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## Editorial Board

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# Editorial Note

"The main business of a lawyer is to take the romance, the mystery, the irony, the ambiguity out of everything [s]he touches."

– Supreme Court Justice Antonin Scalia

Justice Scalia makes a point that ought to be repeated far more often than it is. In a world of veils and vagary, there are few things which maintain a hold on the notion of sense besides the law. The reason for this is because of what we as lawyers do as its agents; not because of the law itself. Legal writing, to my mind, is the prime embodiment of the business of a lawyer. It exists to take the law we are given, or the law we are not, and subject them to a gauntlet of reason; a process which gives birth to legal thought, and thus, to new law. With every work we produce, we take away a little bit of the romance, the mystery, the irony and the ambiguity of the law – but we also step toward the future.

That in mind, I am proud to present the first issue of the fourteenth volume of the NUALS Law Journal. This year marks several advances for us, including moving to a biannual publication system, as well as starting our blog and developing our online presence. This Journal is the result of significant work and discussion and I thank the University, the Board, the professors and the authors who contributed to making this issue possible. The Journal has strived to lift the veil on the vagaries of the law, and I am certain it will continue to do so in the future.

On behalf of the Board of Editors,

Nikhil D. Mahadeva
**Chief Editor**

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# Reclaiming Personhood: Subjecthood and Property Relations in Hindu Succession Laws

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This essay tries to problematise Hindu intestate succession and inheritance by using Hegel's personality theory of property. In Hegel's conception, property is a pre-requisite for the self-actualisation of individuals. The abstract, self-conscious person ontologically acquires a sense of being by externally manifesting its personhood in property. This forms the basis for a general right to property. Using this Hegelian framework, I will focus on the dynamics of women's personhood in Hindu personal laws, primarily in the Hindu Joint Family and the property-holding unit of the coparcenary.

First, I will attempt to show how the whole kinship system is predicated upon a systemic deprivation of women's personhood. Divesting women of their personhood is a necessity to constitute them as conduits to pass property within the joint family. I then go on to trace the intuition of personhood in the organicity of the coparcenary. One's eligibility to acquire a share in the coparcenary property is based on the qualification to offer funeral oblations. This totalitises the masculine personhood in the coparcenary unit by transcendentally tracing the members position and stature to deceased ancestors. Women's exclusion from this ritual stems from the stereotypical notion of them lacking the potency to deal with gods, thus reducing them to a subordinate plane within the coparcenary.

The essay then critically examines the Hindu Succession Act, 1956 and the much-celebrated 2005 Amendment to it. By questioning the rhetoric of gender neutrality in these legislations, I attempt to underline why legislative interventions might not suffice without progressive judicial attitudes and meaningful changes in the hegemonic discourses that regulate and plunder women's personhood. The reclamation of women's personhood can be a prudent anchoring point for this movement. In this scheme of things, Hegel's framework provides the crucial link between the social and economic forces dictating what it means to be a woman and its reflection in joint-family property.

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## INTRODUCTION: THE FORMAL AND ONTOLOGICAL CONTOURS OF PERSONHOOD

Property is the embodiment of personality. This, in a nutshell, is Hegel's justification for private property.[1] His most sustained account of private property can be found in the first part of *Elements of the Philosophy of Right*—his seminal work on legal, moral, and political philosophy.[2] Hegel uses the polymorphous word "person" to mean a self-conscious subject. The person is a free and rational agent whose existence is an end in itself. Although this resembles the Kantian Categorical Imperative,[3] Hegel is quite critical of "purely formal" theories that extract moral and legal rights from the abstract self-relations binding a subject to itself, divorced entirely from its social existence.[4] This abstract person, a personification of will, is "infinite and universal". However, nature is constraining.[5] The indeterminate will of the person must therefore manifest itself in "external things" to realise the freedom of its existence. In Hegel's framework, property moulds the personhood[6] of the individual.

The first part of *Philosophy of Right*, aptly titled "The Abstract Right", expounds this transition from the ontological impossibility of full-fledged personhood in the state of nature to a socially relevant sense of personhood mediated through property rights. Personhood for Hegel is not a solipsistic being-for-self. It is a social unity of free intersubjectivity bound in an ethical relationship of mutual respect; a unity of being-for-self and being-for-others.[7] The book begins by contemplating personhood as being-for-self or as inner capacities enabling reflective freedom for the person.[8] This is a conception of legal personhood that is yet to be concretised and sees the possibility of true freedom in respect for the other. The differentials of being-for-self and being-for-others encapsulated by the unity of personhood as a category, at another level, is also characterised by defined social roles within the totalities of state, civil society, and family. Property

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[1] For a lucid introduction to Hegel's theory of property, *see generally*, Dudley Knowles, *Hegel on Property and Personality*, 33 THE PHILOSOPHICAL QUARTERLY 45 (1950).

[2] G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (Allen M. Wood ed., Cambridge University Press 1991).

[3] I. KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 31, 45 (Allen W. Wood trans., Yale University Press 2002).

[4] Friedricke Schick, *The Concept of the Person in Hegel's Philosophy of Right*, *in* RECHT OHNE GERECHTIGKEIT? HEGEL UND DIE GRUNDLAGEN DES RECHTSSTAATES (Königshausen & Neumann 2010).

[5] HEGEL, *supra* note 2, at 70.

[6] My use of the word "personhood" is based on its everyday, dictionary definition. Throughout the essay, however, I have qualified it with relevant anthropological evidence as per the context in which the word is used.

[7] Robert R. Williams, *Hegel on Persons and Personhood*, *in* HEGEL ON THE PROOFS AND THE PERSONHOOD OF GOD (Oxford University Press 2017).

[8] Arto Laitinen, *Hegel and Respect for Persons*, *in* THE ROOTS OF RESPECT: A HISTORIC-PHILOSOPHICAL ITINERARY 171 (De Gryuter 2017).

then becomes a prerequisite for not just the abstract person to acquire personhood but, more importantly, for legal personhood itself to affirm its existential aspects. A rereading of Hegel's philosophy allows us to say something of which legal scholarship today must be resolutely mindful: that property rights are not a detached end but a means to guarantee subjecthood to the disenfranchised; that legal recognition means nothing without a politics of ethical love and moral respect. And this is neither an empiricist overstatement nor a juridico-formal simplification.

This essay will attempt to problematise the workings of Hindu joint-family property and inheritance through the lens of Hegel. His is a foundational theory of property, intuitions of which can be found in most property systems.[9] I will begin by foregrounding the hints of this approach in Hindu classical law and its legal institution by the colonial project of codification. Drawing on anthropological literature and doctrinal developments, I hope to highlight how women's subservience has been a traditional necessity for the circulation of property. The second part places women's access to coparcenary property within Hegel's framework. I will end with some comments on the Hindu Succession Act, 1956 and its 2005 amendment, underlining why legislative action in terms of women's property rights leaves much to be desired. The primary endeavour here is to ponder if the personhood approach offers ample space for the personhood of women in Hindu succession laws, especially since Hegel's argument is for a general right to property that everyone should have.[10] Indeed, it is a clear shortcoming to binarily posit women's personhood as the opposite of the universal male personhood. But my effort here is precisely to exploit that fault line—to critically analyse the idea of personhood and property itself. The entrapment of this essay in the gender-binaries is coincidental to the heteronormativity immanent in Hindu personal laws.

## I. COMMUNITY AND PROPERTY

There is sufficient anthropological evidence that women's personhood in property is often articulated through marriage. In construing dowry and bride-wealth as contributions towards a specific conjugal fund rather than a "circulating societal one",[11] Goody seems to be drawing a normative understanding of title over property from the very marital union that facilitates this exchange. Of course, his ethnographic insights compellingly foreground the structural forces underlying this kinship-regulated flow of property, but to argue that the property exchanged upon marriage becomes some sort of community-property has a more nuanced undertone. For a

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[9] *See* Margaret J. Radin, *Property and Personhood*, 34 STANFORD LAW REVIEW 957 (1982).

[10] It must be noted that Hegel himself thought very disparagingly of women. In his book, he has likened the personhood of a woman to that of a "plant". Women's desires are stripped of "ideals"; so are they stripped of the "universal element" required for "higher sciences, for philosophy and certain artistic productions". *See* HEGEL, *supra* note 3, at 207.

[11] Jack Goody, *Bridewealth and Dowry in Africa and Eurasia*, *in* JACK GOODY & S.J. TAMBIAH, BRIDEWEALTH AND DOWRY 1, 2 (Cambridge University Press 1973).

property transacted with an individual to be assimilated into a communally-owned pool, marriage must imply a "mutual and undivided surrender"[12] of the individual personalities. It is then that the "substantial personality" of the family[13] comes into existence with its "external reality in property", as Hegel would put it.[14]

Although this usually remains an unstated intuition in both legal thought and common perception, the hegemonic grip of this normativity cultivates a plethora of theses like Goody's. The same intuition plays out in the idea that dowry acts as a guarantee for the husband's exclusive access to his wife.[15] Controlling the reproductive autonomy of the wife ensures the "purity" of the children, the logical extension of which is the confinement of the property within the same family.[16] Instead of being negative players, women act as "transforming agencies" in this process[17]; by reproducing the family, they maintain and reproduce its intemporal manifestation in the property.

A great many scholars of Hindu law have admonished judicial pronouncements[18] allowing the Hindu Undivided Family (HUF)[19] to continue with a sole surviving coparcener and the female members.[20] In fact, these judgments built on earlier privy council decisions that had already laid the groundwork for this development.[21] The point is not to comment on the merits of these judgments but to highlight the implicit presence of a personality-based understanding of joint-family property. The impressions of this approach can be traced in the judiciary's bid to retain the joint family[22]—a commonality in all the judgments cited here. After all, every Hindu family is

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[12] HEGEL, *supra* note 2, at 208.

[13] Whether it is the marital family (as in the case of dowry), the bride's family (as with bride-wealth), or merely the conjugal couple would differ from society to society.

[14] HEGEL, *supra* note 2, at 209.

[15] *See* S.J. Tambiah, *Bridewealth and Dowry Revisited: The Position of Women in Sub-Saharan Africa and North India*, 30 CURRENT ANTHROPOLOGY 413, 423-424 (1989).

[16] Tambiah's paper must be read with adequate caution, for he often romanticises the "notions of purity" by whitewashing the violence inflicted and internalised under its garb.

[17] Mitzi Goheen, *Comments on Bridewealth and Dowry Revisited*, 30 CURRENT ANTHROPOLOGY 413, 427 (1989).

[18] *See* CIT v. Gomedalli Lakshminarayan, (1935) 37 BOMLR 692; Gowli Buddanna v. CIT, AIR 1966 SC 1523.

[19] The Hindu Undivided Family is a separate taxable legal fiction. For more on the tax-related implications of an HUF with a sole surviving coparcener, *see* S.P. Verma, *Ownership Rights of a Sole Surviving Coparcener and Tax Liability*, 13 JOURNAL OF THE INDIAN LAW INSTITUTE 234 (1971).

[20] *See* B.N. Sampath, *Hindu Undivided Family in Taxation: A Saga of Conceptual Aberrations*, 20 JOURNAL OF THE INDIAN LAW INSTITUTE 29 (1978).

[21] J. Duncan M. Derrett, *The Supreme Court and the Hindu Undivided Family: A Footnote*, 20 JOURNAL OF THE INDIAN LAW INSTITUTE 463, 466-470 (1978). *See* Attorney-General of Ceylon v. Ar. Arunachalam Chettiar, (1958) 34 ITR 42 (SUPP).

[22] This does not mean that the coparcenary remains intact if there is just one male member. However, the surviving members still interact with each other with respect to the property through the family. For instance, a justification of retaining the HUF is the added obligation on the family to maintain the women out of the property.

presumed to be a joint family,[23] even though the ethnographic evidence flounders in sustaining this colonial (mis)reading of the texts and reality.[24] In one case, so irresistible was the inclination that the court refused to dissolve the joint-family property "merely because the family [was] represented by a single coparcener", while inserting a caveat eschewing an opinion on the status of the HUF in the same breath.[25] This preferential focus on preserving the property in the hands of the community over fragmenting it might not bode well with Hegel's own view; for in his words, the "community does not ultimately have the same right to property as a person does".[26]

## II. PROPERTY AND WOMEN

This begs the question: is there any scope in Hegel's framework for a radical redistribution of property? Borrowing from his theory, there is a "developmental thesis" which propounds that a minimal amount of private property is instrumental in realising an individual's freedom and capabilities.[27] Property, therefore, is necessary for the self-actualisation of an individual—the highest attainment in Maslow's hierarchy of needs. A "musician must make music, an artist must paint, a poet must write, if he is to be ultimately happy", and for that to happen, the musician must have some property in the instrument, the artist in the canvas, and the poet in the pen and paper.[28] Hegel himself concedes to the moral preferability of a civil society where individuals have the bare minimum to meet their livelihoods.[29] This does not stem directly from nature; in nature, the abstract person is yet to be particularised in a determinate social clime. If considered seriously, Hegel's conception is malleable enough to make a broad case against the exclusivity of the coparcenary.

Joint-family ownership of property can most closely be aligned with a system of collective property where social rules govern allocation. Hegel's framework on the other hand operates explicitly for private property from an individual-oriented standpoint. Nonetheless, a reconciliation is plausible in that, as Waldron notes, property systems can seldom be pigeonholed strictly into a uniform

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[23] DINSHAW F. MULLA, HINDU LAW, 346-347 (22nd edn., LexisNexis 2016).

[24] The concept of the Indian joint family was an outcome of colonial engagement with indigenous systems of kinship and marriage from a historically and methodologically flawed textual perspective. *See* Patricia Uberoi, *The Family in India*, *in* HANDBOOK OF INDIAN SOCIOLOGY 275 (Veena Das ed., Oxford University Press 2004).

[25] Gowli Buddanna v. CIT, AIR 1966 SC 1523, ¶ 22.

[26] HEGEL, *supra* note 2, at 78.

[27] Alan Patten, *Hegel's Justification of Private Property*, 16 HISTORY OF POLITICAL THOUGHT 576 (1995).

[28] For that matter, one might argue that the musician must hold property in the music, artist in the artwork, and the poet in the poem. *See* A.H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOLOGICAL REVIEW 370 (1943).

[29] HEGEL, *supra* note 2, at 80.

pattern.[30] These are analytical categories, "ideal types" in the Weberian sense.[31] In a system where it is possible to partition joint-family property (coparcenary property, to be precise) at the will of the coparceners and, in a stroke, convert it into separate property (essentially, private property), the divide between private and other forms of property becomes a fluid theoretical invention.

Hegel himself admits that the ultimate interest of individuals lie in the pursuit of the collective goals of the community.32 Perhaps too deeply rooted in his time, Hegel refrains from subsuming private property entirely in the organic community unit.33 However, that an individual can only fully actualise in a community, is something that he does argue. A sense of belongingness to a community, be it the family or the state, prompts the individual to perceive it as the universal that circumscribes "personal individuality" and consciousness.34 The universality of the community only prevails when its members act not merely as private persons but as individuals in pursuit of the community's ends by cooperating among themselves in their designated roles. The family offers its members "full development" and "recognition of their right."35

What Hegel is saying here is quite pragmatic: that freedom cannot thrive in isolation from a concrete social and ethical order.[36] The state of affairs in the Hindu Joint Family, where social organisation is premised upon ordaining women into subordinate roles, is therefore a hinderance to both individual freedom and the community's development. The individual's interests, though aligned with the community's, need not be subservient to its greater good. Unconsciously, she caters to the completion of the "whole" that makes up the community while ontologically she becomes a person.[37] Only her enhanced freedom can lead to a fledging community. The hierarchies within the family which fundamentally degrade freedom—divesting women of ownership, to name one—would thus be amiss in any radical retake of Hegel's framework cherishing the attitudes of emancipatory politics.

In Margaret Radin's authoritative work on personhood and property, she perspicaciously notes the communitarian's frustration with the definition of person steeped in an individualistic worldview.[38] Likewise, to move from the individual to the family in this essay, we must deliver the person from

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[30] *See* Jeremy Waldron, *What is Private Property?*, 5 OXFORD JOURNAL OF LEGAL STUDIES 313, 332 (1985).
[31] For a comprehensive discussion on Weber's Ideal Types, *see generally* Donald McIntosh, *The Objective Bases of Max Weber's Ideal Types*, 3 HISTORY AND THEORY 265 (1977).
[32] JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 347 (Clarendon Press 1988).
[33] Radin, *supra* note 9, 977.
[34] HEGEL, *supra* note 2, at 282.
[35] *Id.*
[36] *See* Z.A. Pelczynski, *Political Community and Individual Freedom in Hegel's Philosophy of State*, *in* THE STATE AND CIVIL SOCIETY: STUDIES IN HEGEL'S POLITICAL PHILOSOPHY 55, 62 (Cambridge University Press 1984).
[37] 2 G.W.F. HEGEL, LECTURES ON THE HISTORY OF PHILOSOPHY, 209 (E.S. Haldane trans., Routledge and Kegan Paul Ltd. 1955).
[38] *Id.*

its confinement in the abstract state of nature to the history and the social fabric that create its existence.

The family is not just a site where the woman's personhood remains subservient to the universalised masculinity of men, but the circuits of power within it destroy any space for her subjectivity. She is always given in marriage by one man to another.[39] Her passivity fuses into the personhood of the husband as his wife; the children as their mother; and the family as a conduit for the property dowered with her.[40] To become a woman is not just a cultural construction but a more "purposive and appropriative set of acts".[41]

For instance, to become a wife and be subject to exchange in marriage ensures the reproduction of the kin.[42] What then becomes some semblance of a system of promises and reciprocal promises, where the flow of women from one family to another is complemented by a simultaneous flow of property, can be situated in a larger heteronormative enterprise of conserving the family in a caste-based society by systemically stripping women's agency.[43] The personhood of the family is just a reflection of the universal masculine personhood. Even in the case of dowry which is more pertinent here, the flow of women and property in the same direction is tactically negotiated by the social statuses of the parties. By paying a hefty dowry, the bride's family stakes claim to a higher social status; whereas by seeking a lavish dowry, the groom's family reaffirms theirs.[44]

Hindu law also has the idea of *stridhan*, property gifted during marriage that becomes the separate property of the woman.[45] *Stridhan* is different from dowry insofar as the husband's family is bound to restore it if misappropriated.[46] One could argue, and problematically so, that the "separateness" of *stridhan* is a projection of the woman's personhood in it. Yet, the husband's family can utilise the property in "extreme distress, as in famine, illness or the like", with the liability of making good the wife's loss.[47] The ease with which the wife can robbed of her *stridhan* suggests not an extension

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[39] SIMONE DE BEAUVOIR, THE SECOND SEX 502-509 (Constance Borde & Sheila Malovany-Chevallier trans., Vintage Books 2011).

[40] *See* Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex, in* TOWARDS AN ANTHROPOLOGY OF WOMEN 157, 169-174 (Rayna R. Reiter ed., Monthly Review Press 1975).

[41] Judith Butler, *Sex and Gender in Simone de Beauvoir's Second Sex*, 72 YALE FRENCH STUDIES 35, 36 (1986).

[42] Broadly, this is Levi-Strauss's exchange theory of studying kinship. As revealed by ethnographic research, the role of this exchange in constituting the family unit in various societies downplays the importance that Levi-Staruss accords to it. To go with his insistence that the exchange of women forms the basis of culture is an awkward argument to say the least. It implies that women's oppression would not have existed without culture. For a critique of Levi-Strauss's theory, *see* Rubin, *supra* note 40.

[43] Harland Prechel, *Exchange in Levi Strauss's Theory of Social Organisation*, 5 MID-AMERICAN REVIEW OF SOCIOLOGY 55, 61-62 (1980).

[44] Alice Schelgel, *Dowry: Who Competes for What?*, 95 AMERICAN ANTHROPOLOGIST 155 (1993).

[45] For an authoritative account of the rights and liabilities attached to stridhan, *see* Bhai Sher Jang Singh v. Virinder Kaur, 1979 CRI.L.J. 493.

