 at 282.

<sup>84</sup> [2003] 15 WRN 32.

<sup>85</sup> Section 245C (1) (a) of the 1999 CFRN (Third Alteration) Act, 2010.

<sup>86</sup> Section 245C (1) (b) of the 1999 CFRN (Third Alteration) Act, 2010.

<sup>87</sup> Section 245C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010.

<sup>88</sup> Section 245C (1) (e) (f) of the 1999 CFRN (Third Alteration) Act, 2010.

association of employers or any association relating to employment, labour, industrial relations or work place and child labour, child abuse, human trafficking etc.<sup>89</sup>

By virtue of section 254C (2), notwithstanding anything to the contrary in the Constitution (particularly section 12 thereof that requires domestication for international treaties to become enforceable in Nigeria) the NIC has the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty, or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith. In fact, it can be safely argued that the circumference of the civil jurisdiction of the NIC is elastic as can be gleaned from the provisions of section 254C (1) (a)-(m) of the 1999 CFRN (Third Alteration) Act.

### **III STANDARD CHARTERED BANK NIG. LTD. V. ADEGBITE AND THE NIC CIVIL JURISDICTION**

The brief and succinct facts of this case are as follows. The Appellant employed the Respondent as an Account Relationship Officer. In the course of her employment, she applied for maternity leave which she was granted for the period of 7<sup>th</sup> February to 6<sup>th</sup> May 2005. On health grounds as it affect her new born baby, upon the expiration of the leave, she applied for an extension and she was granted. On the 3<sup>rd</sup> day of February 2006, she had separate meetings with her supervisors and one of the Appellant's Executive Directors where she was informed that her performance appraisal was abysmal. On the 8<sup>th</sup> day of February, 2006, the Respondent resigned from the Appellant's employ. On the 15<sup>th</sup> day of June, 2007, she filed a suit against the Appellant contending that the Appellant staff told her that her appraisal was poor and therefore inimical to her continuous employment with the Appellant and she was therefore technically compelled to resign, her resignation was not voluntary and in good faith and it amounted to wrongful dismissal. It was her contention that in evaluating her, the Appellant discriminated against her on the basis of her sex and the fact that she was a nursing mother and the Appellant wrongfully debited her account to the tune of ₦ 1, 628, 209. 64. She therefore sought for several reliefs including a declaration that her dismissal from the Appellant's employ was discriminatory and constitutional same having been done on the basis of her sex and status as a nursing mother and order directing the Appellant to pay her damages to the tune of ₦ 50,000,000, refund of the money wrongfully deducted by the Appellant from her account, etc.

The Appellant denied that the Respondent was wrongfully dismiss as she admitted the facts of her poor performance based on the evaluation report during the meeting with her Supervisor and one of the Directors of the Appellant, thus, her resignation was voluntary. It also denied the allegation that it discriminated against the Respondent on the basis of sex and her status as a nursing mother and that the money deducted from her account was her pension and the mandatory nonrefundable National Housing Fund Scheme contribution. At the trial, the Respondent gave evidence and tendered several documents in proof of her case while the Respondent to the fact that in 2005, the Appellant gave her a target that was higher than her other team members who were neither women nor nursing mothers despite her legitimate absence from work pursuant to the leave and its extension granted her. The Appellant entered defence, call witness and tendered documents absolving itself of any wrongdoing but never controverted the fact that it gave the Respondent a higher target than her other team members. The Trial Court delivered its judgment in favour of the Respondent holding that she was discriminated against on the basis of her sex and her status as a nursing mother and that her resignation was not voluntary. It awarded her damages of ₦ 5, 000, 000. The Appellant dissatisfied with the judgment appealed to the Court of Appeal while the Respondent also cross appealed on the quantum of damages contending that it was too small for the breach of her fundamental right to freedom from discrimination.

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<sup>89</sup>Section 245C (1) (h) (i) (ii) (iii) (iv) (v) (vi) of the 1999 CFRN (Third Alteration) Act, 2010.

One of the grounds of appeal of the Appellant was that the learned trial judge erred in law when she<sup>90</sup> assumed jurisdiction and proceeded to enter judgment in favour of the respondent (claimant at High Court of Lagos State) on the 12<sup>th</sup> day of October, 2012 as per the reliefs contained in the respondent's writ of summons and statement of claim dated 15<sup>th</sup> June, 2007 and 12<sup>th</sup> June, 2007 respectively, in direct violation of the provisions of section 254C (1) of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 and sections 7 and 11, National Industrial Court Act, 2006, Cap. N 155, Laws of the Federation of Nigeria, 2010. By this ground of appeal, the Appellant was contending that as at 4<sup>th</sup> day of March, 2010 when the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 came into force, the High Court of Lagos State ceased to have jurisdiction over the subject matter pursuant to section 46 of the 1999 CFRN as same has now been vested in the NIC to the exclusion of any other court and the matter ought to have abated pursuant to sections 7 and 11, National Industrial Court Act, 2006.

The Court of Appeal held that section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 upon it coming into effect, did not sequester the jurisdiction of the High Court of Lagos State to be seized of matters contained in Chapter IV of the 1999 CFRN arising from labour and employment matters as the applicable law to a cause of action is the law prevailing as at the time the cause of action arose and not any other as was held in *Obiuwebi v. CBN*.<sup>91</sup> Besides, having failed to expressly provide that upon its coming into effect, all matters pertaining to Chapter IV of the 1999 CFRN relating to matters of labour and employment, pending before any court other than the NIC abates, the provisions of sections 7 and 11, National Industrial Court Act, 2006. Which provides same cannot be legally invoked to repealed section 46 of the 1999 CFRN which is hierarchically superior and prevail rendering null and void section 7 and 11, National Industrial Court Act, 2006 as was held in *African Petroleum Plc. v. Akinnawo*.<sup>92</sup> Hence, the point was resolved against the Appellant in favour of the Respondent.

This part of the decision of the Court of Appeal is what this article is concerned with as it has far reaching effects on the exclusive original civil of the NIC as far as Chapter IV of the 1999 CFRN is concerned. While it is conceded that the law existing as at the time the cause of action arose is the applicable law as has been repeatedly held in avalanche of judiciary pronouncements such as *Aremu v. Adekanye*<sup>93</sup> *Ontario Oil & Gas Nig. Ltd. v. Federal Republic of Nigeria*<sup>94</sup> and *Nurudeen Adewale Arije v. Federal Republic of Nigeria*<sup>95</sup> it is obvious that the draftsmen had intended a contrary situation as far as section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act was concerned. However, the draftsmen failed to avert their minds judiciously to the subject of abatement of pending dispute and that an Act or any law under a democratic dispensation does not have retrospective effect. In fact, retrospective nature of law runs afoul to the ethos of democracy and it is a characteristic nature of military or totalitarian rule which subverts the will of the people. From the phraseology of section 254C (1) (a) of the 1999 CFRN (Third Alteration) Act, 2010, the draftsmen had intended that"

notwithstanding the provisions of sections 251, 257, 272 and anything contained in the Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters relating to or connected with any

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<sup>90</sup> The use of the word "she" in description of the learned trial judge by the appellant in its notice of appeal runs contrary to the traditional description of judges as "learned brothers." It is unethical for a lawyer to refer to a judge in an inappropriate nomenclature.

<sup>91</sup> [2011] 7 NWLR (Pt. 1247) 465.

<sup>92</sup> [2012] 4 NWLR (Pt. 1289) 100 at 116-117.

<sup>93</sup> [2004] 13 NWLR (Pt. 891) 972.

<sup>94</sup> [2015] LPELR-24651 (CA).

<sup>95</sup> Suit No. CA/L/770/2009 judgment delivered on 6/11/2014.

dispute over the interpretation and application of the provisions of Chapter IV of the Constitution as it relates to any employment, labour, industrial relations, trade unionism, employer's association any other matter which the court has jurisdiction to hear and determine.

An important point is imbedded in the provisions above with regard to the exclusive original civil jurisdiction of the NIC. It is apposite *ipssima verba*, to note that sections 251, 257 and 272 relates to the jurisdictions of the Federal High Court, High Court of the Federal Capital Territory, Abuja and the State High Courts. These Courts are created by the Constitution and their jurisdiction can only be expanded or compressed by the law creating them and not just by an Act of the National Assembly *per se*. The gist is that where a provision of the Constitution is to be amended, for a purported amendment to be valid, it is not enough that the National Assembly enact an Act to that effect. Such an Act must be an Act of a constitutional dimension, i.e. that is must go through the process of constitutional amendment and not just the National Assembly alone exercising its powers and function of law making. The Bill must be sent to all the State Houses of Assembly to get the required percentage altering the particular portion of the Constitution as provided in section 9(2) (3) (4) of the 1999 CFRN which requires a resolution of supporting votes of not less than two third majority of the members of both houses of the National Assembly and approved by a resolution of the House of Assembly of not less than two-third of all the States for any matter not contained in Section 8 of the Constitution while matters in Chapter IV and section 8 of the 1999 CFRN requires a resolution supporting the proposal passed by not less than four-fifth majority votes of members of either Houses of the National Assembly supported by a resolution of the Houses of Assembly of not less than two-thirds of all the States.

Juxtaposing the above with Sections 7 and 11, National Industrial Court Act, 2006 makes the argument of the Appellant for their applicability untenable. For purposes of completeness the Section 7 of the NIC Act pertains to the jurisdiction of the NIC and is *in pari materia* with Section 254C (1) of the 1999 CFRN (Third Alteration) Act, 2010 however, due to its aptness, we take the liberty to reproduce *verbatim ad literatim* the provisions of section 11 (1) (2) of the NIC Act which states as follows:

In so far as jurisdiction is conferred upon the court in respect of the causes or matters mentioned in the foregoing provisions of this Act, the Federal High Court, the High Court of a State, the High Court of the Federal Capital Territory, Abuja, or any other court shall, to the extent that exclusive jurisdiction is so conferred upon the court, cease to have jurisdiction in relation to such causes and matters. Nothing in subsection (1) of this section shall affect the jurisdiction of the Federal High Court, the High Court of a State or of the Federal Capital Territory, Abuja to continue to hear and determine causes and matters which are part heard before the commencement of this Act and any proceedings in any such causes or matters, not determined or concluded at the expiration of one year after the commencement of this Act, shall abate.

The stage is now set for juxtaposing the constitutional efficacy of the NIC Act 2006 and the 1999 CFRN (Third Alteration) Act, 2010. Noteworthy is the fact that both Acts are Acts of the National Assembly but their legal efficacy differs. The NIC is an Act made by the National Assembly as an act of its ordinary legislative powers and function without any input whatsoever from any quarters. Thus, it can be described as an "ordinary Act" of the National Assembly in the discharge of its traditional functions. However, the later one is an Act of the National Assembly but with the input of four-fifth majority of the State Houses of Assembly and can be rightly categorized as an "Act of a Constitutional dimension." In fact, it ranks *pari passu* with the unsuspending part of the Constitution and its provisions where so expressed, supersedes any existing provision that runs contrary to it. Put differently, the Act is the Constitution and has the same supreme efficacy over every other law in Nigeria. It enjoins the supremacy efficacy of the 1999 Constitution contained in section 1 (3).

Thus, Section 11(1) (2) of the NIC Act, 2006 which the Appellant assiduously sought to invalidate the jurisdiction conferred on the Lagos State High Court by sections 46 and 272 of the 1999 CFRN with regards to Chapter IV of the same Constitution cannot achieve the intention expressed therein. The reason is, the said section 11(1) (2) of the NIC Act 2006, is subservient to section 46 and 272 of the 1999 CFRN. Thus, the draftsmen intention in section 11(1) (2) of the NIC Act, 2006, can only be legally effectuated pursuant to an Act of the National Assembly of the nature of the 1999 CFRN (Third Alteration) Act, 2010 and not just an ordinary Act. Having failed to transfuse into the provisions of the 1999 CFRN (Third Alteration) Act, 2010 the provisions contained in sections 11 (1) (2) of the NIC Act, 2006, the court was right in coming to the conclusion it did by placing reliance on the dictum of Ogakwu JCA in *Strand Nigeria Limited & Ors. v. Mr. Ngozi Ijeh*<sup>96</sup> The trial having commenced before the commencement date of the 1999 CFRN (Third Alteration) Act, 2010, section 254C could not be evoked. This is *in tandem* with the decisions in *Mustapha v. Governor of Lagos State*<sup>97</sup>, and *National Union of Road Transport Workers & Anor. v. Road Transport Employee Employees Association of Nigeria*.<sup>98</sup>

Thus, while the intention of the draftsmen in section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 is genuine and laudable, as same will ensure that the special nature and stature of the NIC with regards to any matter relating labour and employment irrespective of the nature of cause of action be ventilated at the NIC, the draftsmen by sheer ignorance or oversight, failed to properly effectuate this and same cannot be done through the back door. It is therefore pertinent that the National Assembly set in emotion, the judicial machinery to amend section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 to incorporate the provisions of section 11 (1) (2) of the NIC Act short of the permission of the matters to be concluded within a year or abate but for all pending matters commenced before the courts mentioned in section 251, 257 and 272 to abate without immediate effect from the date such an amendment becomes effective.

#### **IV JUXTAPOSING THE EFFECTS OF SKYE BANK LTD. V. IWU AND STANDARD CHARTERED BANK NIG. LTD. V. ADEGBITE**

This section juxtapose the decision of the Supreme Court (SC) in the case of *Skye Bank Ltd. v. Victor Iwu*<sup>99</sup> where the SC held that all appeals arising from matters contained in the exclusive original civil jurisdiction (whether as of right or with leave) from the decision of the NIC terminates at the Court of Appeal by virtue of section 243 (3) and (4) of the 1999 CFRN (Third Alteration) Act, 2010 and the decision of the Court of Appeal in *Standard Chartered Bank Nig. Ltd. v. Ndidi Adegbite*<sup>100</sup> wherein the Court of Appeal held that since the Third Alteration Act failed to provide for abatement of labour cases before any other court than the NIC before its coming into force, such cases would continue before such court so long as they deal with fundamental right issues arising from labour relations notwithstanding that section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 has vested exclusive original civil jurisdiction over such causes and matters on the NIC.

It is apposite to state that these cases have created a dichotomy on fundamental right labour cases which can for the purpose of convenience be categories as “Pre-1999 CFRN (Third Alteration) Act labour cases and Post-1999 CFRN (Third Alteration) Act Labour cases.” The practical effect of this dichotomy is profound when examined against the appellate jurisdiction of the Court of Appeal over labour disputes. In *Adegbite’s Case*, the Court of Appeal made it clear that labour fundamental right matters commenced at the High Court prior to the enactment of the 1999 CFRN (Third Alteration) Act would validly continue. Thus, appeals

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<sup>96</sup> Unreported Suit No. CA/L/790/2012.

<sup>97</sup> [1987] 2 NWLR (Pt. 58) 539.

<sup>98</sup> [2012] 10 NWLR (Pt. 1307) 170.

<sup>99</sup> [2017] 6SC (Part 1) 1.

<sup>100</sup> [2019] 1 NWLR (Pt. 1653) 348.

from such matters by virtue of section 241(1) (d) of the 1999 CFRN dealing with the appellate jurisdiction of the Court of Appeal from the High Courts, shall lie as of right to the Court of Appeal. Hence, such appeals from the High Court to the Court of Appeal, by virtue of section 233(1) (d) of the 1999 CFRN, shall lie to the Supreme Court irrespective of their nature of the dispute once the decision emanated through the appropriate Court.

By this, while labour matters (irrespective of the nature) from the NIC terminates at the Court of Appeal as the final court, fundamental right labour commenced at the High Court prior to the enactment of the 1999 CFRN (Third Alteration) Act can be appealed up to the SC contrary to the decision of the SC in *Skye Bank Ltd. v. Victor Iwu*<sup>101</sup> which is *in tandem* with section 243(3) (4) of the 1999 CFRN (Third Alteration) Act. The justification of the above is that since such fundamental right labour matters did not emanate from the NIC to the Court of Appeal but the High Court to the Court of Appeal, it would be overzealousness to seek to apply the decision in *Iwu's Case*.<sup>102</sup> This outcome clearly defeats the mischief sought to be cured by section 243(4) of the 1999 CFRN (Third Alteration) Act with regards to appeals on labour matters. Unfortunately, the finality of the decision of the Supreme Court in the *Iwu's Case* is being whimsically being questioned. This state of the law is undesirable as it engenders instability on an area of the law that certainty and stability is not only urgent but continuously necessary giving the nature and importance of labour to the economy of Nigeria and its total wellbeing.

## V CONCLUSION AND RECOMMENDATIONS

The NIC as a specialized court is a product of necessity for the settlement of labour and related disputes in Nigeria. Its evolutionary journey has been very tumultuous as a lot of controversies have surrounded its jurisdictional status and stature. In an effort to curb the menace, several legislative steps from the military to the democratic eras have been taken and today, the NIC is a constitutional superior court of record with coordinate jurisdiction with the Federal High Court and State High Court. Under the 1999 CFRN (Third Alteration) Act, 2010, the jurisdiction of the NIC has been greatly enhanced. Unlike its hitherto position, the NIC now has both civil and criminal jurisdiction with the civil being exclusive. However, while its original civil jurisdiction is exclusive, with regard to matters relating to Chapter IV of the 1999 CFRN, the NIC cannot exercise this exclusive jurisdiction to the prejudice of the High Court and Federal High as the powers conferred on them by section 46 of the Constitution have not been revoked by section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act, 2010 as the section failed to make provisions for abatement of actions commenced before the commencement date of the Act hence, such matters continue to subsist before those courts regardless. Also, section 11 of the NIC Act cannot be used to achieve the same result since same is subservient to sections 46, 251, 257 and 272 of the Constitution as was held by the Court of Appeal in *Standard Chartered Bank Nig. Ltd. v. Ndidi Adegbite*.<sup>103</sup> Thus, in order to give effect to section 11 of the NIC Act, 2006, there is a need to amend the 1999 CFRN (Third Alteration) Act, 2010.

Based on this finding, it is recommended that in order to realize the intention of the draftsmen in amending the 1999 CFRN with regard to the jurisdictional quagmire of the NIC, the 1999 CFRN (Third Alteration) Act, 2010 should be amended by incorporating the provisions of section 11 of the NIC Act to the effect that all proceedings relating to Chapter IV of the CFRN arising from labour and employment matters pending before any court prior or after the commencement of the Act abates and must be transferred to the NIC forthwith.

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<sup>101</sup> [2017] 6SC (Pt. 1) 1.

<sup>102</sup> *Ibid.*

<sup>103</sup> [2019] 1 NWLR (Pt. 1653) 348.

# SHARING ASSETS ON DIVORCE IN ENGLAND AND NIGERIA: JUDICIAL AND OTHER APPROACHES

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## Abstract

*The vexed question of how to exercise judicial discretion in sharing assets between couples on divorce remains at the front burner in family law. This is informed by the interpersonal nature of family and marriage. Case law abound in England and Nigeria which suggest a nagging need to close the gap between law and justice. Have the cases produced some principles from which some certainty can be observed? The cases have produced some popularly touted phrases that need clear conceptualisation. The work examines cases dealing with statutory marriage to determine the metaphorical reality of marriage “for richer or for poorer” in that vow of unity. The work discovers that a clear ideological difference exists between English law and Nigerian law on sharing property. Unlike English law, the concept of having a matrimonial property does not exist in divorce law of Nigeria. It recommends options to produce a more realistic approach. It concludes that there is need for the legislature to provide some steam to this intractable issue of spousal right to share property on divorce.*

**Key Words:** *sharing, matrimonial property, Nigeria, equality.*

## I Introduction

Sharing or dividing assets on divorce is central in the divorce process. While some jurisdictions provide a predictable framework through a property regime that parties enter into when getting married, some, like Nigeria and England, are bereft of an articulated regime beyond the ordinary incidents of law regarding property. How the courts in Nigeria and England have managed this delicately vexed issue of property claims in a changing landscape of marriage is important to legal development. What are the principles for sharing assets on marital breakdown in English law? What does the popularly touted yardstick of equality mean? Is equality ever departed from? Does the concept of sharing property on divorce even exist in Nigeria? What are the similarities between English law and Nigerian law on assets sharing on marital breakdown in view of Nigeria’s legal pedigree? The objective of this paper is modest. It aims to distil from English and Nigerian cases the basic principles of asset sharing/property readjustment, paying particular attention to the equality yardstick in England and settlement of property in Nigeria. It seeks to probe whether the sharing ideology of community as exists in England similarly operates in Nigerian law. By comparison it focuses on settlement of property under MCA 1973 of Nigeria. As a cautionary note the premise of the work is sharing of matrimonial assets and not determination of ownership disputes. To this end, the paper examines the meaning of “matrimonial property” or “family assets”; the components of equality as a yardstick and when equality is departed from; the factors that assist the courts in exercise of their discretionary justice; the ideology of settlement of property in Nigeria as a property readjustment order. It concludes with recommendations regarding the relationship between English and Nigerian cases.

### 1.1. What is Matrimonial Property

The central issue in most divorce claims where property claims are in contention is whether the property is or is not “matrimonial property” or “family assets”. There is no statutory reference or definition of the term in Nigeria. In 1970 the House of Lords in *Pettitt v Pettitt*<sup>104</sup> deprecated the use of the term “family assets.” It considered it “a useful loose expression” and that “family assets were not a special class of property known to law”. This was reiterated by Viscount Dilhorne in *Gissing v Gissing*.<sup>105</sup> Today, a value shift has occurred and the House has recognized that “family assets” “family property” “matrimonial

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<sup>104</sup> *Gissing v Gissing* [1969] 1 All ER 1043(CA), [1970] 2 All ER 780 (HL).

