ISSN: 2321-4716

Refereed, UGC Approved Journals S. No. 1025

JOURNAL OF CAMPUS LAW CENTRE

VOLUME VII: 2019

[Advance Online Issue]

Editorial Advisory Board

ISSN: 2321-4716

Refereed, UGC Approved Journals S. No. 1025

JOURNAL OF CAMPUS LAW CENTRE

VOLUME VII: 2019

[Advance Online Issue]

Mode of Citation: VII JCLC (2019) [Advanced Online Issue]

ISSN: 2321-4716

Refereed, UGC Approved Journal S. No. 1025

Published by

Campus Law Centre,
Chhatra Marg, North Campus,
Maurice Nagar
University of Delhi,
Delhi- 110007 (INDIA)

Website: http://clc.du.ac.in
Email: pic@clc.du.ac.in

JOURNAL OF CAMPUS LAW CENTRE

VOLUME VII: 2019

CONTENTS

THE METHOD OF HANS KELSEN:
AN ANALYSIS OF PURE THEORY OF LAW FROM A KANTIAN PERSPECTIVE

Rakesh Kumar Singh[*] *& Bhanu Pratap*[†]

Abstract

Hans Kelsen occupies a unique place in legal theory. Being a legal positivist, he was influenced by various sources including legal humanism of Cohen, Dante and Jellinek. What separates Kelsen from other legal positivists, is his epistemological approach to law. Kelsen's work is a product of the tumulus conditions of his times. His approach towards law shall be called an 'anti ideological approach'. Kelsen's approach is hugely influenced by the philosophical underpinnings of German society, and its unique take on the nature of public and private law. However, the biggest influence on Kelsen was that of Immanuel Kant. Closely following the Kantian method, Kelsen was able to counter the thoughts of Carl Schmitt. In fact, 'Pure Theory of Law' is Kelsen's homage to Kant. The paper is an attempt to trace the influence of Kant on the writing of Pure Theory of Law.

Section I of the paper will assess the impact of Dante on a young Kelsen which made him a humanist just like Kant. Section II will trace the impact of Kant on Pure Theory of Law. Section III will make an argument that Kelsen's grundnorm has a striking similarity with Kant's 'noumenal' world. Section IV will assess the impact of Marburg school on Kelsen. Section V will assess the similarity of Kelsen's cosmopolitanism with that of Kant with special reference to legal monism and its future in international law.

Introduction

Hans Kelsen gave us a unique epistemological approach to law. His work is a result of the tumulus political conditions of his times. His approach towards law can also be termed as an 'anti-ideological' approach. His work is hugely influenced by the philosophical underpinnings of the German society and its unique take on the nature of public law and private law. It will be an error to study Kelsen's work in isolation, as his work was hugely influenced by German metaphysics. The political uncertainties of his time allowed him to construct a 'transcendental' view of law. His work is hugely influenced by the Kantian traditions. Kelsen follows Kant in his epistemological approach to law. The title of his magnum opus 'Pure Theory of Law' is homage

[*] Ex Head and Dean, Faculty of Law, University of Lucknow.
[†] Assistant Professor, Faculty of Law, University of Lucknow.

to his Kantian roots. Kelsen's method is a unique meeting point of Kantian tradition; likewise, Dante's invocation of Universalism is echoed in Kelsen's 'Peace through Law'. Kelsen's Jewish roots also make a cameo in his work. Carl Schmitt was his theoretical opponent and 'Pure Theory of Law' is a reaction against the Schmitt's analysis of unbridled sovereign. The term 'Method' in this paper means the unique framework that has helped in the creation of a unique Kelsenian school of legal philosophy, a philosophy that although being studied under the umbrella of legal positivism, has its roots in natural law. The very concept of 'Grundnorm' can be compared to Kantian concept of 'noumenal'. What is being said here is that in spite of belonging to the positivist traditions, Kelsen based his theory of Grundnorm on the epistemological foundations of Kant. Kelsen is a positivist in a restricted sense as he only retained the separability thesis. His 'Grundnorm' is not posited by a human; hence, Kelsen is not a positivist like Austin. Grundnorm is based on Kantian 'Transcendental – logic' where law is presented as an abstract-epistemological device through which legal cognition and political society becomes possible. Grundnorm accounts for de-personalization of law. Perhaps, it is imperative upon the reader to interpret 'Pure Theory of Law' as an anti-ideological approach to law to appreciate the use of Kant's transcendental method by Kelsen. This method was a befitting reply to Schmitt who had personified law in the image of Hitler.

Kelsen's work is hugely influenced by the German legal philosophy and many aspects of his work are a typical by-product of German metaphysical tradition. Some of the aspects of his theory including 'grundnorm' do not fit well within the common law traditions. Common law system, being primarily designed on an Austinian basis, did not adopt the transcendence/metaphysical approach of German legal studies. Common Law tradition had an empiricist and fact driven culture. It is the failure of the common law tradition to appreciate the framework of the German legal system which has raised an element of mystery and skepticism against the work of Kelsen. It is our lack of knowledge of the German legal culture which has allowed questioning the genius of Kelsen. Chris Thornhill has sketched an outline of the German legal philosophy. Following are the essential points:

(i) German legal philosophy is primarily concerned with the state. It is usually interpreted as the apex organ of social solidarity.

(ii) German political thought strives to strike a balance between power, state and law.

(iii) German political philosophy has been skeptical towards the contractarian traditions of English and American legal cultures.

(iv) Except for the Kantian and Neo-Kantian methods, 'abstraction' has not been a constant factor of German legal thought.

(v) It is averse to the natural law tradition and its universalizing tradition.

(vi) In Germany the ultimate political and legal reality is the state. Due to the predominance of Hegel's ideas, the concept of laissez faire could never gain a stronghold in Germany. It is for this precise reason that Roman private law had to make way for German public law.

(vii) According to Thornhill, political anthropology is the essence of German philosophy. It is based on the Aristotelian thought that politics is a medium of human emancipation and state is an extension of human personality. This view is diametrically opposite to the English laissez faire system where Roman private law had established itself as a dominant thought. German legal thought is organic in nature and has serious reservations against the laissez faire doctrine.

(viii) Philosophical humanism is an integral part of German legal culture. State, according to philosophical humanism, is an instrument of realizing human freedom. This idea was supported by Kant's Copernican revolution where he exorcised metaphysics of its mystical nature and made it affairs of the humans. Kant, being an idealist, supported the notion that state as an instrument helped in the full realization of the individual's personality.

(ix) The opposing tendencies of humanism and metaphysics converge on the point of self legislation and self creation.[1]

It is in the above mentioned context that the paper intends to interpret Kelsen's work. The German legal philosophy is the scaffolding which paves way for the cosmopolitan and Kantian approach of Kelsen. Kelsen's positivism is different from his British counterparts because of the peculiar differences between the German and English legal culture. It will be further argued that, 'Pure Theory of Law' proved to be groundwork for Kelsen's bigger cosmopolitan project, 'Peace

[1] Chris Thornhill, *German Political Philosophy: The Metaphysics of Law* 2-7 (Routledge, New York, 2007).

through Law'. These works were highly influenced by the German legal culture in which he was operating.

I

The Influence of Dante

One of the earliest influences on Hans Kelsen was the work of Dante Alighieri. Kelsen was influenced by the vision of the great Italian poet in his student life. One might wonder as to why a scholar of law would choose an Italian literary figure to further his academic quest, but a close investigation will clarify that Kelsen based his cosmopolitan views on the work of Dante. Kelsen's curiosity about Dante's work allowed him to write, '*Die Staatslehre des Dante Alighieri'*, which was published in 1905.[2] Kelsen's maiden attempt to understand Dante started during the classes of Leo Strisower, who was an associate professor at the University of Vienna.[3] Kelsen developed an interest in one of Dante's work '*The Monarchia'.* It can be said that Kelsen's interest in Dante's *'Monarchia'* happened as their political environment were somewhat similar. Kelsen and Dante, it seems, share a compassion for universalism. His understanding of Dante allowed him to frame his vision of international law in the 1920s.

Dante was a local politician in Florence. Florence, at that time, had a participatory democracy which limited the influence of nobility. Rule was given to the elected officials from Popolane who represented the bourgeoisie. The Popolane were sub divided into two classes i.e. the White Geulf (the prosperous economic class, to which Dante belonged) and the Black Geulf (loyal to the Pope and representing common people). When the Black Geulf seized power, Dante was banished from Florence and was exiled. He never returned to Florence in his life time. It was his yearning to return home that allowed him to shape his Universalist vision in *Monarchia.* According to Oliver Lepsius, *The Monarchia* has two aspects: First, it is written in a specific political situation and second, it is about Dante's personal fate. One of the main objectives of the *Monarchia* was the establishment of peace so that people could return home.[4] Dante's vision is that of a 'universal order' where the state of affairs is dominated by a universal monarch, who

[2] Oliver Lepsius, "Hans Kelsen on Dante Alighieri's Political Philosophy" 27 *EJIL* 1154 (2017).
[3] *Ibid*.
[4] *Supra* note 2 at 1156.

works like a public servant to attain the political objectives of peace, freedom and justice.[5] Dante's emphasis on universalism and individualism paved way for Kelsen's vision of an objective international law in '*Peace through Law'*.[6] Kelsen was highly impressed by Dante's sense of freedom of judgment and the legal limitation that Dante had imposed on the universal monarch were instrumental in construing Kelsen's vision of an objective, binding international law. In a nutshell, Kelsen and Dante's views converge on the following points: (a) Peace; (b) Importance of individuality as a limitation of power; (c) Liberty; (d) Popular sovereignty; (e) Democracy; and (f) Organization of national diversity.[7]

Kelsen started working on the concept of legal monism from 1911.[8] Monism, according to him, was a theoretical device which could achieve international peace. The nexus between Dante and Kelsen's Monist views is reiterated by Jochen von Bernstorff.[9] The medieval order of Dante had a logical consistency which furthered the cause of Monism. The comparison between the two of them becomes apparent when one takes into account the structure of Habsburg dynasty. In spite of having a diverse culture, the only source of consistency in the Habsburg dynasty was the legal unity.[10] This is the meeting point of Kelsen and Dante. Both of them, in spite of being centuries apart, theoretically agreed that there has to be an international authority which will transcend the sovereign nature of the states and guarantee the supremacy of law at an international level in an objective way. For Dante, it was a universal monarch and for Kelsen it was an international court equipped with the power of compulsory jurisdiction.[11] Kelsen's Dante is a forerunner of Kelsen himself.[12] According to Garcia Salmones Rovira both Kelsen and Dante shared a historical moment: Dante was in the pre state mode where state had not developed fully whereas during Kelsen's time internationalism was emerging as a challenge to the traditional Westphalian system.[13]

---

[5] *Id.* at 1157.
[6] Hans Kelsen, *Peace through Law* (University of North Carolina, North Carolina, 1944).
[7] *Supra* note 2 at 1164.
[8] Alice Marras, *The Influence of Dante Alighieri's Political Thought in Hans Kelsen's Theory of International Law* 662 (Unpublished paper, University of Salzburg).
[9] Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* 76 (Cambridge University, Cambridge, 2013).
[10] *Supra* note 8 at 662.
[11] *Supra* note 2 at 1158.
[12] *Supra* note 8 at 664.
[13] *Id*. at 661.

II

Kantian influence on Pure Theory of Law

There are certain explicit references to Immanuel Kant in Kelsen's work. In a letter to Renato Treves, Kelsen states: "It is altogether correct that the philosophical foundation of *Pure Theory of Law* is the Kantian philosophy."[14] The most explicit reference is found in *Pure Theory of Law* itself. Kelsen writes:

> … the basic norm as represented by the science of law may be characterized as the transcendental – logical condition of this interpretation, if it is permissible to use by analogy a concept of Kant's epistemology. Kant asks: 'How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?' In the same way, the Pure theory of Law asks: 'How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?[15]

Kelsen answers it by comparing the 'basic norm' to a 'presupposition'. The influence of Kant on Kelsen becomes apparent in the title of *Pure Theory of Law.* The word 'Pure' has a specific Kantian meaning. The essence of Kantian understanding of knowledge lies in the fact as to how knowledge is possible without an appeal to the idea of 'empirical'. Howard Caygill in his 'A Kant Dictionary', defines 'pure' as something that is opposed to empirical; something that is not mixed with anything extraneous; it is often used interchangeably with a priori, form, condition, autonomy and original. Purity here means that makes other phenomenon possible, and is itself not dependent on anything to prove its existence. God, Space, Time are the examples of 'a priori'. They are the presuppositions that make all material things valid but they themselves are not subject to verification.[16] Purity in this manner is the essence of '*Pure Theory of Law'.* Therefore, Kelsen's magnum opus is 'Pure' in a Kantian way. Kelsen's interpretation of the *Grundnorm* is fashioned in a Kantian construct. He calls the basic norm the highest reason for the validity of the norms.[17] Immanuel Kant famously devised a new 'middle path' between the rationalists and the empiricists, and religion and science.[18] Similarly, Kelsen devised a middle

---

[14] Juliele Maria Sievers, *A Philosophical Reading of Legal Positivism* 16 (2015) (Unpublished Ph.D. thesis, University de Lille).
[15] *Ibid*.
[16] Howard Caygill, *A Kant Dictionary* 341 (Blackwell Publishing, Oxford, 2nd edn., 2009).
[17] Hans Kelsen, *Pure Theory of Law* 195 (Lawbook Exchange, New Jersey, 2nd edn., 2009).
[18] Paul Guyer, *Kant* 10, 21, 43 (Routledge, Chicago, 2nd edn., 2014).

path between natural law and legal positivism. Another key element in forging a relationship between Kelsen and Kant is the notion of transcendental logic. Whereas transcendent means those who profess to pass beyond the limits of sensorial experience, transcendental on the other hand is about the method which we use to know things. The concept of 'a priori' belongs to transcendental and not transcendence. Kelsen uses the transcendental method in *Pure Theory of Law.* According to Richard Tur: "The *Pure Theory of Law* is not a book of knowledge but a book about knowledge. As a prolegomenon to all future jurisprudence which aspires to be scientific it must necessarily relate to the forms of knowledge and not provide knowledge itself. The a priori element of law is its form, not its content."[19] As a transcendental – presupposition and a pure ought norm, *Pure Theory of Law* uses an epistemological method to make legal cognition and validity possible. If Kant asked the question as to how knowledge was possible, then Kelsen, following the transcendental method, asks: "How is positive law qua object of cognition, qua object of cognitive legal science, possible?"[20]

One of the less discussed aspects of Kelsen's theory is his 'middle path' method which goes on to show his Kantian roots. Kant's frustration with the very concept of metaphysics allowed him to construct a unique method which was a 'middle way' between rationalists and empiricists as well as between religion and science. The term 'frustration' is used, as Kant was highly skeptical about the excesses of metaphysics. The Era of Enlightenment certainly belonged to science. Kant being trained in pietism, created a unique compromise between science and religion. George D Ramanos calls Kant an 'anti metaphysician'.[21] Kant himself did not create a theory; rather he is best known for presenting a *Critique.* His 'Critique' is presented in his seminal works *Critique of Pure Reason, Critique of Practical Reason* and *Critique of Judgment.* The starting point of Kant's inquiry is how knowledge is possible to human mind itself. In order to answer this fundamental yet profound question he avoided the excessive skeptical methods of the empiricists and the excessive abstract notions of the rationalists. In fact the followers of metaphysics looked to a higher dimension of an abstract world to sense and perceive reality. Their indifference to the scientific outlook made philosophy a 'speculative enterprise'.[22]

[19] Richard Tur and W. Twining (eds), *Essays on Kelsen* 160 (Clarendon Press, Oxford, 1986).
[20] Hans Kelsen, *Introduction to the Problems of Legal Theory* xxxi (Clarendon Press, Oxford, 2002).
[21] George D. Ramanos, *Qunie and Analytic Philosophy* 5 (MIT Press, Massachusetts, 1984).
[22] *Ibid*.

Philosophy became subject to an 'individual philosopher's imagination',[23] thus depriving itself of an objective analysis. Kant carefully created a realm of transcendent and transcendental. He placed a ceiling on human understanding. He divided human understanding into the dual realm of 'phenomenon' and 'noumenon'. The noumenal world is beyond human sensorial experience. The phenomenal world is subject to human interpretation. In this way, Kant created a middle path between the contradicting tendencies of his times. This method is apparent in the work of Kelsen. The paper attempts to trace this tendency under two categories:

(a) Stanley Paulson's analysis of Kelsen's method under the reductive and normativity thesis;[24] and
(b) Kelsen's analysis of the relationship between validity and efficacy in *Pure Theory of Law*.[25]

The reductive thesis claims that law is explicated ultimately in factual terms. There is an inseparability of law and fact. Normativity thesis claims the separation of law and fact. Reductive thesis is an aspect of legal positivism and normative thesis is an aspect of natural law. Kelsen's *Pure Theory of Law* is an attempt to bridge the gap between separability thesis and normativity thesis.[26] Josef Raz is of the view that, Kelsen, though rejecting natural law theories, 'consistently uses the natural law concept of normativity, i.e. the concept of justified normativity.[27] This is reminiscent of Kant's compromise formula. This Kantian approach allowed Kelsen to approach legal positivism with a difference; he does not accept reductionist thesis tendency in toto and while defending the 'normativity' thesis he does not appeal to natural law. Kelsen is of the view that while normativity thesis is derivable from the morality thesis, morality thesis is not derivable from normativity thesis. Similarly, though separability thesis is derivable from reductive thesis, reductive thesis is not derivable from separability thesis.[28] Kelsen, having excluded morality and reductionist thesis, resorts to Kantian approach. Stanley Paulson comments that Kelsen's mid way approach is 'rather a reflection of bits and pieces of

[23] *Ibid*.
[24] *Supra* note 20 at xxvi.
[25] *Supra* note 18 at 211.
[26] *Supra* note 20 at xxvi.
[27] Joseph Raz, *The Authority of Law* 144 (Clarendon Press, Oxford, 1979).
[28] *Supra* note 20 at xxvi.

Kant's theory of knowledge'.[29] Kant resolved the juxtaposition of the empiricists and rationalists by arguing that the notion of a world 'existing' by itself is a contradiction and must be replaced with a world that exists not of itself but in relation to mind. This is reminiscent of the influence of Rousseau on Kant. Rousseau's 'anthropocentric' approach allowed Kant to propose that an individual is not the object of knowledge but its subject. Our senses do not conform to any external object rather it is the object that conforms to our senses.

By criticizing Michael Green's 'psychological' approach for analyzing the validity of laws of logic itself,[30] Paul Gragl cites the observation of Gottlob Frege to assess the impact of Kantian and Neo Kantianism on Kelsen's *Pure theory of Law.* For Frege, laws of logic shall not be interpreted through the realm of psychological sensitivities of humans. This will deprive logic of its very essence.[31] It is essential that laws of logic must be interpreted through axiomatic methods only.[32] In this way, Frege announces the Neo Kantian approach.[33] Paul Gragl forges a link between Frege's system and Kelsen in the following words: "To cut a long analysis short, it is pivotal to highlight that what Frege is to interpretation of languages, the pure theory of law is to the interpretation of legal systems. In response to strictly empiricists trends in legal theory that effectively undermine legal meanings, Kelsen especially intended to save the logical analysis of the law by adopting a (neo) Kantian epistemology of legal meaning …."[34] Hence, it can be said that Kelsen's positivism is distinct from that of his English counterparts. Kelsen is more comfortable with his 'Continental' roots and frequently applies this 'Transcendental' tool of Kant in his analysis of law.

Another aspect of Kant's 'Transcendental Logic' apparent in *Pure theory of Law* is the distinction between 'is' and 'ought'. Norm, according to Kelsen, has the following characteristics:

(i) It is an act of will.

(ii) It has to be a prescription or a command.

---

[29] *Id*. at xxix.
[30] Paul Gragl, *Legal Monism* 59 (Oxford University Press, Oxford, 2018).
[31] *Ibid*.
[32] *Ibid*.
[33] *Ibid*.
[34] *Id*. at 58.

(iii) This command has to be directed to the behaviour of another person to conform to a behavior of a certain type.
(iv) Norm has to be objective.
(v) Objectivity implies authorization.
(vi) A person must be authorized to make law.
(vii) Only when is it objective, can it be called a norm.
(viii) The essence of norm lies in its 'validity'.
(ix) Norm decrees an 'ought'.[35]

Kelsen famously distinguished between the 'Is' and 'Ought' propositions. It has already been mentioned that 'validity' is the essence of a norm. In logic 'validity' is used to denote an 'argument'. An argument is valid if it can be reached from a proposition to a conclusion without any contradiction. In law, ought is different from a moral and a scientific 'ought'. In legal positivist sense if a norm having an 'ought' proposition is written in a Constitution, statute or a public place like a swimming pool, then instead of normal sentences they become law having a sanction behind them. They are valid because of their 'legal ought' propositions. Kelsen worked on the famous assertion of David Hume that an 'Ought' cannot be derived from 'Is'. An 'Is' is indicative and is apparent in facts of nature, causal links, scientific discoveries etc. An 'Ought' is normative and is created by an act of will. This legal ought is transcendental in nature i.e. making ought a reason for the legal validity. The difference between ought in 'law of nature' and law is best described by Kelsen himself in the following words: "The rule of law does not say, as the law of nature does: when *A* is, "is" *B*; but when *A* is, *B* "ought" to be, even though *B* perhaps actually is not. The reason for the different meaning of the connection of elements in the rule of law and in the law of nature is that the connection described in the rule of law is brought about by a legal authority (that is by a legal norm created by an act of will), whereas the connection of cause and effect is independent from such human interference."[36] Ought then is a part of 'transcendental logic' or an a priori category which validates all other phenomenon.

[35] *Supra* note 14 at 23-24.
[36] *Supra* note 14 at 25.

III

Grundnorm and Noumenal world

This section makes an argument that Kelsen's notion of *Grundnorm* bears a resemblance to Kant's notion of noumenon. To start with, a bare understanding of the concept of 'noumenon' will be given then the paper will proceed with a comparative analysis of grundnorm and noumenon.

As a point of convenience, the concept of 'noumenon' can be analyzed by dwelling on Kant's analysis of 'representation'. A constant area of problem in Kant's time was the debate about knowledge and representation. Kant gave a novel idea about 'presence' and 'absence'. It is asserted that, 'knowledge' is achieved in the difference between the failure of representation and the desire to represent. According to empiricists, knowledge is a consequence of general action of the principles of reflection within the depths of mind. Rationalism is of the view that these ideas cannot be represented yet they remain the precondition of existence. Kant created a novel model which went beyond the simple division given by rationalists (knowledge is anticipated) and empiricists (knowledge is experienced).

Kant's works on the concept of 'noumenon' and 'phenomenon': Phenomenon is the realm which is subject to the sensorial experience of humans. Noumenon is beyond the realm of human sensorial experience. The world of noumenon is a priori. Since Kant wanted to create a mid way between science and religion, he imposed a ceiling on the human thinking capacity. Kant's a priori 'noumenal' world consists of 'presuppositions', concepts which make knowledge possible. This includes Space, Time and God. Kant calls the noumenon, 'things in itself'. According to Caygill, 'thing in itself' is the quality of limiting the employment of human understanding and reason. The things in itself cannot be known since knowledge is limited only to human experience.[37] Kelsen's concept of 'Grundnorm' is a self sustaining concept too. There are four ways to interpret Kelsen's *Pure Theory of Law:*

(a) An anti ideological approach to law and a reply to Carl Schmitt's heavily politicized interpretation of sovereign.
(b) An application of Kantian transcendental method.

[37] *Supra* note 16 at 393.

(c) An epistemological approach to law.

(d) A defense of the idea of legal monism in international law. The Pure theory of law lays a prequel/predecessor to 'Peace through Law'.

Kelsen's *Pure Theory of Law* is an answer to Carl Schmitt's endorsement of Nazi ideology and his assertion that 'Sovereign is the one who decides on the exception'.[38] Kelsen's insistence on Constitution as a 'Grundnorm' was his account of a 'de politicized' aspect of law. Kelsen's Grundnorm is a reply to Schmitt's sovereign. Kelsen harped on the strict distinction between state and law. The reason behind the validity of law is law itself and not state. Law is simply 'pure law'. It is a logically closed complex of norms[39] where one norm derives its validity to a higher norm. Kelsen opposed a personalized account of law which was apparent in the work of Schmitt.[40] A personalized concept of law allows it to be a handiwork of state, a product of power and monopolization of wills.[41] It is only by interpreting law as a 'normative' system that law can attain its objectivity and neutrality. This guarantees legal stability, pacification, reasonableness and democracy.[42] Kelsen even opposed metaphysics. Metaphysics, according to Kelsen, opposes democracy as it promotes the notion of 'absolute causes' which in turn manifests itself in 'absolute person'.[43] This undermines an objective approach and results in a terror state like the Nazi regime which Schmitt endorsed and sponsored in his works.

The connection between Kelsen and Kant is described by Hakan Gustafsson. According to him, Kelsen's basic norm is a 'presupposition' and has three basic features:

(1) Grundnorm is an epistemological device serving a well defined cognitive purpose.

(2) Grundnorm is internal to the system and also immanent to it.

(3) It is pre supposed. [44]

The concept of Grundnorm has had a rich history in German philosophy. Jellinek's '*Denknowtwendigkeit*' and the notion of '*Ursprung*' are the predecessors of grundnorm.[45] By

[38] David Dyzenhaus, *Legality and Legitimacy* 42 (Oxford University Press, New York, 2003)
[39] *Supra* note 17.
[40] *Supra* note 38.
[41] *Ibid*.
[42] *Ibid*.
[43] *Supra* note 1 at 264.
[44] Hakan Gustafsson, "Fiction of Law" (2007), *available at*: http://www.helsinki.fi/nofo/NoFo4Gustafsson.pdf (last visited on March 1, 2019).

saying that 'grundnorm' is a presupposition and not posited, Kelsen deviates from the early positivists. Kelsen borrowed the concept of grundnorm from his brilliant colleague Adolf Julius Merkl who called it '*Stufenbaulhere'*.[46] Grundnorm then refers to legal norms in a hierarchical structure. The advantage of having a hierarchical structure is that it leads to an objective, neutral chain of validity.[47] A grundnorm has the capability of resolving the validity of a norm.[48] It is the common source for the validity of all norms belonging to a given legal order.[49] It is to be noted that Grundnorm is the source of validation; it does not talk about the content of the inferior norm. Kelsen first uses the term 'grundnorm' on page 8 of *Pure Theory of Law* and uses the term pretty late in the book (i.e. page 195).[50] Chapter V of the *Pure Theory of Law* is titled '*The Dynamic Aspect of Law: The Reason for the validity of a Normative Order: The Basic Norm.*[51] Kelsen starts with the 'Is' and 'Ought' distinction, and then cites an example as to why the commands of God are 'presupposed'. In fact the words 'presupposition' and all its variants are the most used set of words in *Pure Theory of Law.* According to Kelsen:

> Such a presupposed highest norm is referred to in this book as basic norm. All norms whose validity can be traced back to one and the same basic norm constitute a system of norms, a normative order. The basic norm is the common source for the validity of all norms that belong to the same order – it is their common reason of validity. … It is the basic norm that constitutes the unity in the multitude of norms by representing the reason for the validity of all norms that belong to this order.[52]

Kelsen's Grundnorm is a reply to juridico – transcendental question, which is only possible if law is separated from morality and facts.[53] Following Kant's Copernican Revolution Kelsen understood that a priori knowledge of law is possible only when we conform object to our intuition.[54] Kelsen's observation on Constitution is intriguing to say the least. If one can trace the reason for imprisoning a person then its validity can be traced to a judicial decision and a statute. The validity of that statute can be traced to a constitution. If one were to argue as to from

---

[45] *Id*. at 96.
[46] *Supra* note 30 at 37.
[47] *Id.* at 70.
[48] *Id.* at 71.
[49] *Ibid*
[50] *Supra* note 17 at 8.
[51] *Id.* at 193.
[52] *Id.* at 195.
[53] *Supra* note 30 at 72.
[54] *Ibid.*

where the Constitution derives its validity, we can trace its validity to an older constitution and finally to a 'historically first constitution'.[55] The validity of this first constitution is owed to the power of the legislator who derived his power from a presupposed norm.[56] The historically first constitution is below the basic norm of a given legal order. Hence, constitution does not exist in a positive legal sense because the power of the law maker emanates from a presupposed norm; therefore, it is a constitution in a logical juridical sense.[57]

Since, grundnorm is not posited in nature and is a presupposition then it can be said that it seeks no validation of its own and cannot even be formulated. According to Juliele Sievers, grundnorm only works as a presupposition when the validity of a specific order is considered.[58] Further, it can be said that as per a Kantian metaphor a valid legal system can be regarded through the lenses of the basic norm.[59] As such a grundnorm cannot even be expressed. Being a 'presupposition' it is a starting point which makes the 'whole' 'valid'. This allows us to draw a comparison between 'grundnorm' and 'noumenon'. Noumenon world, particularly the notion of Space and Time, makes the cognizance of other things possible. It is the ultimate source of validation. It can be called a pre supposition of knowledge. Both Kelsen and Kant share the scheme of transcendental logic. Here, Kant's noumenon and Kelsen's grundnorm by virtue of being presuppositions are the source of knowledge; a source that is self sustaining. The idea can be traced backed to Plato's concept of a 'true' idea. According to Plato, mind holds the essence of a thing by finding the ideal concept which corresponds to its literal meaning.[60] According to Heinrich Rommen, this ideal concept becomes a norm, and a positive law must conform to this true and proper law.[61] In our analysis, even on a Platonic scale, grundnorm is that true and proper law. Plato had created a separation between pure ideas and human perception and we are of the view that noumenon and grundnorm are a particular application of that world.

IV

Kelsen and Neo Kantianism

[55] *Id*. at 73.
[56] *Ibid.*
[57] *Id.* at 74.
[58] *Supra* note 14 at 92.
[59] *Supra* note 30 at 76.
[60] Heinrich Rommen, *The Natural Law*13 (Liberty Fund, Indianapolis, 1998).
[61] *Ibid*.

The following section traces the roots of Kelsen's legal philosophy in an intellectual movement called Neo Kantianism. Its basic feature is 'legal humanism'. Kelsen's concern for the individual as a subject of international law can be traced to legal humanism. The later part of the nineteenth century, saw a reaction against certain metaphysical aspects of Kant. Neo Kantianism was one of such reactions which eroded the metaphysical account of Kantian philosophy and rooted him in a post metaphysical account of human determinacy and human politics.[62] This school was concentrated around Hermann Cohen and Heinrich Ricket. Neo Kantianism focused on the following aspects:

(a) Anthropological doctrine of rational human autonomy;
(b) Self realization; and
(c) Legal statehood.[63]

According to Cohen, human is truly free if it is autonomous.[64] This is reminiscent of Kant's slogan 'sapere aude'.[65] Cohen avoided the noumenal argument and emphasized on the ethical life as depicted by Kant. He preferred Kant's practical reason over pure reason.[66] In his analysis, metaphysical limits of reason must make way for moral elements of reason.[67] The emphasis of Neo Kantianism was on 'legal humanism'.[68] Legal humanism is based on human self causality and rationality freedom.[69] According to Cohen, the focus of philosophy should be on 'anthropological self realization' and his emphasis was on the 'doctrine of human being'.[70] The doctrine of human being shall be a doctrine of law. Law, according to Cohen, is the foundation of 'self' and humans become fully self aware through rationally justified laws. Cohen, then, expounds on 'pure will' or 'pure self legislating wills'. The pure will is not stimulated by any other content but of itself, i.e. rationally prescribed laws.[71] This aspect can be compared with Kelsen's *Pure Theory of Law*, where Kelsen insists that the validity behind law is law itself. Both Kantian and Neo Kantians backed 'Rechsstat' i.e. a state ruled by law. This is in

[62] *Supra* note 1 at 239.
[63] *Ibid*.
[64] *Ibid*
[65] H.S.Reiss (ed.), *Kant Political Writings* 54 (Cambridge University Press, Cambridge, 2015).
[66] *Supra* note 1 at 240.
[67] *Ibid*.
[68] *Ibid*.
[69] *Ibid*.
[70] *Id.* at 241.
[71] *Ibid*.

consonance with Kelsen's idea of superiority of a law dominated structure to which the sovereign and the state were subservient.