[46] Shri. Ashok s/o Laxman Kale v. Sau. Ujwala w/o Ashok Kale, AIR 2007 (NOC) 1093 BOM, ¶ 23.

[47] Pratibha Rani v. Suraj Kumar, (1985) 2 SCC 370, ¶ 7.

of her personhood to include the specific property that was gifted—the ornaments, the furniture, or even the utensils—but a mere right to maintenance that can be fulfilled by any other object.

In this configuration of legal relations, the property is rendered somewhat "fungible"[48] and the ambit of the wife's personhood in it purposively moot to secure the self-preservation of the family. Be it *stridhan* or dowry, the exchange entails joining her personhood with that of the husband's to channelise property.[49] That women be bereaved of their personhood is not just a fallout of this exchange but a crucial necessity to constitute this process.

A similar logic of divesting women of their personhood operates within the legal entity of the coparcenary. The coparcenary derives its spiritual legitimacy from funeral oblations. Within the family, the act of offering funeral oblations transcendentally ties the members sharing blood relations with a dead common ancestor.[50] This ceremony has its provenance in the *Dharmasastra* which imagines the household by stringing it together through a variety of rituals, with oblations being one key sacred element.[51]

As Durkheim would say, these rituals bind the members of the family in their experience of a close-knit social life.[52] Rituals demonstrate the infusing of individual consciousness in the social system[53]; the sensibilities and desires of the family members are intricately codified in them.[54] In this scheme of things, the ceremony of funeral oblations becomes a ritualistic means to invoke the personhood of the dead coparceners. It is by establishing this organicity in the family that the property is held jointly.[55]

Exclusion from this organic unit, thus, naturally translates into a disqualification from holding property. Traditionally, women, and male members beyond four degrees of descent have been denied membership in the coparcenary.[56] Various texts in classical Hindu law, from Manu's *Dharmasastras* to Vijnanesvara's compilations that later became the principal source of the

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[48] Fungible in the sense that the specificity of the *stridhan* is diluted by allowing its replacement with something of equal market value. *See* Radin, *supra* note 9, at 959-960, 970.

[49] *See* BEAUVOIR, *supra* note 24, at 122.

[50] Vijender Kumar, *Coparcenary Under Hindu Law: Boundaries Redefined*, 4 NALSAR LAW REVIEW 27, 29 (2008).

[51] 1 PANDURANG V. KANE, HISTORY OF DHARMASASTRA 11 (Bhandarkar Institute Press 1930).

[52] *See* ANTHONY GIDDENS, SOCIOLOGY 692 (6th edn., Polity Press 2009).

[53] Daniel B. Lee, *Ritual and the Social Meaning and Meaninglessness of Religion*, 56 SOZIALE WELT 5, 14 (2005).

[54] *See* Raymond Boudon, *Max Weber on the Rationality of the Religions*, 51 L'ANNEE SOCIOLOGIQUE 9, 33 (2001).

[55] The idea of jointness of property is also visible in the way Black's Law Dictionary defines "coparceners": "Persons to whom an estate of *inheritance* descends *jointly*, and by whom it is held as an entire estate" (emphasis added). However, in *Mitakshara* law, coparcenary property does not devolve through inheritance but through survivorship. *See* HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY, 405 (4th edn., West Publishing Co. 1968).

[56] *See* Moro Visvanath v. Ganesh Vithal, (1873) 57 BOM. H.C. REPORTS 444.

Mitakshara school, directly employ this organic personhood of the family as the bedrock of individual's rights in the coparcenary property.[57]

## III. PERSONHOOD AND LAW

The first attempt in post-colonial Indian to comprehensively codify Hindu personal laws resulted in the introduction of the Hindu Code Bill by Congress in 1947. With the mindwork of Ambedkar and the backing of progressives like Nehru, the Bill sought to organise the "rules of Hindu Law" scattered in "the innumerable decisions of the High Courts and the Privy Council".[58] The legislation was vehemently resisted by the Hindu orthodoxy and traditionalists for its proposed changes in the precepts of Mitakshara Law, mainly by supplanting them with Dayabhaga elements. By extending Dayabhaga Law to the Mitakshara territories, the Bill, in effect, ensured that "a woman who also [had] a right to inherit [got] it by the reason of the fact that she [was] declared to be an heir irrespective of any other considerations".[59] The Bill dissolved by 1952, giving rise to a period of piecemeal legislations such as the Hindu Marriage Act of 1955, the Hindu Succession Act (HSA) of 1956, the Hindu Minority and Guardianship Act of 1956, the Hindu Adoption and Maintenance Act of 1956 and the Dowry Prohibition Act of 1961.[60] Contrary to the Hindu Code Bill, the HSA extended Mitakshara Law over the whole country.

With the enactment of the HSA, women were classified as Class I heirs.[61] This meant that they could now inherit their husband's or son's property.[62] Section 6 of the act, even prior to its amendment in 2005, diluted the doctrine of survivorship by requiring the devolution of an intestate male coparcener's share through succession upon being survived by a female Class I heir.[63] This experiment in Anglo-Hindu law was initially declaimed as a confused piece of legislation.[64] Its progressiveness failed to see beyond the patriarchal-patrilocal joint-family central to its subject

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[57] *Effects of Adoption*, SHODHGANGA, *available at* http://shodhganga.inflibnet.ac.in/bitstream/10603/132435/10/10_chapter%205.pdf (last visited Apr. 15, 2019).

[58] B.R. Ambedkar, *The Hindu Code Bill*, *in* THE ESSENTIAL WRITINGS OF B.R. AMBEDKAR 495 (Valerian Rodrigues ed., Oxford University Press 2002).

[59] *Id.* at 497.

[60] P.K. Menon, *Hindu Jurisprudence*, 9(1) International Lawyer 209 (1975).

[61] *See* The Hindu Succession Act, 1956, Schedule I (hereinafter "HSA").

[62] HSA, s. 8.

[63] *See* HSA, unamended s. 6.

[64] For a brief analysis of the early debates surrounding this act, *see* J. Duncan M. Derrett, *The Hindu Succession Act, 1956: An Experiment in Social Legislation*, 8 THE AMERICAN JOURNAL OF COMPARATIVE LAW 485 (1959).

matter.[65] Mired deeply with heteronormative hues, women in the Act featured only as daughters and wives. Moreover, they were still not eligible to become coparceners.

In classical Hindu law, married women acquire a share upon partition for maintenance. Her right is appended to an obligation on the marital family to maintain her. To put in other words, to maintain a woman means conserving her functionality as a conduit for property. Therefore, she is placed in a narrative that dispossesses her of her prudence and her faculties. This narrative essentially reduces married women to "weak women", and from it stems the need to maintain them. Women are said to lack the *indriya* (literally, the senses)—the potency to deal with the gods.[66] As a result, property would pass through women in the joint family, but this "weak woman" is never capable of retaining it herself.

The 2005 amendment to the act elevated women to the status of coparceners in their natal families. Instantly, this "ground breaking legislation" was hailed as a "more progressive legislation than possibly seen in the entire previous decade".[67] Yet, the inherent patriarchal overtones in the Hindu Succession Act eclipsed the celebration of its gender neutrality. In the whole amendment, much like the rest of the act, nowhere does the subjectivity of an independent woman personhood become visible.

To begin with, the amended Section 6(1) as it stands today defines the coparcenary rights of the daughters with reference to the sons in the family. The act frames gender in terms of its performance in the roles of wives and daughters.[68] What emerges, therefore, are contesting identities that reveal the fissures in the quest for a universal woman personhood or identity, if at all there is one.[69] For instance, the induction of the daughter into the coparcenary, while leaving out the wife, has led to a diminution in the share that the latter receives for maintenance. An extra coparcener—the daughter—decreases the quantum available for partition. This doubly jeopardises the wife; first, on not being included in the husband's coparcenary, and second, owing to the reduction in her share.

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[65] *See generally* Rakesh. K. Chadda & Koushik S. Deb, *Indian Family Systems, Collectivist Society and Psychotherapy*, 55 INDIAN JOURNAL OF PSYCHIATRY 299 (2011). A majority of Indian joint families are patrilocal and patrilineal, though a number of matrilineal and matrilocal systems exist in the southern and north-eastern parts of the country. The effect of these systems is simply not a subject of anthropological study, but forms of inheritance and residence in the family have a discernible psychotherapeutic effect on the personhood of its members. However, by extoling the benefits of a collectivist family system, the article ignores the subordination and violence that occurs within the family.

[66] 2 J. DUNCAN M. DERRETT, ESSAYS IN CLASSICAL AND MODERN HINDU LAW 30 (E.J. Brill 1977).

[67] *Groundbreaking Legislation*, 40 ECONOMIC AND POLITICAL WEEKLY 4487, 4487 (2005).

[68] For more on gender performativity, *see generally* JUDITH BUTLER, GENDER TROUBLES: FEMINISM AND THE SUBVERSION OF IDENTITY (Routledge 1990).

[69] Shivani Singhal, *Women as Coparceners: Ramifications of the Amended Section 6 of the Hindu Succession Act, 1956*, 19 STUDENT BAR REVIEW 50, 64 (2007).

Of course, one could argue that exclusion from the husband's coparcenary would be compensated by inclusion in her natal family's coparcenary. This, however, does not account for the disparity between Section 8 and Section 15 of the act. While Section 8, governing succession among males, circulates the property within the male intestate's heirs, Section 15 perceptibly prefers the husband's heirs over the wife's own parents, let alone her other heirs.[70]

The wife has been put at a further detriment by the judiciary's unempathetic, formalistic interpretation of these sections. One might have been deserted by her husband's family. She might have then toiled herself and amassed considerable property. Yet, the precedent in *Omprakash v. Radhacharan*[71] would force us to permit the husband's heirs to inherit. In this case, Narayani Devi, the deceased widow, was driven out of her matrimonial home after her husband's death within three months of her marriage. With her parents' support, she completed her education, secured employment, and died intestate with a considerable provident-fund balance almost three-and-a-half-decades after the eviction. The same in-laws who had abandoned her filed an application for the grant of succession. While the Supreme Court was astute enough to note that it was a "hard case", they stuck to a literal interpretation of the HSA and allowed the in-laws to inherit. The violence of Narayani Devi's experiential past featured merely as a chronological building block in the juridico-deductive reconstruction of her life for the purpose of applying the law, which, for the SC judges, was set in stone in this case.

In Hegel's framework, the manifestation of one's will in the property is complete when it is given an "end other than that which it immediately possessed".[72] One might be motivated by a number of reasons to acquire property. Narayani Devi in *Omprakash* might have intended a handsome bequest for her heirs or might have simply wanted fruits for her labour, but to plausibly fathom that it was her "will" to leave the property in the hands of the heirs that had maltreated her, defies all tenets of reasoning. In the workings of Sections 8 and 15, courts have trapped the personhood of the women in a mythic sphere. In this sphere, gender sensitivity exists elusively in rhetoric,[73] but not a single provision allows women to acquire property as *women*.

If we are to conceive of gender neutrality in Hindu personal laws, the reclamation of personhood must first occur within this domain. Otherwise, anomalous legislations are bound to happen. Consider the 1985 state amendment passed by Andhra Pradesh, inserting *Chapter II A* in the act.

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[70] *See* Mamta Dinesh Vakil v. Bansi S. Wadhwa, (2012) 6 BOM. C.R. 767. Subjecting these sections to constitutional scrutiny, the Bombay HC in this case found them to be unconstitutional.

[71] (2009) 15 SCC 66.

[72] HEGEL, *supra* note 2, 76.

[73] For a critical take on the gender bias in the Hindu Succession Act, *see* Kusum, *Towards Gender Just Property Laws*, 47 JOURNAL OF THE INDIAN LAW INSTITUTE 95 (2005).

The new chapter amalgamates succession and survivorship, producing an incongruous mishmash of inheritance and joint-tenancy.[74]

A similar story of anomaly dictates Section 14 of the HSA. The section grants full and absolute ownership to "female Hindus", for once not limiting them to gendered roles, at least in the wordings.[75] In a piece of legislation where gender sensitivity hangs by a slippery rope, provisions like Section 14, though welcome, can hardly be harnessed. Instead of remaining an aberration in the HSA, Section 14 must become a guiding exemplar of rethinking Hindu intestate succession. The emphasis must be on altering the internal cogency of the whole Act, and the sources of classical law on which it rests.

One starting point can be delving deeper within the diversities of Hindu personal laws. Unlike Mitakshara, Dayabhaga bases women's heritable rights on a loose composition of the organic unit within the family. From this accrues the limited property rights of five female heirs; namely, the daughter, widow, mother, paternal grandmother, and paternal great grandmother. Likewise, the Bombay school recognises many more female heirs than Mitakshara.[76] This multiplicity in personal laws has been rendered invisible through the hegemonic functioning of law and culture.[77] Granted that even these shadows of the personhood approach carry an inextricable history of violence and subordination within the family, but the preponderance of Mitakshara law in succession curbs any internal scope of equalisation in property rights within Hindu personal laws.

A redemption of this brutal history, however, lies precisely in a just and equitable redefinition of personhood itself. Modern forms of power, of which law is a vital technique, do not brazenly oppress but they regulate identities[78]; they structure and restructure personhood. As Foucault has written, the dynamics of juridical power shape the representation of its subjects.[79] Therefore, we must abjure the illusion of law being a transformative force and mobilise for social change at its modalities. Radical politics, to name one means, might usher in the transformation of women's

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[74] B. Shivaramayya, *The Hindu Succession (Andhra Pradesh) Amendment Act 1985: A Move in the Wrong Direction*, 30 JOURNAL OF THE INDIAN LAW INSTITUTE 166, 168 (1988).

[75] The section is one of the more progressive provisions in the act. Yet, the discourse around this provision has been restricted to "maintenance" and "stridhana". Rather than eradicating these obsolete and oppressive tools, the section has been usurped to vindicate them. *See* Judupdy Pardha Sarathy v. P.R. Krishna, (2016) 2 SCC 56.

[76] P.C. Jain, *Women's Property Rights Under Traditional Hindu Law and the Hindu Succession Act, 1956: Some Observations*, 45 JOURNAL OF THE INDIAN LAW INSTITUTE 509, 513 (2009).

[77] *See* NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW 17-20 (University of Illinois Press 2004). Menon construes the hegemony of law as the constituent discursive force behind the shaping of "real bodies".

[78] *Id.* at 205.

[79] Michel Foucault, *Right of Death and Power over Life*, *in* HISTORY OF SEX 133, 135-159 (Robert Hurley ed., Pantheon Book 1978).

personhood into agents and subjects of their own.[80] "Freedom of the will"[81] is contingent on nature, and nature is not a pre-discursive. In this case, Hindu personal laws are the discursive site where "nature" is conditioned.

It is time to reorient these obsolete concepts of personhood to suit a more progressive "nature". In other words, we might not know what a coherent and adequately representative idea of personhood is, but we can certainly fight its manifestly iniquitous constructions. Simply introducing seemingly gender-neutral amendments propelled by a shallow motive of undoing the "oppression and negation"[82] of women's fundamental rights will only take away from the thrust of movement.

A validation of the personhood approach need not be recklessly imported from the Western philosophical tradition in which Hegel wrote. Strands of it can be discerned in the debates on the Uniform Civil Code and personal laws in India as well. The 2018 consultation paper authored by the B.S. Chauhan-headed Law Commission advocates the formation of a "community of property" comprising all separate property acquired by either spouse after marriage.[83] The call for such a conjugal fund is not new, but the reasoning in the paper is indeed novel. By recognising the instrumentality of the woman's household labour as a underprop for the man's economic activities, the paper reinforces her entitlement "to an equal share in a marriage", hence not degrading her labour to a secondary stratum for the want of "monetary or financial" calculability.[84]

Yet, the idea of this conjugal fund originates from a *gender/sex* system where heteronormativity ensures a gendered division of labour in the household,[85] forcing women to provide for "household labour, home management, and child bearing". If the family is the site where this division of labour is enforced, then by restricting the conjugal fund to only separate property acquired after marriage, not joint-family property, the paper becomes yet another plot to subdue women's personhood within the family.

Even the Goa Civil Code, often championed by the proponents of a nation-wide UCC, is a peculiar outcome of colonial interventions in an already composite system of personal laws.[86] The

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[80] *Id*. at 208-215. It is beyond the scope of this essay to explore the merits of radical politics to make interventions in the sphere of law. The point simply being that if personhood is to be recovered, then Hindu personal law must not be understood as *the given*. It ought to be seen as the site where the struggle unfurls, but it is not the means that guide the contestation. Furthermore, the debate on the juridical representation of the women-subjecthood is another contentious path that this essay refrains from treading.

[81] HEGEL, *supra* note 2, at 35.

[82] The Hindu Succession (Amendment) Act, 1956, *Statement of Objects and Reasons.*

[83] The Law Commission of India, *Consultation Paper on Reform of Family Law*, Aug. 31, 2018, 29-31, *available at* https://barandbench.com/wp-content/uploads/2018/08/Consultation-Paper-LCI-Family-Law.pdf.

[84] *Id.* at 30.

[85] *See* Rubin, *supra* note 40.

[86] D.C. Manooja, *Uniform Civil Code: A Suggestion*, 42 JOURNAL OF THE INDIAN LAW INSTITUTE 448, 451 (2001).

code allows for a "communion of assets" pooled by the spouses, albeit the management lies with the husband.[87] Law, rather than being an agent of social change, renders invisible this secondary personhood of women in exhorting the code's ostensible gender neutrality.[88] Both the "communion of assets" and "community of property," at best, work as securities that the wife can redeem if the marriage breaks down. During its continuation, the matrimonial union precedes her personhood. Unless we confront these oppressive structures, will personhood invariably remain an exclusionary privilege? Will marriage remain an avenue to exchange property, or women for that matter, unless we question the economic and social forces of coercion within the kinship system? And will the family continue reducing women to their reproductive function unless we stand for a vision of personhood which encapsulates the full subjecthood and agency of all its members?

## CONCLUSION

I have tried in this essay to show the prevalence of the personhood approach in the very foundations of property relations in Hindu personal laws. The trajectories that have chiselled the personhood of women, or the sheer lack thereof, in succession laws raise a timely call to introspect within judicial discourses and critically examine their intuitive underpinnings.

In this rereading of Hegels' *Elements of the Philosophy of Right*, I have tried to build from the right-based claim that property is instrumental for the actualisation of one's personhood. Constructing women as passive channels devoid of a subjective personhood facilitates the kinship-regulated flow of property through them, without women ever being active holders of property. The Hindu Succession Act of 1956 legitimates the Mitakshara school as the exclusive authority on Hindu personal laws throughout the country. It was not until the 2005 amendment to the Act that women were offered a share in their natal coparcenary. This legislative intervention was instantly hailed as a historic step towards a gender-neutral personal-law regime. Perhaps rightly so; for many women, the long due legal recognition was indeed a momentous change. However, we would lose sight of the core issues if the moment of reparations hides that which amendment is symptomatic of: the problematique of personhood. Kinship and marriage structures represent women only in the gender roles they create; that of the wife, mother, daughter or after the breakdown of the marriage, widow. The text of the 2005 amendment raises daughters to the status of sons, at no point acknowledging their independent subjecthood.

The personhood framework is not just a Hegelian theoretical device confined to select academic circles. It is much more than that. The anatomy of the word "personhood" is historically, socially,

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[87] Nabeela Jamil, *Is the Goa Civil Code the Answer to India's Sexist Laws?*, FEMINISM IN INDIA (Nov. 9, 2018), https://feminisminindia.com/2018/11/09/goa-civil-code/.

[88] Shaila Desouza, *'Just' Laws are not Enough: A Note on the Common Civil Code, Marriage and Inheritance in Goa*, *in* WOMEN'S LIVELIHOOD RIGHTS, 277-287 (Sumi Krishnan ed., Sage 2007).

and culturally contingent, and deconstructing it ruptures the bulwarks that separate subalterns from their rightful claim to personhood.