<sup>105</sup> *Ibid.*

property” or like expressions do exist as a class in law. Baroness Hale in *White v White*<sup>106</sup> used the term “family assets.” According to her, these are assets generated by the family: the family home, family savings, income from joint business of the couple but excludes assets generated by sole efforts of a spouse. English cases have held that the property to be shared must be matrimonial property. Non matrimonial property cannot be shared in short marriages.<sup>107</sup> Non-matrimonial property means assets that are not ‘family assets’, or not generated by the joint efforts of the parties. This includes property acquired before marriage, gifts and inheritances during the marriage. The majority decision in *Miller v Miller*<sup>108</sup> and *McFarlane v McFarlane*<sup>109</sup> regards business assets as generated by sole effort of one person unless both work in the business. With respect to business assets, Lord Nicholas dissented saying business assets should be shared in order not to discriminate against a home maker. His approach buttresses the earlier decision of Lord Denning in *Nixon v Nixon*.<sup>110</sup> Lord Denning held that a wife was entitled to a share in the matrimonial home and in the husband’s business where she had worked. Lord Nicholls also included the matrimonial home as matrimonial property even if one party had brought it into the marriage. According to Lord Diplock matrimonial property is:

“property, whether real or personal which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for common use and enjoyment of both spouses or their children, such as the matrimonial home, its furniture and other durable chattels’ but without intending any connotation as to how the beneficial proprietary interest in any family asset was held.”

These conceptualization has provided some element of certainty in an otherwise uncertain terrain in English law. Given this conceptualization in England and the non-conceptualization in Nigeria, as will be seen later, what implications does it have on sharing of assets in divorce?

## II How are Matrimonial /Family Assets Shared?

It is evident from case law that the principles regulating the readjustment of property on divorce are clearly a creation of the proactivity of the English courts. On their parts the English courts have stepped into the gap created by statute which failed to create a template of distribution. The social and policy issues have been considered in the line of cases of *White v White*,<sup>111</sup> *Miller v Miller*<sup>112</sup> and *Macfarlane v Macfarlane*.<sup>113</sup> First it must be noted that only matrimonial assets are shared. Baroness Hale in *White v White*<sup>114</sup> was not prepared to share non family assets on the grounds that “it simply cannot be demonstrated that the domestic contribution, important though it had been to the welfare of the family as a whole, has contributed to their acquisition.” The settled law is the flexible approach of Baroness Hale: distinction must be made between family assets and non-family assets, family assets meaning assets acquired by joint efforts. This position of determining family assets as based on joint efforts does not settle the inquiry. Joint effort is a matter of varied interpretation: must the effort be proportional, directly referable to the assets or would general contribution to the marriage suffice? These issues are further addressed by looking at the equality yardstick.

### 2.1. The Equality Yardstick

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<sup>106</sup> [2001]1 FLR 981.

<sup>107</sup> Note that there is no statutory definition of these concepts.

<sup>108</sup> [2006] UKHL 24.

<sup>109</sup> Ibid. These cases are co-joined decisions of the House of Lords.

<sup>110</sup> [1969]2 All ER 414.

<sup>111</sup> Above note 3.

<sup>112</sup> Above note 5.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.



English courts have held that matrimonial property must be shared equally thereby creating a yardstick of equality. In *Miller v Miller*<sup>115</sup> and *MacFarlane v MacFarlane*<sup>116</sup> it was said that the yardstick is an aid, not a rule. According to Baroness Hale in *White v White*<sup>117</sup> matrimonial assets are governed by the equality yardstick and divided equally unless there is a good reason for not doing so. Non family assets are not subject to the equality yardstick and may be kept by the person who generated them but in very long marriages the court may well decide to divide them equally. The case of *White* is significant in many respects: in its definition of matrimonial property/ family assets and creating the equality yardstick; it is also significant for pursuing equality of outcomes which ensures that there is no bias against any party. The statement of the Court of Appeal in *Charman v Charman* (No. 4)<sup>118</sup> is potent:

Property should be shared in equal proportions unless there is good reason to depart from such proportion and that the source of the property will be relevant to the decision as to whether there is good reason to depart from equality.

In *Miller v Miller*<sup>119</sup> the couple were married for three years. At the time of the divorce the assets of the husband were worth £17 million pounds. The trial court awarded the wife £5 million. The Court of Appeal confirmed this award on the ratio that the husband had caused the marital breakdown by running away with another woman and that he had caused the wife reasonably to expect a generous provision in the event of a divorce. At the House of Lords, both arguments were rejected as irrelevant. The House decided that even though it was a short marriage, she had a right to an equal share in the assets acquired during the marriage. The husband received £20 million from their sale of a company he had built up and the wife received £5 million for a three year marriage.<sup>120</sup>

In *Macfarlane v Macfarlane*<sup>121</sup> the wife had given up a lucrative career in the course of the marriage in order to look after the children and family while the husband continued to pursue his career. They were before the divorce court 16 years after the marriage; their assets as worth 3 million which they agreed to share. They could not agree on the periodical payments. The House of Lords ordered £250, 000 pounds per year from the husband's earning of over £750, 000 per annum. This ensured fair compensation of the wife for losses created during the marriage.

The yardstick of equality is generally applied to matrimonial property; the outcome is that the property is divided into two equal halves or disproportionately to generate equal outcomes. The distinction between matrimonial and non-matrimonial property is maintained. However, this distinction is blurred in lengthy marriages. Equal division of all assets, matrimonial or non-matrimonial, is usually applied to marriages of 20 years or more. Baroness Hale and Lord Nicholls agreed that in a case of lengthy marriages, whether the assets were family assets or matrimonial assets would become increasingly irrelevant and it would be likely the courts would likely divide everything the couple had in half.

## 2.2. Equality of Outcome and Non Discrimination

The line of English cases has shown that equality does not necessarily mean equal division but equality of outcomes. One can deduce that the House recognises the need for equality to be equitable. In *Miller's case* the husband's assets had increased during the marriage and £5 million was a fair share of the assets. Accordingly, the amount was way short of equal division. It was geared at equality of outcome. The Matrimonial Causes Act 1973 of England and the Marriage (Same Sex Couples) Act 2013 of England contain the exercise of discretion by English Courts listing also a number of relevant factors rather than

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<sup>115</sup> Above note 5.

<sup>116</sup> Ibid.

<sup>117</sup> Above note 3.

<sup>118</sup> [2007] EWCA Civ. 503.

<sup>119</sup> Above note 5.

<sup>120</sup> A classic example of equality of outcome.

<sup>121</sup> Above note 5.

guiding principles directing the court to take all relevant circumstances of the case into account in exercising discretion'. English courts, in departing from the yardstick of equality are to consider such factors as:

- (a) the income, earning capacity, property and other financial resources;
- (b) the financial needs, obligations and responsibilities which each party has or is likely to have in the foreseeable future
- (c) the standard of living enjoyed by the parties before breakdown of the marriage;
- (d) the age of the parties and duration of the marriage;
- (e) any physical or mental disability of either party to the marriage;
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family including any contribution like looking after the home or caring for the family;
- (g) the conduct of each of the parties, if that conduct is such that in the opinion of the court it would be inequitable to disregard;
- (h) in nullity proceedings the value of any lost benefits.<sup>122</sup>

The factors are treated of equal value. An examination of these factors reveals that the philosophy is to produce equality of outcome. The English courts have over the years developed some principles to assist in interpreting the Act. These include: welfare of the child as first consideration;<sup>123</sup> the policy of clean break; looking at the needs of the parties especially housing needs; and the yardstick of equality.

Non-discrimination is meant to produce equality of outcome. The House of Lords held that there should be no bias against home maker in favour of breadwinner in the application of equality yardstick.<sup>124</sup> This is as demonstrated in *White v White*. The awards must be checked against the yardstick of equality. This is necessary to get a fair outcome. Lord Nicholls stated thus:

[T]here is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles . . . If , in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets, there should be no bias in favour of the money earner and against the home maker and child carer."<sup>125</sup>

Non-discrimination was reiterated in *McFarlane's* case. It held that division of property may even involve element of compensation where the homemaker had given up a career to do so as to take care of the home. In the attempt to divide equally the focus is not on achieving fairness at the time of divorce only but also in the foreseeable future.<sup>126</sup> In *Macfarlane* for instance, the couple 's assets was worth £3 million and the husband was earning £1 million a year. If assets are equally divided, each would get £1.5m. After a few years the husband would be many times wealthier than the wife. To avoid this the House of Lords approved an order of substantial periodic payments from the husband to the wife.<sup>127</sup>

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<sup>122</sup> It is of note that in making financial orders of maintenance in Nigeria under the MCA similar factors are used. See the enumeration of these factors by the Nigerian Court of Appeal in *Menakaya v Menakaya* [1999] NWLR (pt. 472) 256.

<sup>123</sup> Matrimonial and Family Proceedings Act 1984. Note that at a point in time English law had used policies like minimal loss principle which aimed at keeping parties in the financial position they would have been had the marriage not broken down. This was overruled. See *M v B (Ancillary Proceedings: Lump Sum)* [1998] 1 FLR 3 which the House of Lords approved in *Piglowski v Piglowski* [1999] UKHL 27 where child interest was recognized as paramount.

<sup>124</sup> This is depicted in the case of *White v White* (above note 3) and *Charman* No. 4 above note 15.

<sup>125</sup> Per Lord Nicholls in *Charman* above note 15

<sup>126</sup> Baroness Hale in *White v White* above note 3.

<sup>127</sup> Probert, R. 2009. *Cretney & Probert's Family Law* London, Sweet & Maxwell pp230- 231 identifies the challenges or problems of equality yardstick: that it's a matter for parliament; that older wife would get less in the needs approach of *White* and that focusing on contributions rather than needs would avoid this. This is what Eekelaar called a shift from welfare based approach to entitlement based approach- contributions approach. Therefore, the spouse will be asking for "my share of the property"

## 2.3 Deviation from Equality Yardstick

Since equality is a yardstick instances of deviation are common. These deviations include instances where there are surplus assets, where there is a stellar contribution from a spouse and in situations of short marriages. A close scrutiny of the case law will depict what the objective of the process entails.

### 2.3.1. Surplus Assets

In *White*, Lord Nicholls limited his comments on equality yardstick to cases where there are surplus assets. Without this limitation, there were concerns that equal sharing would prejudice lower income cases because it has a debilitating effect on the primary carer who would in effect get less. Therefore, equal division will not be done where the assets are insufficient to meet the needs of the parties; in such situations the needs of the parties would prevail.<sup>128</sup> But where assets are sufficient to meet their needs, the sharing principle would apply: accordingly, in big money cases, where there is sufficient property to meet needs of parties, it is only marital property that can be shared.

### 2.3.2. Stellar Contribution

Equality (sharing marital assets in equal halves) will also not be followed where one party makes “extraordinary contribution”, “stellar contribution” or their effort is regarded as containing a “spark”, “force” or “seed of genius.” For example in *Cowan v Cowan*<sup>129</sup> the contribution of the husband was regarded as “stellar” or “really special” justifying departure from equality.<sup>130</sup> The case of *Charman (No. 4)*<sup>131</sup> significantly looked at the outcome of special contribution in relation to awards. The couple were married for twenty eight years. Neither brought capital into the marriage. While the husband worked in the insurance business the wife stopped work when they started expecting their first child. The husband became very wealthy. In 2004 the wife petitioned for divorce and applied for financial and property settlement. The husband and wife’s assets were assessed at £8 million and £123million respectively. The wife conceded that the husband had made “special contribution” which was significant enough to justify departure from equal division of their assets. She proposed 55/45% in the husband’s favour. The trial judge awarded 63.5% to the husband as proportional to his special contribution. He ordered him to pay the wife £40million plus the £8million to make £48million. The husband appealed, praying that the wife should get £20 million. The Court of Appeal unanimously disagreed. Sir Mark Potter stated that special contribution should normally give to one who has made it at least 55% of the assets. However, it would be unlikely to entitle that party, after a very long marriage, to receive more than twice as much as that party and therefore the maximum the special contributor was likely to receive was 2/3 or 66.6% of the assets. In the light of what the trial judge awarded him, the difference was not significant enough to uphold the appeal.

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rather than the share of “his property.” Nigeria adopts the contributions / entitlement approach but the result is debilitating. There is also the challenge of inter comparison whereby you look at the lazy wife receiving same thing as the hardworking wife. English courts, in the light of *Miller*; *Macfarlane* use periodic payments to not only meet needs of parties but also to compensate for lost income. So after doing equal division, they also order periodic payment as seen in *Macfarlane* where Mrs Macfarlane was awarded the periodic payment to compensate her for the fact that shortly after the marriage she gave up a high paying job to care for the children, thereby being deprived of developing her career.

<sup>128</sup> See the *Miller and McFarlane* case, above note 5.

<sup>129</sup> *Sharp v Sharp* [2017] EWCA Civ. 408.

<sup>130</sup> See *Lambert v Lambert* [2002] EWCA Civ. 1685.

<sup>131</sup> Above (note 15).

### 2.3.3. Short Marriages

In *Sharp v Sharp*<sup>132</sup> the misconception that property is shared equally in all cases was cleared. The couple had cohabited for two years and married for four years before the divorce. The couple were in their early 40s and had no children. The High Court decided that her former husband should get half of the fortune she built up during their marriage. The marital assets of £5.45m pounds was equally divided with each getting £2.7million. On the wife's appeal against equal sharing, the Court of Appeal upheld the appeal and gave Mr Sharp £2m pounds on the basis that the marriage was short, parties kept their finances separate during marriage and they each had their own career. According to Justice Macfarlane "the husband made no contribution to the source of the wife's businesses and this is not the case where . . .the husband is said to have contributed more to the life or welfare of the family than the wife". Therefore for short marriages fairness requires that the claimant does not share in the other's non matrimonial property.<sup>133</sup>

### III Sharing/ Readjustment of Assets in Nigeria

The starting point is to identify the nature of the property involved. The decision from England maintain distinction between matrimonial and non-matrimonial property. Matrimonial property is divided between the parties. Unfortunately, Nigerian statutes do not define the term matrimonial assets or property even though case law uses indiscriminately. For example, in *Oghonoye v Oghonoye*,<sup>134</sup> Aderemi JCA spoke of ". . . joint matrimonial property." The Nigerian Court of Appeal in the case of *Mueller* also referred to the disputed property as "joint matrimonial property which belongs to the parties jointly". These cases did not define or conceptualise the terms. However, one could deduce from the facts of cases that the courts consider the efforts put into the property as critical. Where parties jointly made substantial financial contributions to the property it can be regarded as joint property. It is a fundamental equitable principle that joint contribution to property creates a joint interest irrespective of where formal title is located. The lack of a matrimonial property as a term of art therefore leaves the judge a much wider field to exercise discretion: he must decide the status of the property and the proportion of interest in order to allocate accordingly under the Married Women Property Act if it's a claim on ownership. Within this context. It is not the object of law in Nigeria to give parties interests in assets that they have not given consideration for. What is the framework for property readjustment in Nigeria then?

#### 3.1. Settlement of Property

This is a property adjustment order available to spouses of statutory marriages under section 72 of the MCA of Nigeria. The section states that:

the court may in proceedings under this Act, by order require the parties to the marriage, or either of them to make for the benefit of all or any of the parties to, and the children of the marriage, such settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

By section 73(1) (j) the court may discharge the order if the person for whose benefit it is made remarries or if there are any just cause for doing so; modify the effect of the order or suspend its operation.

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<sup>132</sup> Above note 27.

<sup>133</sup> By this is meant assets that are not 'family assets', or not generated by the joint efforts of the parties, the duration of the marriage may justify a departure from the yardstick of equality.

<sup>134</sup> [2010] 3NWLR (pt.1182) 564.

Settlement of property can be made for the benefit of the spouse or child of the marriage.<sup>135</sup> The property to be settled may be sole or joint property, it could be held in possession or reversion, and may be subject of post nuptial or ante nuptial settlement. Section 73(d) and (e) provide that the court in exercising its powers under the Act may “order that any necessary deed or instrument be executed, and that the documents of title be produced or such other thing be done as are necessary to entitle an order to be carried out effectively or to provide security for the due performance of an order”.

Accordingly, property adjustment order of settlement could be a permanent or variable order to the recipient. Whilst the MCA gives equal access to spouses of statutory marriage to access the court during divorce proceedings. It does not confer matrimonial homes and matrimonial property rights on spouses. In fact, it operates an ideology of separate property. Section 72 speaks of “property belonging to either or both parties.” The only factors the courts are to consider are in section 72 “as the court considers just and equitable in the circumstances”. The basis of the award is discretionary apart from the terms of the award.

Some judicial interpretation / application of the section is not devoid of misconception by the courts who attach conditions not stipulated by the Act. The ideology that has been judicially recognized is that of providing the claiming spouse a roof over the head. In *Menakaya v Menakaya*<sup>136</sup> the court did not award settlement but rather lump sum maintenance order (a financial order) despite the fact that the husband had six properties.

In *Kafi v Kafi*<sup>137</sup> the court ordered property to be settled on the wife with condition that the deed of transfer contain a condition that the property be not transferred in the lifetime of the respondent. The basis of settlement was evidence that the wife respondent contributed to the development of the husband’s property by supervising construction, fetching water for builders, buying building materials, feeding workers; she also contributed to the success of the husband’s the business. It is of note that despite the fact of having six properties the husband challenged the award. Thankfully the Court of Appeal dismissed his appeal. In *Akinboni v Akinboni*<sup>138</sup> the court ordered settlement in favour of the wife and children as long as they are of good behaviour. A restriction like these on property settlement are at variance with the ideology of the statute to provide a home for the spouse and children of the marriage. Section 72 requires that the court should consider what is “fair and just” in the light of circumstances. The statutory limitation is as to the order of award and not as to the holding of the property. The purport to give a permanent home to the recipient is defeated by putting conditions of good behaviour as a restriction. There are other conditions in section 73 MCA, relating to the variation of orders for ancillary reliefs, due to factors of change in circumstances like remarriage but which are hardly sought in practice.

The Nigerian judiciary run shy of giving divorcing spouses permanent rights in each other’s assets unless evidence exists of a legal beneficial claim. The matrimonial relief of settlement or maintenance are available under the MCA; neither confers equal sharing or equality of outcomes or minimal loss. They are needs assessed orders. Entitlement to the asset purely on the basis of marriage or contributions are out of the question.

The ideology behind settlement of property in Nigeria is not that of a party claiming his legal rights to an asset but a consideration borne out of equity and justice to ensure that minimal arrangement is made for welfare. Settlement connotes a recognition of the legal entitlement of the settlor spouse to the asset,

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<sup>135</sup> MCA, section 72(1). By section 72(3) the order cannot be made for benefit of child who has attained 21 years unless the court is of the opinion that there are special circumstances that justify the making of the such order.

<sup>136</sup> Above (note 19).

<sup>137</sup> (1986) 3 NWLR (pt. 27) 175.

<sup>138</sup> (2002] 5 NWLR (pt. 761) 564.

whether solely or jointly with the claiming spouse or any other.<sup>139</sup> The exercise of discretion by Nigerian judges demonstrates that settlement of property is regarded as the privilege/ licence to occupy the other spouse's property.

The MCA principle of settlement of property is unknown to customary and Islamic marriages. This is not unusual considering that settlement relates to landed property. Such property is governed by closed rules of tenure under customary law. That the family or community has exclusive ownership and never an individual unless there is partition is trite law.

Unless joint interests can be established by principles of property law, in which case the claim is a claim as of right to the asset as beneficial owner. Neither statute nor courts promote a claim to joint ownership based on domestic or other non-financial contribution.

Accordingly, Nigerian courts do not operate the equality principle like English law. Upon divorce, parties in statutory marriage seek maintenance and settlement of property for the benefit of the spouse and or children<sup>37</sup>. They do not seek such for customary and Islamic marriages. It is of note that Nigerian courts have a general power of the court to do justice like the English courts under section 73(l) the court has general power to:

“Make any order (whether or not of the same nature as those mentioned in the preceding paragraphs of this subsection, and whether or not it is in accordance with the practice under any other enactment or law before the commencement of this Act) which it thinks it is necessary to make to do justice.”

This is a lame dock in the hands of Nigerian courts. The section is hardly used. Powers to order sale, to do equal division and all others may be accommodated under this omnibus power. The time has come to utilise this in the changing world of marriage.

## IV Options

Redistribution of property on divorce is problematic.<sup>140</sup> Policy considerations are critical to any coherent legal formulation of rules or principles. The desire for certainty on one hand and fairness on the other appear mutually exclusive. This cannot be avoided bearing in mind the interpersonal nature of family law. What options are viable towards a holistic approach to some of the issues raised in property rights?

In Nigeria, what should be the starting point in adjudicating spousal claims the face of changing world of marriage? Should the law continue insist on separate property with no co-mingling at all as is now the case? The following options have been considered to some issues of spousal property rights in other jurisdictions. Could they be used in Nigeria?

### 4.1. Creating a Property Regime by Legislation

This demands community of property but it has failed with the English society, except for the judicial enthronement of deferred community as seen in the cases above. In contrast, continental countries embrace community of property regime. Nigeria might do well to interrogate the aspirations of her people in order to determine the workability of statutory creation of property regime. Given the patriarchal nature of the society legislation has mostly been used to force positive change in the value system. In family matters this has often met with stiff resistance from the least expected quarters, even legislators

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<sup>139</sup> S. 73(1) and (2). Where a person alleges contributions to particular property, financial or otherwise, the focus should therefore be the MWPA 1883 and local counterparts.