Kelsen's relationship with Kantianism and Neo Kantianism in Kelsen's 'Foreword' to the second edition of his habilitation thesis:[72] Here, he draws the attention of the readers to the book review of the First edition of 1911, where Oscar Ewald remarks that it seemed to him that Kantian and Neo Kantianism trend of transcendental method had proved to be crucial to Kelsen.[73]

After Ewald's analysis Kelsen became a committed Neo Kantian.[74] When Kelsen asks in *Pure Theory of Law* that "How is it possible to interpret without recourse to meta legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively legal norms describable in the rules of law?"[75] Kelsen echoes Cohen transcendental method. To corroborate the nexus between Kelsen and Neo Kantianism, Kelsen's letter to Renato Treves one of Kelsen's Italian translators can be used. Kelsen wrote:

> … What is essential is that the theory of the basic norm arises completely from the method of Hypothesis developed by Cohen. The basic norm is the answer to the question: What is the presupposition underlying the very possibility of interpreting material facts that are qualified as legal acts, that is, those acts by means of which norms are issued or applied? This is a question posed in the truest spirit of transcendental logic.[76]

V

The return of Legal Monism

This section primarily reflects on the ideas of Hans Kelsen regarding International law and the doctrine of Legal Monism. Kelsen campaigned for the binding and supreme nature of international law. International law had been facing an existentialist crisis due to the legal philosophy of Hegel, which had made State the cornerstone of legal and political philosophy. Hegel's views, along with that of Triepel and Anzilotti, helped in the creation of the school of legal dualism which espoused for the distinction between international law and domestic law.

---

[72] *Supra* note 30 at 65.
[73] *Ibid*.
[74] *Ibid*.
[75] *Id.* at 66.
[76] *Ibid.*

The domain of international law, in the nineteenth century was primarily dominated by legal positivism and the theory of auto limitation which denied international law its objectivity and based its (international law) existence on self obligation.

However, C Kaltenborn in his book *A Critique of the Law of Nations* argued in favour of an objective and binding international law.[77] He criticized the Hegelian view which made State absolute and the highest institution in international affairs. According to him, there was a branch of law that had a higher legal entity than state. This entity was international law. Kaltenborn said: "In this way, the legal life of the state, which is inherently only national, is elevated into a general human community of law that goes beyond the nation, into an international order of law."[78] International law emerged from an international community which in turn has attained an 'organic' existence because of the co existence of nation states. Kaltenborn insisted that international law was a law in a true sense as it could be enforced and had a coercive character.[79] The enforcement of international law was possible through the voluntary nature of states, mediation and war.[80] War gave international law its coercive character and allowed international law to monopolize the use of force.[81] Kelsen and Kaltenborn agreed on the point that war was an essential force of sanction in international law. Hegel's views had fostered the growth of legal positivism and subjective principle in international law while the views of Kaltenborn supported an objective aspect of international law. According to Jochen Von Bernstorff, the theory of international law oscillated between the 'subjective' and 'objective' principle.[82] As it has been mentioned in this paper earlier that Kelsen was highly influenced by the work of Dante (who had also worked on one of the earliest Perpetual Peace models),[83] then it was natural for Kelsen to be a Cosmopolitan. Kelsen was highly critical of the concept of state and sovereignty. The starting point of Kelsen's theory of international law can be found in 1920 monograph *Das Problem der Souveranitat und die Theorie des Volkerrechts*.[84]

[77] *Supra* note 9 at 15.
[78] *Id.* at 19.
[79] *Ibid*.
[80] *Id.* at 21.
[81] *Ibid*.
[82] *Supra* note 9 at 17.
[83] *Supra* note 9 at 79.
[84] *Supra* note 9 at 61.

Kelsen's legal monism was a reply to the positivist theory of legal dualism. Kelsen's main aim was to free international law from any ideological structure. He challenged the following dominant German legal traditions of international law:

(a) Doctrine of sovereign will.

(b) Jellinek's concept of self obligation.

(c) Dualistic nature of international law as espoused by Hegel and Triepel.

(d) The notion of identity thesis and legal fiction.[85]

Kelsen was highly critical of the concepts of 'collective soul', 'Volk', and 'Nation'.[86] He was also critical of the prevailing theories of sovereignty. Kelsen was of the view that the claim of the state that sovereignty was their absolute right was based on flawed reasoning. Sovereignty in its classical form always promoted anarchy in international law. Right to wage war was seen as an extension of sovereignty. The classical international law had very little control over the *jus ad bellum* regime. Sovereignty, according to Kelsen, was determined from within the law.[87] Sovereignty is legal attribute and a part of legal order. By focusing on legal monism, Kelsen talks about the primacy of international law. In his analysis, states do not represent a sovereign entity that 'precedes the law' but a subordinated legal sphere that is integrated into the universal legal system. It can be called 'de sanctification of State in International Law'.[88] Sovereignty, according to him, should be assigned to international legal system.[89] Kelsen refuted the doctrine that considered international law as a mere agreement between states. It was an objective and binding law.

The events after First World War created an antagonistic atmosphere against a state centric Hegelian approach. Hugo Krabbe, Duguit and Kelsen opposed the voluntaristic basis of international law.[90] This paper makes an argument that *Pure Theory of Law* anticipates Kelsen's political cosmopolitan project *Peace through Law.*[91] The penultimate chapter of *Pure Theory of Law* is solely dedicated to the issue of legal monism and the supremacy of international law over

[85] *Ibid*.
[86] *Id.* at 57.
[87] *Id.* at 63.
[88] *Id.* at 125.
[89] *Id.* at 127.
[90] *Supra* note 9 at 70.
[91] *Supra* note 6.

municipal law.[92] By drawing an analogy between Ptolemaic point of view and Copernican point of view on one hand, and international law and municipal law on the other hand, Kelsen cleverly argues in favor of the supremacy of international law.[93]

Kelsen's alternative international legal order in *Peace through Law* had two objectives: First, creation of a powerful world court with a compulsory jurisdiction in a true sense and second, more autonomy to individuals under international law.[94] Kelsen published a draft Charter for a 'Permanent League for the Maintenance of Peace' (which according to him should have been the League's successor) where he said that the world court shall be the final approver of the system of sanctions.[95] In Kelsen's League, the Court became the central organ and the eruption of violence was judicially dominated. Kelsen's vision in *Peace through Law* paid no heed to state immunity and urged for the prosecution of war criminals, thus favoring the rights of the individuals.[96]

Recently, Paul Gragl has argued for the revival of legal monism in the 21st century.[97] According to him the following events have created a gridlock in the international scenario:

(a) The fallout of the Presidential election of 2016.

(b) Brexit.

(c) Election of Donald Trump.

(d) Rise of populism and irrational political choices.[98]

Paul Gregl has vehemently defended the theory of monism as it guarantees the idea of a peaceful and tolerant world order. Since the outbreak of the refugee crisis of the Middle East, the world order has witnessed an aggressive rise of nationalism which borderlines jingoism and fosters xenophobia. The rise of the right wing all around the world does not serve the subject of international law well. Nationalism as a concept is not a part of international law and is one of the centrifugal forces of international law. In fact, international law is the anti thesis of nationalism. International law was created to act as a check on the *jus ad bellum* which was a

[92] *Supra* note 17 at 320.
[93] *Id.* at 345-347.
[94] *Supra* note 9 at 72.
[95] *Supra* note 6 at Annexure I, 127-148,138.
[96] *Supra* note 9 at 198.
[97] *Supra* note 37.
[98] *Supra* note 37 at viii.

nation's most preferred way to settle a dispute. An aggressive nationalism in the 21st century is not feasible as the traditional notion of Westphalian sovereignty has already been shattered.[99] Nationalism guarantees international co-existence but cannot guarantee international co-operation. Robert Kolb has criticized the notion of nationalism. According to Kolb, 'aggressiveness' is the basis of nationalism. An order solely based on nationalism is bound to lapse into solipsism. Nationalism is a natural enemy of international organizations and peace movements.[100] Nationalism coupled with sovereignty shows little respect for human rights. In a globalized and interdependent world, nationalism with its sole focus on 'national interest', hampers the spirit of *pacta sunt servanda* and subsequently inhibits international confidence and agreements. It will not be an exaggeration to say that nationalism inhibits the growth of international law itself. A weaker nationalism will favour the juridical pacification of international relations. An instance may be mentioned here, which will show that how nationalism, in the garb of 'national interests', undermines international legal values. There is a prohibition of torture in all legal regimes. It is a part of *jus cogens* regime. But a nation state that is 'dualist' in nature will believe in strict distinction between national law and international law. A 'dualist' state believes in the supremacy of national law and may even justify the imposition of torture in the name of national interest.[101] This method of a 'dualist' approach not only hampers an international legal framework but also commits a logical fallacy of 'equivocation'.[102] The essence of legal positivism lies in 'validity' of a norm. Legal validity is the basis of legal epistemology. It is through validity that we are able to identify law. Validity itself is not a matter of degree. Either a norm is valid or it is not. A dualist state fails this test. If a norm is valid in its international sphere then it is valid in the national sphere too. There cannot be two standards to judge the validity of a norm.[103]

Legal monism has an added ethical dimension to it.[104] As compared to dualism, monism has a higher ethical notion attached to it. Legal monism acts as a check on unbridled sovereignty

[99] Cynthia Weber, *Simulating Sovereignty: Intervention, the State and the Symbolic Exchange* (Cambridge University Press, Cambridge, 1995). Also see, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, Ottawa, 2001).
[100] Robert Kolb, *Theory of International Law* 301 (Hart Publication, Portland, 2016).
[101] *Supra* note 30 at 15.
[102] *Ibid*.
[103] *Ibid*.
[104] *Id*. at 291-292.

and protects human right values. Legal monism has an affinity with democracy as both aims for pacifism. Legal monism envisions a cosmopolitan world, a cause which has been championed by Dante and Kelsen. Immanuel Kant, too, wrote extensively on a Perpetual Peace Project which formed the basis of Covenant of League of Nations and Charter of United Nations. Gregl supports a heretical reading of *Pure Theory of Law* to show that legal monism supports pacifism, cosmopolitanism and human values.[105] The heretical method is important as *Pure Theory of Law* is a defense of legal positivism having no moral overtones. Kelsen believed that legal monism could solve the problem of world peace but avoided the notion that it 'ought' to be adopted as a legal science. Kelsen avoided using legal monism as a solution to the universal peace as it carried a strong moral base which could have hampered a scientific and positivist base of *Pure Theory of Law*. But if we see the entire construct of Kelsen's work, then it can be said that he himself was a cosmopolitan. Hence a 'radical' or 'heretic' reading of *Pure Theory of Law* is required. Gregl gives an analogy from Kant's *Critique of Pure Reason.* It is usually interpreted as a commentary on epistemic faculties and their limits (What can I know?) but Kant was of the view that the ultimate view of philosophy was morality. This is a heretic interpretation of Kant's work. The same heretic method can be used to interpret Kelsen's work as a 'whole'. Gregl wants that one must look beyond the 'jurist' Kelsen.[106] It is then that we can see that the aim of *Pure Theory of Law* was to create a pacifist world under the epistemic superiority of monism which undermines and curtails sovereignty and nationalism.

The demarcation of the spheres of domestic law and international law are not based on a logical basis. Both domestic law and international law have certain concurrent areas of coverage including laws related to individuals. In fact, the very existence of state as a legal personality is verified by international law and not by domestic law. Thus, the case for a monistic order gets even stronger. It has been mentioned that the very notion of validity requires a single integrated legal structure as validity is not a matter of degree and this strengthens the notion of a unified monist order. A younger Kelsen favoured a monist order under the supremacy of international law, however, in his later years he adopted the 'choice hypothesis' and said that monism is possible even under the supremacy of national law.

---

[105] *Id*. at 293.
[106] *Id.* at 295.

Kelsen's monism is most relevant for a 21st century world because it is a predecessor of all the recent schools that have made sovereignty a relative concept. Kelsen was of the view that sovereignty was not a part of the state order but was vested in international law and was eventually subsumed under the grundnorm. Kelsen takes away the factual and political characteristics of sovereignty and places it in a single unified order.

The epistemological necessity of legal unity entails that law, as a matter of cognition, is a unitary object.[107] This idea is rooted in Kantian 'mid –way' method elaborated in *Critique of Pure Reason*. Kant was of the view that cognition of knowledge cannot be purely a priori or a posteriori. The rational thoughts are already present inside the human mind in the form of 'categories'. This leads to 'unity of appreciation' where representation is possible in the identity of the self. The unitary consciousness of the observer constitutes the unity of the observed object.[108] Following the Kantian concept of 'unitary of appreciation', Kelsen states that legal method creates legal science.[109] In essence law is a coercive system, created by men to regulate their behavior and the normative structure of the system governs itself. It is because of this unified structure that international law cannot be distinguished from domestic law. Although, Kelsen favored choice hypothesis in his later years but very subtly stated that a primacy of national order was eclipsed by politics and would result in a collapse into solipsism and selfishness.[110] This leads to primacy of international law under international legal order thereby delegating national orders.

Legal monism can serve as a 'peace map' for the future generations. The paper has focused on the following aspects:

(a) A transcendental logical approach to law.

(b) An epistemological approach to law.

(c) An inherent connection between the work of Kelsen, Kant and Dante.

(d) Kelsen's defence of an objective, binding regime of international law.

(e) Relevance of legal monism in the present scenario.

---

[107] *Supra* note 30 at 104.
[108] *Id.* at 105.
[109] *Ibid.*
[110] *Id*. at 112.

A value free and legal scientific defense of international law is the roadmap to peace. A strict adherence to the supremacy of national law and the Westphalian system has fostered jingoism, xenophobia and intolerance among nation states. A resurgence of Legal monism and a look back at Kelsen's vision can help in creating a better, tolerant and peaceful world. The future lies in judicial cosmopolitanism and an 'epistemic world order'.

VI

Conclusion

Ours is a world of contradictions. In times when we are witnessing exchange of global cultural values, states have entered a state of gridlock. A return to legal monism is arguably one of the first attempts to interpret peace in a transcendental manner. A single, seamless world order unified by a single doctrine is a viable solution to a conflict driven world. It is pertinent to mention here that Kelsen's views were an echo of the Groatian tradition. The trinity of Grotius, Kaltenborn and Kaltenborn vied for an objective and binding international law. Hyper nationalism is toxic. Shallow pursuit of national interests is a reiteration of a hollowed approach of Realist school of international politics. The onset of legal monism is desirable because the influence of a traditional Westphalian system is decreasing. Legal dualism serves the national interests and avoids issues of global nature. Legal monism's idea of a unified world under a single regime of objective law is unparalleled. Monism accompanied by a powerful World Court envisioned by Kelsen is a futuristic device for a peaceful world. The epistemic and neutral stand of monism is way towards the utopia of Perpetual Peace. The march is towards a pacifist, objective and cosmopolitan world.

THE INTEGRATION OF SUSTAINABLE DEVELOPMENT CONSIDERATIONS IN INTERNATIONAL INVESTMENT LAW: NEWEST DEVELOPMENTS OF A LONG-AWAITED CHANGE

*Adeline Michoud**

Abstract

Over the last four decades, many corporations from Western countries have chosen to relocate several of their activities in developing countries. As a consequence, many host countries took the decision to loosen their regulations to attract Western companies and foreign investors. This has led to what is commonly known as the "race to the bottom", corresponding to countries seeking to attract foreign capitals on their territory by reducing their social and environmental standards.

In the context of these movements of capitals, governments of Western States have sought to ensure the fair treatment of their corporations in their operations abroad through the conclusion of trade and investment treaties. These treaties award protection to investors and entitles them to enforce their rights vis-à-vis the host state before arbitral tribunals. Such international investment agreements generally do not place obligations on investors, but only on the State Parties.

While corporations and private investors have accumulated a certain number of rights under these treaties, a certain asymmetry has developed with regards to their accountability towards the countries and the populations affected by the adverse impacts generated by their activities. Several abuses by transnational corporations have revealed the importance of bringing more balance to state-investors treaties and underlined the necessity to impose sustainable development obligations to transnational companies and investors.

This article aims at discussing the necessity of including corporate social responsibility considerations in the international investment treaties framework. We shall notably discuss the latest developments in that respect in recent investment treaties. We shall also assess the adequacy of arbitral tribunals to handle corporate human rights breaches and analyse what mechanisms could be adopted in order to broaden the scope of arbitration and to develop new mechanisms to put an end to the State/investor asymmetry.

I

Introduction

Over the last four decades, many corporations from Western countries have chosen to relocate several of their activities in factories based in developing countries. As a consequence, many host countries took the decision to loosen their regulations to attract Western companies and foreign investors. This has led to what is commonly known as the "race to the bottom", corresponding to countries seeking to attract foreign capitals on their territory by reducing their social and environmental standards and by establishing poor legislative frameworks that limit the liability of corporations for the adverse impacts caused by their activities.[1]

* Trainee Lawyer, Research & Teaching Assistant at the University of Geneva.

In the context of these movements of capitals, governments of Western States have sought to ensure the convenient treatment of their corporations in their operations abroad through the conclusion of trade and investment treaties, often referred to as Bilateral Investment Treaties (BITs). These treaties award protection to investors and grant them several rights such as fair and equitable treatment, protection from expropriation and performance duties for investments. BITs also ensure that host governments treat foreign investors the same way as domestic companies (also known as the right to national treatment).

With the rise of globalization, corporations have obtained, under international law, extensive legal rights against States. Foreign investors have acquired these rights through the investor-state dispute settlement provisions of bilateral investment treaties, which are considered as neutral dispute settlement forums.[2] Upon the signing of BITs, States are deemed to accept to appear before arbitral tribunals.[3] National courts, because of their presumed potential partiality in favour of their governments, are thus generally not competent to hear the claims relating to foreign investments.

According to the United Nations Conference on Trade and Development (UNCTAD), 2930 bilateral investment treaties are in force today.[4] These investment treaties between States have privatized the international protection of foreign investors, granting them a direct right of action before arbitral tribunals in the event of a violation of provisions designed to protect their investments.[5] On the other hand, BITs generally do not place obligations on investors, but only on the State Parties.[6]

---

1 See G.L. Skinner, "Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World", 46 *Colum. Hum. Rts. L. Rev.* 158, 169-173 (2014-15) (explaining that some "countries' dependence on investment has led to a race to the bottom in terms of regulation of business activities"); see also J.A. KIRSCHNER, "Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe? : Extraterritoriality, Sovereignty, and the Alien Tort Statute", 30 *Berkeley J. Intl Law* 259, 266-267 (2012) (noting that certain countries will refrain from making certain activities illegal in order to encourage foreign investment). ; See also S.R. RATNER, "Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale L. J.* 461 (2001); B.A. SIMMONS, "Bargaining Over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment", 66 *WPR* 20-21 (2014).

2 P. Dumberry and G. Dumas-Aubin, "How to Impose Human Rights Obligations on Corporations Under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs", in Karl P. Sauvant (ed), *Yearbook on International Investment Law & Policy 2011-2012* 570, 572 (Oxford University Press, 2012).

3 See, e.g., *Saluka Investments B.V.* v. *Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, May 7, 2004, para. 39.

4 See: https://investmentpolicy.unctad.org/international-investment-agreements (last visited on June 23, 2019).

5 See on the topic: T. Schultz and C. Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study", 25 *Eur. J. Int'l L.* 1147-1168 (November 2014).

6 UNCTAD, Social Responsibility, Vol. 17, UNCTAD/ITE/IIT/22 (Mar. 31, 2001); Y. RADI, "Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox", 37 *N.C.J. Int'l L.* 1110 (2012).

While corporations and private investors have accumulated a certain number of rights under these treaties, a certain asymmetry seems to have developed with regards to their accountability towards the countries and the populations affected by the adverse impacts generated by their activities. Several abuses by transnational corporations, benefitting from the almost non-existent regulatory framework of their host countries, notably in terms of labour and environmental laws, have been revealed to the main public in the past years. One of the most famous of these abuses is the Rana Plaza clothing factory collapse, which occurred on April 24th 2013, in Bangladesh, killing more than 1 100 persons and injuring 3000 others.[7]

Such incidents reveal the importance of bringing more balance to investment treaties and state-investors contracts and underline the necessity to impose sustainable development obligations (i.e. compliance with human rights, labour and environmental standards) on transnational companies and investors. In fact, it appears crucial that states and companies agree on a certain social contract, where both States and investors have equivalent duties and obligations.[8]

John Ruggie, the UN Special Representative for Business and Human Rights from 2005 to 2011, has specifically noted the importance to consider human rights in investment contracts and treaties: "Negotiation is an opportune time to define expectations and responsibilities of the parties regarding all kinds of risks, including those related to human rights. Moreover, the proper management of human rights risks will also have implications for other contractual issues, so it is best to consider them coherently along with economic and commercial issues."[9]

Therefore, in this article, we shall discuss about the necessity to incorporate social responsibility clauses in international investment treaties and ways to put an end ~~and~~ to the current asymmetry between States and investors in international investment law. First, we shall assess why the incorporation of sustainable development considerations is important in BITs. Second, we shall see that such an incorporation is becoming a growing trend and we shall study several examples of bilateral investment treaties progressively integrating corporate social responsibility considerations. Then, we will analyse the increasing

---

7 The Rana Plaza Accident and its Aftermath, *available at*: https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm (last visited on December 23, 2018).

8 H. Peter and G. Jacquemet, *Corporate Social Responsibility : analyse des rapports 2013 des dix plus grandes sociétés du SMI,* L'expert-comptable suisse 1029 (2014).

9 United Nations, Principles for Responsible Contracts: Integrating the Management of Human Rights Risks Into State-Investor Contract Negotiations—Guidance for Negotiators (United Nations, 2015).

.

consideration awarded to human rights standards by arbitral tribunals and their application to State/investors relations. Finally, we shall discuss the adequacy of arbitral tribunals to handle corporate human rights breaches and analyse what mechanisms could be adopted in order to broaden the scope of arbitration and to develop new mechanisms to put an end to the State/investor asymmetry.

II

The effects of the incorporation of human rights in Bilateral Investment Agreements

The desirability to regulate TNCs' obligations in terms of human rights in investment agreements has been subject to much discussion for many years. A number of arguments in disfavour of this change have been raised throughout time.

Some authors argue that such an integration would have a negative impact on investments in developing countries, as this would prevent companies from investing abroad because of the danger of costly litigation that this can generate for them.[10] Second, corporations explain that their corporate social responsibility initiatives are sufficient to regulate their behaviour.[11] Third, it is claimed that imposing human rights standards extraterritorially on TNCs could be perceived as some kind of neo-colonialism trying to impose Western standards on developing countries.[12] Finally, authors like Milton Friedman insist that the "*raison d'être*" of corporations is not about enforcing public policies but only about making profit[13], claiming that imposing such a requirement would be too heavy a burden. We disagree with this opposition and shall briefly address each of the critiques related to the incorporation of human rights in investment treaties.

First, with respect to the negative role that the inclusion of human rights clauses would have on the conclusion of treaties in the future, we can oppose that investments should be based on long-term strategies incorporating labour and environmental regulations.[14] Second,

---

[10] T. Rule, "Using 'Norms' to Change International Law: UN Human Rights Laws Sneaking in through the Back Door?", 5 *Chi. J. Int'l L.* 325-333 (2004).

[11] International Chamber of Commerce and International Organization of Employers, Joint Views of the ICC and IOE on the Draft [UN Norms], 2004 : "If put into effect, it will undermine human rights, the business sector of society, and the right of development", *available at*: https://business- humanrights.org/en/joint-views-of-the-ioe-icc-on-the-un-human-rights-norms-for-business (last visited on November 13, 2017).

[12] S. Seck, "Home State Responsibility and Local Communities: The Case of Global Mining", 11 *Yale Hum. Rts. & Dev. L.J.* 182 (2008) (citing a critique of the Australian Corporate Code of Conduct Bill 2000 who stated the bill would be viewed overseas as "arrogant, patronizing, paternalistic and racist").

[13] M. Friedman, *Capitalism and Freedom* 133(University of Chicago Press, 1962).

[14] S. Marks, "The Human Rights Framework for Development" in A. Sengupta, Archna Negi *et. al.* (eds.),

concerning the argument that voluntary initiatives are sufficient to regulate corporate activities, we can oppose the fact that since the adoption of these voluntary initiatives, several human rights violations and scandals have been revealed to the public, which is a strong indicator that these breaches of fundamental human rights are still occurring.[15] Therefore, a certain amount of commitments shall be taken by private actors in order to ensure compliance with fundamental human rights.

Third, the assertion that human rights regulation represents neo-colonialism can be contradicted as human rights represent universal values that have been adopted by developing countries. Finally, the profit-making aims of corporations should in no way legitimize corporate human rights violations. In fact, due to the impact of their activities, corporate actors should be made accountable and be sensitive to the adverse impacts of their activities.[16]

It has been asserted that including human rights obligations in international investment agreements would only add to their complexity and create legal uncertainty[17], but on the contrary, it can be opposed that incorporating express human rights obligations for corporations is the best way to cure their original imbalance, as States are often the only duty-bearers in such agreements.[18] The integration of human rights in investment treaties is necessary if human rights obligations are to be invoked and applied in investment arbitration. Indeed, arbitrators cannot apply rules (even more so if these rules are soft laws) that are outside the mandate of the investment treaty, as they would exceed their jurisdiction, which

---

Reflections on the Right to Development 23-61 (Sage, New Delhi, 2005).

[15] See for example the revelations regarding the rubies extraction's industry in Mozambique: http://www.lemonde.fr/afrique/article/2017/10/04/au-mozambique-l-extraction-du-rubis-prend- la-couleur-du-sang_5195758_3212.html (last visited on November 7, 2017).

[16] See the arguments raised in Section 1.2.

[17] M. Jacob, "International Investment Agreements and Human Rights" 36-37 (2010), *available at*: https://www.academia.edu/9240477/International_Investment_Agreements_and_Human_Rights_Institute_for_Development_and_Peace_INEF_Research_Paper_Series_Human_Rights_Corporate_Responsibility_And_Sustainable_Development_03_2010 (last visited on July 27, 2019).

[18] See, e.g., J. Letnar Černic, Corporate Human Rights Obligations Under Stabilization Clauses*,* 11 *GLJ* 216–217 (2010); P. Dumberry and G. Dumas-Aubin, *How to Impose Human Rights Obligations on Corporations Under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs*, Yearbook on International Investment Law & Policy 581–582 (2011-2012); T. Weiler, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order"*,* 27 *B.C. Int'l & Comp. L. Rev.* 429 (2004) (suggesting a counterclaim mechanism allowing individuals to bring claims against foreign investors for the violation of human rights); G. Bottini, "Extending Responsibilities in International Investment Law", 2015, *available at*: http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Bottini-FINAL.pdf (last visited on November 7, 2017); H. Mann, K. Von moltke *et. al.*, IISD Model International Agreement on Investment for Sustainable Development 10 (2005), *available at*: https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf. (last visited on November 7, 2017).

would amount to a risk of annulment of their arbitral award.[19]

To this day, for a human right to be invoked and applied before arbitral tribunals depends on its status. Indeed, a distinction needs to be made between fundamental human rights obligations that represent *jus cogens* norms and are, therefore, directly binding on all as peremptory norms of international law, and other human rights obligations which may need further implementing rules to be directly effective against non-state actors under international law.[20]

The new treaty on business and human rights[21] discussed at the United Nations could finally establish the express recognition that businesses have hard legal human rights obligations and that these obligations should also be applied in commercial regimes. This would encourage a reform of international investment law treaties and potentially lead to the integration of human rights obligations for corporations in these investment treaties.

Yet, at this stage, the current zero draft[22] of the treaty does not try to call into question the existing Bilateral Investment Treaties. Indeed, as Article 13(3) of the zero draft states: "The present articles are without prejudice to any obligation incurred by States under relevant treaties". However, the drafters do not completely ignore the issue. Indeed, Article 13(6) of the zero draft provides: "State Parties agree that any future trade and investment agreements they negotiate, whether amongst themselves or with third parties, shall not contain any provisions that conflict with the implementation of this Convention and shall ensure upholding human rights in the context of business activities by parties benefiting from such agreements".[23]

---

[19] J. Ruggie, *Just Business: Multinational Corporations and Human Rights* 184 (W. W. Norton & Company ed., New York, 2013).

[20] Jus cogens norms in the field of human rights include 'the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict and the right to self-determination'; International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/ CN.5/L.702 (18 July 2006), para. 33. See also for the recognition of the application of peremptory norms, *World Duty Free* v. *The Republic of Kenya* (Award), ICSID, No ARB/00/07 (4 October 2006), para. 157.

[21] See Human Rights Council Resolution—Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights, UN Doc No. A/HRC/26/9 (14 July 2014) .

[22] The « zero draft » is *available at*: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf (last visited on September 22, 2018).

[23] The author notes that the question of investment treaties is not directly addressed in the revised version of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises that will be discussed in mid-October 2019 at the United Nations in Geneva. However, Article 12(6) of this revised version provides "States Parties agree that any bilateral or multilateral agreements (…) on issues relevant to this (Legally Binding Instrument) and its protocols, shall be

Therefore, some hope can be raised as to the progressive change of Bilateral Investment Treaties. UNCTAD supports the idea of a reform of the current investment regime, calling for an integration of sustainable development considerations in investment strategies and treaties to secure a better coordination between trade objectives and sustainable development goals.[24] As we shall see in the next section, a few investment treaties have started including corporate social responsibility and sustainable development clauses.

III

The increasing inclusion of labour and environmental clauses in BITs

Due to the growing civil attention on this matter, an increasing number of investment agreements[25] have started including sustainable development provisions. We can notably quote the Canada/Senegal Investment Agreement, which states that: "Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. Such enterprises are encouraged to make investments whose impacts contribute to the resolution of social problems and preserve the environment."[26]

In the same vein, we can also quote the 2016 Morocco/Nigeria Bilateral Investment Treaty, which provides: "In addition to the obligation to comply with all applicable laws and regulations of the Host State and the Sustainable Development Goals of the United Nations, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of

---

compatible and shall be interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols". The revised draft is *available* at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf. (last visited on July 27, 2019).

24 UNCTAD, World Investment Report—Investment and the Digital Economy, 2017, 126-127.

25 The first agreements that included the notion of Corporate Social Responsibility were the EU-Chile Association Agreement (2003), the US-Chile Trade Agreement (2004), the EU-Cariforum Economic Partnership Agreement (2008), and the Canada-Peru Bilateral Agreement (2009).

26 Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments, Article 3, *available at*: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/senegal-agreement.aspx?lang=eng (last visited on October 10, 2018).

socially responsible practices."[27]

Reference to corporate social responsibility principles has increased in the more recent Bilateral Investment Treaties.[28] In fact, the notion of a so-called "new generation" of investment treaties has started to emerge[29], to describe the inclusion of sustainable development considerations as well as the mention of the importance to respect labour and environmental standards in these treaties. Treaties such as the the 2008 EU-CARIFORUM[30], the 2010 EU-Korea Foreign Trade Agreement[31] and the 2012 EU-Colombia/Peru Agreement[32] are good examples of this growing trend to dedicate provisions to foster respect for labour and environmental standards.[33]

Over time, references to sustainable development have become more elaborated. In fact, increasing references are made to CSR instruments such as the OECD Guidelines for Multinational Enterprises in investment treaties.[34] The language used is soft, but a higher level of commitment can be noted, as the wording expresses that the parties to the treaty "should" commit to adopt CSR principles. The United Nations Guiding Principles on Business and Human Rights (UNGPs) themselves recognize the potential of investment agreements, urging states, when concluding such agreements, to be mindful of their duty to protect fundamental rights.[35]

---

[27] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Article 24, *available at*: http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409.

[28] See notably Article 12 of the 2016 Indian Model BIT or Article 15 of the 2015 Brazil-Chile Investment promotion and Co-operation Agreement.

[29] L. Borlini, "The EU's Promotion of Human Righs and Sustainable Development through PTAs as a Tool to Influence Business Regulation in Third Countries" in A. Bonfanti (ed.), *Business and Human Rights in Europe* 80 (Routledge, New York, 2018).

[30] Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and its Member States, of the Other Part. In OJ L 289, 30 October 2008, arts. 72-73.

[31] Free Trade Agreement between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part, 2011 OJ (L 127/54, 24 May 2011), ch.13

[32] See EU-Colombia and Peru TA, Title IX. The suitable development chapter of the agreement contains obligations on the effective implementation of, and non-derogation from, domestic labour laws, recognition of the ILO recent work principles and their relevance for trade and labour. It also includes a provision on equality of treatment as regards working conditions with a focus on migrant workers legally employed in the Parties' respective territories (art. 276).

[33] Similarly, two recent investment treaties awaiting ratification also follow this trend, namely: the 2016 EU-Vietnam Free Trade Agreement (see Chapter 15), as well as the 2017 EU-Japan Economic Partnership Agreement (see Chapter 16). These documents are available at: http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/ (last visited on October 26, 2018).

[34] For example, reference is made in the 2014 Colombia-France Bilateral Investment Treaty to Article 11 of the OECD Guidelines for Multinational Enterprises (the agreement is not in force at this date), *available at*: http://investmentpolicyhub.unctad.org/IIA/country/45/treaty/3488 (Visited on October 7, 2018).

[35] United Nations Guiding Principles on Business and Human Rights (UNGP), 2011, Principles 8 to 10.