# ECONOMIC ANALYSIS OF FUGITIVE ECONOMIC OFFENDERS ACT, 2018

Nitesh Mishra*

The Fugitive Economic Offenders Act, 2018 (hereafter, "the Act") had been hastily enacted by the Government of India in order to keep up with the growing public rage against a number of high-profile economic offenders evading the process of law, by leaving the shores of the country, within the last couple of years. This paper intends to apply the tools of microeconomics to analyse the social and economic efficiency of certain provisions of the Act.

It shall be argued, in the course of the paper, that it is economically efficient to set the expected punishment cost high, by attaching all the property, including benami property, of an economic offender, in order to prevent him from leaving the shores of India for evading the process of law. However, it shall be argued, in the course of this paper, that the Act has gone overboard in providing for a complete confiscation of the property of a fugitive economic offender, rather than mere attachment. This is economically inefficient for the reason that it deprives the fugitive offender from returning to the shores of India to face the process of law, because the Act lacks a provision that deals with return of the property in case he is eventually acquitted of the charges.

Further, the provision for disallowing the civil claims of both, the fugitive economic offender and a company or LLP, where he had authority, leads to economic inefficiencies at several levels. The setting of a monetary lower limit of Rs. 100 crores for proceeding under the Act, leads to further economic inefficiencies.

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## INTRODUCTION

With the rising number of high-profile white-collar crimes coming to the limelight in the recent years, where the offenders leave the shores of the country, in order to avoid prosecution at the Indian courts, the Government of India enacted the Fugitive Economic Offenders Act, 2018 with an objective to deter such offenders from leaving the country and for the purpose of compelling the offenders who have already left the country, to come back to India and face the justice system.

A Fugitive Economic Offender (hereafter, "FEO") is defined under Section 2(f) of the Act, as any individual who has an arrest warrant against himself, issued by any court in India, in relation to the scheduled offences, and such person has left India, or being abroad, refuses to return to India to face criminal prosecution.[1]

The Act can be used by the Enforcement Directorate (hereafter, "ED") to allege that a person is an FEO and that an amount more than 100 crores is involved.[2] Based on these allegations, the ED can confiscate the property of an alleged FEO at the initial stage itself, if there is an apprehension that the properties might be sold off.[3] In other cases, the ED has to file an application to the Special Court,[4] at which the Court issues a notice to the alleged FEO to appear before the Court in six weeks.[5] If the person himself appears, then the proceedings under the Act terminates, and if he appears through a lawyer, then the Court gives a week to file a reply.[6] If neither of the two are done, then the Court hears the ED on merits and passes an order for confiscation of all property, irrespective of them being proceeds of the crime or not, including benami property.[7]

Further, according to section 14 of the Act, any court or tribunal in India has the power to disallow any civil claims of an FEO, and also the civil claims of the companies or the Limited Liability Partnerships (hereafter, "LLP") where an FEO has a majority share or holds a key managerial position.[8]

However, these provisions have been claimed to be draconian and a sort of "economic death penalty"[9] by some of the interested parties, including a declared FEO, Vijay Mallya, who claimed

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[1] The Fugitive Economic Offenders Act, No. 17 of 2018, § 2(f) (hereinafter 'FEOA').
[2] FEOA, § 2(m).
[3] FEOA, § 5(2).
[4] FEOA, § 4.
[5] FEOA, § 10.
[6] FEOA, § 11.
[7] FEOA, § 12.
[8] FEOA, § 14.
[9] *Declaring me fugitive offender is like giving 'economic death penalty': Vijay Mallya tells HC,* LIVEMINT (April 24, 2016), https://www.livemint.com/news/india/declaring-me-fugitive-offender-is-like-giving-economic-death-penalty-mallya-1556108853208.html.

that his firm's assets worth Rs. 14000 crores were confiscated by the government, where he owed only Rs. 9000 crores to the banks in India.[10]

Economic analysis of law applies the tools of microeconomic theory to analyse the legal rules and institutions. This field has been garnering the growing interests of scholars across the globe, for the reason that it provides a cohesive interdisciplinary approach by conferring a mathematical logic to the laws that are prevalent or to the legal prescriptions.[11]

The economic analysis of crime and punishment had started with Gary Becker, in 1968, where he had argued for a model where the penalties internalise the social costs of the crime.[12] Richard Posner gave an alternative model, by suggesting that the penalties should be set to completely deter any sort of offenses.[13] Later scholars have tried to harmonise these two economic positions on crime and punishment.[14] Robert Cooter has provided a detailed and mathematical analysis to crime and punishment in his book.[15]

## I. ANALYSIS OF ATTACHMENT OF PROPERTIES OF AN FEO

Section 5 of the Act provides for the 'attachment of property', where the Director or any other officer authorised by the Director, not below the rank of Deputy Director, may, with the permission of the Special Court, attach any property which is proceeds of crime, a benami property of the FEO, or is being or is likely to be dealt with in a manner which will make the property unavailable for confiscation.

It is to be noted that despite the term being used in this particular section is "attachment of property", the subsequent provisions of the Act uses the term "confiscation", and the nature of the process makes it more of a confiscation than mere attachment of the property. The difference between the terms lies in their definitions. Attachment refers to the process of court merely taking the property and holding it during the course of trial, as a security against the defendant,[16] while

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[10] *Vijay Mallya claims confiscating his properties under Fugitive Economic Offenders Act is draconian,* SCROLL.IN (Apr. 1, 2019) https://scroll.in/latest/918616/vijay-mallya-claims-confiscating-his-properties-under-fugitive-economic-offenders-act-is-draconian.

[11] L. Kornhauser, *The Economic Analysis of Law*, STANFORD ENCYCLOPAEDIA OF PHILOSOPHY (Jun. 9, 2019), https://plato.stanford.edu/entries/legal-econanalysis/.

[12] Gary S. Becker, *Crime and Punishment: An Economic Approach,* 76 JOURNAL OF POLITICAL ECONOMY 169 (1968).

[13] Richard A. Posner, *An Economic Theory of the Criminal Law,* 85 COLUMBIA LAW REVIEW 1193 (1985).

[14] Keith N. Hylton, *The Theory of Penalties and the Economics of Criminal Law,* 1(2) REVIEW OF LAW AND ECONOMICS 175 (2005).

[15] ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (6th ed., Berkeley Law Books 2016).

[16] BLACK'S LAW DICTIONARY 161 (4th ed. 1968).

confiscation refers to appropriation of property to the use of State, or forfeiting the property to the public treasury.[17]

We will first venture into establishing that the act of evading the process of law by an FEO is a socially inefficient act, and hence, it needs to be deterred by the use of criminal law, and we will then, try to analyse the optimal level of punishment for the FEOs for providing efficient deterrence to the offenders from fleeing, and for giving the absconded FEOs sufficient incentives to return and face the process of law in Indian courts.

### A. EVADING THE PROCESS OF LAW IS SOCIALLY INEFFICIENT –

Criminal law should minimize social costs related to crimes, which is the sum of harm caused by the crime and the amount that is spent to protect oneself against such crimes.[18] It basically forbids an economically inefficient act.[19] Markets can be implicit or explicit. When the transaction costs are low and hence, bargaining can occur, the market is the most efficient means of allocation of resources. However, a criminal act is something that attempts to bypass this market process. Therefore, the function of criminal law is to prevent people from bypassing the system of voluntary, compensated exchange, called the market.[20] It might accrue utility to the offender, but to a socially benevolent planner, the process is socially inefficient.[21]

A criminal act reduces the social surplus that could have been created by market transaction with efficient bargaining. The threat of a crime also leads to potential victims spending greater amounts of money on precaution, which also comes at the opportunity cost of social efficiency.[22]

It would be worthwhile to notice that Posner's theory is based on the assumption that the transaction cost is low and hence, bargaining would be possible in every situation. However, that might not be the case always, for there may be cases where bargaining cannot occur between the parties due to high transaction costs.[23] In such situations, Becker's theory applies well, for there is a lack of any definite market structure, and the optimal deterrence can only be provided by means of internalisation of costs caused due to crime, within the penalty imposed.[24]

Now, in the situations which are sought to be dealt with by the Act, there is a simple case of crime with an expected conduct by the offender, to not evade the process of law in India and face the Indian courts for the economic offences that he had committed. There was also a prescribed

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[17] *Id.* at 371.
[18] COOTER, *supra* note 15.
[19] POSNER, *supra* note 13.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] HYLTON, *supra* note 14.
[24] BECKER, *supra* note 12.

punishment against the deviance from the expected act, which was confiscation of the assets of the fugitive offender. In the case of an economic offender, fleeing away from the country is a conduct that, if allowed, would frustrate other statutory obligations.[25]

### i. ANALYSING THE PERSPECTIVE OF FEO:

Now, if the FEO surrendered himself to the process of law, he would have been imprisoned under the other statutes he violated, committing the economic offences. However, by virtue of the Act, he would risk all his assets in case he evades the process of law. Hence, assuming that the FEO values only two things in life: his freedom from imprisonment and his assets, the FEO faces a trade-off between the two.

In the absence of this Act, there is no trade-off between the assets and freedom, for the assets of the offender are not at risk. If the offender still chooses to evade, then he attaches more value to his freedom than to his assets.

### ii. ANALYSING THE PERSPECTIVE OF STATE:

The efficient situation would be where the economic offender faced the courts in India, for that would accrue benefits on the society. By evading the process of law, the FEO is depriving the society from the benefits that would have been accrued upon it, by the trial of FEO. It is an efficient deterrence for other people of the society against committing such economic offences, constituting the basic aim of criminal law. Also, if there is a large possibility that an economic offender can leave the shores of the country and avoid the process of law, then the State will have to spend more resources in trying to secure the means of transportation outside the country. Further, the evasion of the economic offender causes other costs upon the State, in terms of extradition, in trying to locate and seize the assets of such fugitive offender, etc. Hence, the costs accrued upon the State by the acts of the FEO is large.

Consequently, the value which the State attaches to bringing the economic offender to justice is quite large. It includes the value of benefits, in terms of deterrence, that is derived from punishing such economic offenders, and the costs that the State might have to spend before and after the evasion, in prevention and adaptation to the evasion by the offender, respectively. The valuation of the State, as a whole, would any day be greater than the value of an individual FEO.

Further, in a situation where the freedom of an individual comes at the cost of social harm, it is an inherently problematic venture. It disrupts the fabric of the society, and hence, this freedom of an individual comes with corresponding duties towards the society. If the individuals do not fulfil these duties, they can be denied their freedom by process of law.

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[25] POSNER, *supra* note 13.

#### iii. EVASION FROM PROCESS OF LAW IS SOCIALLY INEFFICIENT:

Hence, it can be safely concluded that the value that the State attaches to the offender facing the process of law in India, is more than the benefit that the offender attaches by securing his freedom, by evading from the country. Therefore, the act of evasion from the country is an inefficient act and it needs to be prevented by criminal law.

We are not concerned with Gary Becker's theory of internationalisation of social costs of crimes into the penalties, for in the present case, the transaction cost was low and so, there was an implicit market available. As there were no high barriers to cooperation between the State and the FEO, transaction cost is said to be low. The FEO could have surrendered himself to the process of law, and the State could have, relatively, easily brought the FEO to justice. However, the FEO bypassed this implicit market by evading from the country.

### B. OPTIMAL DETERRENCE

Having established that, an FEO's act of evading from the country is a socially inefficient act, that leads to distortion in the efficient allocation of resources in the society, we now proceed to analysing what would be the punishment that would provide optimal deterrence to the offenders.

In this analysis, we safely assume that the FEO is a rational person, for he has indulged into very calculated and planned economic offences previously. Hence, an optimal deterrence would work for him since he is not risk neutral.

In the economic analysis of crime, it has been often stressed by the scholars that fines are the most effective type of punishment. However, in cases where the offender would not be significantly harmed by the fines, non-monetary sanctions are used, including imprisonment and forfeiture of illegal gains. These provide a more optimal deterrence than that by fines alone. Forfeiture of illegal gains, as a means of punishment, is usually applied in cases where the offence tends to be repetitive and lacks a specific victim.[26]

The offence of fleeing from the country to evade the process of law lacks any specific victim, and tends to be repetitive, if not effectively deterred. Hence, it is only logical and rational for the Act to provide for attaching the proceeds of the crime of an FEO.

The process of determining the optimal punishment for a crime involves two steps.

#### i. DECIDING THE EXPECTED PUNISHMENT COST:

Firstly, we need to decide the expected punishment cost of the crime based on a variety of factors, including the seriousness and nature of the offence. The punishment cost needs to be higher than

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[26] Roger Bowles, Michael Faure & Nuno Garoupa, *Forfeiture of Illegal Gain: An Economic Perspective,* 25(2) OXFORD JOURNAL OF LEGAL STUDIES 275 (2005).

the benefits from the crime to create an optimal deterrence in the minds of people. However, too high an expected punishment cost for a relatively lesser severe offence can lead to people being more careful than necessary to avoid the act, which would yet lead to another social inefficiency.[27] For example, if the fine that a person has to pay for overspeeding is to the tune of Rs. 1,00,000, then this would result in people driving their vehicles too slowly, and would eventually result in frequent traffic jams. Hence, it is necessary to have an expected punishment cost that creates an optimal level of deterrence in the minds of the people: not too high, nor too low.

The crime that an FEO commits is a binary situation, where the offender either leaves the country or does not leave the country. His act of leaving the country is a serious offence in itself, due to the large social costs attached to it, which falls upon the State, requiring an expected punishment cost greater than the gains from the crime.

The objective of the Act is to deter every act of evasion from the process of law. In such cases, the higher the expected punishment cost, the more the deterrence. So, it is not inefficient for the Act to prescribe attaching of assets of the FEO, irrespective of it being the proceeds of the crime or not, including the benami property. Such a high punishment cost covers the social harm caused due to the crime, and also the cost which the State spends in attaching the property, and other processes.

However, the Act actually goes a step further than mere attachment of properties as security, and provides for confiscation of the same. The provisions under the Act providing for such confiscation are excessive and hence, socially inefficient. This would result in the FEO, discounting the punishment and committing more serious offences before evading the country, thereby incurring further social costs.

This can be understood with the help of an example. An economic offender, who is a rational person, would know that on mere declaration of him as an FEO, all his properties could be confiscated and sold off by the State, without any trial. Hence, he would put in more resources in trying to avoid being caught, which would increase the opportunity cost of the crime, and is socially inefficient. He would also try to commit offences worth a higher value, in order to balance out the increase in expected punishment, due to confiscation and its not remaining mere attachment of property. He might try to liquidate the assets before fleeing from the country, in order to take it with him, which would channel the money of the country into black economy, which causes further economic and social inefficiencies.

Further, one of the other aims of the Act was to make the FEOs return to India to face the process of law. However, the Act does not provide for any provision regarding how to deal with the property, if the FEO is eventually acquitted by the courts. There is no provision for returning the confiscated property to the acquitted persons, nor is there any compensation for the property that is already sold off by the State. Hence, a rational FEO has no incentive to return to India to face

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[27] *Id.*

the courts. Despite this being mere redistribution of the property within the society, it is inefficient because it leads to the failing of the primary goal of the Act, which lowers the level of deterrence that is sought to be brought about by the Act.

Hence, the confiscation of property is a socially inefficient punishment and the Act should have restricted itself to attachment of property. The expected punishment cost of the Act should have been set up accordingly.

### ii. DECIDING THE SEVERITY OF PUNISHMENT:

After determining the expected punishment cost, we have to decide the combinations of severity and probability of punishment, which complies with the expected punishment cost. Expected punishment cost is equal to the product of probability of punishment and its severity. For example, if the expected punishment cost for an offence is set to be Rs. 10000 by the policy maker, then the severity and probability combinations could be any of the following, respectively, as all of these amount to the same punishment cost: (100000*0.1), (1000000*0.01), and so on.[28]

Increasing the probability of punishment requires significant resources from the State, as it needs an increase in manpower, increased efficiency of the existing manpower, etc. However, increasing the severity of punishment does not require any significant extra resources from the State, rather, it shifts the costs on the offender who is apprehended.[29] So, increasing the severity of punishment can be considered to be more efficient than increasing the probability of punishment by the State.

Hence, the attachment of an FEO's properties, irrespective of it being proceeds of the crime or not, would be efficient, as it would increase the severity of the punishment, without having to increase the probability of punishment. However, it is stated that since the expected punishment cost has been set too high, in this case, by providing for confiscation of property, the severity of the punishment has also been set inefficiently high to correspond to it.

## II. ANALYSIS OF BARRING OF CIVIL CLAIMS

Section 14 of the Act deals with the 'power to disallow civil claims', by virtue of which any court or tribunal in India has the power to disallow a declared FEO from putting forward or defending any civil claim. Further, the civil claims of companies and LLPs where the FEO holds a key managerial position or is a majority shareholder, is also barred from putting forward or defending any civil claims.

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[28] *Id.*

[29] COOTER, *supra* note 15.

### A. DISALLOWING THE CIVIL CLAIMS OF AN FEO –

At the outset, it seems that in view of the severity of the act of evasion, the provision of disallowing the civil claims provides an efficient deterrence, and thereby, reduces the social cost. However, an in-depth analysis of the same brings out the social inefficiency of the provision.

By disallowing any civil claims, the provision goes dangerously overbroad, and makes it impossible for an FEO to advance or defend civil claims, relating to matrimonial disputes, writ petitions, property disputes and a host of other civil disputes.[30] This is economically inefficient for the reason that it would enable the opposite party of the FEO in such cases, to get away with denying the civil rights of the FEO, and thus, reducing the social surplus created by enforceable legal rights of either parties.

For example, assume that a person A, who is an FEO, wants to invest an amount of Rs. 10,000 from his assets which is left after confiscation, into a business venture. For this purpose, he engages an agent B. Upon investment, there would be a surplus generated of Rs. 10,000, which A and B agree to reasonably divide amongst themselves. However, since A cannot advance any civil claims before the courts, B, assuming him to be rational, would have an incentive to appropriate the money, rather than investing it. A, who is also assumed to be rational, would realise that B is likely to appropriate the money, and by virtue of having a first mover advantage, A would not invest the amount. Thus, there would be no surplus created, which is a socially inefficient situation.[31]

Further, by not allowing an FEO to defend any civil claim, the result of any civil suit against him would be an automatic loss for the FEO. This would increase the probability of winning the suit for the opposite party to 1, and hence, would promote a host of vexatious and frivolous suits against him, which the opposite party is sure to win. This would incur a social cost to the society, which is inclusive of the administrative cost of entertaining such claims.

### B. DISALLOWING THE CIVIL CLAIMS OF THIRD PARTIES –

The bone of contention in this particular provision also lies in the fact that along with the FEO, the companies and LLPs where he has a major role to play, have their civil claims barred in the courts and tribunals as well. This incurs huge negative externalities to third parties, who have no role to play in this specific transaction between the economic offender and the State, nor do they have the resources or means to stop the economic offender from evading the process of law. Hence, the Act overreaches in this aspect as well.

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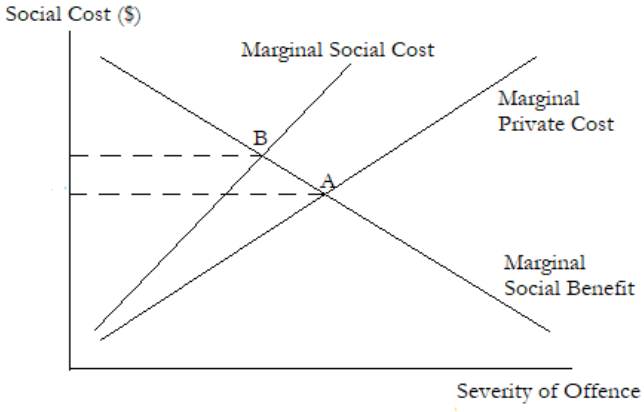
[30] Abhinav Sekhri, *The Fugitive Economic Offenders Ordinance: Gearing Up for Challenge?,* THE PROOF OF GUILT (Jun. 12, 2019, 4:53 PM), https://theproofofguilt.blogspot.com/search/label/Fugitive%20Economic%20Offenders.

[31] COOTER, *supra* note 15.