<sup>140</sup> Cretney above (note 24) p. 322; Herring J. 2007. Family Law London, Pearson Educational Publishers.

themselves. A good example is the Gender and Equal Opportunities Bill 2010 that has continued to fail in the National Assembly due to is considered entrenchment of new grounds.<sup>141</sup> However, this is still the likely direction in the long run.

#### **4.2. Creating a Concept of Family Home**

Nigeria could explore the option of creating a concept of family home by statute which will enjoy community of property. However, while it is an attractive option it is not practical approach: it in fact creates more problems: questions regarding location of such homes considering the land tenure system: homes built in consanguine villages or family lands of either spouse may be subject to extended family or community interests. It will be difficult for a wife to enjoy property interest in property located in husband's family or communal land unless it is monetized on divorce. The socio-cultural nature of marriage type, a polygamous marriage may have to consider the interests of other spouses as well.<sup>142</sup> Moreover there seems little official support for this approach going by the position of the Nigeria Law reform Commission:

“We consider it appropriate that even within marriage there should be a measure of individuality, otherwise either or both of the spouses could in the course of time begin to feel smothered and this situation could eventually destroy the marriage. To this end it is felt that while some property could be joint property of the spouses each should be able to own his or her separate property. Indeed, since the MWPA the proposed position could be said to have been assured for a long time in relation to women married under the Act.”

What the Commission regards as 'joint property' is not certain.

#### **4.3. Intended User**

The beneficial title to property is made to depend on intended use. This will demand a journey into the history of the marriage and the intendment of the parties towards the property at the time it was acquired. It creates the problem that is manifest for common intention constructive trust, which is the current approach to property ownership disputes in Nigeria.

### **V Conclusion**

There are many differences between Nigeria and England in efforts to adjudicate family assets; in England since White and Macfarlane the starting point of sharing assets is equality. English cases have held that the property to be shared must be matrimonial property; non matrimonial property, which it construed as property acquired before marriage, gifts and inheritances during the marriage cannot be shared in short marriages. In Nigeria separate property operates as a basis of all claims; English judges have stepped into the gap of statute, Nigerian courts have failed to do so; the idea of matrimonial homes exists in England but not in Nigeria.

Attempts by Nigerian courts to step into the gap created by statute which lacks a policy and template for redistribution has been faulty being devoid of clearly articulated principles that are autochthonous to the realities of the Nigerian society. Social and policy considerations are not considered. If any philosophy can be deduced therein, it is that a party in divorce proceedings may be given a settlement of property in assets belonging to either or both parties. The determination of whether the property belongs to either

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<sup>141</sup> This bill is meant to give effect to some human rights instruments like chapters ii and IV of the 1999 Constitution of Nigeria, international human rights on non-discrimination and the domestication of CEDAW and the African Charter. Getting it enacted into law since 2010 has been a herculean task.

<sup>142</sup> This may be purely academic. Polygamous marriages are governed by customary law which does not recognize equality rights.

or both is settled by principles of property law. This privilege arises as a needs based mechanism in the light of the stated considerations in section 72 and 73 of Nigeria's MCA.

In Nigeria the concept of matrimonial and non-matrimonial assets, matrimonial home and the ideology of joint efforts giving rise to equal shares or communal interests are not encapsulated in settlement of property issue. It is suggested that there is need for an emergence of a distinction between matrimonial and non- matrimonial assets in Nigeria.



# EXTANT REGULATIONS ON DISTRIBUTED GENERATION SYSTEM IN INDIA

Dr. Uday Shankar\* & Ajay Chaurasiya\*\*

## Abstract

*Access to electricity is very crucial for sustainable development as well as the social and economic development of any nation. It also helps in eradicating poverty from the nation. But amidst the concern of climate change, the mode of electricity access should be affordable and environment friendly. The distributed generation (DG) system provides a new hope of ray for better electricity access in the wake of low-cost renewable energy development. It is relatively advantageous to the existing centralized generation system, like low transmission and distribution losses, while enhancing energy diversity and security. It reduces peak-load demand, links to remote and inaccessible areas providing better response for more power demands. This paper tries to study the present DG system's position in the current legal and policy framework under the Electricity Act, 2003. It also analyzes the existing government of India's policies, which has done for the DG system. In addition to this, a study has been done on the various government schemes and policies which support the development of basic infrastructure for the DG system. This paper also analyzes the Regulatory commission's existing regulations for the DG system.*

**Key Words:** Electricity Access, Distributed Generation System (DG), Renewable Energy (RE), Policy, Regulation

## I Introduction

As the world is moving away from fossil fuels, global energy policy is increasingly focused on sustainability and the environment. Developed countries have ensured affordable access to energy and stable infrastructure while developing countries aren't seeing the same progress. Report of the United Nations Commission on Sustainable Development has expressed the above ethos by stating that "Access to energy is crucial to economic and social development and the eradication of poverty. Improving energy accessibility implies to find ways and means by which energy services can deliver reliably, and affordability, in an economically viable, socially acceptable, and environmentally sound manner"<sup>143</sup>. The Electricity accessibility has been described in a different form by various international institutions and countries. As per the World Bank's electricity access schema, four hours of electricity supply per day per household is sufficient to meet their lighting and communication appliance like cell phones. According to the International Energy Agency's energy access models, an electricity supply of 250 kWh per year per household defines electricity access for rural households. In South Africa, a household having an electricity supply of 50 kWh per month per household free of cost defines an electrified house. While in India, electricity access defines over region-based rather than household level. A village is declared as an electrified village if public institutions and 10 percent of households of that village are electrified<sup>144</sup>. The World Energy Council's definition of energy sustainability is based on three core dimensions, i.e., Energy Security, Energy Equity, and Environmental Sustainability of Energy Systems. Balancing these three goals constitutes a 'Trilemma', and balanced systems enable the prosperity and competitiveness of individual countries<sup>145</sup>.

In the last few decades, India's dependence on fossil fuels has dramatically increased to improve the quality of life, to give impetus to industrialization in the period of fastest economic growth, and the need for the growing population. In this era of sustainable development, the ideal choice of energy generation

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<sup>143</sup> UNITED NATIONS COMMISSION ON SDG, Energy - United Nations Sustainable Development, Available at: <https://www.un.org/sustainabledevelopment/energy/> (last visited Apr 12, 2020).

<sup>144</sup> World Economic Forum, What does energy access mean?, Available at: <https://www.weforum.org/agenda/2015/01/what-does-energy-access-mean/> (last visited Apr 12, 2020).

<sup>145</sup> World Energy Trilemma index 2019, WORLD ENERGY COUNCIL, Available at:

[https://www.worldenergy.org/assets/downloads/WETrilemma\\_2019\\_Full\\_Report\\_v4\\_pages.pdf](https://www.worldenergy.org/assets/downloads/WETrilemma_2019_Full_Report_v4_pages.pdf) (last visited Apr 12, 2020).

is the one that has no or less harmful imprint on the environment. Therefore, renewable energy plays a critical role in fulfilling the vision of the power sector and the sustainable development goal. As part of Nationally Determined Contributions (NDC) to mitigate climate change, India has set an ambitious target of 175 GW or 40 percent of the total electricity generation of renewable energy by 2022. The cost curve of various renewable energy technologies is hitting its very low as per their maturity in the market and making affordable these resources to everyone. The Electricity Act, 2003, is a directive to regulate the entire Indian electricity sector. The Electricity Act, 2003, has few provisions which deal with the renewable energy sector and addresses renewable energy-related issues in a spasmodic manner. A dedicated legal framework for renewable energy generation, transmission, and distribution is astray.

The Electricity Act 2003 has brought reforms to sectors related to generation, transmission, and distribution of energy. The generation sector is reformed by de-licensing of energy generation; in the case of transmission, reformation has done by providing non-discriminatory open access. Even the distribution sector has reformed by providing measures such as multiple licensing in distribution, open access in distribution, mandatory metering of all electricity supplies, and adoption of multi-year tariff principles. It also has provision for a cross-subsidy surcharge on direct sale to consumers until cross-subsidies phase out gradually<sup>146</sup>.

Overall efficiency and healthiness of the distribution system of the electricity sector reflect in terms of Aggregated Technical and Commercial (AT&C) losses. The total Aggregated Technical and Commercial (AT&C) loss is estimated to be equivalent to 1.5 percent of India's Gross Domestic Product (GDP) or approximately USD 17 billion in terms of 2010 GDP<sup>147</sup>. In the last two decades, there have been many policies and schemes designed to reduce these losses. The majority of consumers who are affected due to these losses come in the rural sector. These consumers are unable to have electricity access for more than eight hours despite having surplus power. In the Indian power sector scenario, Agriculture alone shares 18.08 percent of total consumption, 24.2 percent by the residential sector, and 2 percent by the transport sector<sup>148</sup>.

Agriculture remains a crucial part of the entire Indian economy and driver of the entire rural economy. The agricultural sector is the highly subsidized sector of the Indian power sector and a high contributor to AT&C losses. In order to reduce the AT&C losses, it is critical to remove unsustainable subsidies in the distribution sector. It is challenging to have such kinds of reform in the highly organized, weight, and active agriculture consumers who are the primary consumer in the rural areas where the very high competitive political arena is always present. In the above circumstances, a technological solution and a new business model may be developed for the high efficiency of the distribution sector. These above conditions lead to the way for renewable energy-based Distributed generation model.

Distributed generation (DG) is a method that uses small-scale technology to generate electricity on-site or near to the end-users. Distributed generators (DG) can provide less expensive electricity as well as higher efficiency and safety of power<sup>149</sup>. DG systems can reduce high transmission and distribution losses, enhance energy diversity and security, reduce peak-load demand, link areas that are remote and

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<sup>146</sup> Ministry of Power, Govt. of India, THE ELECTRICITY ACT, 2003, THE GAZETTE OF INDIA (2003), [https://powermin.nic.in/sites/default/files/uploads/The Electricity Act\\_2003.pdf](https://powermin.nic.in/sites/default/files/uploads/The_Electricity_Act_2003.pdf) (last visited Mar 8, 2020).

<sup>147</sup> Sun-Joo Ahn and Dagmar Graczyk, Understanding Energy challenges in India- Policies, Players and Issues, 17 INTERNATIONAL ENERGY AGENCY, PARTNER COUNTRY SERIES 39–41 (2011), Available at: [https://www.iea.org/publications/freepublications/publication/India\\_study\\_FINAL\\_WEB.pdf](https://www.iea.org/publications/freepublications/publication/India_study_FINAL_WEB.pdf) (last visited Mar 3, 2020).

<sup>148</sup> ENERGY STATISTICS 2019 (Twenty-Sixth Issue), Chapter-6 Consumption of Energy Resources, Central Statistics Office, Ministry of Statistics And Programme Implementation, Government of India New Delhi, Available at: [http://mospi.nic.in/sites/default/files/publication\\_reports/Energy Statistics 2019-final.pdf](http://mospi.nic.in/sites/default/files/publication_reports/Energy_Statistics_2019-final.pdf) (last visited Mar 25, 2020).

<sup>149</sup> Thomas Ackermann, Göran Andersson & Lennart Söder, Distributed generation: A definition, 57 ELECTR. POWER SYST. RES. 195–204 (2001).

inaccessible, and provide a better response for more power demands<sup>150</sup>. On the other hand, recent studies have confirmed that the widespread use of DG technologies significantly reduces emission: A British study reported that domestic combined heat and power technologies decreased carbon dioxide emissions by 41 percent in 1999 and a similar report on the Danish power system showed that the widespread use of DG technologies from 1998 to 2001 reduced emissions by 30 percent<sup>151</sup>. DG systems can provide emergency power to a large number of public utilities such as hospitals, airports, military bases, communications stations, etc. The Electricity Act, 2003, has given a thrust to distributed generation, particularly in the context of rural electrification. The Act specifies distributed generation and supply through stand-alone.

## II Distributed Generation

Distributed generation (DG) is a method that uses small-scale technology to generate electricity on-site or near to the end-users. Distributed generators (DG) can provide less expensive electricity as well as higher efficiency and safety of power<sup>152</sup>.

DG can help to achieve the various mandatory targets designed in the renewable energy and the Electricity Act, 2003 like a contributor to RPO (Renewable Purchase Obligation) for Distribution Company (Discom), last-mile connectivity with quality and reliable power supply and fulfillment of Universal Service Obligation without impacting Discom's financial viability. It enhances and fixes the accountability on quality and reliability of power supply, service to consumers, especially by providing power to productive loads to enhance livelihoods and support the rural enterprises. It intensifies customer service management through timely billing and collection. It shows confidence to have clear and comprehensive coverage for all loads in an area inclusive during peak hours and resilience to cater to the load likely to emerge in power for all situations. Simultaneously, this model of power generation has no or very less AT&C loss than current high AT&C loss as low operational expenditure. It helps in framing a business framework and viability construct built off significantly improved power distribution business activity in rural areas.

In the Indian power sector scenario, Agriculture alone shares 17 percent of total consumption, 21 percent by the residential sector, and 2 percent by the transport sector. Agriculture remains the highly subsidized sector and a crucial part of the entire Indian economy and driver of the entire rural economy. Agro-Photovoltaic type DG system can play a game-changing role in the agriculture sector.

### II. A. Existing Legal and Policy framework for DG

One of the significant highlights of the Electricity Act, 2003 is the mandate of the formulation of policy on tariff and rural electrification. Ordinarily, the policy precedes the enactment of a statutory instrument. On the one hand, a detailed statutory framework on electricity has given the certainty to several stakeholders connected with the sector; on the other hand, it admits the dynamic nature of the electricity market which requires regular reviewing of the intervention by the regulatory agencies.

Section (5) of the Electricity Act, 2003 states that bulk purchase of power and management of local distribution in rural areas through Panchayat Institutions, users' associations, cooperative societies, non-governmental organizations, or franchisees<sup>153</sup>. Also, Section (4) of the Act allows the operation and

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<sup>150</sup> Guido Pepermans et al., Distributed generation: Definition, benefits and issues, 33 ENERGY POLICY 787–798 (2005).

<sup>151</sup> The National Science Foundation, Chapter-1 Introduction to Distributed Generation, Distributed Generation Educational Module, Available at: <https://www.dg.history.vt.edu/index.html> (last visited Mar 31, 2020).

<sup>152</sup> Ackermann, Andersson, and Söder, *supra* note 8.

<sup>153</sup> Section (5) of the Electricity Act, 2003, "The Central Government shall also formulate a national policy, in consultation with the State Governments and the State Commissions, for rural electrification and for bulk purchase of power and management of local distribution in rural areas through Panchayat Institutions, users' associations, co-operative societies, nongovernmental organizations or franchisees".

distribution system of renewable energy sources based on stand-alone systems for rural areas<sup>154</sup>. In the National Electricity Policy (NEP), Section 5.1.2 mentions the DG system operations in the remote as well as grid-connected areas<sup>155</sup>. In the NEP, section 1.7 uses the Electricity Act, 2003, and introduces the Renewable Purchase Obligation (RPO) and preferential tariffs for the development of RE. But there is a need for some light on these aspects that whether this section includes the RE-based DG system for the grid connection case. In the National Tariff Policy (NTP) 2006, section 6.3 mentions the fixation of tariff rate by SERCs for the trading of excel power from captive power plants<sup>156</sup>, but it does not explicitly state such kind of trading for DG systems.

Rural Electrification Policy (REP), 2006 is a repercussion of Section (4) and Section (5) of the Electricity Act, 2003<sup>157</sup>. This policy tries to address the rural electrification problem through the integration of the rural electricity distribution, village electrification infrastructure, and DG system. This policy mentions the electricity access to households and key activities of local rural economies like irrigation pump sets, health centers, education premises, cold storage, small and medium enterprises, cell phone towers. This policy asks the CERC to set up guidelines for a mechanism to transfer the subsidies to the consumers. Till date clarification is missing in the form of subsidies, whether it is in terms of generation-based incentives, feed-in tariffs, capital subsidies, or any other form. The policy is also silent on the tariff determination on case to case basis. Implementation, monitoring, and verification mechanism for the policy are missing in this policy.

The Draft National Renewable Energy Act, 2015 has been addressed the DG system by 'Net-Metering'. It refers to a system, appropriate for distributed generation, in which a distribution grid user has a two-way connection to the grid and is only charged for his net electricity consumption and is credited for any overall contribution to the electricity grid<sup>158</sup>. Even Section 6.11 of the Draft National Energy Policy 2017 of NITI Aayog has said about the DG system<sup>159</sup>. Under section 6.11 of the policy, it states that:

*“The steep rise in the share of Renewable Energy in the electricity mix will call for a number of measures to adapt the grid. The measures listed above are expected to allow integration of this variable and seasonal electricity source by addressing both commercial and technical challenges. Diversified geographical and distributed generation helps in addressing the above challenges in a cost-effective manner. NITI Aayog will offer a platform to bring the Central Ministries and State Governments together to solve the inter-agency issues related to integration and growth of Renewable Energy in the country as per the Renewable Energy Integration Roadmap 2030.”*

### **III Analysis of existing policies and regulations for the DG System**

To address climate change issues, In the COP21 meeting held in Paris in 2015, India has set a target to meet its 40 percent of total installed electricity generation from renewable energy resources by the year 2030. Among various measures taken, one of the measures undertook to meet these targets include the deployment of distributed generation system like mini and microgrids. The draft National Policy on RE

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<sup>154</sup> Section (4) of the Electricity Act, 2003, “The Central Government shall, after consultation with the State Governments, prepare and notify a national policy, permitting standalone systems (including those based on renewable sources of energy and non-conventional sources of energy ) for rural areas.”

<sup>155</sup> Ministry of Power, Govt. of India, National Electricity Policy, 2005, THE GAZETTE OF INDIA (2005), Available at: <https://powermin.nic.in/en/content/national-electricity-policy> (last visited Mar 25, 2020).

<sup>156</sup> Ministry of Power, Govt. of India, National Tariff Policy, 2006, THE GAZETTE OF INDIA (2006), Available at: [https://powermin.nic.in/sites/default/files/uploads/Tariff\\_Policy\\_1.pdf](https://powermin.nic.in/sites/default/files/uploads/Tariff_Policy_1.pdf) (last visited Mar 30, 2020).

<sup>157</sup> Ministry of Power, Govt. of India, Rural Electrification Policy, 2006, THE GAZETTE OF INDIA (2006), Available at: [https://powermin.nic.in/sites/default/files/uploads/RE\\_Policy\\_1.pdf](https://powermin.nic.in/sites/default/files/uploads/RE_Policy_1.pdf) (last visited Mar 30, 2020).

<sup>158</sup> MNRE, Govt. of India, Draft Renewable Energy Act 2015 (2015), Available at: <https://mnre.gov.in/file-manager/UserFiles/draft-rea-2015.pdf> (last visited Mar 30, 2020).

<sup>159</sup> NITI Aayog, Govt. of India, Draft National Energy Policy, 2017 (2017), Available at: [https://niti.gov.in/writereaddata/files/new\\_initiatives/NEP-ID\\_27.06.2017.pdf](https://niti.gov.in/writereaddata/files/new_initiatives/NEP-ID_27.06.2017.pdf) (last visited Apr 5, 2020).

based Mini/Micro Grid by the Ministry of New and Renewable Energy (MNRE) is framed to promote the RE-based micro and mini-grids deployment in un-served and under-served parts of the country to serve the 237 million people till now deprived of electricity access.

In the preamble of this policy, it is guided to develop the state-level policies and regulations that enable a better eco-system for its growth. It is also suggested to frame a detailed policy to boost the local economy by a meeting of needs of various kinds of consumers from residential to commercial. The Ministry targets to install 10,000 RE based Micro/Mini-grids of a total capacity of 500 MW in the next five years. It targets to fulfill basic needs like lightings, fans, mobile charging of every household. The policy directs to use only renewable energy sources until unless some rare cases which enforce to use conventional energy resources as a backup<sup>160</sup>.

It is framed with aims to<sup>161</sup>:

- Mainstream RE-based mini/micro grids for enhancing access to affordable energy services, and improving the local economy
- Optimize access to central financial assistance and other incentives
- To develop the Public Distribution Network to distribute the energy generated
- To encourage cluster form DG systems through linking of all the nearby DG systems with the aim of better operational efficiency and cost reduction
- Encouraging the development of State-level policies and regulations that enable the participation of Energy Service Companies (ESCOs).

The installation part is addressed, but scaling up remains untouched, which is critical for long term sustainability of projects. Duties such as Value Added Tax, Entry Tax, and others have an implication on the cost of service from mini-grids. The State governments may consider waiving certain taxes to promote the sector. Typically, the entrepreneurs (or those who will be Renewable Energy Service Providers (RESPs)) need training and handholding, which requires disproportionate investment, time, and effort than the size of the business. It requires cross-sector linkage, but the policy is silent on cross-sector linkage to achieve such kind of objectives. Rural residential and agricultural consumers have heavily subsidized grid power, and simultaneously the micro and mini-grid power are expensive. The policy is silent on direct financial incentives or subsidies. Due to this, it creates a non-level playing field. The policy is silent in building level playing field in this aspect.