Lately, in May 2018, the Netherlands has made available for public consultation its new Draft Model Bilateral Investment Treaty (BIT)[36]. Dutch BITs are amongst the two most frequently-invoked BITs in the world according to UNCTAD[37], generally offering strong protection for investors. However, the previous 2004 model had faced much criticism for the many advantages it conceded to investors and the lack of protection of states' interests. Therefore, the new Dutch BIT Model released in 2018 aims to "create more balance between the rights and duties of host States and investors"[38]. As the Preamble of the new Draft Model BIT states, it seeks to reaffirm "commitment to sustainable development and to enhancing the contribution of international trade and investment to sustainable development".

The new Model BIT notably restricts the possibility for investors to invoke the breach of the BIT when the State Parties seek to implement public interest policies. It provides that "The provisions of this Agreement shall not affect the right of the Contracting parties to regulate (…) to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection (…) The mere fact that a Contracting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations or profits, is not a breach of an obligation under this Agreement".

Article 6 of the Dutch Draft Model BIT is dedicated to sustainable development, while Article 7 is dedicated to corporate social responsibility. Both these articles were absent in the 2004 version of the Dutch BIT.[39] Article 6(2) provides: "Each Contracting party shall ensure that its investment laws and policies provide for and encourage high levels of environmental and labor protection and shall strive to continue to improve those laws and policies and their underlying levels of protections". Moreover, Article 6(3) underlines: "The Contracting Parties recognize that it is inappropriate to lower the levels of protection afforded by domestic environmental or labor laws in order to encourage investment".

The Draft BIT also makes reference to several international instruments as integral parts of its scope in Article 6 (5): "the Contracting Parties reaffirm their obligations under the

[36] See https://globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf (last visited on October 1, 2018).
[37] See http://investmentpolicyhub.unctad.org/Upload/Documents/diaepcb2017d1_en.pdf (last visited on October 1, 2018).
[38] See: https://www.debrauw.com/newsletter/new-model-treaty-to-replace-79-existing-dutch-bilateral-investment-treaties/# (last visited on October 1, 2018).
[39] See: http://investmentpolicyhub.unctad.org/Download/TreatyFile/2859 (last visited on October 1, 2018).

multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which they are party, such as the Paris Agreement, the fundamental ILO Conventions and the Universal Declaration of Human Rights." Article 6 has been criticized for not introducing any binding obligations on companies.[40] Yet, a discernible change can be witnessed in comparison to the previous version. Moreover, this BIT integrates the importance of public protection of social and environmental rights by States, which shall override all other investment considerations and prevent any claim from being brought against States wishing to introduce social legislation that might go against investors' interests.

As we have seen, the consideration of human rights standards in investment law is important to secure the well-being and protect the health and security of workers and local populations that can be affected by foreign corporations' activities in their vicinity. However, we shall not forget that governments of developing countries are the main guarantors of the due enforcement of human rights standards in their respective countries. The main responsibility to secure the rule of law and compliance with human rights lies with host states, who should also be proactive in elaborating a regulatory framework ensuring that all businesses prevent, mitigate and remedy human rights violations occurring on their territory.[41] Therefore, it shall be reminded that the abuses committed by foreign companies are only possible because of the lack of action of developing countries to impose thorough regulatory standards. The sole change of BITs will not be sufficient if it is met by a lack of political willingness on the side of developing countries to implement human rights regulations.

IV

The increasing recognition of labour and environmental standards in the investment-related arbitral case law

Arbitral case law's contribution to develop a trend that take human rights and sustainable development considerations seriously is significant. In *Maffezini v. Kingdom of Spain*[42], the tribunal took into account provisions of European and Spanish environmental

---

[40] B-J. Verbeek and R. Knottnerus, "The 2018 Draft Dutch Model BIT : A Critical Assessment", *available at*: https://iisd.org/itn/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knottnerus/ (last visited on October 1, 2018).

[41] S. Deva, Statement of the Chairperson of the Working Group on Business and Human Rights, UN Forum on Business and Human Rights, Closing Plenary, 29 November 2017, *available at*: http://www.ohchr.org/Documents/Issues/Business/ForumSession6/ClosingSuryaDeva.pdf (last visited on June 23, 2019).

[42] *Emilio Augustin Maffezini* v. *Kingdom of Spain*, ICSID Case No. ARB/97/7, November 13, 2000.

law in determining whether the claimant's rights had been infringed.[43] This is consistent with the Vienna Convention on the Law of Treaties, 1969 (VCLT) which provides that "any relevant rules of international law applicable between the parties (…) should be utilized when interpreting a treaty".[44]

In 2002, in the *Feldman v. Mexico* case, the arbitral tribunal had recognized that governments shall be authorized to allow some public interest concerns to prevail over the investment treaty rules: "governments must be free to act in the broader public interest through protection of the environment (…) and the like (…) Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this".[45]

Similarly, in 2005, in the *Methanex Corp. v. United States of America* case, the arbitral tribunal found that California was entitled to ban a Canadian gasoline product which posed significant risks of drinking water contamination when it leaked from underground tanker and pipelines. The arbitral tribunal held that the ban decided by the Californian authorities was non-discriminatory, as it aimed to defend a public interest. Therefore, it did not constitute an expropriation and no compensation was thus due from the Californian government.[46] More recently, following a similar line, the ICSID arbitral courts, in the *Aven v. Costa Rica*[47] case, the arbitral tribunal recognized a state's right to apply and enforce its environmental protection laws (which stemmed from the Dominican-Republic Central America Free Trade Agreement) against foreign investors.

However, the recognition of the relevance of human rights by an arbitral tribunal does not necessarily imply that this recognition will constitute a determining factor for its final decision. For instance, in *Biwater v. United Republic of Tanzania*[48], the arbitral tribunal, despite agreeing in one of its procedural orders[49] with the argument of one of the *amicus curiae* statements that there is a considerable public interest element to a case involving urban water supply for millions of people, failed to expressly recognise the decisive role played by human rights considerations in its final decision.

---

43 *Id*. at para 67-71.
44 VCLT, Article 31(3) (c).
45 *Feldman* v. *Mexico*, ICSID Case No. ARB(AF)/99/1, December 16, 2002, para. 103.
46 *Methanex Corp.* v. *United States of America*, August 3, 2005, Part IV, Chapter D, para. 15. The decision is available at: https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf (last visited on June 23, 2019).
47 *David R. Aven and others* v. *Republic of Costa Rica*, ICSID Case No. UNCT/15/3, September 18, 2018.
48 *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*, ICSID case No. ARB/05/22, July 24, 2008.
49 *Id*. at Procedural Order No. 5, para. 51.

Yet, the arbitral case law gradually moves towards the recognition of corporate actors' duties, as illustrated in 2016 in the case *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v. The Argentine Republic*[50]. This dispute arose under the Spain-Argentina bilateral investment treaty, after the termination of a concession for water and sewerage services in the Province of Buenos Aires. Argentina sought to invoke that the claimant, during its administration of the concession, had breached international human rights obligations, in this case, the human right to water. The arbitral tribunal agreed that the treaty primarily imposed obligations on the host state. However, it rejected the claimant's argument according to which the investor, as a non-state actor, did not have any obligation.[51]

In fact, the tribunal held that as corporations benefit several rights under BITs, they are subjects of international law and can also bear obligations in international law.[52] The tribunal notably made reference to Article 30 of the Universal Declaration on Human Rights, 1948 and Article 5(1) of the International Covenant on Economic, Social and Cultural Rights, 1966 to establish that private parties were also bound by human rights obligations.[53] The tribunal concluded that there was "an obligation on all parts, public and private parties, not to engage in activity aimed at destroying" human rights.[54] The Tribunal also retained that BITs have "to be construed in harmony with other rules of international law."[55] Therefore, the arbitral tribunal recognized that both investment law and human rights are part of one international legal system, which should not be fragmented.[56]

Moreover, the tribunal later held that "prohibition to commit acts violating human rights (…) can be of immediate application, not only upon States, but equally to individuals and other private parties".[57] However, the tribunal concluded that no applicable human rights obligations had been breached in the present case. Nevertheless, the detailed reasoning provided by the arbitral tribunal shows a willingness coming from certain arbitral tribunals to take into account international law principles and apply them to corporate actors.

We shall now discuss the suitability of arbitral tribunals to hear corporate social responsibility claims in the context of investment agreements.

---

50 ICSID Case No. ARB/07/26, August 12, 2010.
51 *Id*. at para. 1194.
52 *Id*. at para. 1195.
53 *Id*. at paras. 1196-1197.
54 *Id*. at para. 1199.
55 *Id*. at para. 1200.
56 A few BITs already recognize that tribunals should adjudicate claims taking into account both principles of public and private international law, as in Article 10(5) of the Spain-Argentina BIT or Article 14(9) let. v. of India's new Model BIT.
57 ICSID Case No. ARB/07/26., para. 1210.

V

The need to broaden the scope of arbitration and to develop new mechanisms to put an end to the State/investor asymmetry

Arbitration is the main dispute resolution method practiced in international investment law. It may take place in any country, in any language and with arbitrators of any nationality. With this flexibility, it is generally perceived by TNCs as a neutral forum, which guarantees the impartiality of decision makers. Arbitration is in fact praised by investors and companies as it is considered to present many advantages[58], especially with regards to time efficiency. Indeed, arbitration proceedings are much faster than the ones undertaken before state courts.[59] Nevertheless, the question of the relevance of arbitration for business and human rights cases has often been raised.[60] Notably, questions have been posed about the legitimacy[61] to allow arbitral tribunals to hear claims involving public law and human rights issues in the context of investment agreements.[62]

Currently, investment arbitration is the mechanism by which investors seek remedies for breaches of treaty standards by states, but this mechanism does not work the other way around for States wishing to invoke corporations' responsibilities.[63] Indeed, States are deemed to accept to appear before the arbitral tribunals as soon as they have signed the Investment Treaty under which the claim is brought, thus granting jurisdiction on "all disputes" that could occur with the investing companies.[64] On the contrary, investors cannot be considered to have agreed to submit their dispute before an arbitral tribunal simply because their State of origin has signed an investment treaty. Therefore, the investor's express consent

---

[58] See generally A. Koritzinsky, R. Welch *et al*, "The Benefits of Arbitration", 14(4) *Family Advocate*45 (1992); See D. Cassel and A. Ramasastry, "White Paper: Options for a Treaty on Business and Human Rights", *6 NDJICL* 1-50 (2016); L. Gallegos and D. Uribe "The Next Step against Corporate Impunity: A World Court on Business and Human Rights?", 57 *Harv. L. Rev.* 7-10 (2016).

[59] Cassel and Ramasastry, *supra* note 57.

[60] E. Aba, International Arbitration Tribunal: The Challenges 2 (Business and Human Rights Resource Centre, London, 2014); L.E. Peterson and K.R. Gray, International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration 18, 33-36 (International Institute for Sustainable Development, 2003).

[61] *Supra* note 35 para.31a.

[62] See, e.g., P-M. Dupuy, E-U. Petersmann *et al* (eds,), *Human Rights in International Investment Law and Arbitration (*Oxford University Press, Oxford, 2009).

[63] R.E. Cirlig, "Business and Human Rights: from Soft Law to Hard Law?", 6 *Juridical Tribune* 242 (2016); See generally, Public Citizen, Case Studies: Investor-State Attacks on Public Interest Policies (2014), *accessible at*: http://www.citizen.org/documents/egregious- investor-state- attacks-case-studies.pdf (last visited on November 7, 2017).

[64] See, e.g., *Saluka Investments B.V.* v. *Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, May 7, 2004, para. 39.

is required in order for this investor to be drawn before arbitral tribunals.[65] States cannot force their nationals to agree to an investment arbitration, as it was notably stated in the *A.M.T v. Zaïre* case: "It appears therefore that the two States cannot, by virtue of Article 25 of the Washington Convention, compel any of their nationals to appear before the Center."[66]

A mechanism must thus be found in international investment law to ensure that TNCs can also be taken before arbitral tribunals in cases of a breach of human rights' obligations.[67] This would allow to cure the original imbalance between the means of actions of states and investors.[68]

Professor Peter Muchlinski suggested to incorporate in trade agreements a model clause drafted by the United Nations Conference on Trade and Development (UNCTAD) which would state as follows: "A human rights clause could ensure that all Contracting Parties would seek to further corporate compliance with human rights in their domestic laws. In addition, any corporate rights to use treaty-based dispute settlement procedures could be made conditional on the claimant company observing human rights in its operations".[69]

Several authors have argued in favour of the development of the possibility to allow victims of human rights abuses to be able to lodge claims against TNCs before arbitral tribunals.[70] It has been argued that granting such a right to victims would be a way to balance the asymmetry of investment agreements where corporations are allowed to bring claims against States for failing to respect some of their obligations, while the contrary is not possible for States against corporations.[71] Therefore, this possibility for individuals to also bring claims on the basis of a breach of an investment agreement would represent a "*quid pro*

---

[65] D. Carreau and P. Juillard, *Droit international économique* 583 (Dalloz, Paris, 2013); M. Norris, Access to Remedy: An International Tribunal for Business and Human Rights? (October 8, 2014), *available at*: http://blogs.lse.ac.uk/humanrights/2014/10/08/access-to-remedy-an-international-tribunal-for- business-and-human-rights/ (last visited on November 7, 2017).

[66] *A.M.T* v. *Zaire*, ICSID, Case no. ARB/91/1, February 21, 1997.

[67] See, e.g., H. Bubrowski, "Balancing IIA Arbitration Through the Use of Counterclaims" in A. De Mestral and Lévesque C. (eds.), *Improving International Investment Agreements* 212-230 (Routledge, London, 2012); G. Laborde, "The Case for Host State Claims in Investment Arbitration", 1 *JIDS* 97-122 (2010).

[68] C. Cronstedt and R. Thompson *et. al*., An International Arbitration Tribunal on Business and Human Rights, Version 5, April 13, 2015, *accessible at*: http://www.14bb.org/news/TribunalV5B.pdf (last visited on November 7, 2017).

[69] Written evidence submitted by Professor Peter Muchlinski (HRB0011) for the 2017 report of the UK Parliament on Human Rights and Business: Promoting Responsibility and Ensuring Accountability.

[70] J. Fry, "International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity", 18 *DJCIL* 91 (2007); C. Cronstedt and R.C. Thompson, "A Proposal for an International Arbitration Tribunal on Business and Human Rights", 57 *Harv. Int'l L.J.* 66-69 (2016).

[71] R. Suda, The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization 100 (NYUGlobal Law Working Paper No. 01, 2005).

quo exchange"[72] between foreign investors and host States, which would put an end to the existing asymmetry that we have previously evoked.

Todd Weiler has even developed a draft provision for future investment agreements: "The nationals of a Party may submit to arbitration... a claim that an investor of another Party has breached an obligation... and that the national has suffered loss or damage by reason of, or arising out of, that breach."[73] If such a clause came to be integrated, this would represent a considerable incentive for investors and their corporations to comply with human rights standards that would be integrated in investment agreements.

Victims of corporate abuses might encounter many difficulties to access justice and obtain compensation for the wrongs they have suffered. In some situations, the lack of a competent jurisdiction might even generate a problematic legal vacuum as no adequate forum can be found to solve the dispute. Therefore, arbitration could represent a useful forum for victims to present their claims and obtain reparation.[74] An interesting proposal has been made in that regard for the establishment of an International Arbitration Tribunal on Business and Human Rights.[75]

Following the numerous cases where courts have shown to be inadequate or inaccessible forums to handle claims related to transnational corporate wrongs[76], a team of international law experts has started reflecting on the elaboration of a set of arbitral rules specifically designed to tackle business and human rights cases.[77] The working group, headed by Bruno Simma, a former judge of the International Court of Justice, has been conducting various consultations for the past three years. The idea of the experts is to address abuses committed by corporations abroad and to offer an effective dispute resolution mechanism to fill the legal void that currently prevents victims from seeking redress. The process is meant to be complementary to other mechanisms (such as mediation, National Contact Points, state grievance mechanisms, etc.…). The project is funded by the city of The

---

[72] T. Weiler, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", 27 *B.C. Int'l & Comp. L. Rev.* 436 (2004).

[73] *Id*. at 440.

[74] C. Cronstedt and R.C. Thompson, "A Proposal for an International Arbitration Tribunal on Business and Human Rights", 57 *Harv. Int'l L. J.* 66-69 (2016).

[75] *Ibid*.

[76] One of the triggering points was notably the decision of the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), where the conditions to present a claim before US courts, usually considered to be a welcoming jurisdiction for transnational cases involving corporate wrongs, were restricted.

[77] C. Cronstedt, J. Eijsbouts *et. al.*, International Arbitration of Business and Human Rights : A Step Forward (November 16, 2017), available at : *http://arbitrationblog.kluwerarbitration.com/2017/11/16/international-arbitration-business- human-rights-step-forward/* (last visited on December 2, 2017).

Hague and supported by the Foreign Ministry of the Netherlands.

The drafters envisage that arbitration could be used in cases where no proper forum can be deemed competent to hear a case, but also in cases where competent courts could exercise jurisdiction, in order to accelerate procedures.[78] Arbitral tribunals have the advantage of representing an impartial forum. Victims definitely have an interest in choosing arbitration when they cannot seek redress before competent courts. However, they may not be the only parties interested in arbitration to solve their claims. Indeed, corporations might be drawn to this resolution mechanism, as "an expeditious and fair hearing would limit their reputational damage"[79] and because "proceedings can be less adversarial than in court litigation"[80], this would therefore help preserving working relationships between the parties (if applicable).

For arbitration tribunals to have jurisdiction, members of the working group suggest that clauses could notably be included in contracts of TNCs with their suppliers. In order to extend the recourse to arbitration, the drafters also propose to include "perpetual clauses" in TNCs' contracts with their suppliers, that is, clauses that require suppliers and contractors to insert the same arbitration clause in all of their contracts with the other entities which are part of the supply chain. Therefore, any actor of the supply chain committing an abuse could be held accountable by anyone in the supply chain, notably workers of the supply chain. However, third parties to the contract (for example, local people being affected by an environmental pollution caused by the exploitation of natural resources) are left without a remedy because they are not part of this chain of contracts and thus cannot invoke the perpetual clause.

The arbitral project that the working group is currently drafting is substantially different from investor-state arbitration, which, as we have seen, was not originally drafted to consider sustainable development goals or human rights, but only to constrain state policies to ensure the possibility for investors to undertake their activities. Several differences can be drawn between the investor-state arbitration and the new arbitral mechanisms considered by the working group[81]:

i) First, the drafters of the working group would like to appoint arbitrators who have

[78] Cronstedt andThompson, *supra* note 74.
[79] C. Cronstedt, J. Eijsbouts and R.C. Thompson, International Business and Human Rights Arbitration (February 13, 2017), *available at*: http://www.l4bb.org/news/TribunalV6.pdf (last visited on December 2, 2017).
[80] *Ibid*.
[81] *Ibid*.

substantial human rights expertise, that is, to appoint arbitrators with a different background than the ones of current commercial arbitrators;

ii) Second, the drafters would like the proceedings to be transparent, that is, to allow final awards to be publicized, as this would enhance the trust of the different stakeholders in the arbitration system.

The arbitration proposal is currently at an early stage of its work. Indeed, the working group held its first meeting in January 2018 and expects to complete the final version of the Arbitration Rules in late 2019.[82] Once they are drafted, the rules will be offered to the Permanent Court of Arbitration and other international arbitration institutions (such as the International Chamber of Commerce, the London and Singapore Courts of arbitration, etc.…), that will decide if they wish to administer these rules or not.

If these new arbitral rules came to be accepted, we believe this kind of arbitration would contribute to counterbalance the existing asymmetry benefitting corporations and investors to the detriment of States and local populations affected by their activities, as the latter are left to this day, without any remedy at the arbitral stage to take action against the abuses by transnational corporations operating in their vicinity. The establishment of new arbitral rules could also lead to a higher accountability for corporations, as arbitrators would be neutrally placed and have specialized knowledge on human rights issue. This impartiality could offer a fair access to justice for the victims in a business-friendly environment.[83] Trust is fundamental for any dispute settlement mechanism. Therefore, arbitration could constitute a valued mechanism trusted by both corporations and individual victims.

VI
Conclusion

Investment law and its related arbitration instruments can play an important role in strengthening the accountability of investors and TNCs. Therefore, the integration of sustainable development consideration in investment treaties would represent a first step towards the increased accountability of TNCs. These obligations could be integrated in BITs.

A promising idea is that of the development of arbitration to settle corporate social responsibility claims. Two interesting trends have arisen in that respect. A first trend has

[82] See: https://www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration.-Report-Drafting-Team-Meeting-25-26-January-2018.pdf (last visited on August 6, 2018).
[83] Norris, *supra* note 65.

emerged with the introduction of human rights related clauses in bilateral investment agreement seeking to promote the development of sustainable goals in corporations' activities. The express incorporation of labour and environmental considerations in BITs could represent an encouraging breakthrough to allow arbitral tribunals to take into account labour and environmental rights. However, we shall remind that the protection of human rights and the end of corporate impunity shall only be possible if host countries are truly willing and committed to ensure the protection of human rights at the national level. Much remains to be done, notably in terms of victims' access to justice. Because of the lack of reliable national judicial mechanisms, victims are forced to turn to other jurisdictions, but at this stage, victims cannot access arbitration courts to present their claims.

The expert project led by Bruno Simma seeks to introduce clauses in TNCs' contracts with their suppliers allowing workers of the supply chains to present their claims before arbitral tribunals when their social rights have been infringed. This project represents a promising solution for workers of supply chains to be able to seek redress for the violation of their labour rights against ordering companies lying at the top of the supply chain. However, for victims of corporate activities, who are not workers of the supply chain, this new mechanism would to be insufficient. Indeed, victims of pollution caused by TNCs or neighbouring communities having been harmed by companies' security forces for example, who have not entered into any contract with the ordering company or one of its suppliers, would still be deprived from any access to these arbitral tribunals.

Solutions can be found to the existing asymmetry that skews the current investment law system in favour of the investor. Therefore, if international human rights and corporate social responsibility came to extend the scope of applicable rules before arbitral tribunals, more balance could be brought between the opposing interests of private investors on the one hand and States and/or local populations of host countries on the other.

The current working group on international arbitration of business and human rights led by Bruno Simma has also made an interesting proposal in that respect.[84] To this day, arbitration has often been perceived as more favourable to investors and corporations in the context of investment-agreements dispute settlement.[85] However, if a specialized arbitral

[84] Cronstedt *et. al.*, *supra* note 77.

[85] See notably, L.E. Peterson, Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration (International Centre for Human Rights and Democratic Development, 2009), *available at*: http://publications.gc.ca/collections/collection_2012/dd-rd/E84-36-2009-eng.pdf (last visited on November 12, 2017).

tribunal on business and human rights were to be established as suggested by the working group led by Bruno Simma[86], it might offer an effective remedy for victims of corporate human rights abuses as the mission of the arbitral tribunal would specifically be to find a right balance between trade considerations and human rights standards.

As Professor Surya Deva rightly summarized: "There must be a change in the mind-set from a "race to the bottom" to "races to the top" in injecting human rights into the DNA of businesses and of states' economic policy frameworks."[87] This idea lies at the core of the present article. The current investment treaty framework must be completed to fully incorporate human rights and environmental considerations in the regulation of State/investors relationships. The rights that companies and investors can enjoy when delocalising their production abroad shall be accompanied with minimum obligations on their side too to prevent the adverse impact of their business activities. Only then can trade considerations be reconciled with social and environmental rights.

[86] Cronstedt *et. al.*, *supra* note 77.
[87] Deva, *supra* note 41.

THE AGE OF CRIMINAL RESPONSIBILITY AND JUVENILE JUSTICE IN INDIA: A MEDICO-LEGAL PERSPECTIVE

*Chaitra. V**

Abstract

The Age of Criminal Responsibility is one of the intricate issues in the area of juvenile justice as there are no objective standards to determine the conclusion of childhood and commencement of adulthood. The recent scientific advancements on brain development indicate that the pre-frontal cortex, the part of the brain which is responsible for decision making and impulse control are not fully mature until the mid-20s.The Indian juvenile justice system predominantly focused on the rehabilitation of juvenile delinquents and mental capacity/ maturity was not an important concern until the recent passage of Juvenile Justice (Care and Protection of Children) Act, 2015. Although, the new legislation maintains a separate justice system for all the juveniles up to the age of 18 years, it also allows juveniles aged 16-18 years committing heinous offences to be tried like an adult after assessing their physical and mental capacity. The Statements of objects and reasons of the Juvenile Justice (Care & Protection of Children) Bill, 2014 stated that the preceding legislation, Juvenile Justice (Care and Protection of Children) Act, 2000 was ill equipped to tackle the juvenile offenders in the age group of 16- 18 years by relying on the data collected by the National Crime Records Bureau which established increased cases of heinous crimes committed by the children in the age group of 16-18 years. But, the NCRB data is merely based on the number of juveniles apprehended and not on the number of convictions which was also observed in the Parliamentary standing committee report. Further, these assessment procedures play a very crucial role as they constitute fundamental factors in depriving a juvenile delinquent the benefits of juvenile justice system and thus necessitate careful, defensible evaluation system. The inevitable question which now arises is, "How to assess the mental capacity/ maturity and what are the tools and procedures available to accurately assess it?" This paper aims to examine India's compliance to international standards and constitutional provisions on the issue of age of criminal responsibility and to analyse Indian position in the light of scientific developments on adolescent brain maturation. An attempt is made to critically look into the significance of treating juveniles aged 16-18 years committing heinous offences differently and bring to the fore undecided issues.

Key words- Juvenile, Age of criminal responsibility, mental maturity, heinous offences, preliminary assessment.

I

Prelude

Children across the world can break the law at any age, but the difficult question which arises is, 'At what age can they be criminally held responsible for their alleged crimes?' Defining when the childhood ends and adulthood begins is one of the most complex problems that the society faces today. The recent scientific advancements on brain development indicate that the pre-frontal cortex, the part of the brain which is responsible for decision making and impulse control are not fully mature until the mid-20s.[1] The significance of this exploration cannot be downplayed as these scientific discoveries could have a major impact on the law. But there are no scientific findings which say that the juveniles or the adolescents cannot differentiate between right and wrong. Youth may be able to distinguish behavior as inappropriate or dangerous, but other reasons such as peer pressure or less developed capacity to foresee consequences may cause youth to engage in the behavior anyway.[2] Does this indicate that the juvenile can be totally excused for their violent and homicidal behavior?

In India a juvenile delinquent/ child in conflict with law is a person who has not attained the age of 18 years on the date of the commission of an offence. A juvenile committing a heinous crime at the age of 17 years and 11 months is treated differently from a person committing the same crime at the age of 18 years and 1 day. The inevitable question which follows is, 'Does the juvenile brain become an adult brain immediately upon reaching the age of 18 years?' The Indian juvenile justice system predominantly focused on the rehabilitation of juveniles and mental capacity/ maturity was not an important concern until the recent passage of Juvenile

* Assistant Professor, School of Law, Christ (Deemed to be University), Bengaluru.

[1] K. Sadler, N. Gupta, "Adolescent Global Health" in N. Gupta, B.D. Nelson *et.al.* (eds.), *The Mass General Hospital for Children Handbook of Paediatric Global Health*, 121-124 (2014).

[2] Mark Soler et al., *Juvenile Justice Lessons for a new era*, 16 Georgetown Journal on Poverty law and Policy 483, 493 (2009), *available at:* http://www.flintridge.org/newsresources/documents/JuvenileJustice-LessonsforaNewEra-2009.pdf (last visited on May 14, 2017); *Adolescent Decision Making and Youthful Culpability*, MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *available at:* http://www.adjj.org/content/page.php?cat_id (last visited on March 28, 2017).

Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as JJA 2015). Although, the new legislation maintains a separate justice system for all the juveniles up to the age of 18 years, it also allows juveniles aged 16-18 years committing heinous offences[3] to be tried like an adult after assessing their physical and mental capacity. The Statements of objects and reasons of the Juvenile Justice (Care & Protection of Children) Bill, 2014 stated that the preceding legislation, Juvenile Justice (Care and Protection of Children) Act, 2000 was ill equipped to tackle the juvenile offenders in the age group of 16- 18 years by relying on the data collected by the National Crime Records Bureau (hereinafter referred to as NCRB) which established increased cases of heinous crimes committed by the children in the age group of 16-18 years.[4] But, the NCRB data is merely based on the number of juveniles apprehended and not on the number of convictions which was also observed by the Parliamentary standing committee report. It is contended that the JJA 2015 has provided for superficial differentiation of juvenile aged 16-18 years without any rationale and justification thus violating Article 14 of the Constitution. Further, these assessment procedures play a very crucial role as they constitute the fundamental factors in depriving a juvenile delinquent the benefits of juvenile justice system and thus necessitate careful, defensible evaluation system. The inevitable question which now arises is, "How to assess the mental capacity/ maturity and what are the tools and procedures available to accurately assess it?"

The JJA 2015 categorizes the offence committed by the children in conflict with law into three groups- petty offences,[5] serious offence[6] and heinous offence.[7] The Juvenile Justice Board (hereinafter referred to as JJB) shall dispose the cases of petty offences through summary proceedings and cases of serious offences through summons cases as per the procedure

[3] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 2(33) "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more.

[4] Committee on Human Resource Development, Rajya Sabha, *The Juvenile Justice (Care & Protection of Children) Bill,* 2014, at 8

[5] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 2(45) "Petty offence" includes the offences for which the maximum punishment under the IPC or any other law for the time being in force is imprisonment upto three years.

[6] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 2(54) "Serious offence" includes the offences for which the punishment under IPC or any other law is between three to seven years.

[7] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 2 (33) "Heinous offence" includes offences for which the minimum punishment under IPC or any other law for the time being in force is seven years or more.

prescribed under the Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC).[8] A wide range of orders are at the disposal of the JJB that could be passed with respect to a child found in conflict with law, viz. to be sent to home after advice or admonition and counselling to such child and his parents, to participate in group counselling, to perform community service, to pay fine, to be released into parent's / guardian's /fit person's/fit facility's care and custody and placed in probation for any period not exceeding three years and to be sent to special home for rehabilitation for a period not exceeding three years.[9] The children aged sixteen and above alleged to have committed a heinous offence can be tried as an adult by following the two stage process which is as follows-

1) Preliminary assessment into heinous offence by the Board
2) Trial of the case by the Children Court

1. Preliminary assessment into heinous offence by the Board

In case of heinous offence alleged to have been committed by a juvenile aged sixteen and above, a preliminary assessment is be made by the Juvenile Justice Board with respect to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence with the assistance of experienced psychologists/psychosocial workers or other experts.[10] If the JJB is satisfied on preliminary assessment that the matter should be dealt by the Board itself, the Board shall dispose it in accordance with the procedure prescribed by the CrPC for the trial of summons cases.[11] On the other hand, if the Board after preliminary assessment is satisfied that such child requires to be tried as an adult, it may pass an order transferring the trial of the case to the Children's Court/ the Court of Sessions having jurisdiction to try such cases (where the Children's Court has not been designated).[12] The order passed by the JJB after making preliminary assessment into a heinous offence is appealable before the Court of Sessions.[13]

2. Trial of the case by the Children's Court

[8] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) ss. 14(5) (d), 14(5) (e).
[9] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s.18 (1).
[10] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 15(1).
[11] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 15(2).
[12] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s.18(3).
[13] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 101(2).

When the case of heinous offence alleged to have been committed by the juvenile aged 16 or above comes before the Children's Court after the preliminary assessment made by the JJB, the Children's Court may further decide as to whether such child should be tried as an adult or not.[14] If the Court decides that there is no need to try such child as an adult, then the matter shall be disposed of by the Children's Court by conducting an inquiry as a JJB and pass appropriate orders that could be passed by the JJB.[15] On the other hand, the Court may also decide for the trial of the child as an adult as per the provisions of the CrPC bearing in mind the special needs of the child and the guarantees of fair trial. In this regard the relevant section of the JJA 2015 reads as follows-

> *Section 19(1) (i) – "After the receipt of preliminary assessment from the Board, the Children's Court may decide that-*
>
> *i. there is need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 and pass appropriate orders after trial subject to the provisions of this section and section 21, considering the special needs of the child, the tenets of fair trail and maintaining a child friendly atmosphere."*
>
> *Section 21 of the JJA 2015 prohibits death sentence and life imprisonment without the possibility of release*.[16]

It is pertinent to note here that as far as the trial of the child as an adult is concerned, Section 19(1) of the JJA 2015 does not mandate the Children's Court to impose the mandatory minimum sentence prescribed for the offence (heinous offence as defined under the JJA 2015) in the IPC or any other law for the time being in force. The aforementioned relevant section uses the language, "the Children's Court may pass appropriate orders subject to the provisions of section 21, considering the special needs of the child**,** the tenets of fair trial and maintaining child friendly atmosphere." Furthermore, the JJA 2015 mandates that the Children's Court shall ensure that

[14] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 19(1).
[15] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s 19(1)(ii).
[16] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 21 No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code or any other law for the time being in force.

such child found in conflict with law is sent to a place of safety for rehabilitation till he attains the age of 21 years and thereafter, the person shall be transferred to a jail, if he is yet to the complete the term of stay.[17] On careful reading of these provisions, the author understands that the judges of the Children's Court are given discretion to decide the duration of stay of such children found in conflict with law. It is pertinent to note here that the definition of heinous offence under section 2 (33) of JJA 2015 "including the offences for which the minimum punishment under the IPC or any other law for the time being in force is imprisonment of seven years or more" is only one of the criteria for the cases that becomes eligible for the transfer to the Children's Court.