Externalities are said to occur when two parties engage in an activity or transaction that influences the well-being of a third party, but neither pays nor receives any compensation for that effect. In case that effect is an adverse one, it is called a negative externality.[32] In case of a negative externality, the social cost of a transaction exceeds the private cost of the same transaction, due to the addition of the external cost, and hence, is an economically inefficient outcome.[33]

Common examples of negative externalities include the pollution that causes a social harm, caused due to production in industries. The people who are not even parties to the transactions of that industry bear the social costs of the pollution caused, without being compensated for the same.

In the case of a transaction under this provision of the Act, the parties should be the State and the FEO. However, due to the laws of the State, the third parties, like the companies and LLPs in question, are affected adversely, without being compensated for the losses borne by them due to barring of the civil claims. Hence, it is a negative externality that is faced by them. The social cost due to this rises from what it should have been in case there were no negative externalities. The graphical representation of the same has been provided below, plotting the relation between social cost and severity of the offence.




In the graph above, the horizontal line corresponding to point A represents the social cost, had there been no negative externality, while the horizontal line corresponding to point B represents the social cost, along with the negative externality. The difference between these two points, in terms of social cost, is the external cost caused by the provision of the Act in question.

The two solutions to correct the negative externalities could be either to compensate third parties for the losses they bear due to the externality, or to amend the law in such a manner that excludes the scope for such negative externality. Since, estimation of the compensation for each third party

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[32] *Negative Externalities,* ECONOMICS ONLINE (Apr. 29, 2019, 6:07 PM), https://www.economicsonline.co.uk/Market_failures/Externalities.html.

[33] Orin S. Kerr, *An Economic Understanding of Search and Seizure Law,* 164(3) UNIV. OF PENNSYLVANIA L. REV. 591 (2016).

affected by this Act is difficult and also would be too high an amount, it is more rational to amend the law in order to exclude the provision barring the civil claims of third parties.

## III. Analysis of Lower Limit for Suits

Section 2(m) of the Act defines the term "Scheduled Offences", and states that for the purpose of consideration as a scheduled offence under this Act, the total value of such offence or offences should be at least one hundred crore rupees.

The fundamental issue that has to be addressed in relation to this provision, is that the lower limit of Rs. 100 crores that has been set up for an act or acts to be considered as scheduled offences under this Act, is based only on the monetary value of the acts. This might be a problematic venture for the reason that there may be offences which value less than Rs. 100 crores, but the nature of the offence and the victim of the offence raises the graveness of it. This makes the provision under-inclusive.

### A. Nature of Offences

Such a provision might have been made for the purpose of avoiding logjam of cases in the Special Courts. However, despite the fact that the value of certain offences might not cross the lower monetary limit under the Act, the amount of resources the State has to mobilise for the correction of the social harm caused can be very significant, in certain offences.

We can understand this proposition by means of an example. Consider 'A' counterfeits currency notes, which is an offence listed in the schedule of the Act,[34] worth Rs. 95 crores. He circulates these notes in the local markets, in exchange for actual currency, and leaves the country in order to evade the process of law. The resources that the State shall have to allocate/utilize in order to remove such counterfeit currencies from circulation in the market would be immense. Hence, it is only rational to attach the assets of A, in order to make up for the cost caused to the State in removing the aforementioned counterfeit currency from circulation, instead of further using the taxpayers money to correct an act to which they were the victims.

Further, in case A circulates counterfeit currency worth Rs. 100 crores, the amount of resources which the State will have to mobilise in this case, will not be significantly higher than what it was in the first case. The same mechanism is used in both. For further increase in the value of counterfeit currency circulated, the marginal increase in the resources mobilised by the State decreases. Hence, the relation between the amount of resources the State mobilises for the correction of harm caused by A and the severity of the offence by A is a square root function, as shown below.

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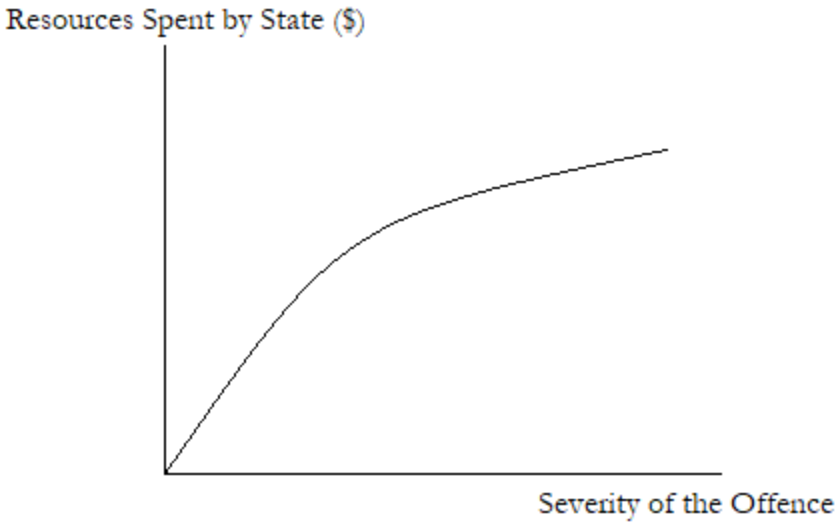
[34] FEOA, Schedule.




### B. VICTIM OF OFFENCES –

There can also be a possibility where the harm that is caused by the acts of the offender may not cross the lower limit of Rs. 100 crores, but the relative disutility that is caused may be hefty, depending upon who the primary victim of the act of the offender is. For example, A cheats several working-class citizens of a place, by promising them affordable housing, and takes advance payments for the same, amounting to Rs. 90 crores. A then, evades from the country. The disutility that is caused to these people is colossal, for they would have invested their life savings into getting that house. Therefore, in order to make good of the losses they suffered, the assets of A should be attached.

Hence, the monetary value being the only standard for setting the lower limit under this Act is a problematic avenue. It serves to be counterproductive by eventually incentivising evasion below the lower limit of Rs. 100 crores.

## IV. CONCLUSION

The Fugitive Economic Offenders Act, 2018, was enacted by the Parliament in a relatively hasty manner, in order to do something about the growing public rage with a series of high-profile white-collar criminals evading the process of law in India, by fleeing to other countries. The economic analysis of the Act provides us with a venue to analyse the efficiency of such a hastily enacted Act, which has been the objective of this paper.

The analysis proves that the act of evasion by an economic offender is a socially inefficient act, that needs to be deterred by the use of criminal law. For the purpose of optimal deterrence in such acts, the expected punishment cost has to be greater than the benefit to the offender. Thus, the attachment of assets, irrespective of them being proceeds of crime or not, including the benami property of the offender, is economically efficient, for the purpose of efficient deterrence.

However, the means used by the Act for achieving optimal deterrence is excessive, since it provides for confiscation of properties and not mere attachment of them. Hence, it leads to social inefficiencies, which requires an amendment. The lack of any provision regarding returning the confiscated property, and compensation for the sold off confiscated property, defeats the primary purpose of the Act, which was to bring the FEOs back to India to face the process of law.

The provision disallowing an FEO to advance or defend any civil claims in India is inefficient as it would lead to a loss of social surplus that can be created by a legally enforceable transaction, and it would also lead to an increase in vexatious and frivolous suits against the FEO, incurring administrative costs. Barring civil claims of the companies and LLPs, having an FEO as a majority shareholder or at a key managerial position, incurs heavy negative externalities on third parties, which can be effectively rectified by the amendment of the law.

Further, the setting of the lower limit for initiating proceedings under this Act, only by considering the monetary value of the offence is a problematic venture, which can be rectified by considering the nature of the offence, and the victims of the offence as well. Creation of a slab system, prescribing at least some punishment for evading the process of law, for economic offences valuing below Rs. 100 crores shall serve the purpose of the statute better rather than setting up a flat lower limit for proceeding under the Act.

Hence, while the Act goes right in providing for a severe punishment to an FEO, the ancillary concerns that arise from it, contribute to social inefficiencies to such an extent that it masks the positive impact of the Act.

# THE CCI'S LENIENCY PROGRAM: SHORTCOMINGS AND SOLUTIONS

Parash Biswal*

Cartels are a form of anti-competitive activity which tend to disturb the competition in the economy and exploit the consumers. The leniency program is an enforcement tool used by competition authorities to eradicate cartels and ensure fair competition. The leniency program lures cartel members to self-report their illegal conduct and share insider information about the cartel in exchange for reduced penalties. The Competition Commission of India's leniency program is governed by Section 46 of the Competition Act, 2002 and the Competition Commission of India (Lesser Penalty) Regulations, 2009.

Leniency programs have proved to be an effective tool against cartelisation in many mature jurisdictions. However, the Indian leniency program is at a nascent stage and is plagued by shortcomings which need to be addressed soon to make it effective. The CCI's current program suffers from unpredictability and concerns relating to transparency and confidentiality. In order to realize its objectives it is imperative that the CCI revamps its current leniency program and arms itself with a strong, dynamic and applicant-friendly leniency program which is in line with international best practices.

This article discusses the benefits and essential ingredients of an effective leniency program. Thereafter, it identifies and critically analyses the shortcomings of the fledgling Indian leniency program by evaluating the Regulations and final orders of the CCI. It concludes by proposing workable suggestions to iron out the flaws and strengthen the present program.

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## INTRODUCTION

Competition law is a framework which regulates competitive activity[1] and safeguards competition in the relevant market. There are many obstructions to fair competition and cartels are one of them. Cartel activities are regarded as one of the most serious forms of anti-competitive behaviour in the world. They are an association of similar but separate business entities who enter into an agreement with each other to restrict competition between them using various strategies like price fixing, limiting supplies or sharing markets. Putting an end to cartel activities is the most important objective of all competition regulators around the world and the Competition Commission of India (CCI) is no different. Detecting and prosecuting cartels remains the nucleus of the CCI's anti-cartel drive. However, detecting cartel agreements is a very challenging task because of the highly secretive and informal nature of such agreements. One effective tool to aid the authorities in detecting cartels and acquiring evidence to prove their existence is the leniency program. The Leniency program fosters and incentivizes cartel members to disclose information which could help in establishing the existence of such competition infringements in return for reduced penalties and in some cases full immunity.[2] The leniency program under competition law in India consists of Section 46 of the Competition Act, 2002[3] ("Act") and the Competition Commission of India (Lesser Penalty) Regulations as amended in 2017[4] ("Regulations"). The leniency program in India had been somewhat dormant for a long period of time but that seems to be changing. The CCI decided on its first leniency petition in early 2017[5] and followed it up with three more orders on leniency applications within a year and a half. This has resulted in a surge of leniency applications and has given a boost to the leniency program. However, the decisions have also gone on to expose the shortcomings that are still prevalent in the CCI's leniency program.

This article starts off by discussing the benefits and prerequisites of an effective leniency program. Thereafter, the shortcomings of the CCI's current leniency program are examined in light of several final orders passed by the Commission. It is then followed by a proposal of workable suggestions which could be used to enhance the program and make it a more effective tool for cartel detection.

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[1] M. Furse, COMPETITION LAW OF THE EC AND UK 1 (5th ed., Oxford University Press 2006).

[2] Anshuman Sakle & Anisha Chand, *Leniency Regime in India: Beginning of a New Dawn*, 13 COMPETITION L. INT'L 115, 124 (2017).

[3] The Competition Act, 2002, No. 12 of 2003, § 46.

[4] The Competition Commission of India (Lesser Penalty) Amendment Regulations, No. 1 of 2017.

[5] *In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*, Suo Moto Case No. 03 of 2014, CCI.

# I. CARTELS

Cartels are considered as the supreme evil of antitrust[6] and the most flagrant of all anticompetitive practices. According to the Competition Act, 2002, "a cartel includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services."[7] An agreement is a prerequisite to establish a cartel but such agreements are extremely difficult to detect. The agreement between the enterprises to not compete against each other and to control the relevant market through a partnership is the most important element of a cartel. Such an agreement may be in writing or maybe oral and it need not be legally binding. Section 3 of the Act prohibits such anti-competitive agreements.[8]

Cartels are mostly formed by business entities in a homogeneous industry to control the relevant market through various tactics which include raising prices, limiting supplies, etc. It is easier to form cartels and reap benefits from the same in a homogeneous industry because there are no substitutes for the concerned product and hence the demand from customers will not fluctuate much in the case of price rise. For example, customers would continue buying products like sugar, milk and cement despite price rises because of the lack of an alternative. Rise in prices of such commodities beyond competitive levels will disturb allocative efficiency. This causes loss to customers and also puts competitors at a disadvantage as a result of which the economy as a whole is adversely affected. Moreover, cartelists do not compete against each other thereby obstructing innovation in products and business methods alike.

## A. LENIENCY PROGRAM

Competition authorities dedicate a lot of effort and resources to detect cartels and penalise them. However, cartel activities are extremely difficult to detect and investigate owing to the secretive nature of agreements between members and hence insider information is necessary to implicate the cartelists.[9]There are times when the commission has failed to initiate any action against a cartel even though they are aware of its existence.[10] Leniency programmes are specifically designed to overcome such situations.

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[6] Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004).
[7] The Competition Act, 2002, No. 12 of 2003, § 2(c).
[8] *Id.* at § 3.
[9] Massimo Motta LENIENCY PROGRAMMES, COMPETITION POLICY: THEORY AND PRACTICE 193 (Cambridge University Press 2004).
[10] ET Bureau, *CCI closes probe into alleged steel cartel on lack of evidence*, THE ECONOMIC TIMES (Jan. 14, 2014), https://economictimes.indiatimes.com/industry/indl-goods/svs/steel/cci-closes-probe-into-alleged-steel-cartel-on-lack-of-evidence/articleshow/28770012.cms.

The leniency programme is a type of whistle-blower protection programme for cartel members who cooperate with the competition authorities by providing vital evidence regarding the cartel activities in exchange for leniency in the form of reduced penalties. Leniency can also amount to complete immunity in the case of the first leniency applicant which gradually decreases for subsequent applicants from the same cartel. This is an extremely useful tool for the competition authorities as it significantly reduces the time, costs and efforts required in detecting and bringing down a cartel.

The first ever leniency programme under competition law was enforced in 1978 by the Antitrust Division of the United States Department of Justice. However, it only became successful in 1993 after it was thoroughly revamped.[11] The European Union followed suit and implemented its very own leniency program in 1996.In India, Section 46 of the Competition Act, 2002, provides for leniency provisions. To enforce the leniency program, CCI came up with the Competition Commission of India (Lesser Penalty) Regulations, 2009 which was amended in 2017.

### B. WHY THE NEED FOR A LENIENCY PROGRAM?

Competition authorities around the world focus on collecting evidence to nab cartels but it is extremely challenging to do so without tips from the inside. Inducing the members of a cartel to report evidence of cartel activities in exchange for lesser penalties provides for an effective enforcement tool and helps in destabilising the collusion. Leniency programs are designed to create a race for confessions when cartels become unstable.[12]Most successful competition agencies have efficient leniency programs and use it in tandem with their regular investigations. Leniency programs can prove to be an extremely successful tool for the antitrust regulators when regular investigations are less likely to give results.

The benefits offered by effective leniency programs are plenty. Firstly, leniency programs help the regulators in gaining access to documents, records and other such evidence which not only uncover the existence of cartels but also give details about the future course of action of such cartels. This kind of intelligence acquired by a competition agency through a leniency applicant will be very hard to come by while using threats of proceedings and penalties against the company and its staff. Moreover, this system also addresses the issue of reliability. The leniency applicant will avoid submitting false evidence as part of his leniency application as that would mean dismissal of his application and attracting penalties.

Secondly, the existence of an efficient leniency program has a destabilising effect as it incentivizes betrayal thus making it difficult for cartels to sustain. Cartels need members to be well coordinated

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[11] Chen, Zhijun & Patrick Rey, *On the Design of Leniency Programs*, 56 JOURNAL OF INDUSTRIAL ECONOMICS 917–957 (2013).

[12] Joseph E Harrington Jr., *Optimal Corporate Leniency Programs*, 56 JOURNAL OF INDUSTRIAL ECONOMICS 215-246 (2008).

and secretive, the absence of which will lead to chaos, distrust and destabilisation. The presence of a leniency program creates distrust between members of existing cartels as it gives rise to the fear of being betrayed upon. This leads to a situation of instability within the cartel and creates a race for confessions.

Thirdly, a leniency program greatly benefits the competition authorities as there is a drastic reduction in time, efforts and costs in gathering evidence as compared to regular investigations. It is not a very resource reliant system and doesn't require long hours of investigation and analysis to get desired results.[13] Moreover, it also helps in lowering the time and costs of adjudication as it will not involve court proceedings in the case of the leniency applicants.

Leniency programs have become an essential enforcement tool for most of the successful competition authorities. The US Department of Justice, for example, had a corporate leniency program dating back to 1978 but it had many shortcomings which were rectified and a revamped leniency program came to place in 1993. In these 15 years the authorities received only one application per year and could not even detect one international cartel.[14] However, after the new program was put in place, there was a twenty-fold increase in the number of leniency applications and it led to the cracking of dozens of international cartels within the following ten years. The related plea agreements model adopted by the US has also been a huge success and has been described as "a good deal with benefits for all."[15]

### C. ESSENTIAL INGREDIENTS OF AN EFFECTIVE LENIENCY PROGRAM

Creating a leniency program on paper is one thing and implementing an effective program is another. Many leniency programs lack certain essential ingredients which prevents them from receiving the full range of benefits which can be accrued from such a program. Although different jurisdictions have different systems in place, there are a few cornerstones of an effective leniency program which need to be adopted irrespective of the form of leniency program in place.

The first ingredient is the threat of severe sanctions in case of detection. The cartel offenders who lose the race of applying for leniency should be slapped with hefty fines so as to create a deterrent effect. Such serious punitive measures would help establish a situation where the probable risks of detection would far exceed the expected rewards from engaging in cartel activities. The fines should be revenue-based and big enough so that they are not dismissed by offenders as a cost of business. The European Commission has set solid precedents by imposing heavy penalties. It has

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[13] Rosa M. Abrantes-Metz & Albert D. Metz, *The Future of Cartel Deterrence and Detection*, 1(2) ANTITRUST CHRONICLE 12 (2019).

[14] Scott D. Hammond, *Cornerstones of an Effective Leniency Program*, THE UNITED STATES DEPARTMENT OF JUSTICE (Nov. 22, 2004), https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program.

[15] Scott D. Hammond, *The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All*, THE UNITED STATES DEPARTMENT OF JUSTICE (Oct. 17, 2006), https://www.justice.gov/atr/speech/us-model-negotiated-plea-agreements-good-deal-benefits-all.

slapped fines amounting up to 7.3 Billion USD in the last three years (2016-18), with the auto industry cartels suffering the most damage.[16]

Secondly, there should be a genuine threat of detection without which stiff fines would be of little help. If the businesses engaged in cartel activities do not feel the threat of being caught then it is less likely that they would come forward. The authorities should create an atmosphere where businesses suffer from a constant threat of being caught. The authorities should be bestowed with all forms of law enforcement powers to investigate. The "stick" is as important as the "carrot" for a leniency program to be successful. Furthermore, an individual leniency program, wherein an employee of a firm has the discretion of filing a leniency application, would create even more fear among the cartels and authorities can feed off of it.

Finally, transparency of the highest degree is of utmost importance for successful implementation of a leniency program. Leniency programs depend on the applicants to self report their involvement and bring in insider evidence against other cartel members. This would be almost impossible in practice, without the applicant's trust and confidence in the competition agency. Prosecutorial discretion should be minimised as much as possible so that leniency applicants can be certain about the fate of their application. The applicants won't be willing to share information on the working of the cartel if the competition authority doesn't ensure certainty in application of the attractive provisions.[17]

## II. SHORTCOMINGS OF THE LENIENCY PROGRAM IN INDIA

The leniency program in India is guided by Section 46 of the Act and the Regulations as amended in August 2017. The amendment brought much needed clarity and additional incentives for leniency applicants but fell short on certain fronts. It continues to be plagued by shortcomings which need to be addressed in order to make it more effective. Discussed below are some of the most obvious flaws in the leniency program, elucidated with the help of recent orders of the CCI.