The policy is silent about the timeline in the setup of the required dedicated institutional mechanism for distributed generation. Though policy aims to mainstream the RE based distributed generation system, due to the absence of a holistic approach, it is unable to provide light on the mechanism for Prosumer (where Prosumer is a household that is both producer and consumer of electricity)<sup>162</sup> enablement and incorporation of Internet technology with ICT for high efficiency and better monitoring. It affects service quality and performance like minimum hours criteria.

The State government/ State Nodal Agency (SNA) is expected to consider defining a decisive plan or an approach for mini-grids in the state. It will build the necessary confidence amongst ESCOs and investors interested in this space. States may consider classifying regions/ areas based on their priority for electrification, mean (grid, off-grid, or both) and or based on the type of government programme. It is suggested in the above draft policy, and also electricity comes in the List III of Seventh Schedule of Constitution of India<sup>163</sup>. So, it is the state which is mainly responsible to design and plan the regulatory,

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<sup>160</sup> MNRE, Govt. of India, Draft National Policy for Renewable Energy based Micro and Mini Grids, Available at: [https://mnre.gov.in/file-manager/UserFiles/draft-national-Mini\\_Micro-Grid-Policy.pdf](https://mnre.gov.in/file-manager/UserFiles/draft-national-Mini_Micro-Grid-Policy.pdf) (last visited Apr 10, 2020).

<sup>161</sup> Id.

<sup>162</sup> Axel Gautier, Julien Jacqmin & Jean Christophe Poudou, The prosumers and the grid, 53 J. REGUL. ECON. 100–126 (2018), <https://doi.org/10.1007/s11149-018-9350-5>.

<sup>163</sup> Seventh Schedule, Constitution of India, Available at: <https://www.mea.gov.in/Images/pdf1/S7.pdf> (last visited Apr 8, 2020).

institutional, tariff structure, interconnection, financial assistance for any distributed generation system. The state is responsible for developing a better eco-system for the growth of the distributed generation system. But to date, there is a draft National Policy on RE based Mini/Microgrids by MNRE, Government of India (GoI). No single state has implemented the policy on the distributed generation system in their state.

#### **IV Others Scheme and policy to support the development of basic infrastructure for the DG system**

Smart grids have recently received increasing attention from policymakers and private investors. India looks at smart grids with a view to the benefits for the distribution level, as one of the components of smart grids is smart metering/advanced metering infrastructure. To enhance grid integration in the wake of the distributed generation systems market, The Indian government is increasingly interested in adopting innovative technology including smart grids.

The minister of power launched the India Smart Grid Forum in 2010, and subsequently, the Indian Smart Grid Task Force was set up to create a roadmap for the development of smart grids in India. Smart grids could help contain the huge commercial losses from which Indian state power distribution companies suffer. But India's goal goes beyond the distribution level. An innovative and interactive power system will result in the moderation of peak load, hence the reduction of required power generation capacity and better integration of RE-based electricity to the grid.

With objectives other than the reduction of AT&C losses like the integration of RE-based electricity, development of RE-based distributed generation system, Prosumer enablement, real-time monitoring, supporting necessary infrastructure for the proliferation of Electric Vehicle (EV), etc., In March 2015, National Smart Grid Mission (NSGM) has established by Govt. of India<sup>164</sup>. Power for All under the Saubhagya scheme launched on October 10, 2018, an opportunity is there to frame an integrated approach for reliable, quality, affordable, and resilient power supply for the rural areas<sup>165</sup>.

#### **V Regulatory Commission on the DG system**

The mutually agreed tariff has been exercising in almost all renewable energy (RE) based distributed generation systems in rural areas. Every year Central Electricity Regulatory Commission (CERC) also used to issues RE tariff orders. In the CERC RE tariff order 2019-20, two tariff model is there viz., Generic and Project specific tariff. Regulation eight covers projects which come under Generic tariff, and Regulation seven covers projects of Project-specific tariff. Generic tariff used the levelled tariff to avoid front-loading of tariff while at the same time ensuring adequate project IRR (Internal Rate of Return). Generic tariff under Regulation eight of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations revision used to hold in every year's CERC RE tariff order.

Regulation eight of CERC's RE tariff regulations contains following categories of RE technologies generating stations: Small Hydro Projects; Biomass Power Projects with Rankine Cycle technology; non-fossil fuel-based co-generation Plants; Biomass Gasifier based projects; Biogas based projects and Regulation seven contains following categories of RE technologies generating stations: Solar PV and Solar Thermal; Wind Energy (including on-shore and off-shore); Biomass Gasifier based projects, if a project developer opts for project-specific tariff; Biogas based projects, if a project developer opts for project-specific tariff; Municipal Solid Waste and Refuse Derived Fuel based projects with Rankine cycle technology; Hybrid Solar

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<sup>164</sup> Ministry of Power, Govt. of India, National Smart Grid Mission (NSGM) (2015), Available at: [http://powermin.nic.in/upload/pdf/National\\_Smart\\_Grid\\_Mission\\_OM.pdf](http://powermin.nic.in/upload/pdf/National_Smart_Grid_Mission_OM.pdf) (last visited Apr 8, 2020).

<sup>165</sup> Ministry of Power, Govt. of India, SAUBHAGYA (2017), Available at: [https://saubhagya.gov.in/assets/download/OM-SAUBHAGYA\(SIGNED COPY\).pdf](https://saubhagya.gov.in/assets/download/OM-SAUBHAGYA(SIGNED COPY).pdf) (last visited Apr 12, 2020).

Thermal power projects; Other hybrid projects include renewable–renewable or renewable-conventional sources, for which MNRE approves renewable technology; Any other new renewable energy technologies supported by MNRE<sup>166</sup>.

In the CERC RE tariff order, detailed guidelines for tariff formulation are available for technologies covers under Regulation eight, while no such detailed guidelines are there for technologies covers under Regulation seven. Detailed tariff design and structure as per the capacity, region, technology, etc. have been found for small hydro, Biomass, Bio-gasifier, and wind in the regulation seven of RE tariff document. But likewise, tariff details have been found missing for Solar PV distributed generation. E.g., WWEA (World Wind Energy Association) argued to consider Solar PV project lifetime as twenty years. But as per the guidelines of CERC, the Solar PV project lifetime is twenty five years.

Similarly, Solar PV Panels Degradation and Lifetime: degradation varies from <1 percent to 9 percent. If projects get degraded by more than 20 percent, it is considered to have reached the end of its lifetime. It is recommended by nearly 1 percent for large solar farms and 2 percent for Rooftop projects. In the case where PV panel degradation is more than defined range, then the policy is silent on those issues. CERC’s tariff policy is silent on such kind of issues.

Distributed generation like Micro Grid or Micro Smart Grid, which are having a smart meter, Internet technology, and ICT devices for real-time monitoring and demand-supply management requires to have new tariff model which can address dynamicity of such advance system, but till date, no such tariff policy found for dynamic pricing mechanism. Studies show that these components are critical for prosumer enablement or Energy Internet or Democratization of Energy, high operational efficiency, and monitoring and scaling up of any project.

CERC RE tariff structure contains parameters like return on equity, interest on loan capital, depreciation, interest on working capital, operation, and maintenance expenses. A carbon tax, savings amount of grid’s cross-subsidy, peak load saving (Time of delivery), project location, quality of local resource availability, annual regression or digression (to avoid overheating problem happens in Germany) is missing in the tariff model structure of RE based distributed generation system, but these are factors which are crucial in order to establish level playing field between grid-based supply and distributed generation supply. Tariff calculation for a grid-interactive hybrid microgrid, it won’t be enough if we calculate the tariff just on the base of marginal retail tariffs principle, especially for designated low-tier residential connection. A hybrid microgrid could play a crucial role as a backup when the grid is down due to some natural calamity or other technical faults. Surplus energy in the hybrid microgrid system can be fed into the regular grid through a smart meter or net-meter for which the equivalent of net-metering policies needs to be formulated.

## VI Conclusion

Thus, it can be concluded that there are various schemes and policies available to support the development of the basic infrastructure of the DG system. Some points which are pertaining to the development of the DG system need to be addressed. Such as, the draft National Policy on RE based Mini/Micro Grid is framed to promote the RE-based micro and mini-grids deployment for serving 237 million people of our country which are either un-served or under-served. But cross-sector linkage for the cost reduction is missing. It also does not indicate the timeline for the setup of the required dedicated institutional mechanism for such a distributed generation (DG) system. The draft policy talks about the installation of the DG system, while it is silent about the scaling up of the system, which is critical for long term sustainability of projects. The policy is even silent in building level playing field in terms of the energy cost of the DG system and current energy cost. Due to the absence of this holistic approach, it is unable to

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<sup>166</sup> Central Electricity Regulatory Commission, CERC RE Tariff Order 2019-20 (2019), Available at: [http://www.cercind.gov.in/2019/orders/Draft RE Tariff Order for FY 2019-20.pdf](http://www.cercind.gov.in/2019/orders/Draft%20RE%20Tariff%20Order%20for%20FY%202019-20.pdf) (last visited Apr 12, 2020).

provide light on the mechanism for prosumer enablement and incorporation of Internet technology with ICT for high efficiency and better monitoring.

The Indian government is increasingly interested in adopting innovative technology including smart grids launched by the ministry of power namely, India Smart Grid Forum, Indian Smart Grid Task Force, National Smart Grid Mission, and power for all, i.e., SAUBHAGYA Scheme supports the development for the basic infrastructure of the distributed generation system and enhance grid integration in the wake of the distributed generation systems market. In the regulation of the Central Electricity Regulatory Commission wherein it is found that detailed tariff formulation guidelines for solar PV distributed generation system is missing. In the existing components of the tariff model structure, carbon tax, savings amount of grid's cross-subsidy, project location, quality of local resource availability, annual regression, or digression (to avoid overheating problem happens in Germany) is also missing. Due to all this, it is unable to establish a level playing field between grid-based supply and distributed generation supply.

It's an urgent need to put in place holistic structural, regulatory, and institutional mechanisms that are fundamental to the sustainable growth of the RE based distributed generation system in rural areas, prosumer enablement and democratization of energy sector. To enable this, supporting eco-systems need to develop, which can address the resources assessment, testing facilities, monitoring, and verification programs, and cross-sector linkage in the implementation and tariff formulation.



# “ON LINE REVOLUTION IN DISPUTE RESOLUTION”- A SHORT SHIFT ON ODR

*Dr. M Madhuri Irene\**

“The technology is there for widely separated parties to meet in cyberspace, exchange and analyze complex information on preferences and needs, do deals, and execute binding settlements.”

- Richard Shell

## ABSTRACT

*India is always hailed as a repertoire of rational virtues, vivacious values and persistent principles. Being a land of karma, people all over the globe repose utmost confidence in the transactions generated on this land, believe in the integrity and honesty of the contractual and commercial obligations with the people on this soil. Indian system intends to resolve the issues and differences through bilateral co-ordination and mutual satisfaction. ‘Adjudication’ is given the ancillary place and ‘pragmatic solution for the problem’ is given the primary place in the Indian thought.*

*Law being dynamic and organic has to live with both the science and sentiments of human race. The beneficiaries of ‘On-line Arbitration’ all over the globe remain unflinchingly grateful to Robert Brinier, the master of ‘Arbitration Avionics.’ In just a few years the picture has changed dramatically. Each year close to a Million disputes are resolved online and over a hundred online dispute resolution providers offer their services worldwide. From a technology gadget, ODR has become a major phenomenon in dispute resolution. Admittedly, it may appear to lack any connection with international commercial arbitration yet, the day-to-day operation of Commercial arbitration cannot remain unaffected by such a vast phenomenon. This article mainly focuses on the evolution and conceptual significance of On-Line Arbitration and its utility and futility in the present day national and international trade and commerce. This article refers to the techno-legal implications and their impact on international relations.*

**Key Words:** *Online dispute resolution, Indian Judiciary, Cyber Arbitration, Arbitral Awards*

## I Introduction

If body is a reality, Soul must also be a reality; if soil is a reality, space should also be a reality and if dispute is a real problem, then Resolution is also a real solution – be it in substance or space. Philosophy might not have been acknowledged by all as a science, but none could assail it as a source of pragmatic reasoning – both legal and logical. Clash and conflicts occur not only in physical form but also in psychological form. If conventional mediation, conciliation and arbitration represent the physical form, On-line Dispute Resolution represents a combination of both physical and psychological forms. Neither space nor technology, like any other species, could march or lead new generations without the aid and assistance of Law and Justice. Technology being a part of science, created a new world known as ‘Cyber Space’ and Information Technology has become the nucleus of this imaginative but real world.

The tardy judicial locomotion compelled the evolution of alternate dispute resolution, though not displacing conventional court system, and the impatient litigation-gentry demanded the instantaneous solution and agreed-justice, on the soil and in the space.

## II Indian soil and Instant justice

India is always hailed as a repertoire of rational virtues, vivacious values and persistent principles. Being a land of karma, people all over the globe repose utmost confidence in the transactions generated on this land, believe in the integrity and honesty of the contractual and commercial obligations with the people on this soil. Innumerable historical and epical episodes testify the morality of Indian kings and traders. To

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honour the word or promise made is a passion of Indian lives. Indian system intends to resolve the issues and differences through bilateral co-ordination and mutual satisfaction. Adjudication is given the ancillary place and pragmatic solution for the problem is given the primary place in Indian thought.

Mediation, Conciliation and Arbitration have been an insignia and characteristic of Indian ethos and culture. Even during the ancient Indian civilization, we could identify the instances of settlement of disputes by the parties outside the conventional court system. The so-called modern Dispute Resolution through alternate modes is nothing but the vintage of our ancient problem-solving process known for more than 4000 years. The 'Village Nyaya Panchayats' of Indian Society may be construed as the genesis of modern A.D.R. system and the trigonometry of Arbitration, Conciliation and Mediation smacks of the judicial reasoning and the wisdom of our justice system.

No doubt, commercial arbitration has gained considerable popularity and prominence because of richness of the parties, both in national and international spheres. The information technology has invaded all spheres of human life and legal field is no exception. Law being dynamic and organic has to live with both science and sentiments of human race. The beneficiaries of On-line Arbitration all over the globe remain unflinchingly grateful to Robert Brinier, the master of Arbitration Avionics.

### **III Cyber space and arbitration – Evolution or Revolution?**

Computers revolutionized the 20<sup>th</sup>. Century scientific advancement and Internet ignited the pace of human interaction throughout the globe. 'Citizen' is dwarfed and 'Netizen' is magnified in 21<sup>st</sup>. century. Man is replaced by machine. 'Documentation' of human activities and human relations was the tale of yester years, and 'wit and/or war in formless air' is the unique pace of the present system of negotiations and human connectivity, and we have moved from a world of calculation to a world of simulation, from an image of the computer as something that calculates and computes to an image of a machine that interacts with us continuously and helps us define our identities. With these whirl-wind changes, Law is briskly associated. Truly, Law is dynamic.

Cyberspace, according to computer scientist David Gelernter, should be viewed as a "mirror world," a place where institutions of the world are represented in digital form and where we can interact with these digital representations as if we were in the physical space. As computer software and networks become more sophisticated and pervasive, Gelernter envisions the development of increasingly complex online communities and institutions, places containing "some huge institution's moving, true-to-life mirror image trapped inside a computer," As a result, cyberspace, in the future, will be many spaces. In these spaces, we will engage and interact with each other, as well as with schools, banks, stores, and a wide variety of other kinds of institutions.

The concept of a "mirror world" or a "life on the screen" also provides a useful entry point and perspective for considering the issue of disputes that originate online. It represents conflict resolving behaviour of the physical world. New online or on-screen spaces facilitate the parties to interact, meet, form relationships, express opinions, pay money, and engage in many other familiar and not so familiar activities, will leave an impression on both and on the landscape of disputes. The mirror or screen world will contain and reflect many facets of the physical world, and will also contain and reflect much of the conflict of the physical world<sup>1</sup>Time is ripe to replace the traditional paradigms of conflict-settlement by need-based arbitration – on land and in space too.

Cyberspace as "Virtual Community"- Cyberspace differs from other technological innovations of the twentieth century in that it has, in and of itself, become a "community" to millions of people. Indeed, it has become a community that is separate from the "real" community in which these people live. Howard

Rheingold writes: People in 'virtual communities' use words on screens to exchange pleasantries and argue, engage in intellectual discourse, conduct commerce, exchange knowledge, share emotional support, make plans, brainstorm, gossip, feud, fall in love, find friends and lose them, play games, flirt, create a little high art and a lot of idle talk. People in virtual communities do just about everything people do in real life, but we leave our bodies behind<sup>167</sup>. Literally, thousands of "virtual" communities, such as the one described above, exist online<sup>168</sup>.

#### IV What is on-line dispute resolution/cyber arbitration?

In fact, INTERNET increased the pace of international trade and commerce and E-commerce necessitated On Line settlements in making and breaking the contracts. **Online dispute resolution (ODR)** is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or a combination of all three. In this respect it is often seen as being the online equivalent of alternative dispute resolution<sup>169</sup>. However, ODR can also augment these traditional means of resolving disputes by applying innovative techniques and online technologies to the process.

With this explosion of activity and collaboration in Cyberspace and with the corresponding rise of what many call "virtual communities" on the Internet comes the certainty of online conflict and disputes. Indeed conflicts are inevitable in any community. The fundamentally unique nature of Cyberspace, however, raises important and difficult questions for lawyers and policy-makers as to how to regulate this "virtual" space and how to resolve the disputes which have and undoubtedly will continue to occur in Cyberspace.

For many, Cyberspace is much more than a computerized Yellow Pages or a place to get a 24-hour weather update. Instead, it has taken on many of the characteristics of community, replete with community-specific customs, needs, and desires. It is crucial that the architects of a dispute design model study and understand these communities before transplanting a model of the "real world" dispute resolution into Cyberspace. Most residents of CYBERIA "would rather be subjected to the judgments of their own virtual community than the laws of a physical place far away from where they live." As a virtual community, Cyberspace differs from real space and those differences matter in the construction of an effective dispute resolution system.<sup>170</sup> As on-line culture has become an integral part of modern existence, so has also emerged diverse ramifications of the same- commerce, regulations, exchange of money and thoughts, leisure academics. But another extremely important feature of net civilization and web behaviour is the emergence of tremendous disputes, differences, fights and controversies on the Internet relating to varied aspects of ON-LINEISM. The resolution of these cyber disputes has emerged as an extremely important challenge. Courts of law do not present a practical option for reasons more than one:-

1. Firstly, because the world itself becomes a big courtroom.
2. Secondly, because of the global nature of the internet, the clarity as to which court would have the exclusive Jurisdiction to try the case is missing.

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<sup>167</sup> Howard Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier* 3 (1994); see also Lawrence Lessig, *The Zones of Cyberspace*, 48 *Stan. L. Rev.* 1403, 1403 (1996)

<sup>168</sup> .(Robert C. Bordone, *ELECTRONIC ONLINE DISPUTE RESOLUTION: A SYSTEMS APPROACH – POTENTIAL PROBLEMS- A*

<sup>169</sup> ADR Arthur M. Monty Ahalt, "What You Should Know About Online Dispute Resolution" ([http://en.wikipedia.org/wiki/Online\\_dispute\\_resolution](http://en.wikipedia.org/wiki/Online_dispute_resolution))

<sup>170</sup> Robert C. Bordone, *ELECTRONIC ONLINE DISPUTE RESOLUTION: A SYSTEMS APPROACH – POTENTIAL, PROBLEMS, AND A PROPOSAL- 3 Harvard Negotiation Law Review*, Spring-1998.

3.Thirdly, litigation and the legal systems in different countries are different and can be extremely expensive and threatening to wipe out millions of legal entities into oblivion.

Cyber-arbitration is being considered inexpensive, quick and universally acceptable. At a time when the Julian calendar is being replaced by the concept of web-weeks, Cyber arbitration is the most effective, simple method for the best resolution of cyberspace disputes.

Some Broad Elements of Cyber arbitration are:

- Cyber arbitration Agreement.
- Deposits of Opening costs Adoption of cyber arbitration procedures.
- Appointment of cyber arbitrator
- Claims or counter claim along with documents.
- Framing of contentious issues.
- Leading of Evidence by way of affidavits all on-line.
- Personal hearing, in the physical world if agreed by both the parties.
- Granting of Cyber award.<sup>171</sup>

During the past years, disputes concerning copyright, E-contracts, and privacy have resulted in judicial decision. Court litigations are lengthy and expensive. If consumer confidence in E-commerce is to be realized, swift and inexpensive mechanisms must be effectively developed to resolve controversies that arise from Internet-based commerce. Online Arbitration is an efficient alternative for transacting over the Internet. The European Union has taken several initiatives to promote alternative dispute resolution. Community legislation and Recommendations have been adopted to regulate e-commerce transactions and out-of-court. dispute settlements. However, online arbitration methods have raised complex legal issues with regards to its relationship with other community legislations<sup>172</sup>.

## **V International Commercial Arbitration vis-a-vis Indian arbitration**

Though Ancient India is known as a traditional centre of dispute resolutions with humane techniques and objectives, the concept of Alternate Dispute Resolution in modern India is viewed with an age of 60 years. The replacement of the Arbitration Act of 1940 by the Arbitration and Conciliation Act of 1996 could not melt the mountain of pending litigation. The Arbitration and Conciliation Act of 1996 is conditioned by many adversaries, want of awareness with regard to the information and communication technology and the I.C.T. related issues etc. Resulting in certain lacunae in the effective implementation of the A.D.R. philosophy.