Furthermore, it is pertinent to note that such child on attaining the age of twenty one years is not automatically transferred to jail to complete the remainder of the sentence. The law mandates the Children's Court to conduct the evaluation of such child based on the yearly follow up progress reports by the Probation Officer/ District Child Protection Unit or the social worker and opinion of relevant experts to make an assessment as to whether such child underwent reformative changes to become contributing member of the society.[18] Based on this evaluation result, the Children's Court may either decide the child to be released under the supervision of monitoring authority[19] or to complete the remainder of the sentence in jail.[20] The orders passed by the Children's Court are appealable before the High Court in accordance with CrPC.[21]

This paper aims to examine India's compliance to international standards and constitutional provisions on the issue of age of criminal responsibility and to analyse Indian position in the light of scientific developments on adolescent brain maturation.An attempt is made to critically look into the significance of treating juveniles aged 16-18 years committing heinous offences differently and bring to the fore undecided issues. For the purpose of this paper, the author uses

[17] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) ss. 19(1)(3), 20(1), 20(2).
[18] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 20(1).
[19] The State Government shall maintain a list of monitoring authorities and prescribe mandatory procedures, The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) Proviso to Section 20(2).
[20] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 20.
[21] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 101(5).

two concepts with respect to the age of criminal responsibility of a juvenile - *Minimum age of criminal responsibility* (hereinafter referred to as MACR) and *Age of Criminal Majority* (hereinafter referred to as ACR). A child below the MACR does not possess mens rea to commit crimes. Thus, they are absolutely excused for their criminal behavior and cannot be subjected to the criminal law procedures of a country. On the other hand, this does not imply that the children who have attained the minimum age of criminal responsibility or above can be brought under the purview of adult criminal justice system. Despite the variation in MACR across the globe, the United Nations Convention on the Rights of the Child, 1992 (hereinafter referred to as UNCRC) obligates all the state parties to establish at the domestic level, a specific justice system for all the delinquent children under the age of 18 years which focus on rehabilitation and reformation rather than punishment and retribution.[22] Therefore, MACR simply means the lowest age limit for juvenile court jurisdiction. The MACR varies from country to country across the globe from as low as 6 years up to the age of 18 years. The international median age of MACR is 12 years.[23] The author uses the term, *age of criminal majority* to mean the age at which the offenders do not get any special safeguards neither under the UNCRC nor in the domestic legislations and are dealt under the adult criminal justice system for the offences committed.

II

International instruments concerning juvenile justice on the issue of age of criminal responsibility

The definition of juvenile is guided by many international instruments- mainly the UNCRC which is a comprehensive treaty covering children's civil, political, economic, social and cultural rights. It is ratified by almost all the countries across the globe. The UNCRC was ratified by India in the year, 1992. Apart from the UNCRC, there are also other international rules and guidelines in the area of juvenile justice viz; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules, 1985), the United Nations Guidelines on the Prevention of Juvenile Delinquency (The Riyadh Guidelines) and United Nations Rules for

[22] The United Nations Convention on the Rights of the Child, art. 40(3).
[23] Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global perspective,* 110 (Ashgate Publishing Company, 2009)

the Protection ofJuveniles Deprived of their Liberty. Although, these rules and guidelines are non-binding in nature, they provide a complete frameworkfor the care, prevention, protection, treatment of children in conflict with law when considered collectively with the UNCRC. The UNCRC and other international instruments urge the State parties to establish separate laws and institutions applicable to all children committing crimes under the age of 18 years. However, they can be subject to penal law procedures but, distinct to adult criminal justice system.[24] As far as MACR i.e. lower age limit for juvenile court jurisdiction is concerned, the international standards appeal to the State parties not to fix MACR at very low level and children below the MACR committing crimes shall be presumed not to have the capacity to infringe the law.[25] The Beijing Rules the earliest international instrument specifically dealing with juvenile justice laid down certain subjective factors viz. emotional, mental and intellectual maturity to be considered in fixing the MACR.[26] The UNCRC which was drafted four years after the adoption of the Beijing Rules has preferred to omit the aforementioned factors in determining the MACR laid down in the Beijing Rules. Interestingly, the UNCRC which has sourced many of its provisions from the Beijing Rules including the MACR has not acknowledged the subjective criteria laid down in the Beijing Rules for fixing the MACR. The lack of substantive guidelines justifies the wide interpretation among the State parties across the globe resulting in practice of varied age limits of MACR. Further, the UN Committee on the Rights of the Child in the General Comment No. 10 has concluded that the "*MACR below 12 years is internationally not acceptable"* and inappropriate.[27] However, the rationale for fixing 12 years as the MACR is not fully understood by the author. The UN Committee on the Rights of the Child further restricts the State parties from transferring persons under the age of 18 years to the adult criminal justice system.[28] Having carefully considered the international standards, the author submits that India has set an age of criminal majority of 18 years which does not violate any international standards. The MACR in India ranges from 7-12 years contingent on maturity and understanding of such child. However, MACR of 7 years appears too low compared to the international standards. In India, the children in conflict with law aged 7-18 years come within the purview of juvenile justice system

[24] The United Nations Convention on the Rights of the Child, General Comment No. 10, Children's Rights in Juvenile Justice, CRC/C/GC/10, para 33(April 25, 2007).
[25] The Beijing Rules, Rule 4.1.
[26] *Ibid.*
[27] The United Nations Convention on the Rights of the Child, General Comment No. 10, CRC/C/GC/10, Children's Rights in Juvenile Justice, para 32 (April 25, 2007).
[28] *Id*. at para 38

governed by special rules and procedures laid down in the JJA 2015. The JJA 2015 permits juveniles aged 16-18 years committing heinous offence to be tried as an adult in Children's Court after assessing the physical and mental capacity of such juveniles. If the juvenile is found to be in conflict with law by the concerned court, the court shall ensure that such juvenile is sent to a place of safety wherein he is rehabilitated till he attains the age of twenty-one years and thereafter transferred to jail to serve the remainder of his term only if such rehabilitation fails. To elaborate further, when such juveniles attain the age of twenty one years, the Children's court is mandated to conduct an evaluation based on the yearly progress reports & opinions of the relevant experts to either decide the child to be released under the supervision of monitoring authority or to complete the remainder of the sentence in jail.[29] Apparently, by retaining the children in conflict with law within the juvenile justice system until the age of 21 years, the JJA 2015 does not seem to violate any international standards concerning the age of criminal responsibility.

III

The impact of Science on the Age of Criminal Responsibility

Assessment of mental capacity/maturity of a juvenile was not a major concern until it became the basis of transfer of such juveniles to the adult criminal justice system in some jurisdictions. The mental capacity/ maturity in the context of neuroscience and developmental psychology include intellectual, social and emotional development. The recent scientific breakthroughs indicate that children mature at a higher age than what has been previously accepted. There is a huge body of scientific research on the adolescent neurological development which indicates that the brain does not fully mature until the mid 20's.[30] Dr. Jay Giedd, a brain imaging scientist who is extensively cited as an expert on the adolescent brain development expounds that the prefrontal cortex, the part of the brain which is responsible for impulse control and decision making is not completely mature until the third decade of life and one of the last regions of the brain to

[29] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) ss.19, 20.
[30] National Institute of Mental Health, Press Release, *Imaging Study shows Brain Maturing,(17/05/2004) available at:* http://www.nimh.nih.gov/news/science-news/2004/imaging-study-shows-brain-maturing.shtm (last visited on August 1, 2016).

develop.[31] The studies have discovered that adolescents mostly employ their amygdala, the region of the brain that experiences fear, threat, danger and which is associated with emotional and gut responses, whereas the adults more often use their pre-frontal cortex, the area of the brain related to reasoning and judgement.[32] These differences will definitely impact the way the adolescents process their thoughts and react to situations. Therefore, adolescents are inclined to act impulsively without analyzing the situation and consequences of their actions. According to Lawrence Steinberg, an internationally renowned expert on psychological development, "the ability of self control is easier brain process for adults in comparison to adolescents."[33] Further, he states that the adolescents are highly hypersensitive to risky acts when the potential of reward is high. However, the neurologist, Paul Thompson at the University of California, Los Angeles, opines that these researches on incomplete brain maturation of adolescents cannot be used to condone them of their violent and homicidal behaviour, but rather indicates that such adolescents are not yet adults and the legal system should not treat them as such.[34] Lawrence Steinberg also affirms that adolescents should be perceived as inherently less responsible than adults and shall be punished less harshly than adults when the crimes committed are identical.[35]

According to the studies of Lawrence Steinberg, the brain systems responsible for cognitive process mature faster than the regions related to self-regulation and accordingly adolescents mature intellectually before they attain social and emotional maturation[36] and on the basis of this finding the author is compelled to infer that some juveniles are smart enough to plan/ carry out adult like crimes but, not matured enough emotionally to magnify the consequences of their actions. These studies further reveal that the structural and functional changes in the brain do not

[31] Daniel R Weinberger, Brita Elvevag, Jay N Giedd, *The Adolescent Brain- A work in progress,* The National Campaign to teen pregnancy (June 2005), at 3, *available at:* https://www.michigan.gov/documents/mdch/The_Adolescent_Brain_-_A_Work_in_Progress_292729_7.pdf (last visited on August 12, 2017).
[32] *Ibid.*
[33] Steinberg Lawrence, *Should the Science of Adolescent brain development inform public policy?"* 50 Court Review 70-71 (2012), *available at:* http://aja.ncsc.dni.us/publications/courtrv/cr50-2/CR50-2Steinberg.pdf (last visited on May 14, 2017); Originally published as Laurence Steinberg, Should the Science of Adolescent Brain Development Inform Public Policy?, 28(3) ISSUES IN SCIENCE AND TECHNOLOGY 67 (Spring 2012).
[34] Thompson, Paul, *Startling Finds on Teenage Brains*, 2 in Sacramento Bee (25 May 2001) B7, *available at:* http://www.scholastic.com/teachers/sites/default/files/asset/file/juvenile_startling_finds_on_teenage_brains-thompson.pdf (last visited on December 25, 2015).
[35] Steinberg Lawrence, *Should the Science of Adolescent brain development inform public policy?"* 50 Court Review 70-74 (2012), *available at:* http://aja.ncsc.dni.us/publications/courtrv/cr50-2/CR50-2Steinberg.pdf (last visited on May 14, 2017).
[36] *Id*. at 71.

take place in an invariable manner and consequently different individuals mature at different ages.[37] The Piaget's theory of cognitive development points to the fact that the cognitive development starts at different times, progresses at different rates in different individuals, but, it takes place within the similar age ranges. The American Psychologist, Lawrence Kohlberg's theory of stages of moral development points to the conclusion that it is impossible to establish that an individual has reached moral development by a particular age. Thus, it is beyond the bounds of possibility to accurately state the age as to when the juvenile brain becomes an adult brain. Precisely, incomplete brain maturation, lack of impulse control and self regulation, diminished decision making capacity, risk taking behaviour etc are the factors that lessen the criminal culpability of juvenile delinquent. The neuroscience and behavioural study suggests that the adolescents lack the maturity and judgement to foresee and understand the consequences of their actions. At this juncture, considering the scientific evidence that all individuals' progress through different stages and at different rates, it may seem reasonableto decide the cases of serious and violent juvenile delinquents on an individual basis after assessing the mental maturity of such juveniles rather than setting a distinct chronological age. However, the relevant studies in this context indicates that the tools to assess and measure mental maturity on an individual basis are neither well developed and nor it is possible to distinguish between mature and immature adolescents on the basis of brain images which is likely to produce many errors.[38] In the light of probability of errors that may arise due to the absence of tools to make individual mental maturity assessments and taking into account the aforementioned neuroscience and psychological findings, it is desirable to set a specific age limit to define a juvenile to determine criminal culpability.

It would be erroneous to say that the Indian juvenile justice system is largely unaffected by the recent scientific advancements on the adolescent brain development. The neuroscience and behavioural psychology on adolescent brain development is cited in the most recent judgments of the Indian Supreme Court namely *Salil Bali* v. *Union of India*[39] (2013), *Subramanian Swamy*

[37] *Ibid.*
[38] *Less guilty by reason of adolescence,* McArthur foundation Research Network on Adolescent development and Juvenile Justice at 4, *available at:* https://ccoso.org/sites/default/files/import/Less-guilty-by-reason-of-adolesence.pdf (last visited on March 12, 2017); Joint Submission to the Ministry of Women & Child Development on Juvenile Justice (Care & Protection of Children) Bill, 2014 by CCL, NLSIU & Nimhans.
[39] (2013) 4 SCC 705.

and Ors v. *Raju*[40]. Reference to mental maturity of a juvenile in the light of scientific advancements were made in the aforementioned judgments on the issue of age of criminal responsibility of a juvenile and the Supreme Court has affirmed the principle that "juveniles under the age of 18 years should be treated in a manner different from their adult counterparts." The same principle has been highlighted by the Supreme Court regarding the classification of juveniles' up to the age of 18 years as a distinct category in Subramanian Swamy case. The relevant extracts from this judgement are reproduced below-

"*Classification or categorization need not be the outcome of a mathematical or arithmetical precision in the similarities of the persons included in a class and there may be differences amongst the members included within a particular class. So long as the broad features of the categorization are identifiable and distinguishable and the categorization made is reasonably connected with the object targeted, Article 14 will not forbid such a course of action. If the inclusion of all under 18 into a class called 'juveniles' is understood in the above manner, differences inter se and within the under 18 category may exist. Article 14 will, however, tolerate the said position. Precision and arithmetical accuracy will not exist in any categorization. But such precision and accuracy is not what Article 14 contemplates.*"

Although, the age of 18 has been set to define a juvenile/child in conflict with law in India, the JJA 2015 permits juveniles aged 16-18 years committing heinous offences to be tried as an adult in Children's Court after assessing their physical and mental capacity known as preliminary assessment.

IV

Categorization of juveniles aged 16-18 years on the basis of heinous offences

The rationale for the genesis of this practice was based on the data collected by the NCRB which established that juveniles in the age group of 16-18 have the highest arrest rates for heinous offences and was not suitable to be dealt by Juvenile Justice (Care & Protection of Children) Act,

[40] (2014) 8 SCC 390

2000.[41] However, it is pertinent to note here that the NCRB does not collect any data regarding convictions of juveniles classified by age and crime. The author understands that reliance on conviction rates rather than arrest rates is likely to provide better estimates and accurate data for the purpose of the sub-classification of juveniles on the basis of age and crimes. Therefore, the author attempted to get conviction data of juveniles and sought details from the High Court of Karnataka by relying on the General circular No.3/2014 issued by this court on 21st December 2014 mandating the JJB of every district to submit the quarterly reports of disposed and pending cases to the High Court. It is pertinent to note here that the convictions/ acquittals are counted at the year of adjudication and not at the year of the institution of the case i.e for instance, a case instituted in the year 2014 might result in conviction/acquittal in 2016 and they form part of the 2016 acquittal/conviction records. Therefore, comparison of cases instituted and the number of conviction/acquittals on an annual basis does not provide correct estimates. Taking this into account, the author posits that it is not judicious to rely on conviction data. In the absence of any other official data, the 'closest' reliable data available regarding crimes committed by juveniles is that of the NCRB on the arrest rates. They are definitely an important source of information which cannot be disregarded in the larger interest of the public. The analysis of the statistical data of the National Crime Records Bureau over the years i.e 2001-2015, indicates that the older juveniles specifically in the age group of 16-18 years have the highest arrest rates and account for the majority of arrests for serious and heinous offences i.e around 70% of the total arrests every year.Even before the passage of the JJA 2015, the Honourable Supreme Court in *Salil Bali's* case (2013)[42] had ruled that the definition of a juvenile could be considered differently if sufficient data exists to necessitate the change. The findings from the various empirical literatures suggest that serious and violent juvenile delinquents constitute a distinct category of offenders with varying behavioural and emotional problems and serious violent offences may indicate rigorous and longer rehabilitative needs than non-violent offences.[43] Thus juveniles aged

[41] The Juvenile Justice (Care & Protection) Bill, 2014, Statements of Objects and Reasons.
[42] (2013) 4 SCC 705
[43] Rolf Loeber and David P Farington, *Never too early, never too late: Risk factors and successful intervention for serious violent juvenile offenders*, Studies on crime and crime prevention 7, 28 (1998); Serious violent offenses with reference to aforementioned study includes homicide, rape, robbery, aggravated assault, and kidnapping; Ellickson P, *et. al., Profiles of violent youth: substance use and other concurrent problems*", 87 (6) American Journal of Public Health 985, 987 (June 1, 1997), *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1380935/pdf/amjph00505-0099.pdf (last visited on March 27, 2018).

16-18 years committing heinous offences constitute a distinct group and this satisfies the first limb of the test of reasonable classification under Article 14 of the Constitution *i.e. the classification must be founded on an intelligible differentia which distinguishes the persons or things that are grouped together from those excluded.*[44] The essence of the JJA 2015 is undoubtedly rehabilitation and reintegration of a child in conflict with law. It is relevant to note here that when a juvenile aged 16 -18 years alleged to have committed a heinous offence is tried as an adult and adjudicated guilty, such child found in conflict with law is sent to the place of safety for rehabilitation (secure confinement) till he attains the age of twenty one years and thereafter shall be transferred to jail to serve the remainder of his term.[45] But, such child on attaining the age of twenty one years is not automatically transferred to jail to complete the remainder of the sentence. The JJA 2015 mandates the Children's Court/Sessions Court to conduct the evaluation of such child based on the yearly follow up progress reports and based on this evaluation result the concerned Court may either decide the child to be released under the supervision of monitoring authority or to complete the remainder of the sentence in jail.[46] In other words, a juvenile aged 16-18 years held guilty of heinous offence is placed in an adult jail only if the rehabilitation of such juvenile has been unsuccessful in the juvenile justice system. The author posits that this satisfies the second limb of the reasonable classification test *i.e. the differentia must have rational nexus with the object sought to be achieved by the statute in question.*[47] Putting together of older serious violent juvenile offenders with the younger non serious offenders in the same correctional institutions is likely to lead to criminal contamination and is against the best interests of the child. Thus, juveniles committing heinous offences in the age-group of 16-18 warrant differential treatment, secure confinement i.e place of safety designed to treat their serious, violent criminal behaviours. Although, the viability and the legality of the mechanism of transferring the juvenile aged 16-18 to Children Court is discussed

---

Also *available at:* https://www.ojjdp.gov/jjbulletin/9805/offenders.html (last visited on April 20, 2016); Robert D Hoge, *Serious and violent juvenile offenders: Assessment and Treatment,* Paper presented at the 139th International training course (2009), Visiting experts' Papers (United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders UNAFEI) Resource Material Series no.78, at 52, *available at:* http://www.unafei.or.jp/english/pdf/RS_No78/No78_10VE_Hoge2.pdf (last visited on April 20, 2016) With reference to this study, violent actions such as homicide, aggravated assault, rape, and robbery are almost always treated as serious violent crimes.

[44] *K.Thimmappa* v. *Chairman Central Board of Directors SBI*, AIR 2001 SC 467.

[45] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) ss.19, 20.

[46] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s. 20.

[47] *K.Thimmappa* v. *Chairman Central Board of Directors SBI*, AIR 2001 SC 467.

critically in subsequent paragraphs, the author submits that there is no fallacy in further categorizing the juveniles aged 16-18 years on the basis of heinous offence to be subjected to differential treatment.

According to the Secretary, Ministry of Women and Child Development these special provisions were being made under the JJA 2015 to address heinous offences such as rape, murder and grievous hurt by children above the age of 16 years which will act as a deterrent for child offenders committing heinous crimes.[48] However, it is relevant to note here that the heinous offence under JJA 2015 includes wide range of offences punishable with minimum 7 years of imprisonment or more not only under the IPC but also other law such as the Narcotic drugs Act (1985), Arms Act (1959) etc.[49] This categorisation of offences into heinous offences with respect to juveniles delinquents is fundamentally flawed. To illustrate, although the juvenile committing murder under the IPC and juvenile illegally importing narcotic drugs to India punishable under the Narcotic Drugs Act are heinous offences as per the JJA 2015, the latter is not as severe as the former. Therefore, the definition of heinous offences in the JJA 2015 needs a relook.

V

Preliminary Assessment into the heinous offences by the JJB

In case of heinous offence alleged to have been committed by a juvenile aged sixteen and above, a preliminary assessment is made by the Juvenile Justice Board (JJB) to transfer the trial of the case to the Children's Court/ Sessions Court where Children's Court is not designated. The assessment is made with respect to mental and physical capacity of such juvenile to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence with the assistance of experienced psychologists or psychosocial workers or other experts.[50] The preliminary assessment is a faulty mechanism premised on a flawed criterion for three reasons. Firstly, the JJA 2015 and the Juvenile Justice (Care & Protection of Children) Model Rules, 2016 entirely places the responsibility to make

[48] *Id.* at 10.
[49] *Supra* note 7.
[50] The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) s.15.

transfer decisions on the JJB members who may take the assistance of experienced psychologists or psychosocial workers. The statute in question and the Rules has not provided any additional guidelines regarding the procedure of preliminary assessments and as a matter of course leaving room for discretion. The draft model Juvenile Justice Rules, 2016 had authorized the JJB to make any transfer decision only after interacting with the child and after taking into consideration the social investigation report, statement of witnesses recorded by the Child welfare police officer, medico- legal report, forensic reports, documents prepared during the course of investigation by Child Welfare Police Officer, medical reports, mental health reports including an assessment of the cognitive maturity of the child in addition to submissions made by the child through his legal representative.[51] However, it is conspicuous by its absence in Juvenile Justice (Care & Protection of Children) Model Rules, 2016 notified on 21st September, 2016. The lack of guidelines and clarity in the procedure may result in differential treatment of similarly situated juvenile offenders.Secondly, taking into account the latest scientific research affirming adolescents diminished criminal culpability on the basis of developmental immaturity and lack of tools to measure mental maturity/ assess mental capacity on an individual basis, the author opines and submits that the criterion of mental capacity in preliminary assessments to transfer juveniles to Children's Court is unintelligible. Thirdly, the judges in the Children's Court and Sessions Court are not trained to deal with children in conflict with law in contrast with the specially designed and trained JJB panel comprising of a Principal Magistrate and two social workers. It is pertinent to note here that the Children's Court is the Sessions Court equipped to try offences committed against children by adults per se and not the offences committed by children. Trial of juveniles in adult courts is violation of the UNCRC as it mandates the State parties to establish distinct justice system applicable to all children in conflict with law.[52]

[51] Draft Model Rules, 2016 under the Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016), Rule 14(4) and 14(5).
[52] The United Nations Convention on the Rights of the Child, art. 40(3).

VI

Conclusion

There is no mechanism in India to deal with the children below the minimum age of criminal responsibility committing crimes. Delinquency research shows that the foundations for both prosocial and disruptive behaviour are laid down in the first five years of life.[53] A juvenile aged 16-18 years held guilty of heinous offence is placed in the juvenile justice system upto the age of 21 years and then transferred to adult jails only if the rehabilitation of such juvenile has been unsuccessful.Thus, there is no fallacy in categorizing juvenile aged 16-18 years on the basis of heinous offence and the classification is intended to achieve the main object of the JJA 2015 i.e. rehabilitation and reintegration. The varying needs of this category of delinquents warrant distinct treatment. However, the definition of heinous offences under the JJA 2015 needs a relook. Also, age cut off of 21 years as provided under section 20 the JJA 2015 is necessary because problems becomes apparent when comparison is made of juvenile delinquent retained in juvenile justice system beyond the age of 21 years on the pretext of rehabilitation with the rest of offenders in the age group of 18 years and above coming under the adult criminal justice system. However, the author challenges the viability and legality of preliminary assessment into the heinous offences by the JJB to transfer the juveniles to Children's Court and submits that preliminary assessment mechanism is faulty procedure premised on a flawed criterion. Therefore, the juveniles aged 16 and above alleged to have committed heinous offences must be given distinct treatment within the juvenile justice system by empowering the JJB to decide such cases rather than transferring the trial to the Children's Court/the Sessions Court. Nevertheless, the JJA 2015 is a novel and unprecedented legislation that tries to strike a right balance among the conflicting interests in the juvenile justice system- rehabilitation of juvenile delinquent, public safety and justice to victims (perpetrator of crime is a juvenile). The author acknowledges the intention of the legislature to consider the need to rehabilitate juveniles committing heinous offences until they attain the age of 21 years and thereafter transfer such juveniles to adult justice system only if such rehabilitation fails. There is an element of threat of transfer to adult justice system when rehabilitation fails and it is likely to deter juveniles from committing crimes. But,

[53] Don Cipriani , *Children's Rights and the Minimum Age of Criminal Responsibility : A Global perspective,* 141 (Ashgate Publishing Company, 2009)

strangely the legislature failed to envision the faulty preliminary assessment procedure premised on a flawed criterion likely leading to arbitrary decisions threatening the best interest of child.

DILUTING THE IMPACT OF CRUELTY LAW IN INDIA: NECESSITY AND IMPLICATIONS

*Nidhi Sinha**

ABSTRACT

Indian society is a patriarchal set up where since independence, governments and women's rights organizations have vehemently worked towards uplifting the female section of society. But despite their best efforts, domestic abuse remains a huge menace in India. Reports suggest that at least 70% of married women in India face domestic violence at the hands of their husbands and in-laws. Though the law on cruelty under section 498A of the Indian Penal Code (IPC) is very stringent, it still remains as one of the most under-used provisions. It is saddening that at least 90% of the domestic abuse victims do not report the crime to any law enforcement agency either because they try to justify the violence or because they fear their husbands might forcefully separate them from their children. Out of those who report the crime, a large portion has reported apathy by the police officers to whom they try to register their complaints. At the same time, reports of misuse of this provision by a few women also surface. This has led to a movement towards diluting the impact of section 498A and has the support of Courts as well as the Government. This paper is an attempt to understand and verify the veracity of the arguments given to dilute the impact of section 498A IPC while also looking at the implications of this movement.

Keywords: Domestic Abuse, Cruelty, Diluting the impact, Section 498A IPC

I

Introduction

"*There is one universal truth, applicable to all countries, cultures and communities: violence against women is never acceptable, never excusable, never tolerable*."

- Ban Ki-Moon,
Eighth Secretary-General of the United Nations[1]

2009: The dead body of a 26 years old female was brought to the Government Medical College, Amritsar for post-mortem. The examination revealed that the deceased was

* PhD Scholar, National Law School of India University, Bangalore, India.

[1] Press Release*, Secretary-General Says Violence Against Women Never Acceptable, Never Excusable, Never Tolerable, As He Launches Global Campaign on Issue*, (United Nations, Secretary General, Statements and Messages, SG/SM/11437-WOM/1665, February 25, 2008), *available at:* https://www.un.org/press/en/2008/sgsm11437.doc.htm. (Visited on October 27, 2018)

subjected to extreme forms of cruelty before she committed suicide by jumping to death. The police investigated into the case and after an initial investigation, they found that the deceased woman was subjected to constant beatings by her husband due to his unmet demand for dowry, while his alcoholic behaviour and unemployment only added to the list of reasons for which he would beat the deceased.[2]

This woman shares her story with innumerable victims of domestic abuse who silently suffer violence at the hands of their husband and his family. Not many gather the courage to report it to a law enforcement agency and for some, the end of domestic violence comes in the form of death. Domestic violence is defined in Black's Law Dictionary as 'violence between members of a household usually spouses, an assault, or other violent act committed by one member of a household against another.'[3] In the context of Indian law, it means any physical, sexual, economic or psychological harm inflicted upon the wife by her husband or his relatives in the premises of their nuptial relationship.

The Indian law recognises and punishes all types of possible abuse that can be meted out to a wife in a matrimonial relationship. The Indian Penal Code, 1860, The Domestic Violence Act, 2005 along with the personal laws together address the issue of domestic abuse, the difference being in the nature of remedies provided to a wife under these laws. The offence of cruelty is provided for under section 498A of the Indian Penal Code, 1860 which punishes a husband and/or his relatives if he engages in the act of subjecting his wife to cruelty which may drive her to commit suicide or is done with an intent to meet their dowry demands. The act being a criminal offence punishes the offenders with a jail term of up to three years along with fine. In case a woman is harassed by her husband and she intends to take divorce from him along with maintenance, the remedy lies under the Domestic Violence Act, 2005 and the respective personal laws.

Despite such stringent laws, the menace of domestic violence still haunts the Indian society which faces the stigma of at least 70% married women between 15-49 years of age facing domestic violence.[4] Also, according to a report published by the World Health Organisation in 2002, 'violence against women is highly prevalent in India and this form of

---

[2] Dr. Gargi J., "Domestic Violence- A Case Report", 9 *JPAFMAT* 99 (2009), *available at*: http://medind.nic.in/jbc/t09/i2/jbct09i2p99.pdf. (Visited on October 26, 2018)

[3] Bryan A. Garner (ed), *Black's Law Dictionary*, (West Group, St. Paul, Minn., 7th edn., 1999).

[4] Press Trust of India, "Two-third married Indian women victims of domestic violence: UN" *The Indian Express*, October 13, 2005, *available at:* http://expressindia.indianexpress.com/news/fullstory.php?newsid=56501. (Visited on October 26, 2018). The report additionally states that around two-third of married women in India were victims of domestic violence and one incident of violence translates into women losing seven working days in the country.

abuse has caused more deaths and disability than many diseases put together.'[5] One of the major reasons cited by the women's rights organisations for this pitiful state of affairs is the under-reporting of domestic violence cases, and statistics do support their claim. As per the report of National Family Health Survey 2005-06, not even 1% of married women facing domestic violence actually lodged complaints under section 498A.[6] Studies done to understand the nature and impact of this crime have revealed that majority of women, who do not report domestic abuse, do it to ensure that they are not separated from their children or because they are financially dependent on their husband.[7] Studies also suggest that children who grow up in families where women are domestically abused are prone to emotional and behavioural disturbances which can lead to them perpetrating or experiencing violence, later in their lives.[8] Thus domestic abuse to a wife not only harms her but also the children of the house. It thus becomes a crime which needs stringent handling and prompt preventive measures.

II

Statement of Purpose

The situation of domestic abuses in India is not only appalling but also alarming. It seems that the Law and the law enforcement agencies have not really been able to address the key issues and have thus neither yielded the desired results nor have been able to gain the confidence of the victims. Hence, cases of domestic abuse are on the rise and victims continue to suffer in silence. But where on one hand, the situation appears so gross in terms of the statistics emerging on domestic cruelty, there have been constant allegations regarding the misuse of section 498A by disgruntled women, who are accused of using the law as a tool to level the playing field between them and their in-laws. This fact of misuse has even been acknowledged by the Government and the highest Court in India. The government has been

[5] Krug EG et al., "World Report On Violence And Health", (WHO Library Cataloguing-in-Publication Data, WHO, Geneva, 2002), *available at*: http://www.who.int/violence_injury_prevention/violence/world_report/en/introduction.pdf. (Visited on October 26, 2018)

[6] Sunita Kishore and Kamla Gupta, "Gender Equality and Women's Empowerment in India", *National Family Health Survey, NFHS-3, India, 2005-06* (Ministry of Health and Family Welfare, Govt of India, August, 2009), *available at*: http://rchiips.org/NFHS/a_subject_report_gender_for_website.pdf. (Visited on October 26, 2018)

[7] Kirti Singh, "Marital Cruelty and 498A: A Study on Legal Redressal for Victims in Two States" (Indian School of Women's Studies and Development, New Delhi, Sponsored by National Commission of Women, 2015), *available at*: http://ncwapps.nic.in/pdfReports/Marital_Cruelty_and_498A_A_Study_on_Legal_Redressal_for_Victims_in_Two_States.pdf (Visited on July 27, 2019)

[8] World Health Organisation, "Violence against women: Intimate partner and sexual violence against women" (Department of Reproductive Health and Research, WHO, Geneva, Switzerland, 2014), *available at*: http://apps.who.int/iris/bitstream/handle/10665/112325/WHO_RHR_14.11_eng.pdf?sequence=1. (Visited on October 26, 2018).

under pressure from both Courts and men's rights organisations to amend the law so as to ensure that innocent husbands, their parents and other relatives are not made victims of the stringency attached to this law. The purpose of this paper is to understand the reasons due to which this law is alleged to be misused and examine them so as to suggest a balanced approach, if required, that can be adopted for effective implementation of this provision.