### A. DISCRETIONARY IMPLEMENTATION OF THE MARKER SYSTEM

The Regulations[18] provide for a priority status marker system. It provides for a reduction in penalty up to or equal to 100% to the first applicant which makes a "full, true and vital" disclosure about the cartel, helping the CCI make a "prima-facie opinion" about it. Applications marked second in

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[16] Philip Mansfield, *Global Cartel Enforcement Repor*t, ALLEN & OVERY (2019), https://www.allenovery.com/global/-/media/allenovery/2_documents/news_and_insights/campaigns/global_cartel_enforcement_control/global_cartel_enforcement_report_-_2019.pdf.

[17] Xavier Groussot & Justin Pierce, *Transparency and Liability in Leniency Programs: A Question of Balancing?*, LUND UNIVERSITY LEGAL RESEARCH PAPER SERIES (2015).

[18] The Lesser Penalty Regulations, *supra* note 4, Regulation 5.

the priority order may be rewarded with reductions up to 50%.[19] Similarly, applications marked third in the priority and subsequent to the same may be granted with reductions in penalty up to 30%[20] for disclosures which provide "significant added value to the evidence".

A leniency applicant has to file a marker with the CCI, either through email or fax or orally,[21] following which, a time period of 15 days will be provided to the applicant to furnish a comprehensive application with details to form evidence against the working of the cartel. It is then left to the discretion of the CCI to decide if the evidence at its disposal makes up for a "full, true and vital" disclosure and if it helps in making a "prima-facie opinion" regarding the cartel, whose existence was hitherto unknown to the Commission.[22]

The Regulations provide the CCI with a lot of discretion while granting leniency as per the marker system. An applicant who has approached the CCI using the marker system and has been accorded the first priority status might not be awarded with complete reduction in penalty if the commission decides that the evidence provided wasn't a "full, true and vital" disclosure.

In In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items,[23] the CCI awarded a reduction in penalty of 75% to the first and only leniency applicant. The Commission stated that the evidence provided by the applicant and the cooperation extended by them was satisfactory and played a crucial role in uncovering the cartel's activities. However, the CCI in its order justified its decision of not granting full immunity to the applicant by noting that although the applicant was the first to approach the Commission its application was submitted at a later stage of the investigation when the CCI was already in possession with email evidence provided to it by the CBI.

A similar stance was taken by the CCI in *Nagrik Chetna Manch v. Fortified Security Solutions and others*[24]where the first applicant was denied complete leniency and was granted a reduction in penalty of only 50% despite providing the commission with evidence and cooperation which helped it uncover a cartel in relation to two tenders. The CCI noted that the first applicant was denied complete leniency because of the time period in which the application was received, i.e., after the DG investigation had commenced.

Furthermore, the Commission makes use of a concept known as "significant value addition" while determining the reduction in penalty of the second, third and subsequent applicants. In *In re:*

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[19] *Id.* Regulation 4(c)(i).
[20] *Id.* Regulation 4(c)(ii).
[21] *Id.* Regulation 5(1).
[22] *Id.* Regulation 4(a).
[23]In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Suo Moto Case No. 03 of 2014, CCI.
[24]Nagrik Chetna Manch v. Fortified Security Solutions and others, Case No. 50 of 2015, CCI.

*Cartelization in respect of zinc carbon dry cell batteries market in India,*[25]the CCI extended a very limited benefit of the leniency program to the second and third applicant by granting them a reduction in penalty of 30% and 20% respectively because the disclosure made by the applicants did not make significant value addition to the existing evidence against the cartel. However, *In Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters*,[26] the CCI granted a reduction in penalty of 30% to the second applicant even though the disclosure made significant value addition.

The above cases underscore the discretionary power at the disposal of the Commission while deciding the quantum of reduction of an applicant. The marker system is not as concrete as it should be and as a result two applicants in a similar position may be treated differently by the CCI. The leniency program won't be seen as an incentive unless the applicants are certain about the rewards. The lack of certainty would create doubts and act as a deterrent for the applicants seeking benefits from the leniency program and would chip away its efficacy.

### B. CONCERNS REGARDING CONFIDENTIALITY

The Regulations direct the CCI to treat the applicant's identity and all the information provided by it as confidential unless "(i) the disclosure is required by Law; or (ii) the applicant has agreed to such disclosure in writing; or (iii) there has been a public disclosure by the applicant."[27]There are widespread concerns regarding confidentiality of identity and information. The applicants furnish a lot of details as part of their leniency application and that might put them at the receiving end of litigation for breaching contractual obligations and cause irreversible reputational loss in the industry.

In the *Nagrik Chetna Manch Case*[28] the applicants sought all its disclosure to be confidential and not be made a part of the DG's report. However, a distinction was created between the applicant's disclosure under the regulations and the information gathered by the DG as part of his investigation. Subsequently, the statements given by the applicants to the DG during the investigation which was later reproduced as part of the applications were made public as part of the DG's report. The CCI disregarded the cooperation and disclosures made by the applicants and made the information public. Such actions by the Commission would deter applicants which in turn would weaken the leniency program. A more pragmatic and applicant friendly approach is necessitated from the Commission. The CCI should be more considerate of the interests of the

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[25] *In re: Cartelization in respect of the Zinc Carbon Dry Cell batteries market in India*, Suo Motu Case No. 02 of 2016, CCI.

[26] *In Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters*, Suo Motu Case No. 02 of 2013, CCI.

[27]The Lesser Penalty Regulations, *supra* note 4, Regulation 6.

[28]Nagrik Chetna Manch v. Fortified Security Solutions and others, Case No. 50 of 2015, CCI.

applicants so as not to put them under risk which in turn would make the program attractive for potential applicants.

Moreover, in cases where leniency applications do not result in the discovery of any cartel, like in, *In Re: Alleged cartelization in flashlight market in India,*[29]the applicants suffer losses because of the detailed order but no gain is yielded to the CCI. The Commission should contemplate alternatives to passing detailed final orders in such cases, a closure statement with minimum details for example.

### C. Absence of Amnesty and Penalty Plus Provisions

Amnesty and Penalty plus are dynamic strategies used by successful antitrust authorities as part of their leniency programs. The Amnesty Plus provisions induce applicants who are currently under investigation to come forward with complete disclosure of their antitrust crimes and reveal their involvement in other cartels in a separate market.[30]It offers an applicant in an ongoing investigation, where there's no certainty of lenient treatment, a guaranteed and complete exemption from penalty in the case of the second cartel affecting a separate market.[31] Penalty Plus is the opposite number to Amnesty Plus, if Amnesty Plus is the carrot, Penalty Plus is the stick. As per Penalty Plus, when an applicant in an ongoing investigation passes on the opportunity to avail the benefit extended by Amnesty Plus and gets caught for the second time, their actions are more severely penalised than what they actually warrant.

Amnesty and Penalty Plus Provisions are currently not a part of the CCI's leniency program. The CCI's recent orders as has been discussed earlier suggest that applicants who have approached the Commission as per the marker system may not be granted the expected quantum of reduction as has been provided by the Regulations. Some applicants may not even receive any benefit at all. Such applicants could have been induced by the Amnesty and Penalty Plus Provisions had it been present. Hence, the absence of such proactive strategies prevents the CCI from gathering further information and uncovering newer cartels.

## III. Suggestions

The above discussed shortcomings can potentially undermine the current leniency program unless they are met with practical solutions at the earliest. It is imperative for the Competition Commission of India to iron out the flaws in the existing program and put in place a more efficient and effective system in line with international best practices. Some workable suggestions are

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[29]In Re: Alleged cartelization in the Flashlight market in India, Suo Motu Case No. 01 of 2017, CCI.
[30]Scott D. Hammond, *Cornerstones of an Effective Leniency Program*, The United States Department of Justice, (Nov 22, 2004), https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program.
[31]Catherine Roux and Thomas von Ungern-Sternberg, *Leniency Programs in a Multimarket Setting: Amnesty Plus and Penalty Plus*, CESifo Working Paper Series Munich, (2007).

presented below which, if implemented, would make the program a lot more attractive to potential applicants and further its efficiency as an enforcement tool.

### A. Remove discretionary power of the Commission and increase transparency

The Regulations grant the Commission with a lot of discretion while deciding the quantum of reduction to an applicant who has approached the Commission using the marker system. In some cases the CCI might not even extend the slightest of benefit to an applicant. Moreover, a reading of some of the CCI's final orders on leniency applications show the differential treatment meted out to applicants in similar positions. The lack of transparency and predictability acts as an obstacle for possible applicants and reduces the efficacy of the program.

The provisions regulating the marker system should be amended and the discretionary power of the Commission should be reduced so that applicants can be sure about what to expect. Furthermore, explanation as to what constitutes a "vital disclosure" and "significant value addition" should be inserted in the regulations so as to improve transparency and predictability.

### B. Need for more confidentiality

There is a lot of concern regarding confidentiality among applicants owing to the nature of disclosures made by them. The information provided by applicants has the potential to threaten their defence in case of future disputes with other cartel members on the issue of breach of contractual obligations and the like.

The Regulations have provided discretion to the DG and CCI to disclose information furnished by the applicant as part of its application, if so is required by law. Further, the DG has been granted the discretion of disclosing information furnished by an applicant to any party for the purposes of investigation even if the applicant has not agreed to such disclosures. This can be done on the condition that the reasons for disclosure are recorded in writing and prior approval is taken from the CCI.[32]

The regulations guiding confidentiality need to be amended and the discretionary power granted to the DG and the Commission should be removed. Confidentiality of identity and disclosure of the applicants should be absolute, only then will potential applicants look at the program as an incentive. If the applicants fear that the risks emanating from applying for leniency outweigh the possible benefits then they will shy away from approaching the CCI and that would undermine the leniency program

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[32] The Lesser Penalty Regulations, *supra* note 4, Regulation 6.

### C. Introduce Amnesty and Penalty Plus provisions

The absence of Amnesty and Penalty Plus provisions is a serious shortcoming of the Indian leniency program. There are many benefits of such provisions as has been discussed in the previous section. Businesses today are more interconnected than ever and have a presence in more than one market which means more networks and agreements across numerous markets. In the 1990s, the US program convicted a dozen international cartels which were repeat offenders in related markets.[33] In 2004, the US Department of Justice was investigating about 50 purported international cartels, half of which were uncovered during investigations on separate markets.[34]

The US authorities have demonstrated the immense benefits of the Amnesty and Penalty Plus Provisions. In India, it has been seen that many applicants don't receive any benefits of the program and these applicants can be induced to reveal about other cartels in related markets if the Amnesty and Penalty plus provisions are implemented. It is a much needed tool and would greatly benefit the Commission in uncovering unknown cartels and gathering fresh information. Hence, such provisions should be introduced as a part of the current leniency program.

### D. The CCI should stop publishing detailed disclosures in the final order

The Commission passes very detailed orders which include the identity of the applicant, the disclosures made by it, mode of operation, customers and much more. This puts the applicants at serious risk and exposes them to litigation by parties who were exposed through the disclosures. The possibility of facing such a situation may act as deterrence for possible applicants which in turn would work against the leniency program. Hence, the final orders of the CCI which are published for the public should not include detailed disclosures and instead should be a shorter non-confidential version with minimal disclosure of information furnished by applicants.

Furthermore, when a leniency application does not lead to uncovering a cartel, like in the In *Re: Alleged cartelization in flashlight market in India,*[35]the CCI should avoid passing detailed orders and instead issue a closure statement with minimal details so as not to affect the applicant's interests.

### E. Implement severe sanctions in case of detection

There should be severe sanctions in place for those who do not apply for leniency and are found guilty of being involved in cartel activities. The sanctions in case of detection should far outweigh the potential rewards from a cartel. In most cases cartelists are aware of the laws that they will be

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[33] Connor J. M., *International Price Fixing: Resurgence and Deterrence*, delivered at Purdue University (2003).
[34] Scott D. Hammond, *Cornerstones of an Effective Leniency Program*, The United States Department of Justice (Nov. 22, 2004), https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program.
[35] *In Re: Alleged cartelization in the Flashlight market in India*, Suo Motu Case No. 01 of 2017, CCI.

breaking when they enter into agreements. The sanctions in case of detection don't deter them as the possible rewards outweigh the risks and penalties are seen as business costs. Hence, they are not induced by the leniency program.

Individual jail sentences have the potential to create genuine fear and would act as a great inducement to cooperate and disclose details of the cartel. A jurisdiction with only financial sanctions will not be as effective as a jurisdiction having both criminal as well as financial sanctions. However, heavy financial sanctions like the ones imposed by the European authorities might make up for the lack of criminal sanctions in a jurisdiction. The penalties imposed should be huge so as not to be dismissed as cost of business and instead should be able to cripple firms financially and instil genuine fear among cartelists. Hence, the CCI should consider introducing individual criminal sanctions and should slap massive financial sanctions on cartelists who are found guilty. This would prompt cartel members to report their activities and cooperate with the Commission.

Moreover, the CCI should step up its efforts with regard to investigations so that cartelists feel the threat of detection. A leniency program thrives when cartelists perceive a high risk of being caught, without which, serious sanctions will be of little value. The "carrot" can be an effective bait only when there is a constant fear of being hit by the "stick." This can be done by increasing investigations and keeping cartels under constant threat. The perfect situation is when the risk of being caught is high, consequences of detection are severe and the rewards of self-reporting are great. So, the CCI should be granted access to all possible law enforcement tools so as to make their investigations more effective and create a persistent threat of detection which would make cartels unstable and induce members to self report.

## CONCLUSION

The objective of the CCI's leniency policy is to uncover cartels by luring cartel members into providing vital insider information in exchange for reduction in penalty. In order to realize this objective, the CCI should implement strategies which incentivize applicants to approach the Commission which in turn would make the program attractive to potential applicants. However, the present leniency program hasn't been quite applicant-friendly and has been left wanting on various fronts.

This article has critically analysed various shortcomings of the present leniency program after evaluating the Regulations and final orders passed under it. The most prominent flaw which threatens to undermine the program is the lack of predictability and transparency owing to prosecutorial discretion exercised by the Commission. If applicants can't be certain about the possible benefits then they won't see the program as an incentive and that would cripple the program. Additionally, there are serious concerns regarding confidentiality of disclosures which makes potential applicants wary of the program. The information furnished by applicants are of very sensitive nature and public disclosure of their identity and their information would jeopardise their interests. It was also observed that the current program lacks dynamic tools like the Amnesty

and Penalty Plus Provisions which have proved to be of great success in other jurisdictions. Such provisions act as great incentives for self reporting conduct without which a leniency program won't be fully effective.

This article has proposed and discussed various workable suggestions to enhance the fledgling program after taking consideration of its shortcomings. Firstly, the Regulations governing the implementation of the marker system should be amended. The discretionary powers of the CCI have to be curbed so as to bring predictability and make the program attractive to prospective applicants. Standards and policies regulating the leniency program should be explicitly stated and adhered to by the Commission. Secondly, the concerns regarding confidentiality should be addressed. The confidentiality of identity and disclosures made by applicants as part of their application should be absolute. The CCI should exclude detailed disclosure of information in their final orders unless explicitly agreed to by the applicant. Moreover, a pragmatic and applicant-friendly approach should be adopted by the Commission which shall safeguard the interests of the applicants. Thirdly, proactive tools like Amnesty Plus and penalty Plus provisions should be introduced in order to provide additional incentives and make the leniency program more attractive. These provisions would significantly aid the Commission in detecting unknown cartels and gathering new information. Lastly, the Commission should ramp up investigations and introduce severe sanctions in case of detection so as to create an environment of continuous threat. The persistent threat of detection and being slapped with severe sanctions will make cartels unstable and start a race towards confessions. The Commission should contemplate implementing criminal sanctions and should be empowered with all the tools of law enforcement so as to effectively achieve this goal. The program would become a lot more applicant friendly and effective if the suggestions proposed herein are incorporated.

The Indian leniency program is still at a nascent stage and is evolving with every new application and order. The Competition Commission of India has the advantage of learning from the experiences of other mature jurisdictions and incorporating the best practices. The government had instituted the Competition Law Review Committee chaired by the Ministry of Corporate Affairs' Secretary Injeti Srinivas in September 2018. The Committee's objective was to review Competition law in India, strengthen it and calibrate it in accordance with international best practices.[36]This is a step in the right direction and might help strengthen the leniency program by making it more efficient and attractive.

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[36] Ministry of Corporate Affairs, *Government Constitutes Competition Law Review Committee to review the Competition Act*, PRESS INFORMATION BUREAU (Sep. 30, 2018), http://pib.nic.in/newsite/PrintRelease.aspx?relid=183835.

The present leniency program requires a revamp as has been established by this article. Therefore, the CCI should work towards building a robust and dynamic leniency program by involving stakeholders, collaborating with foreign commissions and engaging in India centric research.

# INTERSECTIONALITY OF LAW, RELIGION AND NATIONALISM: THE *'OTHERING'* OF MUSLIM WOMEN AND ISLAMIC FEMINISM IN INDIA

Dr. Garima Tiwari*

Contemporary India is highly complex, volatile and diversified. The universal human rights principles and other international norms that guide secular feminists for women empowerment, get fragmented and vernacularized when the question of religious personal laws is raised. The *Shah Bano* case was a momentous feat for the rights-based demands of Muslim women in India, and recent decisions including the Triple Talaq judgment have also highlighted some progressive strands. However, as the discussion on public and private spaces of personal law is scrutinized from the vantage of secularism and religious specificity, it projects itself predominantly as a communal issue within the public domain and not merely a question of equality or empowerment of women in the family structure. Thus, the paper studies the "othering" of Muslim women and intersectionality of nationalism, the law, and religion in the context of women's rights in India, by reviewing literature, judicial decisions and an analysis of women's rights movements.

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## INTRODUCTION

Law, morality and religion have often collided with each other and yet they intersect in their knowledge, values, contexts and policy inferences. While most liberalised South Asian countries have opened up their economies to an international legal order, religion remains a crucial factor in domestic governance of these countries and projects itself at the vanguard of politics. *National* constitutional tenets often interact with the *international* norms and in this interaction, religiosity intertwines itself with the "grand rights" agenda.[1] Religion, despite its higher appeal and value laden discourses, has been accused of initiating and perpetrating riots, wars, conflicts and disturbances. Further, the "pluralistic" feature of these South Asian countries dense with gender connotations, does not make the situation any better as practically all religions have produced their own species of radicalism and disdain for the common and secular rights.[2] Within this matrix of national, international and religiosity, the demands of secular feminists get fragmented and vernacularized.[3] Over the years, various scholars like *MacKinnon*[4] and *Marc Galanter*[5] have suggested that the Indian judiciary has shown reluctance in application of equality laws to personal laws and thereby, failed to assess them on the benchmark of fundamental rights. Decisions like *Triple Talaq*[6] did try to adopt a progressive approach towards Muslim women in India and consequently, it may be argued that the court had attempted to deal with critical issues of personal laws, sometimes appeasing, and sometimes attempting to be courageous despite facing retaliation. Therefore, as the discussion on public and private spaces of personal law is scrutinized from the perspectives of secularism and religious specificity, it projects itself predominantly as a communal issue within the larger nationalism rhetoric and not merely as a question of equality.