Cyber arbitration is one such aspect. Cyber arbitration is popularly known as online dispute resolution O.D.R. mechanism. ODR is a better and improved form of ADR provided India is willing to encash its benefits. Unfortunately, there are very few O.D.R. institutions and there is great dearth of experts who can resolve technical, legal and other scientific disputes in an On-Line environment. Even the National Litigation Policy of India (NLPI) failed to address this issue.

The problem is there are very few ODR institutions in India. Even lesser are ODR experts who can resolve technical, legal and other scientific disputes in an online environment. Even the national litigation policy of India (NLPI) failed to address this issue.

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<sup>171</sup> info@cyberlaws.net

<sup>172</sup> Sylvia Mercado Kierkegaard, Legal Conundrums in Cyber Arbitration,

Now business community is stressing more upon online dispute resolution *ODR* than ADR mechanism. *ODR* is the most convenient, efficient and speedier method of dispute resolution. The parties are not even required to leave their places and they can resolve their disputes even while sitting at their homes or offices.

Sooner or later Indian arbitrators and mediators must learn to adopt and use *ODR* as the future belong to the *ODR* community. Lawyers or judges may consider the techno-legal training platform by Perry4Law Techno Legal base ***PTLB*** for getting good ADR and *ODR* training.

### **1.Global Development of Online Arbitration**

The developments in Information Technology have ushered in a new era in the traditional arbitral practices and procedures. To match these developments, ICC took a lead and has issued guidelines on the use of Information Technology (IT) in arbitration, devised a web-based system for conducting and managing arbitration proceedings, and established an online clearinghouse system for small claims. Electronic submissions by e-mails or VoIP (Voice over Internet Protocol) or videoconferencing pioneered the IT-intense online arbitration. Arbitration agreements are concluded, proceedings conducted, and awards rendered by electronic means in online settings.

The issue is whether an *online arbitration* is fully admissible and effective under the current legal framework?

On-line arbitration issues can be divided into three major categories: -

- Arbitration agreements,
- Arbitral proceedings, and
- Arbitral awards.

There can be three possible situations for submitting or referring a claim, dispute or Difference to an online arbitration.

Firstly, An E-contract containing an online arbitration clause.

Secondly, A written contract providing for online arbitration; and

Thirdly, Reference to online arbitration after the dispute has arisen.

The agreement of the parties to refer their disputes to the decision of the arbitral tribunal must be intended to be enforceable by law and hence, it must satisfy the requirement of enforceability as prescribed by Section 10 of the Contract Act, 1872 with a clear intention of entering into a legally binding relationship and parties must be *ad-idem*. Arbitration Agreement has been defined under Section 7 of the Arbitration and Conciliation Act, 1996. If an online arbitration clause passes a test of Section 7 then it is deemed to be a valid arbitration clause. Exchange of letters, telex, telegrams or “other means of telecommunication” should signify an active assent by both parties and a demonstrable meeting of minds as to the arbitration agreements.<sup>173</sup> Whether any agreement entered into through such other means of telecommunication is enforceable? What would be included in such other means of telecommunication? Can exchange of emails embodying an agreement to arbitrate be covered under Sec-7?

The e-mail exchange may also refer to a separate written arbitration agreement (“incorporation by reference”). The parties may also wish to reach agreement through a website. In such case, an exchange of electronic communications occurs through the parties browser software. Either method (e-mail or website) will ultimately lead to the same question as to whether an electronic communication provides a required record of the agreement. The answer was given in affirmative by the Hon’ble Supreme Court in the case of Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.<sup>174</sup> In this case, the Petitioner submitted commercial offer through e-mail for supply of bauxite to Respondent. Respondent conveyed acceptance of offer through e-mail and the Parties entered into contract. The Contract contained an

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<sup>173</sup> Shakti Bhog Foods Ltd. V. Kola Shipping Ltd., AIR 2009 SC 12

<sup>174</sup> 2010) 3 SCC 1

Arbitration Clause for resolution of disputes between the parties. Thereafter, Respondent refused to honour contract on the ground that there was no concluded contract between the parties and the parties are still not ad idem in respect of various essential features of the transaction. It was held by the Hon'ble Court that if the intention of the parties to arbitrate any dispute has arisen in the above offer and acceptance thereof, the dispute is to be settled through arbitration. Once the contract is concluded, the mere fact that a formal contract has to be prepared and initialled by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialled.

Needless to state that Section 4 of the Information Technology Act, 2000 renders legal recognition of such electronic transfer of communication which is admissible as evidence.

Though, e-commerce laws have "legitimized" electronic communications in the light of traditional paper-based legal requirements, it does not mean that the controversies about arbitration agreement concluded online completely disappeared. Nor could one assume that every arbitration agreement concluded by an exchange of e-mails or electronic data interchange will be valid. The means of telecommunication applied must satisfy certain conditions, i.e. provide the agreement's record that is "accessible so as to be usable for subsequent reference".

## **VI Regulations applicable to International and domestic laws**

A number of arbitration institutions have already opened the possibility to perform arbitral proceedings online. They have made an effort to either acclimatize their existing arbitration rules to the online environment, or to set up new sets of rules for online arbitration. The legal framework for online arbitration requires multiple layers of regulation at different level. The international commercial arbitration not only encompasses the institutional rules of arbitration and private contractual agreements but also international conventions, bilateral treaties, model laws (such as UNCITRAL model laws) and national arbitration laws. All these aspects need to be taken care of even in online arbitration. Entering into arbitration agreements in certain online settings may conflict with the basic principle of international arbitration law that the consent of the parties is a condition sine qua non to validly agree on arbitration. To give an example of a peculiar but common situation, when a single mouse click suffices to accept an offer with an arbitration clause, it may of course sometimes happen that an alleged acceptance does not reflect the fully informed consent of a party. It is important in an online arbitration that the contents of the arbitration clause are meticulously drafted and take into account, inter alia, the governing law of the arbitration agreement, jurisdiction of the courts (whether exclusive or nonexclusive), procedure for the nomination and/or appointment of the arbitral tribunal, place or seat of the arbitration, language of the arbitral proceedings and applicable institutional rules on online arbitration.

### **1. Arbitral proceedings**

Information Technology is already used rampantly in arbitral proceedings. It is indeed cost effective and convenient but involves legal questions of vital importance to be settled first. Parties are free to agree that the whole or part of arbitral proceedings are conducted online, with the use of whether asynchronous (e.g. e-mail) (Asynchronous electronic means are those where there is a time lapse between an initial communication and a reply.); or synchronous (e.g. video- or audio-conference) electronic means. It is pertinent to analyse the applicable mandatory rules of procedure as "place", or "seat", of online arbitration is literally "virtual". The principles of tribunal's impartiality and equal treatment of parties, enshrined in Section 18 read with section 12 of the Arbitration and Conciliation Act, are relevant. These online techniques can be used in arbitral proceedings, provided that their application does not prejudice.

It is suggested that in order to safeguard the fairness of online arbitral proceedings, the implementation of information technology, regardless of its scope, should be suitably and carefully codified in procedural

orders issued by the arbitral tribunal or, preferably, by agreement between the parties at the outset. If parties agree on institutional online arbitration, applicable rules also have to be taken into account. Article 3(2) of the ICC Rules specifically authorizes electronic communication with the Court and the Secretariat of the ICC. If there is any conflict between the institutional rules on online arbitration and the intent of the party then such rules can be categorically amended/ deleted by an express agreement between the parties. The need for clarity may arise when provisions of applicable arbitration rules require inter alia, references in a written form or a physical appearance of the parties before the arbitral tribunal. As already stated above, many arbitration institutions have already adapted or supplemented their rules to include online proceedings. It will not be pre-mature to say that such problems are gradually reducing. In online arbitration; parties may decide to conduct hearings online and to examine and cross-examine witnesses, or hear experts, using teleconferencing or videoconferencing technology. India has introduced Personal Data Protection Bill 2006 but it could not see the light of the day. Section 72 of the Information Technology Act takes care of the use of tele and video-conferences in court proceedings, is currently admissible in many jurisdictions. Probably the most innovative web-based broadband video conferencing system, that allows solicitors to conduct their court hearings from a remote source, has been set up in Singapore<sup>175</sup> A major legal issue concerning electronic hearings in online arbitration concerns the legal significance of evidence produced online.

Many practitioners and academicians have mooted for a blend of both online and off-line methods for procuring or taking evidence on record. There can be online filing platforms where the parties to the online arbitration may file their documents and evidence through an independent and authorised third party provider. Such online filing is part of the institutional rules or necessary procedural orders passed by the Arbitral tribunal. Documents and evidence that are filed before the Arbitral tribunal may be scanned copies of the originals or can be protected and authenticated with the help of digital signatures. If a document bears a digital signature then it is presumed to be unaltered.<sup>176</sup>

## **2.The place of arbitration**

It will not be an exaggeration to state that international commercial arbitration has achieved a considerable degree of independence from national courts. Nonetheless the whole arbitral proceedings remain subject to the laws of the many jurisdictions in which arbitration takes place and in which award is to be enforced. If arbitral proceedings are conducted entirely online at a distance, with parties and arbitrators in distinct places, *prima facie*, it seems difficult, or even impossible, to determine the place, or seat of the arbitration<sup>177</sup> It is indispensable to ascertain the seat or place of arbitration which is online. The issues involving jurisdiction in online arbitration will be more complex as compared to conventional arbitration unless a formal seat of arbitration is decided either unanimously by the parties or by the Arbitration Rules or by the arbitral tribunal. Section 20(1) of the Act states that the parties are free to agree on the place of arbitration. Importantly, Section 20(2) indicates that if the parties have not agreed to such place then arbitral tribunal would determine the place of arbitration having regard to the circumstance of the case including the convenience of the parties. Parties sometimes choose the place of institution to be the place of arbitration. Thus, deciding a place of online arbitration can be achieved through unanimous decision of parties (either directly or by reference to the arbitration rules) or by arbitrators if the rules are silent or if parties fail to decide the same unanimously. Case law allows the seat of arbitration to be "***a strictly legal concept dependent on the will of the parties***".<sup>178</sup>

## **3.Arbitral Awards**

There are legal impediments which have to be taken care of when it comes to Arbitral Awards. These can primarily be:

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<sup>175</sup> see: online <<http://www.justiceonline.com.sg/index.html>>

<sup>176</sup> R. Hill, Online Arbitration: Issues and Solution, Kluwer Law International, 1999)

<sup>177</sup> .(A. Vahrenwald, Out-of-court dispute settlement systems for e-commerce, online <<http://www.vahrenwald.com/doc/part4.pdf>> at 83.).

<sup>178</sup> The decision of Court of Appeal of Paris, 28 October 1997, SociétéProcédés de préfabrication pour le bétonv.Lybie, Revue de l'arbitrage, 1998, at 399.

- a) Can an arbitral award be validly pronounced by the Arbitral Tribunal over the internet or online?
- b) Whether such online arbitral award be enforced by national courts within the existing legislative framework?

Section 31 of the Arbitration and Conciliation Act deals with Form and contents of the arbitral award. Such an award must be in writing and signed by the members of the arbitral tribunal. Such an award must state the reasons upon which it is based unless the parties have agreed that no reason is required or the award is pursuant to the settlement between the parties. It is important to note that the Act also makes it mandatory to incorporate the date and the place of the arbitration so that it shall be deemed to have been made at that place. An arbitration clause contemplating an online arbitration must specifically fix the place of arbitration even though the arbitral proceeding would be held online. A section 31(5) state that after the arbitral award is made, a signed copy shall be delivered to each party. The New York Convention on Recognition and Enforcement of Foreign Awards (herein after referred to as "the NYC") merely requires a party seeking enforcement to furnish the duly authenticated original award or a duly certified copy thereof. It is submitted that electronic documents can be considered „originals within the meaning of the NYC by invoking the doctrine of "functional equivalence".<sup>179</sup> Sections 15 of the Information Technology Act, 2000 deals with secure digital signature. Electronic signatures can provide for both authenticity and integrity (they encrypt the contents of the message in such a way that its content cannot be altered without prior decryption and subsequent re-encryption). They are comparable to handwritten signatures and should carry the same evidential weight. Recognised electronic signatures should not be restricted to digital signature, but extend to all types of procedures used to electronically attach a signature to a document,

Provided they (a) identify the user, (b) are in the exclusive control of the user and (c) encrypt document in such a manner that any subsequent alteration is noticeable. It can be inferred from the combined reading of Sections 15 and 11 of the Information Technology Act, 2000 that a secure digital signature can be attributed to the originator of such signature. Thus, if an award is digitally signed by the arbitrator then it can be deemed to have been signed by him. Further, if the arbitrators digitally sign the arbitration agreement and the award, the goal of the New York convention appears to be met. Would such a solution be recognized? This poses a double question: first, whether such certification is acceptable; second, who should be capacitated to certify.

The New York convention does not determine the law applicable to certification. This silence is usually interpreted as allowing the enforcing court to apply the law of either the Country of origin of the award or country in which enforcement is sought, at the option of the party seeking enforcement.<sup>180</sup> The issue would be resolved if law of one of these two countries recognizes digital signatures as equivalent to handwritten signatures. In that event the enforcement court should hold that the arbitration and the award are validly certified by way of a digital signature<sup>14</sup> These issues regarding the recognition and enforceability of online arbitral awards can be reduced if the online arbitration clause is drafted meticulously and with due care or if it refers to specialised institutional rules on online arbitration. Indeed the New York Convention is "the single most important pillar on which the edifice of international arbitration rests"<sup>181</sup>.

## VII CONCLUSION

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<sup>179</sup> The "functional equivalent" approach is promoted by the Model Law on Electronic Commerce. See also: Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (New York, 1997) at

20 (section 15).

<sup>180</sup> See E. Gaillard and J. Savage (eds), Fouchard Gaillard Goldman on International Commercial Arbitration para. 1675; J.F.

Poudret and S. Besson, Droit compare de arbitrage internationa, para. 920; and A.J. van den Berg, TheNew York Convention of 1958, para. 252-253).

<sup>181</sup> See R. Hill Online Arbitration: issues and solutions 1999 (published by Kluwer Law International), Pg 222.)



The “dematerialised” *arbitration* resulted in the increasing interest in the question of whether an online arbitration is valid within the Indian legal framework. Such evolved mechanism of dispute resolution which is *online arbitration* may run into complications in the application of traditional principles of international commercial arbitration law. An online arbitration is the change in platform rather than in essence. The application or use of online arbitration cannot be restricted merely by formal requirements. Online arbitration is now considered as an acceptable legal mechanism that is hopeful but it must be cautiously handled due to the above mentioned legal uncertainties. It gives a new dimension to the conventional form of Arbitration.<sup>182</sup> Although the initial euphoria has subsided, turnover on the Internet continues to increase. Irrespective of the ups and downs in the global social, political and economic spheres, ODR has a growing role to play. Disputes arising out of large international commercial transactions, which constitute the major part of the traditional arbitration case-load, are unlikely to be referred to ODR. These disputes will progressively assimilate IT techniques as a means of improving the management of the arbitration, but will never be entirely online. The amounts at stake will not act as an incentive to replace live hearings with e-mails and chat rooms. By contrast, small and medium-sized disputes, including B2B disputes, can very effectively be resolved by way of ODR. There is no reason to restrict ODR to contracts entered into electronically and no reason to limit ODR to disputes submitted to private justice. ‘The true victory of soft law’ is an established fact. There is a general trend in contemporary law, as a reaction to the inefficiencies of traditional justice, to sensitize and educate the present brothers in legal profession to appreciate the pragmatic results of Cyber Arbitration, and lead the law to CYBERIA. Particularly for small and medium enterprises, CYBERIA is a dependable shelter.

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<sup>182</sup> . J. Wetter, “The Present Status of the International Court of Arbitration of the ICC: An Appraisal” (1990) 1 Amer. Rev. of Int'l Arb. 91 at 9 (<http://www.odr.info/Re%20greetings.doc>)

# SOARING THE CLEAR SKY WITH CLIPPED WINGS: THE PARADIGM OF LOW COST CARRIERS (INDIAN PERSPECTIVE)

SUKANYA KR\*

## Abstract

*Indian Aviation Industry is still at a developing stage. With more dependency on Low Cost Carriers for Domestic travel, Post lockdown period is going to be a sour grape. High Maintenance of fleets, Air Turbine Fuel costs, Running expense can India survive? The problem is many folds and not easy to untangle. Will this pandemic bring in new dawn or doom the industry? it is also important that going forward to ensure travelling is safe, comfortable, eco friendly, and imbibes universal hygiene principles in its overall operations in terms of air quality and handling of solid hazardous solid wastes, there is an urgency for developing more sustainable environmental practices to be followed. Priority will be on the safe disposal of waste. Be it from managing infections due to ever growing burden disposed solid waste or exposure to potential carrier of virus.*

**Key Words:** Sustainability model, Role of GDCA, Open Sky Principles, Maintenance and Creation of spares, Problems in Indian Aviation Sector

## I Introduction to the Aviation industry

Indian flying culture is not just business but a passion and end in itself. There is a big canyon between the frequent flier to non flying population. For millions flying is still a dream. When the Indian aviation industry began its presence, no one would have imaged such a mammoth growth or the sudden show stop one fine day getting hit by a pandemic

The First domestic route charted was from Karachi to Delhi in Dec. 1912.(Indian state air service collaborating with imperial Airways, UK). It was an extension of the already plying London Karachi route.<sup>183</sup> The first step had been taken. From here it was a giant leap. If we go by time, our Indian Aviation Industry can be summarized into three 3 phases. The preliminary establishing the foot hold stage; The middle Sustainability stage and the Final Revenue sweeping Golden age.<sup>184</sup>

**Stage one 1.** In the pre 1960s.there were nine private airlines.(Eight pre-Independence domestic airlines, Deccan Airways, Airways India, Bharat Airways, Himalayan Aviation, Kalinga Airlines, Indian National Airways and Air Services of India and the Domestic wing of Air India, were merged to form the new domestic national carrier Indian Airlines Corporation. Subsidiary: Alliance Air, Vayudoot)

India wanted a carrier identity and Indian Airlines was the poster child. The airlines were nationalized and airline sector was brought into the purview of Indian government. Till the 1980s there was no competition, it was a government's monopoly.<sup>185</sup>

**Stage two 2.** Air Taxi era. With the Passing of the Air Corporation Act 1953<sup>186</sup>, things began to change. Monopoly of Indian Airlines Corporation in Domestic sector and Air India in International Slowly began to wither. Private players began to occupy sky space and by 1990s extensive expansion took place, unfortunately it was confined only to high profitable routes.

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<sup>183</sup> Government of India Ministry of Statistics and programme implementation,Statistical YearBook, 2017, Chapter 23, Civil Aviation, [http://www.mospi.gov.in/sites/default/files/Statistical\\_year\\_book\\_india\\_chapters/Ch\\_23\\_SYB2017.pdf](http://www.mospi.gov.in/sites/default/files/Statistical_year_book_india_chapters/Ch_23_SYB2017.pdf)  
Association of Private Airport Operators, [http://www.apaointia.com/?page\\_id=185](http://www.apaointia.com/?page_id=185), visited on April, 28,2020

<sup>184</sup> Indian Airlines, Wikipedia, [https://en.wikipedia.org/wiki/Indian\\_Airlines](https://en.wikipedia.org/wiki/Indian_Airlines), visited on April, 28,2020

<sup>185</sup> Indian Airlines, Wikipedia, [https://en.wikipedia.org/wiki/Indian\\_Airlines](https://en.wikipedia.org/wiki/Indian_Airlines), visited on April, 28,2020

<sup>186</sup> Association of Private Airport Operators, [http://www.apaointia.com/?page\\_id=185](http://www.apaointia.com/?page_id=185), visited on April,28,2020

**Stage three 3.** The Golden Era. The open door policy brought in new business options and it was the End of monopoly. The Air Corporation Act 1953 was repealed with effect from March 1 1994. New flying carriers craved for space and in the year 2003, the least expected but highly anticipated happened. Indian sky was thrown open to Air Deccan. It was a budget carrier and the pricing factor made everyone believe that flying is a low hanging fruit. They charged way low than the then operating carriers and soon became the major carrier.

In the early 1980-90s when private airlines were allowed to operate charter and non-scheduled services to all authorized airports. They were placed under the Air Taxi Scheme and were also permitted to decide their fares and flight schedules. However, there still remain restrictions on *cabotage* since international airlines are not allowed to carry domestic cargo on their flights within the country.

{Cabotage: the right to operate sea, air, or other transport services within a particular territory. Restriction of the operation of sea, air, or other transport services within or into a particular country to that country's own transport services}

## **II The new era of high domestic flying opened many new vistas. The new normal <sup>187</sup>**

*Objectives:*

First and foremost priority was to remove monopoly of Air Corporation on schedule services. The government sector employees were the majority fliers, with private sector slowly making its presence in economy; private carriers were able to decide their future for themselves. They began to operate schedule services. The government understood that they being tight fisted will no longer help them in revenue. They had to adapt and the government decided to Convert Indian Airlines and Air India to limited co.

The government had to open the door completely to the private players and with them came the swarm of *Problems*.

1. *Government policy:* the government had to tweak and create new policy that would ensure safety of the new private players at the same time ensuring that the vast interest and individuality of the business model did not get affected. The carrots before the donkey policy were no more working with the new demand. India had to cope up with the ever emerging demand and pressure from international aviation industry to be on par with domestic flights. Tourism was the major attraction and air connectivity paired with good accommodation was the need of the hour. The tourism industry was the key player to break or build a new route. The world was shrinking but the domestic market was ever expanding.