III

Research Methodology

The researcher has carried out a doctrinal study and the main sources of information for this study are secondary in nature. The researcher has studied the various international instruments providing for against domestic abuse. To understand the legal scenario against domestic violence and cruelty in India, the researcher has studied the relevant statutory provisions, judicial pronouncements along with governmental and non-governmental reports, books and articles. To test the arguments posited in favour of diluting Cruelty Law in the course of this article, the researcher has analysed government reports published by the National Crime Records Bureau (NCRB), published by the Ministry of Home Affairs, relating to the crime statistics in India, NCRB Reports providing the statistics of prison inmates across all jails in the country and the Reports of National Family Health Survey, published by the Ministry of Health and Family Welfare, providing the state and national information on the various health and family welfare issues prevalent in India.

IV

Indian Legal Scenario against Domestic Abuse

The Constitution of India under Article 14[9] read with the Preamble[10] provides for equality of status and equal protection of laws to all men and women. The central and state governments are also empowered under Article 15(3)[11] to make any special provisions to enhance the status of women and children and give them substantive equality. Even at the international level, India has ratified majority of the International treaties and conventions set out to protect women from domestic violence. The Universal Declaration of Human Rights,

[9] The Constitution of India, 1950, Article 14. It provides that 'the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'
[10] The Constitution of India, 1950, Preamble (Justice, social, economic and political; Equality of status and of opportunity)
[11] The Constitution of India, 1950, Article 15(3). It provides that 'nothing in this article shall prevent the State from making any special provision for women and children.'

adopted by India, recognises equal rights of men and women in a marital relationship.[12] India has also ratified the Convention on Elimination of All Forms of Discrimination Against Women in 1979[13] and The UN Declaration on Elimination of Violence Against Women, 1993[14] which both call for strict measures to remove this historically established unequal power relations between men and women which ultimately lead to the discrimination against women by men in the form of domestic abuse. Along with these instruments, the Beijing Platform for Action adopted at the Fourth United Nations World Conference on Women in 1995,[15] also ratified by India, called upon member nations to take adequate steps to ensure that women are not discriminated nor subjected to violence in any sphere.

In India, domestic violence was a very common phenomenon, especially in the early 20th century. Post-independence, a number of laws were enacted to ensure the protection of women rights against discrimination and violence. One of the main reasons why women were considered less in society was the menace of dowry. Dowry was a regular feature of Indian marriages and married women often faced physical and verbal abuses in their matrimonial homes. To put an end to the system of dowry and the consequences that ensued upon the women due to it, the Indian legislature passed the Dowry Prohibition Act, 1961. This law punished the act of giving and taking dowry during marriages.

But unfortunately, the Dowry Prohibition Act, 1961 could not effectively deal with the menace of abuse of wives for dowry and a large number of incidents of dowry deaths and dowry related violence began to emerge. Women rights movement in the 70s and 80s was gaining momentum, and these organisations vehemently worked to bring the government's attention to the increasing number of dowry deaths. As a response to the movement, the Law Commission of India *suo moto* took upon itself to address this issue and came out with the

[12] Universal Declaration of Human Rights, G.A. Res. 217A(III), UN Doc. A/810, (December 12, 1948); *available at*: http://www.unhcr.org/refworld/docid/3ae6b3712c.html. (Visited on October 26, 2018)

[13] Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34, U.N. Doc. A/RES/34/180, (December 18, 1979), *available at:* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm. (Visited on October 26, 2018).

[14] Declaration on the Elimination of Violence against Women, G.A. Res. 48, UnN. Doc. A/RES/48/104, (December, 20, 1993), *available at*: http://www.un.org/documents/ga/res/48/a48r104.htm. (Visited on October 26, 2018).

[15] United Nations Entity for Gender Equality and the Empowerment of Women, "The United Nations Fourth World Conference on Women", (Action for Equality, Development and Peace, Platform for Action, Beijing, China, September, 1995) *available at:* http://www.un.org/womenwatch/daw/beijing/platform/plat1.htm#statement. (Visited on October 26, 2018).

91st Law Commission of India Report in August, 1983[16]. The Commission addressed and acknowledged two very important issues. First, that the laws prevalent at that time were ineffective to deal with the problem since there were numerous cases which couldn't fit into the *pigeon-hole* of the then existing offences under the IPC. An example of such a situation could be of a woman who committed suicide after being harassed for dowry in which case her husband and in-laws could only be charged for abetment of suicide, that too after establishing guilt beyond reasonable doubt. Second, the law was not preventive in nature and intervened only when the victim had succumbed to her injuries. As a solution to these two issues, the Commission suggested the insertion of what we find today as section 304B and 498A respectively in the Indian Penal Code. Another extremely important fact that was acknowledged and given legal recognition to by the Law Commission was that when a husband abuses his wife, other members of the family *present in the house* are either guilty associates in crime or silent but conniving witnesses to it.

The Government agreed upon the suggestions by the Law Commission and inserted these provisions in IPC by way of the Criminal Law (Amendment) Act, 1983[17] and Criminal Law (Second Amendment) Act, 1983.[18] Section 304B,[19] introduced by Criminal Law (Amendment) Act, 1983 punishes the act of causing the death of a woman due to reasons of dowry and even includes cases where the woman herself commits suicides. Section 498A, introduced by Criminal Law (Second Amendment) Act, 1983, punishes the act of cruelty done to a woman and reads as follows:

Section 498A: Husband or relative of husband of a woman subjecting her to cruelty — Whoever, being the husband or the relative of the husband of a woman, subjects such woman

[16] Law Commission of India, 91st Report on Dowry deaths and law reform amending the Hindu Marriage Act, 1955, The Indian Penal Code, 1860 and The Indian Evidence Act, 1872, (August, 1983), *available at*: http://lawcommissionofindia.nic.in/51-100/Report91.pdf. (Visited on October 26, 2018)
[17] Criminal Law (Amendment) Act, 1983 (Act 43 of 1983).
[18] Criminal Law (Second Amendment) Act, 1983 (Act 46 of 1983).
[19] The Indian Penal Code, 1860, s. 304B. It states as follows:
Dowry death —
(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.
Explanation - For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (Act 28 of 1961).
(2) Whoever commits dowry death shall be punished with imprison-ment for a term which shall not be less than seven years but which may extend to imprisonment for life.

to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation — For the purpose of this section, 'cruelty' means—

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Not soon after section 498A was introduced, the constitutional validity of the provision was challenged in the Delhi High Court in the case of *Inder Raj Malik* v. *Sunita Malik*,[20] whereby it was argued that section 498A violates article 14 of the Constitution, it gives arbitrary power to the police as well as the Court and it also violates the principle of double jeopardy as contained in Article 20(2) of the Constitution. Rejecting the petition, the Court held that the section was not unconstitutional as the term 'cruelty' is well defined in the section. The Court further held that the section does not overlap the provisions of the Dowry Prohibition Act, 1961 as the former penalises demand of money or valuable property coupled with harassment, whereas the 1961 Act merely penalises demand of dowry and the element of cruelty or harassment is not present in the Act, thus the two are separate and therefore Article 20(2) of the Constitution is not violated. After almost two decades, once again the constitutional validity of this section was challenged in the case of *Satish Kumar Batra* v. *State of Haryana*,[21] this time on the ground of misuse of the section. But once again while upholding the constitutional validity of section 498A, the Supreme Court held that 'merely because there is possibility of misuse of the offence of cruelty to wife under section 498A, it is not a ground to hold this provision as unconstitutional.'

The Courts have ornately discussed and elaborated upon the section in various judgements. In the case of *Savitri Devi* v. *Ramesh Chand and ors*,[22] the Court held that 'in order to prove cruelty or harassment it has to be proved that the woman was tortured or coerced physically or mentally through constant intimidation in order to compel or persuade

[20] *Inder Raj Malik* v. *Sunita Malik,* 1986 Cri LJ 1510 (Del).
[21] *Satish Kumar Batra* v. *State of Haryana,* (2009) 2 Cri LJ 2447 (SC).
[22] *Savitri Devi* v. *Ramesh Chand*, 2003, Cri LJ 2759 (Del).

her to fulfil the dowry demand which is legally prohibited.' In another case of *Koppisetti Subbharao @ Subrahmaniam* v. *State of Andhra Pradesh*,[23] the Supreme Court held that 'the word husband in section 498A is not limited to cover only those persons who have entered into legally valid marriage. The thrust of the offence under section 498A is subjecting of the woman to cruelty. Thus the evil sought to be curbed is distinct and separate from the person committing the offending acts and there could be no impediment in law to liberally construe the words or expressions relating to the persons committing the offence so as to rope in not only those validly married but also anyone who has undergone some or other form of marriage and thereby assumed for himself the position of husband to live, co-habitate and exercise authority as such husband over a woman.'

Along with sections 304B and 498A, certain other sections were also introduced into the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 for proper and effective implementation of the abovementioned sections.[24] The First Schedule of the Code of Criminal Procedure, 1973 was amended so as to include entries to state that the offence under section 498A would be cognizable, non-bailable and non-compoundable. The Amendment Act also introduced section 198A to the Code of Criminal Procedure, 1973 which reads as follows:

Section 198A: Prosecution of offences under section 498A of the Indian Penal Code-

No Court shall take cognizance of an Offence Punishable section 498A of the Indian Penal Code except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister or by her father' s or mother' s brother or sister or, with the leave of the Court, by any other person related to her by blood, marriage or adoption.

Thus, the combined effect of these amendments now is that the offence is cognizable and gives power to the police to arrest without warrant along with being non-compoundable, thus parties cannot withdraw the case by a compromise between themselves. It is a non-

[23] *Koppisetti Subbharao @ Subrahmaniam* v. *State of Andhra Pradesh*, (2009) 3 Cri LJ 3480 (SC).

[24] The Criminal Law (Amendment) Act, 1983 introduced section 113A into the Indian Evidence Act, 1872 laying down a presumption of guilt in cases where the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty. Section 113B was introduced by the Criminal Law (Second Amendment) Act, 1983 and laid down a presumption of dowry death in cases where it is shown that soon before her death the deceased woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry. Section 174 of the Code of Criminal Procedure, 1973 was also amended making inquest by Executive Magistrate mandatory in cases of suicide or suspicious death of a woman within seven years of her marriage.

bailable offence meaning thereby that the accused does not have a right to bail and it is the complete discretion of the Court as to whether bail should be granted to accused or not. A victim of cruelty by husband or his relatives can either approach the police and file a FIR or can directly file a private complaint with the 'Crimes Against Women' (CAW) Cell of the Court. The power to arrest is exercised by the police in light of section 41 of the Code of Criminal Procedure, 1973.

V

Diluting the Impact of Section 498A

The introduction of section 498A was initially seen as a major step towards protection of women from domestic abuse and cruelty, especially the women coming from a rural background who faced a lot of abuse and still found no recourse to end their peril. But soon after, cases of abuse of the section started surfacing and it was alleged that the section has become a tool in the hands of women to level the playing field between them and their in-laws. It was also alleged that the conviction rate is the lowest under s 498A among all offences under the criminal law.

And then began the discussion on diluting the effect and impact of section 498A. Various High Courts and even the Supreme Court acknowledged the misuse of cruelty law in their judgements and started suggesting measures to ensure least or no misuse of the provision. The first judgement by the Supreme Court came in the case of *Sushil Kumar Sharma* v. *Union of India*,[25] whereby the Court held that the section was being misused by women who intend to seek personal vendetta against their in-laws and that adequate measures should be taken by the Legislature to introduce changes in section 498A to prevent misuse. Next in line was the case of *Chander Bhan and Anr*. v. *State*,[26] wherein the Court, for the first time, issued guidelines to prevent misuse of section 498A. The guidelines suggested the involvement of NGOs, police, and courts together to ensure that no woman files a complaint in the heat of the moment and that she is sufficiently counselled before filing the complaint.

Then in the case of *RamGopal* v. *State of Madhya Pradesh*,[27] the Supreme Court introduced the idea of making section 498A compoundable by introducing a suitable amendment in the Statute. The reasoning given by the Court was to reduce the burden of

[25] *Sushil Kumar Sharma* v. *Union of India* (2005) 6 SCC 281.
[26] *Chander Bhan and Anr*. v. *State*, (2008) 151 DLT 691.
[27] *RamGopal* v. *State of Madhya Pradesh,* 2010 (7) SCALE 11.

Courts of deciding cases where parties were ready to arrive at a settlement. At the same time, in another case of *Preeti Gupta* v. *State of Jharkhand and Anr.*,[28] the Supreme Court held that a large number of complaints were being filed under section 498A for trivial reasons in the heat of the moment. The Court further stressed upon the fact that many times, the complaints under section 498A suffer from the vices of over-implications and false exaggerations. In both these cases, the Supreme Court urged the government to consider suitable amendments in the law so as to avoid misuse of the law.

In response to these judgements, the Law Commission of India looked into the matter and elaborately dealt with this issue under the 237th Law Commission Report on 'Compounding of (IPC) Offences', released in December, 2011.[29] The Committee suggested that 'if the wife is prepared to condone the ill-treatment and harassment meted out to her either by reason of change in the attitude or repentance on the part of the husband or reparation for the injury caused to her, the law should not stand in the way of terminating the criminal proceedings, and thus the offence under section 498A should be made compoundable.' The Commission opined that the objective of section 498A cannot be achieved if the prosecution is allowed to take the usual course disregarding the intention of the parties to reconcile. At the same time, it also acknowledged that women might be forced by police and CAW cell members for an out-of-court settlement. Thus, the offence, as per the Law Commission, should be made compoundable but only with the permission of the Court.

In addition to this, the Law Commission came out with another report to deal specifically with all other aspects related to section 498A in its 243rd Report.[30] The Commission recommended that the offence should remain non-bailable and cognizable. Though the Commission critically pointed out that before making arrests under section 498A, the police should exercise necessary caution, it still highlighted the fact that least reporting of cases is done by poor women even though they are the worst sufferers. The Commission was of the view that if the offence is made bailable and non-cognizable, it will lose its deterrent value. The Commission also pointed out that while it may be true that the provision is being misused by some women, misuse or abuse is not peculiar to this provision and can be aptly curtailed within the existing framework of the law. To suggest a way to it, the Commission

[28] *Preeti Gupta* v. *State of Jharkhand and Anr* (2010) 7 SCC 667.
[29] Law Commission of India, 237th Report on Compounding of (IPC) Offences, (December, 2011), *available at*: http://lawcommissionofindia.nic.in/reports/report237.pdf. (Visited on October 26, 2018)
[30] Law Commission of India, 243rd Report on Section 498A IPC, (August, 2012). *available at*: http://lawcommissionofindia.nic.in/reports/report243.pdf. (Visited on October 26, 2018)

recommended advisories to State Governments to avoid unnecessary arrests and to strictly observe the procedures laid down in the law governing arrests.

Despite these judgements and Committee recommendations, the law remained intact and its effect was not diluted. But then in 2014, the first attempt to dilute the effect of section 498A was made in the case of *Arnesh Kumar* v. *State of Bihar*,[31] whereby the Supreme Court laid down the statistics of low conviction in section 498A cases and deduced that majority of the complaints are false and as a result of the offence being cognizable, the police abuses its power and makes illegal arrests. The Court further held that automatic arrests should not be made by police in case of section 498A complaints unless they have complied with the requirements under section 41(1)(b)(ii)[32] of the Code of Criminal Procedure, 1973. This section provides for the power to arrest without warrant and the Court instructed all the State Governments to instruct all police officers in their jurisdiction to not make any automatic arrest under this section unless they are satisfied that the requirements under section 41 are met. The Court further held that police shall be given a checklist in accordance with section 41(1)(b)(ii) which they have to fill and submit it to Magistrate while forwarding/producing the accused before the Magistrate for further detention. The Court went to the extent of holding any police officer who does not comply with these directions to be subjected to a departmental enquiry.

Once the judgement came out, there was a lot of hue and cry about the impact that this judgement would have on victims of domestic abuse. One of the main arguments raised by the women's rights groups was that the chances of a victim, who dares to complain against her husband and in-laws and seek recourse under section 498A, to being further abused by her in-laws would increase. The reason behind this argument is that the accused, who would

[31] *Arnesh Kumar* v. *State of Bihar* (2014) 8 SCC 273.

[32] The Code of Criminal Procedure, 1973, s. 41(1)(b)(ii). It states as follows:
Section 41: When police may arrest without warrant -
(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—
(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:-
(ii) the police officer is satisfied that such arrest is necessary-
(a) to prevent such person from committing any further offence; or
(b) for proper investigation of the offence; or
(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or
(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or
(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,
and the police officer shall record while making such arrest, his reasons in writing.

by then know about her complaint and wouldn't have been arrested, would then take all possible steps to stop the victim from pursuing her complaint. Also, these groups questioned the reasoning given by the Supreme Court that there were low rates of conviction arguing that 'no conviction' does not necessarily imply 'no guilt' and that an accused might be acquitted due to a poor investigation or inability of the prosecution to produce sufficient evidence in the Court.

The National Commission of Women even filed a curative petition in 2016 against this judgment before a three-judge bench of the Supreme Court but the petition was rejected. Despite strong criticism against this stand of the Court, in 2017, in the case of *Rajesh Sharma* v. *State of Uttar Pradesh*,[33] the Supreme Court maintained the same stand and issued a revised form of guidelines to disallow automatic arrests in section 498A complaints. The Court instructed the District Legal Services Authorities to constitute a Family Welfare Committee who would look into every complaint filed under section 498A and unless the Committee recommended, no arrest would be made. As per the Court, if the Committee is able to bring the parties to a settlement the complaint would be withdrawn and no case shall be made out.

The decision was vehemently criticized and less than three months after the Judgement came into force, an NGO, Nyayadhar filed a PIL against the decision in Rajesh Sharma case. The Court held that it did not agree with the stand taken by the Court in Rajesh Sharma's case because this judgment was actually writing the law, for which Judiciary is not eligible. Another NGO, SAFMA i.e. Social Action Forum for Manav Adhikar had also filed a PIL against Union of India in 2015 on the same issue. The Supreme Court merged the two PILs of 2015 and 2017 and on September 14, 2018 partially overruled the judgment in Rajesh Kumar's case.[34] With regards to the Family Welfare Committee, the Court held that the constitution of such a committee is beyond the power conferred under Criminal Procedure Code and thus conferment of power on the said Committee is erroneous. The Court further said that the offence being non-bailable, it is only the Court and not any Committee which can decide whether bail should be granted or not and if the parties arrive at a settlement, they always have the option to approach the High Court and get the proceedings quashed. But the Court upheld the judgement in Rajesh Sharma's case with regards to accepting the misuse of

[33] *Rajesh Sharma* v. *State of Uttar Pradesh*, AIR 2017 SC 3869.
[34] *Social Action Forum for Manav Adhikar and another* v. *Union of India, Ministry of Law and Justice and others*, WP (C) No. 73 of 2015 with WP (C) No. 156 of 2017.

the provision by educated women and police and have thus upheld the guidelines in Rajesh Sharma's case with respect to automatic arrests.

The decision was seen by men's rights organisations as a major victory. Hailing the judgment by the Apex Court, Wasim Ali from the Save Family Foundation said that 'seventy-five percent of cases are withdrawn because the women use the charges to extort money and even of the 15 percent convicted, many would be innocent.'[35] Unfortunately, Wasim Ali could not present any data to support his claim. Other men's rights organisation claim that 'when a married man faces domestic violence in the form of verbal abuse, mental abuse and economical abuse, there is no provision in law to seek justice, which is why there should be a National Commission for Men also.[36] On the other hand, senior advocate Indira Jaisingh was quoted saying that 'in a patriarchal society like India, there is no need to give special rights to men to defend their lives when they already have so many rights to appeal with.'[37] Then in the recent case of *Rashmi Chopra* v. *The State of Uttar Pradesh*,[38] the Supreme Court held that 'section 498A does not contemplate that a complaint under this section should be filed only by women, who is subjected to cruelty by husband or his relative'. But at the same time, the Court also issued a note of caution by stating that 'Courts should be careful in proceeding against the distant relatives in crimes pertaining to matrimonial disputes and dowry deaths. The relatives of the husband should not be roped in on the basis of omnibus allegations unless specific instances of their involvement in the crime are made out.'

In 2015, after a series of judgments by Supreme Court pointing out the necessity of amending section 498A and keeping in mind the recommendations of the Law Commission, the Union Government initiated suitable amendments to the provision to make the offence compoundable. However, the suggestion was not supported in the two houses and hence the

[35] Jaiswal Nimisha, "Indian court rules that men need protection from women making unsubstantiated domestic harassment claims", (*Global Post*, August 15, 2017), *available at*: https://www.pri.org/stories/2017-08-15/indian-court-rules-men-need-protection-women-making-unsubstantiated-domestic. (Visited on October 26, 2018). Save Family Foundation is a men's rights group that offers counselling and legal assistance to "distressed men" accused under this law and others.

[36] NDTV, "Over One Lakh Suicides in India Every Year, Says Report", (*Indo-Asian News Service*, *NDTV*, July 3, 2014); *available at*: https://www.ndtv.com/india-news/over-one-lakh-suicides-in-india-every-year-says-report-583403. (Visited on October 26, 2018)

[37] Zee News, "Men have rights too! Aggrieved men put up a fight", (*Zee News, India*, June 2, 2013), *available at*: http://zeenews.india.com/news/nation/men-have-rights-too-aggrieved-men-put-up-a-fight_852326.html. (Visited on October 26, 2018)

[38] *Rashmi Chopra* v. *The State of Uttar Pradesh*, Appeal (Crl.), 594 of 2019, *available at:* https://sci.gov.in/supremecourt/2018/33286/33286_2018_Judgement_30-Apr-2019.pdf

Criminal Law (Amendment) Act, 2018 was enacted without touching upon the subject of cruelty.[39]

VI

Analyzing the Impact of the Suggested Changes

There has been a lot of debate around making the offence of cruelty compoundable, bailable and non-cognizable. But before the Government amends the law to implement the suggestions by the Courts and the Law Commission, a careful examination of the implications of this change is extremely cardinal. Equally important is to understand the objective sought to be achieved by way of these amendments. Men's rights organisations have claimed that the law is being misused leading to violation of fundamental rights of liberty and equality of men. Thus, to protect their rights it is foremost necessary to verify the legitimacy of the '*misuse*' argument.

The argument that section 498A is misused is based on the following grounds:

i. Low number of convictions as compared to the number of incidents reported[40]
ii. Women withdrawing their complaints for vested interests[41]
iii. Callous attitude of police officials while making arrests against section 498A complaints[42]

To test if these grounds are correct, let us analyse each of them separately.

Low Conviction Rate:

This is one of the most often contested argument by men's rights organisations. Even the Courts have quoted the data from the National Crime Records Bureau (NCRB) to state that since the number of convictions is very low in comparison to the number of incidents reported, a majority of complaints under section 498A are false. On the other hand, women's rights organisations argue that 'no conviction' does not necessarily imply 'no guilt' and an

[39] Ministry of Home Affairs, Misuse of section 498A IPC, Rajya Sabha Starred Q. no. 307 (Govt. of India, December 17, 2014); *available at*: https://mha.gov.in/MHA1/Par2017/pdfs/par2014-pdfs/rs-171214/307.pdf. (Visited on October 26, 2018)
[40] Dubuddu Rakesh, "Conviction rate of Sec 498-A cases is among the lowest of all IPC Crimes", (*Factly*, September 15, 2018); *available at*: https://factly.in/conviction-rate-for-cases-registered-under-sec-498a-ipc-is-among-the-lowest-for-all-ipc-crimes/. (Visited on October 27, 2018)
[41] Raja Vidya, "SC Lays Guidelines for Dowry Complaints to Make Section 498A More Balanced & Curb Misuse", (*The Better India*, July 29, 2017), *available at*: https://www.thebetterindia.com/110238/dowry-complaints-immediate-arrest-misuse-498a/. (Visited on October 26, 2018)
[42] Choudhary Amit, "No arrest in dowry cases till charges are verified, says Supreme Court" *The Times of India*, Jul 28, 2017, *available at*: https://timesofindia.indiatimes.com/india/no-arrest-in-dowry-harassment-case-without-verifying-authenticity-of-complaint-sc/articleshow/59796255.cms. (Visited on October 26, 2018)

acquittal may be the result of several other factors. It is thus important to analyse whether this counter-argument is correct even in case of section 498A acquittals.

The conviction rate is deduced by calculating the percentage of the number of convictions to that of acquittals for a given offence in a particular year. The table below indicates a number of factors apart from acquittal and conviction with respect to section 498A complaints.

Year	**Cases Pending Investi-gation from Previous Year**	**Cases reporte d during the year**	**Total cases for a given year**	**Cases declared false due to mistake of fact/ law**	**Cases in which charge-sheets were laid**	**Cases compo-unded or with-drawn**	**Number of convi-ctions**	**Convi-ction Rate (in %)**
(i)	**(ii)**	**(iii)**	**(iv)**	**(v)**	**(vi)**	**(vii)**	**(viii)**	**(ix)**
2016	51807	110378	162185	18011	91810	8437	5433	12.2
2015	50933	113403	164336	3314	90971	10318	6559	14.3
2014	46348	122877	169225	4125	97081	8911	6425	13.7
2013	43372	118866	162238	10864	93386	8218	7258	16.0
2012	40802	106527	147329	10235	87633	8162	6916	15.0
2011	34409	99135	133544	10193	77786	7450	8167	20.2

Table 1.1: Statistics on Disposal of cases by Police and Courts of section 498A IPC cases[43]

A careful examination of this table shows two very important points:

i. The number of cases pending investigation has increased almost every year, meaning thereby that investigation for a large number of cases doesn't get completed in the same year. It implies that women who file a complaint under section 498A have to fight a

[43] The statistics in Table 1.1 have been obtained from the statistics provided under the NCRB Reports titled 'Crime in India' for six consecutive years. These Reports present a pan-India picture and include data from all Courts and Prison establishments throughout India, *available at*: http://ncrb.gov.in/. (Visited on Jun. 24, 2018)

long legal battle that too after they have left their matrimonial homes and, in a majority of cases, when they do not have any financial means to support themselves. This is one of the major reasons why a woman is not able to fight the case properly and either withdraws (as reflected in column vii of the table) from the complaint or ends up losing the case. But if a woman, unable to fight the case, loses the case it does not establish the innocence of the husband or his relatives even though the Court might acquit the accused by giving him the benefit of doubt.

ii. Another important point is if we compare the number of cases filed (as reflected in column iv of the table) against the number of cases in which finally a chargesheet is filed (as reflected in column vi of the table), it appears that a lot of cases are either declared false even without the case approaching the Court or because they are withdrawn by the state or because the police does not even investigate the case. One of the arguments stated by men's organisation is that as compared to the men against whom the complaints are filed, it is only a few of them who are finally found guilty. What is important to note here is that a very few cases actually reach the level of the Court for it to decide the innocence or guilt of the accused, while a majority are either not investigated or are withdrawn. The Court does not decide the innocence of all the accused against whom complaints are filed and thus to state that the conviction rate is low will not be a correct assessment of the whole picture. In fact cruelty by husband remains as one of the most under-reported crimes in India. As per the report of National Family Health Survey NFHS-4, 44.3% women reported facing cruelty and abuse at the hands of their husband where the NCRB data quotes only 32% cases to be under section 498A.[44]

Another way of analysing the argument that 'section 498A is being misused as indicated by the low conviction rates' is by looking at the other offences where the conviction rate is more or less the same is in section 498A. The table below lists the conviction rate for some other offences during the past three years:

Year	**Kidnapping and abduction (in %)**	**Attempt to commit rape (in %)**	**Assault with an intent to outrage the modesty of**	**Cruelty by husband or relatives**

[44] International Institute of Population Sciences, "India Fact Sheet", *National Family Health Survey NFHS-4, 2015-16*, (Ministry of Health and Family Welfare, 2016), *available at:* http://rchiips.org/nfhs/pdf/NFHS4/India.pdf. (Visited on October 27, 2018)

(i)	(ii)	(iii)	women (in %) (iv)	(in %) (v)
2016	20.8	19.7	21.8	12.2
2015	23.9	19.8	24.3	14.2
2014	22.2	14.7	28.1	13.7

Table 1.2: Other offences with low conviction rate as provided under the NCRB Reports[45]

It is not surprising that the majority of offences that fall in the least conviction rates category are offences that occur in private spheres or behind closed doors. It thus becomes extreme difficult in these cases to find eye-witnesses so as to support the victim's case. The result is the accused being acquitted due to the disability of the prosecution in proving their case beyond a reasonable doubt. With respect to section 498A, the reason given for lower conviction rate is of false complaints by wives against husbands but does it mean that for every offence where the conviction rate is low, the complainant is making a false claim. What is also important to note here is that despite the offences of attempt to rape and sexual harassment having low conviction rates, the Government is constantly making laws to make the provision more stringent. In such a scenario, a diagonally opposite approach towards section 498A of making it liberal does not seem reasonable at all.

Thus, the argument that section 498A should be amended due to a low conviction rate does not seem correct. The lower conviction rate, as also argued by a number of women's rights organisations, can be the result of botched-up investigations, structural infirmities in the criminal justice system, prejudice and corruption of the enforcement agencies. On the other hand, efforts should be made to ensure that no woman should be forced to withdraw cases due to lack of resources or poor investigations by the police. It should be ensured that more and more women are encouraged to come out and report incidents of domestic abused meted out to them by their husbands and other relatives.

Withdrawal of complaints for vested interests:

It is undoubtedly true that a large number of cases are withdrawn in section 498A complaints, as also indicated by column (vii) of the table, but at the same time it is important to assess what are the reasons for withdrawal of complaints. A study conducted by Centre for

[45] *Ibid.*

Women Development Studies in 2005 highlighted that a large number of cases are withdrawn by the victims owing to various reasons 'ranging from the concerns for children, absence of support network or depletion of social, mental, emotional and financial resources to continue with the proceedings.'[46] Also, studies suggest that many a time the police officials and the women cell officers urge women to go for a settlement with the husband rather than pursuing the case. In fact, even though the offence is non-compoundable in nature, the police officials and court officers try to pursue the victim to settle the case, especially when marital counselling is neither the duty of the police nor of the Courts.

When a married woman who has been abused by her husband or his relatives is asked to settle the matter, the law considers it acceptable and even the law enforcement agencies pursue the women to mediate with the accused. On the other hand, if an unmarried woman is abused by a man, the law does not allow settlement at all. One of the best examples of such a situation was the case of *V. Mohan* v. *State*,[47] where the Madras High Court hearing a rape case asked the victim to go for a mediation with the accused and asked the accused to marry the victim. The judgement was severely criticised on the ground that neither the offence is non-compoundable and nor can marriage to the victim ever be a punishment in a rape case. It is surprising that when both rape and cruelty to wife are offences against women and both are offences committed in a private setting, the attitude towards rape is so severe while towards cruelty it is very liberal.

The Supreme Court in a number of cases has held that marriage after rape cannot be a defence to the offence of rape. It looks so ironic that if a man rapes a girl and tries to marry her, it is not allowed but when a man rapes his wife or beats or abuses her, nobody raises a finger, instead the victim is asked to settle the matter. It is absurd to even consider a scenario where in a rape victim is asked to stay in the same house as the offender till the police decides to act against her rapist, on the contrary we have in-camera trials for rape victims and at times the victim is allowed to be questioned in an isolated room just to ensure that she doesn't have to face her offenders. It is astonishing that the same law expects a married woman to stay in the same house with her offender husband and in-laws, without even considering the possibility of further abuse by them on the victim. An argument may be given

[46] Nigam Shalu, "Understanding Justice Delivery System from the Perspective of Women Litigants as Victims of Domestic Violence in India (Specifically in the Context of Section 498-A, IPC)" (*Centre for Women's Development Studies*, *New Delhi*, 2017), *available at*: http://www.cwds.ac.in/wp-content/uploads/2016/09/UnderstandingJustice.pdf. (Visited on October 27, 2018)
[47] *V. Mohan* v. *State*, M.P. No. 2 of 2014 in Crl. A no. 402 of 2014.

that the victim need not go back to her matrimonial home after filing a complaint but does the law gives her any other option where she can find herself safe, and the answer is negative. The question that then arises is whether is it any lesser a crime if the abuse is directed towards a wife instead of any other woman.