Thus, in a multicultural Indian society, when rights are curated through Constitutional mechanism, and the arguments are based on personal laws, there is an underlying "othering" of Muslim women.[7] The "secularising" aspects of globalisation have failed to account for the bottom

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[1] Garima Tiwari, *Gendered Decision Making: The Engagement of the Supreme Court of India with International Norms in the area of women's rights*, 51 VRÜ 499-513 (2018).
[2] Ran Hirschl & Ayelet Shachar, *Competing Orders: The Challenge of Religion to Modern Constitutionalism*, 85 U. CHI. L. REV. 425 (2018).
[3] Michael G. Peletz, *Gender Pluralism: Muslim Southeast Asia since Early Modern Times*, 78(2) SOC. RES. 659, 662 (2011).
[4] Catharine A MacKinnon, *Sex Equality under the Constitution of India: Problems, Prospects, and Personal laws*, 4(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 181-202 (2006).
[5] Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISRAEL LAW REVIEW 101, 106–11 (2000).
[6] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[7] Martha C. Nussbaum, *India: Implementing Sex Equality through Law*, 2 CHI. J. INT'L L. 35, 47 (2001).

up and parochial ideologies that aim to preserve their religiosity.[8] There is an abundance of literature on the friction between law and religion and it is asserted that legal techniques must mitigate this friction.[9] The paper studies the "othering" of Muslim women and the intersectionality of law, religion and nationalism for the Islamic feminist movement in South Asia and specifically India. The first part of the paper elaborates on the multifaceted intersectionality in the area of Islamic feminism. The next part extrapolates a critical perspective on Indian Islamic feminism and its localising goals and finally, and the final part provides a concluding analysis. .

## I. NATIONALISM, RELIGION AND FEMINISM: A MULTIFACETED INTERSECTIONALITY

In the late 80's and 90's, the Islamic women who openly depicted their religious identity started speaking about the restricted 'typical' description of an ordinary Muslim woman. They argued radically for substantive equality of genders and promotion of women's rights as may be interpreted through the reading of the Quran. This was termed as Islamic Feminism by the secular feminists.[10] The dawn of twenty-first century saw a worldwide Islamic feminist movement ready to assert their presence. During this period, a Muslim woman was considered a representation of Islamic subjugation and the global perception of Muslim women called for a "woman-sensitive and gender-egalitarian version of Islam."[11]

Religion and gender therefore, kept feeding the feminist movement. An intersectionality analysis requires a study of more than one "identity marker"[12] which in this paper would be: religion, nationality and gender. South Asian countries have witnessed parallel progress in "developmental nationalism" and "cultural nationalism" each one stronger than the other on different occasions.[13] Nationalism remains critical to governance, despite the predictions of its demise by the

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[8] T.L. Friedman, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALISATION (Farrar, Straus, and Giroux eds. 1989); S.P. Huntington, *The Clash of Civilizations in* GLOBALIZATION AND THE CHALLENGES OF A NEW CENTURY 3-23 (P.O Meara et al. eds. 2000).

[9] Ayelet Shachar, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (Cambridge University Press 2001).

[10] *See* M Badran, *Between Secular and Islamic Feminism: Reflections on the Middle East and Beyond*, 1(1) JOURNAL OF MIDDLE EAST WOMEN'S STUDIES 6-28 (2005).

[11] Chandra Mohanty, Introduction *in* THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM 1-50 (Chandra Talpade Mohanty et al. eds. 1991).

[12]Aisha Nicole Davis, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28 HARV. HUM. RTS. J. 205 (2015).

[13] Radhika Desai, *Conclusion: From Developmental to Cultural Nationalisms* 29 (3) Third World Quarterly 647-670, 647 (2008).

"globalisation thesis".[14] Here, *Okin's*[15] assertion that integration and assimilation of the minority community with the secular motives may be considered oppressive today becomes relevant.[16] This highlights the current dilemma of South Asian and the Indian Islamic feminists when seen in contrast with the generally propagated ideas of women's rights by the secular feminists or the liberal states.[17]

Secularism does not imply "irreligion"[18] and Islamic feminism is not feminism against its religion as a whole. It is manifestly against the regressive practices within the religion. All societies with varying socio-cultural arrangements have witnessed some form of discrimination based on gender.[19] However, the criticism of regressive religiosity for women's rights, applies to some nations only i.e. the developing or Third World countries and the developed nations escape the blame. [20] This "Third World Feminism" highlights that, "the putative distinction between the economic and the cultural is itself another moment in the production of each-a denial of the culture of the economy and the economics of culture."[21] Thus, nationality intersects with women's rights and some women are made subjects of pity, not because they are marginalised but because they belong to a particular nation and a specific religion.[22] Feminists do not delve deeper into this form of intersectionality because, despite their demands for a secular humanist religion and awareness of the regressive patriarchal elements of their religion, their own engagement with the religion is mostly reactive[23]and not proactive.[24]

### A. COLONIALISM AND ISLAMIC FEMINISM

Relevant literature points to the impact of colonialism on Islamic Feminism. India and several South Asian countries were colonised by the Britishers who used the "divide and rule" policy and employed discriminations based on caste, gender and religion i.e. pluri-legal systems. These

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[14] Kecia Ali, SEXUAL ETHICS AND ISLAM: FEMINIST REFLECTIONS ON QURAN, HADITH, AND JURISPRUDENCE (One World 2006).
[15] Susan Moller Okin, IS MULTICULTURALISM BAD FOR WOMEN? 7, 9 (Joshua Cohen et al. eds. 1999).
[16] *Id.* at 7-10.
[17] Leti Volpp, *Feminism versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001).
[18] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1297 (8th edn.).
[19] Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, *in* WOMENS RIGHTS, HUMAN RIGHTS INTERNATIONAL FEMINIST PERSPECTIVES 11,12 (J. S. Peters & Andrea Wolper eds. 1994).
[20] Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?* 23 HASTINGS CON. L. Q. 727, 739, 800-05 (1996).
[21] Vasuki Nesiah, *The Ground Beneath Her Feet: TWAIL Feminisms in* THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION 133, 140-41 (Antony Anghie et al. eds., 2003).
[22] The concept of "Self-Reflexivity" becomes important here. *See* Karen Knop et al., *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589, 600, 601 (2012).
[23] Gabriele Dietrich, REFLECTIONS ON THE WOMEN'S MOVEMENT IN INDIA (Horizon Books 1992).
[24] Bandana Purkayastha et al., *The Study of Gender in India: A Partial Review*, 17(4) GEND. SOC. 503-524 (2003).

systems continued to exist in countries like India and Indonesia post-independence and differential standards of equality based on religion also entered the new socio-legal regimes.[25] Some have termed this inheritance of pluri-legal systems as, "an anachronistic legacy of colonialism."[26] None of the newly independent countries in South Asia seem to have sought the suggestions and opinions on women when it came to continuance of these personal law-based systems and it was the men of the communities that articulated the rules of the family by gender unequal interpretations of religions and traditions.[27] The other view is that, personal laws like Sharia law, preceded the birth of constitutionalism and therefore, the new forms of governance merely replaced the religious systems. Cumulatively the two views aver that religion continues to play an important role with or without colonialism and constitutionalism.

### B. INTERNATIONAL LAW, NATIONAL LAW AND PERSONAL LAWS

While Islam may have traditions that harm women, law in itself has been considered as androcentric and hence, ineffective in bringing reforms.[28] The grand rights which international law requires the domestic systems to adhere to, get obscured as international law emerges from municipal law itself and under the garb of sovereignty the states may refuse to surrender control over critical areas like religion.[29] For example, reservations in Convention on the Elimination of all Forms of Discrimination Against Women, 1979 based on religion, stifle its wholesome application.[30]This relinquishment of sovereignty usually does not contemplate the zone of women's rights, particularly in private space. Thus, even international law takes cue from domestic systems and becomes male-centric because it is constructed upon the idea of sovereignty and state consent.[31]

International law, national law and personal laws, therefore, all have androcentric biases and traditions which discriminate against women. In both Occidentalism and Orientalism approaches, the Other Woman and one's "own" woman are central, and the former is usually abhorred while the latter is idealized. Thus the "native" women ought to be satisfied with their advantageous

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[25] *See generally* Mahmood Mamdani, CITIZEN AND SUBJECT CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM (1996).

[26] John Griffiths, *What Is Legal Pluralism?* 24 JOURNAL OF LEGAL PLURALISM & UNOFFICIAL LAW 1, 6 (1986).

[27] Asma Barlas, BELIEVING WOMEN IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QUR'AN 94-95 (University of Texas Press 2002); Judith E. Tucker, WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW 30-31 (2008).

[28] Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AJIL 613- 645, 621 (1991).

[29] *Id.*

[30] Aniekwu, *The Convention on the Elimination of All Forms of Discrimination against Women and the Status of Implementation on the Right to Health Care in Nigeria* 13(36) HUM. RTS. BRIEF 38 (2006).

[31] Hilary Charlesworth, *Feminist Critiques of International Law and Their Critics*, Third World Legal Studies 1, 2-3 (1994).

position in the society as in comparison to the "other" they are treated well.[32] Treating a Muslim woman as an "other" suggests that she is absolutely and essentially different and hence, would not adhere to the existing standards of an "ideal" woman. Influence of the concept of "Westoxification" is therefore seen as adverse. [33] In India too, some judgments like the *Hirjibhai v. State of Gujarat* [34] used this 'othering' approach in rape cases when the Supreme Court differentiated an ideal Indian woman as incapable of lodging a false complaint of rape as opposed to a westernised one.

Feminism may however, contradict with the Orientalist position when it searches for a "sovereign female candidate" and tries to give her a voice. [35] Muslim women in different countries experience the effects of their religion differently.[36] They may be considered as an "other" racially like in the United States of America or because of their nationality like in Iran. They could also be labelled as a part of a social movement opposing the existing activism like in Egypt or they could a minority religion in a secular nation like in India. In Pakistan for example, within the Islamic fundamentalist agenda, the feminists have found support in the nationalistic political movements where they converge the "secular" and "religious" by delving into the issue of modernity and secularism as a means to women empowerment.[37] To speculate feminism and multiculturalism as contradictory to each other is to suggest that such "other" women are perpetually victimised in their cultures.[38] As has been argued, feminism is, "becoming prone to paralysis by cultural difference, with anxieties about cultural imperialism engendering a kind of relativism that [has] made it difficult to represent any belief or practice as oppressive to women or at odds with gender equality."[39] Islam owing to its presence in other raging issues like terrorism etc, gets more focus and consequently, more "othering".

Therefore, Islamic feminism narratives particularly in South Asian context, seem to hinge on intersectionality of several factors like colonialism, secular visions of state, nationalistic agendas, androcentric nature of law and of course, religion and its interpretations.

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[32] Synnøve Bendixsen, THE RELIGIOUS IDENTITY OF YOUNG MUSLIM WOMEN IN BERLIN: AN ETHNOGRAPHIC STUDY 110, 112 (Brill 2013).

[33] The term Westoxification has been coined by Iranian secular intellectual Jalal al-e Ahmad. He coined the term Gharbzadegi and it is variously translated in English as: "western-struck"; "westoxification", and "Occidentosis"; *See also* Brumberg, REINVENTING KHOMEINI: THE STRUGGLE FOR REFORM IN IRAN 65 (University of Chicago Press 2001).

[34] *Hirjibhai* v *State of Gujarat*, 1983 SCR (3) 280.

[35] Julie Stephens, *Feminist Fictions: A Critique of the Category 'Non-Western Women' in Feminist Writings on Indian Women in* SUBALTERN STUDIES 92-131 (Ranajit Guha ed., 6th edn. 1989); *See also* Shahnaz Khan, *Muslim Women: Negotiations in the Third Space*, 23(2) SIGNS 463-494 (1998).

[36] Miriam Cooke et al., *Roundtable Discussion: Religion, Gender, and the Muslimwoman*, 24 (1) JFSR 91, 95-98 (2008).

[37] Amina Jamal, *Feminist 'Selves' and Feminism's 'Others': Feminist Representations of Jamaat-e-Islami* Women, 81 PAKISTAN FEMINIST REVIEW 52-73, 53 (2005).

[38] Leti Volpp, *supra* note 16.

[39] ANNE PHILLIPS, MULTICULTURALISM WITHOUT CULTURE 1 (2007).

## II. INDIAN ISLAMIC FEMINISM: (UN)SECULARISING AND LOCALISING THE MOVEMENT

### A. THE NEED FOR A SECULAR CODE

Secularism is presumably in the veins of the Indian Constitution[40] and the fundamental right to freedom of religion is enunciated under Article 25 of the Constitution of India extending equally to citizens and non-citizens. Additionally, the Directive Principles of State Policy give aspirational "hope"[41] for a "[u]niform civil code for the citizens"[42]. Since the 1950s, Indian Islamic feminists argued for a secular UCC as a means for women empowerment and as a means to curtail the hold of religion on women. However, in the mid-1980's there was a change in the movement both conceptually and philosophically and the women organisations in India re-worked on their strategies to bring reform from within.[43] This was the result of the state's apathy and an understanding that Hinduism and its propagators would malign their genuine claims of women's rights with a fundamentalist agenda. Legislature has time and again, failed to break the shackles of religion and male domination for Muslim women and had speciously indulged in a "compromise with patriarchy".[44] Thus, in South Asian societies the debates around feminism got convoluted with the idea that even a secular code would necessarily be skewed and favour the majority religion.

This move from secular feminism to feminism seeking emancipatory validation and reform from the religion itself, also suggested that UCC was not really a demand for Indian Islamic feminists anymore.[45] The feminist slogan, of the personal being political emphasises the fact that private can fall within the public domain.[46] This aligns with *Amartya Sen*'s "dominant approach" to secularism in India as "a basic symmetry of treatment" of different religions, and not a claim for no-state involvement at all.[47] However, it must be recalled that the androcentric nature of law may cause

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[40] Kesavanada Bharti v State of Kerala, AIR 1973 SC 1461; Indira Swahney v Raj Narain, AIR 1975 SC 2299.
[41] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (Oxford Clarendon Press 1966).
[42] INDIA CONST. art. 44.
[43] Flavia Agnes, *Constitutional Challenges, Communal Hues and Reforms Within Personal Laws*, 3 COMBAT LAW 4-10 (2004).
[44] Haideh Moghissi, FEMINISM AND ISLAMIC FUNDAMENTALISM: THE LIMITS OF POSTMODERN ANALYSIS (Zed Press 1999); Madhu P. Kishwar, DEEPENING DEMOCRACY: CHALLENGES OF GOVERNANCE AND GLOBALIZATION IN INDIA (Oxford University Press 2008); Flavia Agnes, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA (Oxford University Press 1999).
[45] Zoya Hasan, SECULARISM, LEGAL REFORM AND GENDER JUSTICE IN INDIA, IN DISSOCIATION AND APPROPRIATION: RESPONSES TO GLOBALIZATION IN ASIA AND AFRICA 137-150, 138 (Katja Füllberg-Stolberg et al. eds., 1999).
[46] Ruth Lister, *Tracing the Contours of Women's Citizenship*, 21(1) P&P 3, 3-4 (1993).
[47] AMARTYA SEN, THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN HISTORY, CULTURE AND IDENTITY 296 (Penguin 2006).

the state to strategically intervene in some, "private issues but not in others. Rules about who may marry, age, and the appending rights and duties are made by the state as also the rules governing divorce, child custody, and inheritance"[48]

### B. THE CHANGE FROM "WITHIN": JUDICIARY AND LOCALISING THE MOVEMENT

While localising and looking within the religion, the movement still remains transnational[49] and there has been some improvement in the socio-legal position of Muslim women in India.[50] This merger of local and transnational is subjected to pluralistic visions which argues that the Muslim women should interpret Quran themselves and not rely on the religious authorities to explain the true meaning of an "Ideal Muslim Woman".[51] Hence, Indian Islamic feminism could also be termed as a "discursive praxis"[52] that is vernacularized and localised to specific and local frameworks.

Cases like the *Shah Bano*[53] opened up avenues for discussion on the rights of a Muslim woman and yet, raised questions on the secular strategy of the movement that created religious polarisation in the country.[54] The Court in *Bano* sidestepped Muslim personal law and interpreted and quoted Quran to legitimize its decision. The uproar came from the fact that the Court directed the Legislature and not the religious leaders, to take forward the reform of their religious personal law.[55] Thus, while many women hailed it, the decision was deeply unpalatable for many Muslim men and even women.[56] To pacify the unrest, Muslim Women (Protection of Rights on Divorce) Act, 1986[57] was enacted that validated Sharia's maintenance stand and exempted it from Section 125 of the Code of Criminal Procedure, 1973. Bano also subsequently denied the ruling through a letter and this is evidence of her being conflicted by the pressures of religion versus rights debate.[58]

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[48] Gayle Binion, *Human Rights: A Feminist Perspective,* 17(3) HUM. RTS. Q. 509, 519 (1995).
[49] BARLAS, *supra* note 27; AMINA WADUD, INSIDE THE GENDER JIHAD: WOMEN'S REFORM IN ISLAM, (National Book Network 2006).
[50] Dale F. Eickelman & Jon W. Anderson, *Redefining Muslim Publics in* NEW MEDIA IN THE MUSLIM WORLD: THE EMERGING PUBLIC SPHERE 1-17 (Bloomington IUP 1999).
[51] Nadja-Christina Schneider, *Islamic Feminism and Muslim Women's Rights Activism in India: From Transnational Discourse to Local Movement - or Vice Versa?*, 11 (1) J. INT. WOMEN'S STUD. 56-71 (2009).
[52] Sylvia Vatuk, *Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law*, 42 MODERN ASIAN STUDIES 489 (2008).
[53] Mohammed Ahmed Khan v. Shah Bano, 1985 SCC (2) 556.
[54] *Id.* at 846-47.
[55] Subrata K. Mitra & Alexander Fischer, *Sacred Laws and the Secular State: An Analytical Narrative of the Controversy over Personal Laws in India*, 99 INDIA REV. (2002) 119.
[56] Zoya Hasan, *Muslim Women and the Debate on Legal Reforms*, *in* FROM INDEPENDENCE TOWARDS FREEDOM: INDIAN WOMEN SINCE 1947, 126, 127 (Bharati Ray & Aparna Basu eds., 1999).
[57] The Muslim Women (Protection of Rights on Divorce) Act, 1986.
[58] Asghar Ali, *Shah Bano 's Open Letter to Muslims*, *in* THE SHAH BANO CONTROVERSY 211, 212 (Asghar Ali Engineer ed., Hyderabad Orient Longman 1987).

Hindu right-wing politicians called this enactment a compromise with the constitutional ethos and a vote politics.[59] Subsequently, it was pronounced[60] that the Muslim husband was mandated to pay maintenance to his ex-wife both during and post-iddat.[61] This, intersectionality and othering are apparent when, "women's equality rights are posited as oppositional to the recognition of minority group rights and often, as well, as oppositional to religious freedom by extension where minorities seek exemption from the application of general or secular rules."[62]

While for religious leaders, the Islamic law being divine and absolute is incapable of alteration, several Muslim reformists like *Abdullahi An-Na'im* have articulated the ambiguity and futility of differentiating the secular and religious. He notes that such dichotomy is merely a tool of oppression for women and non-followers.[63] Thus, the need as Indian Islamic feminists is for change from within the community itself.[64] The suggestion is to not only work together with the legislature and the judiciary but also personal law reforms through hermeneutic activities and "internal discourses"[65] of evolved and emancipatory interpretations. [66]

Despite the complex atmosphere of personal laws, secularism and nationalism-facing the global world dynamics, the position is changing gradually as seen in a recent judgment of *Prakash and Others v. Phulavati* [67] where the Supreme Court noted that, "In spite of guarantee of the Constitution, Muslim women are subjected to discrimination. There is no safeguard against arbitrary divorce and second marriage by her husband during the currency of the first marriage". This resulted in the controversial *triple talaq* decision of *Shayara Bano v Union of India*[68], which

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[59] S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 192 (Oxford 2002); GARY JEFFREY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 106 (Princeton 2003).

[60] Danial Latifi v. Union of India, (2001) 7 SCC 740.

[61] Werner Menski, *Double Benefits and Muslim Women's Postnuptial Rights,* 2 KERALA LAW TIMES 21-34 (2007); Noorjehan Safia Niaz, *Marriage in Islam*, 3 COMBAT LAW 25-28 (2004); Sylvia Vatuk, *supra* note 52 at 489.

[62] Vrinda Narain, *Critical Multiculturalism*, *in* FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES (Beverley Baines et al. ed., Cambridge University Press 2012); Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71 (2003).

[63] Abdullahi An-Na'im, *The Best of Times and the Worst of Times: Human Agency and Human Rights in Islamic Societies*, 1 MUSLIM WOMEN JOURNAL OF HUMAN RIGHTS 11, 12 (2004).