2. *Strategic alliance:* the much awaited wedding was set. India started having strategic alliance with carriers. India does not build its carriers, so partnerships, MoU were placed to bring in the best to our nation. The Maharaja flying experience opened up new career options in plethora. Maintenance of the carriers, skilled and trained crew, support staff, technical support were the need of the hour. Socks had to be pulled.

3. *Fuel prices:* the biggest nightmare of any country and carrier is its Air Turbine Fuel Cost. Price mechanism is a highly volatile. It in itself is a subject of study.

4. *Open sky policy<sup>188</sup>:* an Open Skies policy means liberalization and ease of access and rules of use of national airports for foreign airlines. It is joined in order to increase the tourist flow and to develop the potential as a regional air hub.

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<sup>187</sup> Jagaran josh, Aircraft(Amendment) Bill 2020, <https://www.jagranjosh.com/current-affairs/aircraft-amendment-bill-2020-passed-by-lok-sabha-1584510916-1>, visited on April,28,2020

<sup>188</sup>Freedoms of Air, Wikipedia, [https://en.wikipedia.org/wiki/Freedoms\\_of\\_the\\_air](https://en.wikipedia.org/wiki/Freedoms_of_the_air), visited on April, 29,2020

The degree of “sky openness” depends on the freedoms of the air in the country granted to foreign airlines. There are nine (9) such freedoms according to the 1944 Convention on International Civil Aviation. It is the Agreement between nations to use and operate in the territorial. International routines and destination also plays an important role in the foot fall of domestic sector. Well connected metro cities slowly gave place to B and C cities and towns. The main players Air india, Indian Airlines, slowly made way to economical airways and air cargo was introduced.

The open sky policy for cargo also allowed international airlines to operate cargo flights without restrictions and to charge rate. Under this policy, any foreign domestic airline or association of exporters or private operator’s could bring freight carriers to India for lifting cargo from any airport. Director General of Civil Aviation (DGCA)<sup>189</sup> has not much role in deciding the charge of cargo rates. But today, international airlines cannot carry domestic cargo without prior permission. With Low Cost Carriers taking a backseat post lockdown, the cargo too will get hit adding additional burden to the existing financial crisis.

### **III The biggest challenge, Covid axe.**

With flights being grounded, the new problem has arisen. The problem of plenty.

Aircrafts are a costly asset and normally all airlines strive to maximize the utilization. Spare parts are an important contributor to this availability and utilization of aircraft.

Aircraft maintenance<sup>190</sup> is highly regulated in order to ensure safe and correct functioning of flight. The industry is shifting to procuring performance services<sup>191</sup> instead of buying an aircraft as a product. Unavailability of a spare part could mean an Aircraft on Ground (AOG) situation which is directly linked to the revenue stream and normally happens to be aircraft availability.

In civil aviation national regulations are coordinated under international standards, established by the International Civil Aviation Organization (ICAO)<sup>192</sup>. These standards have to be implemented by government to ensure airworthiness, to regulate maintenance tasks, deploy personnel and carry out regular inspection. Maintenance staff have to be licensed for the tasks they carry out which include periodic inspections that have to be done on an aircraft after a certain amount of time or usage. Often maintenance functions are referred to as Maintenance, repair and overhaul (MRO) and MRO is also used for Maintenance, repair and operations. Over time, the terminology of maintenance .The routine recurring work required to keep the facility (plant, building, structure, ground facility, utility system, or other real property) in such condition that it may be continuously used, at its original or designed capacity and efficiency for its intended purpose is time and money consuming.<sup>193</sup>

Most Indian airlines have not structured their business models to withstand even regular shocks.

### **IV Cash-strapped Indian airlines have sought for a bail out package from the government**

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<sup>189</sup> Director General of Civil Aviation, <https://dgca.gov.in/digigov-portal/> Director General of Civil Aviation,

Wikipedia, [https://en.wikipedia.org/wiki/Directorate\\_General\\_of\\_Civil\\_Aviation\\_\(India\)](https://en.wikipedia.org/wiki/Directorate_General_of_Civil_Aviation_(India)), visited on April, 28,2020

<sup>190</sup> Anderson, J.C., Narks, J.A. (1995). Capturing the value of supplementary services. Harvard Business Review, 73(1), 75–83.

<sup>191</sup> Baines, T. S., Lightfoot, H. W., Evans, S., Neely, A., Greenough, R., Peppard, J., Roy, R. (2007). State of the art in product service systems.

Proceedings of the Institution Mechanical Engineers, Part B: Journal of Engineering Manufacture, 221(10), 1543–1552.

<sup>192</sup> ICAO Uniting Aviation A united Nations Specialized Agency, <https://www.icao.int/Pages/default.aspx>, visited on April, 29,2020

<sup>193</sup> Kilpi, J., Vepsalainen, A. P. J. (2004). Pooling of spare components between airlines. Journal of Air Transport Management, 10(2), 137–146.

Aircraft can't simply be dusted back into action. They need plenty of work and attention even while in storage, from maintenance of hydraulics and flight-control systems to protection against insects and wildlife or nesting birds. Humidity can corrode parts and damage interiors. Even when parked on runways, planes are often loaded with fuel to keep them from rocking in the wind and to ensure tanks stay lubricated.

Cash-strapped Indian airlines have sought for a bail out package from the government, as the sector stares at job losses and closure. All the 600+ crafts have been lying idle and never was this such a mammoth problem. In its online magazine, IATA said it asked governments to cut parking fees, which usually account for less than 2% of airport revenue in a normal year. Under current circumstances, those charges could "make-or-break" some airlines, it said. Asia Pacific has been a rapidly growing aviation market, with a slew of budget carriers from Indonesia, Vietnam, Malaysia, India and elsewhere ordering thousands of planes, buoyed by an emerging middle class embracing flying. That expansion halt and has also hit orders for manufacturing giants Boeing and Airbus.

Most airlines in India have not structured their business models to withstand even regular spoilers, like elevated fuel prices or economic downturns, let alone pandemic. Even post the lift off the nation-wide lockdown passenger growth will face a sharp contraction considering the inhibitions of travelling anywhere till the pandemic scare has been settled fully in the domestic regions and internationally. The grounded planes are not feasible to operate so the other option will be to ensure the usage of spare parts that are highly volatile and unpredictable. The spare provisioning has to take into account the procuring cost, carrying cost, and the cost of obsolescence. With the increase of quantity of aircrafts, this volatility or the variation decreases. The idea of pooling of resources can be developed from the idea of the common nature of similar parts and the central locations making shipment of the parts easy. The need is a robust centralized warehouse to store the spare parts and quick delivery in minimum turn around time to make the aircraft ready to take off.

Indian population true promises for vast easy travelling, but can it survive? Sustainability is going to be a big problem as it goes from here. Companies around the world are already on tight budget and India too now needs to be operating on a platform which accounts for the triple bottom line factors, namely *social*, *environmental*, and *financial* sustainable model with lower material cost and high energy efficiency thereby reduction of waste. The loss is huge and the maintenance of carrier is going to be a hundred headed Hydra. The service maintenance industry instead of selling spares would concentrate more on the businesses of support the sold products. Firms are in a better position to optimize the product to its true function given its characteristics. In an effort to move towards sustainability, the obstacle that this industry faces is to bring the competitors on a common platform. Futuristically India will need to depend more on to products being designed for durability and up gradation due to their intense use post pandemic. The manufacturers will also have to extend services for their products, the industry can become more efficient and the service of product availability is maximized. We need to look towards longer solutions , better ; life-time solutions by Pooling and co opting limited available products seems a viable option for sustaining with an ultimate objective of sustainability resulting in longer life, and a better utilization of the material resources.

## V Conclusion

Problems to tackle immediately post lockdown would be multi fold. The prime concern will be to cut the dangerous rate of inflation that is going to clip the GDP.<sup>194</sup> Secondly, there is a loom of Global financial crisis which will surely impact the national aviation sector too. With no tourism to promote, many cities

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<sup>194</sup> Dror, M., Hartmann, B.C., Chang, W. (2012). The cost allocation issue in joint replenishment. *International Journal of Production Economics*, 135(1), 242–254.

will have their flights docked or temporarily suspended. Thirdly, Stock market is highly volatile. Making or breaking is just a matter of decision. Few companies have already started filing for insolvency. Fourthly, the domestic carriers' in pre pandemic time were issuing tickets much lower than the actual cost incurred. But, post lockdown, this might not be a viable option and small distance flight will have to bear the brunt. Fifthly, the price of the Air turbine fuel will decide the future of many carriers, routes and sustainability. Sixth, the maintenance and manufacturing company may not be able to issue Certificate of Release to the carrier. With no CSR in place, this delayed inspection now will put many aircrafts and carriers in limbo, because they may not be permitted to fly immediately after removal of lockdown, putting extra burden on company and industry.

Seventh, reduction in over head cost has been already in place now with renewed Baggage weight charges, the companies will try to make the amount by pinching the pockets of travelers. With the Indian court order to airline companies to pay full charge against cancellation during lock down period, the carriers may resort to price hike as the only option to make good the loss and to take care of the sudden surge.

Eighth, Fuel efficiency programme may break many isolated pockets of travel and cargo shipment. CO2 emission has been the biggest problem in the aviation sector. India may plan to take down many non viable routes in the name of efficiency. If government on recommendation continue social distancing, the carriers and their staffs have to be specially able to cope up with the new norm. This will add additional cost to logistics and managing airport.

Next, Manpower retrenchment- pink slips may also be a big blow to the crippled industry. Lack of experienced hands may put pressure on performance. {While writing this article, News is out that popular airline company have planned to cut down their staff by 12,000 numbers across globe}.<sup>195</sup>

On the other side, with the nationals stranded at other countries, like other nations, India too is working on the feasibility to bring back their nationals; which also may be by using warships and defence aircrafts . With less trained man power, it is going to be a Herculean task.

**Solution:** Indian Government is yet to roll out aid to the aviation sector but the most needed relief should be based on

- a) Custom duty reduction
- b) Tax rebate of Air Turbine Fuel
- c) Bailout packages
- d) Financial assistance in form of interest free loans to Low Cost Carriers
- e) Fuel price monitoring to ensure price hike is not transferred to the passengers.
- f) Airport landing cost to be regulated or subsidized for next few months
- g) Route terminal navigation charge and overnight charges to be reduced to encourage flights on non profit route too
- h) Airport service enhancement charge to be cut to ensure more footfall

As somebody in the industry rightly pointed out;“It might seem a simple task, but there’s some nuance to it,” “It doesn’t just stop, here.

**Endnote:** The air transportation services in India are controlled by DGCA, operating under Ministry of Civil Aviation (MCA). DGCA, under the provisions of Rule 134 of the Aircraft Rules, 1937, grants permission to persons to operate an air transport service to, within and from India. The DGCA rules governing issuance of permits for air transport services are prescribed under: (i) Scheduled Air Transport Services (Passenger) (Civil Aviation Requirements Section 3 Series 'C' Part II); (ii) Non- Scheduled Air Transport Services

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<sup>195</sup> BBC NEWS Business, <https://www.bbc.com/news/business-52462660>, visited on April, 28,2020

(Passenger) (Civil Aviation Requirements Section 3 Series 'C' Part III); (iii) Air Transport Services (Cargo) (Civil Aviation Requirements Section 3 Series 'C' Part IV);

Non-Scheduled Air Transport Services (Charter Operation) (Civil Aviation Requirements: Section 3 Series 'C' Part V). The permits issued by DGCA are equivalent to the Air Operator's Certificate (AOC) required to be granted by ICAO member States in accordance with the provisions stated in Annex 6 of the rules. Permits for any other special type of operation can be granted subject to the applicant showing satisfactory capability to undertake the type of operations.

DGCA also decides on matters relating to: (i) commencement of Scheduled International Air Services by a Foreign Airline; (ii) import of Aircraft on Short term on wet lease basis; Open Sky Policy for Cargo Flights to India; (iii) foreign Equity Participation in the Domestic Transport Sector. The MCA creates enabling provisions for DGCA to sign agreements for technical and managerial expertise in civil aviation sector in the areas relating to: (i) providing technical and managerial expertise in developing, improving and operation of civil aviation infrastructure, standards, procedures, policies, training and equipment; (ii) co-operation in a range of aviation safety areas; (iii) Providing training for civil aviation personnel; (iv) inspection and calibration of our civil aviation equipment and air navigation facility; (v) assistance in aircraft certification in India; (vi) assistance in the field of helicopter operational safety initiative.

# CYBER CRIMES IN INDIA: JUDICIAL APPROACH

*Dr. Prakash Chandra Mishra\**

Cyberspace is a common heritage of ours which we have inherited in our life time from the benefits of ever growing technologies. This cyberspace is the lifeline of the entire universe and given its irreversible position today, it is the duty of every citizen to contribute toward making the said cyberspace free of any trouble or cybercrime.

## ABSTRACT

*Internet is a phenomenal piece of technology and has occupied a central position in our lives. In the last decade development of cyber laws in India has been rapid and progressive. Pertaining issue of cyber crime have been dealt by Indian courts in number of cases and important principles of law have been explained therein. This article outlines concerns about the judicial approach on expanding horizons and deleterious impacts of cyber crimes critical information infrastructure, individual and society as a whole. It describes the characterization and classification of cyber crime and also what are the criminogenic insights behind their offending and others responding at national levels. In India most complaint have to do with issues like Freedom of speech and expression, constitutional validity of section 66A of information Technology Act,2000, online banking, credit cards, hacking of e-mail, face book related complaint ,website hacking, lottery frauds ,fake websites, data theft ,sexual harassment, job frauds, Cyber terrorism<sup>196</sup>, Interpol issue and cyber extortion have perturbed the state. Presence of MNCs, BPO and tech-savvy youth are some of the major factors contributing to ever increasing numbers. Unless appropriate steps are taken to protect ourselves against cyber crime, India will suffer tragic cyber crime that will have devastating impacts on our economy and will include loss of life. Censorship of internet was a highly debated and discussed topic when Google and facebook and other social media were sued for alleged hosting offensive content on their websites .So it is need of time that cyber crime included in National Crime Records Bureau Statistics as separate category.*

**Keywords:** *Cyber Crime, Judicial Approach, Critical Information Infrastructure, Constitutional Validity Of Section 66A Of IT Act, 2000, Substantive and Procedural Laws.*

## I Introduction

Criminal cases are the most frightening of all and they are also the most fascinating to the public<sup>197</sup>. There is no universally accepted general definition of cyber crime .No national legislation provides us with a definition or explicitly employs the term. Cyber crime comprises two overlapping domains. The first is illegal activities directed at or perpetrated through the use of computer s. this can include crimes through and via the medium that is the internet, Wilful damage to computer system or network, unlawful access to or interference with the operation of computer systems, transmitting offensive or illegal content and committing fraud or other offences thorough the use of medium. The second related area is the protection of information<sup>198</sup>. In the wake of increased instances in banking system of cyber attacks, To many access points are left unmonitored , too many people share passwords or have easily penetrated passwords and too little surveillances is maintained of vendors and the software they created. On other hand electronic media is useful for mobilising people for demand of justice, The santacruz police (Bombay) registered an FIR against a driver employed by cab aggregator Uber for allegedly molesting an Italian women when a face book status uploaded by the victim's friend o face book went viral, with over 7000 users sharing it. In the development of cyber space now central government is introducing and appointing a authority to administer and manage its digital locker .as it looks to push paperless governance. The government will appoint a digital locker authority to establish, administer and manage digital locker system to preserve and retain information for efficient delivery of services to the uses. The internet is a bad place. At least ,

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<sup>196</sup> See Section 66F Of The Information Technology Act,2000

<sup>197</sup> Ronald Dworkin, Law's Empire, Universal Law Publishing Co Delhi, Page 1

<sup>198</sup> Rodney D Ryder Introduction To Internet Law And Policy Wadhwa & Company Nagpur First Edition , Page 216



it can be with predators lurking online and able to cast their net with a greater deal of anonymity, it has become a cause of concern for law enforcement agencies. The Tamil Nadu government informed High court that between 2013 and July 2016 ,a total of 3501 persons involved in human trafficking were arrested .People involved by portals locanto.in and cheenai.backpage.com to lure customers. They also maintain separate website,giaflyzea.com for soliciting customers to escort services. In criminal law the offence is define by state and interpretation is done by courts. In cyber law some country is liberal approach on free speech and expression and some has strict approach on free speech and expressions. In Australia, father posted the images on Facebook include girl baby picture of her having her nappy changed and those of potty training. Despite the request of girl (now she is 18 years old) refused to delete the photos. Court held that if it can be proven that the images have violated her rights to a personal life, and then her parents may lose the case. It seems that Austrian social media are not as strict as some other countries. In France anyone convicted of publishing and distributing images of another person without their consent can face up to one year in prison and fine of up to 45,000 euros.

In a land mark ruling of the *Shreya Singhal v. UOI*,<sup>199</sup> the Supreme Court of India struck down section 66A of the IT Act, 2000 as unconstitutional. This public interest litigation (PIL) was filed to challenge the constitutionality of section 66 A of the IT Act as being arbitrary, ambiguous and violative of fundamental right to free speech guaranteed under article 19 of the Constitution of India. The court held that section 66A is clearly vague, ambiguous and is violative of right to freedom of speech and it takes within its sweep the speech that is innocent as well. The court took the view that no part of judgment was severable and section as a whole was struck down as unconstitutional. Commenting on arbitrariness of section 66A, the court observed: If one looks at Section 294, the annoyance that is spoken of is clearly defined-that is, it has to be caused by obscene utterances or acts. Equally, Under Section 510, the annoyance that is caused to a person must only be by another person who is in a state of intoxication and who annoys such person only in a public place or in a place for which it is a trespass for him to enter. Such narrowly and closely defined contours of offences made out under the Penal Code are conspicuous by their absence in Section 66A which in stark contrast uses completely open ended, undefined and vague language. Incidentally, none of the expressions used in Section 66A are defined. Even “criminal intimidation” is not defined-and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act. Quite apart from this, as has been pointed out above, every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another. So Section 66A Of Information Technology Act, 2000 Held Unconstitutional

## II Substantive Law

The substantive and procedural laws are inadequate to address the cyber crime. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define nature or extent of legal duties. The Information Technology Act,2000 in chapter XI ( section 65 to78) deals with the offences . A thing is offence if it is punishable under any statutes. Some things are punishable under the IT Act; they are offences. Nevertheless every wrong thing relating to the internet or to information technology is not punishable under the IT Act; It may be punishable under any other statute and would be an offence punishable under that law. The offences consists of tempering with computer source documents <sup>200</sup>, hacking with computer system, publishing of information which is obscene in electronic form, penalty for misrepresentation , penalty for breach of confidentiality and privacy , penalty for publishing digital signature certificates false in certain particular. Publication for fraudulent purpose, act to apply for offences or contraventions committed outside India, confiscation .etc.

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<sup>199</sup> AIR 2015 SC 1523

<sup>200</sup> See Section 65 Of The Information Technology Act,2000

### III Tempering of Source Code

The internet and Computer is indispensable for banking or corporate governance. Computer data often contain personal information. Now day's money transfer and mobile recharge all these may done by online. It is automatically collected where sales are through credit cards and perhaps in the future all sale will be through credit cards. Personal data is also recorded in different records ; It could be related to banks , insurance ,hospital ,school, telephone etc, In such situation " loss of privacy is another major worry where the network is concerned' ...the potential problem is not the mere existence of information. It is the abuse that makes us worry"<sup>201</sup> On other hand Article 21 of Constitution of India,1950 protected right to Privacy. But in *X vs Hospital Z,(1998)8SCC 296* court observed that right to privacy is not absolute the disclosure of private information is justified in certain circumstances'. In IT Act,2000 the right to privacy may be infringed by :

1. Utilizing private information data already collected for a purpose other than that for which it was collected.
2. Unauthorized reading of emails of others
3. Sending of unsolicited emails or spamming.

Phishing: Phishing is a fraudulent way of getting confidential information. In phishing, unsuspected users receives official –looking emails that attempt to fool them into disclosing online passwords, user names and other personal information. Victims are usually persuaded to click on a link that directs them to a doctored version of an organization's web site. In *Shri Umashankar Sivasubramaniam Vs Branch Manger ICICI Bank*<sup>202</sup> the applicant proved the element of negligence of bank where unauthorized debits to his account caused. There were no proper secure communication to customers as no digital signature or other valid authentication mechanism were used. The adjudicating officer held the bank guilty of negligence and compensates the applicant. This is clear case of Phishing in Information Technology Act,2000.

In *S.Raju Aiyer vs Jawaharlal Nehru University*<sup>203</sup> the appellant send obscene mails containing sexually explicit content to lady. There after commission and inquiry found that he is guilty of the stalking. On the report of commission and inquiry and other evidence court held that he is liable for cyber stalking. Stalking is the crime of following and watching somebody over a long period of time in way that is annoying or frightening .It generally involves harassing or threatening behavior that an individual engages in repeatedly , such as following a person calls, leaving written messages or objects, or vandalizing a person's property. The term cyber stalking, broadly refer to the use of the internet,email ,or other electronic communication devices to stalk another person. In India cyber stalking is not punishable under the IT Act we have accepted strict construction for which there must exists certain amount of publication or transmission of obscene material within the meaning of section 67 of ITAct,2000<sup>204</sup>. The thing (claimed to be cyber stalking) would also be an offence if stalking were an offence under any statute. Fortunately in 2013 added section 354D of the Indian Penal Code, 1860.So by this way the cyber stalking is totally acceptable as an offence only against a women in border connotation.