In light of this scenario, it remains doubtless that asking victims of domestic abuse to withdraw complaints and settle the matter with the abusive husbands and relatives is obnoxious. Infact greater efforts should be put to build confidence of a woman who gathers the courage to report the incident to the police, while facing all odds from her matrimonial relations. The offence should not be made compoundable, else the law will itself re-victimise the victims of domestic cruelty.

Callous attitude of police while making arrests:

The Supreme Court of India on a number of occasions acknowledged that cruelty law is creating a sort of 'legal terrorism' and the biggest contributing factor is the attitude of 'arrest first and then proceed with the rest'.[48] Right after the Supreme Court in *Arnesh Kumar's* case acknowledged that section 498A was being widely misused, reports started flourishing in media about how Indian jails are crowded with females and males accused under section 498A. As per a report published in a leading newspaper, Tihar jail in Delhi was allegedly overcrowded with females accused under section 498A.[49]

However, an analysis of the figures provided on the website of Tihar Jail reveal that as on December 31st, 2015, the total females residing in jail were only 4.08% of the entire prison population. The allegation that the jail was being overcrowded with 498A prisoners is not true since statistics show that out of the entire population of under-trial prisoners, only 0.08% of them were accused under section 498A whereas out of the entire population of convicted prisoners, only 0.68% of them were convicted under section 498A.[50] Also, the situation is not peculiar to Tihar jail in Delhi. The last available manual on Prison Statistics in India – 2015 released by the National Crime Records Bureau annually shows that in the 1401 jails all over the country, in 2015 there were 4,19,623 inmates out of which females

[48] *Supra* note 30.
[49] Manra Mahinder Singh, "Tihar overflowing with dowry cases: How infamous Delhi jail is crammed to bursting with women accused of harassment", *Mail Online India, Daily Mail UK*, July 6, 2014, *available at*: https://www.dailymail.co.uk/indiahome/indianews/article-2682604/Tihar-overflowing-dowry-cases-How-infamous-Delhi-jail-crammed-bursting-women-accused-harassment.html. (Visited on October 27, 2018)
[50] Central Jail, "Prisoner Profile", (*Department of Tihar Prisons, Government of Delhi*, 2015), *available at*: http://www.delhi.gov.in/wps/wcm/connect/lib_centraljail/Central+Jail/Home/Prisoner+Profile. (Visited on October 27, 2018)

constituted only 4.3% of the entire population. Out of the entire population of under-trial prisoners, only 4.2% were females and out of the entire population of convicted prisoners, only 4.3% were females. Also, out of the entire population of convicted prisoners throughout all jails in India, the number of inmates convicted under section 498A are only 0.9%. whereas only 2.2% of under-trial prisoners throughout Indian jails are being tried under section 498A[51] Thus the argument that the jails are flooded with males and females accused under section 498A is not correct.

Yet the Apex Court issued guidelines in a number of cases to ensure that the police officials do not carry out automatic arrests. The latest guidelines issued in Rajesh Sharma's case were partially overruled in SAFMA's case but the guidelines which still hold ground are as follows:

i. Complaints under Section 498A and other connected offences may be investigated only by a designated Investigating Officer of the area. Such designations may be made within one month from today. Such designated officer may be required to undergo training for such duration (not less than one week) as may be considered appropriate. The training may be completed within four months from today;
ii. In cases where a settlement is reached, it will be open to the District and Sessions Judge or any other senior Judicial Officer nominated by him in the district to dispose of the proceedings including closing of the criminal case if dispute primarily relates to matrimonial discord;
iii. If a bail application is filed with at least one clear day's notice to the Public Prosecutor/complainant, the same may be decided as far as possible on the same day. Recovery of disputed dowry items may not by itself be a ground for denial of bail if maintenance or other rights of wife/minor children can otherwise be protected. Needless to say that in dealing with bail matters, individual roles, prima facie truth of the allegations, requirement of further arrest/ custody and interest of justice must be carefully weighed;
iv. In respect of persons ordinarily residing out of India impounding of passports or issuance of Red Corner Notice should not be a routine;

[51] National Crime Records Bureau, "Prison Statistics India – 2015" (Ministry of Home Affairs, Government of India, New Delhi, September 26, 2016), *available at*: http://ncrb.gov.in/index.htm. (Visited on October 27, 2018)

v. It will be open to the District Judge or a designated senior judicial officer nominated by the District Judge to club all connected cases between the parties arising out of matrimonial disputes so that a holistic view is taken by the Court to whom all such cases are entrusted; and
vi. Personal appearance of all family members and particularly outstation members may not be required and the trial court ought to grant exemption from personal appearance or permit appearance by video conferencing without adversely affecting progress of the trial.
vii. These directions will not apply to the offences involving tangible physical injuries or death.[52]

The implications of these guidelines are that the offence should be treated like a compoundable offence so that whenever the victim wishes to withdraw on the grounds of settlement, the Courts should allow it. This cannot be legally done since the power to quash proceedings in case of a non-compoundable offence does not lie with the District and Sessions Judge and can only be exercised by the High Courts and Supreme Courts due to their inherent powers.

But at the same time the guidelines suggest that Courts should be lenient while granting bail, and for relatives residing outside the city personal appearance should not be stressed upon. This is a very important guideline which should ideally be followed in letter and spirit by police personnel. Even the 91st Law Commission Report stated that any relative of the husband, who does not reside in the same house and city and does not frequently visit the victim's house cannot be considered at par with relatives residing in the same house as the victim. Thus, the treatment meted out to them should definitely be more liberal.

A cursory perusal of section 498A would make it clear that 'cruelty' as defined under the Act is not intended to punish a trivial family fight or discords, rather for an accused to be guilty under this section, the harassment should be severe and directed specifically against the victim. A relative staying in a different city as that of the victim cannot cause harassment similar or even close to what can be caused by a relative living in the same house. Thus, if a victim names any relative, who does stay in the same house, in her complaint, then police or courts should not take immediate action against them and should only proceed after an initial investigation, of course except where it is extremely necessary for the sake of justice. But

[52] *Supra* note 33.

with respect to husband and relatives living in the same house, the police should make immediate arrests in case a prima facie case exists. This will ensure that distant relatives of the accused husband will not be unnecessarily troubled.

VII

Conclusion and Recommendations

Women in India are often subjugated in this patriarchal system of society that our country has. One of the most severe forms of harassment that often a married woman is subjected to is in the form of physical and mental abuse by her husband and in-laws for various reasons including unmet dowry demands. Even though the majority of victims of domestic cruelty do not report the crime to law enforcement agencies, the argument to strike down section 498A is made on the ground of its alleged misuse.

One of the most important factors here is that Indian society has a culture of disbelief. We firmly believe in the concept of 'innocent unless proven guilty' especially when a woman reports of an abuse done to her by a man. We see even now when a victim comes forward to narrate her #metoo story, the first approach of people is to question her silence for the duration she didn't come forward to report. Rarely do people acknowledge that in the Indian society where women are severely judged on their morality and virginity, it takes immense courage for a woman to open up and talk about the abuses hurled on her.

Also, since our society follows a patriarchal and male-dominated thought process, rarely any woman facing domestic abuse is encouraged to speak up against the abuse or to approach the law enforcement agencies. Victims are asked to adjust and compromise and wait for the time when their husband or his relatives would behave nicely to her. But our society would not have the same attitude if a wife commits any form of abuse, physical or verbal, against the husband and under no circumstances would the husband then be forced to adjust with his wife. There is a dire need to change this attitude of considering the wife as the sole bearer of the responsibility of making the marriage successful. Our sons and daughters should be taught that it is equally the duty of the husband, as is of wife, to respect the other partner and make the marriage successful. Also, as beautifully put in a quote by a well-known

writer from Malaysia, '*parents should teach their daughters that it is better to come home from a failed marriage than coming home in a coffin.*'[53]

Violence and abuse, in any form whatsoever, should not be tolerated and no woman should be even expected to adjust in such circumstances. At the same time, if any law has to effectively address and protect the rights of victims, it has to gain the confidence of the victims and encourage them to come forward and report the crime committed against them. This cannot be achieved if a victim finds that right after she reports her case to the police, she would be asked and pressurised to settle the matter and her husband and relatives who harassed her might be roaming freely in the society. But at the same time, it cannot be ignored that there have been cases where women have unnecessarily exaggerated their complaints and named relatives who do not even live in the same house and city as hers. It is necessary to prevent the rights of these relatives in such circumstances for which police need to be extra cautious while making arrests.

In light of the above the author would like to conclude the paper by making the following recommendations:

i. The offence of cruelty by husband and his relatives should remain non-bailable and non-compoundable.

ii. The offence should be cognisable but where the relatives named in the complaint do not live in the same house/ city/ country as the complainant, arrest should only be made after initial investigation and with the permission of the Court. Both the Court and the police should not stress upon the personal appearance of such relatives, unless extremely necessary.

iii. Greater efforts should be made to encourage women, especially from the rural background to report any instance of domestic abuse committed against them. Women should be educated about the remedies available under various laws in case they have faced domestic abuse in their marriage.

iv. The Courts should be careful while granting adjournments in such proceedings and should remember that, in most cases, it is extremely difficult for domestic abuse victims to continue

[53] Prabh Lahari, "Coming Home From A Failed Marriage is Better Than Coming Home In A Coffin", (*Word Press, Prabh Lahari - Beyond the waves*, June 10, 2019), *available at:* https://prabhlahari.wordpress.com/2019/06/10/coming-home-from-a-failed-marriage-is-better-than-coming-home-in-a-coffin/. (Visited on June 24, 2019)

with the trial, considering her lack of financial support. Courts should not allow either of the parties to unnecessarily delay the proceedings by seeking adjournments on pointless grounds.

v. Lastly, women who do come and report their cases to the police or women cell officers should not be pressurised or even urged to settle the case with their husbands and settlement and withdrawal of complaint should be the sole discretion of the complainant.

ASTONISHING CONTRIBUTION BY SIR WILLIAM JONES TO INDIAN LEGAL SYSTEM

*Vivek Sehrawat**

Abstract

This paper highlights the contribution made by Sir William Jones towards the Indian legal system in 18th century. The laws written by Sir William Jones led the foundation for Indian legal system. He provided the platform to future scholars for evolvement of Indian legal system. Later, his laws were enhanced and amended for the better governance of the Indian society. Sir William Jones preferred local Indian laws instead of imposing English laws in India. It was astonishing to learn about the culture and tradition of a country which was different in many ways from England. He used culture, traditions, and religious scriptures as the main source of law and his lectures are cited at length at the Asiatic Society. His studies form part of law as we know today, and displays how his work can guide the development of Indian Law and Jurisprudence. This paper discusses the establishment of Asiatic Society which was used as study center to develop Indian legal system. This paper highlights the main points of different discourse given by Sir William Jones at the Asiatic Society. The paper summarizes the contribution made towards the Hindu law and Mahommedan Law. Finally, he contributed to the history of English Law with a volume entitled "An Essay on the Law of Bailment (1781)".

I
Introduction

First Indian Prime Minister Jawaharlal Nehru said, "it was through his writings and translations that Europe first had a glimpse of some of the treasures of Sanskrit literature. … To Jones and to many other European scholars India owes a deep debt of gratitude for the rediscovery of her past literature."[1] Sir William Jones in fact knew most prominent men in all walks of life - literature, drama, arts, law, university, politics, diplomacy and others.[2] This paper discusses his astonishing contribution towards the establishment of Indian legal system in 18th century. The laws written by Sir William Jones led the foundation for the Indian legal system. He

* Assistant professor, BML Munjal School of Law; Visiting scholar, UC Davis School of Law, SJD, University of Kansas.

[1] Garland Cannon, "The Indian affairs of Sir William Jones (1746–94)", 9 *Asian Affairs* 280 (1978).

[2] S. N. Mukherjee, "Politics and Poetics: Sir William Jones and Eighteenth-Century Views on Aesthetics", 54/55 *Bulletin of the Deccan College Research Institute* 75 (1994).

provided the platform to future scholars for evolvement of Indian legal system. Later, his laws were enhanced and amended for the better governance of the Indian society. His research played a vital role in Indian legal system. Sir William Jones is remembered with great affection throughout the subcontinent as a man who facilitated India's cultural assimilation into the modern world, he helped to build India's future on the immensity, sophistication, and pluralism of its past.[3] Remarkably, he did not impose laws of the west on Indian legal system rather he studied the Indian culture and tradition and wrote coherent, precise and equal for all laws.

Sir William Jones was born in London on 28th September 1746.[4] Sir William Jones was a polymath as well as an extraordinary linguist, famous for his knowledge of twenty eight languages.[5] At a tender age of twenty he became adept in French, Italian, Spanish, Portuguese, Greek, Latin and English.[6] His knowledge of Arabic and Persian made King Christian VII of Denmark assign him the translation of "Tariq-i-Nadiri" into French.[7] Sir William Jones was also an eminent lawyer; his life appears along with the lives of Coke, Blackstone and Mansfield in the legal histories of England. [8]

He was made a fellow of the Royal Society in 1772 and in the following year, a member of the prestigious Literary Club of Dr. Johnson.[9] Jones's translation of the Hindu myth of Sakuntala (1789) led to an Oriental renaissance in the West and Cultural Revolution in India.[10] Sir William Jones, an outstanding scholar from Oxford, arrived in Calcutta on 25 September 1783,[11] as a puisne judge of the Old Supreme Court. While still on board of the frigate Crococlile carrying him from England to India, he prepared a memorandum detailing his plan of study. This included “the laws of the Hindus and Mahomedans.[12]

---

[3] Michael J. Franklin, *Orientalist Jones'" Sir William Jones, Poet, Lawyer, and Linguist, 1746-1794* (Oxford University Press 2011).
[4] *Ibid.*
[5] *Ibid.*
[6] Dr. K.L. Kamant, “Sir William Jones”, *available at:* http://www.kamat.com/kalranga/people/pioneers/w-jones.htm (last visited on August 15, 2019).
[7] *Ibid.*
[8] *Supra* note 2 at 76.
[9] *Supra* note 6.
[10] *Supra* note 3.
[11] *Supra* note 6.
[12] Visit the the webpage of the Asiatic Society. http://asiaticsocietycal.com/history/index.htm (last visited on August 15, 2019).

The British began to exercise certain judicial functions in India as early as the seventeenth century, but it was not until the East India Company took on the official Mughal post of Diwani for Bengal, Bihar and Orissa in 1765 that its officers became generally responsible for the administration of justice in those territories.[13] In 1772, Warren Hastings became governor of Bengal (the following year he became the first Governor-General of India) and instituted a series of reforms designed to rationalize the legal system that the East India Company had taken over.[14] Hastings created separate civil and criminal courts, the British presiding over the first, and Mughals the second.[15]

Following his belief that good governance in Bengal could be achieved through the continued use of Indian customary law, an arrangement that was both practical as well as ideological, the civil courts were organized to administer Hindu law to Hindus, and Muslim law to Muslims, while the criminal court applied Muslim law only.[16] Throughout these arrangements, the ethical principle of Hastings and his followers (James Forbes, Nathaniel Halhed, William Jones), was that British common law should not be forced on a subject Indian population.[17] Wishing to found the authority of the East India Company on the ancient laws of Bengal, while at the same time being responsible for their administration, put the British in a position of dependency on the local pundits who had access to the secret sources of the law and its interpretation.[18]

Sir William Jones realized that it was the East, which held the secrets of early history and civilization of man; and that unless the East was known, the history of man could not be written.[19] India is considered as one of the most diverse countries in the world with multiple cultures, religions, and languages. India's culture is among the world's oldest; civilization in India began about 4,500 years ago.[20] Many sources describe it as "Sa Prathama Sanskrati Vishvavara" — the first and the supreme culture in the world, according to the All World Gayatri

[13] Robert Young, "Sir William Jones and the Translation of Law in India" *Law Explorer,* Nov. 30, 2015.
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid*.
[17] *Ibid*.
[18] *Ibid*.
[19] *Supra* note 6.
[20] Kim Ann Zimmermann, "Indian Culture: Traditions and Customs of India" *Live Science*, July 20, 2017, *available at:* https://www.livescience.com/28634-indian-culture.html (last visited on August 15, 2019).

Pariwar (AWGP) organization.[21] Western societies did not always see the culture of India very favorably, according to Christina De Rossi, an anthropologist at Barnet and Southgate College in London.[22]

Sir William Jones contributed to the codification and utility of Indian Law with the posthumous Institutes of Hindu Law (1794). The motives that induced him to propose to the government of this country, what he justly denominated a work of national utility and importance, the compilation of a copious digest of Hindu and Mahommedan Law, from Sanskrit and Arabic originals, with an offer of his services to superintend the compilation, and with a promise to translate it.[23] He prescribed its arrangement and mode of execution, and selected from the most learned Hindus and Mahommedans fit persons for the task of compiling it. Flattered by his attention, and encouraged by his applause, the pundits prosecuted their labors with cheerful zeal to a satisfactory conclusion.[24]

During the course of his compilation, and as auxiliary to it, he was led to study the works of *Menu*, reputed by the Hindus to be the oldest, holiest of legislators, and finding them to comprise a system of religious and civil duties, and of law in all its branches, so comprehensive and minutely exact, that it might be considered as the Institutes of Hindu Law, he presented a translation of them to the government of Bengal.[25] He contributed to the history of English Law with a volume entitled "An Essay on the Law of Bailment" (1781). Additionally, Sir William Jones wrote on Indian medicine and chemistry; on Indian music.[26]

This paper highlights the contribution made by Sir William Jones towards the Indian legal system. Sir William Jones understood the culture, customs, language, society, manners, etiquette and values of the people for the legislature of laws. It is significant to note that Jones modified his Whig philosophy to suit the Indian situation; the central theme of his ideas, the

[21] *Ibid*.
[22] *Ibid*.
[23] Lord Teignmouth, *The works of Sir William Jones,* Vol 3, IV (London, 1807).
[24] *Id.* at VII.
[25] *Ibid.*
[26] Garland Cannon, Sir William Jones's Indian Studies, *19 Journal of the American Oriental Society no. 3*, (1971)

protection of the individual, his person, property and freedom, was still valid.[27] He used culture, traditions, and religious scriptures as the main sources of law.

This paper discusses the establishment of Asiatic Society which was used as a study center to develop Indian legal system. His lectures in the Asiatic Society have been cited at such length because he used culture, traditions, and religious scriptures as the main source of law. The paper discusses how his studies form part of law as we know today, and through displaying how his work can guide the development of the Indian Law and jurisprudence. This paper agrees that Sir William Jones did not believe in imposing laws of the west on Indian legal system rather he studied the Indian culture and tradition and wrote coherent, precise and equal for all laws. This paper highlights the main points of different discourse given by the William Jones at the Asiatic Society. The paper summarizes the contribution made towards the Hindu law and Mahommedan Law. This paper discusses an essay on the law of bailment. This paper analyses how colonial laws are still used in India.

II

The Asiatic Society

Sir William Jones realized that India had much to offer to the world in the sciences and the arts, and that the discovery of her rich past and culture could not be achieved by himself.[28] On January 15, 1784, he decided to establish the "Asiatic Society" with the support of his colleagues.[29] It marked the restoration of ancient learning in and about India.[30] He said Asia, was the "nurse of sciences" and the "inventress of delightful and useful arts."[31] He proposed to found a Society under the name of The Asiatic Society.[32] However, the name of the Society underwent several changes during the last two centuries such as the Asiatick Society of Bengal (1832-1935), The Royal Asiatick Society of Bengal (1936-1951) and in July 1952 it came to be known as the Asiatic Society.[33]

---

[27] *Supra* note 2 at 87.
[28] *Supra* note 6.
[29] *Ibid.*
[30] *Ibid.*
[31] History, "The Asiatic Society", http://www.asiaticsocietykolkata.org/history (last visited on August 15, 2019)
[32] *Ibid.*
[33] "The Asiatic Society", available at: http://www.asiaticsocietykolkata.org/history (last visited on August 15, 2019).

Jones delivered a presidential discourse to the Asiatic Society in February of each of the next ten years after its foundation.[34] The pioneering activity of the Society was praised abroad and even compared with that of the Italian Humanists of the quattrocento.[35] In January of 1784, he and approximately 30 other English gentlemen, founded "The Asiatic Society of Bengal."[36] The Memorandum of Articles of Society read as follows:

> "The bounds of its investigations will be the geographical limits of Asia, and within these limits its enquiries will be extended to whatever is performed by *man* or produced by *nature*."[37]

Sir William Jones gave four discourses at Asiatic Society, where he spoke about the different topics related to India.

Local laws instead of British laws: Sir William Jones preferred local Indian laws instead of imposing English laws in India. This led to publication of comparative studies on the different legal systems that were encountered in a colonial context. These studies received wide publicity and acceptance at the global level particularly in the American market.[38]

Following his genealogical linking of Indian and European languages, Sir William Jones maintained his preference for local law while at the same time claiming that it formed part of a wider universal law – an affiliation which he achieved by linking Manu to Roman law, with the suggestion that like European and Indian languages, they all shared some common primordial revelatory source.[39]

> Wishing to found the authority of the East India Company on the ancient laws of Bengal, while at the same time being responsible for their administration, put the British in a position of dependency on the local pundits who had access to the secret sources of the law and its interpretation. The paranoia characteristic of the uncertain colonizer, the

[34] Michael Palencia-Roth, "The Presidential Addresses of Sir William Jones: The Asiatick Society of Bengal and The ISCSC" 218 *Diogenes* 103 (2008).
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] Michael Hoeflich, "Comparative Law in Antebellum America" *4 Wash. U. G. S. L. Rev.,* 544 (2005). See also note 13 at 85.
[39] *Supra* note 13.

> British distrusted the pundits, felt that they were manipulated by them and disliked being effectively caught in the power of the native's 'sly civility.' First governor general of British India Warren Hastings, therefore commissioned translations of local Hindu and Muslim legal writings, as well as compilations of digests of local laws.[40]

Sir William Jones was entrusted with the responsibility of translation. He was entrusted with the responsibility to develop the reliable version of legal works. If the Court were to rule in the spirit, substance of Indian laws, and customs because pundits could not be depended upon to cite the appropriate laws when needed.[41] His purpose in studying Sanskrit, an incredibly difficult task for a Western Christian of the days, was not literary or aesthetic.[42] Learning a foreign language and writing system was, to him, never valuable in its own right but only as a means to a predetermined end, in this case the collecting and making accessible of Hindu laws.[43] Sir William Jones used his language skills and proved instrumental in translating local laws.

A. First discourse (February 24, 1784)

In Sir William's first discourse, he spoke about the importance of Asia in the history of mankind-advantages to be derived from cultivating its history, antiquities & hints for the foundation of the society's objects and future views.[44]

> It gave me inexpressible pleasure to find myself in the midst of so noble an amphitheatre, almost encircled by the vast regions of Asia, which has ever been esteemed the nurse of sciences, the inventress of delightful and useful arts, the scene of glorious actions, fertile in the productions of human genius, abounding in natural wonders, and infinitely diversified in the forms of religions and government, in the laws, manners, customs, and languages, as well as in the features and complexions of men.[45]

---

[40] *Ibid.*
[41] *Supra* note 1 at 419.
[42] *Ibid.*
[43] *Ibid.*
[44] James Elmes (ed), "Discourses delivered by before The Asiatic Society: and Miscellaneous Papers, on the religious, poetry, literature, etc. of the Nations of India by Sir William Jones" (1824), *available at:* https://play.google.com/books/reader?id=mNk_5vKDvj8C&printsec=frontcover&output=reader&hl=en&pg=GBS.PR3 (last visited on August 15, 2019).
[45] *Id.* at 1.

Further, he said:

> It is your design, I conceive, to take an ample space for your learned investigations, bounding them only by the geographical limits of Asia; so that considering Hindustan as a center, and turning your eyes in idea to the north, you have on your right many kingdoms in the eastern peninsula; the ancient and wonderful empire of china, with all her tartarian dependencies and that of Japan, with cluster of precious islands, in which many singular curiosities have too long been concealed. The very interesting country of Tibet, and the vast regions of Tartary, from which, as from the Trojan horse of poets have issued so many consummate warriors, whose domain has extended at least fro the banks of the IL Issus to the mouths of the Ganges. On your left are the beautiful and celebrated provinces of Iran, or Persia; unmeasured deserts of Arabia and once the once flourishing kingdom of Yemen.[46]

B. Discourse II (February 24, 1785)

In Second discourse, Sir Williams congratulated at the success of the institution about the reflections on the history, laws, manners, arts, and antiquities of Asia.[47] He gave a sketch of objects of the society. Furthermore, he pointed out the study of the botany, medicine, chemistry, fine and liberal arts, poetry, architecture, sciences, jurisprudence done by the Indians, and it makes them more advance than west.[48] He said:

> The civil history of their vast empires, and of India in particular, must be highly interesting to our common country; but we have a still nearer interest in knowing all former modes of ruling these inestimable provinces, on the prosperity of which so much of our national welfare and individual benefit seems to depend. A minute geographical knowledge, not only of Bengal and Bihar, but, for evident reasons, of all the kingdoms bordering on them, is closely connected with an account of their many revolutions...[49]

[46] *Id.* at 4.
[47] *Ibid.*
[48] *Ibid.*
[49] *Id,* at 12.

Regarding medicine, he underlined the presence of approved medical books in Sanskrit.[50] He further emphasised the need for a thorough study of Sanskrit medical manuscripts and contemporary Indian physicians' practices to ascertain the real medical virtues.[51] Likewise, for chemistry, particularly the possible improvement of European dyes and metallurgy.[52]

He spoke about the law by highlighting the immediate advantage from the jurisprudence of the Hindus and Muselmans. He further stressed the utility of translating laws from Sanskrit and Arabic to produce a complete Digest of Indian Laws so that all disputes among the natives might be decided without uncertainty.[53]

Sir William Jones concluded by urging to pen down the information in the form of literature so that it can be kept secure and used in future.[54]

C. Discourse III (February 2, 1786)

In this discourse, William Jones focused on Languages and Letters; their Philosophy and Religion; the actual remains of their old Sculpture and Architecture; the written memorials of their Sciences and Arts of Hindus from a historical point of view. He said:

> By India, in short, I mean that whole extent of country, in which the primitive religion and languages of the Hindus prevail at this day with more or less of their ancient purity, and in which the Nágarì letters are still used with more or less deviation from their original form."[55]

He relates to the derivation of words from Asiatic languages.

> That Cús then, or, as it certainly is written in one ancient dialect, Cút and in others, probably, Cás, enters into the composition of many proper names, we may very reasonably believe. when we are told from Europe, that places and provinces in India

[50] *Id.* at 13.
[51] *Supra* note 1 at 424.
[52] *Ibid.*
[53] *Id.*at 17.
[54] *Id.*at 18.
[55] Winfred P. Lehmann, *A Reader in Nineteenth century Historical Indo-European Linguistics* (Indiana University Press, 1967).

were clearly denominated from those words, we cannot but observe, in the first instance, that the town, in which we now are assembled, is properly written and pronounced Calicátà; that both Cátá and Cút unquestionably mean places of strength, or, in general, any inclosures; and that Gujaràt is at least as remote from Jezirah in sound, as it is in situation.[56]

The Hindus themselves believe their own country, to which they give the vain epithets of Medhyama or Central, and Punyabhúmi, or the Land of Virtues, to have been the portion of Bharat, one of nine brothers, whose father had the dominion of the whole earth; and they represent the mountains of Himálaya as lying to the north, and, to the west, those of Vindhya, called also Vindian by the Greeks; beyond which the Sindhu runs in several branches to the sea, and meets it nearly opposite to the point of Dwáracà, the celebrated seat of their Shepherd God: in the south-east they place the great river Saravatya; by which they probably mean that of Ava, called also Airávati in parts of its course, and giving perhaps its ancient name to the gulf of Sabara.[57]

Further he considered the qualitative supremacy of Sanskrit language when compared to Greek and Latin; and at the same time underscored the strong affinity between these languages.[58] He went on to praise the Indians for their eminent moral wisdom and texts like Níti Sástra, or System of Ethics.[59]

D. Tenth Discourse (February 28, 1993)

In this discourse he spoke about the historiography and Indian natural history or science.[60] He talked about the importance of early texts such as *Puránas* and *Itihásas* in order to pictures of ancient manners and governments. He further recognised the possibility of writing a perfect history of India with the help of people with competent knowledge of Sanskrit, Persian, and Arabic, albeit with the warning that in the details of history, truth and fiction are so

[56] *Ibid.*
[57] *Ibid.*
[58] *Supra* note 1 at 450.
[59] *Ibid*.
[60] Sir William Jones, The Tenth Anniversary Discourse, delivered 28 February, 1793, by the President, at the Asiatick Society of Bengal, *available at:* http://www.eliohs.unifi.it/testi/700/jones/Jones_Discourse_10.html (last visited on August 15, 2019).

blended as to be scarce distinguishable.[61] He further mentioned that the religion, manners, and laws of the natives preclude even the idea of political freedom.[62] He went on to emphasise the benefits that the UK may accrue from the diligence of a placid and submissive native people.[63]

The real system of Indian philosophers and mathematicians can scarce be distinguished:

> [A]n accurate knowledge of Sanskrit and a confidential intercourse with learned Brahmins, are the only means of separating truth from fable; and we may expect the more important discoveries from two of our members; concerning whom it may be safely averted, that, if our society would have produced no other advantage than the invitation given to them for the public display of their talents, we would have a claim to the thanks of our country and of all Europe.[64]

Sir William Jones was in favor of nature should be studied carefully and preserved; the animals brought to Jones for preservation had to be set free in the rocks and woods unless they could be tamed and protected.[65] According to Jones the history of nature distinguished:

> Could the figure, instincts, and qualities of birds, beasts, insects, reptiles, and fish be ascertained either on the plan of *Buffon*, or on that of *Linnaeus*, without giving pain to the objects of our examination, few studies would afford us more solid instruction or more exquisite delight. But I never could learn by what right, nor conceive with what feelings, a naturalist can occasion the misery of an innocent bird and leave its young, perhaps, to perish in a cold nest, because it has gay plumage and has never been accurately delineated, or deprive even a butterfly of its natural enjoyments, because it has the misfortune to be rare or beautiful; nor shall I ever forget the couplet of *Firdausi*, for which *Sadi*, who cites it with applause, pours blessings on his departed Spirit.[66]

He spoke about the minerals and highlighted the level of knowledge and information available in early Indian texts. For instance, he specifically mentioned the fact that there were books on

[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*
[65] *Supra* note 2 at 87.
[66] S*upra* note 60.

metals and minerals in Persian and Sanskrit, particularly on gems which the Hindu philosophers considered (with an exception of the diamond) as varieties of one crystalline substance either simple or compound.[67]

Finally, in India, Jones developed a passion for botany.[68] He observed numerous Indian plants and tried to classify them according to the Linnaean system.[69] This study of botany was not merely to satisfy the curiosity, but was stimulated by his deep religious feelings.[70] He said:

> We now come to Botany, the loveliest and most copious division in the history of nature; and, all disputes on the comparative merit of systems being at length, I hope, condemned to one perpetual night of undisturbed slumber, we cannot employ our leisure more delightfully, than in describing all new Asiatick plants in the Linnœan style and method, or in correcting the descriptions of those already known, but of which dry specimens only, or drawings, can have been seen by most European botanists.[71]

III
Hindu Law

Translation of Hindu Law was another main aim of Sir William Jones. However, the project was never completed by Jones in its entirety, although, what survives of that project are the Laws of Manu, translated in 1794 as The Institutes of Hindu Law: or, the Ordinances of Manu.[72] Hindu law was based on custom and tradition, much of it oral, as well as a wide variety of texts in Sanskrit that existed only in manuscript, sacred texts that were available only to the pundits.[73] To that extent Hindu law was an example of customary law, though not focused on the individual defining case, as in the case of common law.[74] Under Hastings' direction, the pundits were encouraged to provide texts for translation, thus implicitly relinquishing their sacerdotal

---

[67] *Ibid*.
[68] *Supra* note 2 at 87.
[69] *Ibid*.
[70] *Ibid*.
[71] *Supra* note 60.
[72] Piyel Haldar, "The Sublime Codes of Manu; Law and Eighteenth Century Orientalism" *available at:* http://www.academia.edu/218218/The_Sublime_Codes_of_Manu_Law_and_Eighteenth_Century_Orientalism (last visited on August 15, 2019).
[73] *Supra* note 13 at 85.
[74] *Ibid*.

function, although their legal function was not altogether abolished until the major reform of the Indian legal system and the institution of the Indian Penal Code in 1860.[75]

Sir William Jones study of Hindu Law foundation for the development of Hindu Law – Laws of Manu: Sir William Jones' specifically worked on Manusmriti, and developed Manu's treatise. The Hindu Law as we know today for all intents and purposes is substantially different from that of Manu's Law. The Laws of Manu was a hybrid moral-religious-law code and one of the first written law codes of Asia.[76] Sir William Jones learned the ancient Indian language of Sanskrit, translated the Law Code of Manu and published it during the British rule of India in 1794, and used to formulate the Hindu law by the colonial government.[77] Sir William Jones assigned the work to the period 1200-500 BCE, but more recent developments state that the work in its extant form dates back to the first or second century CE or perhaps even older.[78] Scholars agree that the work is a modern versified rendition of a 500 BCE 'Dharma-sutra,' which no longer exists.[79]

In spite of its age, it has sustained paramountcy in the Hindu culture.[80] It was also the code of conduct for inter-caste relationships in India.[81] Laws of Manu, son of Brahma, this ancient Hindu law code of India, collectively called "Smirtu." It is the best known of India, and one of the oldest written legal code in the world.[82] It combined rules of law sprinkled between many moral rules, the latter predicated on a firm belief in reincarnation and a formal caste system.[83]

Much of the *Laws of Manu* speak of purging even serious crimes by some act such as murmuring a certain saying a prescribed number of times at dawn. Other penalties, which ought to attract the attention of defence counsel everywhere, are stated to be promised to the offender -

---

[75] *Ibid*.
[76] "Time table of world legal history, 200 BC - Laws of Manu", *Duhaime,* March 16, 2008, *available at:* http://www.duhaime.org/LawMuseum/LawArticle-297/200-BC--Laws-of-Manu.aspx (last visited on August 15, 2019).
[77] Sir William Jones, "The Works of Sir William Jones" (The Institutes of Hindu Law or The Ordinances of Manu According to the Closs of Caluuca), *VoU,* 275 (1794, Reprint 1909) Difficult to locate the exact reference, since the works of William Jones is compiled in multiple volumes.
[78] Subhamoy Das, "Laws of Manu (Manava Dharma Shastra)", *Learn Religions,* May 30, 2019, *available at:* https://www.thoughtco.com/laws-of-manu-manava-dharma-shastra-1770570 (last visited on August 15, 2019)
[79] *Ibid*.
[80] *Supra* note 76.
[81] *Ibid*.
[82] *Ibid*
[83] *Ibid*.

not in this life but in the next! But although no longer the only Hindu law code, Manu is recognized as being paramount in the event of conflict between it and any other Smirtu.[84]

Present-day scholars have criticized the work significantly, judging the rigidity of the caste system and the contemptible attitude towards women as unacceptable for today's standards.[85] However, the caste system is still strongly practiced in India. Also, it is important to recognize that the text also has its strengths.[86] *Mitra* argues throughout her piece *Human Rights in Hinduism* that the practice of *dharma,* which is the focus of the *Laws of Manu,* focuses on justice and thus it does in fact consider the rights of individuals by prescribing *dharmic* practices.[87] The text outlines the ways in which individuals should protect their families and conduct themselves in public to outline a properly functioning Hindu society.[88]

Sir William Jones wrote about the education, especially about vedas. He said: "Know that system of duties, which is revered by such as are learned in the *Vedas*." Sir William Jones wrote about the marriage according to the *Vedas.* The discipline of a student in the three *Vedas* may be continued for thirty-six years, in the house of his preceptor; or for half that time, or for a quarter of it, or until he perfectly comprehends them.