[64] Mengia Hong Tschalaer, *Muslim Women's Rights Activists' Visibility: Stretching the Gendered Boundaries of the Public Space in the City of Lucknow*, SAMAJ 11 (2015).

[65] Abdullahi An-Na'im, *Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, *in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 19-43 (Abdullahi An-Na'im ed., 1991).

[66] Zoya Hasan, *Minority Identity, State Policy and Political Process*, *in* FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE IN INDIA 59 (Westview Press 1994).

[67] Prakash v. Phulavati, 2015 (6) CTC 576.

[68] Shayara Bano v. Union of India, (2017) 9 SCC 1.

pronounced the instant divorce of one kind (*triple talaq)* as unconstitutional. An in-depth reading of this decision would clearly show a failed opportunity to discuss women rights and Islam from a constitutional standpoint and further, that it actually does not bring in any new reform. [69] Interestingly, other South Asian countries including those with a Muslim majority like Pakistan, Bangladesh and Sri Lanka have shunned and legally banned the practice of instant *triple talaq*. Like Bano's decision, again the Islamic religious leaders have pointed to the overreach of the Supreme Court and asked for analysis from within the community.[70] As opposed to religious dogmatism, Islamic feminism is not asking for a "boxed" interpretation of such practices, what is wants is a dynamic interpretation within the socio-cultural and constitutional scheme.

From the standpoint of pluralism then, religion becomes very critical in legislative and judicial discourses. Pluralism of Sharia for women rights searches for "reclaiming the egalitarian core of Islam.[71] *MacKinnon* observes, "India's jurisprudence having come this far for women, bearing such enormous promise, one major exception stands out. Out of step is the judicial reluctance to apply sex equality principles to the personal laws."[72] This is also seen in a study of other South Asian countries where women's rights are getting localised for example a study of family laws in Pakistan by *Niaz Shah* shows Quranic discussion as opposed to the global and international positions as is done for other chapters of the same book.[73]

Western view of Islamic feminism in South Asia and in particular for India, is restricted to "triple talaq", "polygamy" and "hijab"[74] which *Ataulla* calls an "essentialist perception of Muslim women", and a "dangerous triangle"[75]. While the Indian Islamic feminism has become localised in its the religious reform agenda, it still engages with the transnational Muslim community and local institutions.[76] This engagement is important, otherwise, prevailing cultural and institutional

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[69] Galanter, *supra* note 5 at 106-11.

[70] Suchitra Mohanty & Rupam Jain, *Muslim instant divorce law ruled 'unconstitutional' by India's top court*, THE SYDNEY MORNING HERALD (Aug. 23, 2017, 3:48 AM), https://www.smh.com.au/world/muslim-instant-divorce-law-ruled-unconstitutional-by-indias-top-court-20170823-gy1yxj.html.

[71] *See, for eg*., Nahida, *Quranic Verses and Misconceptions: Divorce and Male Privilege*, FATAL FEMINIST (Jun. 16, 2012), http://thefatalfeminist.com/2012/06/16/quranic-verses-andmisconceptions-divorce-and-male-privilege.

[72] MACKINNON, *supra* note 4.

[73] NIAZ SHAH, WOMEN, THE KORAN AND INTERNATIONAL HUMAN RIGHTS LAW: THE EXPERIENCE OF PAKISTAN (Brill Publications 2006).

[74] Lama Abu Odeh, *Post-Colonial Feminism and the Veil: Thinking the Difference*, 43 FEM. REV. 26 (1993).

[75] Nigar Ataulla, *Muslim Women: The Dangerous Triangle*, Islamic Research Foundation International, http://irfi.org/articles3/articles_4001_4100/muslim%20women%20-%20the%20dangerous%20trianglehtml.htm.

[76] PEGGY LEVITT & SALLY ENGLE MERRY, UNPACKING THE VERNACULARIZATION PROCESS: THE TRANSNATIONAL CIRCULATION OF WOMEN'S HUMAN RIGHTS (2008); *See also* Radha Kumar, *From Chipko to Sati: The Contemporary Indian Women's Movement*, *in* THE CHALLENGE OF LOCAL FEMINISMS. WOMEN'S MOVEMENTS IN GLOBAL PERSPECTIVES 58-86 (Amrita Basu ed., 1995).

preconceptions will weaken the movement.[77] This "vernacularization" of global rights, through discursive praxis and hermeneutic activities brings in intersectionality in reforming the personal laws and (un)othering from within.[78] However, removing the Indian Muslim woman from this "othered" category of "passive victim "who is "too weak to fight for their rights"[79] is still a daunting task.[80] Thus, in pluralistic societies like India where religion is embedded in every little aspect of daily life, Islamic feminism faces not only a "clash of values" but also a crucial "structural clash of orders" searching for jurisdictional spaces to operate.[81] The cross-cultural transitional debate[82] therefore, flows within the Islamic community and the solution offered by *Delmas-Marty* of an "ordered pluralism" where global law succeeds in getting rid of the "contradictions of one and many" and "differences are tolerated" becomes relevant for the current South Asian feminist movement.[83]

## CONCLUSION

*Nadia* has profoundly asserted that, "women have no problem with Islam. They have a problem with power."[84] Islamic feminism in South Asia and particularly in India, has become an important point of reference and critique. Feminism in Indian context is cocooned in the perpetual controversy of personal laws versus democratic principles and personal laws versus legal pluralism Courts have tried, failed and consequently assumed a cautious approach in their deliberations of women rights in religious contexts. However, it may be said that the Supreme Court has attempted to deal with critical issues of personal laws, sometimes appeasing, and sometimes attempting to be courageous despite facing retaliation. The idea of "other" while not the judiciary's discourse, has still become evident in their refusal to engage with the issue. The nationalist secular drive for women rights has, therefore, curtailed itself to this localisation with support from Quranic interpretations where reform is sought from within. It is not an overreach to say that these

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[77] Yuksel Sezgin, *Women's Rights in the Triangle of State, Law, and Religion: A Comparison of Egypt and India*, 25 EMORY INT'L L. REV. 1007 (2011).

[78] PEGGY LEVITT & SALLY ENGLE MERRY, *supra* note 76.

[79] SABINA KIDWAI, IMAGES OF MUSLIM WOMEN: A STUDY ON THE REPRESENTATION OF MUSLIM WOMEN IN THE MEDIA 1985-2001 (WISCOMP, 2003).

[80] Amrita Chhachhi, *Forced Identities: The State, Communalism, Fundamentalism and Women in India*, *in* WOMEN, ISLAM AND THE STATE 144-175 (Deniz Kandiyoti ed. 1999).

[81] Ran Hirschl & Ayelet Shachar, *Competing Orders: The Challenge of Religion to Modern Constitutionalism*, 85 U. CHI. L. REV. 425, 427 (2018).

[82] Andrew L. Milne, *Sharia and Anti-Sharia: Ethical Challenges for the Cross-Cultural Lawyer Representing Muslim Women*, 57 S. TEX. L. REV. 449 (2016).

[83] MIREILLE DELMAS-MARTY, ORDERING PLURALISM: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRANSNATIONAL LEGAL WORLD 13 (Bloomsbury Publications 2009).

[84] Daniel Steinvorth, *Interview with Moroccan Islamist Nadia Yassine*, SPIEGEL ONLINE INT'L (Jul. 3, 2007, 2:22 PM), http://www.spiegel.de/international/world/interview-with-moroccan-islamist-nadia-yassine-ourreligion-is-friendly-to-women-a-492040.html.

fragmented personal laws have become tools of political manipulations and patriarchy. The arguments of Islamic feminists for localising the debate and segregating it from a secular agenda is on the premise of making it democratic by discarding the patriarchal elements. Further, the existing literature on Islamic feminism in South Asian countries suggests that the tag of "Islamic feminism" does not subsume all the existing feminist movements. Intersectionality requires the Muslim minority to engage with the majority community. (*Un*)othering, (*Un*)secularising and thereby, localising to Quranic interpretations has made the task of women empowerment for Islamic feminists in India very daunting. The crucial prerequisite for Islamic feminism in Asian context then becomes education, particularly Islamic education. There is a need for an intersectional study and strategy with a bottom up approach starting at grassroot levels-rather than perceiving the Islamic women as "other" who is a victim of her religion. The government needs to strengthen nationalism by promoting democratic equality for the larger Muslim community to curtail the sense "othering" for them as a whole. Islamic feminism needs a multifaceted approach culminating the best practices of the existing ones: hermeneutic, discursive and secular means, to support the egalitarian aims.

# E-COMMERCE IN INDIA: ISSUES SURROUNDING FOREIGN DIRECT INVESTMENTS AND INTERMEDIARY REGULATIONS

Jayesh Kumar Singh*

Electronic commerce refers to the process of buying, selling, marketing, and distribution of goods and services including digital products through the internet.[1] Over the years, the e-commerce sector in India has grown considerably. With the sector expected to grow from USD 24 Billion in 2017 to USD 84 Billion in 2021, the future of e-commerce in India seems to be promising.[2] In recent years, the legal framework governing e-commerce in India has witnessed a paramount shift. Unless the framework is reconciled with the interests of market players, the expectations seem to be a distant reality. This paper seeks to capture certain emerging trends arising out of the Draft National E-Commerce Policy ("the **draft policy**") and the foreign direct investment ("**FDI**") regulations governing the e-commerce activities. The first part of the paper deals with the changing FDI regulations in the e-commerce sector. The second part deals with the rising trend to impose additional intermediary responsibilities on the e-commerce marketplaces. Lastly, the third part provides a conclusion to the paper and also includes certain suggestions to deal with the issues addressed in the paper.

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[1] Consolidated FDI Policy Circular, Circular no. 5(1)/2017-FC-1 (Dep't for Promotion of Industry and Internal Trade Aug. 28, 2017).

[2] *Unravelling the Indian Consumer*, DELOITTE & RETAILERS ASSOCIATION OF INDIA, (Feb. 2019), https://www2.deloitte.com/content/dam/Deloitte/in/Documents/consumer-business/in-consumer-RLS-2019- noexp.pdf.

## I. FDI REGULATIONS GOVERNING THE E-COMMERCE SECTOR

In the past few years, there has been a significant increase in FDI in the Indian e-commerce sector. The recent acquisition of Flipkart by US-based Walmart for USD 16 Billion bears testimony to this fact. FDI in India can be made either under the 'automatic route' or the 'government route'. In the former, the non-resident investor or the investee company does not require any approval from the government. Under the government route, the FDI proposal is to be authorized by the concerned government department. Mostly, e-commerce entities are operational under Business to Business ("**B2B**") and Business to Consumer ("**B2C**") models.

While the FDI policy permits 100% FDI under the automatic route in B2B e-commerce, no FDI inflow is allowed in the B2C category.[3] This means that the complete share capital of the resident B2B e-commerce can be held by the non-resident investor. As an exception, Indian e-commerce entities operational even under the B2C category that sell Indian products and are mandatorily managed by Indian leadership can raise foreign equity upto 49%. For availing the FDI, all sellers on the marketplace shall also be registered on a B2B basis. Moreover, such investments are only possible in 'marketplace based model' of e-commerce and not in the 'inventory based model' of e-commerce.

The distinction between the two is that while the former merely acts as a facilitator between the buyer and the seller, the latter allows the e-commerce entities to own the inventory of goods and services which can be sold to the consumers directly. However, an e-commerce entity can use the inventory based model if it does not seek to attract FDI. As a general rule, an e-commerce platform will be deemed to be operational under the 'inventory based model' if more than 25% of the vendor's sales are from the e-commerce entity or its group companies. Such restrictions have been imposed so that the marketplaces do not exercise control over the prices of products sold by the e-commerce entities, thereby ensuring a level-playing field to the online sellers.

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[3] *Supra*, note 1.

The following chart provides the existing picture of foreign direct investments in India:

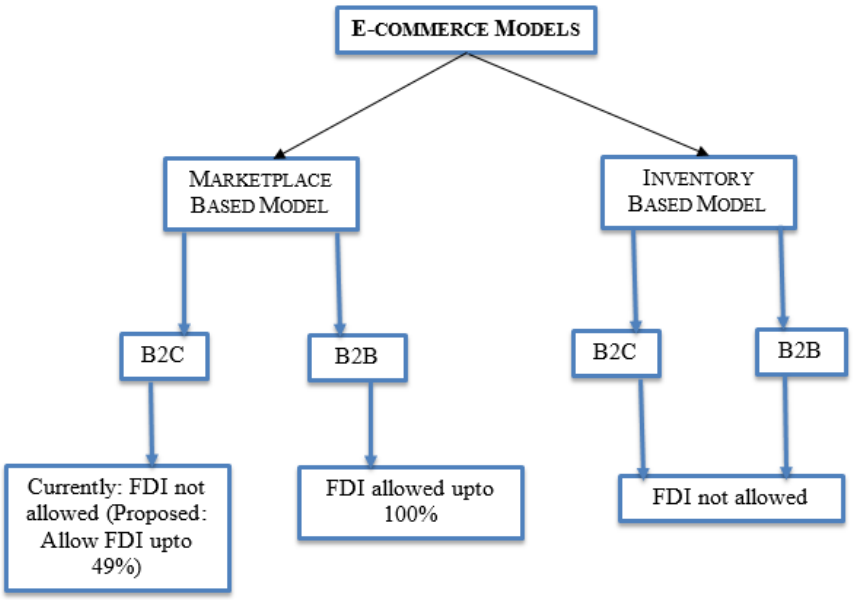


Fig. (i)

## A. FLAWS IN THE FDI REGULATIONS AND DRAFT POLICY

Contrary to the legislative intent, the e-commerce entities always manage to capitalize on the loopholes associated with the legal framework on restricting their control on prices of products. For example, the holding companies of e-commerce marketplaces have created their indigenous private labels such as Billions, Adrenex, and Amazonbasics. Private Labels refer to branding of products manufactured by third parties. Legally, this does not render the marketplaces to be operational under the inventory-based model since the processes associated with creation of private labels is not done by the marketplaces directly. Instead, they are created by certain related companies, thereby rendering a ban on inventory based model for raising FDI to be futile in nature. Further, although the e-commerce marketplaces are explicitly barred from exercising ownership over the products, they can provide support services such as warehousing, logistics, order fulfillment, and call centres. Although such services are to be provided to the vendors at arm's length and in a fair and non-discriminatory manner, putting such a subjective criteria in the law makes it ambiguous in nature.

The draft policy obligates the marketplaces to display MRPs on all the products.[4] It rules out the possibility of inflating the prices by e-commerce marketplaces and subsequently giving discounts or cashbacks. However, the draft policy provides that the cashbacks provided by group companies of marketplaces to the buyer shall be deemed to be non-discriminatory.[5] This exception does not sink in with the object to provide a level-playing field to the online and offline traders on two counts. *First*, the marketplaces may still give different cashbacks for the same products sold by different sellers. Even if they do not discriminate in providing cashbacks on products offered by the online retailers, the exception aggravates the plight of offline retailers because they lack the resources to offer huge cashbacks. *Second*, the question of providing equal treatment to competing online retailers would arise only if competitors exist. The marketplaces can strengthen the market for their private labels by increasing the listing and advertising costs for the competitors of those private labels. Consequently, when the competitors are forced out of the market, the marketplaces could get the cashbacks on private labels funded by the group companies. Adopting this process would save the marketplace from providing cashbacks on products sold by the competitors.

The FDI Policy provides that "the inventory of the vendor shall be deemed to be controlled by the marketplace if more than 25% of the purchases of a vendor is done through the marketplace entity or its group companies". This in turn will render the business to be operational under the inventory based model.[6] Moreover, the marketplaces shall ensure that not more than 25% of the sales in a financial year is through a single vendor or their group companies. Further, there shall be no equity participation by the marketplace platform or its group companies on the share capital of its sellers.[7] This has been done to ensure that the e-commerce marketplaces do not influence the sale price of products directly or indirectly and maintains a level playing field for all the traders.

These regulations have led to change in the capital structure of multiple online sellers such as Cloudtail India, Appario, etc. For example, Amazon Asia initially held a 49% stake in Cloudtail India, but after the FDI regulations came into effect, Amazon Asia reduced its shareholding to 24%, thereby ceasing to be a group company. The complex corporate structures formed by e-commerce giants are merely avenues to evade legal liabilities. Behind the corporate veil, the e-commerce giants still control the inventory of the sellers. Further, there is a lack of transparency in the corporate structures of e-commerce giants.

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[4] Draft National Policy on E-Commerce, India's Data for India's Development, Dep't for Promotion of Industry and Internal Trade, (Feb. 23 2019) https://dipp.gov.in/whats-new/draft-national-e-commerce-policy-stakeholder-comments.

[5] *Id.*

[6] Ministry of Commerce & Industry, Government of India, *Review of the policy on Foreign Direct Investment (FDI) in e-commerce, Press Note No. 2 (2018 Series)*, https://dipp.gov.in/sites/default/files/pn2_2018.pdf.

[7] *Id.*

To foster healthy competition in the market, the marketplaces have also been barred from entering into exclusive sale agreements.[8] However, it needs to be answered whether the sellers can voluntarily enter into exclusive sale agreements with the marketplaces. Such agreements may even create problems for the marketplaces because the sellers may not perform their part of obligations on the ground that the agreement was *void ab initio*. Thus, it can safely be said that the policies need to be assessed practically or else the intended objectives may never materialize. The plight of the vendors is further aggravated by the indifferent legal redressal mechanism.

### B. CAPITALIST APPROACH OF THE COURTS

The judicial approach towards ensuring a level playing field for the retailers is beset with flaws. There has also been a lot of discrepancies between the judicial approach and subsequent regulations introduced by the government. In *Mohit Manglani v. M/s Flipkart India Pvt. Ltd.*,[9] the Competition Commission of India ("**CCI**"), ruling in favour of e-commerce companies, held that exclusive sale agreements are not anti-competitive because they do not amount to an appreciable adverse effect on competition ("**AAEC**"). Although CCI did not find anything wrong with exclusive sale agreements, the government did away with such agreements.

Any agreement entered between enterprises which directly or indirectly determines the purchase or sale prices of the products shall be presumed to cause AAEC.[10] To offer huge discounts and cashbacks, the wholesale arms of e-commerce giants purchase products from manufacturers at original cost and subsequently sell it to the associated online retailers at huge discounts. This enables the sellers to offer products in the marketplace at huge discounts. Thus, the e-commerce entities, by forming colourable structures, indirectly influence the price of products sold on the marketplaces. Thus, this practice should be treated as causing AAEC. However, it has been held that the deep discounts offered on the marketplaces fail to meet the standards of abuse of dominant position and thus they are not anti-competitive.[11]

Dominant position refers to a position of strength enjoyed by an enterprise in a relevant market which enables it to operate independently of competitive forces, or affects its consumers or competitors or relevant market in its favour.[12] The marketplaces do hold dominance in the identified relevant market which is of "services provided by online marketplace platforms". Thus, the decision of CCI is beset with multiple flaws. *First*, CCI had already, in multiple instances, recognized the anti-competitive approach by e-commerce platforms. Thus, a holding that the practice in dispute was not anti-competitive on the ground that there was no dominant position is flawed in nature. *Second*, instead of rejecting the contention that Flipkart enjoys 40% share of the

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[8] *Id.*
[9] Mohit Manglani v. M/s Flipkart India Pvt. Ltd., 2015 CCI 97.
[10] The Competition Act, 2002, § 3.
[11] All India Online Vendors Association v. Flipkart India Pvt. Ltd. 2018 SCC OnLine CCI 97.
[12] The Competition Act, 2002, § 4.

market, the CCI should have ordered an independent enquiry to determine the same because a *prima facie* case had already been established by the petitioners. The draft policy itself suggests that "a company which has access to maximum information about the market, is in a position to dominate it".[13] If this explanation is to be adhered to, then the e-commerce giants shall be held to be holding a dominant position in the market. Thus, the difference in the stand taken by the courts and the government departments is understanding the interests of retailers, as a whole, is evident.