In *Shashank Shankar Mishra Vs Ajay Gupta*<sup>205</sup> the High Court of Delhi on issue of right to privacy held that if defendant disclosing the private information pertaining the plaintiff and his family members and also using his software(Quizprowordpressplugin) illegally .The court held that right to privacy is covered under

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<sup>201</sup> Bill Gates ,The Road Ahead ,Chapter "Critical Issue' Page 302-303.

<sup>202</sup> Petition No, 2462 Of 2008, Order Passed By Adjudicating Officer, Chennai ,Dated 12 April 2010

<sup>203</sup> 2013LLR1213.

<sup>204</sup> Justice Yatindra Singh , Cyber laws, universal law publishing 2005 page 79

<sup>205</sup> 2011(184)DLT675

article 21 of constitution of India even the public authorities are not entitled to invade one's privacy in India except in accordance with procedure prescribed by law.

#### **IV Liability of Director Of Company For Cyber Crime**

A corporation is an artificial being, intangible and existing only in contemplation of law. Company has neither a mind nor a body of its own. This makes it necessary that the company's business should be entrusted to some human agents. The position of Directors are agents, trustee and as organs of corporate body of a company. In *Avnish Bajaj vs state*<sup>206</sup> the Baazi.com website published a MMS clip which offered for sale a video clip, shot on a mobile phone of two children of Delhi school indulging in sexual act. The managing director of the company was arrested for changes under section 292 and 294 of Indian Penal Code 1860 and 67 of IT Act, 2000. This MMS is clear cut violation of section 67 of Information Technology Act,2000 that details whoever publishes or transmitted or cause to be published in the electronic form, any material which is lascivious or appeals to the prurient interests or if its effect is such as to tend to deprave. Court held that petitioner is liable under section 67 of the IT Act, 2000 and quashed the section 292 and 294 of Indian penal Code 1860. The question of law invoked on section 85 of IT Act,2000 court applied the strict rule of interpretation of Information Technology Act,2000 and held that commission of offence by the company is an expression condition precedent to attract the vicarious liability of a director.

#### **V Obscenity**

It is often said that if one's child is spending too much time alone on a computer then one should be careful. The reason is that the material available in cyber space is as diverse as human thoughts. It also contains obscene information and material. An impressionable mind can be misled or lured by such material. Section 67 of Information Technology Act,2000 prohibit publishing or transmitting obscene information in electronic forms is punishable under the IT Act. A person is also liable to be punished with imprisonment which may extend up to 5 years or a fine, which may extend up to one lakh rupees. A book seller who is selling obscene books or distributing any obscene material or is in possession of any such material is covered under section 292 of the Indian Penal Code,1860. A cyber café is place which facilitates the use of the internet to any one on payment of fixed charges. Cyber café owners are nether publishing, nor transmitting or causing any obscene material to be published. They may not be guilty of an offence under section 67 of the act if any person, while utilizing the facility of the internet, watches any obscene material in their cyber cafes. cyber crime India is increasing against children, which can manifest in many forms like sexting, online grooming ,production and distribution of child pornography and cyber bullying etc

In famous case *Kamlesh Vaswani Vs Union Of India*<sup>207</sup> was argued that Since The Information Technology Act,2000, is primarily meant to be a legislation to promote e- commerce. It is not very effective in dealing with several emerging crimes like cyber, defamation, stalking and so on, .These crimes are associated crimes of pornography, The preamble of The Information Technology Act, 2000, which Says" An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce" In reality information technology act is unapt to solve pornography in India. Cyber law enforcement is the need of the hour as the use of technology is increasing by leaps and bounds. We are able to optimize the use of Information Technology (IT) industry only when our cyber law is strictly enforced. So there need to strict interpretation of cyber law. The only reason that could be understood for not banning the internet porn and adult videos would be not to violet the constitutional rights of freedom of expression and speech under Article 19. Whereas pornography is a unlawful conduct however it itself encourages the breach of

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<sup>206</sup> 150(2008)DLT769

<sup>207</sup> 2013 Supreme Court

constitutional law and constitutional duties enshrined in Article 51. Watching porn itself puts the country security in danger, encourages violent acts unacceptable behavior in society, exploitation of children and lowers the dignity of women. Does in such situation harmonious construction is possible. The correct formulation is cyber pornography is unlawful content which came under the purview of Article 19(2) of the Constitution. So in no way pornography is permissible under Indian constitution too. *In Madhu Kishwar v. State of Bihar*<sup>208</sup> court held state must uphold the dignity of women at all level. As above mentioned context of pornography, Indian constitution also not allow unlawful trade or contract or unauthorized access to information by use of computer. Although with in the country while interpreting section 2 read with section 75 of information technology act, 2000 provide extra territorial jurisdiction to Indian courts. Alibi is common defense in such offences. The basic tendency of criminal coupled with the permissible anonymity provided by the internet makes the cyber criminal almost invisible. Cyber crime is done by the computer or other electronic devices as a tool, target, or both for their unlawful act either to gain information which can result in heavy loss/damage to the owner of that intangible sensitive information. Internet is one of the means by which the offenders can gain such price sensitive information of companies, firms, individuals, banks, intellectual property crimes (such as stealing new product plans, its description, market programme plans, list of customers etc.), selling illegal articles, pornography etc. this is done through many methods such as phishing, spoofing, pharming, internet phishing, wire transfer etc. and use it to their own advantage without the consent of the individual.

*Devidas Ramachandra Tuljapurkar v. State of Maharashtra*,<sup>209</sup> the Supreme Court of India considered whether framing of charges be made for offence punishable under section 292 of IPC ode in relation to publication of a poem of historically respected personalities. The issue for consideration was whether the poem titled "Gandhi Mala Bhetala" ('I met Gandhi') in the magazine named the 'Bulletin' published, in July-August, 1994 issue, which was privately circulated amongst the members of All India Bank Association Union, could give rise to framing of charge under section 292 IPC against the author, the publisher and the printer. The court held that considering the fact that appellant(publisher) had published the subject poem which had already been recited and earlier published by others and that on coming to know about reactions of certain employees, he tendered unconditional apology before inception of proceedings (since when more than two decades had passed), for these reasons, the court held that charge framed was liable to be quashed. But in *Maulana Mohmood Azad Vs Union Of India*<sup>210</sup>, where people were involved in uploading religious sensitive film on Muslims on internet court held that blocking of such films on all websites.

## VI Cyber Terrorism

It is an offence under Section 66F of the Information technology act 2000 that made it punishable. The glaring illustrations of such activity are Delhi red fort a terrorist attack on red fort took place in December, 2000. Investigation of the crime revealed that the terrorist were using steganography as a means for communicating the terrorist designs online. Similarly on 2<sup>nd</sup> January 2002 as reported the chief minister of Uttar Pradesh alleged received email from the *Lasca -E -Toiba*, which threaten to blow up the 17<sup>th</sup> century wonder of the world, the TAJ MAHAL. In terrorism ,the user threats of action that is designed seriously to interfere with or seriously to disrupts an electronic system designed to influence the government or to intimidate the public or a section of the public, and made for the purpose of advancing a political, religious or ideological causes. In *Mohd Ajmal Amir Kasab Vs State Of Maharashtra*<sup>211</sup> the

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<sup>208</sup> (1996) 5 SCC 125 And It May Be Relevant To Site Aim And Objective Of The Convention On The Elimination Of All Forms Of Discrimination Against Women, 1979 (CEDAW)

<sup>209</sup> (2015) 6 SCC1.

<sup>210</sup> See karnika seth, cyber laws, , Annual survey of Indian law the Indian law institute Vol.XLIX PAGE 477

<sup>211</sup> 2012(9)SCC1

important evidence of criminal conspiracy was traced from the intercepted mobile phone call recordings of accused. The terrorist concealed their identities and location from where they made calls by using the services of cellphonex. In *Mohd Arif V State (NCT Of Delhi)*<sup>212</sup> The accused who had committed gun firing near the Red fort in Delhi. During investigation police found that number of was used to make calls from two handsets with two IMEI<sup>213</sup> numbers which were found *Essar Telecom* on investigation. This case is relevant to discuss how with the assistance of data available from mobile phone towers, the location of the subscriber making or receiving calls from his mobile phone can be traced. In *K.K.Velusamy V N.Palanisamy*<sup>214</sup> the court observed that the term evidence has been widened due to IT Act 2000. If section 3 of the Indian Evidence Act club with section 2(l) (t) of the Information Technology Act,2000 the court find that electronic records can be received in evidence.

## VII Cyber Defamation

In *Vyakti Vikas Kendra Vs Jitendra Bagga*<sup>215</sup> Defamation is the intentional infringement of another person's right to his good name. The case is related to the publication of highly defamatory material about Sri Sri Ravi Shankar, owner of the Art Of Living Foundation on [www.blogger.com](http://www.blogger.com) in a blog that was created by defendants. On this Delhi high court restrained defendants for sending any e-mail, or posting any material over the internet which has a direct or indirect reference to the plaintiff or the Art Of Living Foundation or Sri Sri Ravi Shankar. There were few other cases seeking injunction from publishing defamatory content on internet. In *Rattan N Tata vs Union Of India*<sup>216</sup> the petitioner filed a petition under article 32 of the Indian constitution seeking issuance of writ directing the respondent to ensure that no further publication of recordings wherein his name figured in conversation made by *Nira Radia Tapes*, be made either as audio files through internet or print as transcripts appear in any media electronic or print. In India people are less technology savvy. It is possible that a person could email a defamatory remark to a person about whom the allegation is made. The sender may well intend that person to be the sole recipient of the message. the email could, however, accidentally and very easily be sent to hundreds of other people. if the sender could reasonably have been expected to know that the defamatory allegations could be disclosed to the other person then he will still be held liable for defamation even if he did not intend to disclose the message to others.

## VIII Intellectual Property Rights And Information Technology

Intellectual property rights disputes regarding domain names and cyber squatting have been the most visible and possibly most dramatic part of cyber related disputes. Chapter XIII (section 63 to 70) of the Copyrights Act, 1957 deals with the offences. Now days due to information accessibility various copy rights are infringement occurs frequently in India. Section 63 of the copy rights act punishes for offences of infringement of copyrights or other rights conferred by this act, section 63B punishes where knowing use of infringing copy of computer programme to be offence, section 65 make punishable where possession of plates for purpose of making infringing copies and section 68A provides penalty for contravention of section 52A of the Copyrights Act, 1957.

In *Super Cassettes Industries Vs My SpaceInc*<sup>217</sup> The act of downloading from internet involves making permanent copies by the user on his hard disk, which amount to reproduction and therefore, infringement, if not authorized by copy right owner. Where the defendants directly infringed its copyrights by uploading

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<sup>212</sup> (2011)13SCC621

<sup>213</sup> Is a 15 digits serial number, the IMEI code is broken into sections that provide information about phone, such as mobile network, its manufacturer etc.

<sup>214</sup> (2011) 11 SCC 275

<sup>215</sup> 2012AIR(DEL)180

<sup>216</sup> 2013(13)SCALE 201.

<sup>217</sup> 2011(48)PTC49(DEL)

infringing songs and videos on defendants web sites. In this case court granted interim reliefs to the plaintiff restraining the defendants from modifying works of plaintiff.

### IX Procedural law

The function of procedural law is to provide the machinery, the manner in which legal rights or status and legal duties may be enforced or recognised by a court of law or other recognised or properly constituted tribunal. There were certain issue like jurisdiction and acceptance of electronic evidence etc solved by Indian court.

**Jurisdiction:** Indian courts have consistently granted relief to plaintiffs in trademark infringement /passing off cases or cyber squatting cases wherein trademarks of plaintiff have been infringed by defendant's malafide registrations with a view to sell the marks at an exorbitant price to the rightful owner<sup>218</sup>. In *Yahoo! Inc vs Akash arora*<sup>219</sup> In this case, the US based yahoo Inc lodged an action against the defendant based in India for registration of deceptively similar trademark 'yahooindia'. The Delhi high court observed that the word 'Yahoo' had acquired distinctiveness and was indicative of the source of origin and association with the plaintiff. It is immaterial that yahoo as a mark not registered in India. It had secured a Trans border reputation. Indian court have jurisdiction to not allow cyber squatting in cyber space.

The section 2 of Information Technology Act,2000 it says that applicability of act is whole of India. Te internet impacts in major ways upon question of jurisdiction. Jurisdiction to prescribe laws and adjudicate dispute historically has been based on territorial principles latter in development of law principle of accessibility has been accepted by courts, because territorial jurisdiction principles appear to fail in cyber crimes due to its peculiar characteristics. In famous case *Narhari vs Pannalal*<sup>220</sup> court held that jurisdiction is only possible if there is voluntary consent to submit to the jurisdiction of the court, the court would be recognized internationally to have competent jurisdiction over the matter and such jurisdiction would be binding. In other word we may say if there is international treaty or agreement then cyber crime may be dealt otherwise its myth to tackle cyber crime.

**Complaint may be filed :** In one case before Mumbai High court, *Janhit Manch Vs Union Of India*<sup>221</sup> court held if the petitioner comes across any web sutes which according to him publishes or transmitted any act which amount to offence under section 67 or 67A of the Information Technology Act,2000 he can file a complaint the court held,

Courts in such matters, the guardian of the freedom of speech and more so a constitutional court not embark on an exercise to direct state authority to monitor websites . If such an exercises done, then party aggrieved depending on the sensibilities of person whose views may be differ on what is morally degrading or prurient will be sitting in Judgment, even before the aggrieved person can lead his evidence and a competent court decides the issue. The legislature having enacted the law a person aggrieved may file a complaint.

#### First Information Report:

We find strict construction of cyber law is not possible in Indian too . *In Youth Bar Association Of India Vs Union Of India And Others* Justice Dipak Mishra and C.Nagappan laid down several guidelines which could help to promote transparency and curb arbitrariness in police work. The decision prescribing expeditious uploading of FIRs on to the internet is therefore in sunc with the court's consistent stand that human rights are sacrosanct and cannot trampled upon out of malice or at the investigation of the police

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<sup>218</sup> See karnika seth, cyber laws, Annual survey of Indian law, the Indian law institute Vol.XLVII PAGE 334

<sup>219</sup> 1999 IIAD DELHI 229

<sup>220</sup> AIR 1977SC164

<sup>221</sup> 2007(2)BOM CR 958

executive. FIRs should be uploaded within 48 hours of their registrations. There will be exemption from the directive when the alleged offence is sensitive, such as sexual violence or one in which there is an angle of national security, insurgency or terrorism.

*In Rajesh Vs State Of Kerala*<sup>222</sup> Information Technology Act, 2000 (Central Act 21 of 2000) Section 66- Cyber Police Station has the power to investigate offences coming under the Information Technology Act only and no other offences can be investigated by them. Cyber Police Station has no power or authority to file final report in the absence of any offence under the Information Technology Act being disclosed in the investigation--If during investigation, the cyber Police finds that none of the offences under the Information Technology Act has been disclosed, the cyber Police should send back the case to the Police Station under which the offence under the Indian Penal Code has been allegedly committed Code of Criminal Procedure, 1973 (Central Act 2 of 1974) Sections 4, 156 and 177. Court finally held that cyber police station has no power or authority to file report in the absence of any offence under the IT Act, 2000 in the final report.

**ARREST:** Now days misuse of cyber law glaring in famous case *.In Rini Johar and Ors. Vs. State of M.P. and Ors*<sup>223</sup>. Dipak Misra and Shiva Kirti Singh, JJ. when cyber state police having registered FIR 24/2012 Under Section 420, 34 Indian Penal Code and Section 66D of IT Act accused Rini Johar and Gulshan Johar should be arrested and for that lady constable Ishrat Khan has been deputed with case diary with address from where they are to be found and arrested and it is ordered that they be brought to Bhopal Supreme court Held that Dignity of Petitioners, a doctor and a practicing Advocate had been seriously jeopardized. Liberty of Petitioner was curtailed in violation of law. Freedom of an individual had its sanctity. When individual liberty was curtailed in an unlawful manner, then victim was likely to feel more anguished, agonized, shaken, perturbed, disillusioned and emotionally torn. It was an assault on his/her identity. Said identity was sacrosanct under Constitution. Therefore, for curtailment of liberty, requisite norms were to be followed. Two ladies had been arrested without following procedure and put in compartment of a train without being produced before local Magistrate from Pune to Bhopal court further observed that In present case, there had been violation of Article 21 of Constitution, and Petitioners were compelled to face humiliation. They had been treated with an attitude of insensibility. Not only there were violation of guidelines issued in case of D.K. Basu, there were also flagrant violation of mandate of law enshrined under Section 41 and Section 41A of CrPC. In such a situation, public law remedy which had been postulated in Nilawati Behra, Sube Singh v. State of Haryana, Hardeep Singh v. State of M.P., came into play. Constitutional courts taking note of suffering and humiliation were entitled to grant compensation. In present case, in the facts and circumstances of case, Petitioners were entitled to compensation

## X Conclusions

Several important judgments delivered by the Indian courts on cyber crime made it clear that constitutional violation is not permissible. Fair trial and evidentiary value of electronic evidence well recognized principle at present criminal justice system. Judgments made clarity and certainty on substantive and procedural law. No matter how well crafted a privacy code might be, privacy will only be protected if the necessary information practices are actually followed. Policy makers need to understand how privacy issue actually arises in the daily activities of information workers, and organizational cultures need to incorporate practicable norm of privacy issue. Certain pertaining issues like cyber terrorism, cyber stalking, obscenity and jurisdictional issues, complaint filing is permissible under the Information Technology Act, 2000. For better investigation and suppress the arbitrariness of police the effort of Supreme Court by judgment for uploading of FIR on websites is necessary in welfare state. By and large, the development of cyber laws in Indian through court decision has been positive and progressive in last

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<sup>222</sup> 2014 Cri.L.J 204

<sup>223</sup> Manu/SC/0667/2016

decades. In view of different from the public that cyber crime is silent killer. Step should be taken to fill the gaps rather than making hue and cry.



# PROTECTION OF WOMEN AND CHILDREN IN INTERNATIONAL ARMED CONFLICTS: LAWS, LOOPHOLES AND POSSIBILITIES

Saurabh Chaturvedi and Rachel Cosmos

## Abstract

*The protection of women and children in times of armed conflict is often a myth that need to be revised and more concern should be paid on it in its entirety. With that in mind, this article attempts to address this sensitive and broad subject of international humanitarian law and how armed conflicts when carried out becomes part and parcel of their lives to these individuals. Armed conflicts have shattered the lives of women and children more than the combatants themselves. Women have been subjected to rape, torture, cruel and inhuman treatments. The rights of children as well have been greatly infringed, they are suppose to be protected from attacks but unfortunately they have been recruited to join the armies in the fight against the enemy. The laws of war and human rights law have been playing a major role in prohibiting the involvement of children in the fight against the enemy including the prohibition of the war tactics of attacking women as a means of sending messages to the enemy. The article sets down and examines the laws of war and its principles regulating the conducts of hostile parties in relation to the protection of women and children. Furthermore it has looked into whether the combatants have been honoring these laws towards the protection of women and children in times of a battlefield. Finally, the article addresses some recommendations to improve the current situations of warfare in protection of these persons.*

## I INTRODUCTION

Special protection implies the enjoyment of some benefits which are distinct and peculiar to certain category of persons only. In international humanitarian law, the special protection is served to women and children since they are vulnerable to the atrocities of the war. The special protection afforded to women in international humanitarian law started to operate in 1929<sup>224</sup>. Prior that time, they were just protected under the status of civilians<sup>225</sup>, wounded or sick and as prisoners of wars<sup>226</sup>. The protection came as a response due to the fact that many women had participated in the world wars though without carrying weapons and out of the fifty millions affected persons, more than half were women<sup>227</sup>. Therefore, arise the need to the protection of women since armed conflict always caught women in surprise, in a situation where they are mothers or pregnant thus jeopardizing their own safety and that of their children.

Despite the fact that the four Geneva Conventions<sup>228</sup> seek to protect women in times of war, the third Geneva Convention was the first international instrument to stipulate that “women shall be treated with all consideration due to their sex”. Thus it provides a special protection and favorable treatment for women comparing to men. They shall be treated with honor and they should not be the object of the attack such as rape, enforced prostitution or any other form of indecent assault in accordance with their sex<sup>229</sup>. All attacks are required to be directed towards the military objectives<sup>230</sup>, that is the rules of wars, a principle of military necessity provides.

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<sup>224</sup> Francoise Krill. “The protection of women in international humanitarian law” 31/12/1985 Article, International Review of the Red Cross no 249, ICRC RESOURCE CENTER.

<<://www.icrc.org/eng/resources/documents/misc/>> accessed on 16/12/2013.

<sup>225</sup> Persons who do not belong to the armed forces, Article 50 of the first additional protocol to Geneva Conventions.

<sup>226</sup> A combatant who falls into the power of the enemy, Article 44 of the first additional protocol to the Geneva Convention.

<sup>227</sup> Ibid ft 1.

<sup>228</sup> Article 12 of the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 12 of the second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 14 of the third Geneva Convention Relative to the treatment of Prisoners of War, Article 27 of the fourth Geneva Convention Relative to the protection of civilian persons in time of war.

<sup>229</sup> Article 76 (1) of the first additional protocol to the Geneva Convention of 1977 relating to the protection of victims of international armed conflicts.

<sup>230</sup> Article 23 (g) of the 1907 Hague Convention.