Sir William Jones wrote about the economics and private morals of a person. He must live, with no injury, or with the least possible injury, to animated beings, by pursuing those means of gaining subsistence, which are strictly prescribed by law, except in times of distress. He wrote about the diet, purification and women, and devotion of a son. He wrote about the government and military class: "By a man of the military class, who has received in due form the investiture, which the *Veda* prescribes, great care must be used to maintain the whole assemblage of laws."[89] He wrote about the judicature and law. Over the years this has went through the massive change and has taken a more formal position.

IV

[84] *Ibid*.
[85] *Supra* note 78.
[86] Rachelle Lamoureux, "The Laws of Manu (On Women)", *Mahavidya*, June 22, 2008, *available at:* http://www.mahavidya.ca/2008/06/22/the-laws-of-manu-on-women/ (last visited on August 15, 2019).
[87] *Ibid*.
[88] *Ibid*.
[89] *Id.* at 241.

An Essay on the Law of Bailment

An essay on the law of Bailment is still considered as an outstanding work in comparative law.[90] Sir William Jones had faith in social contract, Anglo-Saxon liberty, a parliamentary system based on franchise for property owners and limited monarchy.[91] He was against the aristocracy who represented the 'feudal', 'Gothic' and 'Norman' dark period.[92] Sir William Jones, like the Levellers of the seventeenth century, took the Lockean doctrine that 'every man has a property in his own person' to the logical extreme.[93] In the essay on law of bailment Sir William Jones writes:

> A delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as purpose for which they were bailed, shall be answered." further he said, I could not but observe with surprise, that a title in our English law, which seems the most generally interesting, should be the least generally understood, and the least precisely ascertained. Hundreds and thousands of men pass through life, without knowing, or caring to know, any of the numberless niceties, which attend our abstruse, through elegant, system of real property and working being at all acquainted with that exquisite logic, on which our rules of special pleading are founded; but there is hardly a man of any age or station, who does not every week and almost every day contract the obligations or acquire the rights of depository or a person depositing, of a commissioner or an employer, of a receiver or a giver or a giver, in pledge; and what can be more absurd, as well as more dangerous, than frequently to be bound by duties, without knowing the nature or extent of them, and to enjoy rights, of which we have no just idea?[94]

The purpose of the British government in India would be best served by 'promoting the security of the right of property to the natives, who by their cheerful industry, will enrich their benefactors and whose firm attachment will secure the permanence of our Dominion.'[95] Law of

[90] *Supra* note 2 at 76.
[91] *Id.* at 81.
[92] *Ibid*.
[93] *Ibid*.
[94] William Jones, *An Essay on The Law of Bailments* 2 (O. Halsted, New York, 1828).
[95] *Supra* note 2 at 90.

Bailment is still applied in Indian courts. For example, Section 148 of Indian Contract Act 1872 that defines bailment is influenced by the law of Bailment by Sir William Jones.[96]

He discovered several modes of diligence, which may justly be demanded of contracting parties, and inquire about what particular cases a bailee is by natural law bound to use them, or to be answerable for the omission of them. When the contract is reciprocally beneficial to both parties, the obligation hangs in a balance; and there can be no reason to recede from the standard. If the bailor only receives benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the bailee. On the other hand, when the bailee is benefited or accommodated by his contract, it is not only reasonable, that he, who receives the benefit, should bear the burden, but if he were not obliged to be more than ordinarily careful, and bound to answer even slight neglect.[97] The plain elements of natural law, on subject of responsibility for neglect, having been traced by the short analysis, in second part of essay or historical part; in which a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the Romans and the English.[98]

The law then on this head, which prevailed in the ancient Roman Empire, and still prevailed in Germany, Spain, France, Italy, Holland, constituting, as it were, a part of the law of nations, is in substance what follows.

V
Muslim Law

Sir William Jones was able to publish portion of Muslim Law in *Mohammedan Law of Succession to Property of Intestates and Mohammedan Law of Inheritance*. His first translation of the Al Sira-jiyyah: or, the Mohammedan Law of Inheritance (1792) was of a book written in and translated into verse.[99] Sharia law was largely written and sourced in the Qur'an, together

[96] "Baliment-Concept and Meaning" *Legal Bites,* April 23, 2017, *available at:* https://www.legalbites.in/bailment-concept-meaning/ (last visited on August 15, 2019).
[97] *Supra* note 94.
[98] *Id.* at 9.
[99] *Supra* note 13 at 84.

with established commentaries and elaborations, and could be relatively easily dispensed by the British.[100]

The Mahomedan Law of Succession to the Property of Interstates about inheritance and other matters: He said –

> Anyone with three incapabilities will be excluded from the succession; servitude, and homicide, and a difference of faith. A moiety then is share of five persons, the husband, and the female child, and the daughter of son, on failure of daughters, and the whole sister, by the opinion of every Mufti, and after her, the sister, who has the same father.
>
> The distant kinswoman is excluded by the nearby the better opinions: and here ends the distribution of the shares, without property or intricacy. The grandmothers on each side are excluded by the mother and brother are excluded by sons and by the nearest progenitor, as we are taught, or son's sons, when they are any."[101]

Further he wrote:

> And, if many kinsmen die by ruin or drowning, or a calamity overwhelming all, as fire, and the case of the survivor be not know, and one deceased cannot be heir to another decreased, recon them all, as if they were strangers and this is found and true determination.[102]

VI

Colonial laws in modern Indian legal system

Laws developed by British with the help of Sir William Jones are still practiced in India. Law was foundational to the ideology and practice of colonial rule. Since the colonial laws continued in post colonial India, it is argued that the 'British justification of colonial rule was de facto accepted and never questioned by the post-colonial sovereign state'.[103] In fact, as product of the

[100] *Id.* at 85
[101] *Id*. at 41.
[102] *Id.* at 46.
[103] *Ibid.*

'period of a globalized imperialism' most legal systems broadly follow one of the two legal system of the world today 'follow one of two legal systems (which are themselves interrelated), Roman civil law or British common law'.[104] It is argued that:

> To that extent Hindu law was an example of customary law, though not focused on the individual defining case, as in the case of common law. Under Warren Hastings' direction, the pundits were encouraged to provide texts for translation, thus implicitly relinquishing their sacerdotal function, although their legal function was not altogether abolished until the major reform of the Indian legal system and the institution of the Indian Penal Code in 1860.[105]

Even-though, the legal reform bought changes in the Indian legal system, but the core of the laws remained the same. Sir William Jones provided the foundation for further legal reforms. His Sanskrit literary work was primarily the byproduct of his central goal, an English version of Indian laws which would permit the English to rule Indians by their own laws.[106]

VII
Conclusion

This paper provided highlights of the contribution made by Sir William Jones towards the Indian legal system. He was an orientalist and a jurist of the eighteenth century. It was astonishing to learn about the culture and tradition of a country which was different in many ways from England. He used culture, traditions, and religious scriptures as main source of law. The laws written by Sir William Jones led the foundation for Indian legal system. Later, his laws were enhanced and amended for the better governance of the Indian society. Sir William Jones preferred local Indian laws instead of imposing English laws in India. He is remembered with great affection throughout the subcontinent as a man who facilitated India's cultural assimilation into the modern world, helping to build India's future on the immensity, sophistication, and

[104] *Id.* at 84-85.
[105] *Id.*
[106] *Supra* note 1 at 418.

pluralism of its past.[107] Sir William Jones was a great human being, who was always preoccupied with India, its people, heritage laws, etc till the last breath of his life.[108]

[107] M J Franklin, "Welsh History Month: Persian Jones Helped to Build India's Future on the Immensity and Pluralism of its Past" *Wales Online,* October 15, 2015, *available at:* https://www.walesonline.co.uk/lifestyle/nostalgia/welsh-history-month-persian-jones-10260468 (last visited on August 15, 2019).

[108] KN Jayaraman, "Sir William Jones who made the ancient language Sanskrit Known world over- British India", *Navrang India,* August 2015, *available at:* https://navrangindia.blogspot.com/2015/08/sir-william-jones-who-made-ancient.html (last visited on August 15, 2019).

JUDICIAL TRENDS

*Sujith Koonan**

This note navigates through some of the landmark judgements delivered by the Supreme Court of India in 2018. It does not venture to cover all important judgements of the year. Instead, the note, due to space and time constraints, includes some judgements that have contributed to key jurisprudential developments in the area of human rights. This note focuses on five important judgements of 2018 that have supposedly strengthened and expanded the notions of fundamental rights and freedoms of individuals.

I

Navtej Singh[1]: sexuality and pluralism

Navtej Singh's contribution to human rights jurisprudence in India is immense. It is a happy moment for LGBT community's fight for their rights in India. This cluster of public interest litigations was filed challenging the constitutionality of section 377 of the Indian Penal Code, which prohibits 'carnal intercourse against the order of nature with any man, woman or animal' and prescribes a maximum of ten years imprisonment as punishment. The petitioners challenged this provision as violative of a number of key values protected under part III of the Constitution of India, most importantly dignity, privacy, identity, and autonomy of individuals.

The court uses the concept of 'identity' of individuals and proceeds to underline that there is something called 'natural identity'. The aim is to make the claim of individual identity persuasive by grounding it in the nature. In other words, the court agues that the attributes of individuals which are inherent by nature cannot be curtailed through social and legal norms and practices.

The court, by relying on its previous decision in the *NALSA* case[2], asserted that '…gender identification is an essential component which is required for enjoying civil rights by the community. It is only with this recognition that many rights attached to the sexual recognition as "third gender" would be available to the said community…' [para 8]. On the one hand, this articulation seems progressive in terms of recognising the rights of people with different sexual orientation. At the same time, this could be problematic at a more fundamental level because this proposition presupposes self-identification in one of the listed categories of sexuality in order to be able to enjoy fundamental rights. Thus, the current

---

* Assistant Professor, Campus Law Centre, University of Delhi. I would like to express my sincere thanks to Mr Arnav Sharma and Mr Himanshu Ahlawat, third year LLB students at the Campus Law Centre, for their assistance in identifying cases. However, the usual disclaimer applies.

1 *Navtej Singh Johar* v *Union of India and Ors*, Writ Petition (Criminal) No 76 of 2016, Decided on 6 September 2018 (Justices: Dipak Misra, A.M. Khanwilkar, R.F. Nariman, D.Y. Chandrachud, and Indu Malhotra).

2 *National Legal Services Authority* v *Union of India*, (2014) 5 SCC 438.

articulation by the court does not consider the potential and possibility of demolishing these categories which are primarily the root cause of the problems raised by the petitioners. In other words, this is far from articulating a freedom to have a life and a society free from these inherently oppressive gender categories.

The court derives legitimacy for its arguments in favour of identity in science. Thus, it qualifies sexual orientation as a natural phenomenon like other natural biological phenomena. According to the court, 'what the science of sexuality has led to is that an individual has the tendency to feel sexually attracted towards the same sex, for the decision is one that is controlled by neurological and biological factors. That is why it is his/her natural orientation which is innate and constitutes the core of his/her being and identity' [para 143]. While the reliance on the biological phenomenon rationale seems fine, it would have been better to include the choice rationale as well. Otherwise, by implication, absence of scientific proof will lead to alternate sexualities being declared 'unnatural' and therefore 'illegal'. A choice rationale, on the contrary, would still keep alive the scope for plural sexualities in the society even in the absence of scientific proof [para 144].

The court further invokes the concept of constitutional morality to support its arguments in favour of pluralism in the context of sexuality. According to the court, "the concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism' [para 111]. Further, the court explicitly makes a point that it is bound by the principle of constitutional morality and not by the public or social morality [para 119]. In other words, the principle of constitutional morality is an effective tool to resist the domination of majoritarian moral impulse.

The right to companionship is another key value that the court highlights. It says, 'there can be no doubt that an individual also has a right to a union under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional. The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others" [para 155]. While the court qualifies the right to companionship with the word 'basic', it shies away from fully and sincerely acknowledging the right. The court is very cautious here to mention that '…when we say union, we do not mean the union of marriage…' The court seems to be very eager to save the institution of marriage from everyone except the heterosexuals. Although the court uses key human rights values such as dignity and privacy to be vocal against discrimination and oppression against sexual minorities, it seems to be of the opinion that the institution of marriage is still far too sacrosanct to be made available for people of all sexual orientations.

At the end, the court in the *Navtej Singh* case gets into the crux of the problem raised before it. Regarding the question whether any sexual relation other than heterosexual relation would qualify to be 'against the order of the nature', the court answers in negative. It says 'it is the freedom of choice of two consenting adults to perform sex for procreation or otherwise and if their choice is that of the latter, it cannot be said to be against the order of nature. Therefore, sex, if performed differently, as per the choice of the consenting adults does not

per se make it against the order of nature' [para 216]. The court also attacks section 377 of the Indian Penal Code from an efficiency point of view and says '…criminalisation of consensual carnal intercourse, be it amongst homosexuals, heterosexuals, bi-sexuals or transgenders, hardly serves any legitimate public purpose or interest' [para 223].

In the end, the court declares that 'section 377 IPC amounts to unreasonable restriction as it makes carnal intercourse between consenting adults within their castle a criminal offence which is *manifestly* not only *overboard* and vague but also has a *chilling effect on an individual's freedom of choice*' [para 246, emphasis added].

II

Joseph Shine[3]: wither the patriarchal laws?

The importance of *Joseph Shine* is that it constitutes an important historical moment where the Supreme Court of India felt compelled to accept an argument the feminist movement has been raising for long. The *Joseph Shine* petition urges the court to declare section 497 of the Indian Penal Code (the provision that defines the offence adultery) unconstitutional. The petitioner's case is that the provision is a reflection of patriarchal values that subordinate women and treat women as men's property or chattel. The *Joseph Shine* court has wholeheartedly accepted the petitioner's call and indeed it had sound legal principles and doctrines to do so. Any other outcome would have earned a different reputation for the court—the reputation of being manifestly masculine.

The *Joseph Shine* court, interestingly, makes certain broad gender sensitive positions. Thus, it says that 'the civility of a civilization earns warmth and respect when it respects more the individuality of a woman' [para 1]. It goes on to assert that 'it is time to say that a husband is not the master' [para 1]. And it repeats, 'we have referred to the aforesaid as we are of the view that there cannot be a patriarchal monarchy over the daughter or, for that matter, husband's monarchy over the wife. That apart, there cannot be a community exposition of masculine dominance' [para 36].

The court's reading is summarised in the following parts:

> On a perusal of the aforesaid provision, it is clear that the husband of the woman has been treated to be a person aggrieved for the offences punishable under Sections 497 and 498 of the IPC [para 11];
>
> At first blush, it may appear as if it is a beneficial legislation intended to serve the interests of women but, on closer examination, it would be found that the provision contained in the section is a kind of romantic paternalism which stems from the assumption that women, like chattels, are the property of men [para 13];
>
> On a reading of the provision, it is demonstrable that women are treated as subordinate to men inasmuch as it lays down that when there is connivance or consent of the man, there is no offence. This treats the woman as a chattel. It treats her as the property of man and

[3] *Joseph Shine* v. *Union of India*, Writ Petition (Criminal) No 194 of 2017, Decided on 27 September 2019 2018 (Justices: Dipak Misra, A.M. Khanwilkar, R.F. Nariman, D.Y. Chandrachud, and Indu Malhotra).

> totally subservient to the will of the master. It is a reflection of the social dominance that was prevalent when the penal provision was drafted [para 22]; and
>
> The offence and the deeming definition of an aggrieved person, as we find, is *absolutely and manifestly arbitrary* as it does not even appear to be rational and it can be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which is extremely excessive and disproportionate…The rationale of the provision suffers from the absence of logicality of approach and, therefore, we have no hesitation in saying that it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary [para 23, emphasis added].

The *Joseph Shine* court explicitly exposes the patriarchal politics of section 497 of the Indian Penal Code. At the same time, the court seems to have been subsumed by the deeper normalised gender structures in the society. Thus, it endorses that 'a woman feels as keenly, thinks as clearly, *as a man*. She in her sphere does work as useful *as man* does in his. She has as much right to her freedom — to develop her personality to the full *as a man*" [para 32, emphasis added]. The effort of the court to equalize women with men impliedly keep men as the benchmark; and consequently, makes women's entitlement contingent and their capabilities limited. The court's approach here is paradoxical because on the one hand it claims to have questioned the patriarchy and on the other hand it uses patriarchal standards to achieve this goal. At the end of the day, the feminist struggle continues because gender as a social category and its associated subordination continue to be intact, responses are worth appreciating, but they are tangential.

III

Sabarimala[4]: the questions of religious autonomy and individual liberty

The *Sabarimala* case, at the core, signifies a tussle between autonomy of religion and liberty of individuals. The intricate question is whether one of these can be, or must be, allowed to prevail over the other. In other words, can individual liberty be allowed to restrict the autonomy of a religion or vice versa?

The *Sabarimala* petition challenges a practice followed in the Lord Ayyappa Temple at Sabarimala in Kerala that prohibits the entry of female devotees between the age group of 10 to 50 years to the temple. The practice, according to the petition, draws its force and legitimacy from certain custom and usage. The rationale behind this prohibition is that the deity in Sabarimala temple is in the form of a *Yogi* or a *Bramchari*. Therefore, young women are not allowed in the temple so that celibacy and austerity observed by the deity is not disturbed or affected. Further, the devotees are required to observe penance for 41 days in order to visit the temple and therefore, women in their menstruating age of their life are not in a position to observe penance due to physiological reasons.

The petitioners' case is that this practice is an unjustifiable discrimination against women and therefore it violates fundamental rights of women devotees in that category.

---

[4] *Indian Young Lawyers Association and Ors* v. *State of Kerala and Ors*, Writ Petition (Civil) No 373 of 2006, Decided on 28 September 2018 (Justices: Dipak Misra, A.M. Khanwilkar, R.F. Nariman, D.Y. Chandrachud, and Indu Malhotra).

The *Sabarimala* court opened the discussion by analysing whether Lord Ayyappa constitute a religious denomination for the purpose of article 25 of the Constitution in order to have the power to manage their internal affairs. The court, by relying on precedents, says '…for any religious mutt, sect, body, sub-sect or any section thereof to be designated as a religious denomination, it must be a collection of individuals having a collective common faith, a common organization which adheres to the said common faith, and last but not the least, the said collection of individuals must be labeled, branded and identified by a distinct name' [para 94]. The court answers the question in negative by underlining that 'there is no identified group called Ayyappans' and 'every Hindu devotee can go to the temple' [para95]. The court concludes 'the devotees of Lord Ayyappa are just Hindus and do not constitute a separate religious denomination. For a religious denomination, there must be new methodology provided for a religion. Mere observance of certain practices, even though from a long time, does not make it a distinct religion on that account' [para 96].

As a response to the basis of the restriction in physiological aspect (that is menstruation) of a female body, the court says, 'the right guaranteed under Article 25(1) has nothing to do with gender or, for that matter, certain physiological factors, specifically attributable to women. Women of any age group have as much a right as men to visit and enter a temple in order to freely practise a religion as guaranteed under Article 25(1)' [para 100]. The court further endorses the view that 'the right guaranteed under Article 25(1) is not only about inter-faith parity but it is also about intra-faith parity' [para 101]. As a logical conclusion, the court says 'it can be said without any hesitation or reservation that the impugned Rule 3(b) of the 1965 Rules, framed in pursuance of the 1965 Act, that stipulates exclusion of entry of women of the age group of 10 to 50 years, is a clear violation of the right of such women to practice their religious belief which, in consequence, makes their fundamental right under Article 25(1) a dead letter' [para 104].

The court then counters the invocation of morality as a ground to restrict article 25(1) right by relying on the principle of constitutional morality. The court says 'we must remember that when there is a violation of the fundamental rights, the term "morality" naturally implies constitutional morality and any view that is ultimately taken by the Constitutional Courts must be in conformity with the principles and basic tenets of the concept of constitutional morality that gets support from the Constitution' [para 106]. The invoking of the principle of constitutional morality should not be difficult or inconvenient for the *Sabarimala* court because it has easy reference points in a few other judgements in the same year and some of the judges were also common in these cases. In other words, the court probably deserves appreciation for being consistent.

The court addresses the question whether exclusion of women of certain age is an essential practice of the religion in a normative way rather than in an empirical way. Thus, it says 'in no scenario, it can be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple as devotees and followers of Hindu religion and offer their prayers to the deity' [para 122]. The court doesn't venture to address the question whether the restriction is an essential practice, instead it prefers to say the practice cannot be an essential practice in Hindu religion. This conviction of the court begs further enquiry into the various forms of fractures and exclusions in the Hindu religion in its historical and contemporary contexts.

In the end, the *Sabarimala* court ranks the right to worship of female devotees higher than the autonomy of the religion. In a way, this outcome seems a logical continuum of *Navtej Singh* and *Joseph Shine* as these judgments were pronounced in the same month (September 2018) and incidentally, all the three cases have a few common judges. From a substantive point of view, these three judgments carry a common thread or principle, that is, to keep the individual rights at a higher pedestal when compared to contrary social morality and practices.

IV

Meesha[5]: creative freedom, social control and constitutional protection

In 2015, Tamil writer, Perumal Murugan, wrote a note in his facebook page that looked like a suicide note. It reads as "Author Perumal Murugan is dead. He is no God. Hence, he will not resurrect. Hereafter, only P Murugan, a teacher, will live".[6] As per a report in a newspaper, he announced the withdrawal of all his novels, short stories and poems; calls on his publishers not to sell his books and promised to compensate their losses; appealed the readers to burn their copies of his books; and requested caste, religious, political and other groups to end their protests and leave the writer alone since he has withdrawn all his books. The controversy was on his novel 'One Part Women'. The question at the core of this case, is, what the Constitution of India promises to artists and writers when state or different social/political groups seeks to control them? *Meesha* engages with this question.

The *Meesha* petition sought to ban a Malayalam novel called Meesha (meaning Moustache) by S. Hareesh on the ground that 'the said literary work is insulting and derogatory to temple going women and it hurts the sentiments of a particular faith/community' [para 6]. The petition urges that 'the said publication…has the proclivity and potentiality to disturb the public order, decency or morality and it defames the women community' [para 9].

The *Meesha* court makes it clear at the very beginning its normative position on this issue, that is 'curtailment of an author's right to freedom of expression is a matter of serious concern' [para 1]. After a detailed narration of the content of the novel, the court emphasises the social utility of free thinking and says 'literature symbolizes freedom to express oneself in multitudinous ways. One should never forget that only when creativity is not choked, it helps the society to be able to accept the thoughts and ideas of a free mind' [para 25]. The Court goes on to repeat the idea in different words (at the same time difficult words!)—'creative voices cannot be stifled or silenced and intellectual freedom cannot be annihilated. It is perilous to obstruct free speech, expression, creativity and imagination, for it leads to a state of intellectual repression of literary freedom thereby blocking free thought and the fertile faculties of the human mind and eventually paving the path of literary pusillanimity' [para 27].

---

[5] *N. Radhakrishnan* v *Union of India*, Writ Petition (Civil) No 904 of 2018, Decided on 5 September 2018 (Justices: Dipak Misra, A.M. Khanwilkar, and D.Y. Chandrachud).

[6] Amrith Lal, 'Tamil author Perumal Murugan Announces His 'Death' on Facebook Over Lack of Freedom of Speech', *available at*: https://indianexpress.com/article/india/india-others/forced-to-withdraw-novel-tamil-author-announces-his-death/ (last visited on 28 September 2019).

In the end, the court refused to ban the novel and underlined 'prohibition should not be allowed entry at someone's fancy or view or perception' [para 28]. It was also observed that 'it would usher in a perilous situation, if the constitutional courts, for the asking or on the basis of some allegation pertaining to scandalous effect, obstruct free speech, expression, creativity and imagination. It would lead to a state of intellectual repression of literary freedom. When we say so, we are absolutely alive to the fact that the said right is not absolute but any restriction imposed thereon has to be extremely narrow and within the reasonable parameters as delineated by Article 19(2) of the Constitution' [para 33].

Overall, the *Meesha* court valued the importance of creative freedom and refused to accept any control on that freedom on the basis of a subjective feeling and opinion of readers. In fact, the court underlined the importance of maturity, tolerance and humanity from the readers' side in order to uphold the freedom of speech and expression. While the *Meesha* court may be hailed by the lovers of freedom of speech and expression, lawyers have raised serious reservations. Gautam Bhatia raises a question on a jurisdictional ground and argues that 'this case needed to have been dismissed at the outset, because under the Constitution, the Court has no power to ban books. But by issuing notice and deciding the case on merits, the Court has now given itself – and every High Court in the country – a new and dangerous power of censorship'.[7]

V

Common cause[8]: expanding 'life' to include death

The question whether the right to life should include right to die has witnessed serious engagements from lawyers and political theorists. The *Common Cause* decision could be seen as part of that larger debate from a jurisprudential angle.

The *Common Cause* petition sought to declare the right to die with dignity as a fundamental right within the fold of the right to live with dignity guaranteed under Article 21 of the Constitution. It specifically focuses on persons who face deteriorated health or terminally ill patients and their right to execute a document titled 'My Living Will and Attorney Authorisation' which can be presented to the hospital for appropriate action in the event of the executant being admitted to the hospital with serious illness which may threaten termination of the life of the executant.

The court draws its base from the idea of personal sovereignty. It says 'the liberty of personal sovereignty over body and mind strengthens the faculties in a person' [para138]. According to the court, worthiness of human person draws its source significantly from personal liberty [para 142]. The court made it clear that 'as part of the right to die with dignity in case of a dying man who is terminally ill or in a persistent vegetative state, only passive euthanasia would come within the ambit of Article 21 and not the one which would fall within the description of active euthanasia in which positive steps are taken either by the

---

[7] Gautam Bhatia, 'The Meesha Judgment: Book Bans and the Supreme Court's Dangerous Grandstanding', *available at*: https://indconlawphil.wordpress.com/2018/09/05/the-meesha-judgment-book-bans-and-the-supreme-courts-dangerous-grandstanding/ (last visited on 28 September 2018).

[8] *Common Cause* v *Union of India*, Writ Petition (Civil) No 215 of 2005, Decided on 9 March 2018 (Justices: Dipak Misra, A.M. Khanwilkar, A.K. Sikri and Ashok Bhushan).

treating physician or some other person' [para 159]. In the case of a person who is in a vegetative state or there is no cure, the Court recognised its duty to interpret article 21 in a further dynamic manner and held that 'the right to life with dignity has to include the smoothening of the process of dying when the person is in a vegetative state or is living exclusively by the administration of artificial aid that prolongs the life by arresting the dignified and inevitable process of dying' [para 160].

Having located the idea of passive euthanasia as part of the right to life under the Constitution, the court introduced the concept of Advanced Medical Directive which means incompetent patients can beforehand communicate their choices which are made while they are competent. The court says, 'in our considered opinion, Advance Medical Directive would serve as a fruitful means to facilitate the fructification of the sacrosanct right to life with dignity' [para 191] and goes to prepare detailed guidelines related to the operationalisation of Advance Medical Directive.

The *Common Cause* is interesting because it takes the idea of individual autonomy to a level where adults with the capacity to consent have the right to refuse medical treatment. In other words, it points to the inappropriateness of paternalistic regulations applied on individuals, for instance by doctors. The Indian Supreme Court seems to be moving towards embracing wholeheartedly an expanded concept of 'individual' in the matters of civil and political rights.

VI

Concluding remarks

The five cases discussed here project an interesting trend—a trend of strong individuation. It seeks to define an 'individual' that constantly needs protection from other individuals, state and different social institutions such as religion that control them. This strong individuation is built upon principles such as freedom of choice, individual autonomy, dignity, privacy and identity. The 'individual' aims to lead an unhindered life and believes in claiming its cherished values as 'rights'. In other words, this individuation process creates a far more egoistic individual where all invasions to its individual space need strong and legislated reasons. However, this individuation process does not seem to be radical in nature because it is not being done by challenging and destroying the historically entrenched oppressive structures such as gender, caste and class. As a result, certain individuals are more 'individuals' than others depending upon their position in different social and economic hierarchies. In other words, this individuation process reinforces existing hierarchies, and possibly creates further fractures and consequently new spaces of subordination and oppression. Nevertheless, these cases demonstrate the fact that the poor and the marginalised classes use law and the language of rights in order to pursue their fight for their rights and recognition. In some cases, law, through its substance and judicial interpretation, offers significant assistance, howsoever temporal and partial such assistance may be, to those whom sufferings and struggle have been rule rather than exception.

LEGISLATIVE TRENDS

*Ajay Kr. Sharma**

This note marks the reintroduction of the column discussing recent legislative trends in India. Though there have been several enactments passed by the Parliament after formation of the 17th Lok Sabha, this column, with its limited contours, discusses only two of them.[1] The Jammu and Kashmir Reorganisation Act, 2019, and The Muslim Women (Protection of Rights on Marriage) Act, 2019 are fleshed out in turn. They have been selected on the basis of the dogged political resolve shown by the present government for their enactment, and also due to the contentiousness of these legislations. They are also likely to have impact and ramifications, direct and indirect, ephemeral and long-term, on the affected communities, and for the nation as a whole.

On the morning of August 5, 2019 the Union Home Minister Amit Shah surprised the nation by announcing, in the Rajya Sabha, the government's decision to bifurcate the State of Jammu and Kashmir into two Union Territories, apart from effectively abrogating the perennially contentious Article 370 of the Constitution of India through a Presidential notification. The apparently beleaguering Article 370 had been effectively done away with earlier on the same day itself, through the executive route, with the publication of The Constitution (Application to Jammu and Kashmir) Order, 2019 (C.O. 272) in exercise of the Presidential power under Article 370(1) itself, extending the entire Constitution of India to the State of Jammu and Kashmir, subject to the newly added Article 367(4).[2] This according to the Home Minister also marked the complete integration of Jammu and Kashmir with India.[3] The creativity in this whole well thought out, but hitherto extremely secretive, exercise emerged from the fact that the existing references to various authorities in relation to the State of Jammu

* Assistant Professor, Campus Law Centre (University of Delhi). The views expressed are personal.