### C. THE DRAFT POLICY AND ADDITIONAL INTERMEDIARY LIABILITIES

Another trend which can be identified in the e-commerce policy is the increase in regulatory overlaps in the area of intermediary regulation and data protection. To put this in perspective, India already has legislations governing the intermediaries, Information Technology (Intermediary Guidelines) Rules, 2011, and a prospective legislation coming up for regulating general data, Personal Data Protection Bill, 2018, in India. Ambiguities in governance would be reduced if specific laws were used to govern specific areas. Under Section 79 of the Information Technology Act, 2000 ("**IT Act**"), an intermediary is not liable for hosting any third party information or data. This immunity is only available if the intermediary merely provides access to a platform where other persons temporarily store or transmit information, or if the intermediary does not play any role in transmission of information.[14] Further, the intermediary shall observe certain due diligence standards. It requires the intermediaries to publish privacy policies and user agreement rules, and also prohibits the users from uploading or hosting certain content. Broadly, the intermediary shall specifically refrain from interference and shall take reasonable steps for promoting cyber security, facilitating government investigations, and addressing the customer grievances. The draft policy, if materialized, would increase the due diligence requirements to be performed by the intermediaries. It would also stand in contradiction to the landmark case of *Shreya Singhal v Union of India*,[15] wherein it was held that intermediaries cannot be subjected to additional responsibilities beyond the scope of the IT Act. The anti-counterfeiting and anti-piracy measures along with the other regulations end up imposing excessive responsibilities on the intermediaries.

#### i. ANTI-COUNTERFEITING MEASURES

To protect the interests of customers and genuine producers, the e-commerce policy has laid down certain guidelines. The draft policy obligates the marketplaces to enter into agreements with the sellers about the genuineness, warranties, guarantees, and sureties about the product. However, it

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[13] Draft National Policy on E-Commerce, India's Data for India's Development, Dep't for Promotion of Industry and Internal Trade, (Feb. 23 2019) https://dipp.gov.in/whats-new/draft-national-e-commerce-policy-stakeholder-comments.

[14] Information Technology Act, 2000, § 79.

[15] Shreya Singhal v. Union of India, AIR 2015 SC 1523.

is unrealistic to expect such undertakings to flow from the sellers instead of the manufacturers. Ideally, such agreements should be executed between the customer and the sellers. The marketplace should not be mandated to play any role in it. Further, vested with the option to register themselves, the trademark owners are entitled to receive notifications once a trade-marked product is uploaded for sale. This requirement imposes a positive obligation on the intermediaries to individually verify the products that are being sold on the platform. In *MySpace Inc. v Super Cassettes Industries Ltd.*,[16] requiring the intermediary to go through all the infringing content has been held to be impractical. It was also held that the owners should provide information regarding infringing content and shall make a take-down request to the intermediary. The requirement also violates the principle of national exhaustion which states that where goods holding a registered trademark is lawfully sold in the market, then further sale by the purchaser is not to be considered an infringement of trademark rights.[17]

The draft policy mandates that certain products cannot be sold without the prior concurrence of trademark owners. This further enhances the due diligence requirements to be done by the marketplaces because they would always have to check whether such consent has been obtained or not. Further, upon allegation of sale of fake products and after its confirmation by the respective trademark owner, if the seller fails to produce evidence in his defense, the platforms are responsible to take down the infringing content. By requiring the intermediaries to check the validity of claims, this requirement exceeds the mandate of Intermediary Guidelines. An intermediary merely on receiving actual knowledge about the infringing content is obligated to disable access to such information within 36 hours. The intermediaries are mandated to create financial disincentives for the sellers selling counterfeit products. It shall also blacklist the sellers responsible for the same. This requirement again obligates the intermediaries to determine counterfeit products. Although the onus regarding warranty/guarantee and post sales delivery of products sold is to be borne by the sellers, in case of refunds immediate payment has to be done by the marketplace instead of the seller.

### ii. ANTI-PIRACY MEASURES

The onus to check online dissemination of pirated content has been put on the intermediaries who shall identify trusted entities to resolve their claims on a priority basis. Further, upon receiving complaints from the copyright holder about pirated products being sold on rogue websites, the access to such content shall be immediately disabled by the intermediaries. Ideally, such concerns should have been addressed exclusively by the Copyright Act, 1957. The draft policy focuses on a concerted effort by Internet Service Providers (“**ISPs**”) and search engines to identify infringing websites. Thus, the burden imposed on the intermediaries will curtail their freedom and require huge resources and complex engineering processes. Further, it also includes the telecom service

[16] MySpace Inc. v Super Cassettes Industries Ltd., 2011 (48) PTC 49 (Del).
[17] Trade Marks Act, 1999, § 30.

providers in its ambit since most of them provide internet services on cellular phones. By imposing additional burden on the intermediaries, the draft policy interferes with the Intermediary Guidelines, 2011 and thereby on the IT Act.

### 1. OTHER STRATEGIES

With a specific legislation in place, the power to regulate the intermediaries can only be drawn from the IT Act. The draft policy, at multiple instances, puts up impractical requirements for the businesses to fulfill. It mandates compulsory registration of businesses which provide download services by all e-commerce sites/apps available in India. Apart from burdening the intermediaries, this requirement also entails that the customers will not have the option to purchase from global apps and websites, unless online platforms have a physical presence in India. Since almost all the apps are available for download, this may force many online platforms to block operations in India. The requirement also includes those sites which merely provide information services. The e-commerce platforms are also obligated to mention the MRP on all products and invoices. Even under the Legal Metrology Act, 2000 the online platforms are only required to display the prices on the platforms. Ideally, this onus should have only been limited to the sellers and not the online platforms operational under the inventory based model.

The marketplaces are required to act immediately on consumer complaints by providing customer care contacts and adequate acknowledgements. Further, they are also obligated to devise mechanisms to prevent fraudulent reviews and ratings along with enhancing transparency and non-discrimination in them. Broadly, the e-commerce policy shall limit its control on the intermediaries because it would seriously impact ease of doing business in India.

## CONCLUSION

The guiding principle behind the FDI regulations on e-commerce is to protect the interests of the small retailers and to foster healthy competition in the market. However, it suffers from many practical loopholes. Unless they are rectified, the e-commerce giants will devise methods to legally escape from the compliances. They would continue to indirectly influence the price of products in the online market. Thus, there shall be a limit imposed on cashbacks, or else it would force the offline retailers out of the market. Ideally, the online sellers should not be allowed to be related with the e-commerce marketplaces in any manner apart from providing an online platform and support services. The legal redressal mechanism shall also be strengthened to be more conducive towards the small vendors. It shall seek to determine the rationale behind the complex corporate structures adopted by the marketplaces.

Internet penetration in India has beaten global records and is stated to increase exponentially in the future. The services provided by the intermediaries has improved internet accessibility and the related investments have been a major boost the Indian economy. In such a situation, the intermediary regulations stand out as a major disincentive for the intermediaries to operate in India. Instead of imposing additional burden on the intermediaries, separate government bodies need to

be created which would take the onus of curbing counterfeit and pirated products being sold through the internet. The intermediaries shall strictly be governed by the specific rules meant for the same. Only after such concerns are addressed, will the draft policy be feasible for implementation.

# KHUMAN SINGH V. STATE OF MP: ANALYZING CONVICTIONS UNDER SECTION 3(2)(V) OF THE SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT

Uttara P.V.*

Recently, the Supreme Court found itself deciding the merits of a conviction under Section 302 of the Indian Penal Code 1860 ["IPC"] and Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act ["Act"], in a case involving homicide of a person belonging to a scheduled caste[1]. The deceased was cultivating his fields and grazing cattle, when the accused also arrived at those same fields to graze his buffaloes. This was objected to by the deceased, at which the furious accused abused the deceased uttering "how the deceased who belongs to Khangar Caste could drive away the buffaloes of Thakurs out of his field". Further objection by the deceased led to him being attacked with an axe resulting in his death.

The court held that the killing was not premeditated, and reduced the conviction to under Section 304 IPC. Further, conviction under the Act was set aside, noting that there is nothing to suggest that the offence was committed by the appellant only because the deceased belonged to a Scheduled Caste.

This article attempts to analyse the aspect of acquittal from offence prescribed under the Act, focusing on the requirements for attracting Section 3(2)(v) of the Act.

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[1] Khuman Singh v. State of Madhya Pradesh, 2019 SCC OnLine SC 1104.

## I. LEGAL HISTORY OF SECTION 3(2)(V) OF THE ACT

Section 3(2)(v) of the Act penalises any person not belonging to the Scheduled Castes or Scheduled Tribe ["SC/ST"], if he commits any offence laid down in IPC punishable with a term of 10 years or more, against a member of the SC/ST or his property *knowing* about his membership in a Scheduled Castes or Schedule Tribes. This current form of the Act came into force, after amending the original act in 2016, wherein the position provided for penalizing the commission of an offence under IPC against a member of SC/ST on the ground of such a person belonging to SC/ST[2]. The difference in the languages points towards the different nature of mens rea required for penalisation pre and post the amendment. The prior version necessitated intention of belittling, intention behind the commission of the crime to be the caste status of the victim for culpability, such that evidence was to be led regarding the *intention* of the accused[3]. However, the amendment has made the language more stringent, by reading *knowledge* as the requisite mens rea to amount to the commission of the offense. In other words, evidence need not be led in regard to the intention of the accused at the time of commission of the offense; rather the more objective criteria of knowledge of the accused being a member of SC/ST need only be shown for conviction under Section 3(2)(v) of the Act. The effect of the amendment is that it acknowledges that the intention to belittle, which had to be distinctly and expressly proven as a question of fact earlier, as implied and underwritten in commission of a grave offense against a person belonging to SC/ST if the accused had prior knowledge of the victim being a member of the SC/ST. Since 26.01.2016, the subjective intention of the accused to belittle the victim is impertinent to attract a charge under Section 3(2)(v) of the Act, so long as there exists with the accused mere knowledge that the person upon whom the offence is committed belongs to SC/ST[4].

Khuman's analysis of Section 3(2)(v) of the Act is problematic, primarily due to non – acknowledgment of this difference between the pre and post amendment statute. The court commits a glaring error in applying the post- amendment position [5] to an incident that occurred in 2005. Unfortunately, the inconsistency does not end there; after having applied the post-amendment version of the statute to the factual matrix, the court erred when it backtracks and adopts an interpretation relevant only to the pre-amendment version. This means that the post-amendment statute which requires the accused to only possess the knowledge that the victim belongs to SC/ST for conviction, has now been qualified by an additional, judicially legislated requirement that apart from knowledge of the victim's caste status, the commission of offence was because of such caste of the victim. In other words, the judicial act overrides the legislative

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[2] The Scheduled Castes And The Scheduled Tribes (Prevention Of Atrocities) Amendment Act, 2015,No.1, Acts of Parliament, 2016, §4(ii)(a).

[3] Asharfi v. State of Uttar Pradesh, AIR 2017 SC 5819.

[4] *Id.*

[5] Khuman Singh v. State of Madhya Pradesh, 2019 SCC OnLine SC 1104, ¶ 12.

presumption that knowledge of caste status of the accused implies that the offense was committed on the ground of his caste and thus to belittle him. This controversial interpretation is formulated by the court, by erroneously applying the ratio of Dinesh[6], a pre-amendment case regarding interpretation of Section 3(2)(v) of the Act, to the post-amended statute, verbatim, without taking into consideration the scope of the amendment that entails the interpretation in Dinesh perfunctory.

The court arbitrarily sidelines the statutory prescription of mens rea (which is knowledge that the victim belongs to SC/ST), in holding that the requisite proof of mens rea is, in addition to knowledge about caste of the victim, the intention to commit the offense only on the ground of the victim belonging to SC/ST. It requires attention that this additional aspect of mens rea is precisely what was eliminated from being a requisite by the amendment. In effect, despite the amendment to Section 3(2)(v) of the Act, the pre-amendment position has been restored, without deciding on the validity of the amendment act.

Previously a Division Bench of the Supreme Court had pronounced on this distinction highlighting the inapplicability of the amended statute to offenses committed before 26.01.2016[7]. The said decision is sufficient to render the current decision per incuriam, although the court was then deciding on mens rea requirement in regard to the pre – amendment provision, and hence the observation that amended Section 3(2)(v) needs only proof of knowledge of caste of the victim and not proof of the influence of caste status in the crime is obiter. This is because by virtue of Ashrafi, entering into the question of applying the amended statute to a pre-2016 incident is rendered nugatory. The question of interpretation of the amended statute is a question that only follows the first chronologically. Having decided the first question in contradiction to Ashrafi in itself renders Khuman per incuriam, without necessitating an analysis of whether the latter would prevail over the obiter of Ashrafi.

The next question for consideration, after assuming but not conceding on the correctness of the decision with respect to the two previous issues, is the question of determination of whether the commission of homicide in this case was on the ground of the caste status of the deceased. The judgment finds that it was not, after mechanically noting that there is no evidence on record to suggest otherwise.

However, a cursory reading of the judgment throws to light the invocation of caste status of the victim by the accused during the altercation that resulted in the homicide. As narrated in the judgment, the deceased's protest against the accused's attempt to graze his buffaloes in the former's fields caused the latter to be offended on "how the deceased *who belongs to Khangar Caste* could drive away the buffaloes of Thakurs out of his field" (emphasis supplied). The deceased protested

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[6] Dinesh alias Buddha v. State of Rajasthan, (2006) 3 SCC 771.

[7] Asharfi v. State of Uttar Pradesh, AIR 2017 SC 5819.

at this as well, and at being offended that a man belonging to a scheduled caste could protest against his upper caste self, the appellant, with an intention to kill the deceased, attacked him with an axe, on his head. The qualification of the deceased by his caste name during the event is pertinent since the reason for the accused taking offense to the deceased's protest and consequently committing the homicide can thus be traced to the caste status of the latter. In other words, the intention to kill was borne out of the ground of the deceased belonging to scheduled caste, who on account of his lower caste status was not expected to not protest against the upper caste man's will.

The court, however, fails to take note of the aforesaid factor, and mechanically cites precedents that have acquitted persons under Section 3(2)(v) to note that evidence has to be led to prove not merely that the victim belonged to SC/ST, but also that offence was committed on the ground that the victim was a member of the SC/ST.

It is noteworthy, that in the bulk of precedents where the accused has been acquitted of charges under Section 3(2)(v), there is no mention of any evidence on record to indicate active or passive engagement of caste status of the victim with the event of commission of offence punishable under IPC[8]. For example, in Dinesh, a woman belonging to Scheduled Caste was raped while returning at night from a marriage procession. There was absolutely no material on record indicating any influence the caste of the woman had on her being raped; rather there was evidence on mere lust being the ground for rape. Similarly, in a matter involving rape of a minor girl who belonged to Scheduled Caste, since there was no direct or indirect, verbal or non-verbal invocation of caste in the course of, or in relation to the event of rape, it was held that there is no evidence indicating that the offense was committed on ground of caste of the victim[9]. In yet another case, it was held that there is no material on record to show the murder of the victim belonging to Scheduled Caste was on the ground of his caste status, since there was not even a statement either in the complaint or in the statement recorded under Section 161(3) of the Code of Criminal Procedure that the crime was committed on the ground of caste status[10]. It was further noted that the fact of the accused not having engaged in invoking the caste status of the victim, verbally or otherwise, in relation to or during the event of commission of crime; rather that the accused was identifiably influenced by the illicit relationship of the victim in committing the murder, it was evident that the ground of murder was the illicit relationship and not the caste status of the victim[11].

Thus, in cases where there is no material on record indicating any interlinkage whatsoever between caste status and the crime committed, clearly, the crime cannot be said to have been committed on the ground of the victim's caste status. However, the case at hand is not one where there is no

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[8] Dinesh alias Buddha v. State of Rajasthan, (2006) 3 SCC 771; Asharfi v. State of Uttar Pradesh, AIR 2017 SC 5819; Ramdas v. State of Maharashtra, (2007) 2 SCC 170; Masumsha Hasanasha Musalman v. State Of Maharashtra, (2000) 3 SCC 557; Sohan Singh v. State Of Rajasthan, 2002 SCC OnLine Raj 1179.

[9] Vaju Gagji Vanja v. State of Gujarat, Criminal Appeal No. 435 of 1995 (Guj).

[10] Mallaiah v. The Deputy Superintendent Of Police, 2011 (1) RCR (Criminal) 8 (Mad).

[11] *Id.*

interlinkage between caste status and the crime committed; the verbal invocation of the victim's caste name during the event of the crime shows the interaction between of caste status and the homicide. In such cases where the crime and caste status intermingle, there exists evidence on record as to some sort of engagement of caste and the crime, which renders necessary a judicial analysis of the extent and scope of the engagement to determine if the crime was committed on the ground of caste status of the victim. In the current case, despite there being material on record that demonstrate the interface between caste and the homicide, the court failed to look into the possible influence that caste played in the homicide. Further, it can be noticed, as analysed earlier, that the homicide was committed because a member of the scheduled castes protested against an upper caste man's wishes. Thus, the extent of interlinkage of caste and crime is so strong that the crime was committed on the ground of the victim belonging to scheduled caste. The court grievously erred in observing otherwise, without taking cognizance of the extent of the influence of caste in the murder, despite there being evidence on record exhibiting the engagement between caste status and the crime.

Finally, the court errs again, when it puts an additional, contra-statutory burden on the prosecution as it requisitions evidence be led to show that the offence was committed *only* on the ground that the victim was a member of the Scheduled Caste. It is noteworthy that the statute does not employ the term "only", nor do precedents[12]. The effect of necessitating proof that the offence was committed only on the ground of caste of the victim is that it narrows down the scope of the provision majorly, as if it were eclipsing an unconstitutional provision, without first discussing the constitutionality of the provision being eclipsed.

Further, it is illogical that a person who committed a crime on grounds stipulated in statute be held guilty of an offense, while another who also committed the same crime on the same ground along with some other additional unlawful grounds be let scot free. Holding a person who raped a woman only to humiliate her based on caste status culpable, while acquitting another who raped with the intent to humiliate her based on caste status coupled with unwelcome carnal lust is an unintelligible classification for two simple reasons. Firstly, the addition of an unlawful intent to an existing mens rea that is the only sine qua non to constitute the offence under Section 3(2)(v) does not erase the statutorily requisite mens rea already present, which along with the actus reus alone has already resulted in attraction of culpability under the provision. The presence of additional ingredients, while can result in conversion of one crime to another of a graver degree[13], it can never result in exculpation, as the additional ingredients cannot possibly expunge the already present ingredients which is the only requisite for conviction for the first offense.

Secondly, the existence of another unlawful intent, in addition to caste based indulgence in crime does not undo the humiliation that was intended to be met out to the victim on account of his

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[12] Dinesh alias Buddha v. State of Rajasthan, (2006) 3 SCC 771.

[13] PEN. CODE §§ 378 r/w 390, §§ 299 r/w 300.

caste status, to eliminate which is the purpose of the Act and Section 3(2)(v)[14]. Thus, as such classification is sans any rational nexus to achieving the object of the statutory provision, the classification is arbitrary, and violative of Article 14 of the Constitution of India[15]. Further, not merely is legislative intent rendered otiose by the judicial activism the court has arbitrarily taken up, but right to life with dignity guaranteed under Article 21 to persons belonging to SC/ST is, as well.

## CONCLUSION

The court has thus completely erred in its adjudicatory function in Khuman. The three distinct questions of law that arose in the case - question of applicability of the amended statute to a pre-2016 incident, the question of whether the amended statute can be interpreted to include pre-amendment conditions, and ultimately the question of whether the commission of homicide in this case was on the ground of the caste status of the deceased, which were to be addressed in that chronological order, was all coalesced together into a ball by the court, and answered without adequate application of mind and appreciation of precedents. Such state of affairs is an extremely sorry one, only testifying that the Supreme Court is final, not because it is right, but that it is right because it is final.

[14] Dinesh alias Buddha v. State of Rajasthan, (2006) 3 SCC 771.

[15] State of A.P. and others v. McDowell & Co., (1996) 3 SCC 709.; Subramanian Swamy v. Director, Central Bureau of Investigation, (2014) 8 SCC 682.