A child means every human being below the age of eighteen years<sup>231</sup>, unless under the law applicable to the child, majority is attained earlier<sup>232</sup>. Almost in all countries, the age of majority is eighteen years in which under all circumstances that may result the best interests of the child is advised to be taken of paramount importance. Under this Convention states are obligated to ensure to the maximum extent possible the survival and development of the child<sup>233</sup> born. The laws of war recognize that children under the age of fifteen years should not be combatants in a war<sup>234</sup>.

In the process of ensuring the maximum extent survival and development of children, it is why the laws of wars have forbidden the use of children “directly” in the fight against the enemy. The word directly means using them as combatants, as spies or instructing them to perform any task that is in relation to the conflict for the purpose of giving advantage to either party to the conflict. Humanitarian laws set aside children from the engagement of the war to ensure that their childhood is well protected and to ensure that whatever circumstances that may be, the rights of children are preserved and what they are entitled are given to them.

## II RULES OF WAR RELATING TO PROTECTION OF CHILDREN AND WOMEN

### 2.1 CHILDREN

Despite the contradiction between Humanitarian laws and the Convention on the Rights of a Child in relation to what amounts to a child, both laws are clear and they advocate that the safety and protection of this growing person is of utmost priority and should be considered whenever parties have resorted to engage themselves in an armed conflict. The fight might be between two groups but the effects of such fight normally extend to innocent persons who are caught in the middle of the said fight including women and children.

The Convention on the Rights of a Child<sup>235</sup> and the African Charter on the Rights and Welfare of a Child<sup>236</sup> as seen earlier provide that “a child is any person below the age of eighteen years” and the laws of war stipulate that a child below fifteen years should not be a combatant in an armed conflict. From this aspect, humanitarian laws allow children who are above fifteen but not yet eighteen to participate directly in a battlefield, thus to be clearly under exceptional circumstances children above fifteen can participate in a battlefield but a note should be taken that when those circumstances are in question, children of older ages should be given priority.

As a response in the protection of children in an armed conflict, International Humanitarian Law has introduced sets of customary international humanitarian laws applicable in both international and non international armed conflict so as to ensure the safety of children. These are:

Rule 135 of the Customary international humanitarian law provides that children affected by armed conflict have to be protected and respected<sup>237</sup>. The effects that arise from the participation in hostilities include the death of parents, being homeless with no one to take care of and the like. The entitlement goes to the extent of provision for food, clothing, shelter and medicines. The law further provides<sup>238</sup> that

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<sup>231</sup> Article 2 of the African Charter on the Rights and Welfare of the Child of 1990.

<sup>232</sup> Article 1 of the 1989 United Nations Convention on the Rights of a Child.

<sup>233</sup> Article 6 (2) of the 1989 United Nations Convention on the Rights of a Child.

<sup>234</sup> Article 4 (3) (c) of the second additional protocol to the Geneva Conventions relating to the protection of victims of non international armed conflict.

<sup>235</sup> Supra note 9.

<sup>236</sup> Supra note 8.

<sup>237</sup> Jean-Marie Henckaerts and Louise Doswald-Beck: Customary International Humanitarian Law v.1 Rules (UK: Cambridge University Press) 2009 p.540

<sup>238</sup> Article 4 (3) of the second additional protocol to the Geneva Conventions relating to the protection of victims of non international armed conflict.

children are required to be given care and aid they need especially education including religious and moral education in keeping with the wishes of their parents or of those responsible for their care. These entitlements are given to them by virtue of being children under the impression that they are not fully grown up to care for themselves.

Parties to the conflict are required to protect children against any form of indecent assault<sup>239</sup> and providing them with care and aid they need due to their age or for any reason. Pursuant to Article 78 (1) of the first additional protocol a nation to which particular children belongs, should evacuate them from the effect of the dangers of the conflict<sup>240</sup>. They should not be evacuated by the parties to the conflict unless they are nationals.

Rule 136 of the Customary International Humanitarian Law provides that children must not be recruited<sup>241</sup> into armed forces or armed groups<sup>242</sup> whether those forces belong to the government or a rebel group. Neither of the parties to the conflict is allowed to use children as combatants in a war. Pursuant to Article 77 (2) of the first additional protocol<sup>243</sup> to Geneva Conventions, parties to an armed conflict have been given an obligation which is also provided under the Optional Protocol to the Convention on the Rights of a Child<sup>244</sup>.

“The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and in particular they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the parties to the conflict shall endeavor to give priority to those who are oldest”.

Recruiting children in the armed forces for the purpose of allowing their direct participation to the hostilities constitutes a war crime under the Rome Statute punishable by the International Criminal Court<sup>245</sup>. The act subjects children to the dangers of the war which in fact may affect them both physically and mentally.

In the case of the *Prosecutor v Thomas Lubanga Dyilo*<sup>246</sup> the accused was found guilty of enlisting and conscripting children under fifteen years into his army called *Forces Patriotiques pour la liberation du Congo* and used them actively to participate in hostilities. He was sentenced by the ICC for fourteen years imprisonment. The court further ruled that the line between voluntary and involuntary recruitment to children in armed conflicts cannot be taken into consideration as children are in no position to decide in the process. The two elements of intent and knowledge were proved from his common plan of building an army for the purpose of establishing and maintaining political and military control in the Democratic Republic of Congo.

Also in the recent case of the *Prosecutor v Charles Ghankay Taylor*<sup>247</sup>, the then president of Liberia was accused of committing several war crimes committed by the Revolutionary United Front including the

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<sup>239</sup> Article 77 (1) of the first additional protocol to the Geneva Conventions relating to the protection of victims of international armed conflicts.

<sup>240</sup>The first additional protocol to the Geneva Conventions relating to the protection of victims of non international armed conflict.

<sup>241</sup> Article 22 of the African Charter on the Rights and Welfare of the Child of 1990.

<sup>242</sup> Jean-Marie Henckaerts and Louise Doswald-Beck: Customary International Humanitarian Law v.1 Rules (UK: Cambridge University Press) 2009 p.540

<sup>243</sup> Additional Protocol to the Geneva Conventions relating to the protection of victims of international armed conflicts.

<sup>244</sup> Article 1 to the Optional Protocol to the Convention on the Rights of the Rights on the Involvement of Children in Armed Conflict of 2000.

<sup>245</sup> Article 8 (2) (b) (xxvi) and e (vii) of the 1998 Rome Statute.

<sup>246</sup> ICC-01/04-01/06 March 2012.

<sup>247</sup>Special court for Sierra Leone Case No.SCSL-03-I-T

breach of customary humanitarian law norm of recruiting children in armed forces during the civil war of 1991 to 2002 in Sierra Leone. He was found guilty and sentenced to fifty years in prison due to the practical assistance, encouragement and moral support he was offering to that group. Despite his appeal on September 2013, the conviction was upheld by the International Criminal Court.

Rule 137 of the International Humanitarian Customary Law provides that children must not be allowed to take part in hostilities. Putting children in the shoes of combatants make them to be object of the attack thus jeopardizing their lives and well being. It is in this regard that the laws of war have prohibited parties to the armed conflict in recruiting children to their armed forces. These children are not yet fully developed to the extent of making their own choices and decisions for their interests. They shall be protected both from engaging themselves in direct participation of the war and well, as form the effect of the war itself.

If it happens that children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party<sup>248</sup>, such children will continue to benefit from the special protection whether or not they are prisoners of war. In case of an arrest or detainment<sup>249</sup> children are required to be held in quarters which are separate from adults so as to ensure safety and moral protection is preserved to them.

Furthermore, Humanitarian Laws provides that death penalty will not be executed to a person who at the time of commission of such offence was not eighteen years old<sup>250</sup>. This is a protection afforded to children in many states as well. A child is protected under the belief that if that child was mature enough to understand the consequences of his acts he would refrain himself from the commission of such an act.

There are six serious violations<sup>251</sup> to the children during an armed conflict. These include Recruitment and use of children in armed forces, killing or wounding of children, sexual violence against children, attacks against schools or hospitals, abduction of children and denial of humanitarian access. All these threaten the welfare and survival of children which is in fact a breach to the various Conventions that advocate for the protection of children at all times.

Pursuant to Rule 93 of the customary international humanitarian law which provides that “Rape and other forms of sexual violence are prohibited”, a breach of this norm leads to liability under international criminal law. It is a norm of custom that once in a state of war, such acts should be refrained from being committed. The worse thing is that these acts are committed contrary to military objectives, that is they are committed against innocent persons who do not take active part in hostilities. The humanitarian laws aim to balance the need for the use of force and the preservation of humanity through the principle of proportionality. That is retaliation should not be massive with the intent of destroying humanity rather than to weaken the enemy.

Pursuant to common article 3<sup>252</sup>, “Persons taking no active part in the hostilities shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria”. From this interpretation, the killing or maiming of persons who are not combatants thus having the status of civilians is a violation to the norms and customs of war and it constitutes a crime against humanity<sup>253</sup>. Children and women who are not combatants are in a group of

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<sup>248</sup> Article 77 (3) of the first additional protocol to the Geneva Convention relating to the protection of victims of international armed conflicts, Article 4 (3) (d) of the second additional protocol to the Geneva Convention relating to the protection of victims of non international armed conflict.

<sup>249</sup> Article 77 (4) of the first additional protocol to the Geneva Convention relating to the protection of victims of international armed conflicts.

<sup>250</sup> Article 77 (5) of the first additional protocol to the Geneva Convention relating to the protection of victims of international armed conflicts, para. 4 of Article 68 to the fourth Geneva Convention relative to the protection of civilian persons, Article 5 (3) of the African Charter on the Rights and Welfare of the Child of 1990..

<sup>251</sup> Office of the special Representative for the Secretary General for Children and Armed Conflict, working paper no.1 “The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation” pdf p.3 Nov.2013 <<http://www.childrenandarmedconflict.un.org/publications/>>> accessed on 16/12/2013

<sup>252</sup> The four Geneva Conventions of 1949.

<sup>253</sup> Article 7 of the 1998 Rome Statute of the ICC.

civilians, therefore acts contrary to this article committed against them constitutes a crime since they violate a principle of distinction<sup>254</sup> that urge combatants to target their military objectives and nothing else.

In regard to sexual violence 'Children shall be the object of special respect and shall be protected against any form of indecent assault'<sup>255</sup>. This article in line with Rule 93 of the customary international humanitarian law clearly prohibits the subjections of children into sexual acts during the war. Furthermore states are obligated to protect the child from all forms of sexual exploitation and sexual abuse<sup>256</sup>. Therefore a party who had signed this treaty and the children are being victimized, will be responsible for not taking proper measures to ensure protection to the children. Also even if not signed, the customary laws which are universally accepted would still bind that state.

Attacks against schools and hospitals a prohibited simply because they are civilian objects in which sometimes civilians run to such places to seek assistance during the war. Therefore once these places are attacked it will limit the accessibility of humanitarian aids such as shelter to civilians who are affected by the war, the inclusion of children therefore threatening their survival. Therefore children will not be able to study or get treated as well and the laws of war does not allow attacks of those places due to that<sup>257</sup>. In Kordic and Cerkez<sup>258</sup>, the ICC was of the view that such acts constitutes a war crime whether committed in international or non international armed conflict and it has the jurisdiction to punish the perpetrators.

## **2.2 THE PROTECTION OF WOMEN**

Pursuant to Rule 134 of the Customary International Humanitarian Law,

“The specific protection, health and assistance needs of women affected by armed conflict must be respected”.

Despite the fact that all human beings are equal in respect, dignity and before the law humanitarian laws states clearly on protecting women who have been affected by armed conflict urging that “women shall be protected in all consideration due to their sex and they shall be the object of respect”<sup>259</sup>.

Practice has shown that women comparing with men have been greatly affected by armed conflict. The combatants as a means of inflicting pains to the adverse have been sexually attacking women. This has been regarded being one of the war tactics of making the enemy to either surrender or adhere to the demands imposed by the enemy.

Serious violations of International Humanitarian Law constitute grave breaches to the Geneva Conventions<sup>260</sup> and Additional Protocol I. Once these grave breaches are committed against protected persons they constitute war crimes<sup>261</sup>. These are willful killing, torture or inhuman treatment, willful causing serious injury to health or body willful causing great suffering. Women and children are groups that enjoy special protection under Humanitarian laws. Therefore if one of those acts is being committed against such a group, a war crime is committed and the perpetrators will be punishable by the International Criminal Court.

From this perspective, humanitarian law introduced this customary law to be applicable in international and non international armed conflict as a means to safeguard women and if it happens that either of the parties to the conflict have breached the norm, they will be prosecuted.

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<sup>254</sup> Article 48 of the first additional protocol to the Geneva Convention relating to the protection of victims of international armed conflicts.

<sup>255</sup> Article 77 (1) of the first additional protocol to the Geneva Convention relating to the protection of victims of international armed conflicts.

<sup>256</sup> Article 37 of the Convention on the Rights of a Child of 1990.

<sup>257</sup> Principle of Distinction and Military Necessity.

<sup>258</sup> (2001).

<sup>259</sup> The four Geneva Conventions and Additional Protocols.

<sup>260</sup> Article 130 of the third Geneva Convention Relative to the treatment of Prisoners of War, Article 147 of the fourth Geneva Convention Relative to the protection of civilian persons in time of war.

<sup>261</sup> Article 8 (2) (a) of the Rome Statute of the ICC.

Women who are not combatants form part of civilian population enjoying the protection accorded to the civilians in which the laws of wars prohibit any attack against them<sup>262</sup>. According to Article 7 and 8 of the Rome Statute<sup>263</sup> attacks against civilians constitutes a crime against humanity and raping a woman constitute both a war crime and crimes against humanity in which the International Criminal Court will be called in question to adjudicate the case.

In the case of the *Prosecutor v Calixte Mbarushimana*<sup>264</sup>, evidences tendered in the court shows that the FDLR apart from mutilating people in the Northern and Southern Kivus of the DRC,

“Babies were pounded to death, women were beaten, raped and killed<sup>265</sup>. Also deep cuts were inflicted on women legs so as to unable them to walk. Moreover, a witness stipulate that a woman was pierced her eyes out and cut her throat with the bayonet of their guns, and cut open her pregnant stomach, causing her moving foetus to fall out as she was six months pregnant. After killing her, the FDLR dismembered her body parts with machetes and threw them around”<sup>266</sup>.

This provides a clear picture as to what extent women have been affected by armed conflicts in various parts of the world. That was just one situation that had occurred in the DRC, there are still many evils that have been committed towards women and have not yet been aired for others to know. It was one of the evidence tendered in the ICC which shows a huge violations of human rights and humanitarian laws. Women are subjected to attack and oppression based on their sex.

Rule 93 of the Customary International Humanitarian Law provides that Rape and other forms of sexual violence are prohibited. It is a norm that has to be adhered in all types of armed conflicts. The situation described above concludes that this norm humanitarian law was violated by the FDLR when they rape and performs other types of sexual violence towards women who reside in the province of Kivu in the DRC. This is a condoned act in the laws of war as it is a crime committed with both intent and the act itself. A person cannot pledge for mercy later on while at the commission of the act he had the full knowledge of the act and its consequences thereto. Even if the act committed flows from the order of the superior, humanitarian laws provides that a soldier is not bound to obey unlawful order<sup>267</sup> and in the circumstance he carries that order, he cannot plead for a defence that he was obeying an order<sup>268</sup>. This is due to the fact that the law has given him an opportunity to disobey such unlawful order but rather he disregards it by carrying the unlawful attack against protected persons. Therefore he needs to be responsible for his acts.

Rule 146 of the Customary International Humanitarian Law prohibits attacks against protected persons, these include women and children. Attacks against protected persons violate the fundamental principles of humanitarian laws. These are:

- Military necessity<sup>269</sup>, that is the seizure or destruction of enemy shall be done once demanded by the necessities of war. The civilian population is unarmed thus do not possess any threat to the combatants. Attacking persons who are unable to defend themselves violates the laws of war.
- Principle of Distinction<sup>270</sup>, it requires that parties to the conflict to distinguish between civilian population and combatants and their attacks should be directed towards military objectives only. Raping a woman or attacking a civilian by any means does not constitute a military objective. A

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<sup>262</sup> Article 51 (2) of the first additional protocol relating to the protection of victims of international Armed conflicts

<sup>263</sup> The International Court Statute of 1998.

<sup>264</sup> ICC-01/04-01/10-465.

<sup>265</sup> Para 127 of the decision on the confirmation of charges.

<sup>266</sup> Para 154 of the decision on the confirmation of charges.

<sup>267</sup> Rule 154 of the Customary International Humanitarian Laws.

<sup>268</sup> Rule 155 of the customary International Humanitarian Laws.

<sup>269</sup> Article 23 (g) of the 1907 Hague Convention.

<sup>270</sup> Article 48 of the first additional protocol relating to the protection of victims of international Armed conflicts.

military objective<sup>271</sup> is limited to those objectives which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage. The object of war should not be to destroy humanity or inflict unnecessary injuries<sup>272</sup> to the adverse rather is to weaken the enemy forces.

- The principle of humanity, according to Article 4 of the second additional protocol<sup>273</sup>, it provides that, “All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honor and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction”. This covers all persons who are non combatants. That is even if a state of war is declared the protection of persons who do not take part in the battlefield should be of paramount consideration as their state of being human still exist and provides them with rights to be protected.
- Principle of Chivalry or Honorable Conduct<sup>274</sup> that is parties to the conflict are required to have a degree of mutual respect towards themselves and civilian population who are not parties to the conflict on the ground that they are both subjected to the same dangers of the battlefield. This means that if it happens that a party to the conflict has violated this rule for instance attacking civilians of the adverse, it is likely that his civilians as well will be attacked. Therefore to prevent such grudges during battlefield, parties are required by humanitarian laws to act honorably at all times of the conflict towards their adversaries.

Women are more affected because, for instance the case of genocide that occurred in 1994 in Rwanda. Apart from killing the members of the group, genocide involves also the imposition of measures that intend to prevent births<sup>275</sup> within such a group. Such measures are imposed to women so that they will be unable to produce children of that group. This is one way on how women can be affected by armed conflict. Also in 1973 when the USA had a fight with Vietnam, American soldiers ruthlessly raped Vietnamese women and it happened that at a time the whole of the generation had their mothers last name because fathers could not be recognized since many of these women were gang raped. Similarly women during the Kosovo crisis were forced to leave their homes and on their ways they were harassed, raped and mass killings took place<sup>276</sup>.

### III CONCLUSION

Humanitarian laws especially those that protects women and children in times of armed conflict have been breached by combatants despite the knowledge regarding the laws of wars. Many reports do report on the use of children as combatants in a battlefield and also sexual violence against women. It has become a custom of war for the commission of such crimes during the war. From this aspect, I run to a conclusion that these laws of war lack enforceability that is why they are not observed. At war everyone run away to save his soul, therefore once a case is instituted against a certain violation, it is difficult to prove the case

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<sup>271</sup> Jean-Marie Henckaerts and Louise Doswald-Beck: Customary International Humanitarian Law v.1 Rules (UK: Cambridge University Press) 2009 p.90, Rule 8 of the Customary International humanitarian law.

<sup>272</sup> Article 35 of the first additional protocol relating to the protection of victims of international Armed conflicts.

<sup>273</sup> The second additional protocol to the Geneva Convention relating to the protection of victims of non international armed conflicts.

<sup>274</sup> Article 37 of the first additional protocol relating to the protection of victims of international Armed conflicts.

<sup>275</sup> Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>276</sup> UNFPA: “The Impact of Conflict on women and girls”. A UNFPA Strategy for Gender Mainstreaming in Areas of Conflict and Reconstruction. Bratislava, Slovakia 13-15 Nov 2002.Pg 89

[http://www.unfpa.org/upload/lib\\_pub\\_file/46\\_filename\\_armedco...>> accesses on 18/12/2013](http://www.unfpa.org/upload/lib_pub_file/46_filename_armedco...>> accesses on 18/12/2013).

since the victim might be dead or the evidence tendered is insufficient to incriminate the suspect since most of the data are destroyed during the crisis. Thus it is easily possible for the perpetrators to walk free.

#### **IV RECCOMENDATIONS**

The Geneva Laws which provides for the protection of persons including women and children in times of armed conflict have very tiny provisions regarding the protection of these persons, which I think they are not sufficient at all. There has to be as many provisions as possible to address the matter. On the other hand, the Hague laws that provides for the means and methods of warfare have not addressed the war tactic of using women and children in the battlefield. This was a huge error in enacting that law. If such law had that provision, the prohibition would have become clearer because it is one thing for one law to address a situation and when it comes to another law that was made for the implementation of the situation, such law does not address the situation.

From that regard, I run to a conclusion that the protection of women and children in times of war remains at the hands of the combatants since they are the ones with the direct contact with them. As a result, it in this respect that they have the opportunity on whether to protect them or use them in their favour. For instance using them as combatants for children or raping women as a war tactic.

The International Committee of the Red Cross as the body imposed with the duty of collecting the needy in times of war is more of a humane body rather than an instructor. From its inception, its main duty is to care the wounded or sick. This body should be given more power for instance its members should have the power to punish a combatants on the spot in the battlefield committing an acts of violence against protected persons. This would at least minimize this trend of attacking persons who are undefended as a war tactic. The ICRC would perform well this task because they pass through in almost every angle of the battlefield thus they may be exposed to some situations which at a later stage may be difficult to prove whether they had occurred or not.

A permanent Committee should be established that will have a sole task of ensuring that humanitarian laws are observed during any war conflict. Once there is a greater possibility of parties to invoke war as an alternative that body as well should prepare its work by establishing their settlement at the disputed place so that the rights of either parties to the dispute as well as women and children can be preserved.





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