[1] There has also been some criticism of the unusually productive Budget Session of 2019, where 30 Bills were passed by both the Houses of Parliament, due to alleged lack of sufficient deliberations, and an apparent docility of the Parliament, see, Valerian Rodrigues, "The imprint of a state juggernaut", *The Hindu,* Aug. 12, 2019, *available at:* https://www.thehindu.com/opinion/lead/the-imprint-of-a-state-juggernaut/article28984796.ece (Visited Sep 9, 2019).

[2] The Constitution (Application to Jammu and Kashmir) Order, 2019 (C.O. 272), *available at:* http://egazette.nic.in/WriteReadData/2019/210049.pdf.

[3] Indo-Asian News Service, "J&K Integration complete with axing of Article 370: Amit Shah", *India Today*, Aug. 24, 2019, *available at:* https://www.indiatoday.in/india/story/j-k-integration-axing-article-370-amit-shah-1591084-2019-08-24 (Visited Sep 9, 2019).

and Kashmir mentioned in Article 370 like, the now non-existent 'Constituent Assembly of the State', and Government of the State of Jammu and Kashmir were changed by modification of Article 367 through the same Constitution Order, by inserting a clause (4) thereunder, to mean 'Legislative Assembly of the State', and include, the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers respectively.[4] This enabled the above Constitution Order to be passed with the concurrence of the Government of State of Jammu and Kashmir, as mandatorily required under Article 370, which in terms of the above modifications in Article 367 basically meant the Governor of the State, as the state was under the President's Rule. On Aug. 6, 2019 yet another Presidential Declaration (C.O. 273) under Article 370(3), read with Article 370(1), of the Constitution of India was published, which explicitly abrogated all the clauses of Article 370, and substituted it with an overriding modified provision making the provisions of Constitution of India, "as amended from time to time, without any modifications or exceptions" applicable to the State of Jammu and Kashmir.[5]

Though these Orders are not subject matter of discussion of this column, which deals with the legislative enactments, there were criticisms of the manner in which Article 370 was effectively abrogated by the executive, without efficacious concurrence of the elected State government, both within the Parliament and in the newspaper articles, in the days to come. The government through the Home Minister, other Ministers, and its Member of Parliaments however vehemently defended both, the legality and the necessity of this measure which was projected as a beneficial one for the state and the country as a whole. The interpretative dialectics concerning the Aug. 5 Constitution Order, in light of Article 370, is explained well by Mohan Parasaran, former Solicitor General of India, in his pithy piece published the very next day.[6]

These constitutional amendments carried out through the executive route, rather than following the procedure prescribed under Article 368 of the Constitution requiring the

[4] *Ibid.*
[5] Declaration under Article 370(3) of the Constitution (C.O. 273), G.S.R. 562(E), Ministry of Law and Justice (Government of India), Aug. 6, 2019, *available at:* http://egazette.nic.in/WriteReadData/2019/210243.pdf (Visited Sep 19, 2019).
[6] Mohan Parasaran, "A bold move but constitutional questions remain", *Hindustan Times,* Aug. 6, 2019, *available at:* https://www.hindustantimes.com/india-news/a-bold-move-but-constitutional-questions-remain/story-mpTehXy6Ee1DcT7c1KVUmK.html (Visited Sep 19, 2019).

Parliament to exercise its constituent power, paved way for the Government to table the bills with respect to Jammu and Kashmir on Aug. 5 in Rajya Sabha, and after their passage, on Aug. 6 in Lok Sabha, which also passed them on the same day after discussion.[7] Thus was enacted The Jammu and Kashmir (Reorganisation) Act, 2019, which received the Presidential assent on Aug. 9, 2019, and which assumes great significance. Arguably, the most significant but contentious feature of this Act is to reorganise the State of Jammu and Kashmir into two Union Territories, by sequestering Ladakh i.e., Kargil and Leh districts from it, which would form a separate Union Territory (ostensibly being a longstanding demand of the people of Ladakh), and converting the remainder of the state into the Union Territory of Jammu and Kashmir, which, unlike the U.T. of Ladakh, will have a Legislative Assembly, but with notable exclusions of legislative powers with respect to "Police" and "Public Order", like the Delhi Legislative Assembly.[8] Thus, the legislative competence of the J&K Assembly has been significantly curtailed, which may be justified by the central government under the present circumstances which pose serious challenges to law and order in the state. The central government also sought justification for these measures for promoting inclusiveness, welfare, and development of the diverse peoples of the state by extending various central legislations, catalogued in the fifth schedule, including the beneficial ones like, The Right to Information Act, 2005, The Right of Children to Free and Compulsory Education Act, 2009, and The Aadhar (Targeted Delivery of Financial and other subsidies, benefits and services) Act, 2016 to the two Union Territories which were carved out of the State of Jammu and Kashmir.[9]

As mentioned above, various learned commentators assailed the above executive measure of the central government along with the said follow up legislative enactments, for which the government had strategically gathered an overwhelming majority support in the Rajya Sabha too, apart from the Lok Sabha, where it is having an obvious majority. On the one hand, constitutionality, necessity, and efficacy of these measures were impugned by these commentators, who termed and described

[7] The Jammu and Kashmir Reorganisation Bill, 2019, PRS Legislative Research, http://www.prsindia.org/billtrack/jammu-and-kashmir-reorganisation-bill-2019 (Visited on Sep. 25, 2019).
[8] The Jammu and Kashmir (Reorganisation) Act, 2019, ss. 3-7, 32.
[9] Anand Patel, "106 central laws to apply in J&K now", *India Today,* Aug. 7, 2019, *available at:* https://www.indiatoday.in/india/story/central-laws-apply-jk-now-1578193-2019-08-07 (Visited on Sep. 25, 2019).

them variously as: the abrogation of the democratic principles, thereby weakening federalism;[10] the demise of constitutionalism;[11] anti-democratic conduct, and brute majoritarianism;[12] violation of the 'Idea of India';[13] without consent of the people, taken for granted;[14] and entirely unnecessary.[15] On the other hand, the government constantly and consistently defended the necessity and legitimacy of its indisputably bold move, highlighting the avowed objectives behind these measures viz., of promoting inclusiveness, accountability, and development in the state; apart from literally viewing Article 370 as a 'temporary measure', on basis of its heading.[16]

The constitutionality of the above Constitutional Orders and the Reorganisation Act have been recently impugned before the Supreme Court.[17] Apart from these issues, a more imminent concern expressed is that of widespread detention of several J&K politicians, including former Chief Ministers of the Jammu and Kashmir, who have either been kept under house arrests viz., Omar Abdullah and Mehbooba Mufti or, detained under the Jammu and Kashmir Public Safety Act, 1978 (PSA) viz., Farooq

[10] Navnita Chadha Behera, "An abrogation of democratic principles", *The Hindu,* Aug. 13, 2019, *available at:* https://www.thehindu.com/opinion/lead/an-abrogation-of-democratic-principles/article29035734.ece (Visited Sep 9, 2019).

[11] Discussion on the Motion for consideration of the Muslim women (Protection of Rights on Marriage) bill, 2017, PARLIAMENT OF INDIA: LOK SABHA, https://loksabha.nic.in/Members/DebateResults16.aspx?mpno=12869 (Visited Sep 9, 2019); Shayara Bano v. Union of India, (2017) 9 SCC 1.

[12] Ashutosh Varshney, "By numbers alone", *The Indian Express,* Aug. 17, 2019, *available at:* https://indianexpress.com/article/opinion/columns/by-numbers-alone-bjp-jammu-and-kashmir-bifurcation-article-370-5911290/ (Visited Sep 25, 2019).

[13] C. Rammanohar Reddy, "The Idea of India' is failing", *The Hindu,* Aug. 19, 2019, *available at:* https://www.thehindu.com/opinion/lead/the-idea-of-india-is-failing/article29127579.ece (Visited Sep 26, 2019).

[14] Rajmohan Gandhi, "People's consent is missing in how J&K has been taken over by the 'rest of India'", *The Indian Express*, Aug. 19, 2019, *available at:* https://indianexpress.com/article/opinion/columns/jammu-and-kashmir-special-status-article-370-peoples-consent-missing-5915553/ (Visited Sep 19, 2019).

[15] Express New Service, "Genesis of the Kashmir issue does not lie in Article 370; solution doesn't lie in (removing) it", *The Indian Express,* Sep. 1, 2019, *available at:* https://indianexpress.com/article/explained/kashmir-issue-art-370-solution-removing-it-dr-aman-hingorani-5954862/ (last visited Sep 26, 2019).

[16] Ravi Shankar Prasad, "Valley's new dawn: An era of development and inclusion beckons", *The Indian Express*, Aug. 19, 2019, *available at:* https://indianexpress.com/article/opinion/columns/jammu-kashmir-ladakh-development-article-370-valleys-new-dawn-5915531/ (last visited Sep 19, 2019).

[17] "Retired Bureaucrats, Defence Personnel Challenge Centre's Decisions on J&K in SC", *The Wire,* Aug. 18, 2019, *available at:* https://thewire.in/law/retired-bureaucrats-defence-personnel-challenge-centres-decisions-on-jk-in-sc (Visited Sep. 26, 2019); and, PTI, "J&K People's Conference moves SC challenging President's Rule, abrogation of Article 370", *India Today,* Sep. 13, 2019, *available at:* https://www.indiatoday.in/india/story/j-k-people-s-conference-moves-sc-challenging-president-s-rule-abrogation-of-article-370-1598950-2019-09-13 (Visited on Sep. 26, 2019).

Abdullah, currently a Member of Parliament.[18] The Union Minister Jitendra Singh recently tried to allay apprehensions with respect to the political detainees, by stating that the Kashmiri Politicians under house arrest are not under arrest but living as "house guests", with access to gym and movies, and will not be kept so for more than 18 months.[19] The Supreme Court was moved recently in the Farooq Abdullah's detention case by filing a habeas corpus petition.[20] Former Supreme Court Judge Markandey Katju, J. in his recent write up termed the PSA as draconian, and while emphasising on the need to uphold Article 21, the "most precious of all the fundamental rights", boldly remarked that the Farooq Abdullah case is the most important case in India today, where the Supreme Court is itself on trial by the people of India.[21] Though Katju, J. has vehemently argued, with supporting authorities, that the grounds of Farooq Abdullah's arrest under the PSA are "manifestly absurd", and thus expressed his expectation from the Supreme Court to order his release 'forthwith'[22]; the ultimate fate of his habeas corpus petition, in view of the applicable law, and relevant facts and circumstances of the case, will be decided by the Apex Court. One thing is however certain, that the legal commentators, advocates, and judges of the posterity will certainly have a number of significant consequential Supreme Court judgments for their analysis and practice, which will contribute towards shaping the realm of Constitutional law in India.

The enactment of The Muslim Women (Protection of Rights on Marriage) Act, 2019, a week before, criminalising the practice of *'talaq-e-biddat'* or triple talaq has been viewed by the central government as an attempt to efficaciously enforce the 2017 judgment of the Supreme Court in *Shayara Bano* case which by a majority of 3:2 had set it aside and, wherein the minority had also directed the government 'to consider

[18] Kamaljit Kaur Sandhu, "Farooq Abdullah detained under stringent J&K public safety law", *India Today,* Sep. 16, 2019, *available at:* https://www.indiatoday.in/india/story/farooq-abdullah-detained-under-public-safety-act-1599573-2019-09-16?utm_source=AT_Desktop_Home (Visited on Sep. 25, 2019).
[19] "House arrest of Kashmiri leaders not beyond 18 months, they have movies, gym: Jitendra Singh", *India Today,* Sep. 22, 2019, *available at:* https://www.indiatoday.in/india/story/jitendra-singh-kashmir-leaders-house-arrest-for-18-months-1601934-2019-09-22 (Visited on Sep. 26, 2019).
[20] Aneesha Mathur, "SC issues notice to Centre on detention of Farooq Abdullah, asks for reply by September 30", *India Today,* Sep. 16, 2019, *available at:* https://www.indiatoday.in/india/story/sc-notice-centre-farooq-abdullah-detention-habeas-corpus-plea-vaiko-jammu-kashmir-1599561-2019-09-16 (Visited on Sep. 26, 2019).
[21] Markandey Katju, "Farooq Abdullah Detention: The Supreme Court is Also on Trial", *The Wire,* Sep. 20, 2019, https://thewire.in/law/farooq-abdullah-detention-right-to-liberty-supreme-court (Visited on Sep. 26, 2019).
[22] *Ibid.*

appropriate legislation' with regard to the said practice, which is considered sinful in Islam.[23] In fact, this permanent legislation in essence repeals and substitutes The Muslim (Protection of Rights on Marriage) Second Ordinance, 2019.[24] There has been criticism of the government, both within and outside the Parliament, for criminalising triple talaq, which pertains to the Muslim personal law, viewing it as an attempt to enforce religious morality through criminal law.[25] But, the government very forcefully defended and justified its measure aimed to deter the Muslim husbands from pronouncing the triple talaq, and also to protect and provide justice to the Muslim women rendered destitute consequentially; as this practice had reportedly continued unabated despite being pronounced as void by the Supreme Court in its above imprimatur.[26] One of the most forceful votaries of criminalising triple talaq has been the Kerala's current Governor Arif Mohammad Khan, who had been in the vanguard of this movement by previously writing a six-page letter to PM Modi requesting for criminalising this derogatory practice.[27]

Coming to the Act itself, it states its avowed welfare objectives in its long title by declaring it to be "[a]n Act to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide for matters connected therewith or incidental thereto". Here, the term *talaq* is statutorily restricted to "*talaq-e-biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband".[28] The

[23] Discussion on the Motion for consideration of the Muslim women (Protection of Rights on Marriage) bill, 2017, PARLIAMENT OF INDIA: LOK SABHA, https://loksabha.nic.in/Members/DebateResults16.aspx?mpno=12869 (Visited Sep 25, 2019); and *Shayara Bano v. Union of India*, (2017) 9 SCC 1.
[24] The Muslim Women (Protection of Rights on Marriage) Act, 2019, s. 8.
[25] Discussion on the Motion for consideration of the Muslim women (Protection of Rights on Marriage) bill, 2017, *supra* note 23; Faizan Mustafa, "Power, not justice", *The Indian Express,* Aug. 1, 2019, *available at:* https://indianexpress.com/article/opinion/columns/triple-talaq-bill-passed-in-parliament-pm-modi-bjp-5867634/ (Visited Sep 25, 2019); Eesha Shrotriya and Shantanu Pachauri, "Criminalisation Of Triple Talaq: Dissecting The Constitutional And Socio-Legal Aspects" *SLR*, http://www.sociolegalreview.com/criminalisation-of-triple-talaq-dissecting-the-constitutional-and-socio-legal-aspects/ (Visited Sep 25, 2019).
[26] Press Trust of India, "Despite SC order, triple talaq practice continued: Ravi Shankar Prasad", *The Economic Times,* Jul. 25, 2019, *available at:* https://economictimes.indiatimes.com/news/politics-and-nation/despite-sc-order-triple-talaq-practice-continued-ravi-shankar-prasad/articleshow/70381428.cms?from=mdr. (Visited Sep 25, 2019).
[27] Press Trust of India, "Modi govt will make same mistake as Rajiv Gandhi if triple talaq not criminalised: Arif Mohd Khan", *Business Standard*, Jul. 19, 2019, *available at:* https://www.business-standard.com/article/pti-stories/modi-govt-will-make-same-mistake-as-rajiv-gandhi-if-triple-talaq-not-criminalised-arif-mohd-khan-119071901524_1.html (Visited Sep 25, 2019).
[28] *Supra* note 24, s. 2(c).

pronouncement of *talaq* is not only declared to *void* and illegal,[29] in terms of *Shayara Bano* case; but, as it is considered to be a punishable offence, the declarant Muslim husband is prescribed a punishment of imprisonment extendable to a term of three years along-with fine.[30] Further, the offence of pronouncing *talaq* is made a cognizable offence, but compoundable at the instance of the wife upon which the *talaq* has been pronounced.[31] To protect the rights of the married Muslim women, who are the victims of such *talaq*, the Act contains enabling provisions for awarding them and their dependent children with subsistence allowance,[32] and also grant them the custody of their minor children,[33] by the competent Judicial Magistrate. The accused Muslim husband's right to be released on bail has also been restricted to 'reasonable grounds' being existent for the grant of bail, after hearing the applicant husband and victim wife.[34] Further, the said provisions regarding the said nature of the offence of *talaq* prosecuted under this Act, and the bail restrictions explicitly override the provisions of the Code of Criminal Procedure, 1973.[35]

The first case under this new legislation was reportedly registered in Delhi.[36] Though the deterrent impact of this legislation in curbing the socio-legal mischief of *talaq-e-biddat* can only be properly assessed after a few years, surprisingly, there has been a spurt of triple talaq cases post-enactment in the State of Uttar Pradesh, which a senior police official viewed as a kind of retaliation from the Muslim men.[37] So, has the legislation intended for the suppression of a mischief instead led to an unintended outbreak of that very anti-social behaviour in the Muslim community? It is too premature to reach this conclusion, and a backlash of any kind by the married Muslim men, if any, is likely to be temporary and localised. But, the constitutionality validity

[29] *Id.,* s. 3.
[30] *Id.,* s. 4.
[31] *Id.,* s. 7.
[32] *Id.,* s. 5.
[33] *Id.,* s. 6.
[34] *Id.,* s. 7(c).
[35] *Id.,* s. 7.
[36] Saurabh Trivedi, "First case against Triple Talaq registered in Delhi", *The Hindu*, Aug. 10, 2019, *available at:* https://www.thehindu.com/news/national/first-case-against-triple-talaq-registered-in-delhi/article28973463.ece (Visited Sep. 26, 2019).
[37] IANS, "Triple talaq cases rise in UP after law comes into force", *The Economic Times,* Aug. 19, 2019, *available at:* https://economictimes.indiatimes.com/news/politics-and-nation/triple-talaq-cases-rise-in-up-after-law-comes-into-force/articleshow/70733525.cms?from=mdr (Visited Sep. 26, 2019).

of The Muslim Women (Protection of Rights on Marriage) Act, 2019 is currently under challenge before the Supreme Court.[38]

Though it is difficult to pragmatically assess and prognosticate the impact of the two legislative measures discussed above, they will undoubtedly have far-reaching implications for India and its society. For now, the judicial scrutiny of these measures will captivate attention of the legal scholars and practitioners alike.

[38] Japnam Bindra, "SC to examine validity of new triple talaq law, issues notice to Centre", livemint, Aug. 24, 2019, *available at:* https://www.livemint.com/news/india/sc-agrees-to-hear-criminalization-of-triple-talaq-and-issues-notice-1566542437661.html (Visited Sep. 26, 2019).

Book Review

The Indian Legal System: An Enquiry, Mahendra Pal Singh and Niraj Kumar. Oxford University Press, 2019, pg. 240.

'The Indian Legal System – An Enquiry' offers valuable insight into the identity of our legal system and explores the incongruities between this system, which traces its origin to English common law, and the ground realities of the Indian cultural and social set-up.

India's recorded legal history can be traced to the ancient Vedic period, with law intertwined with philosophical discourse. However, the classical Hindu legal tradition underwent a major transformation under the colonial rule and was replaced with a 'modern' system of codified law. The authors, Shri Mahendra Pal Singh and Shri Niraj Kumar, trace the journey of this transformation and the result thereof, emphasizing that the plurality of our cultural set-up continues to shape the 'legal reality in contemporary India'.

Governing a diverse society with a monolithic system is bound to result in a situation where there is a gap between the law in statute and law in practice. Grappling with polycentric issues in the confines of such a system is a rather difficult task for both the lawmakers and the judges. The authors have meticulously researched the non-State legal systems adopted by local communities in different States, combed relevant judicial pronouncements and undertaken a comprehensive review of literature on law and social sciences, making this book a handy resource to address this gap with appropriate legislative and policy initiatives.

The authors ultimately drive home the point that a broad reform of the Indian legal system is needed, keeping in mind India's colonial heritage, Western knowledge and practices as also our indigenous legal practices. In my view, this is partially reflected from two recent judgments of the Hon'ble Supreme Court decriminalizing homosexuality and adultery, wherein the Court took note of the jurisprudence prevalent in England and other countries while emphasizing on 'constitutional morality' (as opposed to majoritarian notions of morality) to be the guiding factor of law.

The authors devote a chapter to the treatment of customary and personal law under the Constitution and make a note of the judgments of the Hon'ble Supreme Court that shed light on its approach to dealing with the legality of customs vis-à-vis Part III of the Constitution.

It is pertinent to mention the recent Sabarimala judgment here. While allowing women between the age of 10 to 50 to enter the Sabarimala temple, which houses a 'Naisthik Bramhachari' deity (an eternal celibate), the Hon'ble Supreme Court (by a majority of 4:1) observed that *"dogmatic notions of biological or physiological factors arising out of rigid socio-cultural attitudes which do not meet the constitutionally prescribed tests."* The Court did not accept the argument of the worshippers of the deity that the custom was put in place not to exclude women but to preserve the deity's character. The judgment paved the way for filing of multiple PILs seeking entry of women to places of worship in other religions as well. However, the dissenting woman Judge observed that religious customs and practises cannot be solely tested on the touchstone of the principles of rationality. She observed, *"Constitutional Morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith in accordance with the tenets of their religion. It is irrelevant whether the practise is rational or logical."*

The Sabarimala case is a classic example of the point the authors try to make i.e. universal application of codified law notwithstanding the multiplicity of religious and customary practices will be somewhat anomalous.

I congratulate the authors for undertaking this laborious exercise and opening up a debate on the need to restructure our legal system with the right mix of indigenous and western elements. The book will undoubtedly be a useful resource for policy makers, academicians and law practitioners who seek to improve the efficacy of legal governance in India.

Mohan Parasaran[*]

[*] Senior Advocate, Supreme Court of India

BOOK REVIEW

Conflict in the Shared Household: Domestic Violence and the Law in India, Indira Jaising and Pinki Mathur Anurag (editors). Oxford University Press, 2019, pg. 409.

Domestic violence is the establishment of control and fear in a relationship through violence and other forms of abuse. It may involve physical abuse, sexual assault and threats. But sometimes, it's more subtle rather than explicit. Isolation and emotional abuse can also have long-lasting effects just like physical violence. The question raised in this book is how far the Domestic Violence Act, 2005 has succeeded in fulfilling the requirements of adequately defining all forms of domestic violence and providing redressal and protection to its victims. This book is divided into three sections - 'Causes and Consequences', 'Critical Issues' and 'Expectations from the Law and Its Enforcement'.

The first chapter written by Indira Jaising, 'Unscrambling the Images', provides a brief outline of the Act. The concept of shared household introduced by the legislation is discussed in detail, bringing out its importance in the context of an Indian household. This chapter also deals with the accusations of misuse of this legislation by women. The second chapter by Uma Chakravarti gives us a picture of the violent set up of patriarchal families. Nature of arranged marriages in Indian society creates a unique patriarchal subjugation of women. She is not safe in her own home and chances of return from a violent marriage are rare.

The chapter 'Mapping Legislative Changes' deals with the limitations of criminal law in women-related crimes. Asmita Basu in this chapter also explains why it is impossible for women to leave a broken marriage due to her economic dependence and the patriarchial environment aimed at non-implementation of pro-women legislations.

Right of residence is discussed in the fourth chapter by Pinki Mathur Anurag. Through the journey of a woman from her parental home to matrimonial home, there is no security of residence. This is the reality of a traditional Indian woman. This absence of security of residence forces her to continue in an abusive relationship. She further explains the need of 'right of residence' for the protection of women and also points out how the judicial system fails in addressing such issues.

The fifth chapter 'Of Keeps and Concubines' by Brototi Dutta brings out the patriarchy in relationships in the nature of marriage. How women in fraudulent marriages are at the mercy of men because property rights are recognized only through males and that too, in a legal relationship. She highlights the stigma attached with such relationships in our society and how this also affects the approach of judges towards women involved in such relationships. She argues for addressing the issues relating to these women without going into the issue of morality, to ensure justice for them.

'Marital Rape', is one of the most interesting chapters of all. Ajita Sharma rightly points out the fear in the minds of people in recognizing marital rape as an offence. Institution of marriage is highly idolized in the Indian society, but the woman in the marriage is nothing more than a body serving the physical needs and desires of the man, as the issue of consent is alien in patriarchal societies. Hence, common people, and even legislators think that recognizing marital rape as an offence would shake the foundations of marriage.

Saptrishi Mandal in 'Towards Uniformity of Rights' speaks of judicial innovations to cater justice beyond the boundaries of religions. He highlights the need of harmonization of personal laws in India. Dealing with judicial attitudes is the next chapter 'Analysing Orders', which is based on the study of 7,000 judicial orders, by Aparna Chandra. This chapter explains how difficult it is to escape a patriarchal system while seeking justice.

The chapter 'Nature of Services Available to Women Survivors' authored by Padma Bhate-Deosthali and Sangeeta Rege traces the evolution of responses to domestic violence and setting up of crisis centres. The author further brings out the lack of feminist perspective and women centred approach in such centres, making it difficult for victims to approach them. In the last chapter, a need for representation of women in policymaking processes is addressed by Kanika Kaul.

This book is very well conceptualized and is a must read for anyone looking for deep insights into all aspects of gender justice. This topic assumes a lot of importance in the present era where the masses are getting aware about 'Women's rights and their safety and security'. It eloquently bring outs the patriarchal framework of Indian society and explains why justice is still a luxury for most of the women. All the chapters are connected by a common thread of 'concern

for victims of domestic violence'. The language used is good, and the footnotes provide further information about the subject. Both primary and secondary sources have been used. This book will pave the way for further research on the subject. This is a good book on the subject and needs to be recommended for researchers and libraries.

KahkashanY. Danyal[*]

[*] Professor, Faculty of Law, Jamia Millia Islamia, New Delhi.

Commemoration

Achieving Highest Legal Academic Target with Grace and Dignity in the memory of Late Dr. N.R. Madhava Menon

B.B. Pande[*]

Legal academics is a preferred career option today, but when Mr. N.R. Madhava Menon moved from the southern tip of Kerala to the Aligarh University in the North, in the late nineteen fifties, to pursue post graduate degree in Law, followed by a Ph.D., it required exceptional individual courage of conviction. After a brief stint at the Faculty of Law, Aligarh University, Dr. Menon moved to the Delhi University in the early sixties. Legal education in India then was selectively coming under the influence of the American model that was characterized by the Case Method of teaching and increasing emphasis on the constitution in the teaching of rule of law. In the Delhi University, Dr. Menon got an opportunity to shape up his learning and teaching with the legal legends such as Professor L.R. Shivasubraminiam, Professor P.K. Tripathi and later Professor Upendra Baxi and others who excelled in different aspects of legal academics like teaching of law, researching in law, reaching out law to the target population, particularly the weaker sections etc.. In the 70s and 80s, the Delhi Law Faculty experienced significant transformation pursuant to the expansion of legal education by setting up three Law Centers and influx of law teachers drawn from diverse State and foreign Faculties. Another significant feature of this transformation was the Delhi Law Faculty was required to cater to the needs of a vast number of employed students, both in the Central and State bureaucracy and the Corporate sector. The second transformation made the Delhi Law Faculty a very exciting place to work, with teachers trying to find solutions to law and society interactions and teachers tryst with the task of reaching out legal knowledge to a mixed lot of fresher and mature law students. While the sizable percentage of legal academics tried to remain contended with the solutions provided in the standard textbooks, western models of the rule of law and the researchers conducted in foreign countries, Dr. Menon located the problems and their solutions in the Indian contextual realities. Two strains of Dr. Menon's vision made him distinct: First, the model of law taught in the classrooms was ill-suited to justice needs of the vast section of the Indian society, and Second, the short-falls in the law and its implementation can be addressed by a drastic alteration in the model of legal education. These two visions of legal education

[*] Former Professor of Law and Professor-in-Charge, Campus Law Centre, University of Delhi.

constituted the foundations of Dr. Menon's brand of legal academics that went in to enrich the Indian legal education in multiple ways.

Dr. Menon had the longest legal academic stint from the early sixties to 1986 (when he moved to Bangalore to set up the first National Law University) at the Law Faculty, Delhi University, where he taught Criminal Law, Criminology, Law and Poverty course to the LL.B. classes and Law and Social Change course to the post-graduate students. In addition to teaching Dr. Menon organized Seminars and Conferences inside and outside the Faculty, held membership of the Legal Aid Committee (1973) and Judicare Committee (1976) and was actively involved in extending legal aid to the needy clients. He also made his services available to the Bar Council of India Trust and assumed the Principalship of the Pondicherry Law School during 1974 to 1977. It is a matter of great distinction and satisfaction that the Campus Law Centre, Faculty of Law, provided the infrastructural and intellectual base for Dr. Menon's ideas of law reform right from the seeding, germination to fructification stages, that was responsible for a full-fledged legal institutional reform plan leading to the setting up of the National Law Universities and the National Judicial Academy.

Many legal academics and law teachers may have held visions similar to Dr. Menon, but they lacked the courage or perseverance to back them up by deeper understanding and concrete action. For example, as the Organizing Secretary of the All India Law Teachers Conference on behalf of the Delhi Law Faculty in Feb. 1972 Dr. Menon managed to move a resolution for the introduction of Law and Poverty course as an optional in LL.B. 2nd year for the students of Delhi University. Dr. Menon offered to volunteer to teach the course at the CLC, Professor Upendra Baxi at LC-II and Pande at LC-I. Later on, the course was introduced in many other Law schools. Perhaps, by introducing this course, Dr. Menon tried to strengthen the legal aid and access to justice mission. This was also Dr. Menon's way of linking the Delhi Law students to the global clinical legal education movement itself. Frank S. Block has captured the key role of Dr. Menon in the edited book: The Global Clinical Movement (2011, Oxford University Press) in these words: "Twenty five years ago – and ten years into my law teaching career – I found myself in the office of Dr. N.R. Madhava Menon, then the head of the Campus Law Centre of the Delhi University. I had heard from colleagues in the United States that he and a few others in India, most notably Professor Upendra Baxi, were seeking to introduce clinical methods into India's tradition-bound system of legal education by establishing university-based legal aid clinics". (p. IX)

Dr. Menon's second vision of establishing distinct and alternate system of imparting legal education was even more radical. It proved a complete re-write of the earlier legal Education Committee Reports, in respect to the entry point for law studies, duration of the course and integration of social science and humanities teaching in the Five year LL.B. Programme. Despite many opposers to this idea, the Bar Council of India Trust and the Karnataka State agreed to set up the first National Law School India University at Bangalore. It was a humble beginning with a grant of barely Rs. 50 Lakhs. In a short time, the hard-work, dedication and sincerely of Professor Menon and his trusted band of teachers at the Bangalore Law University made a mark not only amongst law students and the community but also the Corporate Houses that had by then constituted the growing category of legal clients. The idea of setting up a National Law University in other States was catching up. Professor Menon, after completing his tenure at Bangalore was invited by the Marxists Party led West Bengal State to set up a National Law University at the Salt Lake City. As a member of the first Governing Council and Academic Council of the National University of Judicial Sciences, Kolkata, I use to wonder and argue about the paradox of setting up an elitist institution, on the face of the dire state of, at least, five state Law Faculties that were languishing for want of funds. I am happy the march of events has proved me wrong. By the end of the century Dr. Menon's credibility as a builder of legal institutions had been fully established, not only amongst legal academics but amongst the judiciary and the Government. That is the reason for his being picked up to head the first National Judicial Academy at Bhopal in early 2000. Even after achieving the two visions, Professor Menon's agenda of meaningful law reforms remained unaddressed without appropriate reforms in the laws. His abilities to expound the nuances of the diverse laws in a simple and uncritical manner made his brand of legal academics most acceptable, not only amongst Bench and Bar, but even amongst the Executive responsible for making and reforming the laws. He was identified as a distinguished member of the Criminal Justice Reform Committee (Malimath Committee) in 2003 and the Chairman of the Committee to Draft a National Policy on Criminal Justice in 2006. Again in 2016, Professor Menon was picked to head the Equal opportunities Commission of the Government of India. For his unique abilities to speak law in a simple, unobtrusive and uncritical manner to a law student, law enforcer, lawmaker and legal policy planner was Dr. Menon's strength, for which he has been awarded the rare civilian distinction of Padma Shri way back in 2003 itself.

With Professor Menon's demise on the 8th May 2019, a master legal academics exited from the scene gracefully. He achieved the highest legal academic target in the course of performing a law teacher role most easily. In remembering him, we must feel obligated in our resolve to don the law teacher qualities - intense awareness, commitment, accessibility, and simplicity - the hallmarks of Dr. Menon model.